NORTH CAROLINA REPORTS

VOL. 71

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1874.

REPORTED BY

TAZEWELL L. HARGROVE, Attorney General.

Annotated through Volume 244

RALEIGH:
REPRINTED BY BYNUM PRINTING COMPANY
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1957

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JUNE TERM, 1874

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1874.

WM. P. TAYLOR, ADM'R. DE BONIS NON, ETC., v. HARRIET O. BIDDLE AND OTHERS.

Judges of Probate in our State are by Art. IV, Sec. 17, of the Constitution, vested with the general jurisdiction and powers of the Ordinary, at common law, and with such other additional powers as are conferred by our statutes; of which the power to remove any administrator for failing to discharge the duties of his office, prescribed by law, is one.

The powers of our Courts of Probate, both as to jurisdiction and as to practice and procedure, extend equally to administrations granted prior and subsequent to the 1st day of July, 1869; and letters of administration may be granted to a public administrator subsequent to 1st July, 1869, although the original administration was prior to that date.

SPECIAL PROCEEDING, to sell real estate for assets, filed in the Probate Court of CARTERET County, and thence carried by appeal before *Clarke, J.*, and heard at Chambers January 2d, 1874.

The petition, praying the sale of six acres of land situate near (2) the town of Beaufort, belonging to the estate of the late Jos. B. Outlaw, was filed June 8th, 1870, and regularly served on the defendants, interested as heirs at law. On the 2d of January, 1871, a decree of sale was obtained. January 16th, 1872, Wm. G. Brinson, public administrator of Craven County, files the following record of the Probate Court of Craven County, to wit:

"STATE OF NORTH CAROLINA, } PROBATE COURT,
Craven County, } Newbern, July 20th, 1870.

"In the matter of Wm. P. Mitchell, administrator of Joseph Outlaw.

"William P. Mitchell, administrator of Joseph B. Outlaw, having failed to renew his bond and render his annual account, at the time required by law, after service of notice to do so upon him; on motion, *it is ordered and adjudged,* that the said William P. Mitchell be removed as administrator of the said Joseph B. Outlaw, and that his letters of administration be revoked.

"*It is further ordered,* that letters of administration be issued to William G. Brinson, public administrator, and said estate is hereby placed in his hands.

I. E. WEST, Probate Judge."

Whereupon, the said public administrator was made a party to this proceeding. And under the foregoing order of the Probate Court of Craven, he, the public administrator of that county, claims the right to represent the estate of Joseph B. Outlaw in the future proceedings in this case.

To this Mitchell, the petitioner, replies:

1. That he has not been removed from the office of administrator *de bonis non,* with the will annexed of Joseph B. Outlaw, deceased, as Sec. 89 *et seq.* of Chap. 113, laws of 1868-69 have not been complied with in any particular; and that he is still the administrator, etc.;

but if he had been removed, that

(3) 2. The public administrator of Craven County, as such, has not and cannot under any circumstances, have jurisdiction, and no Court can give him justisdiction in this, or any like case. That there are but three cases pointed out in the law, where he can get letters of administration, and that this case is not one of these. Laws of 1868-69, Chap. 113, Secs. 6 and 92. Further, the public administrator, as such, cannot have jurisdiction of an estate, where original administration was granted prior to July 1st, 1869.

For the public administrator, it was insisted in answer to this, that the petitioner has been removed and he, himself, appointed in his place, by the only Court having jurisdiction of the matter, and that this Court, (the Probate Court of Carteret,) is bound to give full faith and credit to its properly authenticated record.

In February, 1872, the petitioner reported that in accordance with a former order of the Court, he had sold the land for $87.50, which was well secured, and that the sum was a reasonable price for the same. The Probate Judge, not recognizing the public administrator of Craven as the legal representative of Joseph B. Outlaw, confirmed

the report of the petitioner, Mitchell, from which order Brinson, the public administrator, appealed to the Judge of the Third District.

His Honor, Judge Clarke, upon a full consideration of the case, was of opinion that the Probate Judge of Craven had original jurisdiction of the case, and had authority under the law to remove the administrator for adequate cause; and that in the case presented, the public administrator of Craven was the true and proper representative of the testator, Joseph B. Outlaw. From this judgment, the petitioner, the present plaintiff, appealed.

Smith & Strong, for appellant, submitted:

That the only question in the case is as to the right of W. G. Brinson, the public administrator, to displace, and to substitute for Mitchell, the plaintiff.

I. The removal was improper: (4)

1. It was not a case within the provisions of Battle's Revisal, Ch. 45, Secs. 140, 141 and 142.

2. There should have been a citation or other proceeding, bringing the plaintiff before the Probate Court, and giving him opportunity to show cause. Williams Executors, 377.

3. The right to remove, given in C. C. P., 479, does not dispense those proceedings giving the party a day in Court.

II. The public administrator is entitled to letters of administration only in the three cases enumerated in Battle's Revisal, Ch, 45, Sec. 22.

III. The entire law in reference to appointment of public administrators, does not apply to administration prior to July 1, 1869. The petition shows that the administration was granted in December, 1867. Acts of 1869-70, Ch. 58, Sec. 1. (Batt. Rev., Ch. 45, Sec. 58.)

The judgment of the Superior Court was therefore erroneous.

Justice and Hubbard, contra, argued.

As to the jurisdiction and power of the Probate Judge to remove the administrator Mitchell, see C. C. P., Sec. 479.

If Mitchell had been removed, the Court had power to appoint some other person to succeed him in the administration of the estate. Chap. 113, Sec. 92, Laws of 1868-69, Sec. 6; Chap. 113, Laws 1868-69, applies only where there has been no administration upon an estate.

In our case an administrator has been removed and another appointed to succeed him.

Mitchell the plaintiff has had his day in Court. See the transcript of the record of the Probate Court of Craven County in the statement of the case. Brinson has been made party as the case shows.

BYNUM, J. At the common law, the Ordinary could repeal an
(5) administration at pleasure, but now, by statute, it cannot be revoked, except for just cause. 1 Williams on Executors, 509.

The Judge of Probate here, by Art. IV, Sec. 17, of the Constitution, is vested with the general jurisdiction and powers of the Ordinary, and with such additional powers as are conferred by our statutes. These statutory powers are contained in Bat. Rev. Chap. 45, Sec. 25, and Chap. 119, Sec. 36-7-8, and are in affirmance and enlargement of the common law jurisdiction, and are decisive of this case. These sections of the Revisal, taken together, clearly confer upon the clerk the power of removal for the failure of the administrator to discharge the duties of his office as prescribed by law. But without invoking the aid of our statutes, the power of removal is inherent in the office at common law, and must of necessity be so, to prevent a failure of justice. So whether we look to our statutes or outside of them, the Judge of Probate, in the order vacating the administration of Mitchell, after notice served and a day in court, acted within the scope of his jurisdiction and powers. The order of revocation, therefore, cannot be void, and if voidable for irregularity it cannot be impeached, in this collateral way, but only by a direct proceeding for that purpose before the Probate Judge of Craven County, where the letters were granted.

It is, however, contended that this administration, having been originally granted prior to the adoption of the Constitution, and the legislation of 1868, changing the law for the settlement of estates, (Chap. 45, Bat. Rev.,) is to be governed by the laws existing prior to July 1st, 1869, the time when Chap. 45, Bat. Rev., went into effect. And inasmuch as no statute then existed, creating the office of public administrator, or providing for the removal of an administrator in the manner it was exercised in this case, the Judge of Probate had no power of removing Mitchell, or of appointing the public administrator as his successor.

The answer to these propositions depends upon the proper con-
(6) struction of Chap. 45, Bat. Rev. As this chapter repeals Chap. 46, Rev. Code, entitled "Executors and Administrators," its provisions must govern this case, both as to the removal and appointment of administrators, otherwise we have no statute law applicable to original administrations granted prior to July, 1869, which is our case. It is perfectly clear from Sec. 58 of this chapter, declaratory of the estates to which it applies, and the *proviso* therein that both as to jurisdiction and as to practice and procedure, the powers of the Court of Probate extend equally to administrations granted prior and subsequent to the first of July, 1869. It follows

that the Probate Court can grant administration to a public administrator, subsequent to the first of July, 1869, although the original administration was prior to that date. But when he does administer he is to be governed, in the settlement of the estate, by the laws which were in force immediately preceding the first day of July, 1869.

So, from the record before us, it appears that Mitchell was removed and Brinson appointed as administrator *de bonis non,* etc., of the estate of Jos. B. Outlaw. The motion of the defendant, Brinson, to be substituted in the proceedings as plaintiff in the stead of Mitchell, should have been allowed by the Judge of Probate of Carteret. There is no error in the judgment of his Honor reversing the order of the Court of Probate.

This will be certified to the end that further proceedings be had according to law.

PER CURIAM. Judgment affirmed.

Cited: Pearce v. Lovinier, 71 N.C. 249; *In Re Brinson,* 73 N.C. 279; *Simpson v. Jones,* 82 N.C. 324; *Edwards v. Cobb,* 95 N.C. 9; *Tulburt v. Hollar,* 102 N.C. 409; *In Re Battle,* 158 N.C. 391, 392.

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(7)

JOHN A. HARRISON & SON v. GEORGE RICKS.

The difference between a tenant and a cropper is—a tenant has an estate in the land for the term, and consequently, he has a right of property in the crops. If he pays a share of the crops for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession in the whole is his. A cropper has no estate in the land; and although he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the landlord who must divide off to the cropper his share.

A rents from B a farm for one year, B agreeing verbally to furnish and feed the teams, and to find the farming utensils to make the crop, and to furnish A corn and bacon during the year, for which he was to be paid out of A's share; A was to furnish and pay for the labor and give B one-half of the crop as rent: *Held,* that A was a tenant and not a cropper, who had a right to convey the crop subject to the right of the landlord to his share as rent.

Act of 1868-69, Chap. 64, cited and commented on.

CIVIL ACTION, for the delivery of two bales of cotton, tried before his Honor, *Judge Watts,* at the Spring Term, 1874, of the Superior Court of NASH County.

The plaintiff introduced as evidence the following instrument:

"STATE OF NORTH CAROLINA,
Nash County.

"This deed witnesseth: That whereas John A. Harrison & Son, of Castalia, Nash County, have agreed to make to Ben. F. Moss, of the County of Nash, and State of North Carolina, certain advances in supplies, and for the purpose of enabling the said B. F. Moss to carry on his planting operations in the County of Nash and State aforesaid, for the present year: Now, therefore, the said B. F.
(8) Moss agrees and binds himself and his heirs by these presents, to consign to the said John A. Harrison & Son, all the crop made by the said B. F. Moss on George Ricks' farm, in the year 1871, (it being one-half of all that is made on the farm, or all of his, B. F. Moss' part, consisting of cotton, corn, fodder, etc.,) to cover advances; and that the said supplies to be made at different times during the year shall constitute a lien on the crop to the amount of one hundred dollars, that being the limit of said lien at any one time, as provided by an act to secure advances for agricultural purposes. July 12th, 1871.

"Given under my hand, etc.

(Signed) B. F. MOSS. [L. S.]"

Plaintiff then proved by the said B. F. Moss, that after the execution of the foregoing instrument, designed to be a mortgage or lien, and until his crop was gathered, the plaintiff advanced to him in supplies one hundred and twenty dollars, to enable him to make and secure his crop during the year mentioned in the lien.

Moss also stated, that in January, 1871, he rented from the defendant, George Ricks, the farm mentioned above; that defendant was to furnish the teams (two horses) to make the crop, the farming utensils and feed for the teams, and to supply him with corn and bacon during the year; and that he, Moss, was to furnish and pay for the labor, and give the defendant one-half of the crop for rent of the land. That this contract for the rent of the land was not reduced to writing. The cotton in controversy was made on said land during the year 1871.

He further stated that Ricks complied with his part of the contract until the month of June in said year, when he refused to furnish him, Moss, with any more supplies, unless he would clear up some land for him, Ricks; that such clearing not being a part of his agreement, he refused to do it, and thereupon Ricks stopped the supplies, and he then gave a lien to the plaintiffs, Harrison & Son. Moss
(9) gathered and housed the crop, when the defendant took and carried it away, including the cotton sued for, without Moss' permission, and in his absence and before any division.

Upon being cross-examined, Moss stated that he agreed when he rented the land that the defendant, Ricks, was to be paid for the supplies furnished out of his, Moss' half of the crop.

His Honor being of opinion that Moss was a cropper and not a tenant, and that no title to the cotton vested in him, and that consequently he had no right to convey any title to the plaintiffs, held that the action could not be maintained. Whereupon the plaintiffs submitted to a non-suit and appealed.

Bunn & Williams, for appellants.
Davis and Batchelor, contra.

RODMAN, J. This is an action to recover specific property, and the first question is,

1. As to the title of the plaintiff.

The plaintiffs claim, under a deed from Moss, dated in July, 1871, by which, after reciting that plaintiffs had agreed to make advances to enable Moss to carry on planting operations during that year; Moss binds himself to consign to plaintiffs all the crop made by him on Rick's (the defendant's) farm in the year 1871, it being half that is made on the farm, or all of his (Moss's) part, to cover advances to be made by plaintiffs, which should constitute a lien on the said crop, etc., to an amount not exceeding $100. This deed was duly registered on the 14th of July, and plaintiffs made advances to the amount of $120.

The act of 1866-67, Chap. 1, re-enacted by the act of 1872-73, Chap. 133, which may be found in Battle's Revisal, Chap. 65, Secs. 19 and 20, provides that persons making advances to cultivators of the soil shall be entitled to a lien on the crop which may be made during the year "in preference to all other liens existing or otherwise:" *Provided,* an agreement in writing be entered into and the same be (10) registered. And (by Sec. 3) *provided further,* that the rights of landlords to their proper share of rents shall not be affected.

There can be no doubt, therefore, that the plaintiffs had, as against Moss, and against all persons who had no paramount rights, a right to a moiety of the crop of 1871. And supposing Moss to have been a tenant of the defendant, and as such to have had the rightful possession of the whole crop, then the plaintiff was a tenant in common with Moss, and equally entitled with Moss to the possession of the common property. This right, of course, was subject to all paramount or prior rights, if any.

2. The next question is, did the defendant have any right of property in the crop. The defendant's right, upon the evidence of Moss was this: In January, 1871, Moss rented from defendant the land on

which the crop in question was raised. Defendant furnished the horses and utensils of cultivation, and agreed to furnish food for the horses and laborers during the year. Moss was to furnish the labor "and to give the defendant one-half of the crop for rent of the land." It was a part of the contract that Moss should pay the defendant for the supplies of food furnished by him out of Moss' share of the crop. The contract between these parties was not in writing.

Without noticing at present, the landlord and tenant act of 1868-69, we will consider whether Moss was a cropper or a tenant of the defendant, and the rights arising out of those relations at common law unaffected by our statutes.

The difference between a tenant and a cropper is clear. A tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession in the whole, is his. The landlord has no lien on the crop for rent, whether such lien be stipulated for or not; although if such lien be given by agreement, it is, as will be seen, strong evidence that the occupier is not a tenant, but
(11) a cropper. *Deaver v. Rice,* 20 N. C., 567; *Ross v. Swaringer,* 31 N. C., 481; *Walston v. Bryan,* 64 N. C., 764; *Hatchell v. Kimbro,* 49 N. C., 163.

A cropper has no estate in the land; that remains in the landlord. Consequently although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop. *McNeely v. Hart,* 32 N. C., 63; *Brazier v. Ansley,* 33 N. C., 12.

Which of these characters an occupier bears depends entirely on the agreement between the parties.

It is a question of interpretation, and the intent, when ascertained, must govern, as in other contracts.

Some rules may be deduced from the cases which may serve to guide us to the intent.

1. If the contract clearly conveys the land to a lessee for a term, in the absence of some contrary and controlling provision, the lessee is a tenant. But generally, when the contract is oral or inartificially drawn, it is left doubtful whether an estate in the land was intended to pass. In such case the intent, one way or the other, must be inferred from the other provisions of the agreement. The use of the word "rent," as that the owner has "rented" his land to another, has, by itself, but little weight in the interpretation of an oral or inartificially and obscurely written contract.

2. If the occupier is to pay a money rent, the title to the crop must necessarily be in him in order that he may convert it into money. He is, therefore, strictly a tenant.

3. If the occupier is to pay the landlord a share of the crop as rent, the property in the whole must be in him in order that he may make the division, and he is a tenant. This interpretation, may however, be controlled by other provisions; as, for example, by a positive agreement that the property in the whole shall be in the landlord, either that he may make the division or that he may be secured by a lien. The stipulation for a lien must be either void, or (12) it must make the occupier a cropper, as it was held to do in *State v. Burrell,* 64 N. C., 661.

4. If the landlord is to divide to the occupier his share, the property in the whole must be in the landlord, and the occupier is only a cropper. *Denton v. Strickland,* 48 N. C., 61.

It would be an unnecessary waste of time to review in detail the cases from which these rules are drawn. They are singularly uniform and are all cited in the briefs of counsel.

We think, under these rules, that Moss was a tenant and not a cropper. This follows from that provision of the contract by which Moss was to pay (or divide off) to defendant his share of the crop; and the effect of this is not qualified by any agreement that the defendant should have a lien on the crop, or by any contrary provision whatever.

The question then occurs, were the rights of the defendant affected to his advantage by any statute? The act for the better security of landlords (1866-67, Chap. 47) is omitted from Battle's Revisal, no doubt because the learned reviser thought it repealed by the act of 1868-69, Chap. 64. In this we concur with him. We turn, then, to that act.

Section 12 gives to a landlord who leases land for a share of the crop, or for that and the performance of other stipulations as rent, a lien on the crop for such share, and for any damages for the breach of such stipulations. As between the occupier and third persons, he may be regarded as a tenant having an estate in the land for the term, but as between him and the landlord, he is only a cropper. But by this section the contract to have that effect, must be in writing.

Section 13 gives to a landlord who leases for a money rent a lien on the crop, whether the contract of lease be in writing or not. This lien was probably intended as a substitute for the old English remedy of distress which was long ago held to have been abolished in this State *Dalgleish v. Grandy,* 1 N. C., 249.

(13) Section 14 is not contradictory of the previous ones. It does not alter the right of lien given by them. It makes it penal in a tenant to remove the crop when he has no right to do so.

As the agreement with Moss was not in writing, the defendant cannot claim a lien under section 12.

The property in the whole crop was therefore in Moss until he made a division, and he had a right to convey it to the plaintiffs, subject to the right of the landlord to his share as rent. (Act 1866-67, Chap. 1.) But it is seen that the landlord had no lien on the crop. By permitting his right both to rent and to compensation for his advances, to rest on the oral promise of Moss and without any agreement for a lien, he lost all other remedy than by an action on such oral promise. The right of the plaintiff therefore is not affected by the concluding proviso in Sec.___ of the act of 1866-67.

The plaintiff is a tenant in common with Moss, and as such may maintain an action to recover the possession of the whole from a wrong doer, as the defendant is. By a plea in the nature of a plea in abatement, the defendant might have compelled the plaintiff to have joined Moss as a co-plaintiff, (1 Chit. Pl. 65,) and thus perhaps have availed himself of his counter claim against him, but he cannot otherwise take advantage of the non-joinder.

Judgment below reversed. There must be a *venire de novo.*

PER CURIAM. Judgment reversed.

Cited: S. v. Pender, 83 N.C. 653; *Smithdeal v. Wilkerson,* 100 N.C. 54; *Rouse v. Wooten,* 104 N.C. 231; *Howland v. Forlaw,* 108 N.C. 569; *S. v. Austin,* 123 N.C. 750; *Hall v. Odom,* 240 N.C. 69.

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(14)

B. M. ISLER v. HARRIET M. DEWEY, GUARD'N, AND OTHERS.

In answer to evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, whose veracity has been thus impeached, evidence of the strict integrity of such witness, and of his scrupulous regard for truth is admissible.

CIVIL ACTION, brought by plaintiff to recover possession of a tract of land, tried before his Honor, *Judge Tourgee,* at the Special (December) Term, 1872, of WAYNE Superior Court.

At June Term, 1872, of this Court, a new trial was granted in the case on account of the rejection of certain evidence. Sec. 67, N. C. 93, as also for a statement of the facts of the case.

Upon the new trial, the plaintiff introduced Samuel Smith, the grantor in the deed of trust, under which the defendants claim title to the land in question. The witness, the case states, was an old man, and testified as to his purpose and intent in executing the said trust. In his testimony he made conflicting and contradictory statements to the plaintiff's counsel, the defendant's counsel and the presiding Judge. Upon his cross-examination he was asked if he ever had solicited one John R. Smith to accept the trusteeship. He replied, that he never had. He was then asked if he had not, at different times and places. (the same being designated,) told divers persons, (naming them,) that the deed of trust from himself to Washington was *bona fide*, and that he was willing for the whole world to know all about it. The witness stated that he did not recollect any such conversations. The persons designated were then introduced by defendants and testified that the conversations referred to in the question to the witness took place as stated and that he, the witness, did make the statements as contained in such question. John R. Smith also testified that Smith, the witness, had approached him as asked, and solicited (15) him to take the trusteeship.

The plaintiff then offered to introduce evidence that Smith, the witness, was a man of good character. Defendants admitted that Smith was a man of good character, at the same time remarking, "we do not impeach his veracity, but merely his recollection." When the plaintiff offered to show that the witness, Smith, was a person of great excellence of character, the evidence was excluded by the Court, and the plaintiff excepted.

The exceptions to his Honor's charge upon other points need not be stated, as the decision of the Court is upon the point of excluding evidence alone.

There was a verdict in favor of the defendants. Judgment and appeal by the plaintiff.

Isler for appellant.
Smith & Strong, contra.

SETTLE J. When this case was before us at a previous term, reported in 67 N. C., 93, we held that Samuel Smith, the grantor in the deed of trust to Washington, was a competent witness to prove "that the understanding and agreement between him and Washington, at the time the deed was executed, was that Washington should hold the land and other property therein conveyed, for Smith, until he should be able to pay the debts from other sources," and that this evidence might go to the jury for what it was worth.

Upon a second trial, the plaintiff introduced as a witness the said Smith, who is an old man, when he testified as to his purpose and intent in making said deed; and the case states that in his testimony he made conflicting and contradictory statements to the plaintiff's counsel, the counsel for the defendants and the presiding Judge. Upon cross examination he was asked if he had ever solicited one John R. Smith to accept the trusteeship. He replied he never had. He was then asked if he had not at different times and places, men-
(16) tioning them, told divers persons, giving their names, that the deed in trust from himself to Washington was *bona fide,* and that he was willing for the world to know all about it. He replied that he did not recollect any such conversations.

The persons named were then introduced by the defendants and testified that the conversations, as stated by the defendant's counsel to witness Smith, had taken place at the times and places specified in counsel's questions to said witness. The defendants also introduced John R. Smith, who testified that Samuel Smith had solicited him to accept the trusteeship. The plaintiff then offered to introduce evidence to show the good character of the witness, Samuel Smith, when the defendant's counsel admitted that Smith was a man of good character, remarking, "we do not impeach his veracity, but merely his recollection;" but the plaintiff insisted upon his right to show that the said witness was a man of great excellence of character, but his Honor excluded the testimony, and the plaintiff excepted.

When the credibility of a witness is attacked from the nature of his evidence, from his situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him in cross examination, the party who has introduced him may prove other consistent statements, for the purpose of corroborating him. *March v. Harrell,* 46 N. C., 329.

And the right to corroborate witnesses, whose testimony has been thus impeached, by proving their good characters, is assumed in the case cited, to be too plain for argument.

The very nature of his evidence, and the peculiar situation of the witness, when he testifies that his own deed was fraudulent, puts him under a cloud, which grows darker when it is shown that his statements have been inconsistent and contradictory.

The bare statement in the record puts an imputation upon the character of the witness, which cannot be removed by the graci-
(17) ous admission of counsel that they only impeach his memory, and not his character.

Who can tell what impression was made upon the jury, by these circumstances, so damaging to the testimony of the witness?

His character was necessarily impeached, and he therefore had the right to prove a good character, if he could do so.

As a general rule, the character of all witnesses is open to attack, and it would seem but reasonable and fair that they should always have the privilege of showing a good character.

And in the nature of things, the presumption of law, that "the character of a witness is good, until it be shown to be bad," cannot impress a jury as forcibly and favorably as the proof of the fact would do.

Mr. Ball, in the argument of another case, at this term, cited us to several English and American authorities, to show that evidence in support of good character is not admissible until the character of the witness has been attacked by an impeaching witness; but such is not the rule in this State.

We have followed the reasoning of Mr. Phillips, in his work on Evidence, 1 vol., page 306, quoted by Greenleaf, 521, when he says, "In answer to evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness whose veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity, and of scrupulous regard for truth." The last case in our own reports, where the subject is discussed, is *State v. Cherry*, 63 N. C., 493. Upon that trial the prisoner introduced one James Davis, as a witness to character only, who testified that the character of certain State's witnesses was bad for virtue and truth. He was then asked by the State if the character of those witnesses was not as good as his own, both for virtue and truth. The prisoner then introduced a witness and proposed to prove the character of James Davis; the State objected, and the objection was sustained.

The Chief Justice, in delivering the opinion of the Court, (18) says: "The question put to the witness, Davis, was an imputation on his character, and was calculated to degrade him before the jury. . . . Why should the jury have been kept in the dark as to what kind of man this witness was? . . . It was said on the argument that his Honor rejected the evidence on a supposed rule of law, 'an impeaching witness cannot be impeached;' and we are told this supposed rule of law is acted upon in that circuit, and is based on the ground of avoiding an endless process. If the impeaching witness can be impeached, the last witness may also be impeached, and so on *ad infinitum*. This inconvenience cannot occur very often, or be very serious, for the general practice is to call only the most respectable men in the community, as to character, and the instance of calling a witness of doubtful character is exceptional. Let it be understood

that an impeaching witness cannot be impeached, and the exception will soon be the general rule. But be this as it may, *truth* should not be excluded to avoid inconvenience. . . . We imagine this supposed rule of evidence had its origin in a misapprehension of the rule, "When a witness on cross-examination is interrogated as to a collateral fact, his answer concludes the matter, and no further evidence of particular facts is admissible, to avoid getting off on a side issue.

"But the matter is open to evidence of general character, so the error to which we have adverted seems to have been caused by not adverting to the distinction between evidence of particular facts and evidence of general character."

There is error.

PER CURIAM. *Venire de novo.*

Cited: Coltraine v. Brown, 71 N.C. 24; *Kendall v. Briley,* 86 N.C. 58.

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(19)

BRANSON COLTRAINE, EXECUTOR, ETC., AND OTHERS, v. DEMPSEY BROWN AND OTHERS.

The rule obtaining in some of the English and American Courts, that evidence in support of good character is not admissible until the character of the witness has been attacked by an impeaching witness, is not the rule in this State.

DEVISAVIT VEL NON, as to a paper writing propounded in the Probate Court of RANDOLPH County, and from thence removed to the Superior court of ALAMANCE, and tried before his honor, *Judge Tourgee,* at Spring Term, 1874.

The paper propounded as the last will and testament of Jane Brown, was caveated by the defendants, certain of her next of kin, upon the following grounds, to wit:

1. That the alleged testatrix had not a testamentary capacity at the date of the original will, nor at the date of the codicil thereto added.

2. That the alleged testatrix, the said Jane Brown, in the execution of the said paper writing propounded as a will, was acting under undue and fraudulent influence.

On the trial in the Court below six issues were submitted to the jury, to wit:

1. Did Jane Brown have testamentary capacity at the date of the paper writing propounded as her will?

2. Did she have testamentary capacity at the date of the alleged execution of the codicil to the said will?

3. Did she execute the paper purporting to be her will?

4. Did she execute the instrument of writing propounded as a codicil to said will?

5. Was the execution of the instrument purporting to be her will secured through fraudulent or undue influence upon the mind of the testatrix?

6. Was the execution of the instrument propounded as a codicil secured by fraud or undue influence?

It was in evidence that the alleged testatrix lived with the (20) defendant, Dempsey Brown, her son, for four years or thereabouts, next preceding the death of Haley Brown, another of her sons, except occasional absences on short visits, and some few weeks both before and after the death of said Haley Brown, which she spent at his house on the occasion of his last illness; and during that time, Joe C. Brown, then fifteen or sixteen years of age, one of the propounders, a son of her deceased son, John S. Brown, was there with the testatrix; that on leaving said Haley's, the said Joe C. Brown went to the house of W. R. Frazier at Trinity College to board and attend school, and the testatrix came back to Dempsey Brown's, where she staid a few weeks and then went on a visit to said Frazier's house, where Joe C. Brown was boarding as aforesaid, and there she remained for thirty-three days.

Frazier stated that soon after coming to his house the old lady, (the alleged testatrix) then about eighty years of age, and Joe C. Brown were much together; that he heard them talking together, and heard him frequently speak to her about his uncle, Dempsey, one of the caveators, and who at the time was guardian of the said Joe C. Brown, his brother and sister, having wasted their father and mother's estate, and that they, the said children and wards, would never get anything from their said uncle, Dempsey Brown.

The witness was uncertain whether this conversation was before or after the making of the will, but afterwards said he thought it was before.

Frazier also heard the old lady frequently talking about her son, Dempsey, and saying that she wanted to make a will, so that John's children could get the most of her estate; that Dempsey had wasted all that they had inherited from their father and mother, and if she did not do something for them, they would be without anything. These conversations were not in the presence of Joe C. Brown.

This witness further stated that he went for Dr. Craven to come and see her, and he wrote the script propounded; that he refused

(21) to become a witness to said will at first, for the reason that he did not believe that she was of a competent mind to make a will; but afterwards attested it at the suggestion of one Riddick, her agent, merely to pacify her. Witness said that the testatrix was very old and feeble, very forgetful, asking over and over again the same questions in a short time; was almost blind and very hard of hearing; and from his, the witness' observation and opportunities to judge of her during the thirty-three days she was at his house, he formed the opinion that she was not competent to make a will.

In this connection the caveators asked the witness (Frazier) if he had ever heard Joe C. Brown talking to any other person about Dempsey Brown having wasted his father's estate, while the testatrix was living at his house. This question being objected to by the propounders, was ruled out by the Court. Caveators excepted.

In the course of the trial, one Dorset was introduced by the defendants, the caveators, who stated that he was a near neighbor—living four miles from Mrs. Brown, the alleged testatrix, and knew her intimately, and had known her intimately for forty odd years; that up to the years 1857 or 1858, she was a woman of good sense, at which time she was beaten by some person who robbed her, and after that time she was feeble in body and her mind impaired, the feebleness of both increasing, according to his observation, until she became childish. She was almost blind and very hard of hearing, of a rambling disposition, and in her conversation asking a question over and over again. On one occasion, in the month of March preceding her death in February, 1871, he could not make her know him, even after telling her his name. Witness further stated that in his opinion she had not capacity in 1866 to make a will, or to do any business acts.

The caveators then proposed to ask the witness: From his knowledge of Jane Brown's mental condition, did he think that if an instrument of the length of the one propounded was read over to her, she would have capacity to understand its provisions? The
(22) question being objected to, was excluded by the Court, and the caveators excepted.

Dempsey Brown, one of the caveators, stated that, in his opinion, his mother, the testatrix, at the date of the alleged will and codicil, was incapable of making a will, and that he had never heard of any wish on her part to make one, nor of her having made one, until after her death. That he was to see her on the day the pretended codicil is dated and just after it was written, and he then found her in such a condition that she did not know him, and he was unable to make her know him, even after telling her his name.

To sustain this witness, the caveators offered to prove his general character, but his Honor refused to hear such proof, stating that as there had been no assault upon his character, he is presumed to be of good character, and that he should so instruct the jury, and did so instruct them, which instruction was not objected to by the propounders.

The other subscribing witness to the original will, one Z. Rush, stated that he was not at Frazier's but one time for the purpose of attesting the will, and that then he did attest it. This witness denied that he hesitated to witness the will on account of any incapacity of the testatrix, but said he did hesitate to become a witness, because he was a minister of the gospel and a circuit rider, and he feared he might be called from a distant station to prove the will in Court.

Frazier, the other subscribing witness, having in his examination stated that he and Rush were together *twice* for the purpose of attesting the will, and that on the first of those occasions they both declined, because of the incapacity of the testatrix, and on account of this conflict in the evidence of the two subscribing witnesses, the caveators proposed to prove the general character of Frazier, which was not objected to by the propounders, but the proposed proof was rejected by the Court, for the reason that his character was presumed to be good. To this ruling the caveators excepted.

As to the execution of the codicil, the propounders offered (23) evidence that the same was executed on the 4th January, 1871; was drawn by one B. F. Hoover, and attested by him and Thomas White, at whose house the testatrix then was living. Both Hoover and White testified that Jane Brown, the alleged testatrix, was of sound mind and capable to make a will. In answer to this, Dempsey Brown, her son, and one of the caveators testified that his mother, the testatrix, did not know him when he called to see her the same day; and Dr. Winslow, the family physician, stated that he saw her two or three times in 1869, as her physician, and several other times, not professionally, the last time in November next before her death in February, and that at all of these times he found her, in his opinion, entirely incompetent to make a will, or to transact any business.

It was likewise in evidence that Hoover, one of the witnesses to the codicil, lived seventeen miles distant from the testatrix, and had not seen her for about three years, and was not with her on the occasion of drawing the codicil more than fifteen minutes. That White was the man at whose house she was living at the time, and where Joe C. Brown was a frequent visitor, and at the time addressing one of his daughters. That Joe C. Brown went for Hoover twice to come and write the codicil, and represented to him that the testatrix, besides

wanting him to write the codicil, wished to make him and his brother and sister a deed of gift or transfer of a certain judgment of about $1,700, on Alex. Robbins' estate; that Hoover, on such representation, furnished the said Joe C. Brown with a blank form of an assignment of a judgment; and afterwards as he went to White's to write the codicil, he went by Joe C. Brown's and let him know where he was going; that soon after reaching White's, Joe C. Brown appeared, and then the testatrix produced a copy of the form of assignment in the said Joe C. Brown's handwriting, and signed it and drew an order on her agent, Riddick, for Mr. Gorrell's receipt, as he had brought suit for her on the claim. This order was presented to Riddick,
(24) who refused to give up the receipt without first seeing the testatrix. Other evidence was introduced, which, not bearing upon the points decided in this Court, need not be recited.

The jury under the instructions of his Honor found all the issues in favor of the propounders. Motion for a new trial refused. Judgment and appeal by the caveators.

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

SETTLE, J. There was not only a direct conflict of testimony between Dempsey Brown and Frazier on the one side, and the witnesses for the propounders on the other, as to the mental capacity of the testatrix, Jane Brown; but Frazier being a subscribing witness to the will, and testifying that the testatrix was not capable of making one, stood before the Court in a very awkward position, and it would seem that his character required support.

As the question involved in this case is discussed and decided in *Isler v. Dewey*, at this term, we content ourselves with a reference to the opinion in that case.

Let it be certified that there is error.

PER CURIAM. *Venire de novo.*

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(25)

N. L. STITH v. JACOB LOOKABILL.

Where land was conveyed to one *in trust* for certain purposes, and afterwards upon an attachment against the trustee at the suit of one of his creditors, the land was levied upon and sold, and purchased by the plaintiff: *Held*, that the trustee had such an estate as was subject to levy and sale; and that as against the defendant who failed to connect himself in any manner

with the *cestui que trusts*, the purchaser acquired a title which entitled him to the possession.

A motion to non-suit a plaintiff in the midst of a trial on the ground that his evidence does not make out a case—the defendant's counsel at the time stating that "if his Honor should overrule the motion, he had evidence to offer, showing title in himself," is an unfair and loose mode of practice, and should not be tolerated.

CIVIL ACTION, to recover possession of certain real estate tried at the Spring Term, 1874, of the Superior Court of DAVIDSON County, before his Honor, *Judge Cloud.*

The plaintiff showed title from the State to one J. M. Lisle; then a deed from Lisle to one F. M. Camman; then an original attachment against Camman, which was duly levied on the premises, and after proper proceedings had thereon, a final judgment in said attachment, and a *ven. ex.* issued to sell the land. Plaintiff further showed a sale and that A. B. Stith became the purchaser, who dying *pendente lite,* willed the same to the plaintiff; also, that the defendant was in possession.

Here, the plaintiff resting his case, the defendant moved the Court to non-suit the plaintiff, on the ground that Camman did not acquire such an interest as was the subject of attachment, levy and sale under execution; the defendant stating that if his Honor should overrule the motion, he had evidence to offer showing title in himself.

His Honor sustained the motion and non-suited the plaintiff. From this judgment the plaintiff appealed.

The provisions of the deed to Camman is sufficiently set forth in the opinion of the Chief Justice.

Bailey, for the plaintiff, submitted the following brief: (26)

The case for plaintiff may be viewed in two aspects.

I. Camman held discharged of the trust,

(1) Because the *cestui que trusts* were not ascertained.

If regarded as a *latent* ambiguity it amounts to a *patent* ambiguity unless explained.

Under statute of uses it was necessary to the execution of the use that there should be a *cestui que use* in *esse,* and therefore if a use was limited to a person not in *esse,* or a *person uncertain,* the statute could have no operation. Sanders on Uses.

And although by the strict construction of the Judges, a use could not be limited upon a use and the ulterior limitation was upheld in equity by the name of a trust. Yet still the object of said ulterior limitation was a *cestui que use* whose case was not transferred into possession, and should be as certain a person as before.

An uncertain person could not sue or *subpœna.*

(2) If it be treated as a foreign corporation (and it does not appear to have been incorporated under our laws) it is submitted that such a corporation cannot take a trust of land without a legislative license.

II. If either position be erroneous:

Camman's estate, treated as a naked legal title, was the subject of sale under execution as decided by *Giles v. Palmer,* 49 N. C., 386; *Rutherford v. Green,* 37 N. C., 121.

The text books impliedly state the same doctrine in the proposition that a purchaser, under an extent, holds subject to the trust as coming in *in the per* and not the *post.*

Dillard & Gilmer, with whom was J. M. McCorkle, for defendant, argued:

There is only *one* point involved.

I. Was the interest of F. W. Camman levied on and sold in plaintiff's testator's attachment (upon judgment against said Camman
(27) personally,) such an interest as could be sold under execution?

It was not. 2 Wasburn on Real Prop., 181, and cases then cited; *Bostick v. Keiser,* 4 *J. J. Marsh,* 597; *Williams v. Fullerton.* 20 Vermont 346.

(a) At one time, under our old system, while the legal and equitable jurisdictions of our Courts were separate, it would seem such an interest was subject to execution. *Giles v. Palmer,* 49 N. C., 386. Yet this very case, in stating that a Court of Equity would interfere and prevent the purchaser from depriving the *trustee* of possession, confirms the principle contended for above.

(b) But since the establishment of our new system, the Courts sitting as Courts of both law and equity, no such rule will prevail, and *Giles v. Palmer,* it is submitted, is not now the law. *Moore v. Byers,* 65 N. C., 242. *Moore v. Byers* was the case of vendor and vendee of realty. The Court holds that the interest of *neither* is subject to levy and sale under execution. "The vendor holds the legal estate in trust for the vendee and is obliged specifically to perform the contract to make title, etc. And a levy and sale would divest him of the legal estate and would defeat the contract of the parties." To the same effect is *Blackmer v. Phillips,* 67 N. C., 340. See also Wash. on Real Property, 188, (marg.) "Such equitable estate in this Court is the same as the land, and the trustee is considered as a mere instrument of conveyance." Wash. on Real Prop., 181, *Cholmendely v. Clinton,* 2 Jo. & W., 148.

(c) Courts of Equity always limit judgment levies to the *actual* interest of the judgment debtor, who in our case had *none whatever,* the land being held "for the *sole and exclusive* use" of others. *Brown*

v. Pierce, 7 Wall. 205. Freeman on Judgments, sec. 357. A trustee cannot *confess* a judgment so as to bind the trust estate. Freeman on Judgments, Sec. 545; *Hunt v. Townsend*, 31 (Md.) 366.

(d) It is further submitted that the declaration of trust in the deed of Lisle to Camman, being an essential and important (28) recital in that deed, it constitutes a part of the title conveyed, and even if plaintiff could sell it, he could never deny that he held in pure trust for the *cestui que trusts* mentioned in the deed, and therefore he could show nothing beyond what he has shown, and upon his own case, he cannot recover. *Crane v. Lessees, etc.*, 6 Peters, 611 and 612.

PEARSON, C. J. Upon the motion to non-suit, the only question was, "had Camman such an estate as was subject to sale under execution by his creditors?" On this depended the right of the plaintiff, who was the purchaser, to maintain an action against the defendant, who for the purposes of the motion, stands as a wrong-doer, without connection, either as assignee or agent, with the *cestui que trusts* for whom Camman is assumed to have held the legal estate.

Mr. Gilmer in a well considered argument admitted the general positions taken by Mr. Bailey, in respect to "uses and trusts," to-wit:

1. This case did not come within the operation of Stat. 27th, Henry 8. So the legal title was in Camman, subject to the trust, set out in the deed "for the sole and exclusive benefit of the members of a company called and known as the "Conrad Hill Gold and Copper Company," there successors and assigns forever.

2. Camman, in the Courts of law, was considered to be the owner of the land, and no notice was taken of the trust, to which he was subject.

3. Camman had power to assign the legal estate, and it could be sold under an execution against him, the purchaser taking subject to the trust, and notice being presumed.

4. Under the old system the plaintiff would have been entitled to judgment on a demurrer to the evidence.

Mr. Gilmer then "proved by the books," that although the plaintiff was in a Court of law, (under the old system,) treated as the absolute owner of the estate, still being a trustee, on the face of the deed by which he derives title, he and his assignee, whether by his (29) own sake, or that of the sheriff, is subject to the control of the Courts of equity, by which these *trusts estates* were upheld and treated, as the *real ownership*. See the reasoning in *Blackmer v. Phillips*, 67 N. C., 340.

The trustee or his assignee will be enjoined from enforcing his mere legal right in order to take possession of the land. From these premises

he drew the conclusion that under our new system, the Court acting both as a Court of Equity and a Court of law the assignee of the trustee by sale on execution will not be allowed to take judgment for the recovery of the possession of the land.

The argument is well constructed, but it fails in this: under the old system the Court of Equity only interfered by injunction to prevent the trustee or his assignee from taking possession as against the *cestui que trusts,* or their assignee or agent, but did not interfere in favor of a wrong-doer, who fails to connect himself in any way with the *cestui que trusts.* Such is the law under the new system. In our case, for the purposes of the motion to non-suit, the *cestui que trusts* are not before the Court, and the defendant stands as a wrong-doer, with-holding the possession from the plaintiff, who is the owner of the legal estate.

If Camman had brought the action, the defendant, so far, as for the purposes of the motion, as the matter now stands, would not have under the old system, entitled himself to an injunction; neither can he do so under the new system, by which the equity of the case as well as the law is administered in the same *forum,* for the plain reason that he stands as a wrong-doer, with-holding the possession from one having the legal estate, and does not in any way connect himself with the supposed *cestui que trusts.*

There is error. Judgment reversed and *venire de novo.*

We cannot even by implication give sanction to the novel practice of allowing a *motion to non-suit the plaintiff, in the midst of a trial,* on the ground that his evidence does not make out a case; the (30) counsel of defendant *stating that if his Honor should over rule the motion he had evidence to offer, showing title in himself.*

By a demurrer to the evidence the defendant puts the case, which means the *exitus* issue, or end of the case, upon the sufficiency of the evidence. The judgment of the Court decides the action one way or the other. But by this novel practice the defendant has two chances to one, which is not "fair play."

When it is decided that on the trial of a State case the defendant has no right to make a motion to dismiss the proceeding and for his discharge, upon the ground that the bill of indictment was fatally defective, and there could consequently be no judgment, even if the jury should find him guilty.

We cannot tolerate this loose mode of trial. C. C. P. dispenses with the formal mode of commencing actions and of pleading, but it does not dispense with the rules for conducting trials which have been heretofore established, as essential to the fair administration of the law. After a jury is empanneled both sides should, in the words of

Lord Mansfield, "play out their cards;" so, in our case, Lookabill is not at liberty to hold back his defense and "fish for" the opinion of the Court, upon the case made by the plaintiff by a motion to nonsuit.

The established rules of practice require that he shall put himself upon that "issue" as decisive of the action.

New trial. This opinion will be certified.

PER CURIAM. *Venire de novo.*

Cited: Tally v. Reed, 74 N.C. 469; *Crawley v. Woodfin,* 78 N.C. 5; *Isler v. Koonce,* 81 N.C. 381; *McCurry v. McCurry,* 82 N.C. 299; *Riley v. Stone,* 169 N.C. 422; *Godfrey v. Coach Co.,* 200 N.C. 42; *Batson v. Laundry,* 202 N.C. 561.

(31)

LEWIS OUTLAW AND WIFE V. JOHN FARMER AND OTHERS.

Where the next of kin of an intestate, whose estate was not indebted, appointed A and B their agents to settle the estate and make distribution; and as such, A and B sold the personals, taking bond payable to "A *or* B, agents;" and afterwards C was duly appointed administrator of the same estate, who settled with A and B, taking the said bond and transferring it to one of the next of kin, as her distributive share.

Held first, that the conjunction "*or*" in said bond should be construed to mean *and;* and *second,* that A and B were not executors *de son tort,* and the bond was valid, which the defendants, the obligors would have to pay to the assignee of the administrator.

CIVIL ACTION, commencing in a Justice's Court, for the recovery of a bond and carried by appeal to the Superior Court of WAYNE County, where it was tried before *Buxton, J.,* at the January (Special) Term, 1874, upon the following *case agreed:*

The complaint of the plaintiffs was on a sealed instrument, purporting to be a bond, and of the following tenor:

"Six months after date, we or either of us promise to pay to John Lewis or James Parker, agents, by agreement with the heirs of Anna Herring, deceased, the sum of one hundred and twenty-five dollars and fifty cents, as witness our hands and seals. January 10th, 1866.

(Signed) "JOHN FARMER, [SEAL.]

"And two others."

The defendants insisted that a recovery could not be had, because the bond was payable to John Lewis *"or"* James Parker. Objection overruled, and defendants excepted.

Defendants then offered to prove that the said bond was given for the purchase of certain personal estate belonging to one Anna
(32) Herring, deceased; that said personal estate was purchased by the defendant, Farmer, and the other two defendants became his sureties to said bond. That said Anna Herring died on the 24th day of December, 1865, intestate, leaving two sisters of full age, and other next of kin; some of the latter being under twenty-one years of age. That said two grown sisters, one of whom is the plaintiff, Catherine, (wife of Outlaw,) desired that the estate of Anna Herring should be settled without administration, and, to that end, requested the said Lewis and Parker to sell the said personal estate of the said Anna and distribute the proceeds among the next of kin, and the said Lewis and Parker, in pursuance of said request, did sell said personal estate on the day the said bond bears date, taking for the property sold the bond in question.

That afterwards, to wit: on the 20th day of Febraury, 1866, one Rhodes became the administrator of said intestate; that Lewis and Parker afterwards settled with Rhodes, and that he, Rhodes, assented to the delivery by Lewis and Parker of the bond herein sued upon, to the plaintiff, Catherine, as her distributive share of the said estate; and that she, Catherine, took the bond with full notice of all the foregoing facts.

The defendants insisted, upon this statement of facts:

1. That the bond was void as to all the defendants;
2. That it was void as to the sureties, Grady and Smith.

His Honor was of opinion that the subsequent assent of Rhodes ratified the transaction, and rejected the evidence; and instructed the jury to render a verdict for the plaintiffs, and gave judgment accordingly. From which judgment defendants appealed.

Faircloth & Granger, for appellants.
Smith & Strong, contra.

BYNUM, J. 1. The first exception of the defendant is, that his Honor refused to hold that the bond, payable "to John Lewis *or* James Parker," was void.

(33) The bond shows upon its face that the payees were joint agents. In such case this Court has recently decided that the word *"or"* will be construed *"and." Parker v. Carrow,* 64 N. C., 563.

It is not necessary to enquire whether this would be a good bond without this construction.

2. The second exception is, that his Honor rejected the evidence offered by the defendants.

We incline to the opinion that the evidence offered was admissible, upon the defence that the bond was void as against public policy or a prohibiting statute. But if admitted, would the evidence answer the action or benefit the defendants? *State v. Purdee*, 67 N. C., 326. We think not. The rejected evidence established the following facts: That one Anna Herring died intestate and owing no debts. That her next of kin and distributees, met together and appointed Lewis and Parker their agents to sell the personal property of the intestate and distribute the proceeds among them. That these agents, in pursuance of this arrangement, did sell personal property to the defendant, Farmer, and took his bond for the purchase money, payable to them, as set forth, with the other defendants as sureties. That after the sale one Rhodes administered upon the estate of Anna Herring, and made a settlement with Parker and Lewis, ratifying what they had done, received the bond in question and transferred it to the female plaintiff, who was one of the distributees, in payment of her share of the estate. Do these facts, in law, avoid the bond?

It may be conceded, that as to the creditors of Anna Herring, had there been any, Lewis and Parker, notwithstanding their agency thus constituted, would have been executors *de son tort,* and liable to be sued by them, as such. But there is a manifest distinction between estates owing debts, where the rights of creditors and third parties intervene, and estates owing no debts, where the rights of the distributees only are involved, which is our case. The defendants cannot maintain their ground without showing that Lewis and Parker were executors *de son tort,* whose act in selling where there were no debts to pay, was void. But where there are no debts and (34) where the only parties having any interest in the estate are the distributees, upon what principle can Parker and Lewis be declared to be executors *de son tort?*

The whole beneficial interest in the estate is in the next of kin, the very parties who constituted these men their agents, to do the very thing that no one has any interest in but themselves. Suppose the defendants had paid off the bond to these agents, would not the debt have been discharged and the purchaser's title be good? Suppose the administrator had brought his action against Lewis and Parker, as executors *de son tort,* to recover the value of the property sold by them after they had collected and paid over to the distributees, would not this Court, as now constituted, have dismissed the action?

In no just sense can Lewis and Parker be considered as executors *de son tort.* They were appointed agents by the parties who owned the entire beneficial interest in the estate. Administration was only the technical form of passing the legal estate from the intestate to the distributees. Without administration they had the potential dominion over the estate and could dispose of it by sale, gift or testament. Therefore a sale by their agent conferred upon the purchaser a title which the Courts will protect. The bond given for the property was given on a valuable consideration and is valid, both as to the principal and as to the sureties. The case of *Turner v. Childs,* 12 N. C., 25, supports this view. There an agent, who sold goods of the intestate in his lifetime, collected the purchase money after his death. The Court held that he was not an executor *de son tort,* even as to creditors, because his right to collect was colorable, which gave character to the transaction, as showing that it was not done as executor or as an officious intermeddler.

As to the subsequent ratification of the acts of Lewis and Parker, by Rhodes, the administrator: This case is put in the books, "Where a man took possession of an intestate's goods wrongfully and
(35) sold them to another, and then took out administration, it was adjudged that the sale was good by relation." Moor. 126, 5 Rep. 30. How far he is bound, in his character of rightful administrator by his own acts done while executor *de son tort,* may be a question, but it is certain that he can ratify and make valid, by relation, all those acts which would have been valid, had he been the rightful administrator. 1 Williams on Executors, 240. If, then, Lewis and Parker, after this sale and bond taken, had administered by relation it would have validated these acts, and it must follow that they are equally made good when expressly ratified by him who does administer.

This is the law in the case where there is an executor *de son tort,* even, which is the most unfavorable view that can be taken of the agents, Parker and Lewis. But we have before endeavored to show that these agents are not executors of their own wrong, representing, as they do, by authority, the only parties in interest, to wit, the distributees.

If the next of kin had assigned their interest in the estate before administration, a court of equity would not allow the administrator to recover from the assignee. *Love v. Love,* 38 N. C., 104. And where an administrator files a bill to recover a chose in action, which he had assigned before administration granted to him, a court of equity will grant him no relief, when it appears that there is no creditor and that the next of kin had assented to the assignment. *Fulhour v. Gibson,* 39 N. C., 455.

So in this Court, where the equitable as well as legal rights of parties are administered, the bond sued on will be upheld as valid against the defendant, and the plaintiffs are entitled to judgment thereon.

PER CURIAM. Judgment affirmed.

Cited: McNeill v. Hodges, 83 N.C. 511; *Baker v. R. R.,* 91 N.C. 310.

(36)

JOHN H. CLEMENT, ADM'R., ETC., v. WILLIAM FOSTER AND OTHERS.

In a petition to sell land for assets, the purchasers of the land sold are not permitted by a motion in the cause, to litigate questions arising because of a trespass committed, or to have questions of boundary decided.

MOTION for an injunction, heard by his Honor, *Judge Cloud,* at Chambers in DAVIE County, on the 1st day of April, 1874.

The plaintiff, as administrator, filed a petition to sell land to pay debts, when James Jordan became the purchaser of one of the tracts sold, and James B. Lanier purchased another tract adjoining. The sale of the land was regularly confirmed, the purchase money paid and deeds made to the purchasers.

Afterwards a difficulty arose between Jordan and Lanier concerning the removal of a division fence, and Jordan made an application to his Honor, at Chambers, founded upon affidavit, for an order restraining Lanier from taking down and removing the fence. The order was granted to the hearing, at which time Lanier filed a counter affidavit, and insisted that Jordan's remedy, if he had been injured, was by an independent action, and not by a motion or proceeding in this cause, to which they were strangers.

His Honor being of the same opinion, dismissed the application; whereupon Jordan appealed.

McCorkle & Bailey, with whom was *Craig & Craig* and *Jones & Jones,* cited and relied on *Mason v. Miles,* 63 N. C., 564, and *Mason v. Blount,* 65 N. C., 99-101.

No counsel *contra,* in this Court.

PEARSON, C. J. We concur with his Honor. The injunction ought to have been dissolved, both on the merits and on the question of practice.

(37) If during his operations, in respect to the fence, Lanier crossed the line, the remedy of Jordan is by a civil action for injury to real estate, which corresponds with the old action, *trespass quare clausum fregit.*

And it may be that if Lanier confined himself to his own side of the dividing line, still if he broke the fence, which had been before used as a common means of protecting the crops, without giving reasonable notice to Jordan of his intention to do so, he could be sued for consequential damages in an action corresponding with "trespass on the case," at all events such conduct on the part of Lanier would not have been consistent with good neighborship.

We are unable, however, to see any principle on which this question of boundary or of consequential damages can be lugged into the proceeding of *Clement v. Foster,* to sell land to pay debts, the parties to that proceeding have no concern whatever with the difference between Jordan and Lanier in respect to the fence; and would have cause to complain should that proceeding be complicated and delayed by a matter in which they have no interest. The cases *Rogers v. Holt,* 62 N. C., 108; *Mason v. Miles,* 63 N. C., 564; *Mason v. Blount,* 65 N. C. Rep., 99, have no application to our case. In the cases of that class some or all of the parties to an action or proceeding still pending had an interest in the matter of the motion. No one of the parties to the proceeding *Clement v. Foster,* have any concern whatever in the matter of this motion.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Jordan v. Lanier, 73 N.C. 92.

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(38)

JOHN McLENDON v. THE COMMISSIONERS OF ANSON COUNTY.

Coupons attached to bonds issued by a county to pay its subscription to a railroad company bear interest at the rate of six *per cent* from the time they become due.

Mandamus may be applied for in a suit brought to recover certain coupons due from a county and is the proper remedy to enforce the judgment.

CIVIL ACTION, for the recovery of certain coupons and for a *mandamus,* tried before his Honor, *Judge Buxton,* at the Spring Term, 1873, of ANSON Superior Court.

The case as settled by the counsel in the Court below is substantially this:

The County of Anson, as authorized by the act of 1857, to alter and amend the charter of the Wilmington, Charlotte & Rutherford Railroad Company, issued certain coupon bonds, each dated 1st January, 1859, redeemable on the 1st January, 1881, and bearing interest at the rate of seven per cent. The plaintiff in this action became the holder of a number of said bonds, and some time in the spring of 1865, by exposure to the weather, his bonds and coupons (having been buried to secure them against loss at the hands of lawless men,) became defaced and mutilated to such extent, that in lieu of those defaced and mutilated the County Commissioners, by virtue of an act of the General Assembly, entitled "An act to authorize the Commissioners of Anson County to issue bonds," etc., ratified 3d of April, 1871, issued to the plaintiff other coupon bonds of like tenor, and corresponding in all respects with the mutilated bonds and coupons. Three of the coupons, maturing on the 1st January, 1864, escaped mutilation.

For the recovery of the foregoing coupons, specifically set forth below, this action is instituted.

The material part of the said bonds is in these words: "The (39) county of Anson, in the State of North Carolina, is justly indebted to John McLendon, or bearer, in the sum of one thousand dollars, and will pay the same to the holder hereof on the first day of January, in the year of our Lord one thousand eight hundred and eighty-one, at the Bank of Wadesborough, upon the surrender of this bond; the interest at the rate of seven per cent. per annum to be paid annually on the 1st day of January in each and every year ensuing the date hereof, at the Bank of Wadesborough, upon the delivery of the said coupons or warrants hereto subjoined, as they shall respectively become due." That the coupons attached to said bonds were thus worded: "Anson County will pay to bearer, January 1st, 18___, coupon No.___, seventy dollars, annual interest on bond No.___, at the bank of Wadesborough." That the following are the coupons due and for which this action is brought, to wit:

Nine coupons, (in which are included the three not defaced,) due January 1st, 1864;

Thirteen coupons, due January 1st, 1865;

Fourteen coupons, due January 1st, 1867;

Fourteen coupons, due January 1st, 1868;

Fifteen coupons, due January 1st, 1869;

Fifteen coupons, due January 1st, 1870.

Amounting to the aggregate value of five thousand six hundred dollars.

The county of Anson had no funds of par value in the Bank of Wadesborough during the years 1864 and 1865 with which to pay the matured coupons, and has had no funds whatever in said bank since that time. That the Bank of Wadesborough has not been since the 1st day of January, 1865, a bank of discount and deposit, but has had a place of business in the town of Wadesborough ever since 1865 for the purpose of settling the affairs of the said bank.

That actual demand for payment of said coupons was made on the 15th day of February, 1872, at the Bank of Wadesborough and
(40) upon the Board of County Commissioners; that the Board refused to pay said coupons unless the plaintiff would remit the interest claimed thereon, and that plaintiff was informed by the officer in charge of the bank that there were no funds deposited there for the payment of said coupons. At this time and the time of the demand on the Commissioners, the plaintiff had the coupons with him. The coupons were so mutilated and defaced that they could not be presented for payment before their re-issue on the 2d day of October, 1871, and none of those sued upon were ever presented or delivered for payment at the Bank of Wadesborough until the 5th day of February, 1872, nor was any demand for the payment of the same ever made at the bank or of the Commissioners until that date.

The issues arising from these facts and the pleadings are:

1. Do the coupons for which this suit is brought bear interest? If so, from what date?

2. Is the plaintiff entitled to a writ of *mandamus,* either alternative or peremptory, to the Board of County Commissioners, as applied for by plaintiff? Or is *mandamus* an original action, to be applied for and prosecuted as a distinct civil action under the act of 1871 and 1872?

His Honor was of opinion:

1. That the county authorities ought to have had the money and kept it when the coupons were payable, so that it might have been received at any time after maturity. As they never had the money there at all, and have had the use of what belonged to the holder of the coupons ever since maturity, his Honor was of opinion that the Commissioners ought to pay interest from the maturity of the coupons, the interest on the coupons being at the rate of six per cent. and not seven per cent., the rate on the bond. Interest is allowed on the coupons by implication of law, and is at the legal rate. Interest on the bond is stipulated to be at the rate of seven per cent.

2. As to the second issue, his Honor was of opinion that as this action is upon a money demand against a municipal corporation,
(41) and as a *mandamus* is asked for in the complaint as part of the

remedy, and is in fact the only mode to enforce the judgment in the case, the plaintiff is entitled to a *mandamus* to enable him to realize the sum adjudged to be due him.

It was therefore adjudged that the plaintiff recover of the defendant the sum of five thousand six hundred dollars, with interest at six per cent., on $630 from 1st January, 1864; on $910 from 1st January, 1865; on $980 from 1st January, 1867; on $980 from 1st January, 1868; on $1,050 from 1st January, 1869; and on $1,050 from 1st January, 1870, with costs of suit, etc.

It was further adjudged by the Court that a writ of *mandamus* issue to the defendants under the seal of the Court, returnable to the next term, commanding them to proceed to provide the means to pay the sum herein adjudged to be due from them to the plaintiff, by laying the proper tax sufficient for that purpose, and that they pay said debt and also the costs of this action and make due return to the next term of this Court.

From this judgment the defendants appealed.

Battle & Son, for appellants.
Steel & Walker and Busbee & Busbee, contra.

READE, J. The first question is: "Do the coupons on which the suit is brought bear interest? If so, from what date?" They do bear interest from the date of their maturity. 7 Wallace, 82.

This would not have been controverted, probably, in view of the case in Wallace, if it were not that we have decided that a demand is necessary before action brought against a Board of County Commissioners. 67 N. C., p. 330. *Alexander v. Commissioners.* And as demand was not made until 1872, although the coupons had matured several years before, it is insisted by defendant that they bear interest only from the demand in 1872. But that does not follow. The *right of action* may not accrue until after demand or until after (42) a given time; while the *cause* of action may have existed long before. A note payabe twelve months after date with interest from the date would be an instance of this. We require a demand before suit against County Commissioners in cases where it would not be required against individuals, for the reasons stated in *Alexander v. Commissioners, supra,* not to fix the amount of the liability, or the liability itself on any of its incidents; but simply to give *notice* of the liability, and an *opportunity to pay* without suit.

The second question is, whether *mandamus* is the proper remedy to enforce the judgment; or whether after judgment another action must not be brought to obtain the writ?

Cui bono, another action? It is true that a *mandamus* issues only when the amount is ascertained; but here it is ascertained when the judgment is rendered, and the complaint demands both the judgment and the writ of *mandamus.* This, therefore, is a civil action for a *mandamus* as much as it is a civil action for a money demand. *Uzzle v. Commissioners,* 70 N. C., p. 564.

We agree with his Honor also as to the rate of interest, six per cent. and as to the terms of the *mandamus,* directing the defendants to provide the means to satisfy the recovery by the levy of taxes or other efficient mode, and to pay and satisfy the recovery, and make return to the next term of this Court.

There is no error. Judgment here for plaintiff, and a writ of *mandamus* in accordance with this opinion.

PER CURIAM. Judgment below affirmed.

Cited: Hawley v. Comrs., 82 N.C. 24; *Fry v. Comrs.,* 82 N.C. 305; *Bank v. Harris,* 84 N.C. 210; *Leach v. Comrs.,* 84 N.C. 831; *Self v. Shugart,* 135 N.C. 195; *Oldham v. Riegar,* 145 N.C. 257; *Silk co. v. Spinning co.,* 154 N.C. 425; *Eddleman v. Lentz,* 158 N.C. 70; *Grocery co. v. Banks,* 185 N.C. 152; *Dillard v. Walker,* 204 N.C. 70.

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(43)

JOHN R. SMITH AND ANOTHER v. WILEY B. FORT.

Where one is sued alone upon a verbal contract, and the evidence on the trial tends to show that the contract was made with the defendant and another person, it is error in the Court to leave it to the jury to say whether there was a sale to the defendant alone, and the defendant is entitled to a new trial.

CIVIL ACTION, tried before his Honor, *Judge Buxton,* at the Special (January) Term, 1874, of the Superior Court of WAYNE County.

The case as settled by his Honor, (the counsel disagreeing thereon,) is substantially as follows:

The plaintiffs were owners of a steam saw mill and fixtures, which, on the 26th Nov., 1868, they contracted to sell to the firm of Jenkins & Southard for the sum of $1,500, secured by three notes of $500 each, due respectively at 3, 6 and 9 months from 26th Nov., 1868, with interest. According to the contract, which was in writing, the vendees were placed in possession, but the title was retained by the vendors, until payment in full. After a number of payments, which were entered as credits on the notes, reducing the principal to about one

half of the original amount, Jenkins & Southard parted with their interest in the mill and fixtures to one Ballinger, and put him into possession.

Rufus Edmundson, one of the plaintiffs, testified: That on the 1st September, 1871, the defendant came to him in Goldsboro, and remarked that he had come to buy our saw mill. Witness asked him, if he proposed to take the position occupied by him and his partner, Smith, the other plaintiff towards Jenkins & Southard in regard to title. Defendant said that he did. Witness then said that he and partner wanted to sell. Defendant answered that if the amount was not more than he understood it was, he would buy. Witness told him that the amount due upon the sale notes was not exceeding $900, and he thought it would be less. He, the defendant, then said that he and one Yelverton had agreed to buy, and that he had come (44) up for that purpose, and to raise the mortgage, if there was no more due upon it than he heard there was. Witness asked Fort what he proposed to do if he and Yelverton purchased the mill. His answer was, that they were going to buy it for Ballinger and wanted it to remain where it was—the place where Ballinger was then running it. To this witness replied that it would suit them (he and his partner) exactly, as they wanted to have some timber cut. He then handed defendant, Fort, the papers and told him *"There are the contract and notes, the mill is yours,"* saying further, that it might possibly require a written transfer on their part, but to go and consult a lawyer. As to payment, the defendant said that if we insisted on it, he would pay part that day, though it would be inconvenient, and he prefered to get his cotton out first; and on being asked when he would be ready he replied in October next.

On the same day witness again saw defendant at the law-office of Mr. Faircloth, and told him that his partner (the plaintiff Smith) was not at home, in consequence of whose absence the witness would not be able to get the exact amount of the credit on the notes, some of which had not been endorsed, and the amount of which Smith had. Witness and defendant agreed to leave the paper, with Faircloth, and ascertain from Smith the amount of credits. This was on Tuesday, and Fort remarked that he and Yelverton would be there on Friday or Saturday following to complete the settlement. Fort did not come either on Friday or Saturday, and on the Sunday following the mill was burned.

The witness further stated that some ten days afterwards, or perhaps more, he saw Fort and he told witness that Yelverton was disposed to back out, but that if he was bound, Yelverton was too, and that he, himself, would not go back on his word for that amount. Wit-

ness saw him two or three times afterwards, and was informed by him that we would have to sue, as Yelverton would not pay.

(45) Upon his cross-examination this witness further stated: That the papers were taken to lawyer Faircloth to see if a written transfer was necessary to pass the title. When witness passed the papers the defendant took them and said nothing. It was at the suggestion of the witness that they went to Faircloth.

Being re-examined the witness stated that the land on which the mill stood did not belong to him and his partner. Witness did not know how the papers got into the hands of his counsel.

The witness further stated that there was a bill of lumber sawed for the defendant before the sale, the amount of which he has since paid to Smith. There was an arrangement between Smith, Fort and Ballinger that the amount was to be credited on the notes.

The papers, contract and notes were then exhibited, the witness stating that he and his partner, the co-plaintiff, had endorsed a written transfer to the defendant and Yelverton on the contract, and had also endorsed the notes without recourse. This may have been done since the mill was burned, but the witness did not think it was. The credits have also all been endorsed.

John R. Smith, the other plaintiff, testified: That the first conversation he had with the defendant was some eight or ten days after the mill was burned. The defendant, Edmundson, the co-plaintiff and himself met in front of the Sheriff's office, and defendant remarked that he was out of the trade. Upon being asked why, he said that Yelverton had sent word that he would not take the mill. The plaintiffs told him that they had heard nothing of it, and they had made the transfer. An hour or two later the same parties met again in the office of the Sheriff, when Fort remarked that he would still stick up and pay for the mill, that he would rather loose $1,000 than falsify his word.

At the next Court witness further stated that the defendant seemed willing, but said that Yelverton held a right to Jenkins' land, and he (Fort) was afraid Jenkins would burn him up, unless Yelverton came into the trade, and Yelverton seemed disposed to back out. Wit-

(46) ness said that Yelverton told him he never agreed to buy the mill in company with the defendant, but only agreed to go security for him. This the witness told Fort, the defendant, who said that Yelverton had so agreed and could not get out of it that way. The plaintiffs told the defendant that they had no claims on Yelverton, as the contract was made with himself.

Witness also stated that he had made a calculation and found that there was due on the notes, 1st Sept., 1871, the sum of $895.92. The

notes witness found at Faircloth's office; and the transfer was made during that week and signed by the plaintiffs. It was made before Sunday. The papers remained with Mr. Faircloth, and the witness has never had possession of them since that time.

In May, 1871, defendant came to witness and told him that he wanted a bill of lumber sawed, and as he and Jenkins were not on good terms, he wanted the witness to get the lumber sawed. Witness and his partner spoke to Jenkins about the matter, and he agreed to saw the lumber. The defendant gave witness the bill and it was sawed, and he paid witness for the same in 1871, after the trade, by crediting the sum, to wit: $116.50 on the $895.92 the price of the mill, etc., remaining unpaid.

Witness authorized Edmundson to sell the mill; did not know on whose land it stood.

Cross-examined, the witness stated that he received a letter from Ballinger informing him that the mill was burned. The witness had signed the transfer before he heard that the mill was burned. Witness and his partner owned the mill together. The agreement was, that the defendant was to pay the balance due on the notes. The defendant had informed the witness that Ballinger claimed the amount he owed for sawing the bill of lumber before spoken of, and as the plaintiffs also claimed it, requested that they would warrant for it. This was done, and the plaintiffs obtained judgment, Ballinger being present.

The transfer was signed the same day it was drawn by the lawyer. No money passed and no notes were given; the transfer (47) was made to Fort and Yelverton, and the defendant wanted the present suit to be brought against himself and Yelverton.

Ballinger, a witness for the plaintiffs, testified that he was in charge of the mill, and went to defendant, Fort, and asked him to raise the mortgage or lien held by Smith and Yelverton, promising, if he would do so, that he would give him the amount of the bill for sawing his lumber. Defendant promised that he would see Yelverton and let the witness know. He did so, and told the witness that he would, saying that he would go to Goldsboro the next evening and attend to it. On his return from Goldsboro, the defendant informed the witness that he had seen Edmundson and had arranged the matter; that it would be all right, and they were going down on next Saturday to sign the papers. He said it would have been fixed up, but Smith was not there to sign them; that it was all right and that he, the witness, could go right on, as the papers would be fixed the next Saturday. Defendant told witness he had travelled rapidly to Goldsboro, changing horses on the way at Coley's.

The bill of lumber spoken of was sawed for defendant before his contract with Smith and Edmundson.

Upon his cross-examination the witness said: He had bought the mill from Jenkins, and had it in operation until the Saturday, 12 m, before it was burned on Sunday. Witness sawed defendant's lumber at the request of Smith. He was running the mill from Tuesday up to Saturday; the defendant got some lumber after witness repaired the mill; this was another little bill given to witness by Fort afterwards.

The defendant used the words, "it is all right, go ahead, it is fixed, or will be fixed, next Saturday." He mentioned no price. Witness wanted to get the money for sawing the defendant's lumber to help repair the mill.

For the defendant, he himself first testified: On Tuesday, 1st of September, 1871, witness met Edmundson at the store of one
(48) Kornegay, in Goldsboro, and stated to him that he had come up to purchase the mill if his lien or mortgage upon it was not more than he heard it was. Edmundson had proposed to sell it to him before. He, Edmundson, pulled the contract papers out, and handing the same to him, suggested a meeting at the office of Mr. Faircloth for the purpose of examining them. They did so, but after consultation and upon the suggestion of Mr. Faircloth, postponed the matter until Saturday, when all the parties could be present, Smith being absent. Witness did not recollect that Edmundson told him that the mill "is yours." Witness had not heard the papers read until the trial. Edmundson said there had been some payments on the papers, which Smith knew of. Witness did not mention to him what he understood the amount due to be. Edmundson asked of lawyer Faircloth if he could transfer the title to the mill. Faircloth examined the papers and expressed the opinion that it could be done.

Witness told Edmundson that he and Yelverton wanted to buy. Edmundson said he did not know how much is due, and witness never heard how much was due until after the mill was burned. Edmundson said he would wait awhile for the money if it would be an accommodation. Witness went home and communicated to Yelverton what had taken place. On the Sunday following the mill was burned.

In regard to the bill of lumber Smith told the witness that he could arrange it so that it could go on the mortgage. Witness gave him the bill and Ballinger sawed it; he afterwards offered to pay Smith for the bill, but he said there was no use for him to receive it, as the mill was the witness's. Ballinger and Jenkins claimed the price of the lumber afterwards, and of this witness informed Smith, who told him to come to the court house and he would warrant him. Witness accepted service of the summons and notified Ballinger. All met at the trial,

and Ballinger agreeing that the price might go on the mortgage, witness gave Smith an order for the money, which was paid.

Witness further stated that Smith spoke of brinking suit and, (49) also of leaving it to referees. Edmundson stated to witness that he did not recollect the exact amount due on the note; witness did not recollect that Edmundson said he would guaranty the amount should not exceed $900. Jenkins was in Goldsboro the day witness had the conversation with Edmundson.

Cross-examined, the witness said: That he was brought to Goldsboro that day by Jack Barden, and he told him to bring him as soon as possible, as he wanted to see Edmundson before Jenkins did. Witness made arrangements to get money from one Day in the event he purchased the mill, and informed Edmundson that he could pay a part of the amount on that day; he also told him that he had a race to get there before other men. Edmundson mentioned an amount which the mortgage would not exceed, but witness does not recollect that amount; he went to Faircloth's office to ascertain as to the title and to find out from Smith the amount yet due. Witness did not return to Goldsboro on Friday or Saturday, nor did he request Smith to warrant him for the bill for sawing, etc., as he had offered to pay him after the mill was burned.

Ballinger gave witness a receipt for the amount, and directed it to be credited on the amount. Witness made the remark that he would pay $1,000 rather than forfeit his words, and he is still of the same sentiment. Witness told Smith that Yelverton would not pay, and of course he would not; that Yelverton had backed out, and so had he. He did not tell them to see Yelverton; may have remarked that they would have to sue before they got the money. After the fire Ballinger tried to repair the mill, but gave it up as a bad job, and rented out a part of it.

The witness (the defendant) upon the direct examination being resumed, stated that Ballinger was running the mill when he had the lumber spoken of sawed. That he never invited this suit; but said if they got the money it would be by suit. Witness always denied completing the contract; the plaintiffs insisted that he had bought the mill; he insisted that he had not; he made arrange- (50) ments with Day to get money on Saturday in case he needed it. At the back of the sheriff's office, witness told Smith that Yelverton refused to buy the mill; and he further told him that he could not see how the plaintiffs could transfer the property in his and Yelverton's absence, and then sue him and leave out Yelverton.

William T. Faircloth, for defendant stated: Edmundson and Fort came to his office on Tuesday, 1st September, 1871. After talking in

a friendly way for some time, they called upon me to know whether they could transfer title to the property and papers without the transfer being in writing. He informed them it could be done, but advised that it should be in writing. They asked if Edmundson and Smith should both transfer; witness answered, as they were partners, either could, but again advised that both should sign the transfer. The parties then fixed on Friday or Saturday following, when they would meet again, the defendant bringing Yelverton, and Edmundson, Smith, the latter not being present at the first conference.

Witness wrote the transfer some time in September, 1871; the parties signed it in his presence; he omitted to insert the day of the month, with a purpose, which purpose he did not draw to their attention. The best impression of the witness was, that the transfer was written and signed during that week. The papers were left with him to be kept until Saturday. Witness gave the papers to the plaintiffs or to their attorney; after both sides told him that they had disagreed.

Thomas Yelverton testified that he was in company with Jenkins after Fort had returned from Goldsboro: he rode up, and Jenkins asked him, "Have you bought that mill?" Fort said nothing and Jenkins asked, "Did you pay any money?" Fort made no reply, but rode off eight or ten steps, called me to him and said: "I have not bought the mill, but I have got it fixed so that I can get her if we want her. Edmundson gave me the papers, which I gave to Faircloth; Smith was not there; the matter was postponed, and we are all to meet
(51) down there on Saturday."

Cross-examined, witness said that it was the Wednesday after the Tuesday when he saw Fort as he was passing. He and Jenkins were not friendly; the mill was burned on Sunday. Fort did not tell him what he was to pay for the mill; neither of them went to Goldsboro on Saturday. Fort never asked him to pay any amount, and the witness did not know exactly how he wanted to use his name. Witness told Smith that he had agreed that Fort should have the use of his name, and that he thought he wanted it as security.

Mr. Jenkins testified that Ballinger fixed up the mill a little after it was burned, and sawed a little and quit. A part has been moved away.

His Honor charged the jury:

The plaintiffs claim (1) that the defendant bought the mill and has not paid for it; and if this is not so, then, (2) the defendant agreed to buy the mill, and violated his agreement.

On the other hand the defendant insists that he merely wanted to buy the mill if it could be bought on satisfactory terms, but that he neither bought it nor agreed to buy it.

1. Whether there was a sale or not is a question for the jury to determine as they shall gather the intention of the parties, not the intention of one only, but of both. Upon a completed sale the property passes to the purchaser, and conversely, if the property passes the sale is complete. The property does not pass absolutely unless the sale be completed, and it is not completed until the happening of any event expressly provided for.

As between the parties property may pass by a sale without delivery of possession, if it is so agreed between the parties. If the property passes without a change of possession, and the thing sold perishes, the loss falls on the purchaser, for it is his property.

In regard to the price, it must be certain, or capable of being made so by reference to a definite standard. It may be payable in the future if the parties so agree.

2. An agreement to sell is a different thing from a sale, and (52) therefore no mere promise to sell hereafter amounts to a present sale. Where there is no sale, but merely an agreement to sell, and the property perishes, the loss falls on the owner, and not on the proposed purchaser.

These are the general principles of law applicable to the case. It is for the jury to apply them according as they shall find the facts.

(1) If the jury shall find from the evidence that it was the intention of both parties at the interview between Edmundson and Fort, on Tuesday, 1st September, 1871, that the title of the property should pass to Fort at once, and he was to pay for it the balance due upon the notes of Jenkins and Southard, to be ascertained by calculation afterwards, the amount not to exceed $900, then the plaintiffs would be entitled to a verdict for the price agreed to be ascertained by such calculation.

(2) If the jury shall find from the evidence that there was no sale effected on Tuesday between the parties, but that Fort then agreed to buy and to return on Friday or Saturday and complete the purchase, and that he violated the agreement, then the plaintiffs would be entitled to nominal damages, there being no evidence that the property was worth less in marketable value on Friday or Saturday than it was on Tuesday, and the rule being where there was a wrong, but no injury, the damages are nominal, and in such cases the verdict should be for a sixpence.

(3) If the jury shall find from the evidence that there was no sale and no agreement to purchase, and all that was done between the parties was a mere appointment to meet to see whether they could not agree on Friday or Saturday, then the plaintiffs were entitled to recover nothing, and the verdict should be in favor of defendant.

To the foregoing charge the defendant excepted, and asked his Honor to instruct the jury: "That if he, (the defendant,) did not complete the contract he was only liable for nominal damages unless he caused or contributed to cause the destruction of the property, and that
(53) there is no evidence that he either caused or contributed to cause the destruction of the property."

This special instruction his Honor omitted to give, as there was no allegation or insinuation, either in the evidence or the argument of counsel, that the defendant had either caused or contributed to cause the destruction of the property; and his Honor was of opinion that the charge already given covered the principal portion of the instruction. Defendant again excepted.

The jury rendered a verdict for the plaintiffs, finding that there was a sale under a special contract between the parties. Upon the finding a reference was ordered to the clerk to ascertain the balance due after allowing the credits endorsed on the notes, and the further sum of $116.50, the amount of the bill of lumber paid for by defendant.

Rule for a new trial, upon the ground that his Honor erred in leaving the intention of the parties to the jury, when there was no delivery nor ascertainment of the price. And also, in instructing the jury that the measure of damages, in case there was a sale upon the terms contended for by plaintiffs, could be ascertained by a calculation upon the notes to find the balance due upon the original contract of sale between plaintiffs and Jenkins and Southard. Rule granted and discharged. Judgment and appeal by defendant.

Isler, for appellant.
Smith & Strong, contra.

SETTLE, J. We have frequently had occasion to condemn the practice of sending to this Court a full report of all the evidence adduced upon the trial, but in the case before us, owing to a disagreement of counsel, his Honor has seen fit to do so. And here, at least, it serves a useful purpose, in that we are enabled to correct an error that does not otherwise appear upon the record.

(54) His Honor left it to the jury to say whether or not there had been a sale of the mill and fixtures by the plaintiffs to the defendant Fort, *alone*, when the written transfer made by the plaintiffs, without receiving in return any security, money or other compensation, in the absence of the defendant, (whether before or after the burning of the mill does not clearly appear,) shows that the plaintiffs intended that it should appear that they had transferred the property to Fort and Yelverton jointly.

The evidence for the defendant tends to prove that no contract was executed on Tuesday, but that there was a conversation about a trade to be consummated between the plaintiffs on the one side and the defendant and Yelverton on the other, and that there was an understanding between the plaintiff, Edmundson, and the defendant, that all parties should meet on Saturday, when the price could be ascertained and the contract executed. The evidence for the plaintiff tends to prove that there was a sale to Fort and Yelverton.

The idea of holding Fort *alone* responsible seems to have been an afterthought, not supported by the evidence.

His Honor should have instructed the jury that there was no evidence upon which they could find that Fort alone had brought or contracted to buy the mill and fixtures.

There is error, for which there must be a *Venire de novo.*

PER CURIAM. *Venire de novo.*

(55)

THOMAS GRAY AND WIFE AND ANOTHER v. JAMES A. GAITHER, EXEC'R., ETC.

An order of a Judge, for the defendant to appear at a subsequent time and show cause why a receiver may not be appointed, does not involve any matter of law nor affect any substantial right, and therefore, is not such an order as can be appealed from.

CIVIL ACTION, returnable to the Spring Term, 1874, of DAVIE Superior Court, and heard before *Cloud, J.*, upon a motion in the cause.

In 1873 one James Gray died, leaving a last will and testament, which was duly admitted to probate, the defendant qualifying as executor thereof.

The plaintiffs instituted this action to recover a legacy under said will, and on Wednesday of the return term moved to be allowed until the following Friday to file their complaint. On Friday they were allowed further time to file their complaint, the defendant objecting. On Wednesday of the second week the plaintiffs filed an affidavit suggesting a waste of the estate by the defendant and that he had given no bond, and moved for the appointment of a receiver. His Honor made an order on the defendant to appear before him on a certain day at Chambers and show cause why a receiver should not be appointed. From this order the defendant appealed.

Furches, for appellant.
McCorkle & Bailey, contra.

RODMAN, J. The cases in which an appeal is allowed are stated in C. C. P., Sec. 299. "An appeal may be taken from every judicial order or determination of a Judge of a Superior Court upon or involving *a matter of law or legal inference,* whether made in or out of term which *affects a substantial right* claimed in any action or proceeding," etc.

The present case fails to come within this liberal rule in two
(56) respects. 1. The order of the Judge does not involve any matter of law. 2. It does not affect any substantial right.

The order determines nothing. It is merely in the nature of a notice to appear and show cause why an order for the appointment of a receiver should not be made. There was no necessity for having such an order sanctioned by a Judge. A notice from the plaintiff that on a certain day he would move for an order, etc., would have been sufficient. It is contended that the rule or order which the Judge made amounted to a determination by him that upon the case which the plaintiff then presented, and unless the defendant could show cause to the contrary, he would make the final order desired. We do not so consider it. As the plaintiff himself could have given a sufficient notice, it would probably have been best for the Judge to have abstained from giving his unnecessary sanction. But that the notice is directed by the Judge does not alter its character. It remains merely a notice, and affects no right of either party unless the Judge on the return day shall make some other order.

PER CURIAM. Appeal dismissed

Cited: Wallington v. Montgomery, 74 N.C. 374; *Mitchell v. Kilburn,* 74 N.C. 484; *Lutz v. Cline,* 89 N.C. 188.

STATE v. WILLIAM H. CURTIS.

If a special verdict find facts of an unequivocal character, the Court can declare the guilt or innocence of the defendant as a question of law; but if the facts found are equivocal—may mean one thing or another—then the Court cannot determine as a question of law the guilt or innocence of the defendant.

INDICTMENT, robbery from the person, tried at the Spring Term, 1874, of CASWELL Superior Court before his Honor, *Judge Tourgee.*
(57) On the trial below the jury returned the following special verdict:

"That the defendant with one Buck Brandon went to the store of the prosectuor, in company with four others, at 6 o'clock and 30 minutes, December 25th, 1873; that Brandon had a double barrel gun, which he set behind the door in the store room.

"That soon after the other four men left the store. Brandon then caught the prosecutor about the body and arms, while the defendant rifled the cash drawer and took outside the store the articles charged in the indictment—making two trips for this purpose.

"In response to the cries of the prosecutor his wife came to his aid, and the defendant and Brandon left the store, carrying away the articles charged. That the son of prosecutor saw the defendant and Brandon the same night, and asked Brandon in defendant's presence why they had treated his father in the manner they did? Brandon said he had taken nothing, but defendant had a bottle of whiskey around the fence there which he could have.

"The next morning the defendant being inquired of as to what he had done with the articles taken, especially the blanket, denied having taken it but afterwards went and got it and told where the jars and other articles (except the money) might be found.

"Neither the defendant nor Brandon were disguised, and both were known to the prosecutor, and made no attempt to conceal their faces or persons. Whether upon these facts the defendant be guilty or not guilty, the jury respectfully submit to the Court."

Upon the finding of the foregoing facts the Court adjudged the defendant not guilty, from which judgment the Solicitor for the State appealed.

Attorney General Hargrove, for the State.
No counsel contra in this Court.

READE, J. If a special verdict find facts of an unequivocal (58) character, the Court can declare the guilt or innocence of the defendant as a question of law, but if the facts found are equivocal, may mean one thing or another, then the Court cannot determine as a question of law the guilt or innocence of the defendant. For example: the jury find that the defendant rudely and of purpose ran against the prosecutor and pushed him down. The Court would have no difficulty in deciding that to be an assault and battery. And so if the jury find that the defendant accidentally stumbled and ran against the prosecutor and pushed him down, the Court could see that that was not an assault and battery. But if the jury find the simple fact that the defendant ran against the prosecutor and pushed him down without finding whether it was by accident or design, then, as has just been

seen, the act being equivocal, the Court could not determine the guilt or innocence of the defendant.

There are two objections made to this view. One is that a man is *presumed* to *intend* the consequences of his acts. The other is that the defendant is entitled to the most favorable construction of whatever is doubtful. Both of these objections might be urged on the trial with propriety. The prosecutor might have insisted that when he proved the acts, the burden was upon the defendant to show mitigation or excuse. And on the other hand if the defendant offered any thing in mitigation or excuse, or if any thing appeared in the case, he had the right to have the benefit of doubts. How all this was upon the trial we do not know. But when the jury undertook to find a special verdict the burden was upon them to present all the facts. As in the case put above the Solicitor might prove that the defendant ran against the prosecutor and pushed him down, and stop his case, and insist upon a conviction upon the presumption that the defendant intended the consequence of his act. And then the defendant would have to show the accident in excuse. But the jury in a special verdict must state both sides, viz.: the facts that were shown to prove his guilt, and the facts shown in excuse, and if nothing was shown in
(59) excuse then they ought to state that fact, or that the act was done on purpose.

In the case before us the special verdict states what was done, but the intent is not stated. And it is very evident that that was the difficulty they had in coming to a general verdict. They could not satisfy themselves as to the intent. Was it the purpose to steal, or was it a Christmas frolic. Now that is not a question of law, but it is a question of fact which the jury ought to have found.

In Hawkins' Pleas of the Crown, vol. 2, p. 622, one of his twelve points said to be settled, is as follows: "That the Court in judging upon a special verdict is confined to the facts expressly found, and cannot supply the want thereof as to any material part, by an argument or implication from what is expressly found; and therefore, where an indictment set forth that the defendant discharged a gun against J. S., and thereby gave him a mortal wound, etc., and the special verdict found that he discharged a gun and thereby killed J. S., but did not expressly say that he discharged it against J. S., it was adjudged that the Court could not take it from the other circumstances of the facts, which were expressly found, though they were as full to the purpose as possible that the defendant discharged the gun against J. S."

In support of the text, Mr. Hawkins refers to a case in Strange's Reports, P. 1015, *Rex v. Francis,* which is interesting enough to quote:

"The defendants were indicted for that they feloniously made an assault on Samuel Cox in the King's highway, and put him in fear, and £9 in money from the person of said Cox did take, steal and carry away." The jury found the following special verdict:

"That Samuel Cox, travelling on horseback on the King's highway, etc., saw all the prisoners in company together, one of whom was then lying on the ground; that Cox passed by them, and one of them called to Cox and desired him to change half a crown that they might give something to a poor Scotchman then lying on the (60) ground, who was one of the prisoners. Cox came back, and putting his hands in his pocket to pull out his money in order to give them change as they desired, and having the pieces of gold in his hand, John Francis, one of the prisoners, gently struck Cox's hand in which he held the gold, by means whereof the gold fell to the ground; that thereupon Cox got off from his horse and said to the prisoners, that he would not lose his money so; and the said Cox then and there offering to take up the pieces of gold which were then upon the ground, and in Cox's presence; the prisoners then and there swore that if he touched the pieces of gold they would knock his brains out, whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold. That the prisoners then and there immediately took up the pieces of gold, and got on their horses and rode off with the gold; that Cox immediately thereupon pursued them, and rode after them for about half a mile, and then the prisoners struck him and his horse, and swore that if he pursued them any further they would kill him; by reason of which menace he was afraid to continue his pursuit any further; but whether upon the whole matter the prisoners are guilty of the felony and robbery charged upon them, the jury doubt and pray the advice of the Court."

That case was twice argued at the bar of the King's Bench and turned upon the single question, whether it was sufficiently found that the taking was *in the presence of Cox.* "The Chief Justice declared that all the Judges, except Carter, Comyer and Thompson, who only doubted, were of opinion that the fact of Cox's presence at the taking was not sufficiently found, though there seems to be evidence enough to warrant such a finding." And the Chief Justice concludes by saying:

"The cases cited show how nice the Judges have always been; and therefore, as here wants one necessary ingredient to make it a robbery the prisoners must be discharged from this indictment."

Hayet's case, which may be found 1 Hale's Pleas of the (61) Crown, p. 688, is cited on the other side. There the special verdict was that a mother, in a pet with a ten-year old child, threw a stool at the child's head and killed it. The stool was of such size

and weight as made it a deadly weapon, but the mother did not intend to kill the child. The question there was whether the Court could adjudge the case to be murder against the finding of the jury that the prisoner did not intend to kill.

The prisoner was pardoned and no final judgment was rendered; but it seemed to be the opinion of Lord Mansfield that it was murder, and the Court might so declare upon the verdict. Intent to kill is not necessary to constitute murder, if there is an intent to do some unlawful act, as throwing the stool was.

In our case the special verdict is, that the defendants went to the prosecutor's store at 6:30 o'clock P. M., 25th December—Christmas Eve—and one of them held him while the other took out of the store a blanket, some candy and whiskey and fifty cents in money. That the prosecutor cried out and his wife came to his aid and the defendants left the store. That they were well known and did not attempt to get away, and were not disguised, and the goods were all got back except the fifty cents. This verdict is imperfect, because it does not find the intent with which the defendants acted.

Our conclusion is, that there has been no sufficient verdict rendered, and that the case stands as if there had been a mistrial, and that there must be a *venire de novo.*

In Hawkins Pleas of the Crown, p. 622, note 2, it is said: "If the verdict do not sufficiently ascertain the fact, a *venire facias de novo* ought to issue," and so are other authorities.

This will be certified, etc.

PER CURIAM. *Venire de novo.*

Cited: S. v. Blue, 84 N.C. 809; *S. v. Bray,* 89 N.C. 481; *S. v. Yount,* 110 N.C. 598; *S. v. Gadberry,* 117 N.C. 820; *S. v. Hanner,* 143-635, 636.

(62)

H. F. BRANDON v. COMMISSIONERS OF CASWELL COUNTY.

The Judge of a Superior Court has no power to make to the Clerk of one of the Courts in his District an allowance for extra services.

This was an ORDER on the defendants in favor of the plaintiff, made by *Tourgee, J.,* at Fall Term, 1873, at CASWELL Superior Court, in the following words, to wit:

"SUPERIOR COURT, Caswell County. } Fall Term, 1873.

"It is ordered that the Commissioners of Caswell County allow and pay to Henry F. Brandon, Clerk of said Court, fifty dollars for his services in attending upon said Court at Spring and Fall Terms, 1873.

(Signed) A. W. TOURGEE,
Judge Seventh District, Presiding."

Plaintiff gave the Commissioners notice that he would move his Honor for an order compelling them to obey the obove order, on the 22d day of November, at which time the Judge granted a rule against the defendants commanding them to appear, etc., and show cause why they should not be attached for contempt. etc.

The Commissioners appeared and filed an answer, in which they disavowed any intentional disrespect to his Honor's order, and contended that the presiding Judge had no authority to make the order presented to them by the plaintiff.

Upon the hearing his Honor made the rule absolute, from which judgment the Commissioners appealed.

No counsel for appellants in this Court.
Battle & Son, contra.

READE, J. The statutes prescribes that the clerks of Courts, sheriffs and other officers shall receive certain specified fees for services, and that they shall receive "no extra allowance or other com- (63) pensation whatsoever, unless the same shall be expressly required by some statute." C. C. P., Sec. 555; Bat. Rev., Chap. 105.

The language is broad, but still it may have been intended to apply to the *services specified* and not to *extra services* for which no fees are specified. And this is made the more probable by reference to the statutes and the practice under the former system. Our former statute, Rev. Code, ch. 102, prescribed the fees which officers should receive, "and no other." And yet the County Courts were in the habit of making to the clerks and sheriffs *extra* allowances for *extra* services. But this was understood to be a matter of county police, regulated by the County Courts, and was never exercised by the Superior Courts as incident to their powers.

So that it would seem that if our statutes do not now forbid any extra allowance, yet if any allowance be made it cannot be by a Judge of the Superior Court, but must be by the Board of County Commissioners, which, in matters of county police, take the place of the old County Courts.

Our conclusion, is that his Honor had no power to make the order of extra allowance to the plaintiff, or any of the subsequent orders against the defendants to pay the same, and that they are not in contempt for refusing to obey.

There is error. This will be certified to the end that the orders may be vacated and the defendants go without day.

PER CURIAM. Ordered accordingly

Cited: Griffith v. Comrs., 71 N.C. 341; *Young v. Comrs.*, 76 N.C. 317.

(64)

STEPHEN W. ISLER v. F. B. HARRISON AND WM. FOY.

In an action for the recovery of real estate, an admission by the plaintiff that the question of title to the same land had been tried in a former suit between himself and the same defendants, and that it had been found against him, will estop him from any further proceedings and justifies a verdict for defendants.

CIVIL ACTION, for the recovery of real estate, tried by His Honor *Judge Clarke* and a jury, at the Fall Term, 1873, of JONES Superior Court.

The defendants in their answer, relied upon a verdict and judgment still in force, heretofore rendered in the said Superior Court between the same parties and for the same cause of action, introducing the transcript of said judgment, etc., to prove the identity of the land, and that the title to the same was determined in the former suit. To this answer there was no replication, and the plaintiff admitted the facts as therein set forth.

The plaintiff on the trial proposed to introduce evidence establishing his title, which being objected to by defendants, His Honor excluded, and ruled that the plaintiff was estopped from further proceeding by the record of the former suit.

There was a verdict, under the instruction of the Court, for the defendants. Judgment in accordance therewith, and appeal by plaintiff.

Green, for appellant.
Haughton, contra.

PEARSON, C. J. The effect of a verdict and judgment in an action for land, under C. C. P., when the title is put at issue and directly

adjudicated, to work an estoppel in respect to the title is so fully discussed in *Falls v. Gamble,* 66 N. C., 455, as to relieve us from the duty of attempting to make any further explication of the (65) doctrine.

Our labor has been to decide whether the verdict and judgment in the first action and the averment of such verdict and judgment set up as an estoppel in respect to the title by the answer filed in the second action, have sufficient certainty and directness to bring the case within the application of a doctrine which, Lord Coke says, "is odious, because it shutteth a man's mouth from speaking the truth," but which, according to modern authority in respect to matters *in pais,* enforces good morals by not allowing one of those who claim, under him, to gainsay what he had directly and in a solemn manner affirmed to be a fact; and in respect to matter of record, enforces a principle of public policy, "there should be an end of litigation," by not allowing one of those who claim under him to ask for a second adjudication of an issue of fact or law which had by *final* judgment been decided against him.

In our case the draftsman of the answer did not advert to the difference between a plea in bar of the second action. "Former judgment between the same parties, for the same cause of action," which could be met by the replication of title since transferred to plaintiff by defendant, and so a new cause and the plea "of estoppel by the record" in respect to the title.

But we find in the case made up for this Court by the counsel of the appellant the clause, "It is admitted by the plaintiff that the facts set forth (in the answer) as to the former judgment and verdict are true."

This admission, beyond question, brings the case within the operation of the doctrine of estoppel, and sustains the ruling of His Honor.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Davis v. Higgins, 87 N.C. 300; *Bickett v. Nash,* 101 N.C. 583; *Blackwell v. Dibrell,* 103 N.C. 275; *Wyatt v. Mfg Co.,* 116 N.C. 283; *Lumber Co. v. Lumber Co.* 140 N.C. 443; *Turnage v. Joyner* 145 N.C. 83; *Freeman v. Ramsey,* 189 N.C. 798.

(66)

JOHN L. HINTON v. B. F. WHITEHURST, ADM'R., AND OTHERS.

The creditor of a deceased ancestor is entitled when there is no personal estate, to the whole of the land descended, or, of what is instead of it, until his debt is paid.

When some of the heirs of a person so indebted have sold the lands descended to them, two years after administration granted, they are liable to the creditor for the whole of the price received and not for their aliquot shares of the debt itself; and those who still retain their several shares are liable for the present value of them.

The creditor is entitled to the rents and profits actually received by the heirs from the lands descended. If the land has been sold the interest is the profit; and if the heir still retains his share, he is equally liable for the profits.

CIVIL ACTION, motion to confirm the report of a referee, heard by *Albertson, J.*, at the Spring Term, 1874, of PASQUOTANK Superior Court.

At January Term, 1873, of this Court, this case was remanded, for the purpose of ascertaining upon a reference the interest of each of the heirs in the lands, the subject of the controversy in this suit.

The referee reported certain facts, upon which his Honor gave judgment; from which judgment the plaintiff being dissatisfied, appealed.

The substance of the facts reported and the decree of his Honor, is fully stated in the opinion of Justice Rodman.

Smith & Strong, for appellant.

No counsel in this Court for defendants.

RODMAN, J. The plaintiff is a creditor of Davis Whitehurst, deceased, to the sum of $2,972.52, bearing interest, etc. The defendants are the heirs of the deceased, five in number, and certain lands descended to them.

(67) The personal estate having been lost by the result of the war, it was held (68 N. C. Rep., 316,) upon the facts that the creditor was entitled to proceed against the heirs in respect of the lands descended. In 1865 partition was made between the heirs. Afterwards, at various dates, some of the heirs sold their respective shares. The prices obtained differed considerably, some being less, and some more than the one-fifth part of the creditor's debt, which, without noticing the accruing interest, it will be sufficient for the present purpose, to assume to be $594.50, on 7th May, 1874. One of the heirs sold a part of his share, and retains a part. One of them retains the whole of his share. As all the sales were made more than two years

after the grant of administration, there is no dispute as to the titles of the purchasers. The creditor claims a right to follow the proceeds of the sales into the hands of the heirs, which is admitted. As the sales were made *bona fide,* it is also properly admitted that the creditor cannot recover from any heir more than the sum for which he sold his share. Assuming the fact, as it seems to be, that the total amount of the sales, and of the present value of the lands still remaining unsold, will not exceed the creditor's debt, the following questions are presented:

1. In the case where an heir sold his share for more than the one-fifth part of the debt, should the creditor recover of him the whole price obtained for the land, or only the one-fifth part of the debt?

2. Is the creditor entitled to recover the profits of the lands received by the heirs from the commencement of their possessions? The above is the general form of the question, and of course, includes the question as to the creditor's right to recover the interest received upon the price, where the land was sold.

1. *On the first question.* We consider it clear under the law of North Carolina that all the land of a deceased debtor is liable to the payment of his debts upon the insufficiency of his personal estate.

Upon such a case appearing, it is the duty of an administrator to take proceedings to sell the land, or so much as may be necessary. The residue, after the payment of the debts is all that rightfully belongs to the heirs, although the title to the whole descends (68) to and remains in them until divested by such or similar proceedings. The heirs can make partition at pleasure, and its being made cannot alter the creditor's rights, neither can a sale whenever it may be made. If within two years, the creditor can reach the land in the hands of the purchaser; if after two years he can follow the price which stands instead of the land in the hands of the heir. In any case he is entitled to the whole of the land, or of what is instead of it, until his debt is paid. There is no personal liability on the heir for any aliquot or other proportion of the ancestor's debt but he is liable only by reason of assets descended, and the value of the assets must be the measure of his liability. The heirs who sold their lands for more than one-fifth of the debt, are liable to pay the whole price received, and those who still retain their shares are liable for the present value, which if not agreed on by the parties, must be ascertained by a sale under the direction of the Superior Court.

The Judge below was of opinion that the liability of each heir was limited to his aliquot part of the debt. In this we think he was in error. To avoid a possible misconception, it will be prudent to observe here, that there is no suggestion any where, that the value of any

share has been increased by any expenditure by the heir. All that has been here said is upon the idea that the greater prices obtained by some of the heirs, were owing to causes other than improvements made by them. There is no suggestion either that upon the partition any sums were charged for equality. If there were any charges of that sort, they ought of course to be considered in ascertaining the values of the shares.

2. *As to the liability of the heirs for the profits.* The decree below charges the heirs who sold their shares with interest on the prices from the dates of their respective sales, and those who still retain the land, with interest from January Term, 1874, of this Court. This decree deprives the creditor of any profits which may have accrued since the death of the ancestor, and prior to the sales by the heirs;
(69) and of all which may have accrued to the heirs who still retain their lands up to January, 1874. The two classes of heirs are dealt with on different principles, without any reason that appears to us. In *Moore v. Shields,* 68 N. C., 327, it was decided that a creditor was entitled to recover from an heir the rents and profits actually received from the lands descended. The principle must equally apply whether the heir has converted the land into money or not. It may well be taken that after the conversion the interest is the profit; but an heir who has not converted his land into money is equally liable for the profits, which may be ascertained by taking an account in the usual way. It may seem a hardship to compel heirs who have received the profits of lands for many years without any doubt as to their right to retain them, to be called on to refund what they have probably long since spent. If such a hardship existed in the present case, it would not be by reason of any thing inequitable in the rule which subjects the rents and profits to the ancestor's debt; but by reason of the acts of the Legislature suspending the statutes of limitation, which ordinarily would furnish an adequate protection against stale demands. Whether in the common law powers of a Court of Equity any relief could be found for the defendants in this case, it is unnecessary to enquire. We have examined the original complaint in this case, and find that it contains no allegation that rents and profits had been received, and no demand for an account of any, and we think the Court cannot give the plaintiff a relief which he does not ask for.

As it is necessary to ascertain the values of the lands remaining unsold, the case must be remanded.

PER CURIAM. Judgment reversed and case remanded to be proceeded in, etc. Let this opinion be certified.

Cited: *Sc.* 73 N.C. 160; *Sc.* 75 N.C. 179; *Renan v. Banks,* 83 N.C. 485; *Jennings v. Copeland,* 90 N.C. 580; *Lilly v. Woodley,* 94 N.C. 415; *Glover v. Beaman,* 101 N.C. 299; *Coggins v. Flythe,* 113 N.C. 119; *Rowe v. Lumber Co.* 128 N.C. 301 *Shell v. West,* 130 N.C. 173; *Privott v. Wright,* 195 N.C. 182.

(70)

ALEXANDER MITCHELL v. JESSE SAWYER, ADMINISTRATOR, ETC., AND ANOTHER.

An agreement to receive a part of an ascertained debt in discharge of the whole is a *nudum pactum,* and cannot be enforced, although such agreement is styled by the parties a "compromise," and so entered on the execution docket.

MOTION to revive a dormant judgment, and for leave to issue an execution, before *Clarke, J.,* at the Spring Term, 1874, of the Superior Court of CRAVEN County.

The plaintiff as a foundation for his motion, filed an affidavit in which was stated that at the Fall Term, 1867, of the Superior Court of Law of Craven County, he recovered of the defendant a judgment for $1,202.30 of which $882.10 was principal money, and for costs; that this judgment had been transferred to the Superior Court as now organized, and regularly docketed in the office of said Court; and that the same remains unsatisfied, except as to a payment of $650, made on the 26th day of May, 1868, and $210, and the costs, paid 27th day of February, 1869; leaving still due and unpaid the sum of $398.59, with interest thereon from 27th day of February, 1869. That it has been three years since execution was issued on said judgment.

The defendant, Sawyer, opposing the motion, also filed an affidavit in which he states that on or about the 26th day of May, 1868, he, with the other defendant, Alford, agreed to pay the plaintiff $850 as a compromise of the judgment set out in plaintiff's affidavit, to be paid $650 in cash, and $200 thereafter. That no particular time was mentioned for the payment of the $200, but that he himself informed the plaintiff that he could not pay this balance until after his crop came in. That some time in February, 1869, he went to the plaintiff and tendered him the said balance of $200, which the plaintiff refused to accept, and thereupon he deposited that amount, to wit, (71) $200 in the office of the Clerk of the Superior Court.

The other defendant, one Alford, in opposing the plaintiff's application for leave to issue an execution, filed his affidavit stating therein

that the plaintiff agreed at his own store in Newbern, to compromise the judgment, and take therefor $650 in cash and $200 to be paid some time thereafter, no precise time of payment of the $200 being mentioned. In his affidavit, Alford further stated that the writing on the docket, after the signature of the plaintiff, to wit "for money received only," etc., was not made at the time of signing the receipt on the docket, but was added thereto afterwards.

One W. G. Brinson, who was at the time Clerk of the Court, made an affidavit in favor of the defendants, in which he stated that all the parties came into his office and made an entry of compromise upon his docket, and that nothing was said, so far as he recollects, as to the time of payment of the $200; that after the agreement had been entered and the receipt signed, the plaintiff came into his office and added after his name, "for money received only."

The entries upon the execution docket were substantially as follows:

"Judgment, Fall Term, 1867.

Debt,	$882.20
Interest,	320.10
	$1,202.30

"Compromised upon the payment of eight hundred and fifty dollars.

"Received of F. E. Alford six hundred and fifty dollars, on account of and to be credited on this judgment.

"May 26th, 1868.

(72) "Alex. Mitchell, for the money, received only $210, deposited in the office as a tender in payment of this compromise, by Jesse Sawyer.

"Feb. 27th, 1869."

In answer to the affidavits filed by defendants the plaintiff stated that on the 26th May, 1868, he did agree to compromise and take in payment of said judgment the sum of $850, which was to be paid in cash; that at the time the defendant, Alford, paid $650, and requested the plaintiff to take his note payable in sixty days, for the balance, which the plaintiff refused to do, but agreed to wait sixty days for the payment of the said sum; that after the expiration of the sixty days, on two different occasions he, the plaintiff, informed Alford that the balance had not been paid, and he afterwards told Alford that the compromise was at an end. That the statement in the affidavits filed by the defendants, as to the addition of the words to the receipt, "for the money received only," is not true. That at least four months after the agreement was made, W. G. Brinson, the Clerk of the Court, in-

formed him that the entry of compromise and receipt for the $650 had not been signed by plaintiff and requested him to sign the same; that he informed the Clerk that he would sign the same after the whole of the money was paid; but the Clerk requested, as a favor to himself, that the plaintiff would then sign, as otherwise he, the Clerk, might possibly get into a difficulty. That he informed the Clerk if he would separate the entry of compromise from the receipt by drawing a line on his docket he would sign the latter, which was done in the presence of the Clerk, he, the plaintiff, adding after his name the words before set out. That Alford was not present at the time.

Upon hearing the affidavits of the parties His Honor refused the plaintiff's motion, whereupon the plaintiff appealed.

Stephenson, for appellant, cited and relied on *McKenzie v. Culbreth,* 66 N. C., 534; *Bryan v. Foy,* 69 N. C., 45; *Fitch v. Sutton,* 5 East; and *Cumber v. Wane, S. L. cases* vol. 1, 249. (73)

No counsel for defendants in this Court.

READE, J. It is not to be doubted that the compromise of any matter in controversy between parties is binding between them. It is equally well settled that an agreement to receive, and the actual receipt of a part of an ascertained debt in discharge of the whole, is *nudum pactum. McKenzie v. Culbreth,* 66 N. C., 534. That case was well argued and fully considered and supported by both English and American authorities, and the principle considered as settled. A very satisfactory case in support of it is *Warren v. Skinner,* 20 Connecticut, p. 659, which is cited in the opinion; but by a misprint is cited as to Com. Law, p. 559. Following that is *Bryan v. Foy,* 69 N. C., p. 45. Both of these cases are directly in point.

It is sought to distinguish the case before us from the cases cited by treating it as a *compromise.* But what was there to compromise? The plaintiff had a judgment against the defendant. It was not only an ascertained, but it was an adjudicated claim. And upon the defendant's own showing, the most that can be made of it is that the plaintiff agreed that if the defendant would pay him a part he would receive it in satisfaction of the whole. For this there was no consideration. The plaintiff received nothing of the defendant but what he was entitled to receive, and he received nothing for that which he agreed to give up. It is said to be bad morals for the plaintiff to make a promise and break it. It does not lie in the defendant's mouth to say so; for he made the first promise to pay the whole debt, and broke it. See also *Hays v. Davidson,* 70 N. C., p. 573.

There is error. This will be certified, etc.
PER CURIAM. Judgment reversed.

Cited: Wooten v. Sherrard, 71 N.C. 378; *Hall v. Short,* 81 N.C. 278; *Hewlett v. Schenck,* 82 N.C. 236; *Koonce v. Russell,* 103 N.C. 181; *Jones v. Wilson,* 104 N.C. 15; *Bank v. Comrs.,* 116 N.C. 362; *Supply Co. v. Dowd,* 146 N.C. 195.

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(74)

AMOS WADE AND A. G. HUBBARD v. J. J. AND E. W. PELLITIER.

The recital in a Sheriff's deed that the land of A was levied on and sold, cannot, by parol evidence, be enlarged so as to include the interest of B in the same; although at the time of the sale, the Sheriff had in his hands executions against both A and B, and stated that the interest of B was at the time sold.

CIVIL ACTION, for the recovery of real estate, tried before *Clarke, J.,* at Spring Term, 1874, of the Superior Court of CARTERET County.

The suit was originally brought against J. J. Pellitier alone, E. W. Pellitier being admitted to defend, on his own motion, at June Term, 1872, claiming, as he did, an interest in the lands described in the complaint and sought to be recovered by the plaintiffs.

For the plaintiffs, a deed from the sheriff of Carteret County to them, conveying the lands in dispute, was read. This deed bore date the 22d May, 1869, and set forth a sale of said lands by the sheriff on the 27th April, 1869, by virtue of a certain writ of *ven. ex.* issued from the Superior Court of Carteret County, wherein B. L. Perry, C. M. E., was plaintiff, and J. J. Pellitier, John Hall, T. S. Gillet and W. F. Bell were defendants. This writ of *ven. ex.* was issued on a levy made in 1861 by the sheriff of Carteret County on the lands described in the plaintiff's complaint. That at the time of the sale by the sheriff as above set forth, he had in his hands several executions and writs of *ven. ex.* against the defendants, J. J. Pellitier and E. W. Pellitier, under which, with that referred to in the said deed, he sold the interest of E. W. Pellitier in the said lands.

The plaintiffs further proved that the defendant J. J. Pellitier was in the actual possession of the land at the time the levy was
(75) made and has continued in the exclusive possession of the same ever since.

There was no evidence offered by E. W. Pellitier that his homestead had been laid off out of the land in controversy; but it appeared that

such homestead had been laid off in another tract of land since said sale.

The jury found a verdict for the plaintiffs. Judgment accordingly, and appeal by E. W. Pellitier upon the following grounds:

1. The sheriff's deed purports to convey to the plaintiffs the land of J. J. Pellitier only.

2. That E. W. Pellitier's interest in the land was not embraced in the levy under A. G. Hubbard's execution, that execution referring to J. J. Pellitier only as owner of the land.

3. That on the above state of facts, E. W. Pellitier, at the time of the sale to the plaintiffs, was entitled to a homestead in the lands, which was subsequently laid off to him in another tract.

H. R. Bryan and Battle & Son, for appellant.
Justice, Green and Haughton, contra.

READE, J. If the sheriff had had several executions against the defendant, E. W. Pellitier, some good and some bad, and had sold under all, and in his deed to the purchaser had recited the bad and had not recited the good, the title would have passed, notwithstanding the mis-recital or non-recital of the good. For this, *Carter v. Spencer,* 29 N. C., 14, and the cases there cited are authority.

But in the case before us there is no recital of any power, good or bad, under which the sheriff sold the land of E. W. Pellitier, nor indeed is there any recital or pretense in the deed to the purchaser that he had sold the land of E. W. Pellitier at all. The recital is that he had sold the land of J. J. Pellitier, and the deed purports to convey the land of J. J. Pellitier only. And there is nothing but parol evidence to connect the sale or the deed with the land of E. W. Pellitier. This cannot be. It would be the same as to sell and convey (76) land by parol, contrary to the statute of frauds. The effect of the deed is to pass title to the land of J. J. Pellitier, or whatever interest he had therein, but it does not pass title to the land of E. W. Pellitier or any interest he had therein, not because of any mis-recital or non-recital of executions, but because the deed does not purport to convey the land of E. W. Pellitier at all under any power good or bad. *Brem and Means v. Jameson,* 70 N. C., 566.

There is error. This will be certified.

PER CURIAM. *Venire de novo.*

CITY OF WILMINGTON v. SAMUEL L. YOPP.

The Act of 1854-55, empowering the Commissioners of the town of Wilmington to establish streets in said town and for other purposes, confers upon the present Commissioners of that place full authority to assess the benefit to be derived to the owners of property from the construction of pavements in front of their houses.

CIVIL ACTION, brought in a Justice's Court to recover a certain assessment levied on defendant, and carried before his Honor, *Judge Russell,* by appeal, and determined by him at Chambers in the county of NEW HANOVER, January 13th, 1874.

The city of Wilmington, the plaintiff, under the provisions of the act entitled "An act to empower the Commissioners of the town of Wilmington to establish streets in said town, and for other purposes," ratified 16th January, 1855, appointed a committee, after due notice to the defendant, to assess the benefit he, the defendant, had derived from the construction of a pavement in front of a certain house and lot on Seventh street, in said city, belonging to him. The com-
(77) mittee made an assessment to the amount of $11.84, which the defendant admitted to be reasonable, but refuses to pay the same, contending that he is not liable to any such assessment by the plaintiff.

The Justice gave judgment in favor of the plaintiff, from which defendant appealed to his Honor, the Judge of the 4th District, at Chambers, upon the question of law. His Honor affirmed the Justice's judgment, and defendant appealed to this Court.

No counsel for appellant.

Hargrove, Attorney General, and London, for plaintiff.

SETTLE, J. The act of 1854-55, Chap. 248, entitled "An act to empower the Commissioners of the town of Wilmington to establish streets in said town, and for other purposes," confers upon the city of Wilmington, (the *city* having succeeded to all the rights of the *town,*) full authority to do all that is now objected to by the defendant, and we are aware of nothing in the Constitution which forbids such legislation.

Statutes authorizing municipal corporations to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement in proportion to the amount of such benefit, have been held to be constitutional and valid in many of the States, having constitutions similar to our own, and these decisions

have been quoted with commendation by such eminent authors as Cooley and Dillon. "A property tax for the general purposes of government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty, and for that reason a property tax is adopted instead of an estimate of benefits. (78) In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the Legislature whose duty it is to prescribe the rules of which taxation is to be apportioned, and when determination of this matter being within the scope of its lawful power is conclusive." *The People v. The Mayor of Brooklyn,* 4 N. Y., 419.

Judge Cooley, in his treatise on Constitutional Limitations, 506, quotes the foregoing extract and adds, "the reasoning of this case has been generally accepted as satisfactory and followed in subsequent cases." He says further, "on like reasoning, it has been held equally competent to make the street a taxing district, and to assess the expense of the improvement upon the lots in proportion to the frontage."

Not only has such legislation been sustained as an emination of the taxing power of a State, but it has been held competent, as a police regulation, "to require the owners of urban property to construct and keep in repair and free from obstructions the side-walks in front of it, and in case of their failure to do so to authorize the public authorities to do it at the expense of the property, the Courts distinguishing this from taxation, on the ground of the peculiar interest which those upon whom the duty is imposed have in its performance, and their peculiar power and ability to perform it with the promptness which the good of the community requires." Cooley, 588.

Judge Dillon, in his work on Municipal Corporations, Sec. 637, says, "Under an authority to make such by-laws as to the Common Council shall seem necessary for the good government of the city, and for the regulation and paving of the streets and highways, a city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to fix curbstones and make a brick way or sidewalk in front of his lot. Such an ordinance is neither unconstitutional, illegal, nor unreasonable. It would doubtless be otherwise if this burden was laid without special

(79) cause upon one citizen, all others similarly situated being exempted.

"Under power to improve 'any street,' the City Council is not required to improve the entire length of the street or none, it may improve part and confine the assessment to the lot adjoining the part improved."

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Keener, 74 N.C. 720; *Raleigh v. Peace,* 110 N.C. 38.

STATE v. JOHN HAYNES.

It is the province of the prosecuting officer to determine who shall be examined as witnesses on the part of the State, and at what time in the course of the trial he will rest his case. The presiding Judge may permit testimony to be introduced at any stage of the trial, and this Court will not interfere with the exercise of that discretion, unless in a clear case of abuse.

The declarations of one who is a competent witness is inadmissible, though offered for the purpose of connecting the witness with crime for which the prisoner is being tried. Proving his acts, tending to establish his guilt, is as far as the rules of practice will permit.

When the prisoner broke and entered the dwelling of the prosecutrix at about 10 o'clock at night, after the inmates had retired, and when discovered fled: *Held,* there was some evidence that he entered the same with *intent* to steal, etc.

INDICTMENT, burglary, tried at the Spring Term, 1874, of the Superior Court of DAVIE County, before his Honor, *Judge Cloud.*

The prisoner was charged with burglariously entering the house of the prosecutrix, Amanda Ellis, in one count, with intent to steal (80) the "goods and chattels," and in a second count, a "pocket book," of the property of the said Amanda Ellis. To both of these counts prisoner pleaded "not guilty."

The prosecutrix stated that she lived with her daughter in a house with two rooms below with a passway between them, and one room above, to which stairs ran up from the passage. In the upper room was a sash window, fastened with a cotton string and opening upon a porch, the roof of which was nearly on a level with the window. She and her daughter went to bed in the west room, when about 10 o'clock she was awakened by some one running his hand over her

face and throwing off her bed clothes. She screamed and called her daughter, and ran out of the room into the east room, in which was a fire place, and where she and daughter had undressed, placing their clothes on a chair. She went to the door on the north side of the house, opened it, got a fat piece of pine and commenced kindling a fire. Whilst so doing some one went to the door on the south side of the house from the passage and tried to get out; failing in this the person went to the north door, the one she had opened. She did not see him or know who he was. The clothes she had left on the chair were scattered on the floor; that in the pocket of her outside dress she had a pocket book, blue on the outside and red within, containing two five dollar bills, one two dollar bill, and one one dollar bill, fifty cents fractional currency and two twenty-five cent bills. This pocket book fitted tight in her pocket. She went to the house of a neighbor, some three hundred yards from her house, and upon her return she missed the book and money. This witness further stated that she saw a rail leaning up against the roof of the porch, and that the upper window was opened.

Emma Ellis testified that she was awakened by the screams of her mother and started to the room where she had left her clothes. In the passage some one caught her by the shoulders and held her until her mother kindled a light; that he then ran to the south door and tried to open it; failing, he walked across the room to the door her mother had opened and stood there four or five minutes with (81) his hands in his pockets. She stated that she saw him distinctly, knew it was a negro, and that the prisoner was the person; that she knew him before and was certain that it was him.

The Solicitor here rested the case for the State. For the prisoner it was insisted that the State should be required to disclose the whole of the evidence in support of the indictment, and not be permitted to call any other witness except in reply to the testimony to be introduced for the prisoner. His Honor declined to interfere, when the prisoner introduced two witnesses, who swore that on the night of the burglary the prisoner went to bed between 8 and 9 o'clock up stairs over a room in which they slept; that he left his shoes by the fire; that they went to sleep about 9 o'clock and that about 2 o'clock two of the brothers of the prosecutrix called for John; that he was then up stairs where he went to bed and that his shoes were by the fire where he left them when he retired. That there was no way for the prisoner to have gone out of the house, except out of the window of his room, without coming down into the room where they were sleeping; that the door of the house was hard to open and made a noise whenever it was opened,

and that they did not think that he could have got out without their knowing it. These witnesses were proven to be of good character.

The prisoner then offered to prove that about 9 o'clock one Miles Haynes called at the house of a person living about one and a half miles from the prosecutrix and proposed to work for two days for a quart of liquor; that he then went to another house, one-half mile from the prosecutrix, and asked if the house he had just passed was not the house of a widow woman, and what sort of a woman she was; at the same time he enquired the way to the house of two women of ill-fame, and that when he left he went in the direction of the prosecutrix. The Court refused to let in the declarations of the said Miles, but said the prisoner might prove his acts.

(82) The prisoner then proposed to prove that between 11 and 12 o'clock the same night, the said Miles Haynes called at the house of one James Wyatt, and wanted him to get some liquor for him, and offered him fifty cents to pay for it. The Court again refused to let in the declarations of Miles Haynes. The prisoner then proved that Wyatt lived about two miles from the prosecutrix, on the way from there to the house where Miles Haynes lived; that on the next day, he, Miles, was seen with a "blackish" pocketbook on the outside, and red inside, and that he had a five dollar bill, a two dollar bill and fifty cents in fractional currency; and prisoner's counsel then offered to prove that in answer to the enquiry, where he got so much money, he answered, he said, his old Mistress had given him fifteen dollars to buy clothes for himself and children. This evidence was rejected by the Court. It was then proved by the prisoner, that this Miles Haynes, on the next day, went to the county of Davidson, and there bought at one store, goods to the amount of $6.95, and at another, he had paid out a one dollar bill; that in paying the bill of $6.95, he paid out a five dollar bill, and that one of the articles bought was a pair of boots, and that when he put them on he threw away his old shoes, which were much worn and run down on the outside; and further, that in a few days after, Miles Haynes left the county. The character of the prisoner was proven to be good, and that of the said Miles to be bad.

The State then proved that the next morning after the burglary, the two witnesses testifying, were at the house of the prosecutrix, and that they found *two* tracks near her house, which they traced to within one hundred yards of the house where the prisoner lived; that the shoes of the prisoner fitted one of them, and that the other track was a "clean," small track, nine and a half inches long, as if made by a new shoe. There was no proof that the prisoner had any money or pocket book, and there was no proof that the prosecutrix missed any goods or chattels.

The prisoner's counsel asked his Honor to charge the jury that if they were satisfied that the prisoner entered the house with (83) any other intent, than the intent charged, then they should acquit; and that there was no evidence that the prisoner entered with the intent to steal the goods and chattels of the prosecutrix, or her pocket book.

His Honor charged the jury that if the prisoner entered the house of the prosecutrix with any other intent than the intent charged, they should acquit; that there was evidence that he entered with the intent charged: That the evidence was, that the pocket book was in the pocket of the prosecutrix when she went to bed, and was missing shortly after her return from the house of a neighbor; that her outside dress was on the floor, and her underclothes on the chair, where she left them.

The jury returned a verdict of guilty. Rule for a new trial granted and discharged. Judgment and appeal by prisoner.

Jones & Jones, for the prisoner.

Attorney General Hargrove and McCorkle & Bailey, for the State.

BYNUM, J. The prisoner has assigned three reasons why he is entitled to a *venire de novo.*

1. After examining two witnesses, the State rested the case. The prisoner insisted that the State should be compelled to disclose its whole case, and should not be allowed to call other witnesses, except in reply to the prisoner's testimony. The Court declined to interfere, in that there was no error. It is the province of the prosecuting officer to determine who shall be examined as witnesses on the part of the State, and when he will rest his case, and the rules of practice are the same in this respect, in civil and criminal actions. After making out a case the State may reserve other testimony for the reply to the prisoner's case, if it should be necessary. This testimony held in reserve, may be merely corroborative of the witnesses first introduced by the State, or it may consist of new facts not before deposed to, but in answer to the case made by the prisoner. But this is a matter of practice, and the objection made by the prisoner was one (84) addressed to the discretion of his Honor below. The Judge presiding at the trial may permit testimony to be introduced, at any stage of the trial, and this Court will not interfere with the exercise of that discretion, unless in a clear case of abuse. *State v. Rush,* 34 N. C., 382; *State v. Martin,* 24 N. C., 101; *State v. Stewart,* 31 N. C., 342; *State v. Perry,* 44 N. C., 330.

2. The Court refused to admit the declarations of Miles Haynes. Haynes was himself a competent witness, and of course his declarations, not on oath, were incompetent as evidence. The acts of Haynes tending to show that he was the burglar and not the prisoner, were admitted in evidence, and that was as far as the rules of evidence permitted the prisoner to go. Even the declarations of Miles Haynes, if competent, were not inconsistent with the guilt of the prisoner, since the whole evidence tended to show that the prisoner had a confederate. *State v. White,* 68 N. C., 158.

3. The last error assigned is, that the Court refused to charge the jury that there was no evidence that the defendant "entered with the intent to steal the goods and chattels," or the "pocket book" of the prosecutrix.

The Court properly refused to thus charge, because there certainly was evidence of such an intent to go to the jury.

The prisoner broke and entered the dwelling about 10 o'clock in the night, and shortly after the inmates had gone to bed; when discovered, he fled; the dress containing the pocket book had been displaced from where it was, upon the chair, and separated from the other garments and thrown upon the floor, and the pocket book, which was in it when the prosecutrix retired to bed, was gone; and there was no evidence that any other person had been in the house.

This was some evidence, the weight and effect of which, in the first place, were for the consideration of the jury, and in the next place, after conviction, for the consideration of the Court, on a motion
(85) for a new trial, because the prisoner had been convicted against the weight of testimony. These are matters which are not the subject of review in this Court.

The record before us shows no error in law.

PER CURIAM. Judgment affirmed.

Cited: S. v. Baxter, 82 N.C. 604; *S. v. McBryde,* 97 N.C. 389, 400; *King v. Bynum,* 137 N.C. 495; *Chandler v. Jones,* 173 N.C. 428; *S. v. Collins,* 189 N.C. 21; *S. v. Church,* 192 N.C. 660; *S. v. Kluttz,* 206 N.C. 728; *S. v. Satterfield,* 207 N.C. 122.

STATE v. ANICA GARRETT AND LUCY STANLEY.

Any circumstances tending to show the guilt of the accused, may be proved, although it was brought to light by a declaration inadmissible *per se*, as having been obtained by improper influence.

Therefore, evidence as to the condition of the prisoner's hand at the time of holding the inquest is admissible, although the prisoner was then compelled to exhibit her hand by the Coroner after objection on her part.

INDICTMENT, for murder, tried at Fall Term, 1873, of the Superior Court of WASHINGTON County, before his Honor, *Judge Moore.*

The prisoners were charged with the murder of Alvina Garrett, a girl of fourteen years of age; on the trial, Lucy Stanley was acquitted.

The evidence for the State established that on the 26th of August, 1873, the prisoners made an out-cry that the deceased came to her death by her clothes accidentally catching fire while she was asleep; and when the witness reached the house where the body of the girl, and where the prisoners were, Anica Garrett told the witness that "she," Anica, "was asleep when she was awakened by the deceased screaming; that she went to her, her clothes were still burning, and in attempting to put out the flames, she, Anica, burnt one of her hands."

By Dr. Walker, the examining physician on the Coroner's in- (86) quest, it was proved that the body of the deceased girl was not burned before, but after death, there being no serum in the blisters, etc.

The prisoner, Anica, while under arrest, and very much agitated before the Coroner, and after the jury had rendered their verdict against her, in their presence, was ordered by the Coroner to unwrap the hand she alleged had been burnt, and show it to Dr. Walker, so that it might be seen if it had been burned or not. This she did, and there was no indication whatever of any burn upon it. This evidence was objected to by the counsel for the prisoner, because it was in substance compelling the prisoner to furnish evidence against herself; and that being under arrest, and alarmed, nothing which she had said or done while under arrest, and at the Coroner's command, was admissible in evidence against her, she not having been cautioned and informed of her rights according to law.

The Court ruled that anything the prisoner said at the inquest was inadmissible, but that the actual condition of her hand, although she was ordered by the Coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide and before she was arrested. To this ruling, counsel for prisoner excepted.

The jury returned a verdict of guilty. Rule for a new trial, granted and discharged. Judgment of death and appeal by prisoner.

J. A. and *A. M. Moore* and *Jones & Jones*, for the prisoner, submitted:

No person is compelled to give evidence against himself, Bill of Rights, Sec. 11. Nor can a defendant be compelled to furnish evidence for the State, by exhibiting himself to the jury. *State v. Jacobs*, 50 N. C., 259. Being compelled to show her hand is within the rule. See also as to this, 1 Lord Raymond, 705; 2 *Ibid.*, 927; *Rex v. Shelby*, 3 Term Rep., 142.

(87) Confessions must be voluntary. *State v. Mathews*, 66 N. C., 106; Greenleaf Ev., 245, 246.

Attorney General Hargrove, for the State.

BYNUM, J. The prisoner objected to the admissibility of the evidence as to the condition of her hand and relied upon the case of the *State v. Jacobs*, 50 N.C., 259.

The distinction between that and our case is that in *Jacobs'* case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error.

In our case, not the prisoners, but the *witnesses*, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation.

The prisoner had alleged that she had her hand burned in endeavoring to extinguish the fire upon the deceased, and at the Coroner's inquest she carried her hand wrapped up in a handkerchief and thus concealed it from view. She was made to unwrap and show her hand to the physician, which thus exposed, upon examination, showed no indication of a burn. It was evidently a fraud adopted to give countenance and support to her story, and the Coroner was justified in exposing a trick upon the public justice of the country.

The later cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declaration, inadmissible, *per se*, as having been obtained by improper influence. Arch. Crim. Pl., 131, and note by Waterman, *State v. Johnson*, 67 N. C., 55. Familiar illustrations are where the accused is, by force, made to put his foot in a track, or allow the foot to be measured, where he is, by duress, compelled to produce stolen goods, or to disclose their hiding place, and they are there found. In these

cases the *facts* thus brought to light are competent evidence, though the declarations of the accused, made at the time, are excluded as having been obtained by improper influence.

We have carefully examined the whole record, and we find (88) no defect therein.

There is no error. This will be certified to the Court below that further proceedings be there had, according to law.

PER CURIAM. Judgment affirmed.

Cited: S. v. Spier, 86 N.C. 601; *S. v. Bishop,* 98 N.C. 777; *S. v. Winston,* 116 N.C. 992; *S. v. Lowry,* 170 N.C. 733; *S. v. Hollingworth,* 191 N.C. 598; *S. v. Riddle,* 205 N.C. 594; *S. v. Cash,* 219 N.C. 821; *S. v. Vincent,* 222 N.C. 545; *S. v. Rogers,* 233 N.C. 398; *S. v. Grayson,* 239 N.C. 458; *S. v. Willard,* 241 N.C. 263.

STATE v. HAYWOOD GAILOR.

Where the evidence against the accused is wholly of a circumstantial nature, it is competent to show malice by his own acts and declarations, as a link in the chain, fixing him as the guilty party.

In an indictment for arson, the ownership of the property is well laid in the widow of the deceased owner, who had occupied and used the same since her husband's death, although there were living heirs, and no dower had been allotted to her.

INDICTMENT for Arson, tried before His Honor, *Judge Buxton,* at the Fall Term, 1873, of SAMPSON Superior Court.

The prisoner was charged in an indictment of six counts with burning an out-house of the prosecutrix, Susan A. Andres, who testified:

That she was the widow of Elisha J. Andres, who died in July, 1873, leaving her and four infant children. Her husband also left a daughter, by a former marriage, Hannah, the wife of Robert Melvin, all of the children living. After the death of her husband she, with her four infant children continued to occupy the premises left by her husband—the married daughter living elsewhere. The house which was burned 11th October, 1873, was situated on the premises, about one hundred and fifty yards from the dwelling, with a fence between; it was a log house, weatherboarded and covered with shingles, with brick pillars and chimney. It had once been used as a dwelling, and had been occupied by negroes, but when burned (89)

it was in her possession and occupation, and used for storing fodder, being half full of fodder at the time it was burned.

The witness further stated that the house was set on fire in the fore part of the night, as near as she could say, before 12 o'clock. Joe Andres was at her house the night on a visit and discovered the fire first. Witness had been lying down, but her baby being sick, she got up and saw the fodder on fire and the flames coming out of the door.

Witness had known prisoner for about a year; he did not live in the neighborhood. The prisoner wanted to rent her turpentine and farming lands, but she would not let him; he then proposed to come on her place and superintend for her; this she also declined. He accused the witness of breaking up a match between him and her sister. On one Sunday night, several weeks before the fire, the prisoner came to her house in a drinking condition and abused her. He said he believed that the witness broke up his match, and threw up to her about a young man's riding with her sister. She told him that her sister had ridden with a gentleman. He said "it was a d——d lie; that he was as d——d a rascal as there was in Sampson County." Witness then gave him orders to stay away.

The house was burned on Saturday night. On the Friday night before, the prisoner came to her house and said Dr. Kerr asked him to come by and tell her that he was going over South River and would call at her house in passing. (This, Dr. Kerr, on his examination, denied.) The prisoner, on this occasion, came to her house in a sulkey, and staid all night. Witness permited him to do this because she was afraid of him. He left on Saturday morning before she got up. He was driving a mule in the sulkey. On Sunday morning she went out to look at the burnt house, and noticed some tracks of a man within fourteen steps of the house, the grass having been for that distance burned off. The tracks came from up the road, through the field from the direction of South River bridge. From the river to the
(90) witness' house is a half mile, the road being so shut up that vehicles cannot pass. Witness followed the track towards and near the bridge; traced them through and outside of the field to a place near where tracks of a sulkey and mule were discovered. The sulkey tracks came from over the bridge and returned in that direction. The tracks of the man went to her lot gate, to the stable, and then back to the gate and down the road. Her own horse had been turned out of the stable. The tracks, in her opinion, were the tracks of the prisoner. She had noticed his tracks a good deal. He wore boots with a star on the heels; the heels of the boots were capped with brass, in the middle of which a star was cut; he wore such boots on Friday; witness noticed the stars in the tracks; and the size of the tracks cor-

responded with his. Prisoner had a peculiar way of walking, causing a pressure on the side of the foot; the tracks showed this; they looked pressed.

This witness further stated that one night, not quite three weeks before this outhouse was burned, she had another house burned across the Bladen line, some three miles distant. On the morning she heard of it she remarked to the prisoner, who was at her house, that she did not think she had enemies round there who would do that. He replied, "You ought to know who your enemies were; they are Bob Melvin and Calhoun Melvin." He then asked how much turpentine she had. She told him she did not know, as it had not been dipped out. He said, "my best advice to you is, to have it dipped out and bunched; he would not be at all surprised if, in three weeks, there would not be a building on that hill, from the threats of Bob Melvin, made between the forks of the road and Harrell's store."

The State then proposed to show circumstances under which the prisoner came to and entered the house of the prosecutrix, Mrs. Andres, on the occasion of the conversation just stated. After objection on the part of prisoner's counsel, by leave of the Court, the witness further stated:

The night the first house was burned, just before day, the (91) prisoner came to her house and knocked and called, and asked if we were all dead or asleep. She knew his voice but made no answer. He then knocked out a nail which fastened the window, raised the window, got in and went up stairs. Next morning he was sitting on the piazza. Here the counsel of the prisoner objected to the reception of the evidence on the ground of irrelevancy; that it had no tendency to prove the crime alleged, and was calculated to prejudice the prisoner's case improperly.

In reply the Solicitor urged that these were acts and doings of the prisoner connected with the premises and showing his animus to the prosecutrix, and ought to be considered in connection with the insinuations made by him that morning against Bob and Calhoun Melvin, the falsity of which insinuations and threats the State expected to be able to prove. (Subsequently the State offered evidence tending to disprove the declarations of the prisoner concerning the same.)

His Honor overruled the objection and admitted the evidence. And the prisoner excepted.

There being no further exception to the evidence, which was all circumstantial, it is unnecessary to detail it.

In his charge to the jury his Honor adverted to the different counts in the indictment, and charged the jury that they might disregard all the other counts as unsupported by proof and confine their attention

to the consideration of the evidence relating to the fourth count, and that if they were satisfied fully from the evidence that the house burned was, at the time, in the possession and occupation of Susan A. Andres, and used by her for the storage of fodder and contained her fodder at the time it was burned, that so far as the description of property was concerned, it was aptly described in the fourth count of the indictment as a certain out-house of one Susan A. Andres.

At the conclusion of the charge the prisoner's counsel handed
(92) to his Honor special written instructions asking that they might be given to the jury, to wit:

(1) That the State must prove the property as laid in the indictment, and that here is no evidence of title, and only evidence of possession of the house charged to have been burnt.

(2) That the State must make out beyond a reasonable doubt the title to the house burned; and if the State fails so to do, the jury must acquit.

(3) That proof of possession is not proof of ownership of land.

His Honor declined to modify his instructions before given or to give those asked, whereupon prisoner again excepted.

Verdict, guilty on the fourth count of the indictment. Rule for a new trial granted, and discharged. Judgment and appeal by the prisoner.

No counsel for the prisoner in this Court.

Attorney General Hargrove, for the State.

BYNUM, J. I. The first exception of the defendant is to the admissibility of the evidence. This objection is untenable because the evidence being wholly circumstantial, it was proper to show the malice of the defendant by his own acts and declarations as a link in the chain fixing him as the guilty party. It was not irrelevant, and if so, could not mislead the jury. *State v. Arnold,* 35 N. C., 184.

II. The ownership of the out-house not properly charged in the indictment. This is also untenable.

It has been held that even a person who had gone into bankruptcy and made an assignment of his real estate to the assignee, but had not given up the possession, may be charged as the owner of the house. Also that a tenant at will in the occupation, or even a lodger, may be charged as the owner. Arch. Crim. Pl., 488; *Rex v. Ball,* Reg. and M., 30; *State v. Mason,* 35 N. C., 341; 44 N. C., 197; Bat.
(93) Rev., Ch. 33, Sec. 93; 2 East. P. C., 505; Arch. Crim. Pl., 336.

Elisha Andres, the owner of the premises, had died and his widow Susan remained in occupation of the land and houses, and was

using the out-house at the time of the burning. She was not in the wrongful possession and was properly charged as the owner of the building which was burned.

III. Special instructions were asked for and denied. His Honor charged the jury that if they were fully satisfied from the evidence that the house burned was at the time in the possession and occupation of Susan Andres, as described in the fourth count of the indictment, it was aptly laid as the out-house of Susan Andres. This instruction covered the first instruction asked by the defendant, to wit, "That the State must prove property as laid in the indictment." The other instructions asked for were properly refused as containing propositions which were untrue in law.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Deming v. Gainey, 95 N.C. 532; *S. v. Thompson,* 97 N.C. 498; *S. v. Lytle,* 117 N.C. 802; *S. v. Daniel,* 121 N.C. 576; *S. v. Battle,* 126 N.C. 1047; *S. v. Sprouse,* 150 N.C. 861; *S. v. Clark,* 173 N.C. 745; *S. v. Kincaid,* 183 N.C. 716; *S. v. Freeman,* 183 N.C. 747; *S. v. McClain,* 240 N.C. 175; *S. v. Long,* 243 N.C. 396.

STATE v. WILLIAM CAPPS.

Where property is charged in an indictment for larceny as belonging to A and another and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by the Act of Assembly, Bat. Rev., Chap. 33, Sec. 65.

When written orders are introduced on a trial as corroborating evidence, such orders need not be proved, and it makes no difference whether the witness speaking of them, and for whose benefit the orders were drawn, could read and write or not.

INDICTMENT for larceny, with a count for receiving stolen goods, tried before his Honor, *Judge Logan,* at the Spring Term, 1874, of the Superior Court of MECKLENBURG County.

The defendant was indicted with two others (not on trial) for (94) stealing ten kegs of gunpowder from W. W. Grier and another, and in another count for receiving ten kegs of gunpowder, the property of W. W. Grier and another, knowing the same to have been stolen.

For the State, one Tom Caldwell swore that he was with the defendant, aiding and assisting him, when he stole the powder, and that he,

the defendant, was to give him one dollar *per* keg for his assistance. The defendant paid him in cash five dollars, and gave him an order on the store of Elias & Cohen for a pair of boots in payment of the remainder. Defendant objected to the speaking of this order without it was produced. One Bethune, a clerk in the store of Elias & Cohen, swore that he did have an order from the defendant for a pair of boots to Tom Caldwell, but that he had either lost or mislaid it, as he could not find it in the place or on the file, where such orders were usually kept. Defendant again objected, insisting that the loss of the paper was not sufficiently proved. The State then examined the magistrate before whom the preliminary investigation took place, who stated that the order for the boots was produced before him and duly proved. Defendant objected to this evidence, and the Court ruled that the objection was well taken. In the argument the Solicitor spoke of this order being duly proved, when it was objected by defendant. His Honor did not interfere with the comments of the Solicitor nor with the reading of the order.

It was further in evidence that one Henry Caldwell purchased of the defendant a keg of powder, of the brand and mark described by the owner of that alleged to be stolen. That the defendant gave him an order on one Turner for the powder. The speaking of this order being objected to, a paper was shown to the witness, who being unable to read, could not identify it. A witness was called who swore that the writing of the paper resembled the defendant's, but that he could not say for certain that it was. No further evidence was offered on this point, and the paper was not given to the jury as evidence, but was read by
(95) the prosecuting officer and commented on as the order of defendant. To this argument the defendant objected, asking the Court to stop it, but his Honor declined.

The State having sworn and tendered several witnesses, the defendant asked leave to cross examine them. This was refused, the Court holding that by the examination of such witnesses the defendant made them his own.

The jury returned a verdict of guilty. Rule for a new trial granted. Argued and discharged. Defendant then moved to arrest the judgment, for that the property was alleged to be Grier's and another, when the evidence showed that it belonged to Grier & Alexander, a firm well known to the grand jury. Motion refused, and appeal by defendant.

No counsel in this Court for defendant.

Attorney General Hargrove and Barringer for the State.

SETTLE, J. The defendant insists that the order in favor of Tom Caldwell on Elias & Cohen, for a pair of boots; and also the order on Turner, in favor of Henry Caldwell, for a keg of powder, not having been duly proved, should not have been spoken of on the trial, nor commented upon by the Solicitor in his argument to the jury.

It would seem that the defendant sought to divert the attention of the jury from the real issue, to wit: his guilt or innocence of the charge in the indictment, and to make the issue upon the probate of these two orders, when they were offered only as corroborating circumstances to support the witnesses.

It makes no difference, in this point of view, whether the orders were proved, or whether the witnesses could read or not; the fact that the witnesses had certain papers upon which one obtained a pair of boots and the other a keg of powder was offered, as a corroborating circumstance, to the jury for what it was worth, and was a legitimate subject of comment by the Solicitor.

The defendant moved in an arrest of judgment, for that the indictment charged that the powder was the property of "Grier (96) and another," whereas the proof showed it to be the property of Grier & Alexander, a firm doing business in Charlotte, and well known to the grand jury, and to the draftsman of the bill. Our attention was called upon the argument to the case of the *State v. Harper,* 64 N. C. 129, where it is said that "the property in stolen goods must be averred to be in the right owner, if known, or if not, in some person or persons unknown; and if it appear that the owner of the goods is another and a different person from the person named as such in the indictment, the variance will be fatal."

Undoubtedly such was the rule at common law, but the objection is met, in words and spirit, by our statute, which enacts "in any indictment wherein it shall be necessary to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, or tenants in common, it shall be sufficient to name one of such persons, and state such property to belong to the person so named, and another, or others, as the case may be; and whenever in any such indictment it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, or tenants in common, it shall be sufficient to describe them in the manner aforesaid, and this provision shall extend to all joint stock companies and trustees." Bat. Rev., Ch. 33, Sec. 65.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Credle,* 91 N.C. 648; *S. v. Van Doran,* 109 N.C. 866; *S. v. Lewis,* 142 N.C. 636.

(97)

F. W. BOND v. OCTAVIUS COKE.

A cotton gin and press annexed to the freehold in the usual way, become fixtures: *Therefore,* where A had mortgaged his land to B to secure the payment of certain debts, and afterwards built thereon a gin house in which he placed a cotton gin and press, attaching them in the usual manner, occupying and using the same for a number of years and then sold the equity of redemption, together with certain personal property including the gin and press by name to C; and B having sold the land under the first trust, excepting the gin and press, but making no exceptions whatever as to gin and press in his deed to the purchaser: *Held,* that the purchaser at B's sale acquired title to the gin and press, as any verbal exceptions at the sale would have no effect in controlling the provisions of the deed.

CIVIL ACTION for claim and delivery of a certain cotton gin and press, tried at the Spring Term, 1874, of the Superior Court of CHOWAN County, before his Honor, *Judge Albertson,* and a jury.

In August, 1870, the plaintiff conveyed a tract of land to Pruden, in trust to secure the payment of certain debts. In the fall of that year, the plaintiff, continuing to occupy and cultivate the land, and for its more beneficial enjoyment, built upon it a gin house in which he placed a cotton gin and press. The press was solidly fastened to the house, and the gin was confined in the usual way, by strips of wood nailed to the flooring, to hold it steady when at work. Both were used by plaintiff in preparing his own crops for market, and also in ginning and packing for others for toll.

In February, 1872, the plaintiff conveyed, by deed in trust, to Biggs his equity of redemption in said lands, and also personal property among which is named the "Cotton Gin and Press" in dispute.

On the 3rd February, 1873, Pruden, the trustee, sold the lands
(98) under the first trust, excepting the gin and press which had been conveyed to Biggs, or attempted to be, at which sale the defendant purchased and received a deed in the usual form, without any exceptions in it as to the gin and press. The defendant, in his answer, denies all knowledge of any exception of the gin and press at the time of the sale and purchase of the land by him.

On the 3rd February, 1873, the plaintiff went into bankruptcy, and the debts secured in both trusts having been satisfied without a sale of the gin and press, the United States Marshal took possession, and

Winston, the assignee, under the bankrupt law, duly assigned to the plaintiff the gin and press. The defendant, soon after his purchase, took possession of the land and gin and press, and this action was commenced by the plaintiff.

Under the instructions of his Honor, the jury returned a verdict for the plaintiffs. Judgment in accordance with the verdict, and appeal by defendant.

Moore & Gatling, for appellant.
A. M. & Jno. A. Moore, contra.

BYNUM, J., after stating the facts of the case as above, proceeded:

In the case of *Latham v. Blakely*, 70 N. C., 368, decided at last term, this Court, in a very similar case of facts, upon a thorough review of all the conflicting authorities, *held* that the gin was a fixture. That case governs this as to the *status* of the gin and press, which we declare to be fixtures to the land and a part of the freehold.

The case is not altered by the fact that these fixtures were erected subsequent to the mortgage. In *Winslow v. The Merchants Ins. Co.*, 4 Metcalf, 306, it was held that a steam engine and other machinery of a manufactory were to be considered as fixtures, and had vested as such in the defendants under a mortgage of the building prior to the period at which they were erected against the plaintiff who (99) claimed as here, under a subsequent specific mortgage of the machinery itself. Many cases to the same effect are collected in 2 Smith L. Cases, 254-5.

The gin and press having thus been so far annexed to the freehold as to acquire the character of fixtures, became mere incidents to the realty and conformed to all the laws by which it is governed, subject to the dower of the widow, descend to the heir, pass to the vendee of the land, unless expressly excepted in the conveyance, etc. *Preston v. Briggs*, 16 Vermont, 124; 12 N. H., 205; 6 Cowen, 665; 2 Smith L. Cases, 255.

The title to the gin and press, having thus vested in the trustee, Pruden, as part of the realty, passed by his sale and conveyance to the defendant, unless the exception of these two articles, at the sale of the land, had the effect of preventing the title as to the gin and press from passing with the land.

This is the ground of the plaintiff's claim, but there are several fatal objections to its validity.

1. The general rule of law is, that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument; therefore, when, as to the extent and limitations of an estate, in a deed, the inten-

tion of the maker is to be ascertained, the Court must decide upon the face of the instrument itself. 1 Greenl. Ev. S., 275-6. *Clayton v. Liverman,* 29 N. C., 92. The deed, in our case, containing no exception of the gin and press, the legal effect of it is to pass them to the defendant, and no parol evidence to the contrary is admissible.

2. The exception of the gin and press at the sale being an agreement touching the sale of an interest in lands, the Statute of Frauds requires it to be in writing. And even if the agreement reserving the gin and press had been in writing, it could only be set up by a bill in equity to reform the deed on the ground of accident or mistake in the draftsman, for the effect of the deed is to pass the land and every substantial part of it; hence, if there be a parol agreement to convey land and to
(100) except the fruit or trees, or certain timber trees, and a deed is executed which does not except the fruit or trees, that part of the agreement in respect to them is defeated. *Flynt v. Conrad,* 61 N. C., 190.

The case just cited, of *Flynt v. Conrad,* illustrates the distinction between those chattels which by annexation become merged in the land, and those which though so annexed to the land do not become a part of it. Thus growing crops may be reserved by parol by the vendor of the land, in which case they do not pass by the deed conveying the land. The reason is that they are *fructus industrialis,* and for most purposes regarded as personal chattels, even before they are severed from the soil; therefore upon the death of the owner of the land before they are gathered, they go to the executor and not the heir; they are liable to be seized and sold under execution as personal chattels; and by statute, growing crops are the subject of larceny. *Brittain v. McRay,* 23 N. C., 265.

The Statute of Frauds thus not applying to agreements concerning growing crops, parol evidence is admissible to show that they were to remain the property of the grantor in the sale of the land.

But personal chattels which have been fixtures are incorporated in, and are, a part of the land as much so as a house or tree, until an *actual* severance and therefore, a deed conveying the land without excepting therein the fixtures, has the legal effect of passing the gin and press, which are part and parcel of the land.

PER CURIAM. Judgment reversed, and *venire de novo.*

Cited: R. R. v. Com'rs., 84 N.C. 507; *Foote v. Gooch,* 96 N.C. 270; *S. v. Green,* 100 N.C. 422; *Horne v. Smith,* 105 N.C. 325; *Overman v. Sasser,* 107 N. C. 436; *Best v. Hardy,* 123 N. C. 228; *S. v. Crook,* 132 N.C. 1058; *Jenkins v. Floyd,* 199 N.C. 473; *Springs v. Refining Co.,* 205 N. C. 449.

(101)

WILLIAM PONTON AND WIFE v. C. N. McADOO AND DAVID SCOTT, ADM'R., ETC.

In an application for a special injunction, when the property is in *custodia legis*, the Court will not let go the property and allow the same to be sold, if there is a probability that the merits are with the plaintiff, notwithstanding the defendant's answer denies the allegations upon which such application is founded. Where the material facts of plaintiff's complaint are not denied, the injunction will more certainly be continued to the hearing.

CIVIL ACTION to set aside a mortgage, and in the meantime for an injunction, heard upon motion to dissolve the injunction, before *Tourgee, J.*, at Chambers, in GUILFORD County, March, 1874.

The plaintiff, Ponton, alleges that on the 9th day of February, 1869, he had a homestead in his lands and an exemption of personal property allotted and laid off to him, according to the provisions of the act of August, 1868, which allotment embraced all of his lands and all of his personal property. That he continued in possession of this property, undisturbed, until 24th day of April, 1873, when the defendant, McAdoo, served him with a warrant, returnable on the next day at Greensboro, in the said county of Guilford, for $36.81; that he was in his field at work when the officer served the warrant, and there remained for some time when the other defendant, Scott, came up, who was met by the officer, and the two had a long talk with each other; that after their conversation the officer and Scott came to where he was, and the officer showed him an execution, issued that day by the Clerk of the Superior Court of said county, on a judgment obtained in said Court by the defendant, McAdoo, the 22d day of July, 1869, which was against him, the plaintiff, and the other defendant, Scott, and one Bevil, for $219.17, with interest on $140, and costs; that this judgment had (102) been paid off by the defendant, Scott, as he had been informed, and assigned by McAdoo, the plaintiff therein, to one Benjamin Scott, (since dead) in order that the same might be kept alive for the benefit of David Scott, the defendant. Payment of this execution was then demanded of the plaintiff, the defendant, Scott, at the same time telling him that "the homestead had gone up," and if he did not pay him or secure him in said execution he would sell him out in ten days; that it was then demanded which of the horses then plowing in the field was his property, and on being told, it was threatened to take them off unless he would give security for the forthcoming of the same next day at Greensboro, which was given.

He and his son carried the horses to Greensboro, when they were invited to the defendant, McAdoo's, store, where a mortgage was drawn

up for the security of the two debts, in which were conveyed to McAdoo all the plaintiff's land and other property, with a power to sell the same in six months. Plaintiff alleges that he executed and delivered this deed in the full confidence of the truth of the statement that the homestead had gone up, as was represented to him, and under the perplexity, confusion and surprise created by the statement, enforced by the presence of an officer, with the threat of sale, etc.; that the mortgage was not signed by the plaintiff's wife, and that the property was the same that had been set apart and allotted to him.

The defendants in their several answers allege that they were honestly under the impression that the homestead in regard to old debts was inoperative; that they used no undue influence with the plaintiff to make him execute the mortgage, and that he did it freely, of his own consent.

Upon coming in of the answers, the defendants moved to dissolve the injunction, which his Honor refused, and the defendants appealed.

Scott and Caldwell for appellants:

(103) I. The plaintiff had no legal homestead. Battle's Revisal, p. 467, Chap. 55, Secs. 4, 2, 8, 13; *Smith v. Hunt,* 68 N. C., 482.

II. The mortgage to defendants, in the absence of fraud, is good as against the plaintiff, Ponton, by estoppel, if not against his wife, for the homestead.

III. It is good to pass the personal property without the wife joining in the mortgage. State Con., Art. X, Sec. 8. It is good also against the husband for the reversionary estate in the land.

IV. There is no fraud, duress or collusion alleged, sufficient, if the facts stated and alleged in the complaint are taken to be true, to authorize the Court to decree a remission or surrender of the deed. *Hunt v. Bass,* 17 N. C., 292, (295); *Gunter v. Thomas,* 36 N. C., 199, (207.)

V. This is, then, an action for an injunction simply, and can be heard and decided upon affidavits.

VI. His Honor below ought to have dissolved the injunction so far as the personal property is concerned, and let it be sold.

Dillard & Gilmer, contra.

Grounds of injunction are two-fold:

1. For that the mortgage conveyed land and personal property which had been laid off and assigned to Ponton as an exemption, under act of Assembly. Special Session in August, 1868, to which the wife of Ponton was not a party.

2. For that the mortgage was obtained under a mistake of law and fact, attended by circumstances of surprise. Threat of sale of his property, levy on it and demand of forthcoming bond, which created great confusion and perplexity of mind in Ponton—defendants acting in concert.

I. Homestead and personal property exemption were laid off and assigned, according to act of special session, 1868, and lists were made and registered, as by that act directed. Acts special session 1868, Chap. 43.

(*a*) It is submitted that this protected Ponton's real and per- (104) sonal property exemptions from execution, and his wife so far acquired an interest in the realty, if not in the personalty, that the husband could not mortgage it without the joinder and privy examination of his wife. Const., Art. X, Sec. 8; *Mayo v. Cotten,* 69 N. C., 289; *Flege v. Garvey,* 1 Amer. Law Times, (new series,) p. 20.

II. It is submitted that the personalty exempted to the husband is within the humane policy of the Constitution, and although alienable by the husband, it extends in spirit also to the wife and children, and a deed conveying it away under circumstances of surprise and imposition, as in this case, ought not to be maintained.

(*a*) A deed or other act done under a naked mistake of the law, if not otherwise objectionable, will generally be held valid and obligatory. 1 Story's Eq., Sec. 116; Adams' Eq., p. 191, (mar.)

(*b*) There are exceptions, however, to this general rule, *e.g.,* a deed executed under a mistake of the law with other ingredients going to show *misrepresentation, imposition,* sudden false information from defendants, calculated to mislead and confuse, and executed under surprise and perplexity of mind, may be set aside as improvidently obtained. 1 Story's Eq., Secs. 119, 120, and note to last section. Adams' Eq., 191, (mar. page.)

(*c*) Cases of surprise, mixed with mistake of law, stand on a ground peculiar to themselves and independent of the general doctrine; in such cases, deeds like the one in question, are regarded as unadvised and improvident, and are held invalid on the principle of protecting those who cannot protect themselves, and on the ground that such acts are not in accordance with the intention of the parties. 1 Story's Eq., Sec. 134.

In our case deed was made in mistake of the law as to validity of exemptions against old debts, as decided in *Hill v. Kessler,* 63 N. C., 437, and it was executed *immediately* after the decision of *Gunn v. Barry,* and *before* the decision of *Garrett v. Cheshire,* 69 N. C., 396, and it was done on the *sudden* application of defendants (105) acting in concert, accompanied with threats to sell plaintiff out

in 10 days, by a levy on his property, demand of forthcoming bond, requirement to produce horses at Greensboro next morning, and immediate procurement of mortgage at counting room of one of the defendants, while plaintiff continued in state of perplexity and confusion. *See complaint,* and defendants' affidavits substantially admit the same.

(*d*) Injunction here is to protect and keep the property in specie, pending the litigation, and is of the nature of a special injunction, and in such cases the rule is not to dissolve, on the coming in of the answer, if in the opinion of the Court it is reasonably necessary to protect the property until the trial. *Heilig v. Stokes,* 63 N. C., 612; *Jarman v. Saunders,* 64 N. C., 368.

(*e*) On a motion to dissolve injunction, when a fund is taken into the custody of the law, the rule is that the Court will not let go, if plaintiff shows probable cause, from which it may be reasonably inferred that he will be able to make out his case at the final hearing. *Craycroff v. Morehead,* 67 N. C., 422; *Brown v. Hawkins,* 65 N. C., 645.

It is therefore respectfully submitted that the Judge below committed no error in continuing the injunction to the hearing.

READE, J. The application being for a special injunction and the property in *custodia legis,* the Court will not let go the property and allow the same to be sold, if there is a probability that the merits are with the plaintiff, notwithstanding the denial in the answer. But here there is no denial in the answer, the material facts are admitted. *Heilig v. Stokes,* 63 N. C., 612; *Jarman v. Saunders,* 64 N. C., 368; *Craycroff v. Morehead,* 67 N. C., 422; *Brown v. Hawkins,* 65 N. C., 645.

Upon this ground therefore, we sustain the ruling of his Honor in refusing to dissolve the injunction.

(106) It may be premature to say, and yet it may shorten litigation, that it is manifest that the mortgage was given under a mistake both of law and fact. It was a mutual mistake of both parties, in producing which the defendant Scott was the active agent. It was a mistake which no amount of diligence or caution on the part of the plaintiff could have avoided; for as alleged by defendant, it was a mistake both of law and fact, common to business men, lawyers and Judges. This makes a clear case for relief. 1 Story's Eq., Secs. 119, 120, and note; Adams' Eq., 191; 1 Story's Eq., Secs. 29, 134.

The well prepared brief of plaintiff's counsel, has made our task an easy one.

There is no error. This will be certified to the end, etc.

PER CURIAM. Judgment affirmed.

Cited: Bruff v. Stern, 81 N.C. 188; *Morris v. Willard,* 84 N.C. 296; *Levenson v. Elson,* 88 N.C. 184.

STATE v. NICHOLAS CARR.

An officer who levies upon the personal property of the defendant in the execution, and refuses to lay off to such defendant upon demand, his personal property exemption, is guilty of a misdemeanor.

INDICTMENT for refusing to lay off a personal property exemption, heard before his Honor, *Judge Russell,* at Spring Term, 1874, of NEW HANOVER Superior Court.

On the trial below the jury found the following special verdict:

That on the 7th April, 1874, Murray & Co. obtained a judgment before a Justice of the Peace on a demand against Rodman Brothers, a firm doing business in New Hanover County, and that on the same day execution was issued and placed in the hands of the defendant, who was a constable. That on the day the judgment was given, Henry T. Rodman, a defendant in the execution, in the presence of the (107) defendant, Carr, disclaimed any title to certain rosin and turpentine then in the city of Wilmington, stating that the same was mortgaged to his mother; that Carr levied on the same as the property of Rodman & Bro., and took possession of the same. Six or seven days afterwards the attorney of the defendants demanded that the defendant, Carr, should set apart to them their personal property exemption out of the property levied on, according to law. This he refused to do, saying he would be protected by a bond. Afterwards, on the 20th April, the defendant, Carr, notified the defendants in the execution that he had abandoned the levy, and on the demand of the attorney to return the property levied on, he refused, saying that it was in the warehouse of Murray & Co. The defendant, Carr, delivered the property to the plaintiff in the execution, and that he did not sell the same.

The following endorsement was on the execution:

"Under the within execution, on the 7th day of April, 1874, I levied upon 40 barrels of spirits of turpentine and 129 barrels of rosin, as the property of Rodman & Bro. The defendants disclaimed all right to the property. I abandoned the levy and notified the plaintiff and the attorney of the defendants.

N. CARR, Constable."

The Court being of opinion that as the defendant did not sell under the levy, but adandoned it, he was not guilty, and gave judgment accordingly, from which the State appealed.

Attorney General Hargrove and London, for the State.
No counsel in this Court for defendant.

SETTLE, J. The facts found by the special verdict constitute a misdemeanor, denounced both by the words and spirit of the Homestead Act, Bat. Rev., Ch. 55.

(108) The evasion or trick by which the defendant attempted to deprive the plaintiff of his personal property exemption, and at the same time avoid the penalties of the law for so doing, deserves the reprobation of the Courts. If the device here resorted to can be justified and sustained, then the homestead provision of the Constitution and the laws in pursuance thereof are not worth the paper on which they are written.

The defendant says the plaintiff did not claim the property. But he says it was the property of the plaintiff and he levied on it as such, and when the plaintiff asked for his legal exemption it was not for the defendant to play upon him the sharp practice of saying, yes, it is your property for the purposes of my levy, but it is not yours for the purposes of a legal exemption.

The pretended abandonment of the levy by the defendant, while refusing to put the plaintiff, as he found him, in possession of his property, but leaving it in the hands of the plaintiff in the execution, is worse than mockery.

Let it be certified that there is error, to the end that the Superior Court may proceed to judgment upon the special verdict as upon a verdict of guilty.

PER CURIAM. Judgment reversed.

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(109)

WM. KNABE & CO. v. SIMON G. HAYES.

A discharge in bankruptcy after due publication of notice, is a good bar to the claims of all creditors who do not allege and show that the omission to give notice was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident or mistake.

KNABE *v.* HAYES.

CIVIL ACTION commenced in a Justice's Court, and carried by appeal to the Superior Court of WAKE, where it was tried before *Tourgee, J.*, at the January (Special) Term, 1874.

It was agreed on the trial below that the defendant and one Geo. W. Blacknall, the surety on the note sued upon, were both adjudicated bankrupts, upon their own petitions, and received their discharges prior to the commencement of this action.

It was admitted by the defendant that the note sued upon was, by inadvertance, not scheduled among his debts, and that in consequence, no notice was mailed to the plaintiffs, to their address, "New York City." It is further admitted that the general notice to the creditors was published in the North Carolina *Standard*, at Raleigh, N. C.; and that the plaintiff had not actual knowledge of the defendant's bankruptcy, until after his discharge.

Upon this state of facts, the Court being of opinion with the defendant, it was adjudged that the plaintiff's action be dismissed. From which judgment plaintiffs appealed.

Battle & Son, for appellant.
Fowle and Snow, contra.

SETTLE, J. The counsel for the plaintiff asks the question: Does the discharge of a bankrupt, under the act of Congress, to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, bar the claim of a creditor who had no knowledge of the filing of the petition in bankruptcy, and whose name was not inserted in the schedule of creditors, and to whom no notice (110) was mailed?

Our answer is, notwithstanding the very high authority of Mr. Bump, in his work on bankruptcy, page 27, *et seq*, to the contrary, that a discharge, after due publication of notice, is a good bar to the claims of all creditors, who do not allege and show that the omission to give notice was the result of fraud, on the part of the debtor, and not the result of forgetfulness, accident or mistake. Few discharges in bankruptcy could stand if the omission to schedule some small article of property, or to give the name of some forgotten creditor, would be sufficient to avoid them.

Such a construction, in our opinion, would destroy the beneficial purposes of the act.

The *intent* with which an omission of property or creditors is made, both under the bankrupt act of 1841 and 1867, is the criterion by which the case should be governed. If made with a fraudulent and wilful

purpose, the discharge should not protect the debtor, otherwise it should be permitted to stand.

In our case fraud is not alleged; on the contrary the omission to schedule the name of the plaintiff, is stated in the case made for this Court, to be the result of inadvertence.

In *Burnside v. Brigham,* 8 Met., 75, it is held: SHAW, C. J., delivering the opinion of the Court, that where a defendant relies on his discharge under the United States bankrupt law of 1841, the plaintiff cannot avoid the discharge by merely showing that the defendant, in his petition in bankruptcy, omitted to insert the plaintiff's name in the sworn list of creditors, and that by reason of such omission the plaintiff had no notice of the proceedings in bankruptcy, and could neither prove his claim against the defendant nor approve the granting of the discharge. But that in order to avoid such discharge by reason of such omission, the plaintiff must show that the omission was wilful and fraudulent. The provisions of the act of 1867 in regard to
(111) notices, etc., are substantially the same as those of the act of 1841.

In *Saunders v. Smallwood,* 30 N. C., 125., it is held, that to avoid a plea of a discharge under the bankrupt law, the plaintiff must show, not merely a mistake or omission in making the inventory on the petition of the bankrupt, but a fraudulent and wilful concealment.

This case also arose under the act of 1841, but numerous decisions under the act of 1867 are to the same effect, and to us they appear well supported by reason. *Hudson v. Binghim,* 8 B. R., 494; *Ryne v. Abell,* 4 B. R., 67.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Blum v. Ellis, 73 N.C. 297; *Sumrow v. Black,* 87 N.C. 106; *Parker v. Grant,* 91 N.C. 342; *Laffoon v. Kerner,* 138 N.C. 287.

THE TRUSTEES OF THE N. C. ENDOWMENT FUND v. L. L. SATCHWELL.

The private Act of 12th December, 1863, incorporating the "Trustees of the N. C. Endowment Fund," being calculated and having the effect to aid the rebellion then existing, is void and confers no powers on the persons attempted to be incorporated.

RODMAN and READE, JJ., dissenting.

TRUSTEES *v.* SATCHWELL.

CIVIL ACTION for the recovery of real estate, tried on demurrer before *Clarke J.*, at the Fall Term, 1873, of WILSON Superior Court.

It was alleged in the complaint that the plaintiff was a corporation duly organized under an act of our General Assembly, ratified 12th December, 1863; that it was entitled to the possession of certain real estate in the town of Wilson, N. C., and that the defendant withholds possession thereof.

To this complaint defendant demurred, alleging as grounds of demurrer that the said act of incorporation is illegal and void, in that it was passed in aid of the rebellion against the govern- (112) ment of the United States, and that said act being so illegal and void, the plaintiff was not a capable grantee to hold any real or personal property under the laws of the State.

After argument His Honor overruled the demurrer, and the defendant appealed.

Fowle and Murray, for appellant.
Smith & Strong, contra.

PEARSON, C. J. The case was argued upon a demurrer to the complaint on the ground that the plaintiff has no legal existence, and, of course, no capacity to sue or to hold property, its alleged character being void because "it was passed by a General Assembly of the then insurgent State of North Carolina in aid of the late rebellion," etc.

Under Sec. 123, C. C. P., the Court is required to take judicial notice of a private statute, which is referred to by its title and pay of ratification. So we are to take the complaint as setting out the statute by which the plaintiff is incorporated.

The question is, whether the demurrer can be restrained on the ground that by the complaint (supposing it to set out the statute) was void, appears on its face, for the reason that it was calculated and intended and had the effect to aid the rebellion.

Let the statute speak for itself:

"SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That Charles F. Deems, Geo. W. Mordecai, S. S. Satchwell, John Y. Foard, David Murphy, J. Q. A. Leatch, D. M. Barringer, Edward J. Hale, S. D. Wallace, R. M. McCracken, Walter F. Leake, E. G. Reade, G. W. Collier, Chas. W. Skinner, Kemp P. Battle, Robert W. Best, John C. Washington, James J. Taylor, John H. Hyman, Wm. J. Hawkins, J. B. Littlejohn, Daniel G. Fowle, John H. Haughton, J. S. Royster, John G. Williams, Peter F. Pescud, A. M. Gorman, Thomas Bragg and others who have contributed fifty dollars or more

(113) to the fund of which Charles F. Deems is and has been financial agent, or who may hereafter contribute a like sum to be invested and the interest thereon expended for the education of the indigent orphan sons of such soldiers as have fallen or may hereafter fall or be disabled in the wars of the Confederate States of America, and when no such claimants shall exist, then of other orphan boys, to be selected as far as practicable from the counties in proportion to the amount contributed from counties, their assigns and successors in office as herein described, be and they are hereby created, constituted and declared a body politic and corporate in law and in fact by the name and style of 'The Trustees of the North Carolina Endowment Fund,' and by that name shall be capable of taking by purchase, devise, or donation, real and personal estates, and of holding and conveying the same, shall have perpetual succession and a common seal, may sue and be sued, plead and be impleaded in any Court of law and equity, and shall have such other powers and enjoy such other rights as are usually incident to corporate bodies, and are not inconsistent with the laws and Constitution of the State.

"Sec. 2. *Be it further enacted, by the authority aforesaid,* That all property, moneys, or effects of whatsoever nature or description heretofore given or conveyed, or devised, and hereafter to be given, conveyed or devised to the said trustees of the North Carolina Endowment Fund, shall be held and possessed in special confidence and trust by the said corporation for the sole use and benefit of the said orphans in such manner as may hereafter be devised and adopted by said trustees.

"Sec. 3, *Be it further enacted by the authority of the aforesaid,* That the said trustees may make and establish such rules, regulations and by-laws as may be necessary for the management of its funds, as they may deem necessary to accomplish the objects of the same, not inconsistent with the laws and Constitution of the State.

"Sec. 4, *Be it further enacted by the authority aforesaid,* That the said trustees may declare what number may constitute a quorum (114) for the transaction of business, and may appoint a board of directors and such other officers as they may deem expedient to manage said fund.

"Sec. 5. *Be it further enacted by the authority aforesaid,* That this act shall be in force from and after its ratification."

("Ratified the 12th day of December, 1863,") in the midst of the war.

Had these charitably disposed gentlemen, after the war was over, applied to the rightful General Assembly of the State for an act of incorporation, to effect the purposes set out in the statute under considera-

tion, their application would have met public sympathy, and no legal objections could have been interposed. It is manifest on the face of the statute that it was the object of the persons who applied for the charter, and of the General Assembly which granted it, thereby to aid the rebellion.

His Honor erred in overruling the demurrer. This will be certified to the end that the action may be dismissed.

PER CURIAM. Judgment reversed.

RODMAN, J. *Dissenting.* It is contended that the act of 12th December, 1863, incorporating the plaintiff, is void, by reason of its manifest tendency to aid and encourage the rebellion then existing. All the questions which can be made in this case, arise upon the complaint and the demurrer. There is no plea averring *as a fact,* an illegal intent in the Legislature in enacting the act, or in the parties incorporated. No evidence outside of the act, therefore, can be resorted to to establish such intent. If it does not appear *as a legal inference* on the face of the act, it cannot be found as a fact in the present stags of the case, and when raised by a plea, the question will be for the decision of a jury. *The intent of the act can be gathered only from the trusts imposed on the corporation.*

The trusts are, to apply donations received or to be received to be expended for "the education of the indigent orphan sons (115) of such soldiers as *have fallen or may hereafter fall or be disabled* in the wars of the Confederate States of America, and when no such claimants shall exist, for the education of *other orphan boys,* to be selected, as far as practicable, from the counties in proportion to their contributions." Here are three classes of beneficiaries clearly described and distinguished. No distinction is made as to race or color. As the act is intended for the benefit of orphans only, by the words, "fall or be disabled," must be meant either immediately killed, or so disabled that death results from the disability.

The questions to be considered may be divided thus:

I. Are any or all of the trusts illegal?

II. If one of them is illegal and the others not, will the act be held void *in toto,* or valid for the purpose of supporting those which are not illegal but meritorious?

Since the close of the late civil war, the Courts of the Southern States have had occasion to make a new and somewhat copious chapter in the law of contracts illegal by reason of being in aid of the rebellion. Strange as it may seem when contrasted with our own experience, the civil wars of England and the unsuccessful insurrections and rebellions in our own country, such as Shay's in Massachusetts, the whiskey

insurrection in Pennsylvania, and the Dorr war in Rhode Island, have not left a single case which I have found cited on this branch of the law.

To decide the cases brought before us, we resorted to the precedents in cases not influenced by any such embittered feeling as every civil war naturally leaves behind it. And I think we have acted wisely in taking the principles of such cases, although the result of our decisions (as it was of those) has been to exempt defendants equally guilty with the plaintiffs, from the payment of debts to which in the forum of morals and conscience, they were unquestionably bound, and sometimes to vest persons with property for which they had given no value, and where they had no moral claim.

(116) Since it pleased divine Providence to visit the "Lost Cause" with defeat, we must regard the unsuccessful effort at independence as a turpitude, and every executory contract, entered into actually or by construction of law, with an intent to promote it as *malum in se,* and void. But it is not necessary to go farther.

I now proceed to consider the questions I have stated in their order:

I. In my opinion a fair examination of the act will show that no one of the trusts declared is unlawful, because no one of them tended, except in that merely possible and remotely consequential way which the law disregards to encourage the rebellion.

It is not contended that the trusts for the benefit of the orphans of soldiers *already* deceased was illegal. The alleged illegality is found in the trusts for the orphans of those *who shall thereafter* fall or be disabled; it is to be noted, not of those who shall *thereafter enter the service* and fall, etc. It is argued that this tended to encourage men to enter, or adhere to the Confederate service. If encouragement is given to any act, it is to being killed or disabled, which is the condition precedent to the bounty. But to encourage that can hardly be considered disloyal, since it is just what *our* armies, as we must now call them, were striving to bring about. But apart from that, I agree that every contract and every act of the Legislature, which can be fairly construed as intending to aid and encourage the rebellion then existing, is void. But before that intent can be imputed to it, it must appear that it *naturally and probably* tended to produce that effect. The inducement which it holds out to join in or adhere to the rebellion, must be such as is *usually* influential upon human conduct, and which is therefore regarded as influential by the law. For if the promised benefit be so trivial, remote or contingent that it would not naturally or probably, and does not usually induce to crime, although by possibility, in some rare and exceptional case it may, such a benefit is not considered by the law as being intended to have a criminal effect. It

is regarded as no inducement at all. *De minimis non curat lex.* I know of no direct authority in point to this case, but I think (117) this proposition may be maintained on the analogy of cases in which the law is clear and undisputed.

A man may insure his life for the benefit of his estate or of his family. A husband may insure the life of his wife, or a father that of his child, for his own benefit, and a wife that of her husband for her own. It was held lawful for a master to insure the life of his slave. *Spruill v. Insurance Co.,* 46 N. C., 126; *Woodfin v. Insurance Co.,* 51 N. C., 558.

In all these cases there is a clear and direct temptation to destroy the insured life, and it is by no means impossible to conceive of circumstances in which it may be done with but little risk of detection and punishment. Cases are not rare in which the temptation has actually proved strong enough to induce the crime. But such is not the usual and therefore not the natural and probable effect, and the law does not consider such policies of insurance void, because of this their feeble and remote inducement to crime. On the contrary, they are lawful and common.

In all such cases the benefit is direct to the individual whom it might be argued was thereby tempted to crime, and is to be enjoyed during his life. But in the present case the supposed temptation is much slighter and more remote; it is a benefit to his children, to be received by them after and through his voluntary death, and is moreover not a benefit of a thing *in esse,* but of an education in a school to be established, if the liberality of donors shall supply the funds. Benefits to be received after one's death are proverbially feeble motives; experience shows us that the future happiness which as Christians we believe will follow a Christian life in this world, has but little influence on the conduct of most men. Many murders have been committed to obtain money insured on the life of the deceased wife, child or slave. But I am incredulous that any soldier ever got himself killed or disabled, or ever entered the Confederate or any other service, in time of war, in order that his children might, after his death, re- (118) ceive a free education in a school which had only a possible existence, rather than in the established public schools.

There is a like analogy in the rule of damages in civil actions against *tort feasors;* only such are allowed as are the natural and probable result of his wrongful act. *Dale v. Grant,* 34 N. J. Law, (5 Vroom,) 142.

In criminal prosecutions, when the criminality of an act depends on the intent to injure another, such intent is only inferred when the injury is the natural and probable result of the act. 2 Stark Ev. 573.

For example, if a mason in building a house on a frequented street, drops a brick, whereby a passer-by is killed, he will be held guilty of a crime, because in such a place the injury was the natural and probable result of his act; but otherwise, in an unfrequented place where he had no reason to expect any one to be. To hold the trust in question illegal is, it seems to me, to violate all these analogies and to give to the doctrine of constructive crime, where no criminal intent in fact existed, an unprecedented and unreasonable extension.

If we consider the act in the light of the history of the times, the real intent is clear. It was not to induce volunteers to enter the army; volunteering had long ceased and been followed by a rigorous conscription which allowed of no volunteers. The act was intended for the children of these conscripts. At all events, the charity was for the innocent children and not for the parents, whether guilty or innocent, volunteers or conscripts. To defeat it upon the ground contended for would confine charity within the narrowest limits of political orthodoxy and shut out from it all whose faith was not ours. It is usually esteemed not the less a virtue when it extends to all the children of poverty and misfortune, without restriction from the creeds, the errors, or even the crimes of their parents. Thou shalt not visit the sins of the fathers upon the children, has been accepted as the law of (119) humanity ever since the time of Moses.

But however this may be and assuming that the particular trust for the orphans of soldiers who should *afterwards* be killed is illegal and will not be sustained, it seems to me that the other trusts which are clearly separable from this and are admittedly free from any objection of turpitude, ought to be sustained and for that purpose the act of incorporation held valid.

In Metcalf on Contracts, p. 246, the law is clearly, and as I conceive, correctly stated. The following are quotations from that work, omitting for the sake of brevity all that can be omitted without injury to the meaning. I avail myself of the authorities collected by the learned author. If the *consideration* of a promise be unlawful the promise is void. "When, however, the illegality of a contract is in *the act to be done,* and not in *the consideration,* the law is different. If for a legal consideration a party undertakes to do two or more acts and part of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Wherever the unlawful part of a contract can be separated from the rest it will be rejected and the remainder established." "Therefore," says HUTTON, J., (*Bishop of Chester v. Freeland,* Leg. 79,) "at the common law, when a good thing and a void thing are put together in the self same grant, the same law shall make such a construction that the grant shall be good for

that which is good and void for that which is void." "So if any part of the condition of a bond be against law it is void for that part and good for the rest; or if a bond be given for the performance of covenants contained in a separate instrument, some of which are lawful and others unlawful." *Chamberlain v. Goldsmith,* 2 Brownlow, 282; *Norton v. Lynns,* Moore, 856.

"If then any part of a contract is valid, it will avail *pro tanto,* although another part of it may be prohibited by statute," etc. See *Moony v. Leak,* 8 Term, 411; *Renison v. Cole,* 8 East. 231; *Doe v. Pitcher,* 6 Taunt. 369.

"It appears from these cases that when the invalid part of an (120) agreement can be separated from the valid, the latter shall stand, although the former be declared void by statute." To the same effect are the class of cases of which *Mallan v. May,* 11 M. & W. 653, and *Price v. Green,* 13 Mess. & Wils. 695, are the leading ones. They decide that in contracts in restraint of trade the reasonable provisions will, if possible, be separated and supported, while the unreasonable, and therefore illegal ones, will be disregarded.

In this State the same principles have been clearly stated and applied to declarations in trust. The leading case is *Brannock v. Brannock,* 32 N. C., 428. There one Thompson had made a deed of land in trust to secure several debts, one of which was usurious, and it was contended that the *whole* deed was therefore void. The Court (PEARSON, J., delivering the opinion,) say: "The operation of the deed was to pass the legal estate, with *a separate declaration of trust* for each of the debts therein enumerated. There can be no reason why the declaration of trust in reference to one debt may not stand and the declaration of trust in reference to another be held void." This case has been recently approved and followed in *McNeill v. Riddle,* 66 N. C., 290. See also *Darling v. Rogers,* 22 Wend. 483; *Van Veckton v. Van Veckton,* 8 Paige 104. *Savage v. Burnham,* 17 N. Y. 561.

I am unable to see how the present case can be distinguished from these, and I think the demurrer should be overruled.

Justice READE concurs in this dissenting opinion.

Cited: Morris v. Pearson, 79 N.C. 261.

(121)

S. D. WYNNE v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

The legal effect of an amendment, is, to put the case in the same plight and condition as if the matter introduced by the amendment had been inserted in the original pleading at the outset.

A clause in an application for a policy of insurance, that the party insured was to take an inventory of his stock every three months, is not a condition by which the policy was to be defeated and become of no force.

The finding of a jury that the loss of the plaintiff was $3,062 of which the sum of $462 is the *value* of the store, and $2,600 the *value* of the stock on hand, should be read, is the *damage* on account of the destruction of the store and goods.

Counsel for appellants are not justifiable in making up a case in such a way as to leave the Court in doubt as to the point intended to be made; every intendment must be made against the appellant.

CIVIL ACTION for the recovery of a loss by fire, tried by his Honor, *Judge Moore*, at Spring Term, 1874, of TYRRELL Superior Court.

Plaintiff brought this action upon a policy of insurance issued by defendant, against the loss by fire of plaintiff's store and stock of goods.

The answer admitted the execution of the policy, but alleged that the contract of insurance was subject to other terms, conditions and limitations and restrictions, than those set forth in the complaint, viz.: To certain conditions and warranties that were contained in the application of the plaintiff, a copy of which was annexed to the answer.

One among the issues submitted by the plaintiff to the jury was the following, to wit:

Was the said contract of insurance subject to other terms, conditions, limitations and restrictions, than those set forth in the complaint; and if so, does the written and printed paper writing attached to the answer contain them? (The said condition, etc., are noticed and sufficiently set out in the opinion of the Chief Justice.)

(122) The defendant introduced the application as evidence, and proved its execution by plaintiff, and moved that the plaintiff be called. Upon motion of plaintiff's counsel, the Court permitted him to amend his complaint by setting forth the application, and making it a part thereof. Immediately on amending his complaint the plaintiff submitted his case to the jury.

Before the complaint was amended, the plaintiff stated (in answer to a question of his counsel) that he had complied with all the conditions of the policy of insurance; and before he left the stand, (upon his cross-examination,) the original application for insurance was handed to him, and his signature thereto acknowledged; he also stated that he

had not taken an inventory of stock after 1st January, and that he expected, when he entered business, to keep up the annual average value of his stock at $4,000, but he did not state that he had done so.

The defendant asked the Court to charge that there was no evidence that the plaintiff had complied with and performed *all* the warranties as contained in his application; and that as the averments and performance of these warranties are conditions precedent to the right of action, the plaintiff cannot recover.

His Honor, the case states, refused the instruction because there was some evidence as before stated. Defendant excepted because the evidence alluded to was as to the conditions of the policy, and before the application had been set out by plaintiff in his complaint; and inasmuch as there was no evidence offered after the amendment, as to the performance of the conditions and warranties, the plaintiff could not recover.

In the application, plaintiff represented the store to be worth in cash, $700. It was in evidence on the part of the plaintiff, that the store was built by him on leased ground, and that his lease was for two years, with the privilege of five. A witness introduced by the plaintiff stated that if he desired to go into business at the place, he would give $700 for the store. On his cross-examination, this witness stated that he was not a merchant, nor did he know the cost of building houses.

The mechanic who built the store was introduced by defend- (123) ant, who stated the actual cost of building the same, everything included, was $226, and that he would replace it for that amount, or for $250 at the outside. This evidence was corroborated by two other mechanics.

Among the issues submitted to the jury were the following:

Was the cash value of the store $700, and the cash value of the stock $3,500 at the time of the insurance?

What was the loss to the plaintiff by reason of the fire?

Defendant asked the Court to charge that under the contract the company had the right to rebuild, and that therefore the cash value of the store, within the legal intendment of the contract of insurance was, what it was worth to rebuild it; and that in estimating the value of the store the jury could not take into consideration the location and favorable circumstances for trade, for that is outside of the cash value, as the fire cannot destroy location, etc.; and that if the jury believe the mechanics who say that the store can be replaced for $250, the plaintiff cannot recover.

His Honor refused so to charge, but instructed the jury that in estimating the cash value of the store, then and there, the location and

favorable circumstances for trade, should not be considered, but find what it would have brought in cash. Defendant excepted.

The Court was further asked by defendant to charge that from the application it appeared that an inventory was to be taken every three months by the plaintiff; that it was taken on the 1st January, 1872, and that the fire occurred more than three months from that time, to wit: on the 4th April, 1872; and inasmuch as plaintiff swore that he made no other inventory than the one in January, he did not comply with the conditions set forth in the application, and could not recover. Instructions refused by his Honor, and defendant again excepted.

To the first issue, the jury found the value of the store to be as stated in the application: And to the second that the loss was $3,062.33, of which $462.35 was the value of the store and $2,600 the value
(124) of the stock. Judgment in accordance with the verdict, from which the defendant appealed.

It is also stated in the case sent up that the jury "responded affirmatively to the following issues in addition to those heretofore set forth, to-wit: Has the plaintiff complied with and performed all the conditions, warranties and limitations and restrictions embraced in the contract of insurance." The jury also found that the inventory was not taken as required in the policy. Other issues were submitted, but were omitted in the statement of the case, as there were no exceptions taken to the finding of the jury thereon.

A. M. Moore and Empie, for appellant.

Jno. A. Moore, contra.

PEARSON, C. J. 1. The point made on the fact that after the amendment was allowed, no further evidence was offered and the case was immediately put to the jury, has nothing to rest upon; for it is a settled principle that the legal effect of an amendment is to put the case in the same plight and condition, as if the matter introduced by the amendment had been inserted in the original proceeding at the outset. So here it is the same in legal effect, as if "the application" had been set out in "the complaint" when it was originally filed. Now this familiar principle follows the rule in equity procedure "no matter can be allowed to be introduced by way of amendment, unless it existed at the time the original bill was filed." If it occurred since it can only be brought to the notice of the Court, and become a part of the proceedings by means of a supplemental bill.

2. The seeming discrepancy in the finding of the jury upon the several issues, is explained by adverting to the fact that the defendants did not insure the full value of the building or goods, consequently the

finding "of which the sum of $462 is the value of the store," should be read *"is the damage on account of the destruction of the store,"* and "$2,600 the value of the stock on hand" should be read, "is (125) the *damage* on account of the destruction of the goods." This is clear after the rubbish is cleared off. But it is really provoking that gentlemen of the bar, under the privilege accorded to them by C. C. P., pay so little attention to the "making up" of cases for the Supreme Court, and throw upon the Justices so much unnecessary labor. The counsel for the appellant is not justifiable in making up a case in such a way as to leave this Court in doubt as to the point intended to be made; every intendment must be made against the appellant.

3. Among the printed matter endorsed on the policy is a stipulation as follows: "The Company shall have the option, when the insurance may be on goods, to supply goods of like kind, etc., and when the insurance may be on houses, etc., the Company shall have the option with all convenient speed to rebuild," etc. As we understand the case, the Company made no offer to rebuild before the action was commenced, or at any time before the trial or after the trial up to this date, and the gravaman is, that the verdict is against the weight of the evidence.

With that question we have nothing to do, and we cannot advert to the testimony of several witnesses, professing to be master mechanics, except as tending to show that the prejudice of juries is against insurance companies. It can duly be construed by the Judge before whom the trial is had, whether it be the cause or the effect of the many references and counter references, in "the policy," to "the conditions endorsed," and in "the conditions endorsed" to the "application" and so in a circle, certain it is that the papers in a policy of insurance are so mixed up and involved that no ordinary man can be supposed to have perused and fully understood them.

4. "The defendant asked the Court to charge that from 'the application' it appeared that an inventory was to be taken every three months; that it was taken on the 1st January, 1872, and the fire occurred on the 4th of April, 1872, and that inasmuch as the plaintiff swore he had made no other inventory than the one in January, he did not comply with the condition set out in the application and could (126) not recover."

"This instruction was declined by his Honor, and defendant excepted."

The prayer for this instruction, although argumentative and not very happily expressed, raises the question as to the proper construction and legal effect of so much of "the application" as relates to the taking of inventories.

We think his Honor did not err in declining to give this instruction, and concur with him in the opinion that the construction contended for was an attempt to strain this clause of "the application" beyond the meaning, that can be fairly put on the words used, and to give to it the legal effect of a *condition* by which the policy was to be defeated and become of no force, by reason of a collateral matter not affecting and relating to the cause of the loss, but at most amounting to a mode of proof in respect to the extent of the loss, in the event of a fire when the omission would be compensated for, by the presumption which jurors are directed to make against all parties who have agreed, covenanted or warranted to do or not to do any act for breach of which they are liable in damages. The omission to take an inventory *at the very day* might have had its influence with the jury. But the notion that the omission to take an inventory of the goods in a country store *precisely* three months after the 1st day of January, 1872, and for no other reason than that the labor should be done, for how "the inventory is to be made or what is to be its form and purpose," how it is to be preserved and in what manner the defendant is to make it available, is not set out.

Look at the application, "question and answers," and take it to be intended to be a part of the contract, or policy of insurance. *"E.g.,* how often is account of stock taken? When was it last, and what amount did it reach? Answer: Every three months—1st January, 1872, $4,000." This is all that is written or printed.

Would it from these words enter into the head of any fair
(127) minded man to suppose that by these words it was the intention of the insurance company to impose, or of the insured to enter into a condition to the effect that if from any cause he should omit to take an inventory of his stock of goods, *on the very day* of the expiration of three months after the 1st January, 1872, and so from three months to three months to the very day, not excepting Sundays or unavoidable or excusable causes of delay, the policy was to become void and of no force?

We have the authority of Lord Coke for the principle, but in truth, it needs no authority, a condition by which an estate is to be defeated or by which a right is not to accrue, must be expressed in direct words, and in the absence of direct words of condition the construction will be in favor of a warranty or covenant or stipulation to be satisfied by compensation or damages instead of a penalty or forfeiture of the entire amount.

If in our case, instead of a mere question and answer as to the inventory, apt words of condition had been used in substance: This application being the basis of the policy, and being so expressly referred to, now the condition of this policy is that provided the said Spencer D.

Wynne shall fail at the expiration of three months, after the said 1st day of January, 1872, and of each succeeding three months thereafter, to make a full and complete inventory of his stock of goods and to enter the same upon his books, subject to the inspection of the insurance company, "then this policy is to be void. There would be sense in it—fair play."

But the suggestion that this provision, however artificial and cunningly inserted, can have the legal effect of a condition precedent, by which the policy of insurance is to be void and of no effect, cannot for a moment be entertained in a court of justice, without submitting to the degradation of being made an instrument of an insurance company to evade the payment of a loss fairly incurred upon grounds technical and untenable.

No error.

PER CURIAM. Judgment affirmed.

Cited: Fowler v. Ins. Co., 74 N.C. 92; *Ely v. Early*, 94 N.C. 7; *Grubbs v. Ins. Co.*, 108 N.C. 481.

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(128)

W. W. VANNOY AND OTHERS v. WM. HAYMORE, SHERIFF.

A Sheriff is not compelled to lay off a homestead or a personal property exemption before his fees for such service are tendered or paid.

CIVIL ACTION in the nature of a *scire facias*, heard before *Mitchell, J.*, at the Spring Term, 1874, of the Superior Court of IREDELL County.

Defendant moved to dismiss the plaintiff's action for want of an undertaking for costs. Motion overruled. He again moved to dismiss for want of a summons and complaint in the name of the State. His Honor overruled this motion also; whereupon defendant filed a defence, setting forth, among other things:

(4th) That the return on the execution, which is alleged to be not a due return is as follows, to wit: "Come to hand,.....day of....., 187...., homestead and personal property exemption not demanded by the defendants," (in the execution.) "My fees for laying off homestead and personal property exemption not paid or tendered to me by plaintiff or claimants, not executed." Which return is a due and proper return in law—no fees being tendered or paid by plaintiff or by any of the parties.

His Honor gave judgment against the defendant for $100, from which judgment he appealed.

Scott and Caldwell, for appellants.
Folk & Armfield, contra.

READE, J. "No officer shall be compelled to perform any service unless his fees be paid or tendered." C. C. P., Sec. 555.

In the case before us, the sheriff returns "my fees for laying off homestead and personal property exemptions not paid or tendered to me by plaintiffs or claimants—not executed."

(129) And the *case* states that "no fees were tendered or paid by the plaintiff or any of them." This statement covers not only fees for laying off homestead and personal property exemption, but for executing the process as well. And it is clear that the sheriff ought not to have been amerced.

The point was made that while the homestead must be laid off *before* the levy, the personal property exemption is to be laid off *after* the levy. So that if the sheriff was not obliged to lay off the homestead without a tender of his fees, yet he was obliged to levy on the personal property. If any such distinction exists, it does not avail the plaintiffs, because the sheriff was not only not obliged to lay off the homestead and personal property exemption without a tender of his fees for that; but he was not obliged to *levy* without a tender of his fee for *that*.

There is error.

PER CURIAM. Judgment reversed and judgment here for defendant.

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(130)

JAMES BOYLE v. THEOPHILUS A. ROBBINS.

A creditor, whose account consists of several items, either for goods sold, or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a Justice for any number of such items not exceeding $200.

If, however, the debt is an entire one, consisting of but one item, and exceeds $200, it cannot be divided to give the Justice jurisdiction.

The notice of the claim to enforce a mechanics' lien, within the jurisdiction of a Justice of the Peace, may be filed with the Clerk of the Superior Court.

Where the holder of a claim, secured by a lien, prior to the commencement of an action against the defendant, assigns a portion of his claim to another person, such assignee is not a necessary party to the action.

CIVIL ACTION, to enforce a mechanics' lien, originally brought before a Justice of the Peace, December, 1871, and heard by *Watts, J.*, at the February (Special) Term, 1873,, of CRAVEN Superior Court.

The following are the facts as settled and signed by the counsel of the parties, plaintiff and defendant.

The lien originally was for $346.43, and was duly registered in the office of the Clerk of the Superior Court at that amount. It was a lien upon a house and lot in Queen Street, in the city of Newbern, adjoining the A. & N. C. Railroad, purchased by defendant as a dwelling house.

Prior to the commencement of this action the plaintiff assigned to one John E. Amyett a portion of the claim against the defendant, secured by said lien, thereby reducing the amount of plaintiff's claim, so secured, to $137. Subsequently, and before the commencement of this action, defendant and wife mortgaged the said premises to the said Amyett, to secure that portion of the amount assigned to Amyett by plaintiff, together with other indebtedness.

Upon this state of facts defendant claims that the plaintiff cannot recover before a Justice of the Peace; and also that (131) Amyett is a necessary party to the action, asking that the same be dismissed.

The Justice of the Peace gave judgment for plaintiff for the amount claimed, and that the same was a lien upon the house in question. From this judgment defendant appealed.

Upon the hearing, his Honor reversed the Justice's judgment, granting judgment in favor of the defendant, from which the plaintiff appealed.

Seymour, for appellant, submitted:

(1) That the amount claimed was less than $200, and that the Justice therefore had jurisdiction. Const., Art. IV, Sec. 33; Bat. Rev., Lien, etc., Sec. 5.

(2) Plaintiff and defendant, *by consent,* divided the amount due by assignment of part, and so reduced the amount to a less sum than $200. *McRae v. McRae,* 20 N. C., 85; *Fortescue v. Spencer,* 24 N. C., 63; *Waldo v. Jolly,* 49 N. C., 173.

Stephenson, contra, argued:

1. No consent can give jurisdiction. *State v. Roberts,* 2 N. C., 176.

2. A mortgage is only collateral security, and cannot change the nature of the original debt.

3. Two notes aggregate more than $200, secured by a mortgage. Judgment can be taken on the notes before a Justice of the Peace; but the mortgage can only be foreclosed in the Superior Court.

4. A mechanics' lien filed in the Superior Court, can only be enforced therein. Bat. Rev., Chap. 65, Sec. 10; Laws 1868-69, Chap. 206, Chap. 254.

5. Action should have commenced in the Superior Court, and Amyett should have been made a party.

RODMAN, J. 1. As to the jurisdiction of the Justice as affected by the original amount of the debt.

(132) The general rule is plain and familiar. A creditor whose demand against his debtor consists of an account of several items, either for goods sold or for labor done, at different times, each of which is less than $200, although the aggregate amount of the account exceeds $200, may sue before a Justice, for any number of such items not exceeding $200. Each item is, in fact, a separate debt, and there is nothing to forbid a separate action on each. It is true that if a plaintiff wantonly or maliciously should bring a great number of actions on separate items which might have been consolidated, the Court will compel him to consolidate them at his costs.

If, however, the debt, whether it be proved by a written or an oral contract, is an entire one, consisting of but one item, exceeds $200, it cannot be divided so as to give a Justice jurisdiction.

For example, a seller of a horse for $300, cannot divide his account and have two actions before a Justice. Neither can a carpenter who has built a house upon contract for an entire sum for over $200, nor a material man who has furnished materials upon an entire contract.

In this case, although it was stated expressly in order that the question of jurisdiction might be raised for decision, the character of the plaintiff's demand is not stated. We can only presume it, by considering on which party the duty fell of setting forth its character. The demand was on the face of the warrant within the jurisdiction. It lay on the defendant to allege matter to defeat it, as he might have done *prima facie* by showing that the debt was an entire and indivisible one. Not having done so, the presumption is, that it was composed of several separable items. This presumption from the course of pleading is sustained as a fact by the ratification by the defendant of the assignment of a part of the original account to Amyett.

Even if the original debt had been entire, a consent by the defendant to the assignment of a part of it, if given at or before the assignment,

(133) would have been evidence of promises to pay the debts thus severed, and a subsequent ratification is certainly evidence of an assent to the severance for the purpose of jurisdiction. Our conclusion is that the jurisdiction of the Justice is not defeated by this objection.

2. It is contended that the Justice had no jurisdiction because the notice of lien was originally filed with the Clerk of the Superior Court.

We think that no sufficient reason was suggested in support of this

objection. The act (1869-70, Ch. 206, Sec. 4,) requires the claim to lien when under $200 to be filed with the *nearest* magistrate. But it does not confine the jurisdiction to enforce it to such magistrate. On the contrary, the act of 1868-69, Ch. 117, Sec. 7, (Bat. Rev., Ch. 65, Sec. 10) gives jurisdiction in such case to any Justice of the county. Consequently, it cannot be necessary that the Justice before whom application is made to enforce the lien, should be in possession of the *original* notice of lien; a copy from the magistrate with whom it was filed, must be sufficient.

If that be so, there can be no reason why a copy of a notice properly filed with the clerk, will not also suffice. The only reason why the justice who is to enforce the lien, must have a copy of the notice is, because he is required to state in his judgment the date of the lien, and also what property it binds. At least this last seems to be required by the act of 1868-69, Ch. 117, Sec. 9, (in Bat. Rev., Sec. 11,) as well as by reason and convenience.

3. A more serious question is, whether Amyett should not be a party. If Amyett is a necessary party, without whom full justice cannot be done, the jurisdiction of the Justice is excluded. Because, 1. if he be a party, the Justice must determine in one action a demand for more than $200; and 2. The Justice has no jurisdiction to order a sale of land and distribute the proceeds.

It is said by defendant that Amyett did not waive his statutory lien by taking a mortgage. In the absence from the mortgage of any inconsistent provisions, we concede this. Then it is said that the whole of the subject property may be sold under a judgment in (134) favor of plaintiff, and if it shall bring less than the whole lien, the plaintiff will obtain a preference to the prejudice of the equal *pro rata* claim of Amyett. This we think can only be so through laches on the part of Amyett. By Sec. 9 of Bat. Rev. above cited, the execution of the Justice's judgment is to be enforced, so far as is material to the present question, like other Justices' judgments. The judgment of the Justice containing the required particulars may be docketed in the Superior Court, and an execution in the nature of a *venditioni exponas*, with a *fieri facias* clause may issue, under which the subject land will be sold, and the proceeds will be distributed under the direction of the Superior Court, where Amyett may make his claim. The possible inconveniences are no greater than frequently occur, where there are several judgments of contemporaneous lien against an insolvent debtor, and the inconvenience furnishes no argument against the jurisdiction of the Justice.

PER CURIAM. Judgment of the Superior Court reversed; and as enough does not appear on the record to enable this Court to give judgment, the action is remanded to be proceeded in, in conformity to this opinion. The plaintiff will recover costs in this Court.

Cited: Hawkins v. Long, 74 N.C. 783; *Jarrett v. Self,* 90 N.C. 479; *Kearns v. Heitman,* 104 N.C. 334; *Kornegay v. Steamboat Co.,* 107 N.C. 117; *McMillan v. Williams,* 109 N.C. 255; *Copland v. Tel. Co.,* 136 N.C. 12; *Mayo v. Martin,* 186 N.C. 6; *Allison v. Steele,* 220 N.C. 326.

(135)

K. MURCHISON, GUARDIAN, v. JAMES H. AND JUNIUS S. WILLIAMS, EXECUTORS, AND OTHERS.

A docketed judgment is a lien upon the lands of the debtor, although it does not divest the estate out of the debtor, nor does it make the land primarily liable for the debt, though the lien exists.

And where the debtor dies, the land descends to the heirs subject to the lien; which lien, however, is subject to the right of the heirs to have the debt paid by the personal property, if there is enough for that purpose; if there is not enough to pay the debt, then the land may be sold for assets by the administrator.

CIVIL ACTION, application for relief, in nature of a *sci. fa.,* heard by his Honor, *Judge Buxton,* at Spring Term, 1874, of HARNETT Superior Court.

The facts as stated by the presiding Judge and transmitted to this Court are:

"The plaintiff had recovered a judgment in Harnett Superior Court against John C. Williams, the testator of the defendants, the executors, in his lifetime, on the 9th August, 1869, which was duly docketed in the office of said Court on the same day. Execution issued 28th February, 1870, returnable to Fall Term, 1870, and was returned, levied on several tracts of land belonging to the defendant in the execution. Date of levy, 10th March, 1870. There was no sale.

"John C. Williams died in January, 1873, after making a partial payment upon the judgment, and leaving a last will and testament, which was duly proved, and the defendants, James H. and Junius S. qualified as executors. They, together with the other defendants, are heirs-at-law.

"There is still a large balance due on the judgment, to enforce the collection of which these proceedings are instituted; the plaintiff seeking

to enforce the lien on the lands, created by docketing the judgment and execution levied in the lifetime of the testator by means of an execution *fi. fa.* or *ven. ex.*, now to be issued by leave of the (136) Court, after notice to the defendants.

"This application the defendants resist on the ground that there are other debts besides that of the plaintiff, to pay which a sale of the land will be necessary, and that the executors have already filed a petition for that purpose, to make lands assets, in the Superior Court, before the Clerk, which proceedings are now pending, and which they insist is the proper course to be pursued under existing laws. The question of lien acquired by the plaintiff is submitted to the decision of the Court.

"His Honor was of opinion, after argument, and so decided, that the judgment of the plaintiff docketed in the lifetime of the testator, John C. Williams, and still in force as to the balance due thereon, created a lien upon the lands levied on, which was still subsisting and valid, being a debt against his estate, entitled to the priority secured by law to debts of the fifth class mentioned in Battle's Revisal, Chap. 45, Sec. 39, p. 403.

"His Honor was further of opinion, and so decided, that in view of the provisions of the law, contained in Bat. Rev., Chap. 17, Sec. 319, (corresponding section of the C. C. P.,) that this lien upon the lands of John C. Williams, affecting the heirs, should be administered and provided for by the executors in the mode which they were adopting, viz.: by application to the Superior Court before the Clerk, for the purpose of making the lands assets. See Bat. Rev., Chap. 45, Sec. 61; and that it would be the duty of the executors to apply the proceeds of the sale of the lands when realized to the payment of the debts of the testator, having due regard to existing liens of the plaintiff and other *ante mortem* judgment creditors, of which there were several besides the plaintiff.

"His Honor was further of opinion, and so decided, that the present proceedings, so far as they affected the lands in the hands of the heirs, were premature, the three years after granting letters testamentary, referred to in Bat. Rev., Chap. 17, Sec. 319, not having elapsed, and the executors consequently not yet guilty of laches, espe- (137) cially as they had commenced proceedings to subject the lands to the payment of the debts of their testator.

With which rulings of his Honor the plaintiff being dissatisfied, appealed.

Busbee & Busbee, for appellant.

B. Fuller and Ray, contra.

READE, J. A docketed judgment is a lien upon the lands of the debtor, by statute, C. C. P., Sec. 254. How, if at all, it differs from the lien of a judgment before that statute, it is not necessary to discuss. It certainly does not divest the estate out of the debtor, but it does constitute it a security so as to enable the creditor by proper process to subject it to the satisfaction of his debt. But still we suppose that the land is not primarily liable, although the lien exists, for if the creditor sue out execution it must run against the personal property first.

And so if the debtor die, as in our case, the estate not being divested out of him, descends to his heirs, subject to the lien, it is true, but then that lien is subject to the right of the heirs to have the debt satisfied and the lien discharged by the personal property of the debtor in the hands of his representative, if there be a sufficiency for that purpose. If there be not a sufficiency of personal property, then the land may be sold for assets by the administrator.

The result is, that when a debtor dies against whom there is a judgment docketed, his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the whole estate is to be administered just as if there were no judgment; that is to say, the personal property must be sold if necessary and all the personal assets collected, and out of these personal assets *all* the debts must be paid if there be enough to pay all, as well docketed judgments as others.
(138) If there is not enough to pay all, then they are to be paid in classes, docketed judgments being the fifth class, to the extent of their lien, which is the value of the land. Bat. Rev., Chap. 45, Sec. 40, Class 5.

If there is not enough personal assets to pay all the debts, then the administrator or executor must sell the land. And if anything remains unpaid of a docketed judgment which was a lien upon the land, then if the personal assets have paid upon the judgment as much as the value of the land, and there still remains a balance due upon the judgment, it does not continue to be a lien upon the land, but takes its place with the other debts against the estate under the *"seventh class."* Bat. Rev., Chap. 45, Sec. 4, Class 7.

But if the amount paid on the docketed judgment out of the personal assets is less than the value of the land on which it is a lien—as if the judgment be $1,000 and the value of the land $500, and only $400 be paid out of the personal assets, leaving $600 balance due upon the judgment, then $100 only of the balance is still a lien upon the land and the other $500 of the balance is not a lien upon the land or the proceeds of its sale, but takes its place with the other debts in the "seventh class." In other words, the only advantage which a docketed judgment has

over other debts is to the extent of the value of the land upon which it is a lien. In this way the creditor gets the advantage of his lien by having it satisfied out of the personal property as far as that is sufficient, and out of the land for the remainder. And the heirs or devisees secure their rights to have the personal property subjected as the primary fund for the payment of debts, and they can also secure equality of contribution as among themselves. And the administration of the whole estate is placed in the hands of the administrator or executor, as best it should be, instead of allowing a creditor to break in upon it with an execution and sale for cash at a probable sacrifice, when it may turn out that the personal assets would be sufficient without a sale of the land at all. The only inconvenience that can result to the creditor is the delay, and that is in common with all the creditors, (139) and is as little as it can be made consistent with the interests of all concerned.

The primary liability of personal property for the satisfaction of executions in the debtor's lifetime and in payment of debts after his death, is not adverted to in *Jenkins, Administrator, v. Carter,* 70 N. C., p. 500.

There is no error. This will be certified, etc.

PER CURIAM. Judgment affirmed.

Cited: Aycock v. Harrison, 71 N.C. 435; *Cannon v. Parker,* 81 N.C. 322; *Lee v. Eure,* 82 N.C. 430; *Mauney v. Holmes,* 87 N.C. 432; *Lee v. Eure,* 93 N.C. 9; *Sawyers v. Sawyers,* 93 N.C. 325; *Lilly v. West,* 97 N.C. 278; *Pate v. Oliver,* 104 N.C. 468; *Egerton v. Jones,* 107 N.C. 290; *Gambrill v. Wilcox,* 111 N.C. 44; *Holden v. Strickland,* 116 N.C. 190; *Dysart v. Brandreth,* 118 N.C. 974; *Bryan v. Dunn,* 120 N.C. 39; *Durham v. Anders,* 128 N.C. 212; *Harrington v. Hatton,* 129 N.C. 147; *Barnes v. Fort,* 169 N.C. 434; *Brown v. Harding,* 170 N.C. 267; *Farrow v. Ins. Co.,* 192 N.C. 149; *Moseley v. Moseley,* 192 N.C. 245; *Trust Co. v. Bank,* 193 N.C. 530; *Trust Co. v. Lentz,* 196 N.C. 404; *Stewart v. Doar,* 205 N.C. 38; *Rigsbee v. Brogden,* 209 N.C. 512.

GERARD LEE AND OTHERS v. BLACKMAN LEE AND OTHERS.

It is no objection to a tales juror, that his name does not appear on the jury list, as made out by the County Commissioners; and a challenge for that cause was properly overruled.

On the trial of an issue, *devisavit vel non,* no presumption of fraud, as a matter of law, arises from the fact that one of the legatees was a general agent of

the testator; and the charge of the Court that in such cases fraud was to be determined by the evidence, was correct.

Issue of DEVISAVIT VEL NON, tried before *Buxton, J.*, at Spring Term, 1874, of HARNETT Superior Court, to which it had been removed from the Superior Court of Sampson County.

Pharaoh Lee, the alleged testator, was an aged white man, who lived and died unmarried in the county of Sampson. The paper writing, purporting to be his last will and testament, was offered for probate in the Probate Court of Sampson County, by the propounders, who are colored people and former slaves of the testator, and mentioned as legatees in the will. The caveators are brothers and sisters, and the children of deceased brothers and sisters, heirs at law and next of kin of the testator.

Upon the trial the caveators challenged a person called as a
(140) tales juror for cause. The grounds of such challenge and the facts connected therewith, are fully stated in the opinion of Justice SETTLE. The presiding Judge overruled the challenge, upon which the caveators excepted.

It was admitted that the testator had sufficient mental capacity to make a will at the time of the execution of the paper writing propounded, but the caveators insisted:

1. That the paper writing purporting to be a will had never been duly executed.

2. That if duly executed, its execution was procured through fraud and undue influence, practiced upon and exerted over the testator by the propounders or by some of them.

The evidence was voluminous, and not relating immediately to the points upon which the case was decided, is omitted.

His Honor charged the jury: That the mental capacity of the supposed testator being conceded, only two questions are presented by the evidence and argument of counsel:

1. Was the paper writing propounded as the last will and testament of Pharaoh Lee, duly executed by him in the presence of two witnesses, who subscribed their names in his presence and at his request? His Honor had passed upon this question before allowing the paper to be read in evidence, and had decided that the propounders had made a *prima facie* case. It was for the jury, however, to pass upon the credibility of the witnesses, and the Court charged that if the jury believed the evidence of the subscribing witnesses and of the draughtsman of the will, then all the requirements of the law had been complied with.

2. Was the paper propounded really the last will and testament of Pharaoh Lee, deceased, or was it, through undue influence exercised over him, not his will, but the will of somebody else?

In determining this question, all the circumstances and surroundings attending its execution, were to be considered by the jury. The Court had even allowed the politics of the draughtsman and of the subscribing witnesses to be given in evidence, along with the color of the propounders, and to be made matters of comment, not for the pur- (141) pose of exciting prejudice, but to assist in ascertaining whether it was his will, by showing the points of sympathy between them and the legatees.

Against all feeling of prejudice, the Court cautioned the jury and charged that in this case there is no presumption of fraud in law, growing out of the relations existing between the supposed testator and the legatees, as disclosed in the evidence. That in this case fraud was a matter of proof, an open question of fact, to be determined by the evidence.

His Honor further charged that in cases of wills, fair persuasion is admissible; it is permitted to remind a testator of previous promises made by him, or of past services rendered by the legatee. Undue influence is forbidden. To be undue, the influence must be fraudulent and controlling—such an influence as would cause a man to make a will which he would not otherwise have made.

Upon the request of the caveators, his Honor gave the following special instructions:

"In this case, if the jury believe it, there is evidence of undue influence over the supposed testator, and sufficient evidence to set aside the will, unless the evidence on the part of the propounders turns the scale on their side." To which his Honor added: The propounders have offered counter evidence. It is for the jury to decide between them. The question for them to respond to is, "Is this his will at that time?" If it was at that time not his free, voluntary act and will, but was executed through fear, coercion or improper influence of the legatees, or of others, then the jury will find against it. But if at the time it was executed, it was his free, voluntary act and will, executed just as he wanted it, then they would find in favor of the will, even though they might think from the evidence that he afterwards changed his mind. For if he changed his mind, he should have changed his will, by destroying the old or making a new one, this being the only way the law allows for revocation.

There is no evidence in this case of any revocation with the (142) formalities required by law.

The jury returned a verdict in support of the will. The caveators moved for a rule for a new trial upon the following grounds:

That the Court erred in ruling that the tales juror objected to was competent to set on the trial;

That the Court erred in allowing the will to be read in evidence;

That the charge of the Court that in this case "there is no presumption of fraud in law, growing out of the relation existing between the supposed testator and the legatees, as disclosed in the evidence, in this case, fraud is a matter of proof, an open question of fact to be determined by the evidence," was erroneous, and his Honor ought to have charged the jury that there was evidence of a general agency of one of the legatees for the testator, which would raise a presumption of fraud as a matter of law.

There were other exceptions to the charge of his Honor, which not being entertained by the Court, it is thought unnecessary to repeat.

The motion for a new trial was overruled. Judgment, admitting the will to probate, and appeal by the caveators.

B. Fuller, for the appellants.

Guthrie, contra.

SETTLE, J. On the trial of this issue of *devisavit vel non,* it became necessary for the sheriff to summons tales jurors, which he did by the order of the Court. The caveators, after having challenged three jurors, peremptorily challenged for cause, a tales juror, being a colored man named Anson Bailey, who was examined on his *voir dire.* He was asked by the counsel for the caveators if he had formed or expressed an opinion about this cause. He answered no. The counsel asked him if
(143) he had paid his taxes. He answered yes. He was then asked if his name was on the jury list for the county. He answered no.

Upon this response the counsel for the caveators insisted that Anson Bailey was incompetent to serve as a tales juror, as the county commissioners had not seen fit to place his name on the jury list; that *ex vi termini* "tales jurors" meant just such jurors only whose names were on the regular jury list. His Honor ruled that no proper ground of objection had been shown to the competency of the juror. To this ruling the caveators excepted, and peremptorily challenged the juror, and another was sworn in his place.

It will be observed that according to our present legislation, the qualification of tales jurors are not the same as those required of the regular panel. All on the regular panel must have paid tax the preceding year; and are required to be of "good moral character, and of sufficient intelligence" to act as jurors. (Bat. Rev., Ch. 17, Sec. 229a.) "And that there may not be a defeat of jurors, the sheriff shall by order of Court summon, from day to day, of the bystanders, other jurors being freeholders within the county where the Court is held, to serve on the petit jury," etc. Addenda to Code, Sec. 229. Bat. Rev., page 860.

So, either by accident or design, tales jurors are required to be freeholders within the county where the Court is held, while the regular panel need not be freeholders. The act prescribes the mode in which the jury list is to be made, revised and corrected from time to time. From ought that appears to us, Anson Bailey was an intelligent, moral man, and a freeholder in Harnett County, who had paid his taxes the preceding year. It is true he answered that his name was not on the jury list, and he doubtless supposed that it was not there, and it may or may not have been there. But how could he know how the fact was? How many men in a county could tell, when suddenly called upon, whether their names are in the jury box or not? A name may have been there last year, and yet may not be there now, or *vice versa*, depending upon such additions or subtractions as the commission- (144) ers may make in the jury list. This mode of testing the qualifications of jurors is utterly impracticable. To carry it out effectually, would require the constant attendance of the county commissioners in Court with the jury list, to ascertain whether the names of talesmen were on their jury list or not.

The statute is directory to the sheriff to summons of the bystanders, moral and intelligent men, who have paid their taxes the preceding year, and who are freeholders within the county where the Court is held.

And it is of the utmost importance, in fact essential to the administration of justice, that none but good men be called to serve upon juries.

If a talesman be summoned who is deficient in any one of these qualifications, he may be challenged for cause; and then the challenging party should assign and show cause, as in other challenges for cause; but we do not concede that the mere fact that the name of an intelligent, moral man, who is a freeholder, and has paid his tax, cannot be found on the jury list, is a good cause of challenge.

His Honor instructed the jury "that there is no presumption of fraud in law growing out of the relation existing between the supposed testator and the legatees, as described in the evidence; that in this case fraud is matter of proof, an open question of fact to be determined by the evidence."

The caveators except to this charge, and insist that his Honor should have instructed the jury "that there was evidence of a general agency of Calvin Lee for Pharaoh Lee, the supposed testator, which would raise the presumption of fraud, as a matter of law."

The authority relied upon to support this position is *Lee v. Pearce*, 68 N. C., 76, where it is said, "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 dealings between the parties on the complaint of the

(145) 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."

But this doctrine has never been understood as applying to wills. To so apply it would raise a presumption against every will in favor of a child, a wife, a father or other relative, and would defeat probably one-half of the will propounded for probate.

Let it be remembered that this presumption of fraud in transactions between persons occupying certain fiduciary and confidential relations, is an emination from the Courts of equity and not from the Courts of law; and as an issue of *devisavit vel non,* always had to be tried at law, this presumption never applied to wills.

Mr. Adams says, at page 176, "the avoidance of transactions on the ground of fraud is a copious source of jurisdiction in equity. With respect to fraud used in obtaining a will, this jurisdiction does not exist."

We think that the other exceptions of the caveators do not require comment.

Let it be certified that there is no error, etc.

PER CURIAM. Judgment affirmed.

Cited: S. v. Ragland, 75 N.C. 13; *S. v. Whitley,* 88 N.C. 691; *S. v. Carland,* 90 N.C. 673; *S. v. Hargrove,* 100 N.C. 485; *S. v. Fertilizer Co.,* 111 N.C. 660; *In re Craven,* 169 N.C. 570; *In re Allred's Will,* 170 N.C. 158.

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(146)

STATE v. ALBERT THOMASON.

An indictment charging the defendant with stealing "two five dollar United States Treasury notes, issued by the Treasury Department of the United States Government, for the payment of five dollars each, and the value of five dollars:" *Held* to be good.

INDICTMENT FOR LARCENY, tried at the Spring Term, 1874, of ROWAN Superior Court, before *Cloud, J.*

The defendant was charged with stealing certain bills of our national currency, United States Treasury notes and fractional currency notes.

Upon the trial the Court charged the jury that the national currency, bank notes, were not sufficiently described in the indictment, and that the jury was not to consider them in rendering their verdict; that there was no evidence that defendant had stolen any such fractional currency

as described in the indictment, and left it to the jury to say, from the evidence, whether the defendant had stolen the United States Treasury notes as charged therein.

There was a verdict of guilty. Motion in arrest of judgment; motion disallowed. Judgment and appeal by defendant.

McCorkle & Bailey, for defendant.
Attorney General Hargrove, for the State.

BYNUM, J. The defendant is charged in the bill of indictment with stealing "two five dollar United States Treasury notes, issued by the Treasury Department of the United States Government, for the payment of five dollars each, and of the value of five dollars each," etc.

The motion in arrest of judgment is not because the description of the notes is insufficient, but that it is no offence at all, because it is not made such by our statute. Bat. Rev., Chap. 32, Sec. 19. The language of this section is: "Treasury warrant, debenture, cer- (147) tificate of stock, or other public security, or certificate of stock in any corporation, or any order, bill of exchange, promissory note, bond, or other obligation, either for the payment of money, or," etc.

The words of this statute are sufficiently comprehensive to embrace this case, and as this class of "public securities" is in universal use, and the principal medium of commerce and measure of values, the Court would be slow to restrict the meaning of the statute, so as to leave unprotected that which is practically the chief wealth of the country. But in the case of the *State v. Fulford,* 61 N. C., 563, we have a construction of this statute which is decisive of the case. It was there held to be larceny to steal "one promissory note issued by the Treasury Department of the Government of the United States, for the payment of one dollar," and that the offence set forth in that language was sufficiently certain as to description.

The objection, that these "treasury notes" are a class of securities created since the enactment of the statute, and are not embraced in it, has no force, since the objection would equally apply to *all* bonds, promissory notes or property, issued or acquired since the statute.

No error.

PER CURIAM. Judgment affirmed.

Cited: S. v. Burke, 73 N.C. 89; *S. v. Bishop,* 98 N.C. 776.

STATE v. JOHN ALLEN KETCHY.

There is no provision of the law requiring the Clerk of this Court to certify to a Court below the *opinion* as distinguished from the *decision* of a case.

PETITION for a *certiorari* filed by defendant at this Term, praying that the judgment and other proceedings in ROWAN Superior Court be certified to this Court.

(148) The facts upon which the defendant's application is founded are fully set out in the opinion of the Court.

J. M. McCorkle, for the petitioner.

Attorney General Hargrove, contra.

READE, J. The defendant was convicted and sentenced to be hung. From that judgment he appealed to this Court, which at its last term declared that there was no error in the conviction, and directed it to be so certified to the Court below in order that the Court below might proceed to judgment and execution. The Clerk of this Court did, under his hand and seal of office, certify to the Court below the *decision* of this Court; and also enclosed with the certificate a copy of the opinion of this Court as drawn out at length by one of its Justices; but to this copy of the *opinion* there was not either the signature of the Clerk or the seal of his office. And at the last term of the Court below when judgment was prayed against the defendant, he made the objection that the Court could not proceed to judgment, because the *opinion* of this Court had not been certified as the law required. His Honor overruled the objection and pronounced judgment. The defendant prayed an appeal, which was refused. And the defendant files a petition in this Court for a *certiorari*.

The only question presented is, whether it was necessary that the *opinion* as distinguished from the *decision* of this Court, should have been certified by the Clerk of this Court to the Court below.

Revised Code, Chap. 33, Sec. 6, provides, "That in criminal cases the decision of the Supreme Court shall be certified to the Superior Court from which the case was transmitted, which Superior Court shall proceed to judgment and sentence agreeable to the decision of the Supreme Court and the laws of the State."

It will be noted that it is the *decision* that is to be certified.

It is further provided, Rev. C., Chap. 33, Sec. 16, that "the (149) Judges of the Supreme Court shall deliver their opinions or judgments in writing, with the reasons at full length upon which they are founded, . . . which shall afterwards be filed among the records of

the Court and published in the reports of the decisions made by the Court."

Here will be noted the distinction between the *opinions* of the *Judges* and the *decisions* of the *Court.*

Sometimes each Judge delivers an opinion, and sometimes there are dissenting opinions, all of which must be "in writing, with the reasons at full length;" and they must be published with the Reports—evidently for general information. But the *decision* is simply the *result* arrived at by the *Court,* and is usually indicated by a *per curiam,* stating such result.

That it was not intended by the statute to have the *opinion* certified in criminal cases, or in any case decided by this Court where there has been an appeal from a trial or upon a final hearing below, is apparent from the fact that while in all such cases it directs the *decision* to be certified, yet in Section 14, in appeals from interlocutory orders it is directed that the *opinion* shall be certified "with instructions," etc.

It would seem therefore that it is necessary to certify the *decision* only. And that was done in this case.

Although this is so, yet if we could see that by possibility the defendant might have been deprived of any right, we would *in favorum vitoe* grant the *certiorari,* the only effect of which would be to have certified to us a record which we have already pronounced free from error, that we might again direct our *decision,* together with the *opinion,* to be certified to the Court below, to the end that there should be judgment and execution. But we do not see any possible injury that could have resulted to the defendant, and he does not allege in his petition that any injury did result; nor does he allege any advantage which would or might have resulted to him if the opinion had been certified.

We are informed by our Clerk that it is his habit, in criminal cases, to send a copy of the opinion with the decision, and to certify both; and that his failure to certify the copy of the opinion sent (150) in this case was an oversight. We commend the habit; as we can see that when a *venire de novo* is awarded, the opinion may be useful on a second trial which may come off before the publication of the reports. But in this case no injury to the defendant or inconvenience to the Court could have resulted from the oversight of the Clerk.

PER CURIAM. The application for a *certiorari* is refused.

COMMISSIONERS OF THE TOWN OF HERTFORD v. T. E. WINSLOW.

Where, in 1758, the owner of a certain tract of land in Perquimans County, "signified to the Governor and Council and Assembly, his free consent, by certificate under his hand and seal, to have 100 acres of said land laid off for a town, and 50 acres for a town common;" and thereupon an act was passed appointing directors and trustees to lay off the land into lots, etc., and another act in 1773, to regulate said town, etc.: *It was held*, that this act of the owner, together with the acts mentioned, had the effect to vest the beneficial interest in the town of Hertford, which interest the Court will not permit to suffer or be defeated by any break in the office of directors, or by their being called by another name, but will recognize the present officers or appoint others, if necessary, to preserve the estate.

CIVIL ACTION for the recovery of two town lots, tried before *Albertson, J.*, at the Fall Term, 1873, of PERQUIMANS Superior Court.

The following is the case settled and sent up to this Court by his Honor, the presiding Judge:

The plaintiff claimed the land lying between Church Street and the river, and north of the lots Nos. 151 and 15. In support of the title of the plaintiff, a private act of the Governor and Council and Assembly, ratified 28th April, 1758, entitled "An act for establishing a town
(151) on the lands of Jonathan Phelps, on Perquimans River;" and also an act of the first session of the Assembly in the year 1773, entitled "An act for regulating the town of Hertford and for other purposes," and an act passed January 31st, 1843, entitled "An act for the better government and the regulation of the town of Hertford," were read as evidence.

The records of the directors of the town showing that on the 13th November, 1758, one hundred and thirty-one lots were drawn in accordance with the act of Assembly of 1758, also the receipts of Jonathan Phelps for £198, in payment for 98 lots so drawn for, were introduced on the part of the plaintiffs and read as evidence.

It further appeared, in support of the plaintiffs' claim, that on the first Thursday in March, 1843, an election was held at the court house in Hertford, according to the said act of 1843, and that three of the citizens of the town were elected to act as a Board of Commissioners, who duly qualified as such in April, 1853, and the Board was then thus organized, and that annual elections have since been held for the same purpose, and that the present Board was duly chosen and organized in April, 1873.

An ancient map of the town was also introduced as evidence, but the paper attached thereto was excluded. The lands in controversy, as shown by this map, lies between lots No. 15 and 16. In 1846 the Commissioners of the town, as appears from their records, surveyed and sold

lots Nos. 151, 152, 153, 154 and 155 from land that had not been drawn and sold off in town lots, and which appeared from the map to have been designated "town commons." No dedication of the land to the public for a common or commons, or any evidence pertaining thereto, was introduced, if it existed.

Plaintiffs also introduced a deed from one Jos. Parks to John Clary, of date November 15th, 1796, conveying lots 1 and 15, and all the right, title and demand *he might have* to all commons, etc., adjoining the same; also a deed from Jno. Harvey and Wm. Skinner for (152) lot No. 16 to John Clary, dated June 26th, 1802, and conveyances of lots No. 1, 15 and 16, regularly down to the defendant, all conveying the commons belonging or attached to said lots, either directly or by reference to preceding deeds in which said commons was conveyed.

It was in evidence that for over fifty years John Clary and his successors, owning said lots, used and occupied a warehouse situated on the river, north of lot No. 15 and close up to the float bridge; that sometimes the whole space north of and between No. 15 and the river was enclosed and sometimes not enclosed; that sometimes wharfage was charged by the occupants, but when resisted the charge was abandoned; and that the public used the wharf whenever they so pleased.

There was no evidence offered that the plaintiffs ever laid claim to the wharf before the bringing of this suit, nor that their predecessors claimed the warehouse or used the commons attached to these lots other than as a part of the public as before stated. It was proved that for more than fifty years John Clary had a negro house on or near the spot whereon the defendant's store now stands, and a short distance south of this he once erected a distillery and kept it in operation for some time. Also, that the lands north of lot No. 15 was for a long time used and occupied as a fishery.

Defendant, without the introduction of any evidence, asked the Court to instruct the jury that the plaintiffs were not entitled to recover upon their own testimony.

Whereupon his Honor instructed the jury that the plaintiffs had not shown any title in themselves, as successors of the "Directors of Hertford," to lay off the town under the act of Assembly offered in evidence, and they had shown no title in themselves by possession of the property in dispute; nor had they shown any other title in themselves in any other manner which entitled them to recover against the defendant.

Verdict and jugdment for the defendant, from which plaintiffs appealed.

Gilliam & Pruden, for appellants. (153)
Smith & Strong, contra.

READE, J. The case does not present the facts very clearly and the plaintiffs were not represented in this Court by counsel, and it may be that we have misapprehended the points intended to be presented. His Honor simply charged the jury that the plaintiff could not recover upon his own showing.

It seems that the land in controversy prior to 1758 belonged to Jonathan Phelps, and that he "signified to the Governor and Council, and Assembly his free consent by a certificate under his hand and seal to have one hundred acres of said land laid off for a town and fifty acres for a town common." And thereupon the Governor and Council and Assembly passed an act appointing "directors and trustees" to lay off the land into lots, streets, etc., reserving a portion for the court house and other public buildings, and to establish the town of Hertford, all of which seems to have been done. The effect of this act in concurrence with Phelps, who received from the "directors and trustees" the price agreed on, was to vest the estate in said directors and trustees, for the use of the town of Hertford, which, by virtue of said act, was made a corporation. *Commissioners v. Boyd,* 23 N. C., 196.

There have been subsequent acts recognizing the corporation and regulating it, the last of which was in 1842-43, authorizing the Commissioners of said town to lay off and sell lots, etc., which was done.

These acts, with the concurrence of Phelps, had the effect to vest the beneficial interest, at the least, in said land in the town of Hertford. And if there has been at any time a break in the office of directors or trustees, or if the same have died, or if the officers of the town have been called by some other name, still it can make no difference, as the Court will not allow the beneficial interest of the town to suffer thereby, but will either recognize the present officers or appoint new trustees.

It appears in the case that the plaintiff offered evidence to
(154) show that the defendant had for a long time occupied and claimed a portion of the said lands under a deed from some person. The object of proving this by the plaintiff is not stated. We at first supposed that it might have been misstated, the plaintiff for the defendant who was claiming by adverse possession under color; but the case states that the defendant offered no evidence. At any rate, if the defendant has title he can show it upon another trial.

There is error. This will be certified to the end that there may be a *venire de novo.*

PER CURIAM. *Venire de novo.*

EDWARD CANTWELL v. COMMISSIONERS OF NEW HANOVER.

Solicitors, before the passage of the Act of 1873-74, Chap. 170, were entitled to the fees allowed by the Rev. Code, Chap. 102, Sec. 14; and in cases of insolvent defendants, the County Commissioners were required to pay them.

CIVIL ACTION against the County Commissioners commenced in the Court of a Justice of the Peace and tried by *Russell, J.*, at Chambers in NEW HANOVER County, January 13, 1874.

It was admitted on the trial that the plaintiff is the Solicitor for the State in the 4th judicial district, and that he prosecuted the action in which the account for fees herein sued for to conviction. It was further admitted that the defendants in said action were insolvent, and that the fees could not be collected from them, and that as to such insolvent fees, the Commissioners stand in the place of the County Court.

The Commissioners contend that by law they are not liable to the Solicitor for his insolvent fees.

The Justice of the Peace gave the plaintiff judgment, from which the Commissioners appealed to the Judge of the district. He affirmed the Justice's judgment, when the defendants again (155) appealed.

Attorney General Hargrove and London, for appellants.
E. G. Haywood, contra.

BYNUM, J. The 11th Sec., Ch. 81, of the acts of 1870-71, repeals the act of 1868, fixing the fees of Solicitors, and restores Sec. 14, Ch. 102 of the Rev. Code, which latter act is now in force and establishes the fees of the Solicitors.

If this act had to be construed by itself, we should not hesitate to declare our opinion to be that the Solicitor was entitled to no fee, except upon the conviction of the defendant to be paid by him only. But the Revised Code is but a single statute, and Sec. 8, Ch. 28 thereof provides, that "where the defendant, if convicted, shall be insolvent and unable to pay costs, the officer entitled to fees in said prosecutions, shall render to the County Court an accurate fee bill, enumerating the costs due him, and the County Court shall order the county trustee to pay them," with a proviso giving sheriffs and clerks half fees, except in certain cases.

As Solicitors are certainly entitled by law to fees on conviction of defendants, this section of the act embraces them, and must have effect, unless it is controlled by Sec. 14, Ch. 102, Revised Code.

Both sections being in *pari materia,* must be construed together and reconciled, if possible, by giving effect to each. This we think can be done.

Sec. 8, Ch. 28, was manifestly intended to supply the omission in Sec. 14, Ch. 102, to provide any compensation to Solicitors, where the defendant was insolvent. Hence the language and the idea are unmistakable, "where the defendant, if convicted, shall be insolvent, the County Court shall order the county trustee to pay them." Unless this construction is given to Section 8, that section has neither efficacy or meaning. But the Court cannot refuse to give effect to a plain provision of the law, which has been on our statute book for many
(156) years, and very generally acted upon in the judicial circuits, according to this construction.

The Legislature of 1873-74 evidently put this interpretation upon the several acts, and by Sec. 1, acts of 1873-74, Ch. 170, cut down the fees on insolvents to half fees to the Solicitor. So the question raised here has no importance except in this particular case, as the latter act clearly fixes the fees, and by whom they are to be paid.

There is no error.

PER CURIAM. Judgment affirmed.

COMMISSIONERS OF EDENTON v. G. W. AND WM. R. CAPEHEART.

A defendant cannot, by demurrer, avail himself of a defence denying his violation of a town ordinance. The averments of the complaint as to such violation, in the absence of an answer, must be taken as true.

The private Act of March, 1870, Chap. 123, gives the Commissioners of the town of Edenton power to tax *all* persons who pack and ship fish, etc., from said town, whether residents or not.

CIVIL ACTION tried at the Spring Term, 1874, of CHOWAN Superior Court, before his Honor, *Judge Albertson.*

This action, for the recovery of a penalty under a town ordinance, was brought at first in a Justice's Court, and judgment rendered against the defendants, who appealed to the Superior Court. The defendants, citizens and residents of the State, though not of the
(157) town of Edenton, were owners of a fishery on Albemarle Sound, and pack large quantities of fish on ice in boxes and ship them fresh. The fish are brought ready boxed and iced from their fishery in small boats and vessels which connect with steamers at Edenton, upon which they are carried to northern markets. Sometimes the

fish are hoisted from these small boats immediately to the decks of the steamers, but are more frequently landed from these boats upon a wharf within the corporate limits of said town, and from that wharf to the steamers.

The Commissioners of the town of Edenton, by virtue of its charter, amended and re-enacted March, 1870, Chap. 123, Sec. 14, Private Laws of that session, are empowered to annually levy and collect the following taxes. Every person, firm or company, who buys and sells, packs, ships or re-ships, within the limits of said town, shad, herring or other fish, if a resident of the State, shall pay a tax not exceeding twenty-five dollars.

The charter further provides on failure of the person so liable to be assessed, to list the subject or property according to the provisions of the act, a double tax shall be collected by warrant in the name of the Commissioners before the Mayor, or a Justice of the Peace.

The lawful authorities of said town levied a tax of ten dollars on the defendants, and upon their refusal to pay recovered judgment in double the amount.

On the trial before his Honor it was contended for the defendants that they were not liable to the tax, because,

(1) They are not residents of said town;

(2) They did not ship or re-ship fish in the town of Edenton, as contemplated by the act, but that when they used the wharf as above recited, it was only as a means of reaching the steamers.

His Honor holding with defendants on the foregoing points, gave judgment dismissing the action, from which judgment the plaintiffs appealed.

A. M. and J. A. Moore, for appellants. (158)
No counsel contra in this Court.

RODMAN, J. We find it convenient in considering the points of defence to reverse their order. The second point, is that what defendant did did not amount to a shipping of fish from the town within the meaning of the ordinance and act authorizing it.

The case states that the action was tried upon demurrer. No answer appears to have been made before the Justice, and none could be made in the Superior Court because the appeal was by the defendant from a judgment for less than $25, in which case the finding of the facts by the Justice is final. C. C. P., Secs. 539-540.

The demurrer of course admitted all the facts averred in the complaint. The complaint alleges that defendant violated ordinance No. 43, made under Section 14 of the act of 28th March, 1869. Upon the

authorities, this is a sufficient averment that defendant did some act by which under that act and ordinance he become liable to a town tax, e. g., shipped fish from within the town. *Watts v. Scott,* 12 N. C., 291. If the defendant had meant to put in issue that what he did, was not a shipping of fish within the ordinance as properly understood, he should have answered, either stating specially what he had done, and denying that he had otherwise acted in violation of the ordinance, or have defended generally, and procured the Justice to find the special facts. In either of these ways the question of law could have been presented to the Superior Court, whether the acts of the defendant brought him within the ordinance. But as the case is, whether by a demurrer before the Justice, the defendant admitted the facts alleged or upon a general traverse the Justice found that he had done the acts alleged, in either aspect, the question of fact as to his having "shipped fish," etc., was not open in the Superior Court. On the second point for the defence, therefore, viz: that defendant had not shipped fish within the meaning of the ordinance and act of 1869, we think (159) it is not open to the defendant to deny it, and that he is concluded by the proceedings before the Justice.

2. The first point of the defence is that he was a non-resident of the town, and therefore not bound by the town ordinance.

We have had some difficulty in coming to the conclusion that this defence is open to the defendant upon the pleadings. But we consider that it is. If the ordinance had been confined by its terms to residents of the town, then upon the authorities the general averment in the warrant that defendant became liable to the tax, would have included by implication, an averment of every fact necessary to constitute the liability, including the fact of residence. *Watts v. Scott,* 12 N. C., 291. But, as by its terms, the ordinance is applicable to all persons who ship fish from within the town; if by law residence is necessary to give the town jurisdiction, the complaint should contain an express averment of that fact, which it does not. The defendant is therefore at liberty to contend that the complaint is defective in not containing an averment of his residence within the town, and thus to present the question whether residence is necessary to make him liable to the tax.

The act of Assembly gives to the Commissioners of the town power to tax all persons who ship fish, etc., from within the limits of the town, and the ordinance is equally general and extensive. Neither are in their terms limited to residents in the town. If therefore, the proposition of the defendant is correct, it can be only because the Legislature has not the power to give to a town authority to tax persons who do business within it, by reason of that business, unless they also reside within the town; or because such an authority would be so mani-

festly unjust, that it cannot be supposed that the Legislature meant to confer it, if the act be susceptible of any other possible construction.

Undoubtedly it is true as a general rule that a corporation can impose a personal tax on its own members alone, and membership of a town corporation is constituted in this State, by simple (160) residence in the town and not otherwise. But this is not inconsistent with a power in the town to tax property within it owned by non-residents, or to tax persons who do any given kind of business within the town, for the privilege of doing that business, although they do not, strictly speaking, reside in it. These have the benefit of the streets and wharves and other conveniences of the town as far as they are needed for the business, as fully as residents do, and there can be nothing inequitable or unreasonable in putting upon them in respect to that business, the same burdens which are borne by all others who carry it on. The principle contended for would go to the length of enabling a tradesmen or shopkeeper, all of whose business is done in a town, to escape a town tax on the business by merely having his dwelling beyond the town limits. It would also deprive towns of the right to tax travelling showmen and other itinerant dealers, and would be necessarily prejudicial to towns as disparaging their own population to the benefit of non-residents.

We are not aware of any authority for the principle contended for, and there are several cases in direct opposition to it. In *Comm'rs. v. Roby,* 30 N. C., 250, the Chief Justice says "It is settled that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation," and it was held that a transient trader was liable to a tax on traders. See also *Comm'rs. v. Pettyjohn,* 15 N. C., 591; *Whitfield v. Longest,* 28 N. C., 368.

In this last case, NASH, J., for the Court, says "All who bring themselves within the limits of the corporation are, while there, citizens so as to be governed by its laws." He cites and approves *Pierce v. Bartram,* Cowp., 269; *Village of Buffalo v. Webster,* 10 Wend., 99. See also *Worth v. Comm'rs.,* 60 N. C., 617. We think there was error in the judgment below, which is reversed, and the demurrer overruled.

(161) Ordinarily when a demurrer is overruled, the case is sent back to the Superior Court to allow the defendant to answer; but in the present case, as the facts cannot be tried over again, (C. C. P., Secs. 539, 540.) there would be no use in remanding it.

PER CURIAM. Judgment for plaintiff.

Cited: S. v. Denson, 189 N.C. 175.

B. D. HOWELL, ADM'R., ETC., v. J. J. HARRELL.

It is an object in every system of procedure to have cases heard and determined upon their merits. Therefore, a party has a right to move to set aside a judgment rendered against him within a year; and if that motion is abandoned for another proceeding, which is also given up, the whole proceedings may be considered as a continuation of the original motion.

MOTION to set aside a judgment, heard by *Moore, J.*, at the Fall Term, 1873, of MARTIN Superior Court.

At .... Term, 18__, a judgment was entered in favor of the defendant against the plaintiff. Thereafter and within the year, the plaintiff gave notice, under Sec. 133 of the Code, of a motion to be made in this Court to set the judgment aside. This motion was heard at Fall Term, 1871, when the Judge being of opinion that a civil action, and not a motion on notice, was the proper remedy, suggested to the plaintiff to adopt that mode.

At that term the docket entry is, "motion dismissed at plaintiff's costs," but neither that nor any memorandum of a judgment was signed by the Judge.

Plaintiff instituted a civil action, which was at the return term dismissed, on the ground that the former proceeding by motion on notice was the proper and only mode of redress.

(162) At this term, all the parties being before the Court, the plaintiff moved to reinstate upon the docket the cause as it was pending upon the original notice. Upon the hearing of this application, his Honor refused the motion, expressly upon the ground that he had not the power to grant it. From this judgment of the Court, the plaintiff appealed.

No counsel for appellant in this Court.

J. A. and A. M. Moore, contra.

RODMAN, J. It is an object in every system of procedure to have cases heard and determined upon the merits. If in any given case this cannot be done, it goes either to the discredit of the system or of its administration.

In the present case the plaintiff moved to set aside a judgment which had been obtained against him by surprise, etc., under C. C. P., Sec. 133. The motion was made in due time, and as a procedure was right; in deference to the opinion of the Judge on the form of the application, he abandoned it and commenced a civil action which the Judge considered wrong as to form; in deference to the Judge he abandoned this

application and moved to reinstate his original motion, which, as more than a year had passed since the judgment, the Judge considered he could not allow. We think that there was no stage of the proceedings at which the Judge could not have heard the application on its merits. The original motion was proper; the civil action, though more formal and expensive than a motion might have been considered a motion without injustice, on making the plaintiff pay any costs incurred through his unnecessary formality. Under the peculiar circumstances of the case, we think we may not improperly consider all the several proceedings as merely stages of the same action. The judgments of the Judge upon the forms of proceeding, as they were expressed, seem to have been in substance and purpose only interlocutory, and although the plaintiff might have treated any one of them as final so as to have appealed from it, yet we think he was not bound to do so until the last, and that his appeal from that brings up the judgments (163) of the Court in the previous stages of the action. This conclusion is sustained by the maxim, "*Actus legis nemini facit injuriam.*" In *Isler v. Brown,* 66 N. C., 506, the County Court had improperly refused to allow the plaintiff to take out execution upon a judgment recovered by him, whereby he failed to obtain a legal lien upon the land of the defendant. This Court held, that as the failure occurred alone by reason of the action of the Court, the plaintiff should not be injured by it, but that equitably his rights were the same as they would have been had he have been allowed to issue his execution when he might lawfully have done so. The present plaintiff commenced his proceeding to annul the judgment complained of in due time, and has constantly prosecuted it. No fault can be imputed to him except his failure to appeal from the first erroneous decision of the Judge, if that be a fault. We think it was an excusable one and not laches, and that he is entitled to have his application heard on its merits. *Critcher v. McCadden,* 64 N. C., 262.

PER CURIAM. Judgment below reversed, and case remanded to be proceeded in conformity to this opinion.

The plaintiff will recover the costs of this Court.

Cited: Gobble v. Orrell, 163 N.C. 494.

MARTHA WILLIAMS AND OTHERS v. ALFRED HOUSTON.

The Court below has no power to permit a Sheriff after a lapse of three years to amend his return on certain executions, thereby changing the levy then made on 950 acres of land, to a levy on 1,800 acres of land.

MOTION to permit a sheriff to amend certain returns, heard and determined by His Honor *Judge Russell,* at Fall Term, 1873, of DUPLIN Superior Court.

(164) The plaintiffs after notice, moved that the Sheriff of Duplin county be permitted to amend his returns on certain writs of *fieri facias* and *ven, exponas,* which had heretofore issued at the instance of the plaintiffs against the defendant, and under which a sale had been made. The amendment moved for consisted in striking out the figures "950" and inserting in lieu thereof "1,800" in the description of the land levied and sold, alleging that by so doing the record would be made to speak the truth.

His Honor refused the motion, on the ground of a want of power in the Court to make such amendments. From the judgment of his Honor refusing the motion, the plaintiffs appealed.

Stallings, for appellants.

Kornegay, contra.

SETTLE, J. A Court has ample power to amend the process and pleadings in any suit pending before it; and also to amend its own record, kept by the Court or Clerk after a suit is determined. But "the power of a Court to allow amendments after the determination of a suit, in the process or returns made to it by ministerial officers, is much more restricted and qualified for the reason, among others, that the Court is not in such cases presumed to act upon its own knowledge, but upon information derived from others." *Phillipse v. Higdon,* 44 N. C., 380.

The record before us is very brief and unsatisfactory; but it appears that the plaintiff, after a delay of three years, seeks, by parol evidence, to make a substantial charge in the levy upon the lands of the defendant by which he will be made to part title with 1,800 acres of land, instead of 950 acres.

The bare statement of the proposition is sufficient to show the wisdom of the rule which restrains Courts from amending returns made by ministerial officers, when substantial rights would be thereby effected;

(165) and not for the purpose of correcting a mere oversight of an officer, in which latter case the power is conceded.

The defendant may have been content to part with 950 acres of his land at the price bid by the plaintiff, and on the other hand the bidders may have been willing to give twice as much, or more, if it had been understood that 1,800 acres were offered for sale instead of 950 acres.

A levy should describe land in such a manner as to notify the defendant and the world of all that it is proposed to sell; and it shocks the sense of justice to take from the defendant, by an amendment of an execution, after a delay of three years, almost twice as much land as he supposed was passing by the sale.

PER CURIAM. The judgment of the Superior Court is affirmed.

ALFRED A. McKETHAN, TRUSTEE, v. DAVID A. RAY AND OTHERS, TRUSTEES.

Section 313, C. C. P., does not confer on parties, who differ as to their rights, authority to propound to the Court, on a case agreed, interrogatories in respect thereto. The purpose of the section is, simply to dispose of the formalities of a summons, complaint and answer, and upon an agreed state of facts, to submit the case to the Court for decision.

The heirs at law of a testator and the devisees of the residuary interest are necessary parties to an action seeking the construction of certain parts of a will.

CIVIL ACTION as to the construction of a will, submitted to *Buxton, J.*, at Chambers, in CUMBERLAND County, March 17th, 1874.

CASE AGREED (166)

The following is a case agreed between the plaintiff and defendants, and submitted in accordance with the provisions of title XIV, Chap. 1, Sec. 315, of the Code of Civil Procedure, for his decision of the questions presented.

The facts in the case are:

Robert Donaldson, of the town of Red Hook, in Dutchess County, in the State of New York, died in the year 1872, leaving a last will and testament, which was admitted to probate in Dutchess County, New York, and a certified copy of the same, under the hand and official seal of the Surrogate of said Dutchess County, has been produced and exhibited before Alexander McPherson, Jr., Judge of Probate for Cumberland County, in the State of North Carolina, and by him has been allowed filed and recorded in accordance with the laws of North Carolina.

It is agreed that the said will of Robert Donaldson was properly executed according to the laws of North Carolina. In said will is a clause deposing of certain real property in Fayetteville, N. C., which said clause is as follows, to wit:

"Ninth. I give and devise to the Presbyterian Church, in Fayetteville, North Carolina, the house and lots, including the lot extending to the creek, which were owned and occupied by my father in his lifetime, situated on Union street, in Fayetteville, and which, by his last will and testament, he devised to me, the same to be used as a parsonage and to be occupied by the pastor of said church."

After making certain other specific legacies, the said will contains the following residuary clause:

"Twelfth. After the payment in full of all the legacies and annuities hereinbefore mentioned, the rest, residue and remainder of my estate shall be divided in five equal parts: 'One-fifth part of which I give and bequeath to the University of North Carolina, located at Chapel Hill, in the said State; one-fifth part to the Trustees of the Theological Seminary of the Presbyterian Church at Princeton, New Jersey; and one-fifth part to the American Bible Society, founded in New
(167) York in the year, 1816; one-fifth part to the American Tract Society of New York, and the remaining one-fifth part to the Board of Foreign Missions of the Presbyterian Church in the United States of America.' "

The plaintiffs and defendants are trustees of the Presbyterian Church in Fayetteville, N. C., duly appointed under the laws of the State of North Carolina. (Bat. Rev., Chap. 101, Religious Societies.) And they hold the property of said church in trust; that beside the church building and lot connected therewith and specially set apart and appropriated to divine worship, the other lands belonging to said congregation, inclusive of the house and lot above mentioned in the testator's will, are *not* of a greater yearly value than four hundred dollars.

Before the above property was devised to said Presbyterian Church, the congregation of said church had purchased and partly paid for a house and lot outside the corporate limits of said town, known as the "Glover House," which was used as a parsonage, and was so occupied at the time of the testator's death and is at present used as such.

For many years before the death of the testator and continuously since up to the present time, one Charles A McMillan has occupied the house given in his will.

In April, 1873, the congregation, by a small majority, directed the property given to them to be sold to McMillan for $1,500. This action gave great dissatisfaction to the minority who opposed the sale; and

the plaintiff, McKethan, one of the trustees, refused to carry out the instructions of the congregation, and threatened to commence a suit against the defendants, his co-trustees, if they did so. The trustees, under the direction of the congregation, agreed to submit the case to the decision of the Court without action.

The following questions are submitted to the Court to decide:

1. Do the words following immediately after the devise to the Presbyterian Church in Fayetteville, viz: "the same to be used as a parsonage and to be occupied by the pastor of such church," annex a condition to the devise, the non-performance of which (168) would divest the estate of said church and cause a forfeiture?

2. Have the trustees (plaintiffs and defendants) the power, under the direction of a majority of the members of the congregation, to dispose of the property as such majority has instructed them?

3. Can the property devised to the church be sold and the proceeds applied, either in whole or in part, in paying the balance due from the congregation for the "Glover House?"

4. Can the property devised be used and occupied by any one else but the pastor of the church? Was it intended by the testator to confine its use and occupancy to that particular person?

5. If the words of the will create a condition, the non-performance of which would cause a forfeiture and divest the estate of the trustees, will the property in that event revert to the next of kin of the testator, or will the residuary legatees take it under the residuary clause in the will?

The prayer of the plaintiff is that the defendants be restrained from selling and conveying the property to McMillan as directed by a majority of the congregation.

If, upon the foregoing facts, the Court shall be of opinion that the plaintiff is entitled to the relief prayed for, a perpetual injunction is to be granted; otherwise, a judgment is to be rendered for defendants.

His Honor delivered the following opinion:

The trustees representing the Presbyterian Church in Fayetteville is a body corporate, whose powers are defined and limited by statute. Chap. 101, Bat. Rev. In these trustees the property devised by the testator to that church became absolutely vested upon the assent of the executors, for the use of the church, according to the intent expressed in the will, and is to be and remain forever to the use and occupancy of the church. Such is the requirements of the act with which it is the duty of the trustees of the church to comply.

The purposes of the devise, as expressed in the will, was: (169) *"The same to be used as a parsonage and to be occupied by the*

pastor of said church." So far as the trustees are concerned, they must do nothing to defeat this purpose. A charity must be accepted upon the same terms upon which it is given, and no agreement of the parishioners can alter or divest it to any other use. Least of all can the trustees violate the law and defeat the will by passing away the legal title to the property, which both the law and the will require them to hold forever for a specified purpose.

There is no question of lapse or forfeiture involved in the case. The devise is absolute, not contingent, expressed in clear terms for a lawful and charitable purpose, to a party capable of taking and enabled and required by law to hold in perpetual succession. The devise is therefore valid, and neither heirs nor residuary legatees have any interest in the matter. The general rule is, if land is given to a corporation for any charitable use which the donor contemplates to last forever, the heir can never have the land back again; if the corporation fails the Court will substitute itself and thus carry on the charity.

The foregoing remarks dispose of all the questions submitted excepting the fourth, relating to the occupancy of the premises devised as a parsonage. Neither the will containing the devise nor the law relating thereto operates upon the pastor or controls his residence. They affect the action of the trustees merely. They are to retain the property to be used as a parsonage, when the present pastor or his successor choose to occupy them; until that contingency occurs there is nothing either in the will or in the law which requires the trustees to keep the property unoccupied, and thus an expense to the church for whose use it was given. A prudent man usually looks out for a good, careful and paying tenant for property which circumstances prevent him from occupying himself. Ordinary prudence is the rule which ought to govern trustees.

The Court being with the plaintiff according to the case
(170) agreed, adjudged that the defendants be perpetually restrained from selling and conveying the premises described, etc., and that they retain title to the same to answer the purposes of the trust declared in the will of the testator, Robert Donaldson.

From this judgment defendants appealed.

Ray and B. Fuller, for defendants.
Guthrie, contra.

PEARSON, C. J. Our construction of Sec. 315, C. C. P. is, that it does not confer upon certain parties who differ as to their rights, to propound to the Court on a case agreed, interrogatories in respect

thereto, but that the purpose is simply to dispose with the formalities of a summons, complaint and answer, and upon an agreed state of facts to submit the case to the Court for decision and thereupon the Judge shall hear and determine the case and "render judgment thereon as if an action were depending."

It follows that all persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in case of an action instituted in the usual way.

The fifth question submitted to the Court for its decision is in these words:

"If the words of the will create a condition the non-performance of which would cause a forfeiture and divest the estate of the trustees, will the property in that event result to the next of kin (heirs at law) of the testator or will the residuary legatees (devisees) take it under the residuary clause?

This interrogatory shows that in certain aspects of the matter in regard to the construction of the will, the heirs at law and the residuary devisees have an interest and of course would not be concluded by a judgment in this case as now constituted, so we are not at liberty to give a judgment unless they be made parties and either enter a disclaimer and put in a condition to be concluded by the (171) record, and have the title settled.

His Honor declares his opinion to be: "There is no question of *lapse* or *forfeiture* involved in the case. The devise is absolute, not contingent, expressed in clear terms for a definite, lawful and charitable use, to a party capable of taking and enabled and required by law to hold in perpetual succession. The devise is therefore valid, and neither heirs or residuary legatees have any interest in the matter."

The estate given by the devise may be an absolute one subject to no conditions or qualifications and subject only to the *charitable use*, "that until the premises are used for a parsonage, the rents are to be applied for the purposes of the congregation," but these are points of construction in which, as we conceive, the heirs and residuary devisees have an interest, and in regard to which they ought to be heard and concluded by judgment, before this Court can take such action as might induce a purchaser to depend upon the title, exposed as it would be to the claims of the heirs at law, or of the residuary devisees.

There is error. The judgment below is reversed and the case will be remanded to the end that the heirs and residuary devisees be made parties, and such other amendments made, as the parties may be advised to move for, and the Court see fit to allow.

The will may admit of several constructions:

1. The testator did not intend to make the donation unless the congregation as a condition precedent, would locate the parsonage upon the premises, making the location of the parsonage the primary purpose.

2. The testator intended to make the donation but to subject the estate to a qualification that the estate should determine when the premises should cease to be used as the parsonage, in other words to create a base or qualified fee, such as we read of in the old books, "to A and his heirs, so long as they are tenants of the Manor of Dale."

An estate clogged with such a burden on free alienation, is not (172) known to our law, and the Courts would be slow to admit it, although it be made to a religious congregation with the best motives imaginable.

3. The testator intended to make the donation, that is a fixed fact—his primary intention; the suggestion as to his purpose in making the donation, being a secondary consideration, and the words do not support the inference of an intention not to make the donation, or to revoke it, unless the premises were accepted and used for that and no other purpose.

We incline to the opinion that the last is the proper construction, and make this intimation for the purpose of calling the attention of the counsel of the parties to the points to be argued, when the case comes before the Court properly constituted in respect to parties and to the judgment demanded.

PER CURIAM. Judgment reversed.

Cited: Overman v. Sims, 96 N.C. 454; *Farthing v. Carrington,* 116 N.C. 325; *Rogerson v. Lumber Co.,* 136 N.C. 269; *Campbell v. Cronly,* 150 N.C. 471; *Herring v. Herring,* 180 N.C. 167; *Burton v. Realty Co.,* 188 N.C. 474; *Bank v. Dustowe,* 188 N.C. 779; *Hicks v. Greene Co.,* 200 N.C. 76; *School Comm. v. Taxpayers,* 202 N.C. 298; *Realty Corp. v. Koon,* 216 N.C. 296; *Bd. of Health v. Comrs. of Nash,* 220 N.C. 144; *Peel v. Moore,* 244 N.C. 514.

STATE AND ROXANA WOODING v. CARR GREEN.

Where a Justice of the Peace neglected, in a proceeding in bastardy, to recognize the defendant to appear at the next term of the Superior Court, but returned the warrant and examination thereto, a *capias* is the proper process to enforce the defendant's appearance, and he is bound to answer upon its return.

PROCEEDING in bastardy, commenced in a Justices' Court, and returned to the Superior Court of JACKSON County, where it was tried before *Cannon, J.*, at Spring Term, 1874.

The facts material to an understanding of the decision of the Court, are substantially as follows:

The defendant appeared at the house of the magistrate upon (173) the return day of the warrant, but there was no Court held, nor was the defendant recognized for his appearance at Court. Afterwards the magistrate returned the warrant and examination to Court, and a *capias* by order of the Solicitor issued, and the defendant was arrested. When the case was called, the defendant moved to be discharged from custody on the grounds that the *capias* had been improperly issued, and that he had been unlawfully arrested.

His Honor allowed the motion, and ordered the discharge of the defendant. The Solicitor appealed.

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

BYNUM, J. The case assumes that all the proceedings of the Justice were regular, up to his failure to take the recognizance required by law for the appearance of the defendant at Court. It was irregular in the Justice not to take, and in the defendant not to give, the recognizance required by law, but the sole purpose of bringing the defendant before the Justice was to secure his appearance at Court to answer the charge. He could make no defence before the Justice, whose duty was merely ministerial, to bind him over to Court, where only he could be heard and make his defence. The defendant knew the charge, and that he must answer it before the very tribunal to which the *capias* brought him. He was therefore *in Court*, however crooked the journey which brought him there, and being there, it was the right and duty of the Court to exercise its jurisdiction and determine the case.

If one charged by indictment comes into the presence of the Court, having jurisdiction, it will, on motion, order him into custody to answer, why then shall the Court discharge from custody an offender who is not only in Court, but there under arrest, to answer the very charge.

Art. I, Sec. 16, of the Constitution, abolishing imprisonment (174) for debt, has no application here, and *capias* was the proper process to bring the defendant into Court. Bat. Rev., Ch. 9, Sec. 3; *State v. Palin,* 63 N. C., 471; 65 N. C., 244; 66 N. C., 648; *State v. Pate,* 44 N. C., 244.

There is error.

PER CURIAM. Judgment reversed and *venire de novo.*

Cited: S. v. Ritchie, 107 N.C. 858; *S. v. Edwards,* 110 N.C. 512; *S. v. White,* 125 N.C. 682.

STATE EX REL. WM. B. HARRIS v. ROBERT C. HARRIS AND OTHERS.

In the case of a guardian bond the statute of limitations begins to run from the time of the ward's coming of age, and not from the time of demand.

Residing beyond the limits of the State is not being "beyond the seas," and does not prevent the running of the statute.

CIVIL ACTION on a guardian bond, tried before *Logan, J.,* at the Fall Term, 1873, of CABARRUS Superior Court.

The defendants pleaded the statute of limitations, and the facts necessary to an understanding of the points decided are fully stated in the opinion of the Court.

On the trial below, the jury returned a verdict for the plaintiff, and his Honor being of opinion that the statute did not bar, gave judgment accordingly. Defendants appealed.

McCorkle & Bailey and Barringer, for appellants.

Wilson & Son, contra.

BYNUM, J. Among other defences to the action, the sureties on the guardian bond plead the statute of limitations in bar of the action (175) against them. The cause of action in this case having accrued prior to C. C. P., the pre-existing statute applies, and is in the following words, viz.: "Any orphan or ward, coming to full age and not calling on his guardian within three years thereafter, for a full settlement of his guardianship shall be forever barred, as to the sureties on the bond of the guardian from all recovery thereon." Rev. Code, Ch. 65, Sec. 4.

It is contended by the plaintiff, 1st, that this statute begins to run, not from the majority of the ward, but from the time of demand made;

and 2d, if this is not so, yet that the time is not to be counted while the plaintiff resided beyond the limits of the State, but within the United States, because in law the absence was "beyond seas," and within the exception of the statute.

1. This is a remedial statute beyond doubt, and the rule is to construe it largely and beneficially, so as to suppress the mischief and advance the remedy; and if two constructions can be put upon the act, that one is to be adopted which is most beneficial to the parties. Darwin, 654; Sedgewick on Stat. and Const. Law, 361.

The defendants contend that the statute began to run from the time the ward became of age and not from the time of demand; and this is the true construction, according to the rule just announced, as being most beneficial to the sureties. Accordingly we find that this construction has been given to the act by our Court in the case of *Johnson v. Taylor,* 8 N. C., 272. The Court there say, "that it is incumbent on the infant, after arriving at full age, not only to call on the guardian for a full settlement, but to have a final adjustment of all accounts, matters and things within three years, and either sue for any balance that may be due him, or notify the securities to the guardian bond of the true situation in which they stand to the guardian." The intent of the Legislature would not be effectuated if the injunction upon the creditor to call for a full settlement meant a *mere* call, and nothing more, for if that were the case, such a call and a total disregard of it by the guardian within three years after the infants arrived at full age, would leave the sureties in the same situation in which they were before (176) the passage of the act.

2. Residing beyond the limits of the State is not being "beyond the seas," and does not prevent the running of the statute. It is true the Supreme Court of the United States has construed the words "beyond seas" in a State statute of limitations to mean *out of the State. Murray v. Baker,* 3 Wheat., 541; 11 Wheat., 361, and some of the States have adopted the same construction, but we have in North Carolina decided otherwise. *Earle v. Dickson,* 12 N. C., 16, and *Whitlock v. Watson,* 6 N. C., 115, where it is held that "a residence in another State is not a residence beyond seas, within the saving of the act of limitations."

As the statute began to run the 3rd October, 1858, when the ward became of age, and the action was commenced the 28th April, 1871, after eliminating the time of its suspension from 20th May, 1861, to the 1st January, 1870, more than three years had elapsed, and the action was therefore barred as to the sureties, and the Judge erred in holding the contrary.

It is unnecessary to examine the other points made by the defendants, as they get the benefit of another trial.

PER CURIAM. *Venire de novo.*

Cited: Lippard v. Troutman, 72 N.C. 553.

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JAMES W. EDWARDS v. JAS. H. THOMPSON AND OTHERS.

Possession, if open, notorious and exclusive, puts a purchaser upon enquiry, and is notice of every fact which he could have learned by enquiry; and if the purchaser lived in another State, the principle of constructive notice applies notwithstanding.

The possession of a tenant has the same effect in regard to notice as possession by the landlord.

A contract to purchase, though in some respects regarded as a mortgage, is not void as to subsequent purchasers for want of registration.

In a proceeding to foreclose a mortgage, when the defendant pleads that the debt has been paid, the Judge below must decide whether a proper case has been made, justifying him in suspending a judgment for a plaintiff whose legal right of possession is not denied, until the determination of the question whether the mortgage debt has been paid or not. If the debt has not been paid, the plaintiff is entitled to judgment, unless the defendant shall pay under the order of the Court, what is found to be due and unpaid.

CIVIL ACTION for the recovery of real property, and damages for withholding the same, tried before *Buxton, J.,* at the January (Special) Term, 1874, of WAYNE Superior Court.

The material facts are fully stated in the opinion of Justice RODMAN.

On the trial below there were a verdict and judgment in favor of the plaintiff, from which defendants appealed.

Smith & Strong, for defendants.

Faircloth & Grainger, contra.

RODMAN, J. This action is to recover land and damages for withholding the possession. It was originally brought against James H. Thompson and one Redford, his tenant.

The answer of Thompson admits that he and Redford were in possession. He says that the land belonged to him until some time in
(178) 1861, when the Sheriff of Wayne sold the same and a slave under execution, when one O. H. Whitfield purchased, and received a deed from the Sheriff on 4th April, 1861. On the same day, Whitfield entered into a written contract with him whereby he agreed that if Thompson would within twelve months after that day, pay to Whitfield $601.28, the price which he had paid for the land and slave, and would also during the same time pay to Bright Thompson a note for $1,530 to

which Whitfield was surety for James H. Thompson, then he (Whitfield) would convey the land and slave to said Thompson. He further says that he has paid the note to Bright Thompson and fully indemnified Whitfield, and that he and Whitfield were partners in making turpentine in the years 1866 and 1867, and that by reason thereof, and otherwise, Whitfield became and was at the time of his sale to plaintiff, and still is indebted to him in a much larger sum than $601, and interest thereon; that Whitfield being thus indebted to him, for the purpose of defrauding him, on 26th March, 1867, sold the land for an inadequate price to the plaintiff who well knew of his rights in the premises. James H. Thompson, after having answered, died and his heirs became parties defendant, and adopted his answer.

The case made for this Court sets forth the purchase of Whitfield under execution, and his agreement with James H. Thompson (a copy of which is made part of the case and corrects some omissions made by the Judge in stating its contents,) in substance as they are stated in the answer. The agreement was never registered. The case further sets forth that after the execution of that agreement James H. Thompson remained in the possession of the land personally, or by his tenants, until his death after the commencement of the action, and that one Simon was in possession as a tenant of said Thompson, on 26th March, 1867, when Whitfield sold to plaintiff, who was a resident of South Carolina. That plaintiff had no knowledge of the agreement between Whitfield and Thompson, or of any incumbrance whatever on Whitfield's title, except so far as such knowledge would be in- (179) ferred from the fact of Simon's being in possession, which fact also was unknown to plaintiff. It is denied in the answer that plaintiff was a purchaser for value in the legal sense of that term, but as no question on that point appears to have been made at the trial, it is unnecessary to notice what is stated on that point. Some only of the heirs of Thompson took possession of the land after his death, and some questions were made as to the liability for *mesne* profits of those who did not take possession. In the view we take of the case it is unnecessary to consider these questions.

The principal question on the trial was whether the plaintiff was a purchaser without notice. The defendants contended that the possession by Simon, whether the plaintiff actually knew of it or not, was notice to him of the equity of James H. Thompson, and that the plaintiff therefore purchased subject to such equity.

His Honor instructed the jury that the continuance in possession by Thompson after the Sheriff's sale, would in the absence of any special agreement, make him a tenant at sufferance, and that his possession in March, 1867, was notice to the plaintiff that he claimed as such tenant,

but was not notice of any other or greater claim by him. Upon this instruction the jury found that the plaintiff was a *bona fide* purchaser, for value and without notice.

There is some difference among the authorities on the question as to whether actual possession by a person is notice to a purchaser, of an equity in favor of such person against a vendor. But the decided weight of authority is in favor of the proposition that possession, if open, notorious and exclusive, puts a purchaser upon enquiry, and is notice of every fact which he could have learned by enquiry.

Webber v. Taylor, 55 N. C., 9, and *Taylor v. Kelly,* 56 N. C., 240, are to this effect. These cases are fully supported by the following English and American cases, which with many others we have examined; 2 Sugden, V. and P., 337; 2 Ves. V., 440; 35 N. C., 121; 2 Lehs. and Lef., 583; 2 Ball and Beat., 416; 1 Mer., 282; 1 Russ and
(180) Mylne, 39; 19 Iowa, 544; 10 California, 181; 34 N. C., 363; 22 Illinois, 310; 1 Story Eq. Jur. S., 400.

These cases clearly go beyond the line laid down by the Judge. They held that if the tenant in possession has a contract to purchase, notice of the possession is notice of that contract, because it might have been found out on enquiry.

The plaintiff, however, says that all these cases are distinguishable, as in all of them the purchaser knew, or from living in the neighborhood, etc., was assumed to know of the possession, whereas in the present case as the purchaser lived in another State, no such presumption would arise.

The observation is true as far as the cases are concerned. I have found no case in which the purchaser lived in another State. But we think the principle of constructive notice applies notwithstanding this.

The proposition of the plaintiff supposes that the question of notice of an equity in derogation of the vendor's right to sell, is exclusively one of fact; and that in order to be fixed on the purchaser it must be shown either that he had notice in fact, or else wilfully, imprudently and in the language of the law, fraudulently omitted to enquire when the means of enquiry were in his reach.

We do not think this is the true principle. On policy the law avoids such minute and uncertain enquiries. It says that if a contract of sale be registered it is conclusive of notice, notwithstanding the purchaser lived in another State and did not, in fact, search the Register's books. 1 Story Eq. Jur., Sec. 403. And on the same principle it follows that open, notorious and exclusive possession, in a person other than his vendor, is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so. If the rule were otherwise, every one who contemplated a fraud on his tenant under a contract to

purchase would evade it by going to another State to sell over him; and the purchaser would carefully abstain from all enquiry. A purchaser who enquires only of his vendor, is guilty of an imprudence, which ought not to be encouraged, and which seldom or (181) never takes place, except where he buys for a trifling sum, or in payment of a bad debt. Such a purchaser can hardly be said to purchase *bona fide*. 1 Story Eq. Jur., Sec. 397.

The plaintiff further contends that the possession of Simon was notice only of Simon's estate, and not of that of Thompson, his landlord.

The contention is supported—or seems to be—by the English case of *Hanbury v. Litchfield*, 2 Mylne & Reene, 629, 633; 1 Story Eq. Jur., Sec. 400, Note 5. It is the only case which we have found that does so. We apprehend that however reasonable that doctrine may be in England, where a long series of assignments of leases and of sub-leases is not uncommon, it has no application to the condition of things existing with us, where such things are almost unknown.

In this case, Simon held directly of Thompson, it does not clearly appear whether as a cropper or as a tenant. It must be presumed that Simon, on enquiry, would have referred the intending purchaser to Thompson, from whom he would have obtained full notice.

Further, it is said for the plaintiff that Thompson is in laches because he failed to register his contract with Whitfield. This is true; but the act (Rev. Code, Ch. 37, Sec. 26,) does not say that a contract to purchase shall be valid only from the registration, as it does in Section 22, of mortgages. We cannot import into the act a provision it does not contain, merely because a contract to purchase is in many respects regarded as a mortgage, when the act makes a difference. The cases of *Webber v. Taylor* and of *Taylor v. Kelly*, cited above, are conclusive that the contract to purchase was not void as to subsequent purchasers for want of registration.

We consider that the plaintiff bought subject to the equities of Thompson, and in respect to those equities, took the place of Whitfield so far as they concerned the land.

What those equities were we are unable definitely to determine. It does not appear that on the trial any evidence was of- (182) fered to prove the allegations in the answer that the claims of Whitfield on Thompson had been paid off. Probably the defendant omitted to offer evidence on this point, because the Judge intimated an opinion that upon the evidence the plaintiff was a purchaser without notice, whereby such proof appeared immaterial.

We are required now to consider a new and important question of practice which, although all the other points in the case were fully and ably argued by the learned counsel on each side, was not touched on.

When Courts of law and equity were separate, a mortgage was considered at law, after forfeiture by the mortgagor, to have an absolute estate, and he could recover the possession by an action of ejectment. The mortgagor could, nevertheless, file his bill in equity, and on showing that he had paid off the mortgage debt the Court would enjoin the action of the mortgagee and compel a re-conveyance of the legal estate. Upon his swearing that he had paid it off and making a probable case to that effect, the Court would enjoin the action of the mortgagee until an account could be taken and the fact ascertained. In the present case Thompson may be considered, for the purpose of the present question, the mortgagor, and Whitfield (or the plaintiff who represents him,) the mortgagee. If the defendant had merely pleaded an equity by the agreement to have the legal estate on payment of a certain sum, without pleading that he had paid it, we apprehend his plea would have been insufficient to prevent the plaintiff from a judgment for the possession. A mortgagee whose estate has become absolute at law by the non-payment of the mortgage debt at maturity, is always entitled to the possession of the land as a security for his debt. But here the defendant pleads an actual payment of the mortgage debt. In such case his plea must be regarded as a bill in equity to enjoin a recovery of the possession in an action at law by a mortgagee, and the Judge must decide,

(183) just as he would have done upon such a bill, whether a proper case has been made upon which he can suspend a judgment for the plaintiff whose legal right to the possession is not denied, until the determination of the question whether the mortgage debt has been paid or not. If it has not, clearly the plaintiff is entitled to a judgment unless the defendant shall pay, under the order of the Court, what is found due and unpaid.

These observations will enable the Judge below to dispose of the question which arises upon our decision that the plaintiff was a purchaser with notice.

Upon the taking of the account or other proceeding to ascertain whether James H. Thompson has paid off his debt to Whitfield, if it shall appear that he had paid it off before his death no question of damages will arise, for the equitable title of the heirs will be complete. If it shall appear otherwise, the question may arise. On taking such an account the personal representative of Thompson will be a necessary party in order that he may be bound by the account taken.

PER CURIAM. There is error in the instructions of his Honor. The case is remanded to be proceeded in, etc. Let this opinion be certified.

Cited: Tankard v. Tankard, 79 N.C. 56; *Tankard v. Tankard,* 84 N.C. 291; *Mauney v. Crowell,* 84 N.C. 316; *Bost v. Setzer,* 87 N.C. 191;

Johnson v. Hauser, 88 N.C. 390; *Strickland v. Draughan,* 88 N.C. 316; *White v. Holly,* 91 N.C. 68; *Staton v. Davenport,* 95 N.C. 17; *Mfg. Co. v. Hendricks,* 106 N.C. 491; *Hargrove v. Adcock,* 111 N.C. 170; *Mitchell v. Bridgers,* 113 N.C. 72; *Patterson v. Mills,* 121 N.C. 268; *Ex parte Alexander,* 122 N.C. 730; *Stancill v. Spain,* 133 N.C. 80; *Smith v. Fuller,* 152 N.C. 12; *Campbell v. Farley,* 158 N.C. 44; *Lee v. Giles,* 161 N.C. 546; *Grimes v. Andrews,* 170 N.C. 546; *Grimes v. Andrews,* 170 N.C. 524; *Perkins v. Langdon,* 237 N.C. 165.

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JOSEPH H. ETHERIDGE AND OTHERS v. MILFORD VERNOY.

Where the objections urged on a petition to rehear were not raised on a trial below, nor made in the case stated on the appeal and not argued upon the hearing in this Court, it is considered that every objection for want of proper parties had been waived or abandoned, and that the case was tried upon its merits.

The wife of a mortgagor has no such interest in the lands mortgaged, as make it necessary that she should be a party to a proceeding to foreclose the mortgage.

Generally, the heirs of a mortgagee are necessary parties to a bill to foreclose. This is not always so; as for instance, when the mortgagee assigns his interest in the mortgage, and the debt secured therein, leaves the State and dies insolvent, leaving in his heirs, who are non-residents, the dry, naked, legal title only, such heirs are not necessary parties to a proceeding to foreclose the mortgage.

Where a mortgagee dies, and a Court of Probate upon an *ex parte* application appoints a trustee under the act of 1869-70, Chap. 168, the irregularity such proceeding is cured by the act of 1873-74, Chap. 127, Sec. 2, undertaking to cure such appointments "confirming and making valid the same," etc. The act of 1873-74, Chap. 127, Sec. 2, although retrospective, is not unconstitutional in respect to the facts of this case.

PETITION on the part of the defendants to rehear the decree made in this cause, see *Etheridge v. Vernoy,* 70 N. C., 713, at the last term of this Court.

The grounds of the petition are fully set forth in the opinion of the Court.

Peebles, Barnes, Batchelor & Son, for petitioner.
Smith & Strong, Gilliam & Pruden, contra.

BYNUM, J. This case is before us upon a petition to rehear. When it was argued at the last term of the Court, 70 N. C., 713, the objections

now urged were not raised or argued by the counsel of the defendant, nor were they made in the case stated on the appeal, and finally,
(185) when the objections were made in the answer and overruled, no appeal was taken. According to all the rules of pleading, every objection for want of proper parties had been waived or abandoned, and the case was tried upon its merits below, and on appeal, it was again reviewed carefully in all matters appealed from. If, therefore, the defendant has lost the benefit of any valid defence to the action, it is the result of his own negligence, and of the firm adherence on the part of the Court to the rules of practice and procedure established for its guidance, and without which there would be no end to litigation. Lord Coke says, "good matter must be taken advantage of in apt time, proper order and due form." But we will examine the grounds of the application to rehear:

1. The first is, that Martha Vernoy, the wife of the defendant, was not made a party. Lewis Y. Bond sold and conveyed the land to Vernoy in February, 1866, and to secure the purchase money, took a re-conveyance of the land in mortgage, which Martha, the wife of Vernoy, signed. Now if this mortgage had been executed, even since the act of 1868-69, endowing widows as at common law, it was not necessary that the wife should join. Bat. Rev., Ch. 35, Sec. 30. Certainly then, her joinder in the deed, prior to that act, did not make the title of the mortgagee better than it was without it. She had no interest and could convey none. We have been referred to *Mills v. Voorhees*, 20 N. Y., 412, as establishing that the wife has an interest and is a necessary party in a bill to foreclose the mortgage. We are not informed of, nor does that case disclose, the statute law of that State upon the subject of dower, but when we have a positive statute making the mortgage good without her joinder, it cannot be an open question in this State. But if there was no such statute as that making mortgages good, without the joinder of the wife, when it is made to secure the purchase money of land acquired since the new law of dower; it has ever been held in North Carolina that the husband has the absolute dominion over his land during his life, and can alien it without the consent of his
(186) wife, and the purchaser thereof under execution acquires a good title against her and all the world. Martha Vernoy was, therefore, not a necessary party to the action.

2. Upon the death of Bond, his heirs were necessary parties to the action. The mortgage was made to Bond and his heirs, and upon his death, of course the legal title vested in them, and generally the heirs of the mortgagee are necessary parties to a bill to foreclose. Adams, 312, but it is not always so. Adams Eq., 321; 36 N. C., 126.

If, for instance, a necessity is shown and sufficient parties are before the Court to protect and represent each conflicting interest. *Vose v. Philbrook*, 3 Story, 336; 7 Beav., 301, 303. So where persons interested are out of the jurisdiction of the Court, and that fact appears in the pleadings and at the hearing, their appearance will be dispensed with. *Spivey v. Jenkins*, 36 N. C., 126; 3 Cranch, 220; *Walworth v. Holt*, 4 M. and C., 619. And this may be done by a rule of Court. Rule No. 47, U. S. Courts in Eq. The facts of our case upon this point are, that Bond sold the land to Vernoy, taking his notes and the mortgage with power of sale for the purchase money. The notes were assigned to the plaintiffs; Bond became insolvent, removed from the State and died. Every interest owned by Bond, both in the debt and in the mortgage, passed to the plaintiffs by the assignment, leaving in him the dry, naked legal title only, which, on his death, passed to his heirs who are non-residents. Now it is clear that the whole interest in this litigation is in the plaintiffs, who are the equitable mortgagees, and the defendant Vernoy, who in equity is the owner of the legal estate in the land. So that the land, the only matter in controversy, is owned by the parties before the Court, who only are interested in its disposition, and who are competent to protect every interest involved in this controversy. The empty legal title is in the heirs of Bond, who are beyond the jurisdiction of the Court, perhaps numerous, infants and scattered. In a technical sense, these heirs might be brought before the Court by publication, but this would be a hollow form and a sham, where the (187) parties have no interest and would not personally appear, and if they did appear, could only give an involuntary sanction to the decrees of the Court. In such a case where every party having a real interest is before the Court, and those having a mere involuntary, passive and technical interest are beyond the jurisdiction of the Court, although it would not be improper to make them parties, and in fact it is most regular and conformable to the course of the Court to have them parties, yet, according to the cases cited, this interest in the heirs is too unsubstantial and formal to constitute such an encumbrance to the title as will make the Court delay the administration of the rights of the parties before the Court, and who in themselves own and defend every interest in the subject of the action. It would certainly be "sticking in the bark" for this Court to revise its judgment heretofore rendered, and send the case back to the great delay of justice, upon grounds so little likely to result in practical inconvenience. The Court is competent to and will protect purchasers under its decrees from all claims not founded in substantial right.

But pending the action Bond died, and by proceedings in the Court of Probate of Bertie County, one D. C. Winston was appointed trustee

in the deed of mortgage in the place of Bond, and was, by order of Court, made a party plaintiff in this action. This appointment was made under the act of 1869-70, Ch. 188, and the defendant insists that it was made *ex parte*, and under the decision in *Gwin v. Melvin*, 69 N. C., 242, is void.

It does not judicially appear to us that the appointment of trustee by the Court of Probate was *ex parte* or otherwise irregular, but assuming it to be so, the Legislature of 1873-74, Ch. 127, Sec. 2, undertook to cure all such appointments, *ex parte*, by "confirming and making valid the same, so far as regards the parties to actions and proceedings to the same extent as if all proper parties had originally been made to such actions or proceedings." It is certain that if the Legislature had the power to do so, it has validated this appointment of trustee, and that there is no defect of parties to this action. The writers on this (188) question, as well as the decisions of the Courts differ, not as to the existence, but only as to the extent of the power. The authorities are well collated in Cooly on Const. Lim., Ch. 11, and in Sedgwick on Stat. and Const. Law, 170, 200.

Without discussing the general question, it will be safe to assert that where the act does not violate express constitutional restrictions, or the principles of natural justice, which lie at the foundation of all free government, but is merely in aid of the Courts, and not to defeat, but to carry into effect, the interest of the parties, and does not divest any real interest of the parties; then the Legislature may interfere by retrospective acts, and where they are clearly expressed the Courts are bound to enforce them. For illustration: Where a judgment entered on the *first* instead of the *third* day of January was void for that reason, it was held to be cured by a subsequent act. *Underwood v. Lilly*, 10 Lerg. & Rawle, 97. So an omission in the certificate of acknowledgment of a married woman to a deed conveying her estate in land, was remedied by an act passed for that purpose after her death and after the Courts had decided that the acknowledgment was inoperative to pass lands. *Hapburn v. Curtis*, 7 Watts, 300; 16 Lerg. & Rawle, 35, and this doctrine is there laid down: that it is competent for the Legislature to pass acts retrospective in character, although their operation may be to affect pending suits and to give to a party rights he did not before possess; or to modify an existing remedy, or to remove an existing impediment in the way of a recovery by legal proceedings, provided they do not violate any constitutional prohibitions. So in Connecticut, where certain marriages had been celebrated with such defective formalities as to make them invalid and the Legislature afterwards passed an act declaring all such marriages valid, the Court sustained the act. 4 Conn., 224. And in *Beech v. Walker*, 6 Conn., 197, where the Legisla-

ture passed an act ratifying and making valid certain execution sales which were insisted upon as being void, the Court, in sustaining the act, say: "A law, although it be retrospective, if conformable (189) to entire justice, this Court has repeatedly decided is to be recognized and enforced."

It is not contended that the rights of third parties, as for instance, a *bona fide* purchaser can be divested by retrospective legislation, but the power is restricted to the parties to the original contract and such other persons as may have succeeded to their rights, with no greater equities.

In our case the legal title in the heirs is coupled with no equity, and the only right taken away from them *is the right of the defendant, Vernoy, to avoid, or hinder and delay the execution of his own contract* —a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. The purpose of the act, as applied to our case, was not to impair the obligation of a contract, and therefore it cannot be considered as taking away vested rights, but to cure certain defects which operate to frustrate the presumed, as well as expressed, desire and intent of the parties to be affected, which defects accrued subsequently to the execution of the mortgage and were not contemplated by the parties, and which would have been provided for had they been apprehended by them.

The opinion of the Court does not extend to the general effect of this act, but is confined to its operations upon the peculiar and somewhat exceptional facts of this case.

The Court attempted to appoint the trustee in conformity to law and the curative act steps in and validates the defective execution of the power. The act does not vary existing obligations contrary to their situation when entered into. The defendant having objected to the order of the Court making this trustee a party plaintiff and having appealed from the judgment of the Court making him plaintiff, and then failed to prosecute the appeal, is estopped from raising the question now.

The discussion of the case a second time is not because the defendant is entitled to it as matter of right, but because the question has been raised whether the purchaser under the decree of foreclosure will get a good title, the heirs of the mortgagee not having been made (190) parties.

The other questions raised in the petition to re-hear are untenable.

New parties may be added in the complaint and need not be inserted in the summons. Nor was it necessary to make the personal representative of Bond a party. Bond had assigned all his interests to the plaintiff, and was insolvent before his death. All the parties in interest were

before the Court and it was the duty of the Court to appoint the commissioners to sell under its decree.

The judgment of this Court, as heretofore rendered, is affirmed, and the petition to re-hear is dismissed.

PER CURIAM. Judgment accordingly.

Cited: S.c., 80 N.C. 78; *Harris v. Bryant*, 83 N.C. 572.

S. W. LITTLE, GUARDIAN, v. C. ANDERSON.

The rule for compounding interest upon notes due guardians is "to make annual rests," making the aggregate of principal and interest due at the end of a particular year, a capital sum, bearing six per cent interest; thence forward for another year, and so on.

Therefore, where the ward arrived at full age Nov. 1st, 1863, *it was held*, that a note due his guardian bore compound interest up to that date, and thereafter, simple interest upon the whole amount, principal and interest due at said date.

MOTION to amend a judgment, heard by *Cloud, J.*, at Spring Term, 1874, of DAVIE Superior Court.

This was a civil action brought upon a promissory note under seal, due the plaintiff as guardian of his ward (who arrived at full age on the 1st of November, 1863.) At Fall Term, 1873, the plaintiff recovered judgment, but in the hurry of business the interest was not com-
(191) puted by the attorneys. Instead thereof, the following entry was made on the Minute Docket for the instruction of the Clerk: "Compound interest to 1st November, 1863, simple interest from that time." The Clerk in filling out the judgment computed compound interest up to November 1st, 1863, and then computed simple interest on the original *principal* of the note from that time to the date of the judgment, instead of simple interest upon *whole amount* due November 1st, 1863, and this sum defendant paid into Court, which was afterwards received by plaintiff under protest. Plaintiff gave defendant notice of a motion to have said judgment corrected. Plaintiff moved accordingly to have said judgment corrected. His Honor being of the opinion that the said interest had been properly computed disallowed the motion, whereupon plaintiff appealed.

Furches, for plaintiff, cited *Ford v. Vandyke*, 33 N. C., 227.

Craige & Craige, for defendant.

BYNUM, J. His Honor was clearly in error according to the universal practice and the well settled law. In *Ford v. Vandyke,* 33 N. C., 227, RUFFIN, C. J., thus announces the rule: "The mode of compounding interest in such cases is to make annual rests, making the aggregate of principal and interest due at the end of a particular year, a capital sum bearing six per cent interest, thence forward for another year, and so on, from year to year." It would be difficult to make the rule plainer.

If, in this case, the original principal of the note only bore interest, it would follow that there would be a less interest-bearing debt, after default of payment, than before, and the debtor would be taking advantage of his own wrong, since up to the majority of the ward all the accrued interest became interest bearing capital, while after that period this same accrued capital bore no interest at all. If this were the law, the longer the debtor could put off the payment of his debt, the more he would gain and the ward lose. Such is not the policy of (192) the law.

There is error. Judgment reversed and the cause remanded to the end that the judgment may be corrected in accordance with this opinion.

PER CURIAM. Judgment reversed.

R. H. JONES v. JACOB F. AND CALVIN SCOTT.

The recital in a Sheriff's deed is not a necessary part of it, and if the deed misrecites the execution under which the Sheriff sells, or recites no execution, the sale is nevertheless good, if at the time it is made, the Sheriff has in his hands a valid execution.

Where the record is carelessly prepared (as in this case the deed under which plaintiff claims not being made a part of it, nor the date of its execution shown) and the statement of the case is vague and irregular, no judgment will be given in the Supreme Court.

CIVIL ACTION for the recovery of land, tried before *Clarke, J.*, at Spring Term, 1874, of the Superior Court of JONES.

This was an action to recover a certain tract of land described in the plaintiff's complaint. It is admitted that the land claimed by the plaintiff is the same land in the possession of the defendants, both plaintiff and defendants claiming under one Daniel Perry. Plaintiff introduced a judgment in favor of Rachel Jones against Daniel Perry, F. B. Harrison and Jacob F. Scott; also execution against same parties corresponding with said judgment, a levy on said land, a return of the sheriff of Jones County that he had sold said land to the plaintiff, and

a sheriff's deed for said land to plaintiff. This deed recites that by virtue of an execution in favor of Rachel Jones against Daniel
(193) Perry alone, one of the defendants in the above mentioned judgment and execution, etc.

His Honor being of the opinion that as the sheriff's deed did not correspond with the judgment or execution, and that no execution was produced corresponding to the specification of the deed, the plaintiff had no title. Plaintiff submitted to a non-suit. Judgment and appeal.

Isler, for plaintiff.
Haughton, Hubbard and Smith & Strong, for defendants.

BYNUM, J. His Honor put his decision upon the ground that the recital in the sheriff's deed did not correspond with the judgment and execution under which the land was sold and purchased by the plaintiff.

It is well settled that the recital in a sheriff's deed is no part of it, and that if he mis-recites the execution under which he sells, or recites no execution, his sale is nevertheless good, if at the time he makes it he has in his hands a valid one. It is not denied here that the sheriff did have a valid execution against Perry, under whom both parties claim. It was error, therefore, for his Honor to hold that the plaintiff had no title because of the mis-recital. *Owen v. Barksdale*, 30 N. C., 81. In reversing the judgment below the Court cannot give judgment here for the plaintiff because of the very carelessly prepared record and vague and irregular statements of the case. The plaintiff in this action must recover upon the strength of his own title and not upon the weakness of his adversaries. The deed under which the plaintiff claims is not made a part of the record, nor is the date of its execution stated or whether made before or after the commencement of the action.

PER CURIAM. *Venire de novo.*

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STATE ON THE RELATION OF R. B. BRYAN v. A. L. ROUSSEAU AND G. H. BROWN.

In an action upon a bond, the *sum demanded* is the penalty of the bond, and not the damages claimed for the breach thereof:

Therefore, where the penalty of the bond exceeds two hundred dollars, suit cannot be brought before a Justice of the Peace.

CIVIL ACTION against the defendant, Rousseau, as County Treasurer of Wilkes County, commenced in a Justice's Court, from whence it

was carried by appeal to the Superior Court of WILKES, where it was tried before *Mitchell, J.*, at Spring Term, 1874.

The facts, so far as are necessary to an understanding of the opinion, are as follows:

This action was begun before a Justice of the Peace against the defendant, Rousseau, Treasurer of Wilkes County, and the sureties upon his official bond for the year 1870. It was admitted that Rousseau was the treasurer, and the execution of the bond by himself and the defendants as his sureties, in the sum of $12,000 was also admitted.

The action was brought upon a county order for $125.80, which was the sum claimed for damages by reason of the breach of the bond.

Armfield & Folk, for defendants.
Furches, for plaintiff.

BYNUM, J. The State on the relation of *Fell v. Porter,* 69 N. C., 140, is decisive of this case. It is there held that if the action is on a bond the penalty of which exceeds two hundred dollars, the penalty of the bond is the sum demanded, although the damages claimed for the breach thereof, is less than two hundred dollars. Such is the construction put upon the Constitution, Art. 4, Secs. 13, 33; and (195) Bat. Rev., Chap. 80, Sec. 13, cannot have the effect of changing the jurisdiction of the Courts, as fixed by the Constitution. It follows that this action, having been brought on a penal bond for the sum of twelve thousand dollars, before a Justice of the Peace, ought to have been dismissed for want of jurisdiction.

PER CURIAM. Judgment reversed and action dismissed.

Cited: Morris v. Saunders, 85 N.C. 140; *Coggins v. Harrell,* 86 N.C. 320; *Joyner v. Roberts,* 112 N.C. 114; *Machine Co. v. Seago,* 128 N.C. 161.

JESSE W. BROADWAY v. MELCHER RHEM.

An inhabitant of one belligerent country cannot maintain an action against a soldier of the hostile belligerent for a trespass to the property of the former, done by the soldier in the course of his military duty.

SETTLE, J., dissenting.

CIVIL ACTION, trespass to personal property, tried before his Honor, *Judge Clarke,* at Fall Term, 1873, of LENOIR Superior Court.

All the facts necessary to an understanding of the case are fully stated in the opinion of the Court.

On the trial below, there was a verdict and judgment for the defendant, from which judgment plaintiff appealed.

Smith & Strong, for appellant.

No counsel contra in this Court.

RODMAN, J. In 1864, a portion of the army of the United States occupied Newbern and its vicinity, while a Confederate force
(196) occupied the upper country. The plaintiff resided within the Confederate, or at least, without the Northern lines. He left his home so far as appears voluntarily, and went within the Northern lines. While so absent, the defendant, who was a soldier in the Confederate army, by command of his captain, went with another soldier and they seized a mule of the plaintiff which was turned over to the quarter master of the Confederate forces.

The question presented seems to be this: Can an inhabitant of one belligerent country maintain an action against a soldier of the hostile belligerent for a trespass to the property of the former, done by the soldier in the course of his military duty?

The counsel for the plaintiff who affirm this proposition have not cited an instance of such an action, nor the opinion of any jurist in its favor. Considering the vast number of cases in which such actions might have been brought and would have been, if the proposition could be maintained, the absence of any instance of one must be deemed strong evidence against it.

There are authorities, which if they do not deny the proposition in terms, clearly assume that there is no right of action in such a case.

Kent, 1 Com., 91-3, says that the general usage in war is to respect private property on land unless in special cases. If a conqueror seizes private property of pacific persons he violates modern usage, "and is sure to meet with indignant resentment, *and to be held up to the general scorn and detestation of the world.*"

The learned writer evidently considers this remote punishment as the only one.

In the case of McLeod, indicted in or about 1840, in a Court of New York, for the burning of the American steamer Caroline, it was considered by the government of the United States (Mr. Webster being Secretary of State,) that after the British government had assumed the responsibility of his act, no action, civil or criminal, would lie against him. Webster's speech on the Ashburton Treaty, Vol. V, of his Speeches, and Diplomatic Correspondence. It is absurd to

suppose that a soldier who in time of war does any act by order (197) of his government within the limits of international law, is subject to any civil responsibility to an enemy injured by the act. Within those limits the soldier is responsible only to his government; the laws are silent in war, not only as to a present remedy, but as to a remedy at any time between individuals of belligerent communities. It is otherwise in the case of a mere riot or insurrection. In such case each rioter or insurgent is criminally liable, and also civilly to all injured by his acts. The decisions of the Supreme Court of the United States sustain these propositions:

1. The Confederate States were a belligerent power.

2. The rights of belligerents are reciprocal and equal during war, and it is indifferent whether the war be between sovereign and independent nations or between powers, one of which claims sovereignty over the other, as in the case in a civil war. If the conflict is recognized as *war* and the rebellious power as a *belligerent*, it is *quoad hoc*, and as regards its belligerent rights on the same footing as an independent nation.

3. A belligerent power may rightfully capture private property on land, at least, if it be of a character to be useful to the enemy.

4. The plaintiff having voluntarily left Confederate territory and gone within the Northern lines, the Confederate government might rightfully regard him as an enemy.

In the Prize Cases, (1862) 2 Black, 635, the Court holds that after the date of the President's proclamations of 27th and 30th April, 1861, proclaiming a blockade of the Southern ports, the Confederate States must be regarded as a belligerent power.

It is not directly said, because it was not necessary to the argument, that the rights of belligerent powers are equal in law. This doctrine results from reason, and is recognized by all writers on the laws of nations.

In consequence of this recognized belligerent position, the United States regarded all persons residing within the Confederate lines, (198) or attempting to trade with the Confederates contrary to the proclamation, as in law enemies, without respect to their neutral character or their individual sentiments of friendship to the United States, and upon that ground held it lawful to capture the property of all Southern residents found at sea, and of all neutrals attempting a violation of the blockade. A few extracts will explain the views of the Court.

"The parties belligerent in a *public* war are independant nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war

may exist where one of the belligerents claims sovereign right over the other." "When the parties in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostitities against their former sovereign, the world acknowledges them as belligerents and the contest a WAR."

The Court quotes from Vattel, "Those two parties (those to a civil war,) therefore must necessarily be considered as constituting at least for a time two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms."

The Court thus states the second question in that case as follows: "Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas to be treated as enemy's property, whether the owner be in arms against the government or not?" "The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property is a necessary result of a state of war." "The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory." See also Dana's Wheaton Inter. (199) Law, note 169 to Sec. 347, and note 171 to Sec. 356.

This decision applied, as will have been seen, only to captures on the high seas. It is stated in text books on international law that the right to capture private property at sea, was a remnant of the barbarous laws of other ages, and that the superior humanity of modern times had abandoned its exercise as to property on land. The acts of Congress, however, of August 6, 1861, of 17th July, 1862, and of March 12th, 1863, do not recognize any such limitation of the right of capture. By this last act it was made the duty of every soldier, etc., to take all "abandoned" property in an insurrectionary district and turn it over to an agent of the U. S. Treasury Department. Under these acts it is well known that if any person, from any cause whatever, was absent from his personal property it was seized as abandoned, without any regard to its character as useful in war or not. Negro women and children, mules, plows, pianos, pictures, sewing machines, and women's dresses were indiscriminately seized and confiscated. The right of the United States to cotton seized under these laws came before the Supreme Court, in the case of Mrs. Alexander's cotton, 2 Wall, 404.

The facts briefly were these: Mrs. Alexander was a widow sixty-five years of age, said to be of infirm health. She resided on her plantation on Red River, and had seventy-two bales of cotton stored in a house about a mile from the river. She was in the Confederate lines until the spring of 1864, when a United States force, under General Banks, went up the river and temporarily drove back the Confederates. During his brief occupation, a force of sailors from a United States gunboat captured the cotton and turned it over to the proper authorities of the United States, when a libel was filed for its condemnation as maritime prize. It is proper to say that Mrs. Alexander was held by the Supreme Court to be disloyal to the United States. The proof on that point was this: as soon as she could, and within three weeks after the seizure of her cotton, she took the oath of allegiance to the United States. On the other hand it appeared that she (200) had been kind to the soldiers of both armies when they were near her; she had not successfully resisted the Confederate army when it impressed some of her slaves to work on a fort before the advent of the Northern forces; and some Confederate officers had visited some young ladies at her house; and she *had remained in the rebel territory* after Gen. Banks had retired. Such being the case the Court says "There can be no doubt, we think, that it (the cotton) was enemies property." "This Court cannot enquire into the personal character and dispositions of individual inhabitants of enemy territory." "Being enemies' property, the cotton was liable to capture and condemnation by the adverse party. It is true that this rule as to property *on land* has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted to special cases dictated by the necessary operation of the war, and as excluding in general the seizure of the private property of pacific persons for the sake of gain. 1 Kent, 92, 93.

The commanding general must determine in what special cases its more stringent application is required by military emergencies, etc. In the case before us the capture seems to have been justified by the peculiar character of the property, *and by legislation.*"

The capture was held to be lawful, although not a maritime prize, and the proceeds were decreed to be paid into the Treasury of the United States. These doctrines were adhered to in *United States v. Klein,* 13 Wall., 128, without any material qualification, although the rule with regard to captured and abandoned property was said to be novel and introduced for the first time in war.

These decisions show that by the law of the United States a capture of property (at least of all such as may be useful to a belligerent) is

not unlawful, and preclude the idea that a soldier making such capture under orders from the commanding officer and in the course of
(201) military duty, can be held liable to an action by the party injured. If it were otherwise, a peace would be impossible. The cessation of the conflict of arms and by organized forces, would be succeeded by conflicts in the Courts even more direful and more fruitful of vindictive feeling. Southern soldiers would be sued for trampling down the grass in Pennsylvania, and Northern ones for doing the same in Georgia. The absurdity and injustice of these results repel the idea that the Courts of belligerent countries can give redress for damages sustained in war. Good policy and the common interests of all sections of a country which has been engaged in a civil war, require that the wounds it has made be healed as speedily as possible, and that the memory of it should pass away.

For these reasons we think the plaintiff cannot recover. Nothing in any previous case before the Court conflicts with what is here said. In *Bryan v. Walker,* 64 N. C., 141, the plaintiff was a citizen and resident of North Carolina, and the defendants soldiers of the Confederate States, of which the State was a member. It was not the case of a capture by one belligerent from another. So in *Franklin v. Vannoy,* 66 N. C., 145. In *Wilson v. Franklin,* 63 N. C., 259, the trespass complained of was committed after the authority of the United States had been fully restored and war had actually ceased.

PER CURIAM. Judgment affirmed.

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(202)

STATE v. LEANDER STAMEY.

An indictment for selling or giving away spirituous liquors during a public election should set forth the name of the person to whom the liquor was sold or given.

When in such indictment, the offence was charged to have been committed "on and during an election day," the statute only making it an offence when done "during," etc., "a public election," *it was held,* that the variance was fatal. *Held further,* that the indictment should have negatived the selling upon "the prescription of a practising physician and for medical purposes," which is allowed by the act.

INDICTMENT for selling spirituous liquor on the day of election, tried before *Cannon, J.,* at Spring Term, 1874, of the Superior Court of CLAY County.

It was charged in the indictment that the defendant, "on the 10th day of September, 1873, at and in the county of Clay, did give away and sell spirituous liquors to various persons, then and there being in the town of Haynesville, Clay County, on and during a public election day, within three miles of the election precinct of," etc., and concluding "against the form of the statute," etc.

The jury returned a verdict of guilty, whereupon the defendant moved an arrest of judgment upon the ground that the indictment was insufficient. His Honor allowed the motion and arrested the judgment. The Solicitor appealed.

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

BYNUM, J. The indictment is fatally defective in several particulars:

1. It does not set forth the name of any person to whom the liquor was given or sold. The offence charged is highly penal, and in order to defend himself the defendant must know not only the offence charged, but the name of the person upon whom it was com- (203) mitted. A conviction upon this bill could not be pleaded in bar of another indictment for the same offence. An indictment charging the defendant with selling spirits to slaves is not good unless their names are given. *State v. Blythe,* 18 N. C., 199. So to charge a white man with playing cards with a slave without naming him. *State v. Ritchie,* 19 N. C., 29.

The purpose of setting forth the name of the person on whom the offence has been committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have notice of the specific charge and have the benefit of an acquittal or conviction if accused a second time.

2. The bill charges the offence to have been committed "on and during an *election day,*" whereas the statute only makes it an offence when done "during," etc., "a public election." No accepted rule for construing statutes creating crimes could, according to the words or spirit of this act, make it an offence to sell or give away liquor on an election day if for any good cause no election was held. The Court must see from the indictment itself the alleged crime. *State v. Haithcock,* 29 N. C., 52; *State v. Eason,* 70 N. C., 88.

3. The bill does not negative the selling upon "the prescription of a practising physician and for medical purposes," which is expressly allowed by the act creating the offence. Bat. Rev., Chap. 32, Sec. 149.

An indictment for trading with a slave in the day time by selling him spirituous liquors was held defective because it did not negative an *order* of the owner or manager, the statute creating the offence allowing such selling to a slave on such order. *State v. Miller,* 29 N. C., 275.

His Honor therefore properly arrested the judgment.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: S. v. Pickens, 79 N.C. 654; *S. v. Miller,* 93 N.C. 516; *S. v. Foy,* 98 N.C. 746; *S. v. Hazell,* 100 N.C. 474; *S. v. Dalton,* 101 N.C. 683; *S. v. Farmer,* 104, N.C. 889; *S. v. Smith,* 106 N.C. 659, 658; *S. v. Gibson,* 121 N.C. 681; *S. v. Tisdale,* 145 N.C. 424, 426; *S. v. Dowdy,* 145 N.C. 434.

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(204)

STATE v. WARREN DIXON AND OTHERS.

An appeal to this Court, without bond, must be perfected, as prescribed by the Act of 1869-70, Chap. 196, during the term of the Court. If not so perfected, it is a nullity and cannot vacate or suspend the judgment of the Court.

INDICTMENT for forcible trespass and assault, tried at Spring Term, 1874, of WARREN Superior Court, before his Honor, *Judge Watts.*

On the trial below the defendants were found guilty, and some fined, others imprisoned. The case sent up states, "From this judgment the said Warren Dixon," and others—naming them—"pray and appeal to the Supereme Court, and if it allowed." The said defendants take the oath of insolvents.

Busbee & Busbee, for the defendants.

Attorney General Hargrove, for the State.

RODMAN, J. It is necessary only to refer to the case of the *State v. Dixon,* 69 N. C., 390, to show that this appeal should be dismissed. Appeals in criminal action are not allowed unless the appellant gives bond with security to abide the judgment of the Appellate Court, (Rev. Code, Chap. 4, Sec. 21,) except where an appeal is allowed without bond either by the section cited from the Revised Code, or by the act of 1869-70, Chap. 196. By each of these statutes the appeal must be perfected during the term of the Court. If not so perfected it is a nullity and cannot vacate or suspend the judgment of the Court.

If the pretended appeal in this case has had the practical effect of suspending the execution of the sentence of the Court without authority on record from the Judge, the sheriff has neglected his duty. We can scarcely suppose that the Judge has knowingly permitted his sentence to be trifled with in so palpable a way.

PER CURIAM. Appeal dismissed.

Cited: S. v. Gayland, 85 N.C. 552; *S. v. Bennett,* 93 N.C. 505; *S. v. Gatewood,* 125 N.C. 695.

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(205)

L. D. WILKIE v. N. A. BRAY.

In order to create a lien in favor of a person who builds a house upon the land of another, the circumstances must be such as to first create the relation of debtor and creditor; and then it is for the *debt* that he has a lien.

CIVIL ACTION to enforce a mechanics' lien, commenced in a Justice's Court against the present defendant and one Charles Bray, and from thence removed by *recordari* to the Superior Court of CRAVEN County, where it was tried before *Clarke, J.,* at Spring Term, 1874.

The facts are fully stated in the opinion delivered by Justice READE.

Below the plaintiff had judgment, from which defendant appealed.

Hubbard, Green and Lehman, for appellant.

Haughton, Seymour, Justice and Smith & Strong, contra.

READE, J. In 1870 the defendant leased to his son, Charles Bray, a tract of land for the year 1871. And the plaintiff and said Charles Bray entered into a copartnership to raise a crop on said land in 1871. A part of the agreement on the part of the plaintiff was that he would "furnish materials and labor for the erection of a house for Charles Bray to live in on the farm." The plaintiff did furnish the materials, etc., and the house was built in October, 1870, before the lease commenced. And now the plaintiff claims a lien on the land for the materials, etc., under the act of 1868-70, Chap. 206, Sec. 1, as follows:

"Every building built, rebuilt or improved, together with the necessary lots on which said building may be situated, and every lot, farm or vessel, or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished. (206)

The language of the statute is very comprehensive; and it is clear that if the house had been built under contract with the defendant, either express or implied, the lien would exist; but under the principle that no man can make another his debtor without his consent, the lien does not exist without a contract. It is true the contract may be implied, as if the house be built with his knowledge, and for his advantage, and without objection. It appears that the defendant had knowledge of the building; but then it appears, also, that "before it was commenced he notified the defendant that he was opposed to the building being put on his land." So it is put in the *case* for this Court, probably "defendant" is put for plaintiff, or else it must refer to Charles Bray, who was originally a co-defendant. But, at any rate, it negatives the idea that it was with the defendant's consent. It appears also that the defendant, when he heard that his son Charles and the plaintiff were going to farm together, cautioned the plaintiff not to credit Charles; and notified him that he would not pay any of his bills. It would seem, therefore, that there was no contract, express or implied, on the part of the defendant.

But here the plaintiff built a house on the defendant's land, and is the defendant to have the use and benefit of it and pay nothing for it? If the plaintiff built the house *officiously,* the folly is his own, and there is no hardship. And besides, it does not appear that the house has ever been of any use or benefit to the defendant. For aught that appears it may have been an injury. It must have been an inferior house, built at the cost of $78. And its location, and the space occupied by it, and the roads leading to and from it, and the timber consumed in the building, and the fire-wood used, may have been a decided injury. At any rate, the defendant did not want it built, and protested against it. And it seems to have been built under the terms of co-partnership between the plaintiff and Charles for the temporary purpose of enabling Charles to reside upon the farm during the
(207) lease. So that the plaintiff and Charles built the house, not for the defendant, but for themselves.

It is not true that in every case where one man builds upon the land of another and improves it, he has a lien upon the land under the statute; *supra:* but in order to create the lien the circumstances must be such as to first create the relation of debtor and creditor; and then it is for the *debt* that he has the lien.

There is error.

PER CURIAM. *Venire de novo.*

Cited: Lester v. Houston, 101 N.C. 609; *Boone v. Chatfield,* 118 N.C. 918; *Weathers v. Borders,* 124 N.C. 613; *Weathers v. Cox,* 159

N.C. 577; *Mfg. Co. v. Andrews,* 165 N.C. 292, 293; *Foundry Co. v. Aluminum Co.* 172 N.C. 705; *Ingold v. Hickory,* 178 N.C. 616; *Boykin v. Logan,* 203 N.C. 198; *Brown v. Ward,* 221 N.C. 346.

STATE v. ADDISON MCADDEN AND ANOTHER.

Where the defendants, two white men, go to the house of the prosecutor, a colored man, and one of them claims a cow, (asserting his purpose to carry the cow away,) then in possession of and claimed by the prosecutor who protests against the defendant's taking the cow; and while the latter has gone to a neighbor's to procure evidence to prove his title, the defendants drive the cow off; they are guilty of a forcible trespass.

INDICTMENT, forcible trespass, tried before *Watts, J.,* at Spring Term, 1874, of GRANVILLE Superior Court.

On the trial below the jury found substantially the following facts:

The prosecutor had in his possession and claimed a certain cow, when the defendants came to his house and McAdden claimed the cow to be his property, asserting his purpose to take possession. Prosecutor insisted that the cow was his, saying that he had obtained her of one West, and could prove by West that the cow was his property, and if the defendants would wait awhile he would go over to West's, who lived near by, and bring him over to where the parties (208) were, and prove that the cow was his. At this time the cow was in a field belonging to one Wilkerson, who had permitted the prosecutor to place her there. While the prosecutor was gone after West the defendants drove the cow out of Wilkerson's field, and when the prosecutor returned they had driven her into the road a few yards outside of the field. Prosecutor pursued defendants and overtook them about 100 or 150 yards beyond the draw bars through which they had driven the cow. The defendants did not have the cow tied or confined in any way; they were simply driving her before them. When the prosecutor got in sight he called to defendants and asked them to desist from driving his cow away, and when he got up to them he again demanded that they should desist from driving off his cow. Defendants refused and drove the cow away.

His Honor, upon the foregoing facts, being of opinion that the defendants were not guilty, gave judgment accordingly, from which judgment Solicitor Cox appealed for the State.

Attorney General Hargrove, for the State.
No counsel in this Court for defendants.

READE, J. There were two of the defendants, and so far as appears, the prosecutor was alone. The force was therefore overpowering, supposing there was nothing to render it so but numbers; but it is stated that the prosecutor was a colored man, and as it is not stated that the defendants are colored, we assume that they are white, and we know that the feeling of subjection of the colored to the white race was calculated to add to the force of numbers. And the fact that the prosecutor did not offer resistance, although he strenuously insisted upon his right to the cow, and followed the defendants, forbidding them to take the cow, shows that he was put in fear.

It is not stated why his Honor held the defendants not guilty; and it may be that he was influenced by the fact that the defendants
(209) got the actual possession of the cow while the prosecutor had stepped off to get a witness to prove his title. But that makes no difference, because the prosecutor returned and in their presence forbid them to drive off the cow. So that they did take the cow out of the possession of the prosecutor, in his presence with a strong hand.

There is error. This will be certified to the end that the Court below may pronounce the judgment of the law as upon a verdict of guilty. *State v. Fisher,* 12 N. C., 504.

PER CURIAM. Judgment accordingly.

Cited: S. v. Batchelor, 72 N.C. 468; *S. v. Gray,* 109 N.C. 793; *S. v. Woodward,* 119 N.C. 838; *S. v Robbins,* 123 N.C. 738; *S. v. Lawson,* 123 N.C. 744; *S. v. Jones,* 170 N.C. 755; *S. v. Oxendine,* 187 N.C. 663; *S. v. Stinnett,* 203 N.C. 832.

RICHARD P. SPIERS v. HALSTEAD, HAINES & CO.

An affidavit, in which it is stated that the defendant is "non-resident of this State," but it does not state that he "has property within the same," is not sufficient to justify a service by publication.

CIVIL ACTION for the recovery of a certain debt by attachment, tried at the Spring Term, 1874, of HALIFAX Superior Court, before his Honor *Judge Watts.*

The only question raised in the case was as to the sufficiency of the affidavit, and the facts relating to which are set out fully in the opinion of the Court.

His Honor, on the trial below, held the affidavit insufficient, and gave judgment accordingly. From this judgment plaintiff appealed.

W. Clark, for appellant.

Moore & Gatling, Batchelor & Son, contra.

READE, J. Service of process upon the defendant so as to make him a party and enable him to defend, is necessary to the validity of every subsequent step in the action. Such service may be by (210) taking the body, or by personal summons, or by publication, as may be prescribed by law in any given case. In this case the service was by *publication*. And the only question is, whether the service is sufficient?

Personal service being the ordinary mode of making the defendant a party, it seems to be contemplated by our statute that that shall be the *only* mode, unless a foundation is laid for some other by *affidavit*. And so service by publication is prescribed where it "appears by affidavit," that the defendant "is not a resident of this State, but has property therein, and the Court has jurisdiction of the subject of the action." C. C. P., Sec. 83. In this case the affidavit states that the defendant is "not a resident of this State," but it does not state that he "has propery within the same." It does appear subsequently by the return of the sheriff that the defendant did have property in this State; and the plaintiff insists that this is sufficient. If so, it would be sufficient if it should appear by the return of the sheriff, or in some other way, that the defendant is not a resident of this State. And so an affidavit might be dispensed with altogether. But the statue prescribes that whatever is necessary to dispense with personal service of the summons shall appear by *affidavit* and not otherwise.

We are of the opinion that the affidavit is insufficient, and that there is no error in the order appealed from.

PER CURIAM. Judgment affirmed.

Cited: Wheeler v. Cobb, 75 N.C. 24; *Burrell v. Lafferty,* 76 N.C. 383; *Windley v. Bradway,* 77 N.C. 333; *Bacon v. Johnson,* 110 N.C. 117; *Foushee v. Owen,* 122 N.C. 363; *Davis v. Davis,* 179 N.C. 188; *White v. White,* 179 N.C. 602; *Casualty Co. v. Green,* 200 N.C. 538; *Martin v. Martin,* 205 N.C. 159; *Comrs. of Roxboro v. Bumpass,* 233 N.C. 193.

(211)

BRYANT LEGGETT v. JAMES GLOVER AND R. A. ROZIER, EXECUTORS, ETC.

Notwithstanding the restrictions contained in Sec. 343, C. C. P., in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under the book-debt law.

CIVIL ACTION to recover a book account, commenced in a Justice's Court and carried by appeal to the Superior Court of ROBESON County, and tried before *Clarke, J.*, at the Special (January) Term, 1874.

On the trial below the plaintiff offered himself as a witness to prove the sale and delivery of the goods, the subject of the action, to the defendant Rozier's testator, contending that he was authorized to do so under the book-debt law. Defendants objected. His Honor overruled the objection and the plaintiff proved his account and had a verdict of $50 against Rozier, the executor.

The case states that the counsel for the defendant, Glover, moved to tax the costs against the plaintiff. Motion refused. Defendant, Rozier, moved the same, and prayed that the judgment should be entered against him *quando*. This too refused. Defendants appealed.

N. A. McLean, for appellant.

Leitch, contra.

READE, J. The case is so carelessly made up that we may mistake the point which the parties supposed they were presenting.

Under the old book-debt statute a party could prove his account by his own oath up to $60. Rev. Code, Chap. 15, Sec. 1; Bat. Rev., Chap. 17, Sec. 343; C. C. P., Sec. 343a.

Under C. C. P., Sec. 343, a party may be a witness in his own behalf generally; but there is a restriction that he shall not testify as to
(212) any matter between him and a person deceased, where his administrator or executor is a party. And now the question is whether that restriction prevents him from proving his debt under the book-debt law as he could have done before.

We are of the opinion that it was no part of the purpose of the late statute, C. C. P., Sec. 343, to narrow the competency of parties to be witnesses, but to widen the same; and that it must be read with the old statute, as if they all together provided that a party should be competent as a witness generally; but he should not be permitted to testify of transactions with a person since deceased, whose representative was a party, except as heretofore he was permitted to testify under the book-debt law. The effect of which is that the book-debt law stands unaltered.

The defendant pleaded "no assets," and yet there was judgment against him. There was some irregularity in entering judgment, so that we cannot affirm it here.

The cause will be remanded to be proceeded in as the law directs, and this opinion will be certified. Defendant will pay cost.

PER CURIAM. Judgment accordingly.

SETTLE, J., *Dissenting:* I dissent from the opinion of the majority of the Court.

Cited: Armfield v. Colvert, 103 N.C. 156; *Marsh v. Richardson,* 106 N.C. 548.

LUKE MASON v. JAMES OSGOOD.

Administrators and all other parties to the record, prosecuting or defending, are permitted under the act of 1873-74, Chap. 60, Sec. 1, to appeal to the Supreme Court, without giving security therefor.

PETITION for a *certiorari* to be directed to the Judge and Clerk of the Superior Court of CRAVEN County, to remove a judgment and certain proceedings in the case to this Court.

It is stated in the petition that the plaintiff obtained a judg- (213) ment against the petitioner, the defendant, as administrator, from which he desired to appeal, but was unable to give security, and for that reason his Honor refused to grant it.

His Honor, Judge CLARKE, in certifying the proceedings, states as his reason therefor that the Court had decided that an administrator cannot appeal *in forma pauperis.*

Hubbard and Lehman, for petitioner.

Smith & Strong and Haughton, contra.

BYNUM, J. This is an application for a *certiorari* upon the ground that his Honor refused to allow the defendant to appeal from his judgment to the Supreme Court without giving an appeal bond and security, he having filed the certificate and affidavit required by law. The motion is founded upon Chap. 60, Sec. 1, Acts of 1873-74, the material fact of which is as follows: "That when any party to a civil action tried and determined in the Superior Court shall at the time of trial desire an appeal from the judgment rendered in said action to the Supreme Court,

and shall be unable, by reason of his poverty, to give the security required by law for said appeal, it shall be the duty of the Judge of said Superior Court, to make an order allowing the party to appeal from said judgment to the Supreme Court, as in other cases of appeal now allowed by law without giving security therefor."

The language of the statute, "when *any* party to a civil action," etc., is so comprehensive that we must suppose it was not called to the attention of his Honor, else he would have held, as we now decide, that administrators and all other parties to the record, prosecuting or defending, are embraced by its terms and its spirit also. It was, therefore, error to refuse to allow the appeal.

The Clerk of this Court will issue the process as prayed for.

PER CURIAM. Judgment, *certiorari* granted.

Cited: Hamlin v. Neighbors, 75 N.C. 67; *Christian v. R. R.,* 136 N.C. 322.

(214)

W. A. MARTIN v. MORRIS MEREDITH.

The lien acquired by the levy of a Justice's execution on the 27th Feb., 1868, is lost by the plaintiff's taking out a new execution on the same judgment, on the 1st day of August following; and a sale under the latter must be made subject to the defendant's right to a homestead.

CIVIL ACTION for the recovery of certain land, tried at the December (Special) Term, 1873, of GUILFORD Superior Court, before his Honor, *Judge Henry.*

Upon the trial below, under agreement of counsel, his Honor found the facts established by the evidence, which, so far as they are material to the decision of this Court, are substantially as follows:

In 1868, one Johnston, a constable, obtained two judgments before a Justice against the defendant, Meredith. On the 27th February, 1868, the constable sued out executions, and on the same day levied them on the defendant's land, the same which is the subject of this controversy.

These executions were not returned to the ensuing term of the County Court, nor were they ever returned to that Court; but on the 1st day of August, 1868, new executions were issued on the same judgments and on the same day levied upon the same land. The last executions were returned to Fall Term, 1868, of the Superior Court. The case states that they were put on the "scratch" docket, but not on the trial docket until Spring Term, 1869, from which term a notice was issued and served on defendant of a motion to be made at Fall Term, 1869, for an order

to sell the land levied on. The defendant not appearing, the judgment was confirmed and an order of sale granted, all of which was entered on the Judgment Docket. A *ven. exp.* issued and the land was sold on the 7th March, 1870, when the plaintiff bought it and received the sheriff's deed, and this without any assignment of homestead to defendant.

The defendant, among other things, insisted that the purchase (215) by the plaintiff at the sheriff's sale, was inoperative to divest his title and vest it in the plaintiff; that the issue of new executions on the 1st August was a waiver of the levies theretofore made; and that his right to a homestead had attached before the judgments and executions of the Superior Court had become a lien on the land sued for.

His Honor being of opinion that the returns to the Superior Court were authorized by law, and that the orders of sale therein were upon causes properly constituted in that Court, and that the sheriff's sale and deed passed the whole title, without any lien as to a homestead, gave judgment in favor of plaintiff; from which judgment defendant appealed.

L. M. Scott, Dillard & Gilmer, for appellant.
Gorrell, Scales & Scales, contra.

READE, J. By the levies of the executions on 27th February, 1868, the plaintiff in those executions acquired a specific lien upon the lands levied on, the same as those in dispute, which barred the defendant's right to a homestead under the Constitution, which did not go into effect until 1st July, 1868. *McKethan v. Terry*, 64 N. C., 25.

But those levied were abandoned and lost their force by suing out new executions 1st August, 1868, under which new levies were made and subsequently the sale to plaintiff, on 7th March, 1870. These levies and sale were subsequent to the homestead law. So that at the time the homestead law went into operation the plaintiff in the executions, having abandoned his levies, had only a judgment, which was not such a lien as to have the defendant's homestead.

If the defendant's homestead had been laid off as it ought to have been, and there had been an excess of land, such excess would have been liable to sale. And so now if, after laying off the homestead, there be an excess, the plaintiff will be entitled to the excess. And if there be no excess it may be that the plaintiff will have his remedy against the plaintiff in the execution under which the land was sold, (216) under Statute Rev. C., Chap. 45, Sec. 27, which gives a remedy to purchaser at execution sale, where the title to the property turns out to be defective. But this is not now before us.

There is error. This will be certified and the cause remanded that the parties may proceed as they may be advised.

PER CURIAM. Judgment accordingly.

CHAS. H. WILLIAMS v. GREEN WILLIAMS.

This Court, upon a petition to rehear, will modify a judgment entered up at a previous term, when it appears that on account of the careless manner the case was made up, but one of the two defences relied on by the defendant was considered, and that on account thereof substantial justice was not administered.

PETITION to rehear a decision of this Court in the same case, made at the last term, praying that the judgment then rendered be altered, etc.

The grounds upon which the petition is filed, are fully stated in the opinion of Justice READE.

Jones & Jones, for petitioner.
Batchelor & Son, contra.

READE, J. This action originally commenced before a Justice. Pleas stat. lim. and counter claim. The Justice gave judgment for plaintiff, and the defendant appealed to the Superior Court, where the same pleas were relied on. But his Honor intimated that plaintiff's claim was barred by the statute of limitations, and the plaintiff differing, judgment was given for the defendant, and the plaintiff appealed to this Court. The case was carelessly made up for this Court, and stated that the statute of limitations was the only question. This Court overruled his Honor upon that question, and there appearing to be no other,
(217) gave judgment here for the plaintiff. The effect of giving judgment here for the plaintiff was to cut the defendant out of his defence of counter claim, etc.

And so a petition was filed at this term to rehear the decision at last term, with the view of reversing so much of it as gave judgment here for plaintiff, and of having the cause remanded to be proceeded with in the Court below, so as to allow the defendant to have his defences passed upon. The facts stated above appear from the petition to rehear, supported by the written statement of his Honor who tried the cause below.

And now upon rehearing the case, we affirm so much of the decision at last term as declares that the statute of limitations does not bar the

plaintiff, and we reverse so much as gives judgment here for plaintiff; and we remand the cause to be proceeded with according to the course and practice of the Court.

Upon the judgment at last term in this Court an execution issued and the money was collected and returned into office. And upon the filing of the petition to rehear, we directed that the money be retained in office to await the further order of this Court. We now order that the money, except so much as was necessary to pay the cost of that suit, be returned to the defendant in the execution. And that the Clerk notify the defendant of this order and return to him the money.

The cause will be remanded and this opinion certified.

PER CURIAM. Judgment accordingly.

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(218)

JAMES DUVALL v. H. H. ROLLINS.

Whenever the record from the Court below, whether upon a "case agreed," or a "case stated," presents clearly and fully the merits of the whole case, this Court will render such judgment thereon as the Court below ought to have done.

An adverse possession, to have the effect of leaving in the true owner the right of action only, must be hostile to him, and under a claim and with the exercise of the rights and privileges of permanent ownership.

The personal property exemption is confirmed by the Constitution, and is inviolable; it cannot be reached by executions nor forfeited by any attempt to make a fraudulent conveyance.

PETITION to rehear the decision in the same case, made at the January Term, 1873, of this Court, and reported in 68 N. C., 220.

The grounds upon which the rehearing is asked, and the facts pertinent thereto, are stated in the opinion of Justice BYNUM, and the former report of the case above alluded to.

Folk and McCorkle & Bailey, for petitioner.

W. P. Caldwell and Smith & Strong, contra.

BYNUM, J. This case was decided at the January Term, 1873, and is reported in 68 N. C., 220. It is before the Court again for a re-hearing, upon a petition filed for that purpose.

It is alleged by the plaintiff that in the former decision the Court assumed that the record presented a "case agreed," when in fact it was a "case stated," under the Code, Sec. 301. Without deciding whether it

is a case agreed or a case stated, and without attempting to draw a line of distinction between the two, it is sufficient to say that, whether it be the one or the other, whenever the record presents clearly and
(219) fully the merits of the whole case, it is the duty of this Court to render such judgment thereon as the Court below ought to have done.

The counsel for the defendant evidently felt the force of this view, for without pointing out any material errors of the Court upon the construction of the record, he assumed that it was correct in substance and presented the final merits of the case; therefore he delivered an able and learned argument to show that the Court erred in its former decision.

After a careful review of the grounds of the former decision, aided by the light of another argument, the Court is unable to see any error in that judgment.

The facts of the case are briefly these:

The plaintiff, Duvall, on the 5th October, 1870, sold and transferred the property in dispute to one Aker, his son-in-law, in consideration of his undertaking to support the plaintiff and his wife, who were old. On the 25th of October, 1870, executions came against the plaintiff, who then had his personal property exemption laid off and assigned to him, embracing this same property, from which we are to infer that he still retained the possession, notwithstanding the previous sale of the 5th of October; and there is no evidence that he ever parted with the possession until the seizure by the officer. On the 24th of December, 1870, the defendant attached it for debts of the plaintiff and took possession thereof, and on the trial of the actions, the same day, Aker appeared and claimed the property as belonging to him, the plaintiff being present and not objecting thereto.

Afterwards, and before the sale by the officer, Aker, "being unwilling to become engaged in litigation, recanted the contract so made with his father-in-law." Afterwards the defendant sold the property under the judgments so obtained, the plaintiff being present and forbidding and claiming the property as his personal exemption.

1. The defendant says that the plaintiff cannot maintain the action, because by his sale he passed the title to Aker, who was the legal owner of the property at the time of its seizure by the officer, and that
(220) being thus in the adverse possession of the officer at the time of the attempted rescission or resale to the plaintiff, such resale was void by the policy of the law, as an attempt to sell a right of action merely.

It is evident that this defence is technical only, for it proceeds upon the ground that the defendant seized the goods of the wrong man. It

admits that he has no title, but that Aker has; and he seeks to escape this action by showing that he has wronged another man. Now it is difficult to see any good reason why Aker, if the title was in him, might not rescind the contract with the assent of Duvall, when the effect would be to improve the condition of the defendant, by putting back the property in the plaintiff, his debtor, against whom the process was directed, and under whom only he can pretend to justify the seizure.

But was the possession of the officer adverse to Aker, in the legal sense, so that he had left in him a right of action only? An adverse possession to have that effect, must be hostile to the true owner, under a claim, and with the exercise of the rights and privileges of permanent ownership. But the claim of the officer was not hostile to Aker but to the plaintiff, neither was it permanent or as owner. He claimed to hold it in *"custodia legis"* only, until further directions. This then was not such an adverse holding as prevented a sale by Aker, much less prevented a rescission which put the title in the debtor, the very place where the defendant should desire it to be where all his legal proceedings assumed it to be.

The defendant next says, that the plaintiff having at the trial before the magistrate, not denied the claim of title then made by Aker, will not now be allowed to set up title in himself.

Such is not the doctrine of estoppels *in pais*, the true principle of which is this: "The admission must be intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the party estopped is cut off from the power of retrac- (221) tion." *Dagell v. Odell,* 3 Hill, 219; 2 Smith L. Cases, 243.

The definition itself precludes all idea of an estoppel here, for so far from the admission of the plaintiff, that the title was in Aker, having any influence to the prejudice of the defendant by changing his line of conduct, he disbelieved it and acted in the opposite direction by attempting to hold the property and fix him with the ownership.

The plaintiff being thus left free to assert his title, the case falls fully within the principle of *Crummen v. Bennett,* 68 N. C., 494.

The personal property exemption cannot be reached by execution at all, for as to that, under the Constitution, there can be no creditor and no forfeiture by an attempt to make a fraudulent conveyance.

Our laws have long been so framed as to make fraudulent conveyances void as to creditors, and our habits of thinking run in the same direction, so that it is difficult to realize that another and a new right has been interposed between the creditor and debtor, which secures certain of his property, even from his own frauds upon creditors.

It is confirmed by the Constitution and is inviolable.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Curlee v. Thomas, 74 N.C. 54; *Lambert v. Kinnery,* 74 N.C. 350; *Comm'rs. v. Riley,* 75 N.C. 146; *Gaster v. Hardie,* 75 N.C. 463; *Gamble v. Rhyne,* 80 N.C. 186; *Albright v. Albright,* 88 N.C. 242; *Arnold v. Estis,* 92 N.C. 167; *Dortch v. Benton,* 98 N.C. 191; *Thurber v. LaRoque,* 105 N.C. 314; *Cowan v. Phillips,* 122 N.C. 74; *Whitmore v. Hyatt,* 175 N.C. 118; *Edgerton v. Johnson,* 218 N.C. 302.

(222)

WILLIAMSON PAGE v. N. C. RAILROAD COMPANY.

Where the hogs of the plaintiff were attracted to the warehouse of the defendant by the drippings of molasses from defendant's cars, and were killed by the train's suddenly starting or approaching without the usual alarm, it was such negligence as entitled the plaintiff to damages.

CIVIL ACTION to recover the value of certain stock, tried at the January (Special) Term, 1874, of WAKE Superior Court, before his Honor, *Judge Tourgee.*

Certain hogs and other of his stock, the plaintiff alleged, had been killed on the railroad of the defendant by the cars and engines.

It was in evidence that the hogs were killed at various times at the defendant's warehouse, to which they had been attracted by the drippings of molasses on the track from the cars. Some were killed by the trains rushing up to and beyond the station at a very rapid rate; others, being under the cars, by the engine suddenly starting without blowing the whistle or giving any alarm.

An ox was killed by an extra freight train before sundown, in a cut and on a curve. The animal could not have been seen much more than 200 yards; that the train could not have stopped under 300 yards, but that its rate of speed could easily have been so checked as to prevent injury to the ox within the 200 yards.

A cow was killed by an extra passenger train running at an unusually high rate of speed, and that the train could have been stopped. No alarm was given nor was the speed of the engine lessened.

The following charge was submitted by his Honor:

1. If the jury believe the hogs were killed at the station by an incoming train, it was negligence.

2. If the jury believe the hogs were so killed by an outgoing train which left without whistling, it was negligence.

3. If the jury find that the ox was killed by the defendant's freight train which, running on schedule time, could have been (223) slackened so as not to overtake the animal in a distance of from 100 to 200 yards, and at that place it might have been sighted at a distance of from 200 to 300 yards, it was negligence.

4. If the cow was killed in a cut on a crooked part of the road by a fast running extra passenger train, which might have been stopped in 100 yards and could have run 200 yards before reaching the animal, it was negligence.

The jury returned a verdict for the plaintiff. Motion by defendant for a new trial; motion refused. Judgment in accordance with the verdict and appeal by defendant.

Smith & Strong and Battle & Son, for appellant.
Fowle and Busbee & Busbee, contra.

BYNUM, J. The counsel for the defendant very properly admitted the liability of the company for the cattle killed in the manner set forth in the case stated. He, however, excepts to the charge of his Honor in reference to the hogs. The charge is to be construed not abstractly, but in reference to the evidence, about which there is no dispute. That evidence is that the hogs were killed at the warehouse of the defendant at Morrisville station, being attracted upon the road track by molasses which had dripped upon the track from the defendant's cars, and while there were killed at various times, some by the train rushing up to and beyond the station at a very rapid rate, and others, being under the cars, by the engine suddenly starting without blowing the whistle or giving any alarm. This unquestionably was negligence in the company and would have justified the Court in instructing the jury that if they believed the evidence they should find for the plaintiff. The Court did charge that these several acts constituted negligence. In that there is no error.

PER CURIAM. Judgment affirmed.

(224)

MARTHA E. DORTCH AND OTHERS v. WM. T. DORTCH, ADM'R., AND OTHERS.

An administrator is not required to insure the estate of his intestate; but he is required to be honest, faithful and diligent.

If an administrator retains the funds of his intestate to meet the exigencies of his office, or to discharge the debts against the estate, when established, or because there are none within the jurisdiction of the Court authorized

to receive it, he is not only permitted but encouraged to invest such funds in interest bearing securities.

CIVIL ACTION for the purpose of settling an estate, heard upon exceptions to the report of a commissioner, at Fall Term, 1873, of WILSON Superior Court, before *Clarke, J.*

This action commenced by a bill in equity, filed at Fall Term, 1859. It was regularly continued from term to term, without action, until the Spring Term, 1872, of the present Superior Court, when it was referred to a commissioner to state an account, who reported to Spring Term, 1873. At this term plaintiffs filed exceptions to the report, which were heard at the ensuing term.

His Honor sustained a part of the exceptions, giving judgment accordingly. From this judgment defendants appealed.

The point raised by the exceptions and the grounds sustaining it are fully set out in the opinion of the Court.

Moore & Gatling, Smith & Strong, and Haywood, for appellants.
Faircloth & Grainger, contra.

SETTLE, J. The material facts are, that in 1854 the defendants became the administrator of L. J. Dortch, who died in that year in Edgecombe County, leaving a widow and three children, who are the plaintiffs in this action. That the plaintiffs removed to and became residents of the State of Mississippi. Some time before the filing of this petition, which was at Fall Term, 1859, and that the three (225) children, all infants, had no guardian in this State. That the estate of the intestate, L. J. Dortch, was much involved in litigation, requiring numerous suits and much delay in its settlement; that the defendant having money in his hands belonging to the estate, with suits pending against him, which he might be called upon to answer, and further, having no one in the State to whom he could pay the money, invested it by loan to one George W. Collier, on what is admitted to have been good personal security, but what afterwards became worthless by the results of the war. That the defendant in 1867, in order to secure this fund, took the note of the said Collier for the same, and secured the note by mortgage on land, which is alleged to be amply sufficient to pay the debt; that in consequence of protracted litigation the Collier land has not yet been sold.

At Spring Term, 1872, an order was made appointing a commissioner to state the account of the administration by the defendant.

A report was made, and exceptions filed, and the controversy is now narrowed down to a single point which arises upon that portion of the report, which is as follows:

"It further appearing that George W. Collier was indebted to the estate, (meaning that he had borrowed money belonging to the estate of the intestate, from the defendant,) and that he became insolvent by the results of the war, and that the administrator took his note on the first day of February, 1867, secured by mortgage on real estate, which is amply sufficient to secure the payment of said note, the collection of which has been delayed by much litigation, I report that the sums due the plaintiff should be paid out of said note when collected, the amount of said note being more than sufficient to pay the sums reported."

The plaintiff excepted to the report of the commissioner, finding that they should be paid out of the proceeds of the Collier note and mortgage, insisting that they were entitled to an immediate judgment; and his Honor sustained the exception from which ruling (226) the defendant appealed.

The question at once presents itself: Did the defendant act in good faith, and with due diligence in his transactions with Collier?

The authorities cited by Mr. Haywood, in his well considered brief, establish beyond question:

1. That when an executor or administrator has money of the estate in his hands, and there are no reasons why he should retain it, and he has an opportunity of paying it over to the legatees or next of kin, he should do so, and will not be heard to say that he had loaned it out, for the sake of interest.

2. If there are reasons why he should retain it, in order to meet the exigencies of his office, or as in our case, to pay debts, if established, or because there was no one here authorized to receive it, he is not only permitted but encouraged to invest it in interest-bearing securities, for the benefit of the fund.

3. An administrator is not required to insure the estate of his intestate, but he is required to be honest, faithful and diligent.

Let us apply these principles to the case before us.

The defendant, in the early part of his administration, had two reasons for retaining the fund, either of which was sufficient, and having once invested it, the result is likely to prove that he has been much more fortunate in his investment, and management of the fund than nine-tenths of those who have had the management of trust funds during and since the war. No one will say that he ought to have collected depreciated currency during the war; and those who have witnessed the general wreck of fortunes since the war will hardly believe that one who is about to save all that was entrusted to him, is not both faithful and diligent.

What we have said disposes not only of the main question, but also of the exception as to the forty dollars expended on account of the Collier mortgage.

This opinion will be certified to the end that the Superior
(227) Court may inquire into the condition of the mortgage, and have it assigned for the benefit of the plaintiffs, or require the defendant to close it, for the benefit of the plaintiffs, as may seem best to meet the ends of justice.

PER CURIAM. Judgment accordingly.

Cited: Gay v. Grant, 101 N.C. 209; *Marshall v. Kemp,* 190 N.C. 493; *S. v. Cahoon,* 206 N.C. 395.

W. S. NORMENT, ADM'R., ETC., v. JOHN PARKS.

A deed which conveys to one certain property naming the same *seriatim,* and which also conveys "all my other estate and interest," does not include a mule which the grantor had theretofore given to her grandson. And as the gift to the grandson was without consideration, the mule was subject to the debts against the grantor.

CIVIL ACTION against the defendant as *executor de son tort,* for the recovery of a mule, tried before *Logan, J.,* at Spring Term, 1874, of MECKLENBURG Superior Court.

The following is substantially the case agreed:

One Mary Howie was indebted by note to the intestate of the plaintiff; that she died in the county of Cabarrus, and that no administration had been granted on her estate.

In the spring of 1866 Mary Howie had a considerable estate, consisting of her dower in 200 acres of land, with a well furnished dwelling house. Another tract of 160 acres, for a part payment of which the note sued on was given. She also had two mules, four horses, some cows and farming utensils, household and kitchen furniture worth $2,000 or over.

John Parks, the defendant, married a daughter of Mary Howie, and after her death took possession of the property. One Mansen Howie, col., testified that as a renter he worked on the farm of Mary Howie in
the year 1866, and that at that time she had the above property
(228) and the two farms; that she rented the land, furnishing her tenants stock, farming utensils, etc., and that they paid her two-thirds of what was made. For 1866 she received something over three bales of cotton, 300 bushels of corn and other products, with $670. That John Parks came to Mrs. Howie's to live in the beginning of the year 1867, the witness working for him that year; and that he took posses-

sion of the horses and mules which he sold, all with the exception of one mule, worth about $150. Those sold were worth $450. He, the defendant Parks, also sold the cotton and used the grain made in the lifetime of Mrs. Howie, and that at her death he sold the mule she had kept in possession. Witness had heard her say that this mule was her grandson's.

The defendant introduced as evidence a deed by Mary Howie to him, dated June, 1866, reciting a consideration of $1,881, and conveying all her estate in two tracts of land, and certain personal property in which are enumerated two horses. He, the defendant as a witness, then stated that the deed was given to him for the consideration set forth therein, and that it consisted of $367, money advanced, and the balance of $1,500 was due his wife on settlement. That Mrs. Howie had acquired no property after the deed was made. The defendant had married her daughter in April, 1866, and the deed was executed in the June following. His wife had lived with her mother up to the time of the marriage, and that her mother was indebted to her for the hire of slaves during the years 1863 and 1864, and other property. Defendant further stated, that at the time he took the deed from his mother-in-law, he knew that the debt sued on was unpaid and was part of the purchase money for one of the tracts of land conveyed to him. That at the death of Mrs. Howie, there was a mule left upon the premises, which she had given to her grandson; that he had never taken possession of it, but after the death of the old lady, he sold it for the grandson. He further stated that he had paid about $80 burial expenses out of his own funds.

His Honor charged the jury that an *executor de son tort* was one who being neither executor nor administrator of a deceased person, intermeddles with, or converts to his own use property of the (229) deceased; and that it was for the jury to say whether the defendant in this case had intermeddled with or converted to his own use any of the property of Mary Howie, and if so, how much. If he had done so the plaintiff would be entitled to a verdict for the amount so found. If the defendant had not so intermeddled, then he would be entitled to their verdict.

The defendant's counsel asked the Court to instruct the jury that the deed from Mary Howie conveyed all the property she had to defendant. This his Honor refused, but told the jury that they had all the facts before them, and to take the case and make up their verdict.

The jury found for the plaintiff, assessing his damage at $150. Motion for a new trial refused. Judgment and appeal by defendant.

Wilson & Son, for appellant.

McCorkle & Bailey, contra.

SETTLE, J. We think the defendant may esteem himself fortunate that the demand of the plaintiff is so modest, and that he has contented himself with the recovery of the value of the mule, given by Mrs. Howie to her grandson, without consideration, and has not seen fit to attack the deed of Mrs. Howie to the defendant for fraud. There is nothing to support the idea that the mule passed to the defendant under the deed of Mrs. Howie, for the property professed to be conveyed, is named *seriatim,* for instance, "two horses," etc.

Why then does not the maxim, *expressio unius est exclusio alterius,"* apply? The defendant replies, because after enumerating specifically certain property, there is a clause in the deed which conveys "all my other estate and interest," to himself and wife, etc. But this is clearly an after thought, for the defendant himself upon the trial testi-
(230) fied that Mrs. Howie had no estate or interest in the mule in question, for the reason that she had parted with it by gift to her grandson.

And while it may be conceded that the gift to the grandson was good, as between the parties, it certainly cannot stand a moment before the claims of creditors.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

A. C. COWLES, ADM'R., v. P. HAYES AND T. N. COOPER.

Where a plaintiff declares for the value of property sold, as the consideration of a note given at an administrator's sale, it is competent for the witness proving the consideration, to refresh his memory from the account of sales kept by himself; and also to read the terms of the sale as they were read just before the sale commenced.

An administrator regularly appointed, succeeds to all the rights of a special administrator.

CIVIL ACTION for the recovery of a note given at an administrator's sale, commenced in a Justice's Court, and carried by appeal to the Superior Court of IREDELL County, where it was tried at Spring Term, 1874, before his Honor, *Judge Mitchell.*

The case comes up upon certain exceptions to the evidence admitted on the trial below, of which the opinion of Justice BYNUM sufficiently sets forth the grounds.

There was a verdict and judgment for the plaintiff. Motion for a new trial; motion overruled. Appeal by defendants.

McCorkle & Bailey, for appellants.
Armfield contra.

BYNUM, J. This was an action originally begun before a (231) single Justice and by successive appeals brought to this Court upon exceptions to evidence and the charge of the Court upon the trial below.

The plaintiff, as administrator of James Howard, sued upon a note given by the defendants to one S.W. Little, who had been the special administrator of the same intestate and as such had taken the note for property sold. The note was given the 3d March, 1865, pending the late war, and under Chap. 34, Sec. 7, Bat. Rev., the plaintiff declared for the value of the property sold and for which the note was given.

Upon the trial many exceptions were taken by the defendants to the testimony admitted and rejected. As all of the exceptions have been repeatedly decided by this Court adversely to the defendants, it would be useless to enumerate them in detail. The plaintiff having declared for the value of goods sold, the Court properly held that to be the only enquiry for the jury and that the testimony introduced by the plaintiff was competent to that end.

The Court allowed the jury to copy a memorandum of articles sold and the prices thereof, made out by the plaintiff's counsel. This was objected to by the defendants. But the case states that this memorandum was but the copy of the account proved and admitted in evidence. It was, therefore, nothing more than a note of the evidence taken down by a juror, which was not only proper, but often commendable. The case of *Benton v. Wilkes*, 66 N. C., 604, has no application, because there the Court allowed the jury to take out with them a slip of paper containing an abbreviated estimate of the plaintiff's claim of damage. This was held error because it was not evidence, but allegation merely.

The counsel of the defendants asked the Court to instruct the jury that the plaintiff could not recover because he had failed to show that he had any connection with the note sued on or any interest in the matter in suit. His Honor declined to give the instruction, and in that there is no error, for the case does disclose that the note was (232) given to S. W. Little, the special administrator, and that the plaintiff was afterwards appointed the general administrator. Clearly, then, the plaintiff succeeded to all the rights of the special administrator, as much so as an administrator *de bonis non* succeeds to all the unadministered effects of the intestate. C. C. P., Secs. 55 and 57; *Eure v. Eure*, 14 N. C., 206; *Cutlar v. Quince*, 3 N. C., 60.

The claim of the plaintiff here was so obviously just and equitable, and the objections to his recovery so technical and untenable, and the

amount involved so small, that it is difficult to see any adequate reason for the obstinacy of the defence. The play is not worth the candle.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Love v. Johnston, 72 N.C. 420; *Davenport v. McKee,* 94 N. C., 331.

J. W. WHITE v. H. A. SNOW.

The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measures to answer the same, is not such excusable neglect as entitles him to relief.

In a judgment by default, the plaintiff can only take so much as is authorized by his complaint. If the judgment be for more, it is irregular.

If the demand in a complaint is for unliquidated damages, and a judgment by default is taken for a sum certain, it is irregular, and will be set aside upon a proper proceeding.

NOTE.—This cause was decided at the last (January) Term, but owing to the detention of the papers by some of the parties until too late, it did not appear in Vol. 70.—REP.

(233) MOTION to set aside a judgment, heard by *Moore, J.,* at the December (Special) Term, 1873, of HALIFAX Superior Court.

The following are the facts, as sent up by the appellant and as found by his Honor upon the trial below.

That the defendant, Snow, some time since, brought suit in this Court against the plaintiff, White, to recover damages because that White had taken certain tolls of a grist mill in which he alleged they were tenants in common.

That on the 21st October, 1870, the plaintiff herein sued Snow, the present defendant, causing a summons to be served on him, which summons, Snow alleges, he supposed to be a paper in the cause he knew to be pending against White; and for this reason he paid no further attention to the matter and did not retain counsel to defend said suit, returnable as it was to Fall Term, 1870, of the Superior Court of Halifax County. That the plaintiff did not file a complaint at the return term, to wit, Fall Term, 1870, nor at either Spring or Fall Terms, 1871, but did file said complaint as of Fall Term, 1870, by his attorney, W. H. Day, Esq., on the 8th December, 1871. In this complaint the plaintiff, White, alleged that the defendant, Snow, had entered on one-half of the

said mill and ousted the said White therefrom, asking judgment for the recovery thereof and damages.

On the 1st day of December, 1871, at a Special Term of Halifax Court, the plaintiff, White, upon motion only and without any evidence whatever, had judgment by default against the defendant, Snow, and thereupon issued his writ of possession and ousted him and has kept him out of the possession of said mill ever since.

On the 26th May, 1872, within less than six months from the rendition of the said judgment, Snow filed his affidavit setting forth the foregoing facts, and after due notice moved to set it aside.

His Honor, being of opinion that the judgment by default was regularly taken according to the course of the Court; that the same was not procured through fraud, ignorance, accident, mistake or excusable neglect, and that therefore the Court had no power in law (234) to set it aside, refused the motion. From this refusal of his Honor the defendant appealed.

Batchelor & Son, for appellant.
Conigland, contra.

RODMAN, J. This is an appeal by the defendant from a judgment refusing to set aside a judgment for want of an answer, given in favor of the plaintiff at a Special Term in December, 1871.

The motion to set aside the judgment was put on two grounds:

1. Excusable neglect, under Section 133 of C. C. P.

The summons was duly served on the defendant by the delivery of a copy. But he supposed it to be some notice or other paper in another suit then pending between the same parties, and paid no attention to it. He does not say whether he read it or not. It is impossible to hold such neglect excusable; it was extremely gross, and has not the slightest excuse.

2. The irregularity of the judgment.

It will be proper, before noticing the matters alleged as irregularities, to consider a general answer made by the counsel for the plaintiff, applying to them all. He contends that no judgment can be irregular which is the deliberate act of the Judge. In the present case the judgment was signed by the Judge. An impression to this effect may arise on reading the cases of *Bender v. Askew,* 14 N. C., 149; *Williams v. Beasley,* 35 N. C., 112, and some other cases. But in those cases the Court only instances judgments taken in the absence or without the knowledge of the Judge as illustrations of irregular judgments. A judgment is irregular if taken contrary to the established practice of the

Court, and a Judge may mistake or inadvertently disregard the practice of his own Court. *Cowles v. Hays,* 67 N. C., 128, and 69 N. C., 406.

Three irregularities are specified:

(235) 1. That the complaint was filed at a special term without any previous leave, and judgment by default taken at the same term.

Every summons must be returnable at a regular term, and regularly the complaint should be filed at the same term, unless the time be enlarged by order of the Court. It is unnecessary to decide whether an omission to file it then, would be of itself a discontinuance or failure to prosecute. But a failure to file it for an unreasonable time certainly would be, unless waived by the defendant, subject to a power in the Judge to allow of its being afterwards filed, if sufficient excuse for the delay was made to appear, and it could be done without prejudice to the defendant. But a defendant could not take advantage of the failure unless he appeared. It might be attended by some inconveniences to hold that a complaint could *under no circumstances* be filed at a special term, and if it could be, we see no reason why a judgment for want of appearance or answer might not be taken at the same term. We prefer to express no opinion on this point, as it is unnecessary that we should.

2. That the complaint is insufficient to warrant any judgment for the plaintiff. The alleged defect is, that the complaint does not allege in the plaintiff a right to the immediate possession of the land. It does not even say that defendant unlawfully withholds the possession, which by a stretch of liberality has been held an assertion by implication of a right to immediate possession in the plaintiff. No doubt the defect would be cured by a verdict, because it is presumed that no Judge would permit a verdict to be given for a plaintiff without some evidence of so essential an element of his right. But a judgment by default is supported by no such presumption, and a plaintiff must be careful to take only such judgment as is authorized by his complaint.

3. That the judgment was final for the sum claimed as damages in the complaint, instead of interlocutory with an enquiry as to the damages. As the complaint was on its face for unliquidated damages, this was certainly irregular. C. C. P., Sec. 217, sub Sec. 2.

(236) *Hartsfield v. Jones,* 49 N. C., 309; *Williams v. Beasley,* 35 N. C., 112.

Judgment below reversed. Let this opinion be certified, to the end, etc.

PER CURIAM. Judgment reversed.

Cited: Price v. Cox, 83 N.C. 264; *DePriest v. Patterson,* 85 N.C. 378; *Wynne v. Prairie,* 86 N.C. 77; *Rogers v. Moore,* 86 N.C. 87; *Witt*

v. Long, 93 N.C. 392; *Williamson v. Cocke,* 124 N.C. 590; *Morris v. Ins. Co.* 131 N.C. 214; *Hood, Comr. of Banks v. Stewart,* 209 N.C. 431; *Johnson v. Sidbury,* 225 N.C. 210.

RUFUS W. COLLINS AND WIFE AND OTHERS EX PARTE.

When in a decree, made in a petition for partition, some of the heirs are required to account for advancements and others were not; and when such decree was made without the knowledge or consent of some of the parties, was not signed by the Judge and was otherwise informal, the same will be set aside, and another decree made.

MOTION to set aside a decree made in a petition for partition at Fall Term, 1869, heard and determined by *Russell, J.,* at January Term, 1874, of NEW HANOVER Superior Court.

The following are the facts as sent with the record of the Court below to this Court:

William R. Moore died intestate, seized of real estate, leaving surviving him four children, Thankful J., wife of Rufus W. Collins, Elizabeth, Susan and Martha, infants, and six grandchildren, William J., Julia, Mary S. and Margaret H. Moore, infant children of Isaac J. Moore, deceased, who was a son of said William R. Moore, and Hanson and George Collins, infant children of a deceased daughter, who was also a wife of Rufus W. Collins.

At December Term, 1866, of the County Court of New Hanover, a petition was filed *ex parte* for partition by Collins and wife, and by all the infant children and grandchildren, by their respective guardians *ad litem,* praying for partition of the lands into *six* equal parts. Thereupon an order was issued to William S. Larkins and others, commissioners, to divide the lands into six equal parts. (237)

The commissioners reported "after the examination of the papers of William R. Moore, we find there has been advancements as per their receipts in the lifetime of said William R. Moore to R. W. Collins and his two wives, of $2200, and to Isaac J. Moore, $1,325, by lands and money, which added, makes $3,525, and at the request of the other heirs, we have assigned and appropriated the balance of the lands to the three youngest children, W. R. Moore, lot No. 1, to Elizabeth, bounded, etc; lot No. 2, to Susan E., bounded, etc.; lot No. 3, to Martha, bounded, etc., valued, etc., which makes the three oldest heirs subject to pay over $1,725 to the three youngest heirs; Isaac J. Moore's heirs to pay over $725, and R. W. Collins' two wives to pay

over $500 each. This report, by inadvertence of petitioners' counsel, was confirmed and registered; that the petition and order was for division into six parts, and the commissioners divided the lands into *three* parts and allotted the same to Elizabeth, Susan E. and Martha Moore, infant children of William R. Moore, and gave no part of the land to the other petitioners, but charged them with advancements.

At Spring Term, 1869 of the Superior Court of New Hanover, a petition was filed *ex parte* by all the same parties, Elizabeth, Susan E. and Martha being represented by their guardian and next friend, Robert W. Moore, to rehear and vacate the decree of 1867; that commissioners be appointed to divide the lands into *six* shares and allot the same, one share each to the four children of William R. Moore, Thankful J., wife of Rufus W. Collins, Elizabeth, Susan E. and Martha Moore. One share to Hanson and George W. Collins, children of a deceased daughter, and the other share to Julia, Margaret, Mary S. and William J., children of Isaac J. Moore, deceased, who was a son of William R. Moore.

At the same Term, (Spring 1869) it was ordered that the decree made at June Term, 1867, be set aside, and that commissioners
(238) be appointed to divide the said lands into *six* equal parts and allot the same as prayed for in the petition. This order was signed by Judge Russell. The commissioners made their report to Fall Term, 1869, dividing the lands as ordered.

At February Term, 1874, a motion was made in the cause upon the affidavit of William J. Herring, who married Susan E. Moore, in October, 1871, setting forth that the decree of 1869 was without the knowledge or consent of the said Susan E., now wife of said Herring and of Elizabeth Moore, who married James A. Bordeaux, in March, 1871, and of Martha Moore, still an infant. These three are the children of William R. Moore, to whom all the lands were allotted by the decree of 1867.

1. They ask that the decree of 1869 be set aside.

2. That Rufus W. Collins and wife Thankful J., Hanson Collins and George W. Collins, infants by their guardian, Rufus W. Collins, Julia, Margaret, Mary S. and William J. Moore, infants by their guardian, John J. Moore, may be required to file an inventory of their advancements, and they be declared not entitled to any portion of said estate.

3. That the report of 1867 be in all things confirmed.

Upon the coming in of the report of commissioners of 1869, there is no formal decree in the papers, but there appears upon the judgment docket this entry, "final decree, costs paid into office."

February Term, 1874, "The Court finds that the decree and petition and other proceedings on which the decree of 1869 were instituted and

rendered, were without the knowledge or consent of the petitioners, Susan E. Herring, Martha Moore and Elizabeth Bordeaux, and may have been in prejudice of their rights, and that no decree in full was drawn up and signed by the Judge, but there is the simple entry of "final decree, costs paid into office," and the decree was founded on a petition at Spring Term, 1869, not sworn to. The petition of 1869 was filed more than twelve months after the decree of 1867. The decree of 1869 is set aside. The decree of 1867 is set aside. (239)

Rufus W. Collins and John J. Moore appeal from so much of said order as sets aside decree of 1869.

Strange, Battle & Son and London, for appellants.

SETTLE, J. We are inclined to think that the reasons in support of the decree of 1867 are much stronger than any that have been or can be adduced in favor of the decree of 1869.

But as there is no appeal from that part of the decree of 1874, which vacates the decree of 1867, we are not called upon to consider that view of the case, but are only required to examine the grounds of appeal from so much of the decree of 1874 as vacates the decree of 1869.

It is evident, from an inspection of the record, that what is called the decree of 1869, does not meet the justice of the case, inasmuch as some of the heirs are not required to account for advancements made in the lifetime of the ancestor.

And it may be that the decree of 1867 is not equitable for no accurate account of such advancements appears to have been taken as a basis for that decree.

By the decree of 1874 the whole matter is opened to the end that the advancements may be enquired into and accurately ascertained, and the rights of all the parties fully determined. This is the only way in which the merits of the controversy can be reached and adjusted.

And his Honor having found "that the decree of 1869, and the petition and other proceedings upon which it was founded, were instituted and rendered without the knowledge or consent of the petitioners, Susan E. Herring, Martha Moore and Elizabeth Bordeaux, (who were infants,) and that no decree in full was drawn up and signed by the Judge at May Term, 1869, nor at any time thereafter, but that the simple entry 'final decree, cost paid into office,' is to be found on the judgment docket of the Court; and further, that the decree was founded upon a petition filed at Spring Term, 1869, which was more than twelve months after the decree of 1867, and that the petition (240)

was not sworn to," it would seem that Collins and the other parties advanced should not complain of the order setting aside the decree of 1869, especially when every argument and authority urged by them in support of the decree of 1869, applies with double force in favor of the decree of 1867, which they procured to be set aside by the irregular proceedings pointed out by his Honor.

Let it be certified that there is no error in the decree of January Term, 1874, from a portion of which some of the parties have appealed.

PER CURIAM. Judgment accordingly.

L. D. STARKE v. THOMAS J. ETHERIDGE AND JAMES S. SANDERLIN.

Where a deed was proved before the Clerk of the late County Court, who wrote opposite the witness' name the word "Jurat," and who swore that the witness did prove the deed: *Held* to be a sufficient compliance with the law, to authorize the registration of such deed.

That a sale, authorized under a deed of trust, is postponed for three years, is no such presumption of fraud as will avoid it, when no possession of the land conveyed, nor other benefit, is reserved to the grantor.

CIVIL ACTION, originally a bill in equity under the old system for the purpose of removing a trustee and appointing a receiver, submitted to and determined by *Moore, J.*, at the Spring Term, 1873, of CAMDEN Superior Court.

(241) The material facts pertinent to the points decided in this Court, and agreed, are substantially as follows:

On the 4th day of April, 1867, the defendant Etheridge executed a deed of trust to the other defendant, Sanderlin, to secure certain persons who were his bondsmen and sureties. The bill in equity was filed to remove Sanderlin from the trusteeship and to get possession of the rents and profits of the lands conveyed in the trust, for the benefit of the *cestui que trust*. Pending this suit, the interest of the defendant, Etheridge, in all the lands described in and conveyed by him in said trust deed, was sold under execution issued from the United States Circuit Court for the District of North Carolina, which interest was puchased by the plaintiff, L. D. Starke. The execution bore test after the date of the registration of the deed of trust. The plaintiff, Starke, had the Marshal's deed, which was duly registered. In the progress of the cause, all the parties named in the trust were made parties to the suit.

The deed of trust was spread out at large upon the records of the Register's office of Currituck County. Against the name of C. W. Grandy, Jr., the subscribing witness, the word "Jurat" is written in the hand writing of Joshua W. Baxter, the then Clerk of the County Court of said county; and he testifies that Grandy, the witness, had proved the execution of said deed of trust before him, and that he had affixed the word "Jurat" to the signature of the said witness, as his private mark or memorandum, showing that the said deed had been proven before him. The probate, however, was not drawn out upon the deed itself, or upon the records of the Register's office.

It is provided in said deed that it was not to be closed until a sale of the land should have been requested by any of the parties interested, and such sale advertised for forty days after the 1st January, 1870. The defendant, Etheridge, and W. W. Sanderlin, the *cestui que trust,* are both discharged bankrupts.

Upon a motion to sell two tracts of the land for the benefit of those interested under the deed, the plaintiff, Starke, inter- (242) posed and contended among other things:

1. That the said deed of trust was fraudulent and void as to the creditors of T. J. Etheridge, the grantor;

2. That he, Starke, was the lawful owner of said lands, by virtue of the U. S. Marshal's deed to him;

3. That said deed was void, because no probate was drawn out and spread upon the record thereof; nor is there any evidence that the same was ever drawn out upon the deed itself, the original deed being lost.

Other objections were pressed by the plaintiff's counsel, but as they do not relate in any manner to the points decided, are omitted.

His Honor below ruling all the points made against him, the plaintiff appealed.

Smith & Strong, for appellant.
Busbee & Busbee, contra.

BYNUM, J. The plaintiff, Starke, who was the purchaser at the execution sale, insists that the deed in trust is void as to him, upon two grounds:

1. For want of probate in due form. Bat. Rev., Chap. 35, Sec. 1, provides that no conveyance of land shall be good and available in law, unless the same shall be acknowledged by the grantor or proved on oath, by one or more witnesses, in the manner thereafter directed, and registered in the county where the land shall lie.

And the 2nd section provides that "all deeds, etc., required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath, before the Judge, etc., or before the Clerk of such county, or his deputy."

The specific objection of the plaintiff, Starke, is that there was no adjudication of probate by the Clerk, and no order of registra-
(243) tion, and that the registration on that account was void as to him.

It will be observed that the language of the statute requires neither an adjudication of probate or an order of registration, but only that "all deeds, etc., may be admitted to registration upon being acknowledged by the grantor, or proved on oath before the Clerk. etc."

It is true that an adjudication and order *in ipsissimis verbis* endorsed upon the deed, would be regularly, orderly and more in conformity with the certainty and precision of judicial proceedings, and this course is, therefore, advisable always, yet it is not required as essential, either by the letter or spirit of the registry act. And should this objection be now allowed to prevail, we apprehend that it would shake the titles of a large portion of the land owners of the State, owing to the untechnical form of these probates, which are usually made without the aid of counsel, and by officers unskilled in the laws.

The facts agreed upon are that the deed "was proved on the oath of the subscribing witness" before the Clerk, who endorsed upon the deed the word "*Jurat*" opposite the name of the witness, "as a memorial of the fact," showing that the deed had been proven before him; but that the probate of said deed was not drawn out upon the deed itself, or upon the records of the register's office.

The statute before cited no where requires, and no decision of our Courts goes the length of establishing that there must be a formal written adjudication of probate, or order of registration endorsed upon the deed itself, or recorded, elsewhere however proper that it should be so done. The act prescribing the mode of probate and registration, Bat. Rev., Chap. 35, draws a distinction between deeds and other instruments, acknowledged or proved before the Clerk himself, and those deeds and instruments which are not proved before him, but are proved before another tribunal, as out of the State, for instance, or by a commission issued for that purpose.

Take Section 7 of the act, as an example: That provides
(244) that "where the acknowledgement or proof of any deed or other instrument, is taken or made in the manner directed by the laws of the State, before any commissioner, etc., and where such acknowledgment or proof is certified by such commissioner, the Judge of Probate having jurisdiction, upon the same being exhibited to him,

shall *adjudge* such deed or other instrument to be duly proved, in the same manner as if made or taken before him." The same language, "*adjudge*," is used in all cases named in Chapter 35, where the probate is to be taken by an officer other than the Judge of Probate himself, but is no where used where *he* takes the proof of a deed to be registered in his county. The reason of the distinction is obvious. The statute *prescribes* the mode for taking foreign probates, and directs that deeds so probated shall be registered only where the Clerk *adjudges* that the statute requirements have been complied with, and *orders* the registration. It may be, and is perhaps, necessary in these cases, that this *judgment* and *this order* thus especially enjoined to be made by the Clerk or Judge of Probate, should be formally recorded and perpetuated. But in regard to his own Probates in his own Court, the law imposes no such duty upon the Clerk, but only prescribes that the deed shall be proved before him, which in this case was done. The *fact* of probate, in due form, is admitted in the case agreed, but it is contended that the registration thereupon, is void as to the plaintiff, unless that probate is evidenced by a formal judgment and order, endorsed upon the deed. As the statute does not require any such written *formula*, we do not feel at liberty to say it is necessary.

In our case not only was the letter of the law complied with by an actual probate, but the spirit of the law was also followed.

The act of 1829, Chap. 20, Bat. Rev., Chap. 35, Sec. 12, is entitled "An act to prevent frauds in deeds of trust and mortgages," and provides "that no deed in trust or mortgage for real or personal estate shall be valid to pass any property as against creditors or purchasers from the donor or mortgagor, but from the registration of such deed of trust or mortgage." The object of this act certainly was (245) to prevent fraud, and to that end it requires all encumbrances upon estates to be registered, so that purchasers and creditors might have notice of their existence and nature, and that all persons might see for what the encumbrance was created.

When registration is made the means of knowledge thus furnished, it enables creditors of the mortgagor to avail themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditor all the benefit he can reasonably ask or that the law intended.

Why then, is it required to prove the deed before the Clerk, instead of requiring its registration at once without probate?

In *McKinnon v. McLean*, 19 N. C., 79, it is said, "The person taking the probate does not adjudge and decide the instrument to be a deed, but only sees that the person offered as a witness to prove it is the person who attested it, and he certifies that the execution was proved

by that witness. The *factum* and the identity of the witness are all that the certificates concludes."

The probate of a deed is but a memorial that the attesting witness swore to the *factum* of the instrument by the parties whose act it purports to be. The officer who takes the probate does not look into the instrument or the interests acquired under it, and as the probate is *ex parte,* it does not conclude. Therefore it may be shown by parol that what purports to be a deed is no deed, but a forgery, or was executed by a married woman or an infant, or was not proved so as to make the deed valid, or that it was not proved at all prior to registration, or was proved by an incompetent witness, as in the case of *Carrier v. Hampton,* 33 N. C., 307. See also *McKinnon v. McLean,* 19 N. C., 79.

As the validity of the registration may be thus impeached so it may be supported by the same kind of evidence. *Justice v. Justice,* 25 N. C., 58; *Moore v. Eason,* 33 N. C., 568.

But assuming that some written memorial of the fact of pro-
(246) bate is necessary, it still appears that at the time of probate, the officer who took it did indicate his official act by endorsing upon the deed the word "jurat," (*juratus,*) the primary meaning of which is "sworn," but the derivative signification is "proved." In support of the deed, *ut res magis valeat quam pereat,* such an endorsement upon an instrument, in all respects regularly executed and *bona fide,* will be held a sufficient compliance with the law against one who now claims against, after having previously claimed under the deed.

This view of the law is sustained by various decisions of our Courts.

Where the records of the Court of Admiralty were loosely kept on slips of paper, depositions were allowed to be read to prove that an order of sale of property was made in a cause. 2 Hay. 291.

In *Horton v. Hagler,* 8 N. C. 48, it was held that when the Clerk of a Court of Record certifies that an instrument has been *"duly proved,"* it is implied that everything required by law has been complied with, upon the maxim, *Res judicata pro veritate accipitur.* But when the record also states *how* it was proved and admits a material circumstance required by law, the certificate of *due proof* is disregarded because the certificate itself shows that it was not duly proved.

So in *Freeman v. Hatley,* 48 N. C., 115, it was held that inasmuch as no statute in our State required the register to put in his books the fact that a deed was *duly proved,* and none which required the probate before the Clerk to conform to any particular formula, there was no mode provided by statute of proving that a deed was duly proved when the deed itself is lost and the record that should establish the fact has been destroyed; in such case, therefore, the proof must be

made according to the rules of the common law, with the aid of the maxim, *omnia presumuntur rite acta, etc.*

II. The second objection is also untenable, to-wit: that the deed is fraudulent and void because the sale is postponed by it (247) for near three years.

A deed in trust postponing a sale of the trust property for three years, and in the meantime reserving the possession to the grantor, without explanation, is *prima facie* fraudulent as to creditors, but the presumption of fraud may be rebutted by proof. *Hardy v. Skinner,* 31 N. C., 191.

But where the deed, as in our case, does not reserve the possession or any other benefit to the grantor, no such presumption can arise, because the title is vested in the trustee and with it the right of immediate possession.

So far as it appears to us, it was the duty of the trustee to enter into possession upon the execution of the deed, receive the rents and profits, and apply them in discharge of the trust debts. *Hardy v. Simpson,* 35 N. C., 132.

III. Whether the plaintiff, if he had the legal title by his purchase, could recover in this suit begun in Equity prior to the Code, we do not decide, as the objection is not raised. All the parties in interest are before the Court and ask for an adjudication of their respective rights, and to that end we have considered the case as if properly constituted in this Court.

The other points raised below, properly enough are not pressed in this Court, and, therefore, are not noticed in this opinion.

PER CURIAM. Judgment affirmed.

Cited: Holmes v. Marshall, 72 N.C. 41; *Love v. Harbin,* 87 N.C. 253; *Strickland v. Draughan,* 88 N.C. 317; *Howell v. Ray,* 92 N.C. 513; *Booth v. Carstarphen,* 107 N.C. 400; *Quinnerly v. Quinnerly,* 114 N.C. 147; *Cochran v. Imp. Co.,* 127 N.C. 394; *Johnson v. Lumber Co.,* 147 N.C. 250; *Moore v. Quickle,* 159 N.C. 130; *Power Co. v. Power Co.,* 168 N.C. 221; *Shingle Co. v. Lumber Co.,* 178 N.C. 227; *Finance Co. v. Cotton Mills,* 182 N.C. 409; *Bailey v. Hassell,* 184 N.C. 456; *McClure v. Crow,* 196 N.C. 661; *Freeman v. Morrison,* 214 N.C. 242; *Ins. Co. v. Knox,* 220 N.C. 737.

(248)

WM. H. PEARCE AND ANOTHER v. J. C. LOVINIER, EXECUTOR, ETC.

Upon appeal to the Superior Court, from an order of the Probate Judge appointing or removing an administrator or executor, the Superior Court does not acquire jurisdiction to appoint or remove such persons; but, when necessary, after determining the questions presented by the record, must issue a *procedendo* to the Probate Judge, requiring him to appoint some proper person to administer the estate.

MOTION to the Probate Judge of CRAVEN County to remove the defendant, as executor, carried by appeal to the Superior Court of said county, where it was heard by his Honor *Judge Clarke,* at Spring Term, 1874.

The allegations of the petition and the facts found by the Probate Judge are fully set out in the opinion of the Court.

On the hearing below, his Honor remanded the cause to the Probate Court to require the executor to give bond, or to remove him in case of his failure to do so. From this judgment defendant appealed.

Haughton and Smith & Strong, for appellant.

Stephenson and Green and Battle & Son, contra.

SETTLE, J. This was an application by creditors to the Probate Judge to remove an executor, on the ground of fraud and incompetency. Upon hearing the motion and affidavits the Probate Judge found:

1. That the plaintiffs are creditors of the estate of Sarah J. Lovinier.

2. That at the time J. C. Lovinier, the executor of Sarah J. Lovinier, filed an affidavit and prayed for an order of the Court to allow him to sell real estate for the payment of the debts of his testatrix, he had sufficient assets in his hands to pay the debts of his testatrix, and the charges of administration, as appears by his account current, recorded in book 312 of accounts for Craven County.

(249) 3. That J. C. Lovinier is guilty of a *devastavit* in this—that his acts of negligence, carelessness, and mal-administration has been such as to defeat the rights of the creditors and legatees under the will of his testatrix.

And thereupon he revoked the letters testamentary theretofore issued to the defendant, and ordered that the estate of the testatrix be placed in the hands of the public administrator of Craven Couny for settlement.

From this judgment the defendant appealed to the Superior Court, when his Honor, upon consideration of the affidavits, *pro* and *con,* ordered that "the proceedings be remanded to the Judge of Probate,

to proceed according to law in requiring the executor, if due cause therefor is shown, to give bond for the faithful performance of his duties, or on notice, to remove him and grant letters of administration according to law."

This Court has held at the present term, *Mitchell v. Biddle,* that the power to revoke letters of administration, upon the failure of the administrator to discharge his duties according to law is vested, by the Constitution and laws of this State, in the Judge of Probate, and it is said in the case cited, "without invoking the aid of our statutes, the removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice."

His Honor seems to have supposed that the requirements of the law would be satisfied by making the executor enter into bonds for the faithful performance of his duty.

All interested parties have a right to require that the estate of a deceased person shall be administerd by an honset and faithful representative, and none other should be permitted to touch it, even though he might be able to give the best of bonds.

Honesty is a better security than a bond; and it is to the interest of the public that estates shall be promptly and faithfully administered, without having to resort to actions on the bonds of personal representatives.

Assuming the findings of the Probate Judge to be true, the defendant has shown himself to be an unfit person to be trusted (250) with the administration of an estate; and the question of fitness or unfitness is one for the determination of the Probate Judge.

Upon appeal to the Superior Court, from an order of the Probate Judge, appointing or removing an administrator or executor, the Superior Court does not acquire jurisdiction to appoint or remove such persons; but when necessary, after determining the questions presented by the record, must issue a *procedendo* to the Probate Judge, requiring him to appoint some proper person to administer the estate.

Let it be certified that there is error in the order appealed from, to the end that the Superior Court may modify its order to the Probate Judge, in accordance with this opinion.

PER CURIAM. Judgment accordingly.

Cited: In Re Estate of Styers, 202 N.C. 717.

ANNIE A. PHILLIPS AND OTHERS v. MOSES L. HOLMES.

An action for a breach of covenant, in not paying for improvements put by the mortgagors upon certain mortgaged premises, must be brought under Sec. 68 of the Code of Civil Procedure, in the county in which the plaintiffs or the defendants, or any of them, resided at the commencement of the action.

CIVIL ACTION for damages for a breach of covenant, tried on a motion to change the *venue*, at Spring Term, 1874, of CARTERET Superior Court, before his Honor *Judge Clarke*.

At the return term of the summons the plaintiffs complained, etc.:

1st. That on the 6th day of June, 1870, they executed a deed to the defendant by which they mortgaged to him a piece of land to secure a debt in said mortgage recited, of $1,670, which land lies in Rowan County:

(251) 2d. That by said deed it was provided, that upon failure by the plaintiffs to pay the said debt, the defendant should have the right to foreclose said mortgage, and that upon the payment of the debt, the plaintiffs should be paid and receive the value of any permanent improvements put upon said lot, not to exceed $500.

3d. That thereafter the defendant commenced an action to foreclose said mortgage, and by a decree of the Court having jurisdiction of the same, the said mortgage was foreclosed and said lands were sold in pursuance thereof, and a deed was, in accordance therewith, made to the purchaser; and all title and interest of the plaintiffs in said land were transferred from them and passed to the purchaser, so that they have no further interest of any kind in said land or claim thereto.

4th. That said debt of $1,670 and interest has been paid.

5th. That improvements were made on said land by the plaintiffs, worth $500, and said debt being paid, they demanded of the defendant said sum, which he covenanted and promised to pay to the plaintiffs, but which he has refused to do and still refuses.

6th. That the defendant owes to the plaintiff $500 and interest from the .... day of .... 18__, when said debt of $1,670 was paid:

Wherefore plaintiffs demand judgment, etc.

From the facts set out in the foregoing complaint, the defendant insisted that there should be a change of venue, and that the case should be removed to the county of Rowan, where the land referred to in the complaint is situate; and before the time of answering said complaint expired, demanded in writing that the trial be had in the Superior Court of Rowan.

Whereupon the Court adjudged and ordered that the case should be removed to the county of Rowan, and that the Superior Court of Carteret did not have jurisdiction of the case.

From this judgment the plaintiffs appealed.

Haughton, for appellants.

Hubbard, McCorkle & Bailey, contra.

BYNUM, J. The place of trial of civil proceedings is fixed by (252) C. C. P., Secs. 66, 69. Section 66 provides: "That actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated subject to the power of the Court to change the place of trial in the cases provided in this Code.

1. For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property.
2. For the partition of real property;
3. For the foreclosure of a mortgage of real property;
4. For the recovery of personal property distrained for any cause."

It is evident that our case falls within neither of these provisions. Sec. 67 fixes the venue in actions for penalties and against public officers, and Sec. 68 provides that all other actions shall be tried in the county in which the plaintiffs or defendants or any of them shall reside at the commencement of the action. Our case falls under this section.

Apart from this provision of the Code, fixing the venue, this action is upon a personal covenant, sounding in damages. The covenant is not that certain improvements shall be put upon the land, but that if they are put upon the land, they shall be paid for; in effect therefore, the action is simply for work and labor done, and in no sense differs from other personal actions. On a breach of the covenant, it becomes a mere personal right, which remains with the covenantee or his executors, and does not descend with the land or run with it. 1 Smith L. Cases, 165.

The action was brought to the property county.

PER CURIAM. Judgment reversed.

Cited: Eames v. Armstrong, 136 N.C. 394.

(253)

MARY RUFFIN v. S. P. COX AND G. W. STANTON, ADM'R., ETC.

Charges upon land, for equality of partition, follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice.

The widow of the party upon whose land the charge is placed, is not a necessary party to an action brought to recover the sum charged.

The dower in the land charged with the payment of a certain sum, cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third assigned for dower, is insufficient to pay off the incumbrance.

CIVIL ACTION to recover $1,000, tried before his Honor, *Judge Clarke*, at Spring Term, 1874, of the Superior Court of WILSON County, upon the following

CASE AGREED.

In the year 1854, H. J. G. Ruffin died in the county of Franklin, having made and published his last will and testament, which was duly admitted to probate in the Court of Pleas and Quarter Sessions of said county at its March Term, 1854, was recorded and the executor therein named qualified. That item 7 of said will was as follows:

(*Item 7.*) "I give and devise to my son, Dr. George W. Ruffin, the one-half part in value of my land and plantation lying and being in the county of Edgecombe, known as the 'Tossnot plantation,' to have and to hold to him and to his heirs forever. And I, considering the share of land hereby devised to him, will fall short of his proper proportion, by the sum of $1,000, I do hereby give to him the sum of $1,000, to be paid to him by my son Etheldred Ruffin, in the manner hereinafter provided for and directed."

(254) Item 9 of said will is in the following words:

(*Item 9.*) "I give and devise to my son, Etheldred Ruffin, the one-half part in value of all my lands and plantations lying and being in the counties of Greene and Wayne, to have and to hold the same to him, the said Etheldred Ruffin, and his heirs forever. And I, considering the share herein given to him, will exceed his proper share by the sum of $1,000, do hereby direct that his share of said land shall be charged with the said sum of $1,000, which said sum of $1,000, he, the said Etheldred Ruffin is to pay to his brother, George W. Ruffin, said payment to be made within two years after my decease; and this said sum of $1,000 is to be charged on the share of his land herein devised to him, the said Etheldred Ruffin, until it is paid."

That said devisees, E. and George W. Ruffin, by virtue of said will, respectively took possession of the said shares of land so devised; and

that the said Etheldred Ruffin died seized and possessed of his said share thereof. That the said George W. Ruffin, a resident of the county of Wilson, died sometime during the year 186—, having made and published his last will and testament:

"*Franklin County, N. C.* I bequeath my entire estate after the payment of my debts, to my mother, Mrs. Mary Ruffin, of Franklin County."

(Signed,) "GEORGE W. RUFFIN,"

which said last will and testament was duly admitted to probate in the county of Wilson, the last place of residence of the said George W. Ruffin.

That W. K. Barham duly qualified as administrator, *cum testamento annexo* of the said George W. Ruffin, and duly assented to all the legacies contained in the said will.

That said Etheldred Ruffin died sometime in the year 186— intestate, and that George W. Stanton was duly appointed administrator of said E. Ruffin, by the County Court of Greene; that the said administrator filed his petition against the heirs of said Ruffin, for a sale of said land for assets, and obtained a decree of sale and sold the same (255) to Joshua Barnes and made title to him; Barnes afterwards sold and conveyed the same to the defendant, S. P. Cox. That neither Barnes nor Cox had actual notice of the said charge; that the estate of the said E. Ruffin was and is largely insolvent; and that he, the said E. Ruffin, left a widow who took dower in the said land.

The plaintiff, Mary Ruffin, is the legatee named in the will of said George W. Ruffin. Two hundred dollars of the $1,000 has been paid.

Upon the foregoing statement of facts, his Honor was of opinion that the legacy of $1,000 was a charge upon the land devised to Etheldred Ruffin, by H. J. G. Ruffin; that the defendant, Cox, purchased the said land with notice of the said charge and holds the same subject thereto. Therefore judgment was entered by order of the Court in favor of the plaintiff and against the defendants.

From this judgment defendants appealed.

Faircloth & Granger, for appellants.

Smith & Strong, contra.

SETTLE, J. By reference to the 7th and 9th items of the will of Henry J. G. Ruffin, it will be seen that he has charged the land devised to his son Etheldred with the payment of the sum of $1,000, in favor of his son George W., in terms too plain to admit of a doubt. His language leaves no room for construction, but charges the land devised to Ethel-

dred with $1,000, which sum the said Etheldred is to pay to his brother George W., within two years after the death of the testator; and he repeats, "this said sum of $1,000 is to be charged on the share of his land, herein devised to him the said Etheldred Ruffin, until it is paid." Then by reference to the will of the said George W. Ruffin, it will appear equally as clear that this charge on the land of his brother Etheldred, passed by said will to his mother, Mary Ruffin, the plaintiff, and that she is entitled to sue for and recover the same. But it was in-
(256) sisted upon the argument that, as the defendant was a purchaser for full value and without notice, the plaintiff cannot follow the lands with this charge into his possession. The decisions of this Court establish the doctrine that charges upon land for equality of partition, follow the land into the hands of all persons to whom it may come; and they are held to be effected by constructive notice. *Wynn v. Tunstall,* 16 N. C., 23; *Jones v. Sherrard,* 22 N. C., 179; *Sutton v. Edwards,* 40 N. C., 425; *Christmas v. Mitchell,* 38 N. C., 536; *Aston v. Galloway,* 38 N. C., 125. And the same authorities hold that there is no bar, by statute of limitations or presumptions, in such cases.

But the defendant says that the widow of Etheldred Ruffin is a necessary party and that if he is to pay anything she should be made to contribute out of her dower the rateable part of such recovery. The plaintiff may look to the land alone and need not trouble herself about other parties or other securities. But the law favors dower, and this Court has held, in *Caroon v. Cooper,* 63 N. C., 386, that the widow is entitled to have dower assigned out of the whole tract, and cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third covered by her dower, is insufficient to pay off the incumbrance of the purchase money.

But the case of *Smith v. Gilmer,* 64 N. C., 546, is still more in point; there the testator had devised land to his son Wm. R. Smith, charged with the payment of $1,500 to W. M. Gilmer, his grand-son. Upon the death of the testator Wm. R. Smith took the land, *cum onere,* and upon the death of the said Wm. R. Smith his widow claimed dower, and this Court held that she took dower as her husband took the fee, *cum onere,* but was nevertheless entitled to have her dower exonerated in the manner pointed out in *Caroon v. Cooper, supra.*

Let it be certified that there is no error, to the end that the Superior Court may proceed according to law.

PER CURIAM. Judgment accordingly.

Cited: Dobbin v. Rex, 106 N.C. 447; *In Re Walker,* 107 N.C. 342; *Herman v. Watts,* 107 N.C. 650; *Overton v. Hinton,* 123 N.C. 6; *Smith*

Ex Parte, 134 N.C. 497; *Chemical Co. v. Walston,* 187 N.C. 826; *Realty Corp. v. Hall,* 216 N.C. 237.

(257)

PRISCILLA WALKER AND OTHERS v. A. A. SHARPE.

When it is alleged in the complaint that the defendant, a trustee, has become insolvent, and is using the fund for his own private advantage, refusing to pay the accrued interest, etc., and that his bond as trustee has become insolvent or of doubtful solvency, the plaintiffs are entitled not only to an enquiry as to the solvency of defendant's bond, but also to an account of the condition of the trust fund.

CIVIL ACTION, brought for the purpose of removing a trustee and securing a certain trust fund, heard before *Mitchell, J.,* at the Fall Term, 1864, of IREDELL Superior Court.

It is alleged in the plaintiff's complaint that the defendant is a trustee of an estate of some $5,000, which belongs to the plaintiff Priscilla for life, and to the other plaintiffs after her death, as her sons, sons-in-law and daughters. That defendant has become insolvent, is using the funds for his own private use, refusing to pay the interest accrued thereon, and that his bond as trustee have become insolvent or of doubtful solvency.

In his answer the defendant admits that he is the trustee, and that by the results of the war he was unable to pay his own debts; but he positively denies that he had used any of the trust fund for his individual purposes, and that his bond as trustee was insolvent or even doubtful, and also denied that he had failed to pay the plaintiff any interest which was due her from said fund. Defendant further alleged that in a suit lately pending in the Superior Court of Iredell County between the same parties, an account of said trust fund was ordered and taken, from which account it appeared that only the sum of $32 was due on said fund over and above the notes of the trustee in possession, which were declared to be good and were so allowed to defendant. That the plaintiffs excepted to said account upon the grounds that defendant had paid to the plaintiff Priscilla $600 more than was due her as accrued interest.

When the present case was called the plaintiff moved the Court for a reference to ascertain the condition of the trust fund in the hands of defendant, and also for a reference to ascertain the (258) condition and solvency or insolvency of defendant's bond.

His Honor allowed the latter motion, but refused to order a reference to ascertain the condition of the trust fund, stating that an account of that fund had been so recently taken it was unnecessary at the present time.

The plaintiffs then moved the Court to order so much of defendant's answer as charged the plaintiffs, or any of them, with intending or endeavoring to cheat or defraud the defendant, to be stricken out as scandalous and impertinent.

His Honor refused to strike out any part of defendant's answer; from which several rulings the plaintiffs appealed.

Folk & Armfield, for appellants.

Furches contra.

SETTLE, J. When the case between the same parties about the same subject matter was before us at a previous term, reported in 68 N. C., 363, there was no allegation that the fund was unsafe in the hands of the defendant, and for the reason stated in the opinion of this Court the action was dismissed without entering any judgment upon the report of the Clerk.

But in this action it is alleged that the defendant has become insolvent and is using the fund for his own private advantage, refusing to pay the interest accrued thereon, and that his bond as trustee has become insolvent or of doubtful solvency.

His Honor directed an inquiry as to the solvency of the defendant's bond, but declined, at that time, to order a reference to ascertain the condition of the trust fund in the hands of the defendant, on the ground that there had very recently been an account of the condition of the fund.

As the first action was dismissed the account went with it and amounted to nothing.

(259) And now, in view of the allegation of the insolvency of the defendant and the abuse of his trust, made in this action for the first time, we feel constrained to say that the plaintiffs are entitled not only to an inquiry as to the solvency of the defendant's bond, but also to an account of the condition of the fund.

It is one of the principal and most important duties of a trustee that he should keep regular and accurate accounts, and that he should be always ready to produce those accounts to his *cestui que trust.* Adams' Eq. 57.

We deem it unnecessary to action the notice of the plaintiffs to have a portion of the answer of the defendant stricken out for being scandalous and impertinent. Nor do we see any reason why the language of

the Chief Justice, in delivering the opinion of the Court when the other case was before us, to characterize the conduct of a portion of the plaintiffs, should be modified.

Indeed we are at a loss to understand why the plaintiffs made the allegations of insolvency and unfitness against the defendant for the first time, after they had failed in the other action, when the facts should have been as well known to them then as now.

Let this opinion be certified to the end that the Superior Court may proceed in conformity thereto.

PER CURIAM. Judgment accordingly.

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(260)

AUGUST BELMONT & CO. v. JOHN REILLY, AUDITOR.

An application by a holder of N. C. bonds for a *mandamus* to be directed to the Auditor of State, commanding him to cause to be levied certain special taxes to pay the accrued interest on said bonds, is an application "to enforce a money demand," and as such, a Judge at Chambers has no jurisdiction thereof.

This was a CIVIL ACTION, being an application for a peremptory writ of *mandamus,* heard before *Watts, J.,* at Chambers in WAKE County, on the 24th day of February, 1874.

At the hearing, the defendant moved to dismiss the action on the ground that this being an action for *mandamus,* to enforce the payment of a money demand, the Judge at Chambers had no jurisdiction. His Honor allowed the motion and dismissed the action, whereupon the plaintiffs appealed.

Other facts pertinent to the points decided are stated in the opinion of the Court.

Reverdy Johnson, Budd and Badger, for appellants.

Attorney General Hargrove, Fuller & Ashe and Smith & Strong, contra.

BYNUM, J. The plaintiffs allege that they are the owners of certain bonds of the State of North Carolina, upon which the coupons for the interest semi-annually accruing, for the years 1870 to 1874, inclusive, are due and unpaid by the State, according to the tenor thereof.

That the act under which the bonds were issued, provides for the assessment, levy and collection of a specific tax, annually, for the payment of the interest as it becomes due, and for a sinking fund for

the payment of the principal, at the end of thirty years. The prayer of the complaint is that a peremptory writ of *mandamus* may be issued to John Reilly, the Auditor of the State, commanding him to cause the special tax imposed by the act referred to, to be levied, collected and paid into the Treasury for the said years, to provide for the
(261) payment of the interest, due as aforesaid, upon the bonds of the plaintiffs; and that the Auditor shall place the tax lists, so prepared into the hands of the sheriff of each county in the State.

The action was commenced by summons issued from the proper office, and made returnable before the Judge at Chambers. Upon the return of the summons, the parties appeared, and the defendant moved the Court to dismiss the action for the want of jurisdiction, which motion was allowed, the Court dismissed the action, and the plaintiffs appealed to the Supreme Court.

So the only question before us is, did the Judge at Chambers acquire jurisdiction of the action thus commenced.

1. The nature of the demand set forth in the complaint; and

2. The construction of our Statutes prescribing the jurisdiction of the Courts and the mode of procedure therein.

The Code of Civil Procedure, Section 381, provides that "all applications for writs of mandamus shall be made by summons and complaint." And "in all applications when the plaintiff seeks to enforce a money demand, the summons shall issue and be made returnable, as is prescribed by Chap. 18 of Battle's Revisal." That chapter provides in Section 1, that all civil actions shall be commenced by issuing a summons, and in Section 2, that the summons shall be returnable to the regular term of the Superior Court of the county where the plaintiffs or one of them, or the defendants, reside, and shall command the sheriff to summon the defendant to appear at the next ensuing term of the Superior Court, to answer the complaint.

It is clear, then, from the positive language of the statute, that if this action is for a money demand, the summons must be made returnable to the Superior Court, in term time only; there is no room for construction.

Is the demand of the plaintiffs then in this action a money demand?
(262) In the argument, the counsel for the plaintiffs admitted that their claim was a money demand, but insisted that in this proceeding they were not seeking to enforce a money demand, but only a remedy preliminary thereto, to wit: the collection and payment of the special tax into the Treasury of the State, which tax was pledged by law for the payment of their debt, and for the purpose of being so applied.

This construction savors of refinement, and to allow it would defeat the plain and obvious intent of the provisions of the Code.

The plaintiffs are the holders and owners of certain bonds for the payment of money which they allege the State of North Carolina owes them and has refused to pay, wherefore they resort to this action for the enforcement of this demand, which is the most direct and efficacious remedy for collecting the money which the law affords them.

The purpose of the action is the collection of the debt through and by means of this proceeding, either as a direct result or as one necessarily incident to and flowing out of the action. In a legal sense, it is as much a money demand as the old action of debt was, and in some respects it is more so, for here the party seeks to lay hold of a specific fund and appropriate it to the satisfaction of the demand.

There is now, in this State, Art. 4, Sec. 1, Const., but one form of action, and the writ of *mandamus* is but a process of the Court in that action, the purpose of which writ is in actions for money demands, to give the plaintiff a more speedy and effectual recovery of his debt, than could be had in the ordinary way.

The plaintiffs are seeking in this action, as the final result, termination and fruit thereof, to collect the money due on their bonds. In every sense, then, practical and legal, this is, in the language of the Code, an "application where the plaintiff seeks to enforce a money demand;" and by the express words of the act, Bat. Rev., Chap. 18, Secs. 1 and 2, the summons must be made returnable to the regular term of the Superior Court. Not having been so made re- (263) turnable, the Judge at Chambers, did not acquire jurisdiction, and the action must be dismissed.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Rogers v. Jenkins, 98 N.C. 131; *Burton v. Furman,* 115 N.C. 168; *Russell v. Ayer,* 120 N.C. 198; *Person v. Watts,* 184 N.C. 506; *Woodmen of The World v. Comr's of Lenoir,* 208 N.C. 435; *Dry v. Drainage Comr's,* 218 N.C. 359; *Brown v. Comr's of Richmond Co.,* 222 N.C. 404.

STATE v. COUNCIL WEST.

When a defendant has once been tried and acquitted upon an indictment, good in form, no appeal lies, even though the acquittal is in consequence of the erroneous charge of the presiding Judge.

STATE *v.* WEST.

INDICTMENT for an assault, tried at Fall Term, 1873, of CRAVEN Superior Court, before his Honor *Judge Clarke.*

On the trial the defendant pleaded "former acquittal;" and it appeared that he had been arrested upon a warrant issued by a Justice of the Peace in the Township where the offence was committed, at the instance of the person upon whom it was alleged the assault was committed. That a jury was empaneled and the trial conducted according to law; and that the jury on that trial returned a verdict of "not guilty."

No record of this trial was returned by the Justice to the Clerk of the Court as required by the act of the Assembly, and after a diligent search no record thereof can be found upon the record book, or among the other papers of the Justice, who since the trial has died.

His Honor, holding that all things are presumed to be done rightly in the absence of testimony to the contrary, and that the case was properly cognizable before the Justice, instructed the jury to return a verdict of "not guilty," which was done, upon which the Solicitor appealed.

(264) *Attorney General Hargrove, for the State.*
H. C. Bryan, for defendant.

BYNUM, J. This case was argued as if it was here upon a special verdict, but upon looking into the record we find such not to be the fact, but that the evidence of the State and the defendant was submitted to the jury, and the Court having charged them they returned a verdict of not guilty.

When a defendant in a criminal action has once been tried and acquitted upon an indictment, good in form, no appeal lies even though the acquittal, is in consequence of the erroneous charge of the Judge upon the law. No man shall be twice vexed for the same offence. *State v. Taylor,* 8 N. C., 462; *State v. Credle,* 63 N. C., 506.

PER CURIAM. No error. Judgment affirmed.

Cited: S. v. Powell, 86 N.C. 643; *S. v. Ostwalt,* 118 N.C. 1214; *Stith v. Jones,* 119 N.C. 431; *S. v. Savery,* 126 N.C. 1088; *S. v. Nichols,* 215 N.C. 81.

STATE v. VERMINGTON AND ANOTHER.

Justices of the Peace have exclusive jurisdiction of the offence of fornication and adultery. Act of February 16, 1874, Chap. 176, Sec. 3.

INDICTMENT for fornication and adultery, tried before his Honor, *Judge Cloud,* at the Spring Term, 1874, of ROWAN Superior Court.

On the trial the defendants moved to dismiss the proceedings upon the ground that under the late act of the General Assembly, conferring jurisdiction upon Justices of the Peace, they have exclusive cognizance of the offence with which the defendants are charged.

His Honor sustained the motion and quashed the indictment; from which judgment the Solicitor appealed.

Attorney General Hargrove, for the State (265)
McCorkle & Bailey, for defendant.

RODMAN, J. This is an indictment for adulterous cohabitation, found at Spring Term, 1874, of Rowan Superior Court. At the same time the defendants moved to dismiss the proceedings, or as it must be understood, to quash the indictment for want of jurisdiction in the Court. The conduct charged is made an offence by Rev. Code, Ch. 34, Sec. 45, (Bat. Rev., Ch. 32, Sec. 46,) and being a misdemeanor as at common law, it was punishable by fine and imprisonment at the discretion of the Court. By an act ratified 16th February, 1874, (act 1873-74, Ch. 176, Sec. 3) the punishment was limited so that it could not exceed a fine of fifty dollars or imprisonment for one month. By Section 13, jurisdiction of the offence was expressly given to a Justice of the Peace. This was perhaps unnecessary, as the Constitution, Art. IV, Sec. 38, expressly gives to Justices exclusive criminal jurisdiction of all offences, the punishment of which cannot exceed that now limited for this offence. The Court acted rightly in dismissing the proceedings as it had no jurisdiction.

PER CURIAM. Judgment affirmed.

Cited: S. v. Fesperman, 108 N.C. 772; *S. v. McAden,* 162 N.C. 577.

(266)
QUINCY F. NEAL, ADM'R., ETC., v. JOSIAH COWLES AND OTHERS.

If the record of the Court below is false, it cannot be corrected in this Court.

A defendant, by a motion to re-hear a former judgment of this Court, cannot call on the Court to specifically perform a contract of compromise, alleged to have been made between the parties in the Superior Court.

MOTION to rehear a judgment of this Court, rendered at the last January Term, 1874, in an action between the same parties reported in 70 N. C.

All the facts and the grounds upon which the motion to rehear is founded, are fully contained in the opinion of Justice RODMAN and in the report of the case above alluded to.

Batchelor for the petitioners (defendants.)
McCorkle & Bailey, contra.

RODMAN, J. This is an application to rehear a judgment of this Court at January Term, 1874, reported 70 N.C.

It is not contended that there was any error in that judgment upon the record then before the Court. In order to understand the ground of the present application, it is necessary to recite as briefly as possible the record of the action.

The action was upon a note for $2,000, dated 2d March, 1863, and payable thirty days after demand, or sooner, "if we" (the obligors) "prefer," etc. The case was tried at Fall Term, 1870, and the jury found that the note was made by defendants, that it had not been paid, and that it should be paid according to the scale of Confederate currency for 21st March, 1864. No judgment appears from the record before this Court at January Term, 1874, to have been entered at the term when the verdict was found. But plaintiff moved for judgment for the value of the note according to the scale at its date, notwithstanding the verdict. This motion was continued from term to
(267) term, until a Special Term in August, 1873, when the Court denied the plaintiff's motion, and it must be presumed gave judgment for plaintiff according to the scale of 21st March, 1864. From this judgment the plaintiff appealed to this Court, which allowed the plaintiff's motion, and gave judgment for plaintiff according to the scale of March, 1863.

The defendant now alleges:

1. That he had no notice of the appeal by plaintiff from the judgment of August, 1873. But it appears of record that notice of the appeal was received. If the record is false in that respect, it cannot be corrected in

this Court. The defendant may perhaps have a remedy against the clerk for his false entry. On this we express no opinion. But while the record so stands it cannot be contradicted here.

2. That at Fall Term, 1870, (when the jury rendered their verdict as aforesaid,) it was agreed between the defendant and the counsel for plaintiff, that by way of compromise, the judgment should be entered according to the verdict applying the scale of March, 1864, and that the judgment was accordingly so entered, and he produces an extract from the records of the Superior Court of that term showing a judgment for $111.83, of which $97.38 is principal, which extract is certified by the clerk of the Court. No explanation is given to show how this extract or additional piece of record is consistent with the rest of the record which shows that at that term the plaintiff moved for judgment according to the scale of 1863. It does not appear that this judgment received the sanction or was ever brought to the notice of the Judge. Perhaps it was made upon an understanding of compromise, which was afterwards broken, in which case the defendant's remedy would be by action for breach of the contract. But we conceive it is not necessary for us to inquire how this entry of judgment was made, or what might be its effect if it stood unaffected by the subsequent action of the Court. It is clear that the action of the Court at the same term in permitting a motion for a different judgment to be made and entered of record and continued, and its action in August, 1873, in giving another (268) judgment, could only have been upon the idea that the judgment in question was not final but remained *in fieri*, until the final decision on the plaintiff's motion in August, 1873. This is the necessary conclusion from the whole record. And this conclusion is confirmed by the fact that it does not appear that upon the hearing of the plaintiff's motion in August, 1873, the defendant claimed that any final judgment had already been entered, which would have been a complete answer to plaintiff's motion.

The judgment which the Judge gave at August Term, 1873, did not profess or appear to be a judgment agreed on by the parties, but did appear to be the judgment of the Judge upon applying the law as he conceived it to the facts found by the verdict. It thus ignored or repudiated the supposed compromise judgment, and proves either that that judgment had never received the sanction of the Court, or else that the Judge impliedly set it aside. It seems to us that the defendants have had a fair hearing upon the merits of their case, and if every fact which they now allege had been (as in fact every material one was) called to the attention of this Court at January Term, 1874, the conclusion would have been the same. The only new fact which can be conceived to be of any importance in bearing on the decision, is that of

the alleged compromise which was not excused but remained executory, and upon that the defendants may have a remedy by action, if they can make out a sufficient case. But they cannot call on this Court by a motion to rehear the former judgment to specifically perform the contract of compromise. We cannot try the facts of an agreement between parties in the Superior Court. We must take the record as being true, and if apparently somewhat inconsistent, must put such reasonable construction upon it as will harmonize the various parts.

PER CURIAM. Motion to rehear refused. The mover will pay costs in this Court.

Cited: S. v. Palmore, 189 N.C. 540; *S. v. McKnight,* 210 N.C. 58.

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(269)

W. G. TEMPLETON v. H. C. SUMMERS.

Where a plaintiff purchases an outstanding incumbrance for $30, for the purpose of perfecting his title to a lot of land purchased of the defendant, and then sues defendant for a breach of contract in not delivering to him a perfect deed, as he promised to do: *Held,* that the sum demanded for the breach of contract being under $200, the exclusive jurisdiction of the case was in a Justice of the Peace.

This was a CIVIL ACTION, tried before Mitchell, J., at the Fall Term, 1873, of IREDELL Superior Court.

Under the instructions of his Honor, objected to by the defendant, the jury returned a verdict for the plaintiff; and a new trial being refused the defendant appealed.

The opinion of the Court contains all the facts necessary to an understanding of the points raised and decided.

Armfield, Furches and Collins, for appellant.
Caldwell, Batchelor and McCorkle & Bailey, contra.

BYNUM, J. The plaintiff purchased two lots of land from the defendant, numbered 3 and 4, who executed and delivered to the plaintiff separate deeds for each lot. About lot No. 4 there is no controversy, but the plaintiff alleges that when he accepted the deed for lot No. 3, although it was a deed regular and valid in form and substance, it was with the promise on the part of the defendant that he would afterwards make or procure to be made another and better deed, including some outstanding encumbrance upon it. That with this understanding

he accepted the deed as a bond for title and paid the whole purchase money of lot No. 4 and a part due on lot No. 3, and gave his note for $45, the balance of the purchase money. The defendant afterwards refused to execute any other deed or to procure the conveyance of the outstanding incumbrance and sued the plaintiff on his note and recovered judgment.

The complaint prays for a specific performance on the payment of the judgment, or in case that cannot be, then for the (270) repayment of the sum paid on lot No. 3. The complaint admits that no specific performance can be had, because, in fact, the plaintiff himself had completed the title to lot No. 3 by purchasing the incumbrance for the sum of thirty dollars, and the sum he demands for the non-performance of the contract is less than one hundred dollars.

On the trial the jury, under the instructions of the Court that if they found for the plaintiff he could only recover the sum paid by him to get in the good title, rendered a verdict for $30 and interest.

The defendant excepted, 1st, to the jurisdiction of the Court; 2d. that the promise, if made, was touching the conveyance of lands and was void under the statute of frauds, not being in writing, and 3d, that having accepted a deed for lot No. 3, he must rely upon the covenants therein contained for any breach growing out of the purchase of the lots.

It is unnecessary to examine the two last exceptions, as the first one is fatal to the action. The plaintiff having bought in the outstanding title, the only matter in dispute, the action in point of fact, was instituted to recover the sum of thirty dollars, which the plaintiff had to pay in consequence of the alleged breach of contract.

The sum demanded for the breach of contract being less than $200, the exclusive jurisdiction was in the Justice of the Peace. Art. 4, Sec. 33, Const.

There is error.

PER CURIAM. Judgment reversed and action dismissed.

Cited: Brown v. Southerland, 142 N.C. 228.

(271)

LOCKWOOD HYATT v. R. L. MYERS AND ANOTHER.

When a nuisance has been established by the verdict of a jury, the presiding Judge committed no error in giving the defendant to a certain time to abate it; and if that was not done, in giving the plaintiff the privilege of renewing his motion for an injunction.

This was a CIVIL ACTION for damages, together with an application for an injunction, tried before *Moore, J.*, at the Fall Term, 1874, of BEAUFORT Superior Court.

At the return term his Honor continued the motion for an injunction, for the purpose of submitting the allegations as to the nuisance complained of to a jury, with leave for the plaintiff to renew the motion at that time. His Honor also directed, for the purpose of informing the Court as to the facts upon which the plaintiff's motion for an injunction is based, that in addition to the issues arising from the pleadings, the following will be submitted. Can the plaintiff be protected from the nuisance of smoke and the damages of fire from defendant's engine by the adoption of any means or appliances known to art, while it remains in its present locality, if so, by what means?

On the trial the following issues were prepared and submitted by the plaintiff:

1. Was the plaintiff's residence set on fire by defendant's mill on the 24th of November last, and is said mill highly dangerous in its present location to plaintiff's residence?

2. Does the plaintiff and his family suffer great inconvenience and annoyance from the smoke, soot and cinders being blown from defendant's mill on and in the plaintiff's house, rendering his condition and that of his family uncomfortable and disagreeable, so as to be a nuisance to him?

Defendants offered certain issues which were not allowed to go to the jury by the Court, upon which defendants excepted.

The jury to whom the issues were submitted rendered their verdict that "the defendant's mill was a nuisance to the plaintiff and
(272) his family," having failed to agree as to the other questions submitted to them.

The defendants excepted to the sufficiency of the verdict, because the jury did not pass upon all the issues submitted to them.

The question of damages was not at first submitted to the jury, the plaintiff only claiming nominal damages. In recording the verdict his Honor directed the Clerk to enter of record that the jury assess plaintiff's damages at six pence, to which defendant's counsel objected; whereupon the Court instructed the jury that for every violation of a

legal right the plaintiff was entitled at least to nominal damages, and that if the jury believed that the defendant's mill was a nuisance to the plaintiff, it was their duty to assess his damages at least one cent. Defendant objected.

The jury, upon further consideration, assessed nominal damages to the plaintiff, whereupon the following judgment was entered up by the Court.

Upon the finding of the jury the plaintiff renewed his motion for an injunction; and it is considered, etc., that the defendants add twenty feet to the height of the smoke-stack and attach thereto spark arresters, on or before the 1st day of August next. And if upon experiment, the nuisance is not abated by this addition to the smoke-stack, plaintiff has leave to renew his motion for a perpetual injunction. It is considered that plaintiff recover of the defendants the damages, etc.

From this judgment defendants appealed.

Warren & Carter and Myers, for appellants.
A. M. Moore, Battle & Son and J. A. Moore, contra.

SETTLE, J. While Courts of equity are slow to interfere in cases of private nuisance, yet they will do so if the fact of nuisance be admitted or established at law, whenever the nature of the injury is such that it cannot be adequately compensated by damages, *or will occasion a constantly recurring grievance.* Adams Eq., 211; Story Eq., (273) 926; *Easonu v. Perkins,* 17 N. C., 38.

In the case before us, the plaintiff having established the nuisance by an issue before a jury, may sue repeatedly and in that way, probably, compel the defendant to abate it.

Failing in that, under our old system his remedy would be to file a bill in equity. And then whether equity would enjoin or not, would depend upon circumstances. If the nuisance were serious and wanton, then it would be restrained as a matter of course. So too, if it were continuing and constantly annoying. But otherwise, if it were useful to the defendant and of trifling injury to the plaintiff, for this, compensation could be made in damages; or if the public benefit over-balanced the private injury, for these, private interest must yield to the public good upon fair consideration. Under our new system, blending law and equity, everything may be considered in the present action.

The plaintiff having established the nuisance by the verdict of the jury, it was proper for his Honor to consider whether he would leave the plaintiff to his repeated actions, or whether he would restrain or abate the nuisance by an order in this cause.

He determined upon the latter course; and the amount of his judgment is to give the defendant time to abate the nuisance. If the defendant fail to do so, then at the appointed time he will hear a motion for an injunction. This, so far as we can now see, was proper. What he will do, or what he ought to do, if that motion is made, we cannot now see. Having heard the trial, he seems to have been satisfied that he ought to interfere by injunction. That may be so; but the facts are not stated so as to enable us to determine the matter.

If there be dissatisfaction with the order which his Honor shall see proper to make, upon hearing the motion for an injunction, and either party shall appeal, it will be necessary to state the facts (not the testimony) so that this Court can review the action of his Honor.

(274) All that we can say now is that there is no error in what has been done, except, perhaps, the suggestion to the defendant, for so we must consider it, to abate the nuisance by raising the smoke-stack; for aught that appears, that might aggravate the nuisance.

It would have been more appropriate simply to have allowed the defendant time to abate the nuisance.

Let this opinion be certified, etc.

PER CURIAM. Judgment accordingly.

Cited: S.c., 73 N.C. 238; *Brown v. R. R.,* 83 N.C. 131; *Hickory v. R. R.,* 143 N.C. 454; *Pedrick v. R. R.,* 143 N.C. 510; *Cherry v. Williams,* 147 N.C. 457; *Little v. Lanier,* 151 N.C. 418; *Webb v. Chemical Co.,* 170 N.C. 666; *Rhyne v. Mfg. Co.,* 182 N.C. 492; *Morgan v. Oil Co.,* 238 N.C. 195.

SAMUEL CALVERT AND OTHERS v. NICHOLAS PEEBLES AND OTHERS.

When a stranger administers on the estate of one of several wards owning a common fund, he can and ought to make an actual division of the fund with the guardian of the surviving wards, and file in Court an inventory and descriptive list of the bonds, notes and other items comprising the estate.

If the guardian makes himself administrator of one of his wards, he must also sever the tenancy in common, and file of record an inventory and descriptive list of the separate share of his intestate, (ward.)

This was a CIVIL ACTION by one set of sureties against another set for a fund in the hands of the sheriff, tried at the Fall Term, 1873, of NORTHAMPTON Superior Court before his Honor, *Judge Albertson.*

His Honor, upon the hearing of the case in the Court below, being of opinion with the defendants, gave judgment dismissing the action. From this judgment plaintiffs appealed.

All the facts pertinent to the questions raised and decided are set out fully in the opinion of the Court.

Smith & Strong, for appellants. (275)
Barnes, contra.

BYNUM, J. Prior to 1859, the defendant, Nicholas Peebles, became the guardian of four wards, brothers and sisters, who owned a fund in common, consisting of notes and bonds, and the plaintiffs became sureties on his guardian bond.

Edward Peebles, one of the wards, died in January, 1859, and in March following the said guardian became his administrator.

The distributees of Edward are his surviving brothers and sisters, the wards aforesaid, and the wife, and Ella, infant daughter of the said Nicholas, who himself separated the share of his intestate from the common fund, and held the same as the sole property of the intestate.

In distributing the estate of Edward among the next of kin, he again separated in certain bonds, the share of Ella, for whom he afterwards became the guardian, to wit, at December Term, 1861, and gave bond with the defendants, Boone, Stephenson and Capehart, as his sureties, and he assigned to her the bond in controversy. At December Term, 1850, Nicholas, the administrator, filed a petition for the settlement of the estate of Edward and at March Court, 1860, made a final settlement of the estate, prior to which time he had lent Ella's share to the county of Northampton.

In making these several divisions of the common fund, the said Nicholas acted alone and represented himself, all the interests involved, and at the time he appropriated this fund to Ella, he also made a like appropriation to his other wards, in other funds, to the full amount of their shares in Edward's estate.

The plaintiffs are the sureties on the guardian bond of the original wards, and the defendants are the sureties on the guardian bond of Ella, and both sets of sureties have paid large sums as sureties on their respective bonds, owing to the default of the guardian who had become and is now insolvent. Nicholas Peebles has recovered (276) judgment for $1,000, balance due on the bond lent as aforesaid, which sum is in the hands of the sheriff, and is claimed by the said Nicholas, as the property of his ward, Ella.

The plaintiffs claim that the said sum is still a part of the common fund of the original wards, undivided, and that their shares, to wit,

three-fifths thereof, should be applied in their exoneration as the sureties on said guardian bond. The defendant, Nicholas, claims that the sum is the separate estate of his ward Ella, by virtue of the facts hereinbefore stated, and that she is entitled to the whole sum.

His Honor below, being of opinion that the fund was the sale property of Ella, dismissed the action, and the plaintiffs appealed to the Supreme Court.

If upon the death of Edward his administrator did not make an actual severance of his part from the common fund so as to constitute it the separate estate of the intestate, *in specie*, the tenancy in common still subsists, and the plaintiffs are entitled to recover.

If it was then so divided as to become the separate estate of the intestate in the hands of the administrator, yet, unless upon the final settlement of Edwards' estate, he divided that and set apart the share of Ella, with the same unequivocal acts of severance and appropriation, the fund would still be common, although new tenants had been let in, and the plaintiffs would be entitled to recover.

Where a stranger administers upon the estate of one of several wards owning a common fund, he can and ought to make an actual division of the fund, with the guardian of the surviving wards and file in Court an inventory and descriptive list of the bonds, notes and other items comprising the estate. In such case, the division would be valid, because the administrator is dealing at arms length with a party, competent and having power to act. If a guardian makes himself the administrator of one of his wards, he cannot, by assuming this double character, evade the duty of severing the tenancy in common, by
(277) other methods equally distinctive and unequivocal. In this case, if he as administrator, had filed of record an inventory and descriptive list of the separate share of his intestate, if, as guardian of Ella, he had returned of record her separate estate and of what it consisted; if on the final settlement of the estate of Edward, made with the Court in 1860, as he alleges, he had filed a circumstantial account of the character and articles of the estate, remaining in his hands for distribution, as our laws respectively require, then cotemporaneous acts would have shown that he attempted at least to make these several divisions of the common fund which he claims to have made. Rev. Code, Chap. 46, Secs. 24 and 25, and Chap. 24, Secs. 11 and 12.

From the time Nicholas Peebles came into possession of this common fund of his wards, in 1856, he never loses the dominion over the whole or any part of it. First as guardian, then as administrator and finally as guardian of Ella, he steadily follows and retains the exclusive control of the entire fund. As administrator, he could not deal and settle with the guardian, and as guardian, he could not settle with the adminis-

trator, because he had voluntarily assumed both characters, and he failed to invoke the aid and sanction of the Court in dividing the common fund in severalty. From his appointment as guardian in 1856, as administrator in 1859, and as guardian again in 1861, it does not appear that any act was done or record made cotemporaneous with and indicating these alleged divisions, though in each case required by law.

The only evidence supporting the answer is that of W. W. Peebles, who states that about two years before the action against the county for the fund now in dispute was begun, he was employed by Nicholas Peebles to bring the action, who then claimed this fund as the separate estate of Ella. This was several years after the war and after all the common fund, except this, had been lost or wasted, when it was his manifest interest, to set up the claim in behalf of his daughter.

If this proof establishes anything it is that no claim for Ella, in this fund, was asserted by act or word, prior to that time.

This course of dealing with the common fund is referred to, (278) not to contradict, but to interpret and put a proper construction upon the case agreed, which is but a meagre statement of conclusions rather than facts.

This action is to be considered as if brought by the wards against their guardian, for an account and the payment of their shares, alleging that this sum in dispute, is a part of the common fund, and that this alleged partition and assignment to Ella, never took place. If when so called on, he in answer, contents himself with a simple affirmation of the division and a general denial of the allegations, leaving his wards to make full proof if they can, he violates the plainest principles of equity. For there is no trust which can be reposed in one person over the property of another, in regard to the management of which a full and detailed account is more imperiously demanded, than in that which the law confides to a guardian, over the estate of the ward. *Graham v. Davidson*, 22 N. C., 155. An *ex parte* settlement by an administrator with the County Court, is not binding on the next of kin. *Wood v. Barringer*, 16 N. C., 67, and that even if honestly made. *Speight v. Gatling*, 17 N. C., 5.

Where negroes were specifically bequeathed to two, and the share of one was set apart, and a profit was made by the executor, on the other share reserved for an infant, this was held to be no severance of the tenancy in common, until the infant should arrive at age and confirm it, and that in the meantime, the profit might be recovered in a joint bill by the two legatees. *Wood v. Barringer*, 16 N. C., 67.

So here we hold that the facts agreed do not constitute a severance of the tenancy in common of the original fund owned by the intestate

Edward in common with his brothers and sisters, nor of Ella's tenancy in common in the intestate, Edward's share of the original fund.

The plaintiffs are therefore entitled to the relief they ask.

Judgment reversed. Let a decree be drawn in conformity with this opinion, and reference to the Clerk.

PER CURIAM. Judgment reversed.

STATE v. D. M. WIDENHOUSE AND WM. FURR.

The defendants, who rode to and fro along the public highway, shouting, cursing and using violent and menacing language, stopping in front of the prosecutor's house, and in his presence, (the prosecutor owning the land on both sides of said road,) are guilty of Forcible Trespass.

INDICTMENT for a forcible trespass on a public highway, tried before *Logan, J.*, at the Spring Term, 1874, of CABARRUS Superior Court.

On the trial in the Court below, the jury returned a special verdict, substantially finding the following facts:

The prosecutor lived in forty yards of the public highway, which ran in front of his house and on both sides of which he owned the land. That at the time of the alleged trespass, the defendants, near dusk, came riding violently along the road in front of his house; that after passing they wheeled and passed back along the same; that they then got down in front of his house and danced and sung and cursed; and that all the time they were riding they kept up a loud noise and cursed and swore and made a noise like preaching, so that he and his family were greatly disturbed thereby. The prosecutor's wife was sick, under the care of a physician and was seriously disturbed and troubled. Having continued at this sometime, the prosecutor went out to the defendants at the road in front of his house, and forbade them to do so any more, and threatened them with a prosecution if they repeated the offence, requesting them to leave. That this only seemed to make them worse, and they continued to ride up and down the road in front of his house, shouting, cursing, singing, until 11 o'clock at night, riding backwards and forwards about forty times before they left, which they did at last, firing two shots before doing so.

His Honor held upon the foregoing facts that the defendants
(280) were not guilty, discharging them from custody, from which judgment the Solicitor appealed.

Attorney General Hargrove, for the State.
No counsel in this Court for defendants.

SETTLE, J. All the questions presented by the record in this case are discussed and well decided in *State v. Buckner,* 61 N. C., 558.

It is there held that where the land on both sides of the road, whether public or private, belongs to the prosecutor, he is the owner of the soil over which the road runs, and persons who stop upon such road and use violent and menacing language to him are guilty of forcible trespass.

The only privilege which the public have in a public road is that of passing over it, and those who abuse that privilege become trespassers *ab initio.*

Let it be certified that there is error, to the end that the Superior Court may proceed to judgment upon the special verdict.

PER CURIAM. Judgment reversed.

Cited: S. v. Talbot, 97 N.C. 496; *Saunders v. Gilbert,* 156 N.C. 475.

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(281)

JOSEPH BALLARD v. W. L. KILPATRICK AND OTHERS.

In administrations granted since the 1st day of July, 1869, the Probate Judge alone has jurisdiction to compel the administrator to a settlement and to state his account, and apportion the assets among the creditors. Bat. Rev., Chap. 90, Sec. 1. The Probate Court has likewise power, upon a deficiency of assets, to order a sale of the land.

Every action brought in the Probate Court to recover a debt against an administrator is necessarily a creditor's bill, as all the creditors must be brought in and their claims ascertained, before any judgment for the payment of any one can be given.

SETTLE J., *Dissenting.*

CIVIL ACTION in the nature of a creditor's bill against the administrator and others, tried before His Honor, *Judge Clarke,* at the Fall Term, 1873, of JONES Superior Court.

Defendants demurred to the plaintiff's complaint upon the ground that the Superior Court did not have jurisdiction of such action. On the hearing, his Honor sustained the demurrer and dismissed the action. Plaintiff appealed.

The allegations of the complaint, so far as are pertinent to the decision of this Court, are stated in the opinion of Justice RODMAN.

Green, for appellant.
Hubbard, contra.

RODMAN, J. At Spring Term, 1872, of Jones Superior Court, before the Judge of the Court, the plaintiff, on behalf of himself and all other creditors of one Council Gooding, brought an action and filed his complaint, of which the allegations at present material are these:

1. That Council Gooding is indebted to plaintiff;
2. Gooding died during the late war intestate;
(282) 3. Certain of the defendants, without authority, took and squandered his entire personal estate;
4. In August, 1871, Isaac Gooding became administrator of Council Gooding, but has no assets;
5. That Council Gooding died seized of certain lands, which it is prayed may be sold and the proceeds applied to the payment of his debts.

Defendants demur for want of jurisdiction.

As original administration was granted after 1st July, 1869, the settlement of the estate is governed by the act of 1868-69, Chap. 113, and by the act of 1871-72, Chap. 213, (Bat. Rev., Chap. 45.)

By those acts the Probate Judge alone has jurisdiction to compel the administrator to a settlement and to state his account and apportion the assets among the creditors. Act, Bat. Rev., Chap. 90, Sec. 1, and Acts, Chap. 45. Every action brought in that Court to recover a debt against an administrator is necessarily a creditor's bill, as all the creditors must be brought in and their claims ascertained before any judgment for the payment of any one can be given. That Court also has power upon a deficiency of assets to order a sale of the lands. Bat. Rev., Chap. 45, Sec. 61; *Pelletier v. Saunders*, 67 N. C., 261.

So that the Probate Court has jurisdiction to give complete relief and the Superior Court cannot consistently with that act give any at all. See Sec. 95, Bat. Rev., Chap. 45.

The act of 1870-71, Chap. 108, Bat. Rev., Chap. 17, Secs. 425, 426, substantially re-enacted by the act of 1872-73, Chap. 175, Sec. 3, does not apply. It is not within the words or intent of the act. The Legislature could not authorize the Superior Court (held by the Judge,) to take the account of an administrator who administered after 1st July, 1869, except by an act repealing *pro tanto* the act Chap. 45 of Bat. Rev., and conferring the powers therein conferred on the Probate Judge on the Judge of the Superior Court. To construe the act in question as having this effect would produce so much inconvenience and so
(283) disarrange the working of the provisions of the acts found in Bat. Rev., Chap. 145, which contain the general law for the settlement

of all estates in which original administration was granted after 1st July, 1869, that we should be disposed to give it that construction only, if the intent of the Legislature was plain.

The decision we now make is not contrary to any heretofore made as to the effect of the several acts curing defects of jurisdiction. In all previous cases before this Court, the original grant of administration was prior to 1st July, 1869, when the act for the settlement of estates went into effect. In the present case it is after that date. It is highly desirable that there should be but one Court in which such actions should begin, and sufficient time has elapsed since the passage of the act conferring the exclusive original jurisdiction in such cases on the Probate Courts to enable the profession and the people to have been informed of them.

PER CURIAM. Demurrer sustained and action dismissed for want of jurisdiction.

SETTLE, J., *dissenting*. I dissent from the opinion of the majority of the Court, believing the defect of jurisdiction to have been cured by the act of 1870-71, Chap. 108, and the act of 1872-73, Chap. 175. *Bell v. King*, 70 N. C., 330.

Cited: Haywood v. Haywood, 79 N.C. 45; *Shields v. Payne*, 80 N.C. 293; *Pegram v. Armstrong*, 82 N.C. 330.

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(284)

H. T. FARMER v. W. H. WILLARD.

A sells a tract of land to B, agent of C, taking in payment therefor C's check on a bank in Columbia, S. C., at the same time making C a deed; upon presentation the payment of the check was refused, and B, the agent, duly notified thereof. In this action to recover the value of the check, *Held* that notice of its non-payment to the agent was notice to the principal: *Held further*, that the consideration of the check being land sold in 1865, the jury might ascertain the value of the land in present currency, and return that as their verdict.

Held also, that, as C accepted a deed for the land through his agent B, that was a sufficient compliance with the law in relation to frauds and fraudulent conveyances.

CIVIL ACTION upon a bill of exchange given in the purchase of a certain tract of land, tried before *Henry, J.*, and a jury, at the Spring Term, 1874, of BUNCOMBE Superior Court.

The following are the facts material to an understanding of the points raised and decided in this Court, as they are contained in the "case settled" and sent up with the record.

The plaintiff sued out his writ 4th April, 1867, under our former system of procedure, and at the return term declared for the value of a certain tract of land and exhibited a bill of exchange, drawn by the defendant on a Bank of Columbia, S. C., for the sum of $80,000. It was in evidence that the defendant had employed one J. D. Hyman as an agent for him, to purchase real estate in Western North Carolina, and had drawn this bill of exchange, dated — day of February, 1865, in favor of his said agent, to make the payments for the lands he, the agent, might purchase.

Hyman, the agent, had purchased of the plaintiff 400 acres of land, and taken a deed on the 8th April, 1865, in the name of the defendant; and had endorsed the bill of exchange with instructions to proceed at once to Charlotte, N. C., and present it for payment, the Bank of
(285) Columbia having removed to that place to escape Sherman's army. The plaintiff presented the bill at the Bank at Charlotte and payment was refused, the officers alleging that they had made a "forced loan" to the Confederate government and had no funds. Immediately thereafter the plaintiff returned to his home and informed Hyman, the agent, of the refusal to pay by Bank, etc. The bill was not protested, it appearing that on account of the confusion and disorder preceding the approach of the Federal army, then hourly expected at Charlotte, no Notary Public or other proper officer could be found; and no notice of its non-payment was ever given to the defendant, Willard.

It also appeared that while the Bank was at Columbia, defendant had a large amount on deposit, sufficient to pay off the debt, etc.; it did not appear that after the removal to Charlotte and after the occupation of that place by the United States Troops, the business of the bank was carried on.

The Court instructed the jury to find: 1st, Whether the check had been presented according to the instructions of the agent, Hyman, for payment, and if payment thereof had been refused;

2d. The value of the land sold.

The jury found both issues for the plaintiff, and assessed the value of the land at $2,000. The plaintiff desired another issue submitted to the jury, which the Court refused, viz.: whether the defendant had sufficient funds in the Bank at the time the check was presented to pay it. The defendant contended that if the plaintiff abandoned the check and declared for the value of the land, he could not recover, because there was no memorandum in writing of sale or of promise to pay. His Honor was of a contrary opinion and ruled otherwise.

There was a judgment for the plaintiff in accordance with the verdict for $2,000, from which judgment defendant appealed.

Fuller & Ashe, for appellant.
No counsel contra in this Court.

BYNUM, J. Hyman was the agent of Willard to purchase (286) land, and it was his duty to reduce the bill of exchange to cash and with it to pay for the land purchased. Instead of doing this himself, he passed the bill of exchange to the plaintiff with instructions to present it to the Bank at once. The plaintiff followed the instructions and duly notified the agent of the nonpayment.

Notice to the agent was notice to the principal. If there was laches it was on the part of the agent in not duly notifying the drawer of the dishonor of the bill, but with this cause of quarrel between principal and agent, the plaintiff has no concern. His cause of action arose on the non-payment when he presented it according to his instructions and gave notice thereof. *Hubbard v. Troy,* 24 N. C., 134.

It was objected that the plaintiff could not recover the value of the land, because there was no note or memorandum in writing, given by the party to be charged. But if this case fell within the operation of the statute of frauds, the case shows that a deed for the land was made to and accepted by the defendant through his agent, and this would be a compliance with the statute. Certainly when the defendant purchased and took a deed for the land, he was bound to the plaintiff for the purchase money, and the action was properly brought on the evidence of debt, to wit, the bill of exchange. It being a Confederate debt, it was competent for the plaintiff to show what was the consideration of the contract, and it was the duty of the jury to determine the value of the contract in present currency. Bat. Rev., Ch. 34, Sec. 7. *Robeson v. Brown,* 63 N. C., 554, and subsequent cases. The consideration of the bill was land, and the jury, by their verdict, have ascertained its value in the present currency.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Dobias v. White, 240 N.C. 687.

(287)

F. P. BIDWELL AND WIFE v. R. W. KING.

An action to recover a legacy of $150, although it is alleged the executor promised to pay the interest on it and failed, must be brought in the probate Court of the County in which the will was proved.

This was a CIVIL ACTION against the defendant as executor, to recover a legacy, tried before *Mitchell, J.*, at Fall Term, 1873, of ALLEGHANY Superior Court.

The *feme* plaintiff, residing in Alleghany County, became entitled to a legacy under the will of her grand-mother, who died in Lenoir County, in which her will was admitted to probate and the defendant, a resident therein, qualified as executor.

The plaintiff alleges that the defendant promised to pay her the interest on the legacy until a certain contingency arose, (her marriage,) at which time he was to pay the principal thereof. That she had intermarried with the other plaintiff, and that defendant had failed to comply with his promise.

At the return term the defendant moved to dismiss the complaint for want of jurisdiction, in this, that the action ought to have commenced in the Probate Court. At the trial his Honor overruled the motion; when the defendant demanded that it should be transferred to the Superior Court of Lenoir County. His Honor refusing this, the defendant appealed.

Attorney General Hargrove and Furches, for defendant.

No counsel contra in this Court.

RODMAN, J. Two objections are made to plaintiff's action.

1. That it should have been brought in the Probate Court. We are of opinion that it should have been. The facts do not bring it within the principles decided in the case of *Miller v. Barnes,* 65 N. C., 67.

(288) Here it is not alleged that the defendant ever promised to pay the principal of the legacy; although it is alleged that he promised to pay the annual interest, and failed to do it. The Probate Court has general original jurisdiction of actions to recover legacies. *Bell v. King,* 70 N. C., 330, and no circumstance is here alleged to make the case an exception to the general rule. The Superior Court had no jurisdiction of the action.

2. An executor is entitled to be sued in the county in which he proved the will and qualified as executor. *Stanly v. Mason,* 69 N. C., 1, and *Foy v. Morehead, Id.,* 512.

PER CURIAM. Action dismissed.

Cited: Hendrick v. Mayfield, 74 N.C. 632; *Clark v. Peebles,* 100 N.C. 352; *Wood v. Morgan,* 118 N.C. 750; *Alliance v. Murrell,* 119 N.C. 126; *Craven v. Munger,* 170 N.C. 426; *Godfrey v. Power Co.,* 224 N.C. 661; *Wiggins v. Trust Co.,* 232 N.C. 394.

STATE v. JAMES B. LANIER.

Riding unarmed through a Court House, after the Court has adjourned and the crowd gone home, may or may not be a criminal offence, according to circumstances. It is for the jury to say, whether or not it was done in such manner and in such presence and at such time as would make the offence criminal.

INDICTMENT for an affray in riding a horse through the court house, tried before *Cloud, J.,* at the Spring Term, 1874, of DAVIE Superior Court.

On the trial below, under the directions of the Court, the jury found the defendant guilty, and from the refusal of his Honor to grant a new trial, the defendant appealed.

The evidence is sufficiently stated in the opinion of the Court.

McCorkle & Bailey, for defendant.

Attorney General Hargrove, for the State.

SETTLE, J. The elementary writers say that the offence of (289) going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in *State v. Huntley,* 25 N. C., 418. It is evident that the indictment before us was drawn upon the assumption that the facts in the case would bring it within the spirit of this offence. Only two witnesses were examined upon the trial, both on behalf of the State. One of them testified that he was in the sheriff's room, on the side of the passage of the court room, and heard an unusual noise, when he opened the door and ran out and saw the defendant on horseback passing out of the north door of the passage of the court house. This was after Court had adjourned in the evening. That the defendant was preparing to ride in again, when he was met and stopped by the sheriff, and he then rode off. From the noise, the witness judged that he rode through the passage of the court house in a canter. Witness thought the defendant was drunk, but had no reason for so thinking except that he would not have ridden

through the court house if he had been sober. Witness also swore that he saw a good many persons in the street near enough to have heard the noise occasioned by riding through the passage.

The other witness testified that Court had adjourned for the day and that it was late in the afternoon. He was upstairs in the court room and heard the noise below and started down to see what it was; saw the defendant at the south door, who said to him, "clear the track, the rider is up," the defendant at the same time laughing; that the people had generally gone home and no one was present but Clouse, the other witness for the State. Witness said to defendant, "don't ride through here any more." Defendant replied, "well I won't," and rode off, being in a perfect good humor. Witness saw no arms of any kind.

His Honor instructed the jury that if they believed the testi-
(290) mony of either one of the witnesses, they must return a verdict of guilty.

While this was very bad behavior by the defendant, we cannot say, as a conclusion of law, that the evidence makes him guilty of a criminal offence.

In this case we attach no importance to the fact that the defendant had no arms, for we think it may be conceded that the driving or riding without arms through a court house or a crowded street at such a rate or in such a manner as to endanger the safety of the inhabitants amounts to a breach of the peace and is an indicable offence at common law. *United States v. Hart,* 1 Pet. C. C. R., 390.

But does the proof in this case sustain the allegations of the indictment?

We conceive that the riding through a court house or a street at 12 o'clock at night, when no one is present, is a very different thing from riding through at 12 o'clock in the day, when the court house or street is full of people.

The same act may be criminal or innocent, according to the surrounding circumstances. Here it seems, according to both witnesses, that only they and the sheriff were actually present, though one witness stated that he saw a good many persons in the street near enough to have heard the noise.

We think his Honor should have left it to the jury to say whether under all the circumstances the defendant was guilty or not guilty.

There is error, which entitles the defendant to a *venire de novo.*

PER CURIAM. *Venire de novo.*

(291)

ALFRED PALMER v. R. T. BOSHER AND F. C. CLARK.

The Clerk of the Superior Court has jurisdiction to vacate an attachment, notwithstanding the act of 1870-71, Chap. 166, makes the process returnable to Court in term time.

A plaintiff has a right to amend his affidavit as to mere matters of form; and if he is ready to swear to the amended affidavit, it is error in the Clerk to refuse it.

MOTION to vacate an attachment, heard upon appeal from the Clerk of WAKE Superior Court, by his Honor *Judge Watts,* at Spring Term, 1874.

Plaintiff obtained a warrant of attachment against the defendants upon the following affidavit, to wit:

"WAKE COUNTY: IN THE SUPERIOR COURT.

"Alfred Palmer, plaintiff, against R. T. Bosher, and F. C. Clark, defendants. } Affidavit.

"Alfred Palmer of the county of Wake, being duly sworn, says:

"1. That during the year one thousand eight hundred and seventy-three, the said R. T. Bosher and F. C. Clark, defendants, become indebted to him in the sum of three hundred and seventy-six dollars for work and labor done and performed by the plaintiff for said defendants during said year on their plantation near Raleigh, N. C., and upon whose crops he has acquired a laborer's lien under the statute in such case made and provided.

"2. That the said Alfred Palmer is about to commence an action in this Court against the said R. T. Bosher and F. C. Clark, and has issued a summons therein.

"3. That the said R. T. Bosher and F. C. Clark is removing (292) or are about to remove some of their property from the State, with intent to defraud their creditors, and have assigned, disposed of, and secreted, (or) are about to assign, dispose of, (or) secrete some of their property with intent to defraud their creditors.

(Signed,) ALFRED PALMER.

"Sworn to before me, Jno. N. Bunting, Clerk of the Superior Court, Wake County."

The defendants, after due notice, appeared before the Clerk and moved to vacate the attachment upon the grounds of insufficiency in

their affidavit. Plaintiff contended that the Clerk had no jurisdiction of the motion, and upon this being decided against him, moved to amend the affidavit by striking out the words in the 3rd paragraph, "is removing or are about to remove some of their property from the State with intent to defraud their creditors, and;" motion overruled, and the order granting the attachment vacated. Plaintiff appealed, and at the ensuing term his Honor affirmed the judgment of the Clerk, when the plaintiff again appealed.

Jones & Jones, for appellant.
Busbee & Bubee, contra.

RODMAN, J. 1. The first question is, whether the Clerk of the Superior Court had jurisdiction to vacate the attachment. We think there can be no doubt that he had. Sec. 212, C. C. P., says, "Whenever the defendant shall have appeared in such action he may apply to the Court in which such action is pending, or to the Judge thereof for an order to discharge the same," etc. By the words "the Court" in C. C. P. is meant the Clerk of the Court, unless otherwise indicated. There the Clerk is expressly indicated as an officer that may be applied to, because either the Court or the Judge may be applied to, and "the
(293) Court," as distinguished from the Judge, must mean the Clerk.

This jurisdiction is not taken away by the act of 1870-71, Ch. 166. That act, Sec. 1, enacts that the attachment "shall be returnable in term time to the Court from which the summons issues."

The case of *Backalan v. Littlefield*, 64 N. C., 233, as it was decided before the passage of this act, has no bearing on its construction.

Sec. 212, of C. C. P. remains in effect, except so far as it is modified by the later act cited. It does not necessarily follow that because the attachment is returnable to a regular term, that the defendant may not voluntarily appear before the return day, and move either before the Clerk or the Judge to vacate it. The act of 1870-71, was apparently made in favor of defendants; but it would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the Court, which might be nearly six months after the seizure. There is nothing inconsistent in such appearance and motion before the return day. As no return has been made the defendant is under the burden of showing that the attachment has been served on his property; but having shown this it would be an unnecessary delay of justice and inconvenient to both parties to continue to deprive him of the possession of his property by irregular and illegal proceedings. We should be

reluctant to give this effect to the provisions of the act of 1870-71, and we think the words by no means require it.

2. The second question is, whether the Clerk should have allowed the plaintiff to amend his affidavit, which was the foundation of the warrant of attachment.

We do not decide that the original affidavit was insufficient. If it had set forth nothing more than that the defendants were about to remove their property; it would have been defective under the decision in *Hughes v. Person*, 63 N. C., 548, for not stating the grounds of plaintiff's belief.

But we think it was not defective because it stated that de- (294) fendants were removing, or were about to remove, their property in the alternative. A plaintiff may not know with such certainty as to enable him to swear to it, whether a defendant is only about to remove his property or has actually begun removing it. The truth of either fact might depend on the hour of the day when the affidavit was made. An affidavit which stated that defendant was *about to remove* his property, (giving the grounds for the belief,) *or* had removed it, could not be irregular.

But this question does not arise here. The plaintiff admitted that his original affidavit was insufficient in form by moving to amend it. We do not wish to be understood as holding that an affidavit for an attachment defective in substance, may be amended so as to sustain the warrant of attachment. We are inclined to think that, as in the parallel case of an injunction, if the original affidavit was insufficient in substance to sustain the attachment, it could not be amended so as to do so.

The amendment moved for in this case, was one of form only. The plaintiff could have been convicted of perjury on his affidavit, if it were proved *both* that defendant was not removing and had no intention of removing his property. To strike out that part of the affidavit that defendant was about to remove, etc., left to the defendant the right to charge the plaintiff with perjury if the fact of actual removal was not true.

The objection of the defendant was, that plaintiff did not swear to his motion. For aught that appears he was ready to swear again to his original affidavit, after it was amended. But the Clerk cut him off before he came to that stage of the case. He might well have told him, I will allow your motion to amend, if you will swear to your affidavit after it is amended. But he says, I will not allow you to amend your affidavit at all. He allowed the plaintiff no opportunity to swear to the affidavit as proposed to be amended.

We think the Judge of the Superior Court erred in confirming
(295) the order of the Clerk of the Superior Court in vacating the attachment. He should have reversed that order.

PER CURIAM. There is error in the judgment below, which is reversed. The case is remanded to be proceeded in, etc. Let this opinion be certified.

Cited: Devries v. Summitt, 86 N.C. 130; *Wilson v. Mfg. Co.,* 88 N.C. 7; *Penniman v. Daniel,* 90 N.C. 157; *Cushing v. Styron,* 104 N.C. 340; *Byrd v. Nivens,* 189 N.C. 625.

STATE v. MICHAEL SEARS AND OTHERS.

In an indictment under the 12th section, Chap. 64, Bat. Rev., for removing a part of the crop, etc., when there is conflicting testimony as to the notice of the lien: *It is error* for the presiding Judge to refuse to charge, that if the jury believed the defendants had no notice of the lessor's lien, they would not be guilty.

When on the trial, it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested.

INDICTMENT, for removing a part of the crop, tried before *Mitchell, J.,* at Spring Term, 1874, of IREDELL Superior Court, having been removed from the Superior Court of Yancey County.

The indictment contained two counts; the first charged a forcible trespass at common law by the defendants upon the land of the prosecutor; and the second was framed upon the 15th Section, Chap. 64, Bat. Rev., for removing a crop of corn without satisfying the prosecutor's lien as landlord, etc. On the trial the first count was *nol-pros'd,* and the defendants held to answer the second count only.

There was conflicting testimony as to the notice had by the defendants of the prosecutor's lien, which was the principal point in the case, and which is fully noticed in the opinion of Justice READE, as are also the grounds alleged for an arrest of judgment.

(296) The jury found the defendants guilty. Motion for a new trial denied. Defendants then moved to arrest the judgment, which was also overruled. Judgment and appeal by defendants.

Folk & Armfield, for the defendants.

Attorney General Hargrove, for the State.

READE, J. The statute makes it indictable for a tenant who is to pay a part of the crop for rent, "to remove any part of the crop from the land without the consent of the lessor," etc.

And so it makes it indictable for any third person to move any portion of the crop:

1. "If he has knowledge of the lessor's lien."

2. If he have the "license or authority of the tenant."

The defendants being indicted as third persons for removing the crop, the first question is did they have knowledge of the lessor's lien?

There was evidence tending to show that they did know it, and there was evidence tending to show that they did not. The defendants offered to prove that one of their number, before he bought and removed the corn, enquired of the lessor whether he had any lien; and he answered that he had not, and advised the defendant to buy it of the tenant. And the defendant asked his Honor to instruct the jury that if they believed that, then they were not guilty. But his Honor declined to give the instructions. In this we think there was error.

The second question is, did the defendants have the "license and authority of the tenant" to remove the corn? Of course they did; for they bought it of him. But then, the difficulty is, that it is not charged in the bill that they had his license or authority. And so we have the *probata* without the *allegata*. And so the indictment is bad, and judgment must be arrested.

This will be certified, etc.

PER CURIAM. Judgment arrested.

Cited: S. v. Smith, 106 N.C. 659.

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(297)

MARTHA L. SHULER v. JOHN A. MILLSAPS' EXECUTOR.

The husband of a plaintiff, in an action for a breach of promise of marriage, married since such action commenced, is not a necessary party thereto. Nor does such action abate on account of the death of the defendant.

This was a CIVIL ACTION for a breach of promise of marriage commenced in Jackson County, and carried thence to the Superior Court of SWAIN County, where it was tried before *Cannon, J.,* at Spring Term, 1874.

The facts are stated in the opinion of the Court.

His Honor, on the trial below, held that the suit had abated and gave judgment accordingly. From this judgment plaintiff appealed.

No counsel for appellant in this Court.
Battle & Son, contra.

SETTLE, J. The plaintiff, whose maiden name was Martha L. Cathey, brought this action against John A. Millsaps, the defendant's testator, to recover damages for the breach of a marriage contract. Since the cause was put to issue, the plaintiff intermarried with one James Shuler, who has not been made a party to this action.

And the defendant Millsaps having died since the cause was at issue, his executor, the present defendant, was made a party in his stead.

The defendant then moved the Court to dimiss the action for that the same had abated; "1st, because of the intermarriage of the plaintiff with James Shuler; and 2d, because John A. Millsaps was dead."

His Honor held that the action had abated and the plaintiff appealed.

The learned counsel, who argued the case for the defendant in this Court, contends that the husband of the plaintiff is a necessary
(298) party, and that he should have been brought in by an amendment. Is this so?

The Constitution of 1868 and the laws made in pursuance thereof, have so changed pre-existing laws on the subject of the estates of females, and the remedies effecting the same, that neither the elementary books nor our own reports afford us much light in determining the questions presented by the record.

We are called upon to make a new departure, leaving old ideas behind, and adapting ourselves to the new order of things.

The Constitution, Art. 10, Sec. 6, ordains that, "The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled shall be and remain the sole and separate estate and property of such female," etc.

A chose in action is a right to receive or recover a debt, or money, or damages, for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. 1 Chit. Pract., 99.

Whatever right the plaintiff had to recover damages for the alleged breach of contract, remains a part of her sole and separate estate; and it is expressly provided that when the action concerns the separate property of the wife she may sue *alone.*

Indeed she may sue her husband, or be sued by him *alone;* and in no case need she prosecute or defend by a guardian or next friend. Bat. Rev., Chap. 17, Sec. 56. It is further provided by Sec. 65, of same act, that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, except in suits for penalties,

and for damages merely vindictive, marriage or other disability of a party, the Court on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by, or against his representative or successor in (299) interest," etc.

And again it is enacted that "upon the death of any person all demands whatsoever and rights to prosecute and defend any action or special proceeding existing in favor or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate." Bat. Rev., Chap. 45, Sec. 113.

And the exceptions made in Sec. 114, are causes of action for libel, slander, false imprisonment, etc., none of which embrace the action under consideration.

Let it be certified that there is error, to the end that the Superior Court may proceed according to law.

PER CURIAM. Judgment reversed.

Cited: Shields v. Lawrence, 72 N.C. 45; *Lippard v. Troutman,* 72 N.C. 553; *McCormac v. Wiggins,* 84 N.C. 279; *Allen v. Baker,* 86 N.C. 94; *Strother v. R. R.,* 123 N.C. 198; *Walton v. Bristol,* 125 N.C. 428; *Wilkes v. Allen,* 131 N.C. 281; *S. v. Jones,* 132 N.C. 1050; *Harvey v. Johnson,* 133 N.C. 364; *Graves v. Howard,* 159 N.C. 598; *Crowell v. Crowell,* 180 N.C. 520; *Roberts v. Roberts,* 185 N.C. 570.

PETER F. PESCUD v. P. B. HAWKINS.

A plaintiff may elect to be non-suited when the Judge intimates an opinion that the Court has no jurisdiction of the action, and when the defendant has moved to dismiss for want of jurisdiction.

CIVIL ACTION to recover an acceptance of one hundred and ninety-one dollars, tried at the Special (January) Term, 1874, of WAKE Superior Court, before his Honor, *Judge Tourgee.*

On the trial below the defendant moved to dismiss the action because the complaint does not set forth a cause of action within the jurisdiction of the Court.

The plaintiff moved to amend the summons and complaint by estimating the interest to the date of the summons, and incorporating that in the demand of the summons and complaint, which would make the amount more than $200. Motion refused. Plaintiff then asked

(300) to be allowed to enter a judgment of non-suit, which was likewise disallowed.

His Honor granted the motion of the defendant to dismiss the action, and plaintiff appealed.

Fowle and A. M. Lewis, for plaintiff.

Batchelor, for defendant.

BYNUM, J. The defendant moved the Court to dismiss the action for want of jurisdiction in the Court. This was met by a counter-motion of the plaintiff to be allowed to take a non-suit. His Honor refused to non-suit and dismissed the action.

In this there was error.

A judgment dismissing an action is unknown at the common law, but is an ordinary judgment in equity proceedings, where before the cause is set down for hearing it is certainly not equivalent to a *retraxit* at law, or a *nolle prosequi* which ordinarily has the effect of a *retraxit;* Adams, 373. This term "dismissed" in law proceedings, has come into use by a provision in our statute. Rev. Code, Ch. 31, Sec. 38, which is dropped in the new system of practice established by the Code of Civil Procedure.

By the latter system of pleading the objection to the jurisdiction can now be taken only by answer or demurrer, the demurrer being either written or *ore tenus.* C. C. P., Sec. 91, 99.

It may be that the proper construction of this new legal term "dismissed," which, as a law term, has no technical signification, would be to give it at law the same effect it has in equity, where it does not necessarily prevent the party from beginning anew, or affect his rights or defence in case another action is instituted.

But this point does not now arise.

In *McKesson v. Mendenhall,* 64 N. C., 502, the very point now before the Court was decided, and it was there held "that the plaintiff may elect to be non-suited in every case where no judgment other (301) than for costs can be recovered against him by the defendant."

But the defendant attempts to escape the authority of this case by drawing a distinction between cases where the Court has no jurisdiction and the action is *coram non judice,* and cases where the action is constituted in the proper Court, admitting that the doctrine applies to the latter but not to the former, which is his case. The Court, however, in the opinion referred to did not make the distinction contended for by the defendant, and no sufficient reason or authority appears why it should be made. For although the Court had no jurisdiction in this case, yet for many purposes the case is nevertheless

in Court, as to move to dismiss, to non-suit, *nol. pros.,* and other motions, and if no defence is made to the action, the plaintiff may proceed to judgment and execution.

It then seems a refinement to say that the plaintiff may take a non-suit, if the Court has jurisdiction, but cannot take a non-suit if it has not jurisdiction. For if the plaintiff cannot move to take a non-suit, because the Court has no jurisdiction, the defendant cannot move to dismiss for the same reason. If the Court has jurisdiction to dismiss, it must have it to non-suit for they are both judgments of the Court.

It is true in Tidds Pr., 868, we have this expression: "That a non-suit, it is said, can only be at the instance of the defendant," but the authority cited for the *dictum* does not bear him out. The case is in 1 Strange, 267, and was where the jury was sworn, but no counsel, parties or witnesses appeared on either side, and the Court there held that there being no body to move in the cause, the only way was to discharge the jury.

The ancient rules in regard to non-suit which were founded on technical reasons, having no existence now, have given way to the more reasonable one which now prevails, to wit: That if it be clear that in point of law the action will not lie, the Judge, at *nisi prius,* will non-suit the plaintiff, although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment or on a writ of error. 2 Tidd. Pr. 867, 1 Cam., 256. And so it is (302) held that whenever in the progress of a cause the plaintiff perceives that the Judge or the jury is decidedly against him, or that he will, on a future occasion, be able to establish a better cause, he may *elect to be non-suited.* 3 Chit. Pr. 911.

The books furnish many instances where judgment by default has been taken against one of two defendants, and the plaintiff elected to be non-suited upon the trial of an issue joined by the other defendant. 5 Barn. & Cres, 178. In none of the cases do we find the distinction, attempted to be made in this case, to wit, that the right to elect to be non-suited, is confined to cases constituted in a Court having jurisdiction.

And why should not this be the rule? The plaintiff, by the non-suit, is mulct in costs as the penalty of his mistake of jurisdiction, and the defendant is deprived of no defence upon the merits, in case another action is begun against him for the same matter.

It would seem that any other construction of the rules of pleading at this day when the tendency of all judicial legislation is to simplify these rules and make them consistent with reason and the more equitable administration of justice, would be both harsh and a step backward.

As a matter of right the plaintiff should have been allowed his motion.

PER CURIAM. Judgment reversed. *Venire de novo.*

Cited: Ins. Co. v. Bishop, 71 N.C. 303; *Purnell v. Vaughan,* 80 N.C. 49; *Wharton v. Comrs.,* 82 N.C. 15; *Tucker v. Baker,* 86 N.C. 3; *Bank v. Stewart,* 93 N.C. 403; *Hedrick v. Pratt,* 94 N.C. 103; *Bynum v. Powe,* 97 N.C. 377; *Baker v. Garris,* 108 N.C. 227; *Asbury v. Fair,* 111 N.C. 258; *Merrick v. Bedford,* 141 N.C. 506; *Mathis v. Mfg. Co.,* 204 N.C. 436.

(303)

N. C. MUTUAL LIFE INSURANCE C. v. GEORGE BISHOP.

(See Syllabus of the preceding case, *Pescud v. Hawkins.*)

This was a CIVIL ACTION brought to recover a promissory note, tried before *Tourgee, J.,* at the Special (January) Term, 1874, of WAKE Superior Court.

The note alleged by the plaintiff corporation to be due and made by defendant was for $198.24, dated 1st day of February, 1863. On the trial below, the same motions were made and the same proceedings had as in the preceding case of *Pescud v. Hawkins.*

The plaintiff appealed from the judgment of the Court dismissing the complaint.

Fowle, Haywood and Battle & Son, for appellant.

Fuller & Ashe, contra.

BYNUM, J. The facts and the questions of law, presented by this case, are precisely similar to those set forth in the case of *Pescud v. Hawkins,* decided at this term of the Supreme Court. For the reasons there given which apply to and govern this case, there was error in the judgment below, and the judgment is reversed here.

PER CURIAM. Judgment reversed.

(304)

STATE EX REL. WM. GRIFFIN AND OTHERS v. JOSEPHINE GRIFFIN AND OTHERS.

The finding of the jury on an inquisition of forcible entry and detainer before a Justice of the Peace, cannot be traversed in the Superior Court, to which it had been carried by *recordari*. If there has been an irregularity, or error in law in the proceedings, or if the verdict of the jury be insufficient to support the judgment of the Justice, it will be quashed.

This was a proceeding on an inquisition of FORCIBLE ENTRY and DETAINER, removed from a Justice's Court to the Superior Court of ROBESON County, where it was tried before *Clarke, J.*, at the Special January Term, 1874.

The facts necessary to an understanding of the point decided are stated in the opinion of the Court.

On the trial below his Honor denied the motion of the defendant, that she be permitted to traverse the finding of the jury before the Justice, whereupon the defendant appealed to this Court.

N. A. McLean and Leitch, for appellant.
Strange and W. F. French, contra.

RODMAN, J. On 25th of April, 1867, the defendants, Josephine Griffin and others, applied to the Hon. Daniel G. Fowle, a Judge of the Superior Court, for a *recordari* to require one Britt, a Justice of the Peace, to return to the Superior Court of Robeson County the proceedings upon an inquisition of forcible entry and detainer, wherein William Griffin and Allen Griffin were complainants against the said defendants. The error assigned in the proceedings was that said William and Allen were not entitled to the possession of a certain mill by title in fee simple, as in the proceedings they had alleged and a jury had found, but that Josephine Griffin, one of the defendants, (305) was so entitled, and that further the defendants had forcibly entered upon and detained the premises. The Judge issued the order asked for and upon the return of the proceedings before the Justice, the case was continued until the Special Term of Robeson Superior Court in January, 1874, when the defendants moved for leave to traverse the findings of the jury before the Justice, which his Honor, CLARKE, J., denied, and affirmed the judgment of the Justice, from which the defendants appealed. It has been held that no appeal lies from the order of a Justice in proceedings under the statute of forcible entry and detainer, (Rev. Code, Chap. 49,) because the proceedings are intended to be summary and the judgment of restitution cannot

be stayed as it would be by an appeal. A *certiorari* may be obtained to bring up the record to the Superior Court. But facts found by the jury not be tried over again. If there has been an irregularity or error in law in the proceedings, or if the verdict of the jury be insufficient to support the judgment of the Justice, it will be quashed. *Sherrill v. Nations,* 23 N.C. 365.

We have examined the record of the proceedings before the Justice of the Peace and perceive no error in them, and none was pointed out in this Court.

It was suggested in this Court, that as the Justice would not now have jurisdiction, his proceedings in 1861, when he did have jurisdiction, ought not to be affirmed. They require no affirmation; they stand good until quashed or reversed.

We think there was no error in the judgment of the Superior Court.

PER CURIAM. Judgment affirmed.

(306)

JOHN HOLMES, EX'R. OF GEO. HOLMES, v. ISHAM GODWIN AND BLACKMAN GODWIN.

If, on a trial below, the jury omit to find a matter which goes to the very point of the issue, the new trial granted by the Supreme Court must be *in toto;* but when, on that trial, all the material issues have been correctly found, and the error does not touch the merits, the Supreme Court may award a partial new trial to correct the error.

CIVIL ACTION for the claim and delivery of personal property, heretofore decided in this Court at June Term, 1873, (69 N. C., 467,) and sent down to the Superior Court of CUMBERLAND, where it was again tried by *Buxton, J.,* at Spring Term, 1874.

The facts are fully set out in the report of the case in 69 N. C., 467. Upon the return of the case to the Superior Court of Cumberland, for a new trial, the defendant obtained leave of the Court to amend his answer, substituting more explicit denials of the allegations in the complaint, for the general one, "that no part of the complaint was true."

Upon the former trial, the following issues, under the direction of the Court, were drawn up in writing and submitted to the jury:

1. Was any rent still due when the corn was taken by George Holmes under these proceedings: if any rent was due, how much? To this the jury responded in writing: No rent was due.

2. How much corn did George Holmes take under these preceedings, and what was its value? To which the jury responded in like manner: 125 bushels, worth $1.25 per bushel.

By way of damages the jury allowed 6 per cent. on the value from the time of taking, 1st January, 1870. Judgment was then accordingly rendered against the plaintiff, and he appealed. This Court reversed the judgment on account of error committed in assessing the value of the corn at the time of its seizure by the sheriff, instead of at the time of the trial. It did not then appear that (307) the corn had been destroyed, so that its return in specie to the defendants was impossible.

On the second trial it became a question submitted to the adjudication of the Court, how far the order for the *venire de novo* extended; whether to the whole case or merely to the assessment of value and damages. The defendants insisted that they were entitled to the standpoint they had acquired by reason of the finding of the jury in the former trial, upon the issues submitted, ascertaining the wrongful taking of the corn by reason of an unfounded claim for rent, and also ascertaining the quantity seized, to wit, 125 bushels; and that the *venire de novo,* only extended and should be so limited to the assessment of the value of the corn, being in the nature of an inquest to assess damages for a wrong already ascertained.

On the contrary, the plaintiff insisted that the *venire de novo* extended to the whole case, and that as a matter of law and legal right the effect of the adjudication by the Supreme Court upon his appeal, was to award a new trial out and out. The plaintiff further insisted that the verdict of a former jury was inconclusive for any purpose, it being only as to facts submitted upon issues framed by the Court; that it was not a distinct finding either for the plaintiff or for the defendant, so as to amount to a verdict for either, or to warrant the judgment of the Court rendered thereon; and that if in fact it was a verdict for the defendants, that both the verdict and the judgment were vacated by the appeal, and were pronounced erroneous by the Supreme Court; consequently the plaintiff was prepared to introduce evidence, as he proposed to do, first, to show at the time of taking the corn by the plaintiff's testator, under the proceedings instituted, the defendants were indebted to him for rent due; and second, to show the quantity of corn taken for rent, was only 40 bushels, and that the residue of the corn in the crib went to the use of the defendants.

His Honor intimating an opinion with the defendants upon the question presented, it was agreed, for the purpose of saving time, and that his decision might be reviewed as upon a case agreed, (308) that the corn before alluded to was burned, so that it could not

be restored in specie to the defendants, and also that its worth at the time of its seizure, was $1 per bushel; and further that 6 per cent. on the value of the corn from date of seizure, 1st January, 1870, should be the measure of damages for the taking and detention; that there should be a *remittitur* entered of 27-12 for the estimated value of corn at the date of seizure, and that there should be a judgment for the defendants accordingly.

Judgment in accordance with this agreement, and appeal by plaintiff.

B. Fuller, for appellant.
Guthrie, contra.

BYNUM, J. This is an action for the claim and delivery of personal property, instituted by the plaintiff's intestate.

1. The defendant denied the plaintiff's title and claimed the return of the corn which had been delivered to the intestate by the Sheriff. On the trial two issues were submitted to the jury.

1. Was any rent due to the plaintiff: and

2. If not, what was the amount and value of the corn taken and the damages for the detention. The jury found that no rent was due, and that 125 bushels of corn were taken, worth $1.25 per bushel, at the time of the taking, and judgment was given for $136.25 and interest.

On appeal by plaintiff to this Court, 69 N. C., 467, it was held to be error to assess the value of the corn as of the time of the taking, instead of the time of the trial, it not appearing that the corn had been destroyed so as to be incapable of being returned in specie, and for that reason a *venire de novo* was awarded. When the case came on for trial the second time, the plaintiff claimed a new trial out and out, upon all the issues found against him on the former trial, while the defendant claimed that the only error assigned being in the assess-
(309) ment of the value of the corn, the new trial must be confined to the correction of that error, and that he could not be deprived of the benefit of the verdict in his favor, upon the other and material issues found in his favor. His Honor held with the defendant, and the plaintiff appealed, and it was thereupon agreed, and it so appears in the case, that the corn had been consumed, and its value was agreed upon as of the time of seizure, in order that a final judgment might be rendered here upon a review of his Honor's opinion upon the case agreed.

The first question presented by the record is, what is the legal effect of a judgment of *venire de novo* upon the rights of the parties? Upon that, there can be no doubt. The technical formula, "*venire facias de novo,*" unexplained by any restrictions, has the meaning and legal

effect of wiping out the former verdict and giving a new trial out and out, upon all the issues, and such was its effect in this case.

That this Court *may* grant a partial and restricted new trial, in a proper case, is settled. *Key v. Allen,* 7 N. C., 553, was an action of detinue for negro slaves, where the jury found for the plaintiff and assessed damages for the detention of the slaves, but did not find their value.

The defendant moved for a new trial, and a question arose, whether the Court should award a new trial *in toto,* or permit the verdict to stand and award a writ of enquiry to assess the value of the slaves. Upon the principles of convenience and the justice of the case, the Court awarded an enquiry, and the criterion for the exercise of the power is laid down to be this: If the jury omit to find a matter which goes to the very point of the issue, the new trial must be *in toto,* but where all the material issues are found correctly, and the error does not touch the merits, the Court may award an enquiry or partial new trial, to correct the error. The English cases are to the same effect, and Coke, 10 Rep. 118, goes the length of saying, that in such cases the Court ought, *ex officio,* to award an inquest of damages and not a new trial upon the whole case. 4 Taunt. 556; Tidd's Practice, 911; *Boyd v. Brown,* 17 Pick. 453; Hilliard on New Trials, Chap. (310) 17, Sec. 29.

The opinion of the Court, as declared in this case heretofore, 69 N. C. 467, does not militate with this view of the power of this Court. The power to award a partial new trial, or an enquiry of damages where they have been erroneously assessed, without disturbing the findings which dispose of the merits of the case, is both convenient and useful, however delicate and difficult, may be its application in particular cases. It certainly should not be exercised except in a clear case. *Key v. Allen,* is very like our case, but there the counsel raised the point and asked for a writ of enquiry, without disturbing the verdict which was not done when this case was here before.

But another question is presented now. The *venire de novo* was granted because, under the instruction of the Court below, the jury assessed the value of the corn, as of the time of seizure, instead of the time of the trial, it not appearing that the corn had been destroyed. It now appears by the case agreed, that in point of fact, the corn had been destroyed and its value had been properly assessed by the jury. If this had appeared to the Court when the case was here before, the judgment of the Court below would have been affirmed. The only error alleged before, is now corrected by the case agreed and now submitted, for the more speedy determination of the case. Why send it

back to be tried *de novo,* when it has been once fairly tried, and the record presents no error of law? The Court will not do a vain thing.

PER CURIAM. Judgment affirmed.

Cited: Meroney v. McIntyre, 82 N.C. 106; *Burton v. R. R.,* 84 N.C. 201; *Nathan v. R. R.,* 118 N.C. 1070; *Strather v. R. R.,* 122 N.C. 200; *Benton v. Collins,* 125 N.C. 91; *Rowe v. Lumber Co.,* 132 N.C. 444; *Dunn v. Currie,* 141 N.C. 126; *Hawk v. Lumber Co.,* 149 N.C. 16; *Jones v. Ins. Co.,* 153 N.C. 392; *Lumber Co. v. Branch,* 158 N.C. 253; *Craig v. Stewart,* 163 N.C. 534; *Ragland v. Lassiter,* 174 N.C. 582.

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(311)

STATE v. HENRY C. PARROTT AND OTHERS.

The defendants are guilty of no offence in tearing down a portion of the Railroad bridge over Neuse River below Kinston, when by so doing they were removing obstructions to the free navigation of that river.

INDICTMENT for a trespass in tearing down a portion of a Railroad bridge, tried before *Clarke, J.,* at the Spring Term, 1874, of LENOIR Superior Court.

On the trial in the Court below, the jury found the following special verdict:

"That the track of the Atlantic & N. C. Railroad Co., which company had been duly incorporated and organized under the laws of North Carolina, crossed the Neuse River a few miles below the town of Kinston, in the county of Lenoir, the said river being there a navigable stream. That at said place of crossing, and as a part of its track, the said company had erected a bridge across said river. That the defendants were owners, officers and employees of a steamboat of thirty-seven tons burden, running between the city of Newbern, a port on said river, and the town of Kinston aforesaid. That on the day named in the bill of indictment, the defendants' boat loaded with goods to be delivered at Kinston, reached the said bridge on her way from Newbern to Kinston, and finding it could not pass further up the stream without removing a part of the bridge, the defendants did remove a part thereof, thereby injuring and removing a portion of the track and rails as charged in the indictment; that said bridge had no draw in it, although by its charter the said company was required to have a draw in said bridge. That said company had been notified several months before that said boat would be placed on said river for

navigation, and had been requested at the same time to place a draw in said bridge. That prior to the day named in the indictment, the said boat had passed the bridge eight times, the company taking up a span of the bridge each time to enable her to do so; that (312) she was delayed each time several hours; that on the day named in the indictment the said company had no one present to remove the span and on that occasion the boat was delayed thirty hours.

"That the owners of the boat then had license from the proper government officers at Norfolk to run the said boat between Newbern and Kinston; that the said railroad was a post road under the laws of the United States; that at the time of the removal of the bridge a number of the employees of the company were standing on the bridge, forbidding its removal, near the defendants, who were standing on the boat below, two of whom had pistols in their hands, which were not pointed at any one. That the company were then engaged in constructing a draw in said bridge and would have had the same finished in seven days; that the bridge could have been kept open for defendants' boat during the construction of the draw, but only at a very considerable additional expense."

His Honor gave judgment upon the special verdict that the defendants were not guilty, from which the judgment the Solicitor for the State appealed.

Attorney General Hargrove, Pou, Seymour and Lehman, for the State.

Smith & Strong, for defendants.

READE, J. The Neuse at the place under consideration is a navigable river. Any obstruction of a navigable river is a common or public nuisance. A common or public nuisance may be abated by any person who is annoyed thereby. The railroad bridge across the Neuse obstructed the navigation thereof by the defendant's steamboat, and for that reason the defendants tore it down. It follows that the defendants are not guilty. It is not necessary to display the learning and decisions in support of these positions, although we have fully considered them, because they may be found collected in a well considered case in our own Court, and we think it respectful and sufficient to (313) support our decision in this case by that. *State v. Dibble,* 49 N. C., 107.

It is insisted, however, that while an *individual* cannot obstruct a navigable stream, yet the *State* may do it on the inland streams unless Congress oppose; and here the State did authorize the railroad to build the bridge. It is true the State did authorize the railroad to

build a bridge across the Neuse, but it did not authorize the bridge to be *so* built as to obstruct navigation, but required a draw to be in the bridge so as to permit navigation. This was not done.

It is further insisted that the defendants acted *wantonly,* for that the railroad was preparing a draw and would have completed it in a few days, about seven days. The facts are that defendants had given the railroad several months' notice to prepare a draw. Prior to the day in controversy, as often as the defendants' boat passed, the railroad removed a span of the bridge to permit the passage, detaining the boat but a few hours, but on the day in question the span was not removed and the boat was detained for thirty hours, when the defendants removed a portion of the bridge.

From these facts it appears that the obstruction was wanton and its removal necessary.

Let this be certified to the end that judgment may be entered discharging the defendants as upon a verdict of not guilty.

PER CURIAM. Judgment affirmed.

Cited; S. v. Harper, 71 N.C. 314; *S. v. Club,* 100 N.C. 482; *Wolfe v. Pearson,* 114 N.C. 634; *Comrs. v. Lumber Co.,* 116 N.C. 742; *Ridley v. R. R.,* 118 N.C. 1005; *S. v. Baum,* 128 N.C. 605; *S. v. Godwin,* 145 N.C. 464; *S. v. Brown,* 191 N.C. 421.

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(314)

STATE v. JAMES W. HARPER AND OTHERS.

(See Syllabus in the case of *State v. Parrott* and others, in which both facts and the points decided are the same as in this case.)

INDICTMENT for trespass in tearing down a portion of a Railroad bridge, tried before *Clarke, J.,* at the Spring Term, 1874, of LENOIR Superior Court.

The facts, like those of the next preceding case, found by the special verdict of the jury, are the same as those in the *State v. Parrott, ante,* 311.

Upon the special verdict his Honor held that the defendants were not guilty, whereupon the State appealed.

Attorney General Hargrove, Pou, Seymour and Lehman, for the *State.*

Smith & Strong, for the defendants.

READE, J. The facts in this case are the same as in *State v. Parrott, ante,* 311, at this term, and the decision is the same and for the same reasons.

Let the decision in this and the opinion in that, be certified as the decision and opinion in this case, to the end that the Court below may proceed to judgment, discharging the defendants as upon a verdict of not guilty.

PER CURIAM. Judgment affirmed.

Cited: Comrs. v. Lumber Co., 116 N.C. 742.

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(315)

STATE v. JAMES W. HARPER AND OTHERS.

(See the Syllabus in the preceding case of the *State v. Parrott* and others, in which the facts and the decision are the same as in this case.)

INDICTMENT for a trespass in tearing down a portion of a Railroad bridge, tried before *Clarke, J.,* at the Spring Term, 1874, of LENOIR Superior Court.

The offence charged and the facts in this case are identically the same as those in the preceding case of the *State v. Parrott, ante* 311.

Upon the special verdict his Honor held the defendants not guilty, whereupon the State appealed.

Attorney General Hargrove, Pou, Seymour and Lehman, for the State.

Smith & Strong, for the defendants.

READE, J. The facts in this case are substantially the same as the facts in *State v. Parrott, ante,* 311, at this term, and the principles governing it are the same and the decision is the same.

Let the decision and the opinion in that case be certified as the decision and opinion in this to the end that the Court below may proceed to judgment discharging the defendant as upon a verdict of not guilty.

PER CURIAM. Judgment affirmed.

(316)

JOHN GRAGG v. DAVID WAGNER.

A conveys to B a tract of land with a covenant against incumbrances, both parties, at the time, having full knowledge of the existence of valid, outstanding incumbrances upon the land conveyed: *Held*, that, under the principle of *caveat emptor*, B, in the absence of fraud or mistake in procuring it, is entitled to recover on the covenant.

CIVIL ACTION, an attachment against the defendant for a breach of covenant, tried on a demurrer to the defendant's answer, before *Henry, J.*, at the Fall Term, 1873, of WATAUGA Superior Court.

The following are the substantial facts relating to the point presented in the Court below, and decided in this Court.

Plaintiff and defendant exchanged lands, those of the plaintiff situate in Watauga County, N. C., and the five tracts of the defendant being in Johnson County, State of Tennessee. Both parties executed and delivered to each other deeds for their respective tracts of lands, covenanting therein against any and all incumbrances, and that they were legally seized, etc.

The plaintiff alleges that at the time and before the deeds were made by the defendant to him for the lands in Tennessee, there had been levied on said land sundry attachments, upon which judgments had been obtained, amounting to the sum of $3,065.08 inclusive of costs, and for which the lands sold by defendant to plaintiff were liable and had been levied on.

In his answer, the defendant admits the incumbrances on the land he sold, and avers that the plaintiff before he accepted the deeds executed by him had notice thereof, being informed by him of the existence of the attachments and of the proceedings under them.

Plaintiff demurred to defendant's answer, in that it is insufficient, as it admits the existence of the covenant declared on, and the fact that the plaintiff knew of the incumbrance, and other matters in said answer stated, are not sufficient from preventing the plaintiff's recovery.

(317) His Honor sustained the demurrer, and the defendant appealed.

Armfield, for defendant.

Folk, contra.

BYNUM, J. A conveys to B a tract of land with a covenant against encumbrances, both parties, at the time, having full knowledge of the existence of valid outstanding encumbrances upon the land conveyed:

Can B recover upon the covenant? There is no allegation of fraud or mistake in procuring the covenants, and therefore, any oral evidence offered in the case, would fall under the general rule that it shall not be admitted to contradict, alter or vary, the written agreement of the parties. If there are known encumbrances, and it is the object of the vendor to except them from the operation of the covenant, it is always in his power to make it appear so on the face of the deed; and if he fails to do so, it is his own folly, and he will not be allowed to repair the error at the expense of the settled rules of construction which have become a part of the laws of property.

The principle is *caveat emptor,* and therefore, if the vendee fails to investigate the title or take covenants, he is bound by the defect of title and must bear the loss; but if he, with ordinary prudence, protects himself by proper covenants, the vendor is then bound to indemnity. Thus the vendor must take care of the covenants he enters into, and notice of the encumbrance can make no difference, as was decided in *Lait v. Witherington,* Luter. 317. There, in an indenture reciting a lease, where the party covenanted that the original lease was good and unencumbered, on an action of covenant alleging an encumbrance, notice of it was pleaded by the defendant, and on demurrer, the plaintiff had judgment. The current of decisions is uniform to the same purpose. *Townshend v. Wald,* 8 Mass., 146, *Harlow v. Thomas,* 15 *Pick.,* 70; 11 Serg. & Rowle, 112; 10 Conn., 533; *Dun v. White,* 1 Ala., 646.

And on the same principle it is held that mere notice does (318) not preclude the covenantee from relief in a Court of Equity, by way of detaining the purchase money, to the amount of the encumbrance, when it is one covenanted against. *Stockton v. Cook,* 3 Munf. 68. So in *Collingwood v. Irwin,* 3 Watts, 309, the covenantor offered to show that at the time of the execution of the deed it was agreed that the assignment of a certain judgment should be the only security of the covenantee, and that the former was not to be held liable on his covenant, it was held, that to admit such proof would not only be admitted evidence to contradict, but to alter and change the character and effect of the deed materially.

If the vendee fails to take a warranty of title, in the absence of fraud, the whole loss will fall upon him, why then should not the loss fall upon the warrantor when he enters into a warranty? The very fact of the purchaser having notice of an encumbrance, is the best reason why he should take a covenant of protection against it. The purchaser consents to take a defective title, because he relies for his security upon the covenants of the vendor, and it may not be unwise in the vendor to make the covenant, for it must be presumed that he

expects to discharge the encumbrance, out of the purchase money, or other available means, and not allow it to be enforced upon the specific land.

If a deceit was practiced upon the vendor, or any false representation, in the nature of a fraud, on which a Court of Equity could take hold, that Court would not permit the party to take advantage of his own wrong, but would, on a proper case, rescind the contract and restore the parties to their original state, or refuse the vendee any aid or relief, upon a covenant thus obtained. But such is not the case before us. Nothing now appears upon which the equitable jurisdiction of this Court can fix itself, and interpose between the parties.

In short, when the contract is that the purchaser takes the land, *cum onere,* it must be expressly mentioned, and the encumbrance excepted from the operation of the covenant in which case the
(319) covenantor will not be liable. But here it is otherwise denominated in the deed, and that instrument must be its own interpreter.

The question of damages is not now presented, and the amount will depend upon the issues which may arise on the future pleadings, provided for by the agreement of the parties, and entered of record. The rule, however, is indemnity, which may be less, but cannot exceed the sum of the purchase money. *White v. Whitney,* 3 Met., 89. Rowle, 130—40.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: S.c., 77 N.C. 248.

W. S. BYNUM, ADM'R. DE BONIS NON OF PAUL KISTLER, v. MARGARET HILL AND OTHERS.

A wills to his daughter B as follows: "I will and bequeath to my daughter B a negro boy named Wilson, and all the other property that she has in her possession; and at my death, I will and direct that my executors pay her the sum of $75, for the purchase of a horse beast: And at the death of my wife, I will and bequeath B the tract of land I purchased from R. Sumney, she accounting to my estate for the sum of three hundred and fifty dollars, which my executors retain out of my estate previous to her receiving any more of my estate:" *Held* that this $350 is not a charge upon the land devised to his daughter B; and that the intention of A was to direct his executor to retain that amount out of the share coming to her upon the death of his wife.

BYNUM *v.* HILL.

CIVIL ACTION, to obtain the construction of a clause in the will of one Paul Kistler, heard by his Honor, *Judge Logan,* at the Spring Term, 1874, of LINCOLN Superior Court.

The following facts were agreed and submitted to his Honor, (320) his said daughter; but the loss by emancipation of the slaves

Paul Kistler died in 1848, leaving a last will and testament, which was duly admitted to probate in Lincoln County. (So much of said will as is material to a proper understanding of the point decided is recited in the opinion of Justice SETTLE.)

The plaintiff, W. S. Bynum, is now administrator *de bonis non* of the estate of Paul Kistler—the executor named in said will having become insolvent and having been removed.

That the administrator *de bonis non* has sold real estate to the amount of $584, and has no personal assets in his hands.

That the negroes given to the testator's widow for life and after death directed to be sold, would have brought some $3,500 or thereabouts, and that all the debts of the testator have been paid.

That one Robert Sumney purchased the land left to his daughter, Margaret Hill, by the testator, before the death of the widow, and that one Cobb bought a part of the same at execution sale against Sumney. That Sumney purchased without notice of the charge, if there be any, only so far as the recording and filing of the will in office may be notice.

The widow died in 1871.

Upon the foregoing facts, his Honor was of opinion that by a proper and equitable construction of the will of Paul Kistler, his intention was that his estate should be equally divided among his children; therefore, if any loss should arise in the value of the estate, as by the emancipation of the slaves, unforeseen to the testator, the loss should fall equally upon each of his children. Hence, it being admitted that the value of the slaves before emancipation was sufficient to discharge all the liabilities of the estate, the conclusion is that the sum of $350, "which my executors" are directed "to retain out of my estate previous to her" (his daughter Margaret,) "receiving any more of my estate," is not a charge upon the R. Sumney tract of land, devised to his said daughter; but the loss by emancipation of the slaves is to fall equally upon all the children, the said Margaret being (321) liable for that proportion of the $350, shown by the loss in the value of the slaves.

From this judgment the plaintiff appealed.

Wilson & Son, for appellant.

Smith & Strong, contra.

SETTLE, J. The ninth item of Paul Kistler's will reads thus: "I will and bequeath to my daughter, Margaret Hill, a negro boy named Wilson and all the other property that she has in her possession and at my death I will and direct that my executors pay her the sum of seventy-five dollars for the purchase of a horse beast. And at the death of my wife I will and bequeath Margaret Hill the tract of land I purchased from R. Sumney, she accounting to my estate for the sum of three hundred and fifty dollars, which my executors retain out of my estate previous to her receiving any more of my estate."

Question: Is the sum of three hundred and fifty dollars a charge upon the land devised to Margaret Hill? It seems that the testator was possessed of a good estate, consisting both of realty and personalty; that he gave the greater portion of it to his wife for life, giving, however, something to each one of his children in separate items; and then by the twelfth and last item of his will, he directs his executors, after the death of his wife, to sell the remainder of his estate of every kind not disposed of by his will, and that the proceeds, together with all moneys, notes and accounts be collected and divided between his nine children, (naming them,) share and share alike.

It is admitted that the value of the slaves directed to be sold is three thousand six hundred dollars. From this it would seem that the testator expected that there would be a considerable sum of money to be divided between his children upon the death of his wife, and when we take into consideration the words of the clause devising lands to Margaret Hill, in connection with the condition of his (322) estate, we think much light is thrown upon the subject.

If the testator had stopped when he said, "I will, etc., Margaret Hill, land etc., she accounting to my estate for three hundred and fifty dollars," there would have been ground for the argument. But he goes on to point out how she shall be made to account for this sum, to-wit, "which my executors retain out of my estate previous to her receiving any more of my estate."

Why say any *more* of my estate unless he intended that she should receive *some* of his estate in any event, to-wit, all that is bequeathed and devised by the ninth item of the will.

We think the intention of the testator was to direct his executors to retain that amount out of the share which he then had every reason to suppose would be coming to Margaret Hill upon the death of his wife, but we see nothing either in the ninth item or in the entire instrument, to justify the conclusion that he intended to make it a charge upon the land.

PER CURIAM. The judgment of the Superior Court is affirmed.

WM. A. BRADSHER, EXECUTOR, v. J. L. BROOKS.

In an action by an executor to recover the amount of a certain bond which the defendant had collected and had not paid over to the testator, his father-in-law, the defendant's wife, a daughter of the testator, is a competent witness to prove that her husband, the defendant, offered to pay her father the money, but was told by him to keep it, as he intended it as an advancement to himself and the witness.

CIVIL ACTION, to collect from defendant the amount of a certain note by him received for plaintiff's testator, tried before *Tourgee, J.*, at the Spring Term, 1874, of PERSON Superior Court. (323)

In his complaint the plaintiff alleges, that in 1866, the defendant signed the following paper:

"Received of Nathaniel Torian one bond for six hundred dollars, dated 15th May, 1860, on John W. Cunningham, to collect for him;" and that as agent, the defendant did collect from Cunningham, in April, 1867, the sum of $802, which he did not pay over to the plaintiff's testator before his death, which took place in February, 1873, nor has he paid the same to the plaintiff since that time. Also, that in January, 1867, plaintiff's testator sold to defendant thirteen bushels of wheat, worth $3 per bushel.

The defendant in his answer admits that he gave the receipt and received the bond on Cunningham, and that he collected the same; that before receiving the bond, he had intermarried with Martha, a daughter of the testator, and lived with him on the kindest relations until his death, and transacted much business for him in selling mules and other stock, and collecting money for him. That soon after receiving the money on the bond from Cunningham, he, the defendant, tendered the same to the testator who told him to keep it, as he would need it; and the defendant alleges, upon this and other circumstances, that the testator gave the said money as an advancement to the said Martha, his wife, and to himself—the testator having at sundry times made advancements to all his other children, in slaves and money, but had never advanced to his wife anything before this except one horse, nor since, but made equal provision between her and all his other children by his last will and testament. Defendant also admitted receiving the wheat, but denied that it was worth $3 per bushel.

On the trial below, after much evidence was introduced not relevant to the point appealed from, and therefore not recited here, the defendant offered his wife as a witness, and proposed to prove by her that prior to her marriage, her father told her that he had no negroes to give her, but he would give her bonds and money to make her equal with the other children. This evidence was ex- (324)

cluded by his Honor. Defendant further offered to prove by his wife that she was present when he tendered to the testator the money received from Cunningham, and the testator, her father, told him to keep it, as he intended it as an advancement to him and his wife. This evidence was also excluded by his Honor.

Other evidence was tendered and ruled out by his Honor, who instructed the jury to return a verdict for the full amount, principal and interest of the sum collected from Cunningham, and for the wheat at $2 per bushel, which was done. Judgment and appeal by defendant; who assigns as error the refusal of his Honor to allow the wife to testify as proposed, and his refusal to allow the evidence of himself as to the tender of the money to the testator.

W. A. & J. W. Graham, for appellant.

No counsel contra in this Court.

SETTLE, J. As Mrs. Brooks is not a party to this action, and has no interest to be effected by the event of the same, she stands like any other disinterested person, and is a competent witness to prove any transaction between the testator and her husband, J. L. Brooks, the defendant, unless there be something in the marriage relation which renders her incompetent.

It is true that the defendant alleges, that the money, collected by him from Cunningham, was an advancement, by the testator, to himself and his wife, the witness, Martha Brooks. But it must be remembered that the defendant collected this money in 1867, before the adoption of our present Constitution, which ordains that the property of any female shall be and remain the sole and separate estate and property of such female, etc., and that consequently the legal effect of the alleged advancement, if there was one, was to give the money to the husband alone; and that, so far as the wife's estate is concerned, she can
(325) have no interest in establishing the fact of an advancement to her husband.

Indeed, as there is a will, which provides for an equal distribution of the estate among all the children of the testator, it would seem that so far as Mrs. Brooks' own separate estate is concerned, her interest might be the other way. But is there anything in the marriage relation which renders her incompetent? The old idea, that the legal existence of the wife is merged into that of the husband, belongs to the past in North Carolina, so far at least as her rights of property are concerned. And we have held, in at least two cases, that husbands and wives are competent and compellable to give evidence for or against each other, save only in the peculiar cases, excepted by the statute.

Rice v. Keith, 63 N. C., 319; *Barringer v. Barringer,* 69 N. C., 179.

We think the testimony of Mrs. Brooks should have gone to the jury, to be weighed by them, and received for what it was worth.

Let it be certified that there is error.

PER CURIAM. *Venire de novo.*

Cited: Hall v. Holloman, 136 N.C. 36; *Powell v. Strickland,* 163 N.C. 400; *Helsabeck v. Doub,* 167 N.C. 206.

MADISON HAWKINS, ADMINISTRATOR, v. WM. H. PLEASANTS AND ANOTHER.

A witness, who denies certain declarations alleged to have been made by defendant to him alone, cannot be impeached, as the declarations were not made in the presence of the other party; and as they related to a matter collateral to the issue, the answer of the witness must be taken as conclusive.

CIVIL ACTION to recover a note given by defendants, tried before his Honor, *Judge Moore,* at the Spring Term, 1862, of the Superior Court of FRANKLIN County.

In his complaint the plaintiff alleged that the defendants (326) made and executed their note to him as follows:

"$766.88. With interest from date, we or either of us promise to pay to M. Hawkins, administrator of P. Hawkins, deceased, the sum of seven hundred and sixty six dollars and 88 cents, for value received of him, as witness our hands and seals, this 26th day of March, 1863.

(Signed,) W. H. PLEASANTS, [L. S.]
J. J. MINNETRE, [L. S.]"

The plaintiff claimed that this note was not subject to the scale established for the depreciated currency of the Confederate States; that the consideration of the said note was other promissory notes, held by him, executed by Henderson Hale, Washington Harris and T. C. Horton, on the 8th day of October, 1860, which said notes were for a balance due for land sold by him, the plaintiff, as such administrator to said Henderson Hale, the said Harris and Horton signing said notes as sureties; and that all of the parties at that time were good and solvent, and some of them now are good and solvent.

Plaintiff introduced Henderson Hale as a witness, who stated that on the 8th day of October, 1860, he purchased a tract of land of one

M. Hawkins, the plaintiff, for the sum of $1,500, and for which he executed four several promissory notes for $375 each, due and payable at one, two, three and four years respectively. That he paid off the first note, and had in part paid the second, when the defendant, W. H. Pleasants proposed to purchase said land. The price was agreed on, and he, the witness, told him, Pleasants, that he would receive Confederate money, if said Hawkins would receive it for the notes due him from witness. Witness saw Hawkins and he declined to receive Confederate money, except for the balance due on the second note, which was then overdue. He then informed the defendant Pleasants that he could not trade, unless he could get his notes from Hawkins.
(327) Pleasants said he could arrange it and did so, delivering up the notes Hawkins held against him, the witness; whereupon he executed a deed for the land to Pleasants and Minnetre. This was on the 26th March, 1863.

On his cross-examination this witness denied going to Pleasants and proposing to sell the land, stating that he owed Hawkins who was pressing him for the money. Witness also denied that Pleasants told him that he would buy the land, but that he did not have more than 300 or 400 dollars by him; and denied further, that a short time after he went to Pleasants and told him that he had seen Hawkins, who could get along with 300 or 400 dollars then, and that he would wait a short time for the balance. Witness also stated, that never to his knowledge was it understood that the amount due from Pleasants and Minnetre was to be paid in Confederate money; nor did ever Pleasants tell him that he would buy the land to be paid for in Confederate money, and upon no other terms. Witness was then asked if Pleasants, (at a certain place and time,) did not tell him that the agreement was that Hawkins was to receive Confederate money for this note?

Question objected to, but allowed by the Court. Witness answered, that he, Pleasants, did not.

The defendant, Pleasants, then as a witness, stated, that at the time and place alluded to, he had informed the witness, Hale, that the agreement was that Hawkins was to take Confederate money—thus contradicting Hale. This evidence was objected to, for the reason that Hawkins was not present at the conversation; and also, that the defendants were bound by Hale's answer—the cross-examination being upon collateral matter. The Court overruled the plaintiff's objection upon the grounds, that if collateral, it tended to show the temper and disposition of the witness towards the parties to the cause.

The jury returned a verdict for defendants. Rule for a new trial, for the admission of improper testimony. Rule discharged. Judgment and appeal by plaintiff.

Cooke, Busbee & Busbee and Moore & Gatling, for appellant. (328)
Batchelor, Edwards & Batchelor and Davis, contra.

READE, J. The plaintiff, Hawkins, had sold land to one Hale in October, 1860, and took his note with surety and paid a part. Hale sold the land to defendant Pleasants, who instead of paying Hale, gave the note sued on to Hawkins in the place of Hale's note, which he owed Hawkins for balance due on the land in March, 1863. And now Pleasants contends that the note sued on is subject to the scale of depreciation as if it had been given for Confederate money.

The plaintiff introduced Hale as a witness to prove the transaction and he proved it to be as above stated. The defendant in the cross-examination of Hale, asked him if he, the defendant, did not tell him, Hale, that he the defendant was to pay the note to plaintiff in Confederate money? Hale answered that the defendant did not tell him so. And then the defendant introduced himself as a witness and swore that he did tell Hale so. The plaintiff objected to the testimony of the defendant because the alleged declaration was not in his presence. And, further, that if it was offered to impeach Hale, the question to Hale was of collateral matter, and his answer was conclusive. We think the plaintiff's objection well taken. His Honor admitted the defendant's testimony upon the ground that although collateral it tended to show the temper and disposition of the witness Hale. But we do not see how the fact that defendant told Hale that he, the defendant, was to pay the plaintiff in Confederate money, showed the temper or disposition of Hale towards either of the parties.

There is error.

PER CURIAM. *Venire de novo.*

Cited: S. v. Johnston, 82 N.C. 591.

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(329)

WM. B. BELL v. HASTY CHADWICK AND OTHERS.

An injunction, restraining defendants from working turpentine trees, when the answer meets every material allegation of the complaint, and the mischief complained of is not irreparable, will be dissolved upon the hearing of the complaint and answer.

This was a CIVIL ACTION, applying for an injunction to restrain the defendants from working turpentine, etc., on a certain piece of land, heard by *Clarke, J.,* at Chambers in CRAVEN County, Nov. 13th, 1873.

The plaintiff alleged that he was the owner in fee of a certain tract of land in Craven County, describing it, and that the defendants trespassed upon a portion of it, destroying its value by getting turpentine, injuring the timber and committing waste generally. He further charged, that the defendants are insolvent, and do not own enough property to make an exemption for one person; that he had commenced already a suit against them for the trespass and damages, which action is pending; but that he is remediless in the premises, unless he is granted a writ of injunction to restrain the defendants from further trespass, as they are utterly unable to pay the damages already committed, etc.

His Honor granted the restraining order until the coming in of the answer.

The defendants appeared and answered the complaint, stating that they only claimed a portion of the land described in the plaintiff's complaint, which they purchased, and occupy under a deed from one Amos Wade, who purchased it at a trustee sale by one Pierce. That since their purchase, they have worked the land and have made turpentine upon it, but they have in no way injured it or cut any timber or trees therefrom. Believing themselves to be the true owners, they have exercised their right to make turpentine, as the former owners did. That the land claimed by the plaintiff is the most valuable part of
(330) their tract, and is necessary for the support of themselves and families, and that they are greatly distressed by reason of the injunction issued at the suit of plaintiff. The defendants further state, that they are poor, with little or no property except their land; that they honestly pay their debts, owe little or nothing and are not insolvent.

Upon filing their answer, the defendants moved to dissolve the injunction. And his Honor being of opinion with them, allowed the motion and vacated the order before given. From this judgment, the plaintiff appealed.

Houghton, for appellant.
Seymour, contra.

SETTLE, J. The affidavit, upon which the injunction was obtained, is defective and insufficient. But assuming that the answer of the defendants waived that objection, we will consider the case upon its merits.

All the authorities say that Courts of equity are slow to move by injunction to restrain trespass, and will never do so unless it is apparent that but for such interference, the injury will be irreparable, and where no redress can be obtained at law.

Of the many cases which have been before this Court seeking to restrain, by injunction, the working of turpentine orchards, few have been sustained, and in every case, cited by the plaintiff's counsel, in support of the present application, the injunction was dissolved.

It should be a very clear case of trespass, and irreparable mischief, to justify a Court in crippling the industry of the country, and preventing the full development of our resources.

In this case the answer of the defendants meet every material allegation of the complaint, in what appears to be a candid manner.

They claim title to the land in dispute, and set forth their claim of title—admit that they are working their turpentine orchard, with prudent care, but deny that they are destroying, or cutting tim- (331) ber of any kind therefrom; and they say, that although poor, they pay their debts and liabilities as they accrue, owe but little, and are not insolvent. The facts in this case are not unlike those in *Thompson v. Williams*, 54 N. C., 176, which was a contest between the parties for the possession of land, each claiming the legal title, the defendant being in possession and using it in the ordinary course of agriculture.

In that case, NASH, C. J., says, "If, in such a case, a defendant can be enjoined, we see no reason, why, in every case, where he is a poor man, possessed only of the land for which he is contending, he may not be stopped by an injunction from opening and clearing the ground."

The judgment of the Superior Court, dissolving the injunction theretofore granted, is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Parker v. Parker, 82 N.C. 167; *Frink v. Stewart*, 94 N.C. 486.

C. A. CARLETON, ADM'R. DE BONIS NON, ETC., AND OTHERS v. WASHINGTON BYERS AND OTHERS.

The Court below has a discretionary power to allow the plaintiff to amend his complaint and the defendant his answer; and from the exercise of this discretionary power, no appeal lies to this Court.

The refusal of the presiding Judge on a trial in the Court below, to dismiss the plaintiff's action, while he appeared and was regularly prosecuting it, was not a judgment from which an appeal will lie.

PETITION to make real estate assets, heard before *Mitchell, J.*, at Spring Term, 1874, of IREDELL Superior Court.

(332) When the case was called in the Court below, the plaintiff moved to be allowed to amend his complaint, the amendment consisting of the insertion of an allegation of the bankruptcy and insolvency of the sureties to the bond of the former executor, and of the former executor himself, charged upon information and belief. Before this motion was considered, the defendant moved to dismiss the action.

His Honor refused the defendant's motion to dismiss and allowed the plaintiff to amend. Defendants appealed.

McCorkle & Bailey, for appellants.

Scott and Caldwell, and Folk & Armfield, contra.

RODMAN, J. Two questions only are presented by the case.

1. The power of the Judge to allow the amendment of his bill moved for by the plaintiff.

We know of no reason why the Judge had not the power. The case does not come within any of the exceptions recognized in *Phillipse v. Higdon,* 44 N. C., 380.

It is not now a question whether with the amendment the plaintiff could maintain his bill.

The Judge having the power the exercise of it in allowing the amendment was a matter of discretion not susceptible of review in this Court. It does not come within the description of determinations from which an appeal lies by C. C. P., Sec. 299. It is not upon a matter of law or legal inference, neither does it affect any substantial right of the parties. If the Judge had refused to allow the amendment the question would be different. The appeal from this order must be dismissed.

2. The refusal of the Judge to dismiss the action at the instance of the defendant.

I do not recollect that any proceeding called the dismissal of an action is given by the C. C. P. The term was unknown to the common law. It was introduced into our practice in common law cases by acts of Assembly found in the Revised Code, Chap. 31, Secs. 40 and 47, pro-

(333) viding that if a plaintiff failed to give security for the prosecution of his suit it should be dismissed. In Equity proceedings, the term has been long known and its meaning is understood. It is allowed to a plaintiff when he does not choose to prosecute his action; and it is granted against him on motion of a defendant *when the plaintiff fails or neglects to prosecute his action according to the rules of the Court.* It may also be ordered when the bill discloses no equity entitling the plaintiff to relief. But in *such* cases its effect is that of a non-suit at common law, and it is expressed to be without prejudice.

It puts an end to that action, but it permanently determines no right, and the plaintiff may immediately start a new action for the same cause. *Springs v. Wilson,* 17 N. C., 385. 2 Daniels, Ch. Pr. 962—1001. Of course I am not speaking now of dismissal upon a hearing on the pleadings and proofs, which are final, but only of those which take place upon a failure to prosecute the action, or upon a hearing of the bill alone. In such cases as in case of a non-suit, it is optional with a plaintiff, whether in deference to the opinion of the Judge adverse to his case, he will submit to a non-suit or dismissal, or will proceed with his action. So long as a plaintiff appears and prosecutes his action according to the rules of the Court, he cannot be forced to become non-suit or to dismiss action without a hearing on the pleadings and proofs. He is entitled, if he requires it, to have the facts alleged in his complaint either admitted by a demurrer, or found by a jury, as the ground of an appeal if he should desire one. It is true that upon a trial, the Judge may instruct the jury that even if they believe upon the evidence that the allegations of the complaint are proved, they should still find a verdict for the defendant, because the plaintiff's allegations do not constitute a sufficient cause of action. But a Judge will rarely do this, and only when the insufficiency of the plaintiff's case in law is quite clear. He will in general permit the jury to find the facts as they may appear upon the evidence, and leave the defendant to take advantage of the supposed insufficiency, either by a motion in arrest of judgment, or for a judgment *non obstante veredicto.* By this (334) course the facts of the case are determined on the record, and the appellate court can render such final judgment, as may be proper. Unnecessary delay and expense are avoided.

This being the character of the defendant's motion to dismiss the plaintiff's action, and there being no allegation that plaintiff was not regularly prosecuting his action, the Judge had no power to grant it, or at least he had a discretion to refuse it, and in either case, we think he committed no error in refusing it.

This Court has upon at least one former occasion, expressed its disapproval of the course of practice here attempted by the defendant. The Code points out how he may obtain the judgment of the Court upon the sufficiency in law of the plaintiff's case, viz.: by demurrer, whereby he admits the facts. A motion to non-suit or dismiss is an irregular attempt to obtain a judgment of the Court upon the same matter without demurring, thereby avoiding the judgment for costs which would follow the overruling of his demurrer. This is unfair to the plaintiff, and can never be allowed to succeed unless with the consent of the plaintiff himself. The refusal of the Judge to dismiss the plaintiff's action while he appeared and was regularly prosecuting it, was not a

judgment from which an appeal will lie. It involved no matter of law or legal inference, and did not affect any substantial right claimed in the action. C. C. P., Sec. 200; *Hatchel v. Odom,* 19 N. C., 302; *Smith v. Smith,* 30 N. C., 29; *Dickey v. Johnson,* 35 N. C., 450. The appeal is therefore dismissed.

It is proper to say here that although as an appeal may be taken by a party without the consent of the Judge, it may be taken in a case in which it is not given by the Code, yet it by no means follows that it is the duty of the Judge in such a case to suspend further proceedings. We will not undertake to say that in *every* case where an appeal is taken from an interlocutory order, the Judge should disregard such appeal, or should regard it only as an exception, of which the
(335) party may avail himself after the final judgment. *Probably* in such a case, and where the Code allows an appeal, it must be left to the discretion of the Judge upon a consideration of the inconveniences of either course, to proceed or not. See C. C. P., Sec. 308. But certainly *when an appeal is taken as in this case, from an interlocutory order from which no appeal is allowed by the Code,* which is not upon any matter of law, and which affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings, and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense, and procrastinate a final judgment.

PER CURIAM. Appeal dismissed.

Cited: Simonton v. Brown, 72 N.C. 48; *Brown v. King,* 107 N.C. 316; *Guilford Co. v. Georgia Company,* 109 N.C. 310; *Veasey v. Durham,* 231 N.C. 364; *Elliott v. Swarts Industries,* 231 N.C. 426.

DEN ON DEMISE OF McWM. YOUNG, ADM'R., v. JOHN O. GRIFFITH AND ANOTHER.

On the trial of an action of ejectment, evidence that at the time the land in dispute was conveyed to the lessor of the plaintiff, the defendants were in possession, claiming the same adversely, is admissible, and its exclusion by the Court is error.

This was an action of EJECTMENT, brought by the lessor of the plaintiff against one David Wilson to Spring Term, 1861, of Yancey Superior Court, for certain lands situate in said county, from whence it was

removed to the Superior Court of MADISON County in which it was tried before *Henry, J.*, at Spring Term, 1874.

The case is brought to this Court upon the appeal of the defendants, who are admitted to defend as landlords, upon the (336) ground that his Honor on the trial below, excluded certain evidence offered by them, the same be objected to by the plaintiff. This Court in its decision, considered only one of the objections, the facts concerning which are stated in the case agreed as follows: The defendants offered to prove, that at the time the plaintiff took a deed for the land, the subject of this controversy, from J. R. Love and the executor of Robert Love, they, the defendants were in actual possession of the same, under a purchase at the sale of the Clerk and Master, holding said land adversely; alleging that their adverse possession rendered the plaintiff's title void. His Honor being of opinion that it was not such a possession of defendants as would make void the deed of the plaintiff, sustained the objection to the evidence and ruled it out. Defendants excepted and appealed.

No counsel for appellants in this Court.
McCorkle & Bailey, contra.

BYNUM, J. This is an action of ejectment, under the old system, and is to be decided by the principles of law, unaffected by equity.

The defendants offered to prove, that at the time J. R. Love and the executors of Robert Love, conveyed the lands in dispute, to the lessor of the plaintiff, to-wit, on the 1st day of June, 1859, they, the defendants, were in the possession of the lands described in the declaration, claiming the same adversely, under their purchase at the sale by the Clerk and Master, on the 20th July, 1857. The evidence was objected to by the plaintiffs and excluded by the Court. There is error.

It is settled, that if at the time the lessor of the plaintiff, purchased and took his conveyance, the defendant was in possession, claiming adversely, the lessor cannot recover, for he had but a right of entry which he could not convey so as to enable his assignee to sue in his own name. *Mercer v. Halstead,* 44 N.C., 311 And the case is not altered by the fact that the defendant was not a purchaser, (337) for it is the adverse possession, whether under color of title or not, that defeats the power of alienation.

In *Mode v. Long,* 64 N. C., 433, one cleared and fenced up to a line of marked trees, believing it to be the dividing line between him and his neighbor, whereas it was twenty-five yards or more upon his neighbor's land; it was there held, that such an act constituted an open and

notorious adverse possession, up to the marked line, and that a deed for that part, made by the neighbor, during such possession, was void.

The evidence proposed by the defendants, was therefore, material to their defence, and should have been admitted.

If this defence were out of the way, as the case now appears, the lessors of the plaintiff, having the older legal title to the interest of J. R. Love, would be entitled to recover the one-half of the lands sued for. It can scarcely be pretended that the deed executed by the executors, passed the title of the heirs of Robert Love. We however, make no decision upon these points, as the case is so defective in distinctness and precision in the statement of facts, that a satisfactory judgment, could not now be rendered. For instance, the "case" states that the decree of sale, under which the defendants purchased, was made in a suit between the heirs of Robert Love, whereas the deed of the Clerk and Master, recites a sale of the "unsold lands of Robert and J. R. Love." The title to one-half of the land in dispute, may turn on whether the fact be one way or the other.

PER CURIAM. Judgment reversed. *Venire de novo.*

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(338)

PARIS S. BENBOW v. MARY A. ROBBINS AND ANOTHER.

Twenty years possession of an easement raises a presumption of a grant. In computing that twenty years, the time from the 20th day of May, 1861, until the 1st day of January, 1870, shall not be counted, so as to presume the abandonment of any right by the plaintiffs.

CIVIL ACTION for damages, and application for an injunction, heard and determined by his Honor, *Tourgee, J.*, at the Fall Term, 1873, of the Superior Court of GUILFORD County.

The plaintiff in his affidavit to obtain an injunction, and in his complaint, alleged that the defendants had exceeded a certain easement they had a right to, to-wit, to pond the water below the plaintiff's mill race to a certain rock, and applied for an order to restrain them from so doing. An interlocutory order was granted, which was vacated upon the coming in of the answer and after hearing the evidence.

The defendants denied exceeding their right to pond the water, asserting that they and those from whom they claimed had used the right for over twenty years. Upon this point, which is the only one considered in this Court, his Honor below, to whom by consent it had been submitted to find the facts, a trial by jury being waived, was of opinion that because of the adverse possession and use for more than twenty

years on the part of the defendants, and those under whom they claimed, the plaintiff was barred of his action.

The plaintiff, contending that the statute barring his right was suspended during the period from May 20th, 1861, to the 1st day of January, 1870, and it having been found as a fact that the defendant's dam was first erected in 1852, appealed from his Honor's decision to this Court.

Busbee & Busbee, Gorrell and Scott, for appellant. (339)
Dillard & Gilmer, contra.

READE, J. 1. As between individuals, twenty years possession of land or user of an easement raises a presumption of a grant. *Rogers v. Mabe,* 15 N. C., 180; *Geringer v. Sommers,* 24 N. C., 229.

In the case before us it was found as a fact, that the defendant had used the easement for more than twenty years. But then comes in the statute of 12th February, 1867, and several other like statutes which *provide* "that the time elapsed from 20th May, 1861, until 1st of January, 1870, shall not be counted so as to bar actions of suits, or to presume the satisfaction or abandonment of rights." *Neely v. Craig,* 61 N. C., 187; *Morris v. Avery, Ibid.,* 238; *Hinton v. Hinton, Ibid.,* 410; *Plott v. R. R.,* 65 N. C., 74; *Smith v. Rogers, Ibid.,* 181; *Johnson v. Winslow,* 63 N. C., 552. And then the defendant insists that that statute is a part of the stay law system and applies only to matters *ex contractu.*

But that cannot be against the express words of the statute, that time shall not be counted to "presume the abandonment of rights." Why does defendant insist upon counting time? Evidently to presume the abandonment of rights by the plaintiff, whereas the statute says that time shall not be counted for that purpose. *Howell v. Buie,* 64 N. C., 446, is a case in point.

2. It is insisted by the defendant that the plaintiff has mistaken his remedy. That he ought to have commenced by special proceedings under the act of 1868-69, Chap. 158, Secs. 10, etc., Bat. Rev., Chap. 72. Mills in analogy to the old practice of a jury of view. See Rev. Code, Chap. 71. Mills. And we think this objection would have been well taken but for the acts of 1870-71, Chap. 108, and 1872-73, commonly called the "curative acts," the latter of which is subsequent to the commencement of this action and cures the defect. Said acts provide that all actions, etc., which may have been irregularly instituted in the Superior Court shall be, so far as jurisdiction is concerned, (340) the same as if regularly brought and shall be prosecuted in the

Court where they are, to final judgment. Those acts are retrospective and they govern this case. *Bell v. King,* 70 N. C., 330.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

Cited: S.c., 72 N.C. 422; *Pearsall v. Kenan,* 79 N.C. 474; *Kitchen v. Wilson,* 80 N.C. 198; *Isler v. Koonce,* 83 N.C. 57; *Geer v. Water Co.,* 127 N.C. 354; *Hickory v. R. R.,* 138 N.C. 316.

J. C. GRIFFITH, SHERIFF, v. THE COMMISSIONERS OF CASWELL COUNTY.

The Judge of a Superior Court has no power to order the Commissioners of one of the counties in his district, to pay the Sheriff any sum for his services in attending upon the Court.

This was an ORDER on the defendants, made absolute by his Honor, *Judge Tourgee,* at the Fall Term, 1873, of CASWELL of Superior Court.

The plaintiff presented the following order to the defendants, who refused to pay it, to-wit:

"It is ordered by the Court that the Commissioners of Caswell County allow and pay to J. C. Griffith, sheriff of Caswell County, fifty dollars for his services in attending upon this Court, at Fall Term, 1873."

In their answer to a rule, obtained by plaintiff, to show cause why they should not be attached, in consequence of their refusal to obey the foregoing order, the Commissioners disavow any intentional disrespect to the Court, stating that they had been advised, that the Court had no legal power to make such order. Upon the hearing, his Honor made the rule absolute, from which order, the defendant appealed.

(341) *No counsel for defendants in this Court.*
Battle & Son, for plaintiff.

READE, J. The questions in this case are the same as those in the case of *Brandon v. Commissioners, ante,* 62, at this Term, and the decision is the same, and for the same reasons.

There is no error.

This will be certified to the end that the order may be vacated and the defendants discharged.

PER CURIAM. Judgment accordingly.

S. P. GILL AND OTHERS v. N. V. DENTON AND ANOTHER.

Where the defendant was induced to purchase certain real property by the representations of the plaintiff, at the time deputy sheriff, that there were no liens on the same, when at the same time the deputy sheriff had in his hands an execution binding the property, or it was in the hands of the sheriff, within the knowledge of the deputy, who purchased the same when sold under that execution: *Held*, that the deputy sheriff was estopped from setting up the title obtained under the execution sale, to the prejudice of the defendant, and that he will be compelled to convey to the defendant the title so obtained.

CIVIL ACTION for partition of certain real estate situate in Raleigh, N. C., heard before his Honor *Judge Tourgee*, at the Special (January) Term, 1874, of the Superior Court of WAKE County.

On the trial below, the sole question was as to the ownership of one-fifth interest of the lands sought to be divided. Upon hearing the complaint and answer, his Honor being of opinion with the plaintiffs, gave judgment accordingly. Defendant Denton ap- (342) pealed.

The facts are fully stated in the opinion of the Court.

Busbee & Busbee and Fowle, for appellant.
Battle & Son, contra.

RODMAN, J. This is a proceeding for the partition of a lot or piece of land in Raleigh. The only question presented is, as to the ownership of an undivided fifth part thereof which it is admitted belonged to Rufus W. Smith under whom both parties claim title.

The plaintiff purchased on 5th April, 1869, at a sale under execution in favor of one Vaughan to the use of Plaintiff, against said Rufus. The execution was levied prior to August Term, 1867, of Wake Superior Court, and was docketed 28th July, 1868.

The defendant purchased *bona fide*, and for value, from said Rufus on 31st October, 1868.

So that in the absence of any equitable circumstances, the purchase by plaintiff would overreach that by defendant and have priority over it.

The equitable circumstances relied on by the defendant to convert the plaintiff into a trustee for him as to this one-fifth, or to stop the plaintiff from setting up his superior legal title or against the defendant Denton, are these. They are thus set forth in the answer of Denton, and admitted by the plaintiff's demurrer thereto.

On or about 31st August, 1868, Denton went to the office of the Clerks of the Superior and County Courts, and Sheriff of said county for the purpose of inquiring if there were any liens upon the said estate of said R. W. Smith, by reason of any judgments against him, or otherwise. That the defendant (Denton) found one or more judgments and executions against said R. W. Smith, which were satisfied and discharged prior to the execution of said deed (to him.) That said

(343) Gill (the plaintiff) examined the records and the defendant was informed by the said Clerk, and was also specifically informed by said plaintiff at that time a deputy sheriff in and for said county, . . . that there were no judgments, executions or other liens whatever against the said R. W. Smith other than those which had been satisfied. Whereas at the time the execution upon which the plaintiff relies, to-wit, *Uriah Vaughan* (use of said Gill) vs. *R. W. Smith and Eldridge Smith* was in the hands of said plaintiff as deputy sheriff, or in the hands of the sheriff with the knowledge of said Gill. That the defendant acting upon these representations, purchased the land from R. W. Smith, and without notice, etc. Afterwards, and before the said sale under execution, defendant was informed by Gill, that there was a balance of about $25 due upon an execution in the hands of the sheriff against Smith; that the debt was the property of Gill, who knew that defendant had purchased the lands, from R. W. Smith; and told defendant that he would use the execution only to secure the sum due on it, and that defendant might, at some time when he would examine the matter, pay what was due, which defendant agreed to do. And that Gill promised to indulge the execution until a settlement of the matter would be had. Notwithstanding the above agreement, Gill fraudulently had the land under the said execution, sold and purchased the same himself for $5. That after such purchase Gill, told defendant thereof, but assured him he had only purchased to secure the sum due on the execution. That defendant has tendered, and is now willing to pay said sum which Gill refuses to receive, claiming the estate of R. W. Smith (one-fifth) under his said purchase.

The case of *Pasley v. Freeman,* 3 T. R. 51, and Smith's L. C., is familiar. There the plaintiff asked information of defendant concerning the pecuniary safety of one Falch, and defendant intending to injure plaintiff, told him Falch was safe when he well knew he was not. In consequence of that information plaintiff gave credit to Falch, who never paid.

(344) The plaintiff was held entitled to damages, although the defendant was under no duty to answer, and gained nothing by doing it.

In *Wicker v. Worthy,* 51 N. C., 500, this Court applied the principle of that case to a sheriff who by his conduct had induced the plaintiff to believe that there was no lien upon land which the plaintiff bought, when the sheriff had in his hands an execution against the vendor of the land under which the land was afterwards sold and purchased by a third person. The plaintiff was held entitled to recover.

That case cannot be distinguished from the present except in the fact that here the sheriff who made the misrepresentation, afterwards bought the land. But that difference does not affect the right of the plaintiff, but only his remedy. In Wicker's case he could only recover the damages he had sustained in being obliged to pay $400 in buying up the title of the purchaser at execution sale. Here the Court can give substantially the same relief by compelling the defendant to convey the land which he purchased. That the purchaser under the execution is estopped to set up his title, and may be compelled to convey it to the plaintiff, we think is adjudicated in *Williams v. Mason,* 66 N. C., 564, as well as by the above cited case of *Wicker v. Worthy.*

PER CURIAM. Demurrer overruled. Judgment below reversed and case remanded to be proceeded in, etc.

Cited: Bank v. Bank, 138 N.C. 472; *McDaniel v. Leggett,* 224 N.C. 811.

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(345)

GEORGE W. LIBBETT AND ANOTHER v. JOHN A. MAULTSBY.

Where a legacy was given to the defendant *in trust,* "the principal and interest to be expended for the maintenance and education" of the plaintiffs, as the trustee thinks best: *Held,* that the *cestui que trust* (the plaintiffs) were entitled to an account as to the manner in which the legacy had been expended.

Where the right of action by a *cestui que trust* against a trustee, accrued prior to the adoption of the Code of Civil Procedure in August, 1868, the limitation prescribed in the Code does not apply, but it is governed by the law as it stood before the enactment of the Code; and as there was no statute limiting the time when such actions should commence, it is left to the principle established by Courts of Equity in such cases.

When one judgment is rendered in favor of two plaintiffs, their claims being several and distinct, *it is error,* which would entitle the defendant to have such judgment reversed, if he had suggested an injury. If no injury is or can be shown, and the record contains the material upon which a severance of the judgment can be made, if asked for, it will be referred to the Clerk to make the same.

LIBBETT *v.* MAULTSBY.

CIVIL ACTION, to recover a legacy, and for an account, tried before *Russell, J.*, at the Spring Term, 1874, of the Superior Court of COLUMBUS County.

The following are the substantial facts of the case. This action is brought by the plaintiffs to recover of the defendant a legacy, or two lagacies, which had been bequeathed to him by one Anthony F. Toon, under the following clause in said Toon's will:

"In the seventh place: I give and bequeath and devise unto John A. Maultsby, one of my executors, the sum of three hundred dollars, for the use and benefit of George W. Libbett; (one of the plaintiffs;) and the sum of two hundred dollars for the use of Annett Libbett, (the other plaintiff,)—the principal and interest to be expended for their maintenance and education, from time to time, as he, the said John A. Maultsby (the defendant) thinks best.

"And I also give and bequeath to him fifty dollars, to have a
(346) small house built for said children, on a tract of land containing sixty acres, that I intend to give to George Libbett."

The defendant claimed in his answer, that he was not liable to account with the plaintiffs, for the manner in which he had disposed of the funds; that he had collected the notes which constituted the legacy during the existence of the Confederate States, and converted the same into Confederate bonds, which were lost; and for a further defence, the defendant alleged that the plaintiffs demanded the legacy of him in the year, 1865, and relied on the statute of limitation of three years.

At Fall Term, 1873, the case was referred to the Clerk of the Court to state an account between the parties, and at Spring Term, 1874 the Clerk reported, charging the defendant with $325.67.

To this report, both plaintiff and defendant excepted, and the issue as to the statute of limitatations was submitted to a jury, who found that the plaintiff, George W., had demanded a settlement more than three years before bringing this action.

His Honor was of the opinion that the defendant was liable to account; that the notes received by him, being good *ante bellum* notes, the collection of them in Confederate money was unauthorized, the defendant failing to show any necessity therefor; and this legacy being given to the defendant on an express trust, was not within the statute of limitations. His Honor thereupon ordered the report of the Clerk to be amended in accordance with the plaintiffs' exceptions, (as to interest, etc.,) and gave judgment for plaintiffs in accordance with the amended report.

From this judgment defendant appealed.

Moore & Gatling, for appellant.
A. T. & J. London, contra.

RODMAN, J. It was not seriously denied in this Court that the defendant was constituted by the will of Toon, a trustee for the two plaintiffs for their respective legacies. That being the (347) case, although his discretion in expending the principal and interest of the fund for the benefit of the children during their minorities, was extensive, and, if honestly exercised, would not be interfered with by any Court, yet the trust was for the benefit of the plaintiffs, and upon no principle of equity, could the fund be permitted to be converted by the defendant to his own use. It is clear, therefore, that the plaintiffs were entitled to an account, unless their action is barred by the statute of limitations. This was the defence principally insisted on here.

1. Before the enactment of the Code of Civil Procedure in August, 1868, there was no positive and absolute limitation to an action by a *cestui que trust* against an express trustee. The lapse of time after the accrual of a right of action was only evidence tending to raise a presumption, that the right had been satisfied or released. *West v. Sloan,* 56 N. C., 102.

It is not material to consider accurately what lapse of time would furnish a conclusive presumption against the plaintiffs in the present case, supposing the law to be as it was before August, 1868; for, in any view, it would not be less than ten years, and as much as ten years, did not elapse from the arrival of the plaintiffs at full age, to the bringing of the present action.

The learned counsel for the defendant, however, contends that the present action comes within the scope of the Code and within Section 34, that it is in the words of that section: "An action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections;" and that consequently it is barred in three years. Whether an action by a *cestui que trust* against an express trustee created by contract, comes within Sec. 34, or as one of the "actions for relief not herein provided for," which are provided for in Sec. 37, is a question of very great importance, but which we think does not arise in the present case. The first question which we have to decide is, whether the present action is within the scope of the C. C. P., and we think it is not, but is governed by the law existing prior to the enactment of the (348) Code in 1868.

Section 16 of C. C. P., Title IV, is as follows: "The provisions contained in Chapter 65 of the Rev. Code, entitled 'Limitations,' are

repealed, and the provisions of this title are established. *This title shall not extend to actions already commenced, or to cases where the right of action has already accrued,* but the *statutes* previous to the ratification of this act shall be applicable to such cases; and in cases where the right of action has already accrued, but the action has not been commenced, the said *statutes* shall be applied according to the subject matter of the action, and without regard to the form." It is not denied that a right of action had accrued to these plaintiffs before 1868, and the section cited (16) expressly excepts from the operation of the whole title, "cases where the right of action has already accrued." This would seem to be conclusive that the case of the plaintiffs was not embraced within the title, in which case it would be left under the pre-existing law, that is, subject to no *statute,* but to the principle established by Courts of equity in such cases. If the section cited had stopped at the words "already accrued," just quoted, there would have been no color at all for the defendant's contention. The plaintiff's case would have been left to the old law, notwithstanding the repeal as to new cases of the chapter concerning "Limitations" in the Revised Code. But in as much as that statute, (which no way affected the plaintiff's case) had been repealed by previous words, it became necessary, in order to provide for cases to which that statute did apply, to insert the words following which provide that notwithstanding its repeal as to after accruing actions, it should continue in force as to such as had already accrued, and which by their form did come within it.

The learned counsel contends that "statutes" means the written law only, and that only is continued in force. Grant it; the word taken strictly does mean only the written law. But still Title IV, under which the counsel contends that plaintiffs are barred does not (349) apply to "causes of action already accrued," as the plaintiff's had. Grant that the previous *statutes* of limitation had been repealed, the right of the plaintiffs to sue within (say) ten years was not affected, for no statute applied to his case. And, as his case is expressly excluded from Title IV, there is no statute which applies to it at this time.

We think his Honor committed no error on this point.

2. The defendant says there is error, in that the judgment is a consolidated one for both plaintiffs, whereas their claims are several. That is an error, and if the defendant had suggested that he was injured by it, he would clearly be entitled to leave the judgment reversed on that account. But there is no ground that appears to us for any such suggestion, and none such has been made. The record contains the materials upon which a severance of the judgments can be made,

and if asked for by any party it will be referred to the Clerk of this Court to make it.

3. The defendant also charges error, in that, by the decree, there is a consolidated judgment for principal and interest, whereby the interest bears interest. This is manifest error, which could only have proceeded from inadvertence. The plaintiffs, however, consent to a correction of the judgment in that respect, which will be made accordingly.

After this correction is made, and subject to the application for a severance above allowed, the judgment of the Superior Court is affirmed, and judgment will be given here in accordance with this opinion.

The judgment below being in part erroneous, each party will pay his own costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Faison v. Bowden, 74 N.C. 45; *Barnes v. McCullers* 108 N.C. 56.

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(350)

THE N. C. RAILROAD COMPANY v. GEORGE W. SWEPSON AND OTHERS.

A committee of three persons, appointed by the plaintiff Commissioners of a Sinking Fund, authorized by law, and empowered to exchange N. C. bonds, known as "old sixes," for those known as "new sixes," must, in effecting such exchange, *all act together;* and any attempted exchange made by one or two of such committee without consultation with, and concurrence of the other members thereof, is utterly void, and in no ways binding on the plaintiff.

This was a CIVIL ACTION, being an original bill filed in the Court of Equity for WAKE County, to set aside a certain exchange of bonds made by defendants and for an account, heard before his Honor, *Judge Tourgee,* at the Special (January) Term, 1874, of the Superior Court of said county, upon an agreed state of facts.

On the trial below, his Honor gave judgment dismissing the bill; from which judgment plaintiff appealed.

All the facts are fully set out in the opinion of the Court.

Moore & Gatling, for appellant.
Fuller & Ashe, contra.

READE, J. The plaintiff had a sinking fund, and a committee of three, viz.: the defendants Mendenhall, Davis and Flanner, to manage

it. A part of this sinking fund was $100,000 in North Carolina bonds known as "old sixes." At a meeting of the plaintiff's Board of Directors in July, 1863, a resolution was adopted that the said committee be authorized "to convert the old sixes North Carolina bonds into new sixes as occasion may offer."

1. Prior to December, 1864, the committee had disposed of all the "old sixes" satisfactorily to the plaintiff, except $33,000. Of that sum the plaintiff alleges that $10,000 has never been accounted for by the committee in any way; $23,000 remained in the hands of the
(351) committee, Davis being the custodian. On the 5th of December, 1864, defendant Swepson applied to Davis to allow him to take the said balance of "old sixes," $23,000, on the terms of his giving two "new sixes" for one old, and allowing him time to comply with the terms. Davis, who lived in Salisbury, replied by letter that he would accede to the proposition if Mendenhall would, who lived in Greensboro, and that is the last that Davis heard of it. Mendenhall did agree to it with Swepson, "but took no proceedings actually to carry out the exchange." And there the matter rested. On the 12th of January, 1865, plaintiff's Board of Directors passed a resolution directing the committee to exchange no more "old sixes" unless for its own 8 per cent bonds, and this notice was immediately served upon the members of the committee. Davis immediately, 16th of January, 1865, wrote to Swepson informing him of the order of the Board. After which Davis never heard more of the exchange; considered his authority to make the exchange at an end, and did not know that any exchange had been made until it was all over. Swepson made no reply to Davis' letter informing him of the order of the Board of the 12th of January, 1865, but went to Mendenhall and insisted that the contract should be carried out, notwithstanding the January order. Mendenhall declined, and insisted upon writing and laying the matter before the Board at its next meeting. Of all this Davis knew nothing, and Flanner, the other member of the committee, had never been consulted at all, until about the 8th of April, 1865, when happening to be in Greensboro, Swepson saw him and told him the state of things, and he told Swepson that if the contract had been made before the 12th of January order, he thought it ought to be carried out in good faith, and he went with Swepson to Mendenhall and said the same. But he did not then consider himself as acting as committee man, as he had never been consulted or had anything to do with the contract, and he would have then given different advice if he had known that Swepson was not prepared to comply with the contract, as it
(352) seems he was not. About the last of April or first of May, 1865, and only a short time before the Board were to meet

in July, Swepson and Mendenhall effected a sham exchange, by Mendenhall's delivering over to Swepson the "old sixes" and Swepson delivering over to him "new sixes," which were not his, but were borrowed for the purpose and were to be returned to the owners in kind, and which were subsequently re-delivered by Mendenhall to Swepson in exchange for others which Swepson had bought up at three cents in the dollar. As before stated, Davis had been the custodian of the fund and of these old sixes, and had sent them to Mendenhall for safe keeping upon the approach of the Federal army, and he did not know of the disposition of the "old sixes" by Mendenhall until the funds were returned to him, when he found the old sixes gone and the new ones in their place.

The excuse given for this transaction between Mendenhall and Swepson is, that the contract was made in December, 1864, before the order of the Board forbidding it, 12th of January, 1865, and that *good faith* required that it should be carried out. Davis, to whom Swepson made the first proposition to make the contract and who knew the terms proposed by Swepson, and what he had done on his part, did not think so, but thought the whole matter ended. Flanner had not been consulted in making the contract, and although he subsequently said to Swepson and Mendenhall that he thought it ought to be carried out, yet if he had known the truth about it he would have advised differently. Mendenhall himself at first declined to carry it out without consulting the Board. How is it that Mendenhall never consulted either of his co-committeemen, especially as Davis made the contract and was the custodian of the bonds? And if Mendenhall had determined to make the exchange, where was the propriety of the unreasonable indulgence given Swepson to comply on his part? Swepson had some time before this transaction, made a like proposition for $25,000 of the "old sixes" and asked time to comply, and the terms were accepted and the exchange was made in a short time thereafter. But here the contract was made 5th of December, (353) 1864, and Swepson had made no proposition to comply 12th of January, 1865, and never was ready to comply until May or June, 1865, six months after the contract. It is true, Swepson had before that demanded of Mendenhall a compliance, but he was not himself prepared to comply. And if Mendenhall had intended to comply at any time, how easy it would have been for him to say, well, I am ready. And then Swepson being not ready, the matter would have ended. But he is indulged for six months, a part of the time under the plea by Mendenhall that he wanted to consult the Board, which was to meet in July. And then just before July the matter is hurried up as if to forestall the Board in July. And thus the valuable effects of the

plaintiff were exchanged for "trash" under the plea that good faith to Swepson required it.

And yet, if good faith had required that the contract should be observed, and that Swepson should be indulged it would have been no bad faith in Mendenhall not to observe it; for it was not *his* contract. He was but an agent, and was dealt with as an agent, and the contract was the contract of his principal, the plaintiff. And, for a breach of it, he was not liable legally or morally. If there was a breach of it by the order of 12th January, 1865, or in any other way, the plaintiff was liable in damages. But that order put an end to Mendenhall's agency in that matter. It forbid him to make the exchange; and "good faith" in Mendenhall required him to obey his principal. It is said, that the refusal of the plaintiff to complete the contract was an afterthought, induced by the repudiation of the new sixes by the State Convention under Federal influence. That cannot be so, because the war had not then ended, and the Convention did not meet until the fall succeeding; but if it were true, still the bad faith of the plaintiff did not give the agent power to act. But, put the case in the most favorable light, the agent made the contract 5th December, 1864, when "new sixes" were of considerable value; Swepson says in his answer that many business men thought them perfectly good, and suffered it
(354) to lie loose until May or June, and then suffered it to be performed by Swepson by the delivery of new sixes, when they had been depreciating all the time and were reduced to the market value of three cents in the dollar. In passing upon the liability of fiduciaries for transactions during the war, we have found that justice required a very liberal rule in their favor; but there has been no case where we have felt at liberty to sustain an agent in such negligence as this, even where no fraud was imputed; and we do not say that moral turpitude is apparent here.

But there is another view which is decisive against the defendants. As has been said, the plaintiff's board appointed a committee of three to act in the premises. It was necessary that they should *all act together*. The act of one without the others was utterly void. It is so laid down in Co. Litt. 181, b; Bacon Ab. Authority C.; Com. Dig. Atty. C. 11, and by all the writers since Coke down to Story on Agency, Sec. 42. "In regard to two or more agents: It is a general rule of the common law that where an authority is given to two or more persons to do an act, the act is valid to bind the principal, only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several. . . . So if an authority is given to two persons jointly to sell the property of the principal, one of them separately cannot execute the authority." The same is

laid down in *State v. Lane,* 26 N. C., 434. A different rule prevails in public agencies where a majority may act. Id.

It is not necessary that we should consider the question whether when there are two or more agents to do an act, there ought not to be not only concurrence, but consultation; because here the three agents never did concur. Davis, to whom Swepson first applied to make the contract, said he was willing if Mendenhall would consent. Mendenhall did consent, but his consent was never communicated to Davis. Take it, however, that this was a concurrence on the part of *two* of the agents; yet Flanner had not even been notified up to 12th January, 1865. And then Davis considering his authority at an end withdrew it and notified Swepson. So that Menden- (355) hall then stood alone. It is true Flanner was subsequently informed of the contract by Swepson and expressed the opinion that if the contract had been made before the authority was revoked it ought to be complied with; but he says that he did not say that as a committee-man, as he had nothing to do with the contract, and he would have expressed a different opinion if he had known that Swepson was not prepared to comply with the contract on his part.

It is clear that there never was any valid contract to bind the plaintiff for the sale or exchange of the $23,000 "old sixes;" and that Swepson is liable for the value of the same with interest from the time of their conversion. And as Mendenhall delivered them over to Swepson after his authority to do so had been revoked, he is liable to the plaintiff also if Swepson should fail. Davis seems not to be liable on this transaction. The facts are not sufficiently explicit to enable us to determine as to Flanner's liability.

The plaintiff is entitled also to an account for the $10,000 which it is alleged the Committee have not accounted for. If they were disposed of prior to January 12th, 1866, under the authority which they had and accounted for the proceeds to the plaintiff, they are not liable, otherwise they are.

There is error in the order dismissing the bill. This will be certified, and the cause remanded to be proceeded with according to law.

PER CURIAM. Judgment accordingly.

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A. M. SLOAN & CO. v. ROBERT J. McDOWELL.

Where a firm brings a defendant into Court to answer a claim for a debt which he owes them, he cannot only require *them* but either *one* of them to answer for a debt due him, whether it is connected specially with their debt against him, or is an independent claim.

CIVIL ACTION, for the recovery of an account due the firm, tried at Fall Term, 1873, of MECKLENBURG Superior Court, before *Logan, J.*, upon a demurrer to the answer of defendant.

All the facts relating to the points decided are fully stated in the opinion of Justice READE, and the dissenting opinion of Justice RODMAN.

Defendant appealed from the judgment of the Court below.

H. W. Guion, for appellant.

Wilson & Son, contra.

READE, J. The action is upon a partnership claim against the defendant for merchandise sold and delivered, and for money paid to his use.

The answer denies that the defendant ever had any dealings with the partnership, or authorized any one else to have for him. But admits that he contracted with the plaintiff, A. M. Sloan, for the articles contained in the bill of particulars filed by plaintiffs in his individual capacity, and with the understanding and agreement with said A. M. Sloan, that the amount was to be entered as a credit upon a bond for a much larger amount which he had against said A. M. Sloan, and that the credit was so entered.

The defendant then sets up the said bond as a counter-claim against said A. M. Sloan, and demands judgment against him for the
(357) remainder after deducting the plaintiff's bill of particulars.

The plaintiffs demur to the counter-claim, and assign for cause, "that said alleged counter-claim does not state facts sufficient to constitute a cause of action again the plaintiffs in this, that the counter-claim sets up an alleged individual indebtedness on the part of A. M. Sloan to the defendant," etc.

And for second cause of demurrer, that an action is pending in the Circuit Court of the United States for said counter-claim. And then it was referred to H. C. Jones, Esq., to decide upon the demurrer, who sustained the demurrer for the first cause and overruled it for the second, and upon exceptions, so did his Honor, and the defendant appealed.

We think there was error in sustaining the demurrer. The plaintiffs come into Court with a joint claim against the defendant which he denies; and he makes a claim against one of them which they admit. And then we have C. C. P., Sec. 248: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties, on each side as between themselves. And it may grant to the defendant any affirmative relief to which he may be entitled."

Reading it as applicable to this case, may grant to the defendant affirmative relief against A. M. Sloan, one of the plaintiffs. It is suggested that this cannot be, in this case, because the plaintiff A. M. Sloan, has not been served with process to bring him into Court. The answer is, that service of process is not necessary where the party appears and pleads; and here he does appear and plead. He both demurs and pleads—demurs because the counter-claim is against one, and not against both of the plaintiffs; and pleads (for so the second cause for demurrer must be understood) that a suit for the same is pending in another Court.

It will be observed that the demurrer shoots wide of the mark. It objects that the counter-claim is not a cause of action against the *plaintiffs*. It does not profess to be; but only against *one* (358) of the plaintiffs. But it no doubt intends to raise the question whether in an action by two plaintiffs against one defendant, the defendant can have affirmative relief against *one* of the plaintiffs. It is the plain letter of the statute above quoted, that he can. And it is not denied that he can, as to any matter connected with the subject matter of the suit; but not as to any independant matter. If it be thus restricted, what is the use of the provision? None, because in that case he can have relief against both the plaintiffs, which is better than against one, or at least as good. So that if that is to be the construction, the Code gives the defendant no advantage which he did not have before, or would not have had without it. It is said that this section in the Code is a copy of the New York Code, and yet we are not informed of any New York decision in which such a restricted construction has been given. We are of the opinion that the proper construction of the Code is, that when the plaintiffs bring the defendant into Court to answer a claim for debt which he owes them, that he cannot only require *them*, but either *one* of them, to answer for a debt due him; whether it is connected specially with their debt against him, or is an independent claim. And this not as a set-off to the claim sued on, but as an affirmative judgment. Indeed, this can scarcely be said to be an open question; because in *Neal v.*

Lea, 64 N. C., 678, it is said by PEARSON, C. J.: "By C. C. P., Sec. 101, the plea of set-off is merged in the defence of counterclaim."

By paragraph 2, the counter-claim in an action on contract embraces not only matter that under the old practice was pleaded as a set-off, but every other cause of action arising out of contract, whether legal or equitable between the plaintiff and defendant. When there are more than one plaintiff or defendant it is further extended, so that not only mutual debts between the plaintiffs and defendants, or any one of them, against the plaintiff, or any one of them between whom a several judgment might be had in the action, is embraced."

(359) And that case was subsequently carefully reviewed in *Harris v. Burwell*, 65 N. C., 584, and overruled in part; yet it has never been disturbed upon this point. And so in *Clark v. Williams*, 70 N. C., 679, we gave judgment for the plaintiff against several defendants for unequal proportions, and judgment for one of the defendants against the other defendants in unequal proportions, and in a matter in which the plaintiff had no interest, thus adjusting the right of all the parties before the Court. See *Walker v. Flemming*, 70 N. C., 483.

We are of the opinion that the demurrer ought to have been overruled, and that the defendant has the right to set up his counter-claim and have affirmative relief, as against A. M. Sloan, *one* of the plaintiffs. And this disposes of the only point upon which the case *now* before us, rests. The question of set off will come up on another trial, if the plaintiffs shall establish their claim against the defendant. I suggest however, as what occurs to me from the full argument before us upon the question of set off, and from the authorities which I have consulted; that the general rule, is that a claim of a defendant against one partner is not a set off against a claim of the partnership against him, either in law or equity. But to this general rule there are several well established exceptions; and some other exceptions in regard to which there are contradictory decisions. The established exceptions are (1) where there was an agreement between the partnership and the defendant that it should be so; (2) Where there has been a settlement of the partnership and a *surplus* in favor of the debtor; (3) Where the partner against whom the defendant has a separate claim is insolvent outside of his interest in the partnership. I put this down among the established exceptions although there are contradictory decisions upon it in England and in some of our sister States; yet in our State it is settled in *March v. Thomas*, 63 N. C., 87, and the cases there cited, where it is said by Judge BATTLE: "When the plaintiff or one of the plaintiffs is insolvent, a bond or note due from him to the defendant may be set off in equity without a strict regard

(360) to mutuality;" (4) Where, as in our case, the *partnership* did not

agree, but *one* of the partners did, that the individual claim of the defendant against him should be set off against the firm debt; this is a good defence to a suit by the partnership *at law*. Lindley on Partnership 170, from whom I quote as follows: "For example, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still as *he* can not dispute the validity of his own act, he and his co-partners cannot recover the property so pledged by an action at law. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm; yet if he actually agrees that such set off shall be made, and it is made accordingly, he and his co-partners cannot afterwards in an action recover the debt due the firm. As observed by Lord TENTERTON in *Jones v. Gates*, there is no instance in which a person has been allowed as plaintiff in a Court of law, to recind his own act on the ground that such act was a fraud on some other person, whether the person seeking to do this has sued in his own name or jointly with such other person. This doctrine has been carried so far that even when the partner whose conduct is relied upon as an answer to an action by the firm is dead, the surviving ex-partners have been held not entitled to sue."

While this is so *at law*, and while under this rule one partner might commit a fraud upon his co-partner, yet in equity the co-partner can have relief by a bill against the debtor partner and his creditor, charging the fraud and showing the injury to himself. As was the well considered case of *Peircy v. Finney*, 12 Eg. cases 67. But note, that to entitle the co-partner to relief he must show *fraud;* as that the debtor partner had not so much as that interest in the firm; or that there were partnership debts to pay. If the debtor partner has a greater interest in the firm than he has disposed of, and if there are no debts to pay, then the co-partner has no relief either in law or equity, and needs none; because he has sustained no injury, and need only charge the debtor partner with so much as he has (361) appropriated to his own use. That is precisely our case, except that our case is made stronger by the facts that A. M. Sloan is admitted to be solvent; and that the firm will not be injured by the appropriation which he made of the partnership effects to pay his own debt to the defendant. Adams, Eq., 244.

Suppose the plaintiffs get judgment against the defendant upon their claim; and the defendant gets judgment against one of the plaintiffs upon his counter-claim, in excess of the plaintiff's claim; then, the defendant would be entitled to an account of the partnership, and to have his judgment satisfied out of the partnership effects, if there should be a surplus due the debtor partner. Just as the de-

fendant would have the right to levy on and sell his interest in the partnership, and then have an account.

If, as is alleged, the plaintiffs are non-residents it furnishes a strong equity that they should not be allowed to recover of the defendant, and put upon him the necessity to go out of the State to pursue his rights against one of the plaintiffs; when, as that plaintiff is solvent, no injury can result to the partnership, or to the creditors thereof, by allowing the defendant to enforce his rights here according to the agreement between him and the plaintiff A. M. Sloan.

So, the plaintiffs cannot recover at law, because of the agreement of one of the plaintiffs; and they cannot recover in equity, because neither the co-partner, nor the creditor can be injured.

There is error. This will be certified, etc.

PER CURIAM. Judgment reversed.

RODMAN, J. *Dissenting.* The plaintiffs A. M. Sloan and J. H. Sloan, partners under the name of A. M. Sloan & Co., complain, that defendant purchased sundry goods of them at the price of $1,330.24, which he still owes, etc.

The defendant answers:

(362) 1. He denies that he is indebted to the plaintiffs.

2. He bought the goods from A. M. Sloan, one of the partners, upon an agreement with him that the price should be credited upon a debt which A. M. Sloan then owed him for a much larger amount, and it was accordingly so credited. But he does not deny that he knew that the goods were the property of the partnership, or say that the other partner had any knowledge of the agreement between him and A. M. Sloan.

3. By way of counter-claim: that A. M. Sloan owes him by bond a much larger sum; and he demands judgment that the said bond debt be set off *pro tanto* against the present claim, and that he recover the residue from A. M. Sloan.

The plaintiffs are presumed by the C. C. P. to take issue on the two first defences.

They demur to the counter-claim, because it is against A. M. Sloan alone, and secondly, because there is a suit now pending against A. M. Sloan in the Circuit Court of the United States for Georgia, for the same cause of action.

It was referred by consent to H. C. Jones to pass on the issues made by the demurrer. He sustained the demurrer for the first cause assigned. The Court confirmed his report and gave judgment accordingly, from which the defendant appealed.

The first and second defences make only issues of fact. The question as to the sufficiency in law of the second may still be made. It would be nearly the same with that presented by the first ground of demurrer. That question is this: Can a defendant who is sued by a partnership for a debt due to it set off against that debt one due to him by one of the partners? And can he have judgment against that partner for any excess? It seems to me, both on reason and authority, that he can do neither, except under special circumstances, which do not exist in this case.

It will be well to note that the two questions are not identical; nevertheless, they may be discussed together without much confusion.

1. It can never be equitable to compel one man to pay the debt of another. Yet, if a partnership, which must always (363) consist of more than one person, is liable to have a debt to it set off by a debt owing to a defendant by one only of its members, that may be the result, unless an account of the partnership be first taken and it be ascertained that the interest of the indebted partner in the partnership property equals or exceeds the debt which he owes to the defendant. If his interest is less than the debt, the certain result is to take the property of the other partners to pay the debt of this one.

I defer at present considering the power of a Court in such a case to require an account of the partnership and the inconvenience which would attend it. I wish now only to establish the general principle, and it must be clear, that if a defendant who owes a partnership of A & B $1,000, can extinguish his debt to the firm by setting off against it a debt of like amount from A alone, whose interest in the partnership property is merely nominal, he is making B pay A's debt without his consent.

It is not surprising that not a single authority can be found supporting any such doctrine of set off, or that numerous cases may be found expressly disaffirming it. The authorities uniformly say that to make a set off allowable, *there must be mutuality.* There is no difference in principle between cases at law and in equity on this point. When Courts of law recognized only legal rights, they allowed a set off when there was a legal but not a real mutuality. As if one of two partners died and the survivor brought suit, a debt owing by him to the defendant was a set off at law, because the survivor was at law the sole owner of the debt to the partnership. But in equity the rule was different. Equity demanded a real mutuality, and considering the surviving partner a trustee, would not permit the assertion of a mere legal right to the prejudice of the real owners of the fund. The doctrine is well stated in Lindley on Partnership, 421, from

which I extract in substance as follows: "It follows from the last proposition, that a debt owing to a firm of partners cannot (except by the consent of all parties or under exceptional circumstances,) (364) be set off against a debt owing by one of its members, or *vice versa*. It scarcely requires to be pointed out, that to allow a set off of such debts would be to enable a creditor to obtain payment of what is due to him from persons in no way indebted to him. As a rule, therefore, a debt owing by one of the members of a firm cannot be set off against a debt owing to him and his co-partners," etc. Also on page 428: "As regards set off in cases of partnership, it will be sufficient to show that in equity mutual debts may be set off if, in substance, they are both joint or both several, although they are not so in point of form, and that on the other hand, debts which are not both joint or both several, in substance, although they are so in form, cannot be set off against each other."

The decisions in this State are numerous. They all accord with the doctrine contended for by me. In *Jurvis v. Hyer*, 15 N. C., 367, the plaintiff was a creditor of the firm of Hyer and Burdett, and issued an attachment against them, and garnisheed Danson who was a debtor to the firm of Hyer, Brimmer and Burdett. The Court say that the sheriff under the attachment could seize only the property of Hyer and Burdett. The creditors of the firm of Hyer, *Brimmer* and Burdett had a prior claim to payment out of the assets of that firm. Judgment for garnishee. *Cook v. Arthur*, 33 N. C., 407, is to the same point. *Norment v. Johnson*, 32 N. C., 80, was an action by the surviving partner of the firm of Alexander & Co., for a debt due the firm. The defendant pleaded that the case called "a counter demand," consisting of a debt due her by the deceased partner for board. She proved that Alexander was the managing partner; had boarded with her, and had agreed that she might take goods out of the store in payment of her bill; and she had accordingly purchased the goods, the price of which was sued for. The Court held the counter demand not available, and as to the bargain with Alexander that defendant should be paid out of the store, say: "That was not sufficient to bind the other members of the firm, for it is nothing more nor less (365) than the case of one partner giving the guarantee of the firm his own debt to a person who knew it to be his own debt. It has been so often held, that fact is conclusive of the bad faith of the partner, thus pledging his partners for his separate debt, and also of the bad faith or gross negligence of the person taking it, which prevents the firm from being bound, that it is only necessary to refer to one or two cases in which the doctrine has been discussed." *Cotton v. Evans*, 21 N. C., 284; *Weed v. Richardson*, 19 N. C., 535; *State*

Bank v. Armstrong, 15 N. C., 519, was an action on the official bond of Armstrong as clerk brought against him and his surety. The defendants claimed to set off the sum of $930 which the plaintiff bank owed the deceased clerk. There were other points not material to be noticed. But on this point the Court say: "It is clear that the disputed credit cannot be allowed as a set off, waiving all other objections to it as such, there is a want of that mutuality between the debt demanded and the debt which the defendants opposed to it, which is indispensable under the statute of set off. A debt which is due from a plaintiff to one defendant only, cannot be set off to a joint demand against two or more defendants." To the same point is *Jones v. Gilbreath,* 28 N. C., 338; *Weed v. Richardson,* 19 N. C., 535, the Court say in an action against two there cannot be judgment against both for a part of the demand, and against one of them for the residue.

In *Bunting v. Ricks,* 22 N. C., 130, the sureties to the Clerk's bond of Whitfield brought suit to recover of defendant the proceeds of certain notes held by the Clerk officially which the defendant had fraudulently purchased from the Clerk. The defendant set up a counter claim against Bunting one of the plaintiffs alone. The Court say, "The demand of the plaintiffs *is joint and cannot be partitioned so as to allot a share to Bunting* by way of satisfying the part of the bond for which he may be liable as between himself and his co-security Arrington who is not a party to this suit. The counter demand of Mr. Ricks is in the nature of a set off, and ought therefore (366) to be between the same parties."

On this point see also *Howe v. Sheppard,* 2 Sumner, C. C. R., 409, for a learned opinion of STORY, J.

In *Sellers v. Bryan,* 17 N. C., 358, the plaintiff as administrator of Esther and Josiah Blackman obtained a judgment against Bryan for $6,097, and Bryan had a judgment against the plaintiff individually for $900. The wife of the plaintiff was a distributee of his intestate, and plaintiff sought to have his individual debt to Bryan applied as a payment of his wife's share of the debt by Bryan to him as administrator. The Court first say that the two debts cannot be set off for want of mutuality, and in reply to the proposition to apply the $900 to the plaintiff's wife's distributive share, say: This position cannot be maintained. In the first place the plaintiff's wife is not entitled to a specific part of this decree, but to a share in the net amount of personal assets to be divided among the next of kin. *This cannot be ascertained without an account between the administrator and the next of kin, and that account cannot be taken in a suit to which the next of kin are not parties. Nor do I apprehend the Court will restain a creditor from the collection of his debt "until all these*

accounts are cleared, in order to see what rights of set off there may be in the result." citing *Ex parte Twogood,* 11 *Ves.* 17.

The case of *Ex parte Twogood* was this: Agnew, one of the partners in the banking firm of Strange, Dashwood, Agnew and Peacock, owed Elderton $84,200. Elderton owed the firm a larger sum. Both Agnew and the firm were in bankruptcy. The question was whether the debt of Elderton to the firm could be set off against Agnew's separate debt to him, or whether Elderton could collect his debt from the separate estate of Agnew which was supposed to be good, while the firm was insolvent, without regard to his debt to the firm. It was argued that an account might be taken to ascertain Agnew's share of the indebtedness of the firm, and to the extent that might be found to exist, the creditors of the firm might be substituted for Elderton in his
(367) claim against the separate estate of Agnew, and the amount so received be applied to extinguish Elderton's debt to the firm.

Lord ELDON said: "Can it be said that all the affairs of the bankruptcy are to be suspended, until all the accounts are cleared in order to see what rights of set off there may be in the result?" On a subsequent day, after consideration, he said: "I do not deny that there is a good deal of natural equity in the proposition on which this petition stands; *but pursuing it through all its consequences, it would so disturb all the habitual arrangements in bankruptcy that I dare not do it."*

These two cases are of great consequence and I shall advert to them again.

In none of these cases except *Sellers v. Bryan,* 17 N. C., 358, was it supposed that the Court could collaterally order an account between joint plaintiffs for the purpose of ascertaining whether one of them had any separate interest, to which the counter demand could apply; and in that case the power to do so was denied.

If, as is alleged in the second plea in this case, A. M. Sloan without the knowledge of his partner agreed that his separate debt should be set off against the partnership demand, such agreement will not make the case an exception to the rule, for it was in fraud of the partner who did not know of it, and the defendant who accepted the agreement was *particeps criminis,* and it was therefore void. See the case of *Norment v. Johnson,* 32 N. C., 80, above cited and also *Gordon v. Ellis,* 526, C. L. R., (2 C. B., 821); *Piercy v. Finney,* E. L. R., 12 Eq. R., 69, (1871.) In this last case Malins V. C. said: "Now the law is clearly settled: . . . that a person may pay a debt owing to a partnership to any one of the partners, even after its dissolution; but it is equally clear, if any person takes a partner's bill or check for the payment of a private debt due from one of the partners with a knowledge that

the bill or check or payment is made without the assent of the other partners, in a certain sense he becomes a party to the fraud on the other partners; and he cannot recover on the bill or check, and if he receive the money he cannot retain it." And further he (368) says: "it is in contravention of every principle of honesty that one partner should apply assets not to pay the partnership debt, but his own individual liabilities."

2. It is said (but not in the plea of counter-claim which we are now considering, and where alone it would be pertinent) that the interest of A. M. Sloan in the partnership property exceeds the debt sued for. Of course that cannot be known to the defendant. If it were contained in the plea of counter-claim it might perhaps have been denied. But suppose it there and admitted by the demurrer. The fact alleged must be true either at the commencement of the action or at the filing of the plea. *Smoot v. Wright,* 1 N. C., 536; *Haughton v. Leary,* 20 N. C., 14. It is immaterial for the present argument to which of these dates the allegation would refer. I think it would be bad in either case. Let us consider how the interest of one partner in the joint property may be subjected to the payment of his separate debt. Only by execution levied on his interest, which is bound from the time of levy and seizure under execution and not before. Act 1868-69, Ch. 148, Sec. 1. 1 Story Eq. Jur., Sec. 677; *Watts v. Johnson,* 49 N. C., 190. Until a levy a defendant may rightfully dispose of his personal property; and until a levy on the interest of the one partner, the partnership may rightfully continue to deal with third persons, and the partners may deal with such other. Watts v. Johnson, 49 N. C., 190. After the levy on the interest of one partner, the creditor may require a partnership account, or after a sale which dissolves the partnership, the purchaser may.

To extinguish the joint debt by allowing a set off of a separate debt against one of the partners, would be to appropriate the interest of that partner as it was at the commencement of the action, although it might have materially changed before the judgment; it would in effect give the defendant a lien before execution, and even before a judgment. Under such a rule no partnership could safely con- tinue business after a plea such as that in this case, or even (367) after the commencement of an action to recover a partnership debt, since it would be impossible to know what retrospective liens on the shares of the several partners might under this decision at any time arise.

3. No other circumstance has been pointed out to make this case an exception to the general rule.

4. Having thus seen that it is impossible to sustain the plea on any known doctrine of set off, it remains to inquire if it can be sustained

under the name of counter-claim. This defence was introduced by the Code and is defined by it. It is a set off and something more. It not only extinguishes the plaintiff's claim if it equals it, but the defendant may have judgment for any excess. But the law of mutuality applies to it as strictly as it does to a set off and for the same reasons.

This law being grounded on eternal principles of equity, may be ignored or violated, but it cannot be abolished by any human power. There is nothing in the Code from which an intention to ignore or violate it can be inferred. Sec. 101 says, "The counter claim mentioned in the last section must be one existing *in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action,* and arising out of one of the following causes of action," etc.

It seems to me that this language clearly denies a counter claim in favor of a defendant against one of two *joint* plaintiffs. And it is clear that no action could be had on the counter-claim against the joint plaintiffs. I do not believe, that the construction now proposed has ever been put on this section in any of the numerous States, in which the Code has been adopted.

5. Section 248 of C. C. P., relates only to cases in which the demand of the plaintiff is not joint.

6. I have anticipated nearly all that I had to say as to the right of a Court to take an account of the partnership, at the instance of a creditor of one of the partners. I think no such right can exist at any time before the creditor, by a levy on the interest of the (368) partner, has acquired a specific lien on his share. The doctrine is novel to me, that a stranger, upon merely claiming that one of the partners owes him, can stop the partnership operations, dissolve the partnership, and in the absence of all creditors, joint or several, inquire as to the interest of that partner in the common property. And the doctrine amounts to no less than this. The case of *Sellers v. Bryan,* 17 N. C., 358, and that of *ex parte Twogood,* 11 Ves. 517, above cited, expressly deny this position, for reasons which must be satisfactory to all who will "pursue it to its consequences," as Lord Eldon did. The account to be of any effect, must be taken in a suit where all the creditors of the partnership, as well as all the creditors of the indebted partner, are actually or by representation, parties. A decision to the effect mentioned is a step in a new path, off from the beaten road, and where it will lead to no one can predict.

If both parties were domiciled in North Carolina, I think the account could not be taken. Still less can it be when they are domiciled in Georgia, and there can be no personal service of process. How can a Court of this State take an account of a partnership in Georgia?

Will the Courts of that State pay any respect to the judgment in this? It is well settled that by an attachment by a creditor on property found in this State belonging to a foreign debtor, the Court acquires jurisdiction to the extent of that property, but no further without personal service. To that extent only will the proceeding be respected by foreign Courts. *Irby v. Wilson,* 21 N. C., 568, Bigelow on Estoppel, 241; *Davidson v. Sharpe,* 28 N. C., 14.

But it is useless to pursue this discussion further. I think the judgment below should be affirmed.

NOTE:—This case was decided at the last term, and was concurred in by the Chief Justice, who is absent at this term. It was held over for the dissenting opinion of Justice RODMAN.

Cited: S.c., 75 N.C. 32; *Francis v. Edwards,* 77 N.C. 276; *Davis v. Mfg. Co.,* 114 N. C. 334; *Moore v. Bank,* 173 N. C. 182.

(369)

ALFRED THOMPSON, ADM'R., ETC., v. ANDREW J. JOYNER AND WIFE AND OTHERS.

Pending a reference to a Commissioner, to state an account of the personal assets in the hands of an administrator, in the latter's petition to make real estate assets, and before a confirmation of the report of such Commissioner, *it is error* for the presiding Judge to order a sale of the land.

This was a PETITION by the plaintiff, as administrator, to sell the land of his intestate for assets, filed in the Probate Court of NASH County, in which the sale was refused, when the administrator appealed to the Superior Court of said County, where it was heard at Spring Term, 1874, before his Honor *Judge Watts.*

The report of the Commissioner, to whom it had been referred to state an account of the personal assets and of their administration, belonging to the estate of the plaintiff's intestate, was filed with the defendant's exception thereto, and before there was any determination concerning the same, or any adjudication thereon, the Court ordered a sale of the land. From this order the defendants appealed.

Battle & Son, for appellants.
Moore & Gatling, contra.

READE, J. The plaintiff, administrator, files a petition against the heirs for license to sell real estate for assets to pay debts. The heirs,

defendants, answer that the personal estate is more than sufficient for that purpose. His Honor refers it to a Commissioner to take an account, and pending the controversy about the sufficiency of the personal estate, his Honor orders a sale of the land, and closes his order as follows:

"This is signed by me upon the necessity shown for a sale, and not as a confirmation of any account stated by the Commissioner
(370) so as to prejudice the heirs-at-law in any subsequent settlement of accounts with the said administrator."

This is manifestly erroneous. The "necessity for the sale of the land" can appear only by taking the account and showing the personal estate to be insufficient. Sell the land and settle the accounts afterwards, says his Honor. That is reversing the order of things, settle the accounts first, and then sell the land, if the personal estate is insufficient to pay the debts. And if there has been a *devastavit*, then the administration land must be embraced. *Latham v. Bell*, 69 N. C., 135.

There is error. Let this be certified.

PER CURIAM. Order reversed.

JAMES C. TURNER v. T. G. HAUGHTON, ADM'R., ETC., AND OTHERS.

In any proceeding, where it becomes necessary to take an account, and that account has been reported by the Commissioner to whom it was referred, the presiding Judge, if in his opinion such account is imperfect, may recommit it to the same Commissioner, in order that it be reformed or perfected.

CIVIL ACTION, commenced by original bill in the Court of Equity of ROWAN County, for the purpose of settling a partnership, and in the meantime applying for an injunction, heard before *Cannon, J.*, at the Fall Term, 1873, of the Superior Court of said county, to which Court it had been removed as prescribed by law.

During the progress of this cause, since January, 1867, it was referred to a Commissioner to take an account of the partnership assets, which was done, and his report, with the exceptions thereto by the
(371) plaintiff, filed and came up for hearing at Fall Term, 1873.

Before the exceptions were argued or disposed of in any manner, the plaintiff moved to re-commit the report to the same Commissioner, with certain instructions, which motion was opposed by defendants.

His Honor allowed the motion, and sent the matter back to the same Commissioner. From this order the defendants appealed.

McCorkle & Bailey, for appellants.
No counsel contra in this Court.

READE, J. This was an equity suit before the Code to settle a partnership and for other purposes, and it was referred to one Henderson to take an account. It does not appear whether the reference was by consent, but it was without objection. The referee reported an account and the plaintiff filed exceptions and moved that it be re-referred to Henderson for certain purposes. The reference was made against he defendants' objection, and he appealed to this Court.

References are for the more effectual working out of details which he Judge, sitting in Court, is unable to investigate. They are usually nade to the Master, unless by consent some other person is agreed on, which seems to have been the case in selecting Henderson, and there are very few cases of importance in which there are not one or more of such references. Adams' Eq. 379.

When the report of the referee came in and was imperfect, there can be no doubt that the Court had the power to recommit to him to reform it. And this seems to be the matter complained of. This is not a compulsory reference unless the first was so, which seems not to have been the case. But if it was a compulsory reference, it deprives the defendant of no right because upon the coming in of the report he can have an issue and a jury. At least that would be so if this were not an old bill to be governed by the old rules up to and including final judgment. And under the old rules in equity cases, the parties had not the right to demand a jury, but the defendant can raise (372) all his defences by exceptions to the report, and, if necessary, the Court will order a jury.

There is no error. This will be certified, etc.

PER CURIAM. Order affirmed.

E. E. HARRIS v. SEPARKS, HICKS & CO.

Where the son of the plaintiff was placed with the defendants, machinists, under a special contract to work for four years, and the son was discharged without any good or sufficient reasons before the end of the second year, the father (plaintiff) may treat the contract as rescinded, and may imme-

diately sue on a *quantum meruit* for the work actually performed by the son.

This was a CIVIL ACTION to recover on a *quantum meruit* for the services of plaintiff's son, tried before *Tourgee, J.*, at the Special (January) Term, 1874, of WAKE Superior Court.

On the trial below, his Honor being of opinion that the plaintiff could not recover, he submitted to a non-suit, and appealed.

The facts are fully stated in the opinion of Justice SETTLE.

Lewis, for appellant.

Fowle, contra.

SETTLE, J. This action was brought to recover of the defendant the sum of two hundred dollars, alleged to be due the plaintiff as wages for the services of his son, during the year 1872.

The plaintiff tendered himself as a witness and testified that he made a contract with the defendant on the 12th day of January, 1872, to the effect that they, being large machinists and manu-
(373) facturers in the city of Raleigh, were to take his son, about eighteen years of age, for the term of four years, and to teach him the trade, as carried on in their establishment; that the plaintiff was to furnish his son with board and clothing for the first year, and make no charges for his services for that year, and the defendants were to pay a fair and reasonable compensation for his services for the second, third and fourth years, to be agreed upon. That the son of the plaintiff worked during the first year, and a short time in the second year, when he was discharged without any good and sufficient reason; that for the time he worked during the second year, the plaintiff was paid at the rate of eighty-seven and a half cents per day, but he received nothing for the first year. That the services rendered by him were worth two hundred dollars, for the first year, regarding him as an every day hand.

Upon this state of facts, his Honor being of opinion that the plaintiff was not entitled to recover, instructed the jury to return a verdict for the defendant.

If the son of the plaintiff had voluntarily quit the service of the defendant without sufficient cause, or if he had been discharged for good cause, he could have recovered nothing.

But we are to assume that "he was discharged without any good and sufficient reason."

It is admitted that when a special contract is open and unrescinded, the plaintiff cannot sue upon a *quantum meruit*. But where one con-

tractor refuses to perform his part of the contract, the other may if he please, rescind, treating such refusal as being equivalent to rescission, and if the plaintiff has performed a part of the special contract, according to its terms, he may sue immediately, in general *assumpsit,* and recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him.

It is said in the notes to *Cutter v. Powell,* 2 Smith L. C. 20, that the result of the authorities is, that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies, viz:

1. He may bring a special action for his master's breach of (374) contract in dismissing him, and this remedy he may pursue immediately.

2. He may wait till the termination of the period for which he was hired, and may then, *perhaps,* sue for his whole wages, in *indebitatus assumpsit,* relying on the doctrine of constructive service.

3. He may treat the contract as rescinded, and may immediately sue, on a *quantum meruit,* for the work he actually performed; but in that case, as he sues on an implied contract arising out of actual services, he can only recover for the time that he actually served. *Brinkley v. Swicegood,* 65 N. C., 626, is an authority from our own reports, sustaining the present action.

Let it be certified that there is error.

PER CURIAM. *Venire de novo.*

C. S. WOOTEN, ADM'R., ETC., v. JOHN V. SHERRARD AND OTHERS.

The borrower of Confederate currency must repay the real value which he received, and not its mere nominal representative.

Therefore, where A loaned B $2,700 in Confederate money on the 16th day of October, 1862, for which a promissory note was given, A at the time verbally promising to take the same currency in re-payment at any time within twelve months, within which time B tendered the amount of the note in such money, and A refused it: *Held,* in an action on the note, that A was entitled to recover the full amount thereof, subject to the legislative scale at the time the note was given, and interest.

CIVIL ACTION, to recover the amount of a promissory note, tried before *Buxton, J.,* at the Special (January) Term, 1874, of WAYNE Superior Court, upon the following

(375) CASE AGREED

The action was brought December 29th, 1869, returnable to Spring Term, 1870, on a promissory note under seal, payable to Wait. Thompson, the intestate of the plaintiff, dated October 16th, 1862, signed by defendant Sherrard, and Lewis and Coley, the other defendants, promising to pay twenty-seven hundred dollars, on which sum small credits were entered in 1867 and 1869. Sherrard and Lewis have been declared bankrupts. The note was given for borrowed Confederate money at the date of the same, at which time there was a verbal agreement between Sherrard and Thompson, that if Sherrard would pay the note within twelve months after the date thereof, he, Thompson, would receive Confederate money. Sherrard tendered the amount due on the 15th of May, 1863, in Confederate money to Thompson, which was refused.

The plaintiff made a demand on the defendants, before suit was brought, for the scaled value of said note at the date thereof and interest, and now claims the scaled value at the date of the contract, interest and premium added.

The defendant claims damages by way of counter-claim, for said refusal of plaintiff's intestate to receive Confederate money.

It is agreed that the value of Confederate money at the date of the note, and at the date of the tender above set forth, is that fixed by the Legislative scale.

Upon the foregoing facts his Honor gave the following judgment:

This is one of the *hard* cases, so far as the defendants are concerned, growing out of the dealing of the parties in Confederate currency. His Honor felt constrained, however, by the legislative and judicial action had in relation to the subject, to hold the defendants liable for the value of the currency borrowed at the date it was borrowed.

The defendants, Sherrard and Lewis, having received their discharge in bankruptcy, judgment is rendered in favor of the plaintiff, C. S. Wooten, administrator of Wait. Thompson, against the defendant,

Willie B. Fort, administrator of John Coley, for the amount of
(376) the note, principal and interest, subject to the legislative scale at the date of October 16th, 1862, with current rate of premium on gold added, say 10 *per cent,* to wit, for the sum of twenty-one hundred and sixty-two dollars and eighy-seven cents, of which thirteen hundred and fifty dollars is balance of principal money, and subject to the credits endorsed, and also for costs to be taxed, etc.

From which judgment, defendant, W. B. Fort, administrator, etc., appealed.

Smith & Strong, for appellant.
Faircloth & Grainger, contra.

RODMAN, J. This is the same case which was before this Court at January Term, 1873, reported under the name of *Wooten v. Sherrard,* 68 N. C., 334. On the trial the defendant, by way of equitable counter-claim, set up a claim for damages arising out of the refusal by the plaintiff to receive Confederate currency in payment of the note sued on when it was tendered to him within twelve months after the making of the note, as he had agreed to do.

In the case of *Terrell v. Walker,* 66 N. C., 224, which was an action brought prior to the C. C. P., the defendant attempted to set up a similar defence under the plea of set off. The Court was of opinion that it could not be done, but in the opinion which I delivered, I suggested that *possibly* damages might be recovered for the breach of such a contract, either by an action founded on the contract, or under the new system of pleading, by way of a counter-claim. The questions which we were then called on to decide were entirely novel; there were not only no authorities to govern us, but there were no cases in which the circumstances were so nearly similar that they could be relied on as guides. The suggestion was made in the hope that if the question again occurred, it should be argued on general principles of equity and as to how far the true principle of equity in such a case, whatever it might be found to be, was affected by our legislation. The learned counsel who argued this case have responded to our (377) wishes, and probably have presented to us all that can fairly be said on behalf of their respective sides.

The defendant argues: "The contract by the plaintiff to receive Confederate currency, if paid within twelve months, was a valid contract; the breach of it was an injury to the defendant which entitled him to damages. The measure of damages for breach of contract is the actual damage sustained, provided it be the natural and probable result of the breach. That damage in this case is the difference between the value of the currency on the day when it was borrowed and its value on the day it was tendered and refused." If Confederate currency is regarded as a commodity, like stocks or specific articles, and all dealings in it as speculative investments, it is difficult, if not impossible, to resist this argument.

On the other side it is said:

1. "Confederate currency cannot be regarded as a commodity. That it shall not be so regarded is a direct and necessary inference from the ordinance of 1866.

2. Although it can never be necessary in any Court of a State to vindicate the equity of one of its statutes, except to show that it is not manifestly inequitable, the equity of the ordinance of 1866 may be vindicated on admitted principles.

If Confederate currency is looked at through its whole history, it was as a fact, neither money at all times, or a commodity at all times. Money, strictly speaking, i.e. gold and silver, or its legal equivalent, has in fact or in contemplation of law an unvarying value. All commodities have a fluctuating and speculative one. At first, and for several years, Confederate currency was regarded and dealt in, as money in the Southern States. It soon began to depreciate and continued steadily to do so. But the people had faith in it, and their contracts generally were made with reference to its value at the time, and without anticipation of its future. This of course gradually
(378) changed, and towards the close of the war, it was refused as a currency and dealt in merely as a commodity. In a case where neither lender or borrower looked to a depreciation of the currency lent, which did nevertheless take place through accidents unforeseen by the parties, it would be inequitable to permit the borrower to have an advantage from the accident by discharging his debt by a thing of less value than he received. By allowing him to do so, he would get something for which he had given no equivalent. A contract to receive Confederate currency within twelve months, if construed to be one to receive it, notwithstanding it might be depreciated, or even worthless, would be without consideration. There was no reciprocal risk on the part of the borrower, inasmuch as though it might fall, it could not possibly rise above the value of "dollars," which *prima facie* means coin. It is a settled doctrine of law that after an actual receipt by a creditor of less than his debt in discharge of the whole, he may still collect the residue. *Cumber v. Wane*, Smith L. C. and notes; *Mitchell v. Sawyer*, at this term, (*ante*, 70.) This doctrine has never been said to be equitable, and in the absence of special circumstances, it is not so. With what consistency can a creditor be compelled to receive less than his debt in discharge of it upon a mere promise to do so, when an actual receipt of less would not effect a discharge?

By being compelled to repay the value which he received, the debtor fails to gain an advantage which under the circumstances would be an unjust one; but he loses nothing; he has received and had the use of so much value. The creditor gets nothing but what he loaned, and it cannot be equitable to take the whole of that."

Probably these or similar views influenced the Convention of 1866. This Court is not required to pass on their soundness. We are bound to consider the equity between the parties to be that which the ordi-

nance directly or by necessary inference declares to be. That is, that the borrower of Confederate currency must repay the real value which he received, and not its mere nominal representative. It (379) cannot be said that this legislation alters the contract, or impairs its obligation. The contract being payable in Confederate currency, and remaining unpaid at the end of the war, had become by accident, impossible of fulfillment in the particular sense intended by the parties. This failing, the rule for construing the contract was the general intent. This could be ascertained on the presumption that the parties intended to assume such obligations as equity prescribed. It was competent to the Convention to declare what rule of equity was applicable in such cases. It did not profess to make a new contract for the parties, but to ascertain on principle of equity what their contract was. This view is in accordance with that taken on general principles of equity by Sir William Grant in *Pilkinton v. Comm'rs,* 2 Knapps P. C. Casses, 18 cited in Story Confl. Laws, par. 313a., in which both the distinguished Judges approve the opinion of Vinnius to the same effect.

PER CURIAM. There is no error in the judgment below which is affirmed.

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(380)

GIDEON PERRY AND OTHERS v. H. M. TUPPER.

If the Supreme Court commits an error in its judgment ordering the Superior Court to issue certain process, the only way to remedy it, is by a petition to re-hear. For the Judge below to refuse to obey such order, would be judicial insubordination, not to be tolerated. Nor is it allowed to a party in the cause to appeal from the order when made by the Superior Court, upon the ground that that Court had no right to make it.

When there has been a final determination of a cause in the Court below, an appeal brings up the whole *cause* to this Court, in which the judgment is affirmed, modified or reversed, such judgment being given, as of right the Superior Court ought to have given. If the appeal is from an interlocutory *order*, the *cause* does not come up to the Supreme Court, but only the *order*, which is decided, and the decision certified to the Superior Court, to the end that the *cause* may be proceeded with.

This was a CIVIL ACTION commenced in the Court of a Justice of the Peace, for the recovery of certain real estate situate in Raleigh, and carried by appeal to the Superior Court of WAKE County, where it was tried, and brought by appeal to this Court, and decided at January Term, 1874, and remanded to be proceeded with according to

the decision. It was again tried before his Honor, *Judge Watts,* at Spring Term, 1874.

At January Term, 1874, this Court gave judgment ordering the Superior Court to issue a writ of restitution. This his Honor, on the second trial in the Superior Court did, whereupon the plaintiffs appealed on the ground that the Superior Court had no power to order restitution, but that the writ should have issued from the Supreme Court.

Fowle and Lewis, for appellant.
Smith & Strong, Haywood and Rogers, contra.

(381) READE, J. This action was originally commenced before a Justice of the Peace against the defendant as an alleged trespasser upon the land in controversy to recover the possession of the same. The Justice made such order in the cause that the defendant was put out, and the plaintiff was let into the possession, and the defendant appealed to the Superior Court.

The Superior Court quashed the proceedings before the Justice upon the ground that the Justice had no jurisdiction. And thereupon the defendant moved to be restored to the possession. This motion was refused by his Honor; and from his refusal, and from that only, an appeal was taken to this Court. And this Court at the last term, decided that as the defendant had been put out of possession by an abuse of the process of the law, a writ of restitution was a matter of course, and the defendant's motion ought to have been allowed as a part of the judgment. And this Court directed that it be so certified to the Superior Court, "to the end that a writ of restitution may issue." Upon the certificate going down the Superior Court ordered a writ of restitution to issue. And from that order the plaintiff appealed to this Court.

The point made before us by the plaintiff is that the Superior Court has no power to issue the writ of restitution, but that the same ought to have been issued, if at all, by this Court. And that this Court was in error when it directed the Superior Court to issue it.

Take it to be true, for the sake of the argument, that this Court was in error in directing the Superior Court to issue the writ of restitution, the question arises, what is the proper way to correct the error? Is it for the Judge below to refuse to obey the order because *he* thinks the Supreme Court erred? That would be judicial insubordination which is not to be tolerated, and which is seldom practiced; and which was not practiced in this instance by the learned Judge who promptly ordered the writ. If the Judge cannot refuse to obey the order because

he thinks there is error, can the party frustrate it because *he* thinks there is error? That would be worse than for the Judge to do it, because it might be supposed that the Judge would exercise (382) discretion, and refuse to obey only in case of palpable error; but the interested party would frustrate the order in every case. If then the Judge cannot refuse to obey, and the party cannot be allowed to frustrate an erroneous decision of the Supreme Court; and if from it there is no *appeal,* are we driven to the revolting alternative that there is no *relief?* Of course not. The practice is well established and the relief perfect; a petition in this Court to rehear.

But there has not in this case been any error at all by the Supreme Court. A party is allowed to appeal "from every judicial order or determination of a Judge of the Superior Court upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right," etc.

When there has been a trial and a final determination of a cause, and an appeal is taken to this Court, it brings *the cause* into this Court, and we "reverse, affirm or modify" the judgment as may be necessary; and we give such judgment here as ought to have been given below; and we issue execution to enforce the judgment. But when an interlocutory order or determination is appealed from, "the cause" does not come up to this Court but remains in the Court below, and only the "order" comes up; which we decide, and certify our decision to the Court below to the end that "the cause" may be proceeded with. So in this case when his Honor quashed the proceedings of the Justice of the Peace, and refused the defendant's motion for a writ of restitution. The plaintiff did not appeal so as to bring up "the cause" to this Court; but the defendant appealed from his Honor's refusal to issue a writ of restitution; and there was nothing before us but that order. It was a motion for an *order in the cause.* The cause was not before us; and so, of course, we could not make the order. All that we could do was what we did, decide that the order ought to have been made, and certify our decision, to the end that the Court below might issue the writ. Compliance with that decision was a duty of the Judge, in regard to which he had no discretion. It was as much his duty to issue the (385) writ of restitution, after we had ordered him to do it, as it would have been the duty of the sheriff to execute it. And the plaintiff had no more right to frustrate one than the other. And his having obtained the possession, by an abuse of the process of the law, and retained the possession by an abuse of the remedy of appeal, against the decisions of both the Superior and the Supreme Court, has all the moral elements, at least, of a contempt.

The order for the writ of restitution in obedience to the decision of

this Court not being appealable, the attempted appeal did not vacate it, and therefore the order for the writ is still in force and the writ may be sued out at any time by the defendant.

The appeal is dismissed. This will be certified, etc. *State v. Lane,* 26 N. C., 434; *Bledsoe v. Nixon,* 69 N. C., 81.

PER CURIAM. Appeal dismissed.

Cited: Heath v. Bishop, 72 N.C. 457; *Hanson v. Comrs.* 89 N.C. 125; *Murrill v. Murrill,* 90 N.C. 123.

GIDEON PERRY AND OTHERS v. H. M. TUPPER.

Where the defendant has been put out of the possession of certain premises by an abuse of the process of the law, and this Court has ordered the Superior Court to issue a writ of restitution, the possession must be restored to the defendant before the Court will entertain an application for an injunction, or pass upon the further rights of the parties.

(See the preceding case, against the same parties.)

This was a CIVIL ACTION, instituted after the decision in the preceding case, tried before *Watts, J.,* on an application for a restraining order, at Spring Term, 1874, of WAKE Superior Court.

This action was brought on the part of the plaintiffs, praying
(386) to have certain corrections made in a deed executed by defendant and wife, to them as trustees of the second Baptist Church in the city of Raleigh, and to have cancelled a certain lease alleged to be held by defendant from some of the trustees, and also applying for an injunction against the issuing a writ of restitution from the Superior Court in favor of defendant, and which was ordered by this Court at the last (January) Term.

His Honor refused to grant the injunction when the application was first made, but made a rule on the defendant to show cause why the application should not be granted on a day certain, to wit, 3d July, 1874, On that day, after hearing the complaint, answer and exhibits, his Honor granted the plaintiff's application and ordered the injunction to issue, restraining the defendant from proceeding further with his writ of restitution until the final hearing of the cause upon the merits.

From this order the defendant appealed.

Smith & Strong, and Haywood and Rogers, for appellant.
Fowle and A. M. Lewis, contra.

READE, J. The defendant had been wrongfully turned out of the possession of the premises under proceedings for alleged forcible entry and detainer, and at the last term of this Court a writ of restitution was ordered. See *Perry v. Tupper,* 70 N. C., 538.

This action is for the same premises, and pending the action, an injunction is asked for to restrain the defendant from suing out his writ of restitution awarded at last term. And his Honor ordered the injunction to issue, and the defendant appealed. Nothing new has occurred since the writ of restitution was awarded; but in this action, the plaintiffs allege that the defendant's title papers were fraudulently obtained and it is sought to set them aside, which accounts for the action being brought while the plaintiff is in possession.

The writ of possession must issue as a matter of course. The defendant having been put out of possession by an abuse of the (387) process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not till then, will the Court be in condition in which it can honorably to itself, pass upon the further rights of the parties. This is sufficiently explained in a case between the same parties at this term, upon a motion to rehear the order for writ of restitution at last term. And see the *King v. Wilson,* 30 Eng. C. L. R.; 3 Adol. & Ellis, p. 229 at 238.

There was error in the order appealed from granting the injunction. Let this be certified.

PER CURIAM. Order reversed.

Cited: Heath v. Bishop, 72 N.C. 457; *Meroney v. Wright,* 84 N.C. 340; *Cottingham v. McKay,* 86 N.C. 244; *Powell v. Allen,* 103 N.C. 49; *Tyler v. Mahoney,* 166 N.C. 513.

GIDEON PERRY AND OTHERS v. H. M. TUPPER.

Where a party has been put out of possession of land by an abuse of the process of the law, there must be restitution as a matter of course, unless some new matter has intervened in the meantime. And until restitution is made no application for an injunction will be entertained by the Court.

This is a branch of the preceding case, demanding the same relief heard upon the application for an injunction by his Honor, *Judge Watts,* at Chambers, on the 9th April, 1874, in WAKE County.

The facts of this case are those of the preceding. When the application for the injunction was first made, as stated in that case, his Honor refused to grant it; and from this refusal the plaintiffs appealed.

(388) *Fowle and Lewis, for appellants.*
Smith & Strong, Haywood and Rogers, Contra.

READE, J. This is a branch of a case between the same parties at this term. In that case the Judge granted an injunction and the defendant appealed. In this case the plaintiff appealed from the refusal of the Judge to grant a restraining order at an earlier stage of the case.

We think his Honor was right in refusing the restraining order. Our reasons for this opinion will be found in the other branch of the case at this term.

Where a party has been put out of possession of land by an abuse of the process of the law, there must be restitution as a matter of course, unless some new matter has intervened in the meantime.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

Cited: Cottingham v. McKay, 86 N.C. 244; *Lytle v. Lytle,* 94 N.C. 525; *Robinson v. McDowell,* 125 N.C. 344; *Wright v. Harris,* 160 N.C. 546.

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(389)
THE NORTH CAROLINA MUTUAL LIFE INS. CO. v. JOHN H. POWELL.

The *failure* of a mutual insurance company does not constitute a "failure of consideration," so as to defeat an action upon a premium note given by a person insured therein.

Such a company after its insolvency loses the power of insisting upon forfeitures of stock by its members for non-payment or otherwise.

If such a company before insolvency treat a member who has failed to pay as if he were still a member, this is a waiver of the right to declare his stock forfeited for the non-payment.

A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 *per cent* on the premium notes in order to enable it to meet its liabilities, etc.

The holders of policies in insolvent mutual insurance companies cannot, when sued upon their premium notes, claim that the *values* of their policies

(supposing the same to be ascertained,) shall be set off in equity against their liabilities.

CIVIL ACTION to recover the value of a promissory note, tried by his Honor, *Judge Tourgee,* at the Special (January) Term, 1874, of the Superior Court of WAKE County.

The following is the case proposed by the plaintiff's counsel and adopted by the presiding Judge, and transmitted with the transcript of the record, as the "case settled."

On the trial in the Court below, the plaintiff produced in evidence the act of incorporation, ratified 27th January, 1849, entitled "An act to incorporate a Mutual Life Insurance Company in the State of North Carolina," by which the plaintiff became an incorporated company; and proved that under said act, the company was duly organized and went into operation sometime in the spring of the year, 1849.

Plaintiff then offered in evidence a promissory note, the execution of which by him, the defendant admitted in the words and figures following, to wit:

"$258.23 GOLDSBORO, April 23d, 1865. (390)

"Twelve months after date, or sooner if required to meet assessments made by the company, I promise to pay to the North Carolina Mutual Life Insurance Company, at Raleigh, or order, two hundred and fifty-eight dollars and twenty-three cents, with interest at 6 *per cent per annum,* for value received. No. 1202.

JOHN H. POWELL."

It was then proved by the plaintiff that at the time the note was executed, the United States forces had possession of Goldsboro in Wayne County, where the note was given, and had also taken possession of the city of Raleigh, where the plaintiff's office was situate, and performed its functions as a Mutual Insurance Company; and that the jurisdiction of the United States had been maintained within the two places aforesaid ever since, and had gradually from that time, been established and maintained over the whole State of North Carolina up to the present time—facts admitted by defendant.

Plaintiff then filed before the Court the affidavit of R. H. Battle, now receiver of the plaintiff corporation, under a decree in Equity of the United States Circuit Court for the District of North Carolina, and at the date when said note was given and for several years previous, and also subsequent thereto, Secretary of said corporation to the effect that it was not understood between the parties to said note, that it was solvable in money, of the value of Confederate currency at the time the note was given; but it was understood between the said par-

ties, that said note was solvable in money of the value of the par funds of the United States.

And the plaintiff here rested the case.

The defendant then offered in evidence the policy of life insurance, and a printed pamphlet containing the by-laws, rules and instructions to the agents of the plaintiff corporation, all of which were admitted by the plaintiff to be genuine. He then offered to prove that when the said policy was issued to him, on the 23d of April, 1851,
(391) he did not pay to the plaintiff in money the whole sum of $43.40, specified in said policy, as paid at that date, but paid only $21.70 thereof in money, and gave his note, in the form of the note now sued on, for the other $21.70; and that when the next annual premium of $43.40 fell due according to the terms of said policy, on the 23d of April, 1852, he paid only $21.70 of that annual premium and 6 *per cent* interest on his note of $21.70 already given, in money, and paid off his said note and the other half of his annual premium, due 23d April, 1852, by giving a note in the form of the one now sued on, amounting to $43.40 therefor. That in like manner, from year to year, until the 23d day of April, 1865, he continued to pay only one-half of his annual premium specified in said policy, and 6 *per cent* interest on his outstanding note in money, and to give a new note, including the amount of the principal of his outstanding note and the other half of the annual premium, due by him for the ensuing year, in the form above specified. That on the 23d April, 1865, he paid the plaintiff $21.70 in money, being one-half of his annual premium as aforesaid, due for the year ending the 23d April, 1866, and gave his note for $258.23, which included the other half of his annual premium, and the principal of his outstanding note, amounting at that time to $236.53; and he at the same time paid the plaintiff in money $14.19, being one year's interest on his said outstanding note for $236.53. That the note declared on by the plaintiff and offered in evidence, was the one for $258.23, given by defendant, as immediately hereinbefore stated, on the 23d April, 1865; and the consideration thereof, was the payment of his annual half premiums, already then accrued in the manner and under the circumstances, immediately hereinbefore stated. That on the 23d of April, 1866, the defendant purposely failed to pay his annual premium, according to the terms of the aforesaid policy, either in money or by giving a note therefor, because the plaintiff corporation was at that time generally reputed to be insolvent, and as the defendant believed, was insolvent; and that the defendant has never since paid, nor
(392) attempted to pay, any such annual premium.

It was conceded by the plaintiff that the directors of the plaintiff corporation has never at any time made any assessment on

the note sued upon, against the defendant, to pay losses due to policy holders, whose policies had fallen in by death, and other debts of the corporation—unless the resolutions of the said directors, of the 6th of August, 1866, (annexed to the record,) and hereinafter more specifically referred to, amounted to such an assessment; or unless the proceedings in the Circuit Court of the United States, in the creditor's bill filed against the plaintiff in equity, before June Term, 1869, and which will be hereinafter more specifically stated, were equivalent thereto; and it was specially conceded by the plaintiff, that no such assessment had been made on the premium note of the defendant sued on, previous to the lapse of his policy, by his failure to renew his premium note, and pay his annual premium on the 23d of April, 1866.

The defendant then offered to prove by unwritten evidence, the terms of an oral agreement, entered into by and between the plaintiff and defendant, at and preceding the execution of the note given by the defendant to the plaintiff, for one-half of his first annual premium, and of the policy issued by the plaintiff to defendant's wife and children, on the 23d of April, 1851, of which agreement the said policy and note were in part execution, to the effect:

1. That it was agreed and understood between the plaintiff and defendant, that any and all notes, including the one declared on, given by defendant in payment of half premiums, should not be collected at the date they became due by their tenor;

2. That the outstanding premium notes should not be collected, but renewed as stated, except as to any assessment made for losses;

3. That notice should be given of such assessment when made, before which the insured should not be in default;

4. That such premium notes should only be paid after death (393) and then be deducted from the amount due under the policy;

5. That upon the non-payment of the annual premium, or the non-payment of the note for the half amount thereof, the entire agreement should be null, and the defendant discharged from all liability to the plaintiff upon his premium notes, or otherwise, except as to such assessments as may have been then made.

6. That this express oral contract was entered into between defendant and the plaintiff's agent, at the date mentioned, to wit: the 23d of April, 1851.

This evidence was rejected by the Court, and the defendant excepted.

Defendant then offered to prove by parol testimony, that the plaintiff knew of the alleged unwritten contract made with the defendant by the company's agent, and did not disaffirm the same, but accepted and renewed from time to time the notes given in pursuance thereof.

This evidence was rejected by the Court, and the defendant ex-

cepted.

Defendant offered to prove by oral testimony, that it was the usage of the plaintiff corporation, to make unwritten contracts of insurance, of the tenor of the oral contract alleged. This too was rejected by the Court, and the defendant again excepted.

Defendant then offered to prove that he did regularly renew his note for one-half the annual premiums, according to the unwritten contract alleged until the plaintiff became insolvent, and that he refused to renew, only in consequence of such insolvency. The plaintiff offered no objection to the defendant's proving, that he regularly renewed his notes, etc., until the plaintiff became insolvent, etc., but did object to his proving that he did these acts in accordance with the unwritten contract alleged. Objection of plaintiff sustained, and the evidence so far as it related to the unwritten contract alleged by defendant was excluded by the Court. Again the defendant
(394) excepted.

The defendant offered to prove that no assessment had been made and no notice given to him, according to the tenor of the unwritten agreement alleged. Plaintiff did not object to the defendant's proving if he could, that no assessment had been made on his premium note and no notice thereof had been given to him, but did object to his proving that these acts had not been done according to the tenor of the unwritten agreement alleged. The Court excluded this evidence, as a part or consequence of such unwritten agreement, and as offered in connection therewith, but did not exclude it generally. Defendant excepted.

It was conceded by the plaintiff that at the date when the note sued on was given by defendant, to wit: 23d of April, 1865, the plaintiff corporation was unable to meet and pay its then existing liabilities as they matured; and it was further conceded that it had never been able since to meet and pay its existing liabilities as they matured; and that on the 4th September, 1869, when this action was instituted, the plaintiff was finally insolvent, and has so remained ever since and would never be able to pay off its existing debts, and have anything for division among its shareholders or members.

The defendant then offered in evidence a printed statement, admitted to be genuine, and which was made a part of the case, of the proceedings of a general called meeting of the members of the plaintiff corporation, held on the 6th of August, 1866, wherein a speedy winding up of the affairs of the company was resolved on, and the directors thereof ordered to carry the same into effect; and proved that the plaintiff had ever since the said 6th day of August, 1866, ceased to transact any business as a Life Insurance Company.

It was conceded by the defendant that he was, on the 23d of April, 1865, when his note was given, and had been for many years previous thereto, one of the local agents for the plaintiff, to receive applications for insurance, and to effect renewals thereof, in a considerable district of country in and around Goldsboro, Wayne County. (395)

The plaintiff then offered in evidence the record of an equity suit, in the Circuit Court of the United States for the North Carolina District, instituted before June Term, 1869, of said Court, by Elvira C. Lawrence and others, on behalf of himself and the other creditors of the plaintiff, against the plaintiff in this action. In the original bill of said suit, it was alleged, that the complainant therein and other creditors aforesaid, had obtained judgments for their debts, at law against the plaintiff in this action, had sued out executions thereon, and they had been returned totally unsatisfied, and praying the Circuit Court to take into its custody the assets of the North Carolina Mutual Life Insurance Company, and to appoint a receiver thereof, to take charge of and collect such assets, and distribute them among the creditors of said corporation, according to their respective rights. A decree of said Court in said cause, made at June Term, 1860, declaring said corporation insolvent, appointing one R. H. Battle, receiver of the assets thereof, and directing him, as such receiver, to institute proper actions in the State Courts for the collection of the assets of the corporation, preparatory to the distribution thereof among the creditors of the corporation. The plaintiff then proved, that although this action is conducted in the name of the plaintiff, yet, that it was in reality brought, and is in truth and fact carried on, by the said R. H. Battle, receiver as aforesaid, in the name of the plaintiff, in pursuance of the decree last aforesaid and for the benefit of the creditors of the plaintiff.

Upon the foregoing evidence, the defendant prayed his Honor to instruct the jury:

If they found that the plaintiff, at the time of taking the note now sued on, was insolvent, and that this fact was known to the plaintiff and not communicated to the defendant, nor known to him, and that, if this fact had been known to the defendant, he would not have executed the note, the plaintiff could not recover.

His Honor declined to give the instruction, as prayed, and (396) the defendant excepted.

That the contracts between the plaintiff and defendant were mutual, concurrent and dependent, and that the insolvency of the plaintiff, and its admitted inability to pay the defendant's wife and children the amount of their policy, at any time hereafter, was a discharge of the defendant from his liability; and, if not to the full amount, yet, to the

extent of the present value of the policy, as of a solvent corporation. His Honor declining to give this instruction as prayed, the defendant excepted.

That if the jury find, that at the time of taking the note now sued for, the plaintiff was insolvent and concealed that fact from the defendant, and falsely represented to him, that it was solvent, and thereby induced the defendant to give the said note, when, but for such concealment and false representation, the defendant would not have given the same, the plaintiff could not recover. His Honor declined to give this instruction as prayed; stating to the jury that any concealment, or representation of its pecuniary condition, upon the part of the plaintiff to the defendant, at the time when the note was given, which would vitiate the same, must have been *fraudulent* as well as false; and there had been no evidence given to the jury of any fraudulent concealment of, or false and fraudulent representations as to its pecuniary condition, by the plaintiff to the defendant, at the time when the note was given. To this instruction, the defendant again excepted.

That the plaintiff, having at a general meeting of his stockholders or members, held on the 6th of August, 1866, adopted the resolution to wind up the affairs of the company, and to discontinue its business from that date, and this action not having been instituted, until the 4th day of September, 1869, more than three years having elapsed since the dissolution of the plaintiff corporation, this action could not now be maintained by it. His Honor declined to instruct the jury as requested, and the defendant again excepted.

(397) That the note sued on was subject to the scale for Confederate money, provided by the ordinance of the convention and the act of the General Assembly; and if entitled to recover, the plaintiff was only entitled to recover the amount specified in said note, reduced by said scale.

His Honor refused to give this instruction as prayed, and told the jury that the presumption arising under the ordinance and act of the General Assembly, that the note sued on was solvable in money of the value of Confederate currency, at the date when the note was given, was in this case rebutted by uncontroverted evidence. Defendant again excepted.

The defendant then asked his Honor to rule, that this suit was not commenced in due time, which ruling his Honor refused to make, and the defendant execepted.

In support of his first counter-claim, the defendant prayed his Honor to instruct the jury, that if he was induced to pay to the plaintiff the sum of $21.70 at the time of the execution of the note sued on,

the plaintiff then being insolvent, by the false representation of the plaintiff's agents and officers, as to its solvency, and the concealment of its true pecuniary condition, then the defendant was entitled, as against the plaintiff, to a counter-claim of $21.70 with interest.

His Honor declined to give this intruction as prayed, stating to the jury, that there was no evidence of any fraudulent concealment of its pecuniary condition, or of any false and fraudulent representations as to its solvency, by the plaintiff, or its agents or officers, whereby the defendant had been induced to pay it the said sum of $21.70, at the time when he executed the note. Again the defendant excepted.

The jury returned a verdict in favor of the plaintiff. Judgment in accordance therewith, and appeal by defendant.

Fuller & Ashe, Smith & Strong and Batchelor, for appellant.
Fowle, Battle & Son, and Haywood, contra.

SETTLE, J. All of the important questions presented by this record, were considered and decided in *Conigland v. Insurance* (398) *Co.*, 62 N. C., 341, and the learned counsel who argued this case, at the present term, candidly admitted that authority to be against him, and decisive of this action, unless the Court reversed that decision.

After giving to the able argument of counsel due consideration, we see no reason to abandon any of the positions established by that decision.

It is a well considered opinion of the Court, delivered by the Chief Justice, and, as we have before said, meets fully the merits of this case. Some of the evidence offered by the defendant and rejected by the Court was admissible, but we need not consider it, for if all that was competent had been admitted, it could not have changed the result. So the defendant has suffered no harm from the rejection of evidence.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Cab Co. v. Casualty Co., 219 N.C. 797.

COMMISSIONERS OF ASHEVILLE v. WM. JOHNSTON.

In a proceeding by the Commissioners of a town to condemn the land of one of its citizens for the purpose of running a street through the same, the jury, in assessing damages, cannot consider any advantage accruing to the owner of the property, in common with the public; on the contrary, it is their duty to consider in such assessment, any *special benefit* to the property arising from the opening of such street.

This was a PROCEEDING to condemn certain land of the defendant for the purpose of opening a street in the town of Asheville, commenced in the Mayor's Court, and carried by appeal to the Superior Court of BUNCOMBE, where it was tried before his Honor, *Henry, J.*, at Spring Term, 1874.

(399) The injunction obtained by the defendant in this case was disposed of at the last term of this Court. *Johnston v. Comrs.*, 70 N. C., 550, in which, and in the opinion then delivered by Justice RODMAN, the facts are fully stated.

On the trial below of this branch of the case, the defendant asked of his Honor certain instructions in regard to the proper measure of damages, which instructions his Honor declined to give, and which are fully stated in the opinion of Justice READE. The jury returned a verdict, to the effect that the defendant had not been endamaged by the proceedings to open the street, whereupon his Honor gave judgment against him for the costs.

Motion for a new trial made and overruled. Judgment and appeal.

McCorkle & Bailey, for appellant.
Fuller & Ashe, contra.

READE, J. The substantial rights of the parties in regard to the subject matter of this suit were declared at the last term of this Court, in a suit between the same parties reversed. 71 N. C., 350. In view of that, the points upon which this case is brought up, would seem to be frivolous and vexatious.

1. The defendant asked his Honor to instruct the jury, "that the damage sustained by defendant is not to be reduced or set off by any alleged benefit to his property."

His Honor instructed the jury that any advantage to the defendant in common with the public was not to be considered, but that any *special benefit* to the defendant's property was to be considered. This was in exact accordance with former decisions of this Court, especially *Freedle v. R. R.*, 49 N. C., 93. And see Cooly Con. Lim., p. 566.

2. Defendant asked his Honor to charge that there was no evidence of any special benefit, etc.

His Honor could not have so charged, because the case states that "there was much evidence on both sides, the plaintiff showing the benefits to be derived by the erection of a new crossing into (400) the defendant's lots, and other items, all of which testimony was admitted."

3. "Defendant moved in arrest of judgment on account of irregularities and vagaries in the proceedings."

This is so irregular and vagarious that we do not consider it.

There is no error. Judgment affirmed. Judgment here for plaintiff for costs.

PER CURIAM. Judgment affirmed.

Cited: R. R. v. Smith, 99 N.C. 134; *Campbell v. Comrs.,* 173 N.C. 501; *Lanier v. Greenville,* 174 N.C. 317 *Elks v. Comrs.,* 179 N.C. 246; *Stamey v. Burnsville,* 189 N.C. 41.

ALEXANDER MITCHELL AND OTHERS, TAXPAYERS, v. THE BOARD OF TRUSTEES OF TOWNSHIP No. 8.

Township Boards of Trustees are forbidden by the Act of 1873-74, Chap. 106, Sections 1 and 2, to levy and collect taxes for necessary expenses—and although such taxes were *ordered* before the passage of that Act, they cannot be collected since its passage.

This was an APPLICATION for an injunction to restrain the defendants from collecting certain taxes, heard before *Clarke, J.,* at Spring Term, 1874, of CRAVEN Superior Court.

The plaintiffs, citizens and tax-payers of Township No. 8, of the county of Craven, applied to Judge Watts on the 24th January, 1874, for a restraining order to be directed to the defendants who were the Board of Trustees of said Township, enjoining the collection of certain taxes, which the plaintiffs alleged had been levied by the defendants to pay certain extravagant bills, etc., under the pretence that such bills and accounts were necessary expenses. The complaint of the plaintiffs contain many other allegations, irrelevant to the point decided in this Court, and therefore omitted in this statement.

His Honor granted the order, as prayed, restraining the defendants from collecting the tax until the matter could be heard.

At Spring Term, 1874, the defendants answered, admitting the (401) levy of the tax ,but averring it was for the necessary expenses

of the township, heretofore incurred, and likewise current which were not unjust or extravagant, but reasonable, etc. Upon coming in of defendants' answer his Honor vacated the restraining order theretofore issued, from which vacating order the plaintiffs appealed.

Haughton and Smith & Strong, for appellants.
Pou and Seymour, contra.

READE, J. At the time when the taxes complained of were levied, the "Board of Trustees had power to lay and collect all taxes which were required to defray the necessary expenses of the Township." Acts 1868-69, Chap. 185, Sec. 19; Bat. Rev. Chap. 112, Sec. 19. And having the *power*, very much—almost everything—must be left to the discretion of the Board to determine what were necessaries. It borders on the ridiculous to ask the Courts to say whether $34 for office rent, $20 for a book, $25 for a table, etc., etc., are necessary expenses. Such things must usually be left to the Board. If they are extravagant, the ballot-box is the appropriate remedy.

But the counsel on both sides had overlooked the fact that the statute, *supra,* authorizing the Board to levy and collect taxes for necessary expenses has been repealed, and the Board is forbidden to levy and collect taxes for necessary expenses. Acts 1873-74, Chap. 106, Secs. one and two.

It is true that the taxes complained of were *ordered* before the passage of the last named act; but that act forbids them to be *collected.* So that the *order* to *collect* what the Legislature has forbidden to be collected, must go for nothing. The same act, Sec. 3, provides another way for paying the necessary expenses of the Township, which frees the repealing act from the objection of violating contracts.

The injunction prayed for ought to have been granted.

There is error.

PER CURIAM. Judgment reversed.

NANCY A. JOHNSON AND OTHERS v. JOHN M. JOHNSON.

On the trial below, the presiding Judge, in his charge to the jury, remarked, "I shall hold that the plaintiffs are justifiable in bringing this action:" *Held,* in the absence of any proper connection with the case, and as justifying them in returning a verdict for the plaintiff, that such remark was error, and entitled the defendant to a new trial.

(402)

CIVIL ACTION, to recover possession of certain real estate, tried before his Honor, *Judge Mitchell,* at Spring Term, 1874, of WILKES Superior Court.

The case, as settled and transmitted with the record, is substantially as follows:

In his answer, the defendant pleaded that he had a license from plaintiffs to enter. He also set up title in one Lewis Johnson, his father, alleging that the said Lewis was a tenant in common with the plaintiffs, and that he entered into possession of the land described in the plaintiffs' complaint, with the full knowledge and consent of all the parties concerned.

The plaintiffs denied that they ever gave the defendant a license to the premises; also denied the tenancy in common, and claimed to be the owners of said land in severalty.

It appeared in evidence, that Samuel Johnson, the ancestor of Lewis Johnson and of the plaintiffs, died about the year 1834, leaving him surviving nine children, of whom said Lewis Johnson and John S. Johnson, under whom the plaintiffs claim, were two, and that in the year 1845 the other heirs of the said Samual Johnson, deceased, released by deed to Lewis Johnson and to John S. Johnson.

Plaintiffs offered evidence tending to show that in the lifetime of the ancestor, Samuel Johnson, said land was divided by a line through the middle, and that Lewis Johnson and John S. Johnson, the father and husband of plaintiffs, occupied the land on opposite sides of said line, after the death of the said Samuel, and claimed on each side of said line adversely—the land in controversy being on the plaintiffs' side. Plaintiffs introduced further evidence showing that from the death of the said Samuel Johnson up to the commencement of (403) this action, that they and John S. Johnson, under whom they claimed, and Lewis Johnson recognized this dividing line between them as being the true dividing line. Plaintiffs also offered as evidence, separate deeds of trusts executed by John S. Johnson and Lewis Johnson respectively, in the year 1852, whereby it appeared that each of them conveyed their separate tracts, recognizing the said division line; and for the purpose of further establishing said dividing line, the plaintiffs offered evidence tending to show that Lewis Johnson and John S. Johnson, both made deeds of conveyance once, to a part of the land occupied by them separately.

The defendant objected to the evidence of the sale of the lands by the said John S. and Lewis Johnson, unless the deeds were exhibited, which were not, except the record showing that the deeds of trust above alluded to were made. Defendant proved upon the cross-

examination of one of the plaintiffs' witnesses, that he, the witness, purchased a part of the land occupied by Lewis Johnson, at or near the dividing line, from said Lewis, who offered to make to him his separate deed for the same, but that he refused to accept such deed until John S. Johnson would join Lewis in the conveyance, which the said John S. did. Defendant introduced testimony also to prove that no such line was established. One of his witnesses testifying that he was little more than forty years of age, and that he never heard of any dividing line, but that when he was a boy there was a fence where the plaintiffs claim that a line was.

Defendant asked his Honor to charge the jury that the plaintiffs had no right to set up adverse possession, except from the date of the release in 1845; and also asked his Honor to instruct the jury, in computing the time of the adverse possession, that the time from 20th May, 1861, to January 1st, 1870, must be deducted.

(404) His Honor, in reply, told the jury that if the plaintiffs had occupied the land in controversy, for thirty or thirty-five years, claiming adversely that in law the dividing line was established; and if they were satisfied that the defendant entered the land of the plaintiffs without a license, that the plaintiff would be entitled to recover. His Honor also remarked to the jury, "I shall hold that the plaintiffs are justifiable in bringing this action."

There was a verdict for the plaintiffs. Motion for a new trial made and refused. Judgment and appeal by defendant.

Armfield, for appellant.
Scott and Caldwell, contra.

SETTLE, J. In this action questions of title and boundary to land arose upon the trial.

There was conflicting evidence, and at the conclusion of his Honor's charge to the jury he remarked, "I shall hold that the plaintiffs are justifiable in bringing this action."

We cannot see, from the record that this remark had any proper connection with the case; and we are at a loss to understand what bearing his Honor intended it to have upon the jury.

We think it possible—yes, highly probable—that the jury understood his Honor to intimate that the plaintiff had a good cause of action, and that the evidence would warrant, or in his language, justify them in returning a verdict for the plaintiff.

There must be a *venire de novo*. Let this be certified.

PER CURIAM. *Venire de novo.*

Cited: Wilson v. Charlotte, 74 N.C. 760; *Tucker v. Raleigh,* 75 N.C. 271; *Wallace v. Trustees,* 84 N.C. 166; *Green v. Kitchin,* 229 N.C. 461.

(405)

MAGNUS WATTS v. ELIZABETH BELL AND OTHERS.

If, on a trial below, the verdict of the jury is, in the opinion of the presiding Judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate Court.

SPECIAL PROCEEDING to recover damages for the injury to plaintiff's land by the erection of defendants' mill dam, tried before *Mitchell, J.,* at the Spring Term, 1874, of CALDWELL Superior Court.

The defendants objected to plaintiff's right to a verdict in this action upon the grounds set forth in the answer, that there was no sufficient averment in the complaint that there was any mill, mentioned in the statute, situate at plaintiff's dam to entitle him to his remedy. This objection was overruled by the Court and the following issues were submitted to the jury upon the evidence, to wit:

1. Is plaintiff's land injured by the mill dam of defendants?
2. Has the defendants acquired by lapse of time an easement to dam the water back to its present height?
3. Has the plaintiff sustained any damage by said dam, by reason of any new injury since 1856?

Upon which issues the jury responded as follows, to-wit, by finding all the issues in favor of the plaintiff, to-wit, as to the first issue, yes; as to the second, no; as to the third, yes.

Upon this finding of the jury, the defendant moved his Honor to set aside the verdict upon the ground, first, that the verdict of the jury was against the evidence; second, that the finding of the jury was immaterial.

Whereupon his Honor set aside the finding upon the second issue, upon the ground that it was found by the jury contrary to the evidence, and he set aside the finding upon the first and third issues upon the ground that they, the second being set aside, were immaterial and that a re-pleader must be awarded. Whereupon the plaintiff appealed.

(406)

McCorkle & Bailey, for appellant.
Folk & Armfield, Scott & Caldwell, Contra.

READE, J. I. The first question is, whether his Honor had the power to set aside the verdict because, in his opinion, it was "contrary to the evidence?" by which we understand the *weight of the evidence.* It is too clear for argument that he has, and the practice has been uniform time out of mind. And upon the supposition that we can review the order under C. C. P. 299, in a proper case, there is nothing in *this* case to show that there was error.

II. There were three issues submitted to the jury: 1. Is plaintiff's land injured by the mill dam of defendant? 2. Has defendant acquired by lapse of time an easement to dam the water back to its present height? 3. Has plaintiff sustained any damage by said dam by reason of any new injury since 1856? All these issues were found for the plaintiff. But his Honor thought the jury ought to have found for the defendant on the second issue, to-wit, that the defendant had acquired an easement to pond the water back as he had done, and because the jury found against the weight of the evidence on this issue, he granted a new trial. And if the defendant was entitled to a verdict upon this issue, he was entitled to a verdict upon the whole case, no matter how the other issues were decided, and therefore he granted a new trial generally. We do not see any error in this. It was discretionary with his Honor, and no error appears on its exercise.

There is no error. The cause will be remanded to be proceeded with according to law. The appellant will pay costs.

PER CURIAM. Judgment affirmed.

Cited: Brink v. Black, 74 N.C. 330; *Edwards v. Phifer,* 120 N.C. 406; *Goodman v. Goodman,* 201 N.C. 810; *Roberts v. Hill,* 240 N.C. 381.

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(407)

IVY KING AND OTHERS v. JESSE W. KINSEY AND OTHERS.

In an appeal from a judgment of a Probate Court, refusing to require the reprobate of a will, on the application of certain of the heirs of the deceased, the proper judgment of the Superior Court granting the application, is, to remand the proceedings to the Probate Court, there to be proceeded with according to law, by making up issues and transmitting them to the Superior Court for trial. C. C. P., Sec. 447.

DEVISAVIT VEL NON, as to a paper writing propounded for probate in the Probate Court of JONES County, purporting to be the will of

Ivy King, deceased, and carried by appeal to the Superior Court of said county, where it was head before his Honor, *Judge Clarke,* at Spring Term, 1874.

The plaintiffs entered a *caveat* in the Probate Court and a citation issued to defendants, who propounded the paper writing, claiming under it, to appear on 18th day of April, 1874, to show cause why the said paper writing should not be adjudged not to be the last will and testament of the said Ivy King.

On the return of the citation the plaintiffs, the caveators, filed their complaint, substantially alleging:

1. That the paper, dated 4th October, 1870, and pretended to be proved the 17th day of October, 1870, is not the last will and testament of the said Ivy King, deceased.

2. That the said Ivy King could not read, and the said paper writing was not read over to him.

3. That he was not of sound mind and memory when he signed the same.

4. That the pretended probate was made without notice to the plaintiffs, the testator's heirs and next of kin, and (5) his only heirs-at-law and distributees.

Plaintiffs demanded that the probate should be set aside, etc.

Defendants answered, denying the material allegations in the complaint, and averring that the plaintiffs had notice, and that the probate was regular and according to law.

The Probate Judge admitted the paper to probate, from whose (408) judgment the plaintiffs appealed to the Superior Court.

Upon the hearing in the Superior Court, his Honor ordered the cause to be remanded to the Probate Court, with instructions to the Judge of Probate to rescind the probate theretofore had before him; and after proper notice to the heirs-at-law, devisees and executors of said will, to cause the same to be propounded in solemn form.

From this judgment the defendants appealed.

Green and Haughton, for appellants.
Isler, contra.

RODMAN, J. The appeal from the judgment of the Probate Judge refusing to require the re-probate of the will took up nothing but the judgment appealed from. The original judgment of probate remained in force in the Probate Court. We think therefore his Honor was right in remanding the proceedings for re-probate to the Probate Court to be there proceeded in according to law, by the making up

of issues which will be transmitted to the Superior Court for trial. C. C. P., Sec. 447.

We think also that enough appears on the pleadings to justify the Judge in ordering the will to be proved in solemn form. C. C. P., Sec. 430.

PER CURIAM. Judgment below affirmed.

Cited: Randolph v. Hughes, 89 N.C. 432; *Daniel v. Bellamy,* 91 N.C. 81.

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(409)

M. A. WILCOX v. W. U. STEPHENSON, EX'R., ETC.

A *Recordari*, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing.

This was a CIVIL ACTION, commenced in a Justices' Court to recover of the defendant's testator the sum of $60, and carried by *recordari* to the Superior Court of NORTHAMPTON, where it was tried before *Albertson, J.*, at the Fall Term, 1873.

The material facts are thus stated upon the record sent up to this Court.

Either just before or at the regular term, (Fall Term, 1869,) of the Superior Court of Northampton County, a case was docketed as follows: "M. A. Wilcox v. James Stephenson," (defendant's testator,) with the following entries: "Warrant and appeal, order for the Magistrate to bring forward the papers;" and the following order appears in the papers, signed "Watts, Judge."

"M. A. Wilcox v. James Stephenson. It is adjudged by the Court, that the Clerk of this Court issue a writ of *recordari*, according to the prayer of the petitioner; and the plaintiff is to give bond before the Justice according to act of Assembly in such case made and provided."

At the said Fall Term, 1869, Peebles & Peebles appeared for the plaintiffs. It did not appear that the defendant, James Stephenson, appeared either in person or by attorney, at that or any subsequent term.

The Clerk on the 24th February, 1870, issued a writ of *recordari*, which, on the 5th day of March, 1870, was executed on Maddry, the

Justice of the Peace, who tried the same. In response to said writ, the said Justice at Spring Term, 1870, filed the original summons, judgment and account on which the plaintiff sued, but filed no transcript. At this term the following entry appears on the docket: "Notice to executor to be made a party defendant," and the (410) following order signed, "Watts, Judge," appears among the papers:

"M. A. Wilcox v. James Stephenson, Spring Term, 1870. It appearing to the Court that the defendant died since the last term, and that W. U. Stephenson is his executor, on motion, *it is ordered*, that notice be ordered to said executor to make him a party defendant in this action."

On August 27th, 1870, said order was served on said Stephenson, and at Fall Term, 1870, of said Court, he appeared by Barnes, his attorney. At the term following, this entry appears on the docket.

"Motion to discharge appeal; continued on motion." And at Spring Term, 1871, the following entry appears:

"Continued—notice to give surety on or before Friday, 1st week of term; motion to dismiss."

An appeal bond without date is filed with the papers. It did not appear at what stage of the case the said bond was filed. The case was regularly continued until Fall Term, 1873; and at said term the case is called upon the motion to dismiss, by Barnes, attorney for defendant; because he alleged the writ of *recordari* was ordered to be issued by the Judge, upon an *ex parte* motion, not founded on a petition or affidavit.

No evidence was offered on this point. No petition or affidavit for a *recordari* appears of record.

The plaintiff proposed to prove that he prayed an appeal from the judgment of the Justice at the time it was rendered, and then gave the Justice notice thereof. But the Court refused to hear this evidence, treating the case as an application for a *recordari* to bring up the appeal, and not an order to the Justice for the papers before him, to be used in an appeal actually taken. Thereupon the Court ordered the proceedings to be dismissed, and rendered judgment against the plaintiff Wilcox for costs of the proceedings in the *recordari*.

From this judgment plaintiff appealed.

No counsel in this Court for plaintiff. (411)
Barnes, for defendant.

SETTLE, J. The proceedings in this action which was commenced before a Justice of the Peace, have been very irregular. The bond

filed before the Justice for the appeal to the Superior Court bears no date, and "it does not appear at what stage of the case the said bond was filed;" nor does it appear clearly, when or how the case got upon the docket of the Superior Court. The order for the writ of *recordari* was made upon the motion of the plaintiff without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued.

Nor are we yet informed whether the object of the *recordari* was to have a re-trial of the merits, and thus answer the purposes of an appeal, or to operate as a writ of error or writ of false judgment, and reverse judgment for error.

As there are no errors upon the face of the record, and none have been assigned, for which the plaintiff can complain, let it be certified that there is no error in the order of the Superior Court dismissing the proceedings. *Leatherwood v. Moody,* 25 N. C., 129.

PER CURIAM. Judgment affirmed.

O. SPRINKLE AND WIFE v. JAS. H. FOOTE, B. P. MARTIN AND OTHERS.

A remark of the Judge below, calculated to mislead and prejudice the minds of the jury is error, and entitles the party against whom it is made to a *venire de novo.*

CIVIL ACTION for the recovery of land, tried before *Mitchell, J.,* at the Spring Term, 1874, of WILKES Superior Court.

(412) The plaintiffs claimed the premises under a judgment in their favor against the defendant, B. P. Martin, obtained at Fall Term, 1869, and an execution thereon returnable to Spring Term, 1870, and a levy on what is called the "mill tract," and a sale thereof, by the sheriff on the 22d, April, 1870; at which sale the *feme* plaintiff became the purchaser. And also, by another execution on the same judgment, still unsatisfied, to Spring Term, 1871, and a levy on what is called the "home tract," a sale by the sheriff on the 3d December, 1870, when the *feme* plaintiff also become the purchaser. She having the deeds from the sheriff for both tracts.

This action was originally brought against B. P. Martin and the other defendants, except Foote, to Spring Term, 1871, all of the defendants except Foote, being in possession of some part of the premises, the subject of this controversy.

At the return term, Foote moved to be admitted to defend as land-

lord, which, after objection on the part of the plaintiffs, was allowed by the Court: whereupon he filed an answer, in which he claimed that he was the sole owner of the lands in controversy, and that the other defendants were his tenants. For title, Foote relied on a judgment obtained in the County Court of Rowan County, at _____ term, 186__, in favor of one Brown against the defendant, B. P. Martin and the plaintiff, O. Sprinkle, as indorser of said Martin, which judgment was docketed in the Superior Court of Wilkes, on the 18th day of February, 1869, and during the same month an execution issued thereon, from the Superior Court of Wilkes, returnable in sixty days; that the same was levied on the lands in dispute as the property of the defendant, B. P. Martin, which were sold by the sheriff on the 14th April, 1869, when Foote alleges he bought the same through an agent, one Leland Martin, (Foote not being present at said sale.)

He, Foote, offered as evidence the deed from the sheriff for said tracts of lands to him, dated 22d day of August, 1870, and with the deed produced the execution under which the lands were sold, on which execution was indorsed a levy on all the land in dispute as the property of the said B. P. Martin, with the following additional (413) indorsement under the levy:

"After due advertisement according to law, sold the above described lands of B. P. Martin, at the Court House door in the town of Wilkesboro on the 14th day of April, 1869, to the highest bidder, under the within execution, when James H. Foote became the purchaser, being the last and highest bidder, at $1,500; my fees and commissions retained; paid into office $1.00; B. P. Martin's receipt filed for surplus on debt and costs. Fall Term, 1869. Execution satisfied in full. See plaintiff's receipt for debt."

(Signed) "J. W. HAYES, Sheriff.
"By J. N. HAYES, D. Sh'ff."

The above return was written on a separate piece of paper, which was closely pasted on the back of the execution; and the same being removed in the presence of the Court, there appeared under it, and entirely concealed by it before removal, the following indorsement, to wit:

"And after due advertisement according to law, land sold at the Court House door on the 14th day of April, 1869, for the sum of $1,500, to Lee Martin, he having been the last and highest bidder, and refuses to pay the purchase money. This April 22d, 1869." Signed as above.

In regard to this execution, under which Foote purchased, the plaintiffs introduced the Clerk of the Court, who stated that sometime

after the sale under that execution, J. N. Hayes, the deputy sheriff, applied to him and made an affidavit that the said execution was lost; and that he thereupon made out and delivered to him a duplicate of said execution, for him to make his return on which however the deputy did not do. This was 18th July, 1870; and he heard no more of the matter until August, 1870, when the original execution was
(414) returned to his office, by the high sheriff, with the paper pasted on the back and the return written on that, as it appeared at the trial; that he had seen the execution in the hands of the sheriff a few days before he returned it, and the sheriff stated he had found it. He, the witness, did not know whether the return on the paper pasted on the back, was then on it or not.

On the part of the defendant, the sheriff stated, that before the sale at which Foote purchased, he had an understanding, either by letter or otherwise, with Foote, who then lived in Wake County, that he, Foote, had become the owner of the judgment in favor of Brown, and intended to purchase the lands of B. P. Martin, at the sheriff's sale, through Leland Martin, his agent; that he did not communicate that to his deputy, who sold the land; that after the sale, he saw the execution in the hands of the deputy, with the endorsement on the back of it; that Leland Martin was the purchaser and had failed to pay, etc. That he then told his deputy of the understanding with Foote, and that the endorsement on the execution was wrong, and that it must be so corrected as to show that Foote was the real purchaser. The sheriff further stated, that shortly after this, the execution was lost, and remained lost until a short time before it was returned to the office with the indorsement on the paper pasted on its back.

It was also in evidence that the land was composed of what was originally two adjoining tracts, but that they had been owned and occupied by B. P. Martin as one tract for many years. The plaintiff stated, that at the sale at which Foote purchased, that part of the land called the "mill tract" was not sold by the sheriff. The witnesses for the defendants, who were present at the sale, stated that *all* the land was sold by the sheriff, and his levy and return showed that the whole of it had been levied on and sold.

Plaintiff introduced evidence tending to show that the land was purchased by Foote under an arrangement between him and B. P. Martin, or with Martin's funds, or for his use, and was held in trust for Martin; and among other things, that Foote had at same time
(415) a note on one Shuford for $1,000, or more, which belonged to B. P. Martin, and had collected a part of the money thereon; but whether he had this note before or after the sheriff's sale to Foote did not appear. Defendants Foote and Martin both swore that the

land was not bought under arrangement or agreement between them; that it was bought by Foote out of his own money, for his own use and not on any trust for Martin. That Foote, after deducting the amount of the judgment under which it was sold, had paid all the remainder of the price of $1,500 to Martin; and that ever since his, Foote's purchase, Martin had occupied it as his tenant, paying rent every year. That the Shuford note had no connection with the sale of the land, and no part of it had been entered into the land transaction; that Foote had taken the note to collect and had collected a part of it, and paid over to Martin all his share of what had been collected.

Plaintiff's counsel asked his Honor to instruct the jury:

1. That the execution under which Foote purchased ought to have issued from Rowan County and not from Wilkes.

2. That it was void because it was made returnable in sixty days, and not to term.

3. For the reason that the sheriff had no authority to alter his return in the manner disclosed by the evidence.

His Honor refused these instructions, and remarked upon the 3d point; that as a general rule, the sheriff would not have the right to alter a return once made, without leave of the Court, but that rule did not apply to the facts proven in this case. He told the jury that he did not fully apprehend what connection the Shuford note had with the purchase of the land.

Plaintiffs' counsel asked his Honor to charge the jury that B. P. Martin being the defendant in the execution, under which the plaintiffs purchased, he could set up no title against the plaintiffs; and Foote being allowed by the Court to defend, the plaintiffs objecting, he, Foote, had no right to set up any defence that Martin could not set up. His Honor refused to give this instruction.

It was admitted by the counsel of defendants in the argu- (416) ment, and also stated to the jury by the Court, that if, at the sale under which Foote purchased, the sheriff did not sell the portion called the "mill tract," the plaintiffs would be entitled to recover that; and also, if there was any contract or arrangement, whereby Foote bought the land for Martin's benefit, or any trust for his use or benefit, or if Foote now holds it on any trust for Martin, the plaintiffs were entitled to recover.

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

Furches, for appellant.
Folk & Armfield, contra.

BYNUM, J. If the defendant, Foote, purchased the land in dispute, as alleged, with the funds of B. P. Martin, the judgment debtor, the title did not pass, and the plaintiff would be entitled to recover. The plaintiff introduced evidence tending to establish this fact, and among other things, he proved that about the time of the sheriff's sale to Foote, he, Foote, had in his possession a note on one Shuford for one thousand dollars or more, which belonged to the said Martin, and had collected a part of the money thereon. It also appeared that after the sale and purchase by Foote, that Martin, the defendant in the execution, remained and still remains in the occupation of the premises, and further, that his receipt was endorsed on the execution for the overplus of the purchase money after satisfying Foote's judgment, neither the amount of this judgment or of the overplus appearing from the case.

There certainly was considerable evidence tending to show that Martin was the real purchaser and not Foote, and the evidence touching the "Shuford note" was natural in that inquiry, yet his Honor charged the jury "that he had not fully apprehended what connection the 'Shuford note' had with the purchase of the land."

(417) A remark of this kind falling from the Court in repeating and commenting upon, the evidence, to the jury, was well calculated to withdraw that part of the evidence from their minds, and certainly to weaken its proper weight in the chain of circumstances, tending to show that Foote had purchased the land for the benefit of Martin, and with funds in part derived from this "Shuford note."

The remark, being thus calculated to mislead and prejudice the minds of the jury, it was error, for which a *venire de novo* must be granted. The other points made in the case it is unnecessary to discuss now. This seems to us the main one.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Debnam,* 98 N.C. 719; *Withers v. Lane,* 144 N.C. 190; *Speed v. Perry,* 167 N.C. 128; *S. v. Rogers,* 173 N.C. 758; *S. v. Hart,* 186 N.C. 588.

WILBORN GERMAN AND OTHERS v. C. W. CLARK, ADMINISTRATOR OF JOHN WITHERSPOON AND OTHERS.

The entry on land that a Court can enjoin, is only an entry under force or color of legal process. It will not enjoin a mere trespass, unless irreparable damage is threatened.

GERMAN *v.* CLARK.

An administrator does not always represent the creditors of his intestate; though, as a general rule, in controversies respecting the personal property, or what from circumstances may be considered personal property, the administrator represents the creditors and next of kin. And if, in an action concerning such property, the administrator fails to set up an estoppel against certain parties claiming it, the creditors are concluded by his action.

An estoppel must be certain at least to a common intent. The subject matter and the estate to which it is sought to be applied, must be ascertained with reasonable certainty.

CIVIL ACTION, by the creditors of the intestate of the defendant, Clark, for a settlement and distribution of the estate, and in the meantime for an injunction against two of the defendants, (418) restraining them from entering upon certain land, tried before *Mitchell, J.*, at the Spring Term, 1874, of CALDWELL Superior Court.

On the trial below, his Honor granting the injunction restraining the defendants, William P. Witherspoon and Sarah A. Dula, from taking possession of a certain tract of land pending the present litigation, and also granting an order appointing a receiver, etc., the defendants appealed.

The opinion of Justice RODMAN contains a full statement of all the facts necessary to an understanding of the decision of this Court.

Folk & Armfield, for appellants.
Smith & Strong and W. P. Caldwell, contra.

RODMAN, J. The record in this case is voluminous, but the material parts of it may be stated in brief, thus:

The summons was issued 20th of May, 1869, and served on all the defendants. At Fall Term, 1869, of Caldwell Superior Court, the plaintiffs, on behalf of themselves and all other creditors of John Witherspoon, filed their complaint, setting forth that John Witherspoon died in 1864; defendant Clark became his admiinstrator in 1866; the other defendants, W. P. Witherspoon and Sarah Dula, are his heirs; the deceased died greatly indebted; his personal estate is insolvent; he died seized of sundry pieces of land; that at Fall Term, 1866, of Caldwell Superior Court, the administrator had filed a petition against the heirs for leave to sell certain lands therein specified, which had been granted, but that he had delayed to sell; it prayed that he might be enjoined from preferring among creditors, that an account might be taken, and that he be compelled to sell the lands specified in his petition. Elk Farm is not specifically mentioned in the complaint, nor does it appear to be specifically mentioned in the petition. The

defendants, W. P. Witherspoon and Dula, did not answer, and
(419) judgment was given against them for want of an answer.

Clark, the administrator, answered, submitting to an account He said that Elk Farm had not been sold by reason of a suit in Wilkes County respecting it, and that the sale of it had been suspended by order of the Court.

The Judge decreed an account, which was accordingly taken, but which it is not material further to refer to.

At Spring Term, 1874, of Caldwell Superior Court, the plaintiffs filed an affidavit reciting substantially the above facts, and they say that the heirs, W. P. Witherspoon and Dula, had brought an action in the Superior Court of Wilkes to recover possession of the Elk Farm, to which they alleged an equitable title, and that the Supreme Court, at January Term, 1874, had granted them that relief, (the case is reported in 70 N. C., 450, *Dula v. Young,*) that they threatened to take possession of the land; that it had been sold to Young by order of the Superior Court of Caldwell, as appears in the report of the case, who had made valuable improvements; that W. P. Witherspoon is insolvent and Sarah Dula a bankrupt, and that these two heirs, and the sons of Sarah Dula are largely indebted to the estate of John Witherspoon for money paid as surety for them.

And they move:

1. That a Commissioner be appointed to sell Elk Farm for the purpose of paying the debts of John Witherspoon.

2. For an injunction against W. P. Witherspoon and Sarah Dula from taking possession of Elk Farm.

3. For a receiver of the rents and profits *pendente lite.*

His Honor, the Judge below, adjudged accordingly, and the defendants Witherspoon and Dula appealed to this Court.

The plaintiffs in this Court rest their motion on a single proposition, viz: that the heirs are estopped from asserting title to the Elk Farm by the judgment for want of answers taken against them in this action as aforesaid.

Upon this proposition several observations occur:

(420) 1. No final judgment was given in this Court in the case of *Dula v. Young.* The Court expressed an opinion on the question presented and remanded the case. It does not appear that any judgment for Dula has been given below. If not, there is no ground for an injunction to prevent their entering on the land. Such entry as a Court can enjoin is only an entry under force or color of legal process. It will not enjoin a mere trespass unless irreparable damage is threatened. There are remedies for a mere trespass, both preventive

and punitory, as effectual and more appropriate than though the equitable powers of a Court.

2. If, however, the case of *Dula v. Young* has been closed by a final judgment, or if from any cause the plaintiffs in this case cannot now avail themselves in that case of the alleged estoppel, the result is that they have waived and lost it by not pleading it in due time. That action was directly to assert an equitable title to the land. If the plaintiffs were estopped to assert it, the supposed purchaser and the administrator might have set up the estoppel. It is said, however, that the creditors, not having been parties to that action by name, had no opportunity to plead the estoppel, and they are not affected by the laches of the administrator. No one contends that an administrator always represents the creditors of the intestate. Often their interests are antagonistic. But it cannot be denied, as a general rule, that in controversies respecting the personal property of the deceased, or what, from the circumstances of the controversy, must be considered personal property *pro hac vice*, as in that case the administrator represents the creditors and the next of kin. This must necessarily be so in the sense in which it is here asserted. A man cannot generally be said to represent his own creditors in his life time. Yet if a hostile claimant obtains a *bona fide* judgment against him for a piece of property, the judgment binds the title and his creditors cannot impeach it. In the same sense, an administrator represents the creditors of his intestate. It is his duty to possess himself of the whole estate for them, and there is a presumption that he discharges it. If there be an antagonism of interests, or fraud, or collusion with (421) the claimant, these circumstances would take a case out of the general rule. Here nothing of that sort is suggested. The creditors might have made themselves parties if they had desired. *Hardee v. Williams*, 65 N. C., 56; *Moore v. Shields*, 68 N. C., 327. If these difficulties were out of the plaintiffs' way, the question would be reached, can the judgment desired to be set up as an estoppel, be considered one?

It being by default is immaterial. Taking it in connection with the complaint, does it adjudge that the Elk Farm descended to W. P. Witherspoon and Sarah Dula as the heirs of John Witherspoon. On referring to the complaint it will be seen that Elk Farm is not specifically or certainly mentioned in it. It says that in 1866 the administrator filed a petition praying for leave to sell "certain tracts of land specified in his said petition, which said specification embraced all the lands of which his said intestate was seized and possessed at the time of his death, excepting the 'Kirby land,' and some smaller tracts." The petition is not referred to as a part of the complaint and is not

set out on the record, and that being so, is immaterial for the present, whether in fact it particularly described Elk Farm or not. Indeed, the object of the action was not to obtain a judgment that certain lands had descended and should be sold. It was assumed that, that had been obtained in the action by the administrator against the heirs, in which it was the direct purpose. The object was to obtain a judgment restraining the administrator from preferences among the creditors, directing an account, and hastening the sales which he had been authorized but delayed to make.

An estoppel must be certain at least to a common intent. The subject matter and the estate to which it is sought to be applied, must be ascertained with reasonable certainty. It cannot be said from the record in this case, except upon conjecture, that Elk Farm was any part of the subject matter of the judgment by default. It is (422) true that the defendant Clark, in his answer, implies that Elk Farm had been ordered to be sold under the petition filed in 1866; but that cannot affect his co-defendants. The judgment by default is based on the complaint alone, and not on his answer. He further says that the sale was suspended by order of the Court.

If therefore the present plaintiffs had duly pleaded in the action of *Dula v. Young,* the judgment which they now rely on, the plea would have been bad for uncertainty.

4. If in the action by, the administrator against the heirs in 1866, there had been a judgment that the intestate died seized of Elk Farm, which descended to the defendants as his heirs, and an order of sale, that would have created an estoppel. *Hardee v. Williams,* 65 N. C., 56.

As the record in that action is not before us for any purpose, we cannot say how that was. But if such had been the case, it is scarcely to be supposed that the defendants in *Dula v. Young,* would have overlooked so clear a defence. If they did, it was waived and lost, for defences must be made in due time, or there would never be an end to litigation.

5. As to the allegation that W. P. Witherspoon and Sarah Dula, *and her three sons,* are largely indebted to the intestate, it is not a precise allegation that W. P. Witherspoon and Sarah Dula are so indebted; the debt may be entirely that of her sons, who have no interest in the land in question. But taking it to that effect, it cannot be contended that an administrator can seize the lands of an heir for a debt alleged to be owing to the ancestor, except in the usual way by judgment and execution.

6. As to the allegation that Young has put valuable improvements on the land since his purchase. It will suffice to say that he is no party to this action. If he is entitled to any remedy, it would seem that it

ought to be sought in the case of *Dula v. Young.* The case in that action says that he bought under an order of sale which was made "without prejudice" to the rights of the heirs. Certainly a (423) singular order for a Court to make; the sale was only of a law suit. We express no opinion as to his rights, except that they cannot be considered in this action.

These observations lead us to the conclusion that the order of his Honor, the Judge below appointing a commissioner to sell Elk Farm was erroneous.

1. As no demand for the sale of that certain piece of land was made in the original complaint, the order embraced a subject which was not in the litigation. If the affidavit and motion at Spring Term, 1874, are to be regarded as an amended and supplemental complaint, amended by the insertion of Elk Farm as a piece of land which descended, etc., and supplemented by the statement of new matter, viz.: the supposed judgment of this Court respecting the title; then the defendants, W. P. Witherspoon and Dula should have had an opportunity of answering the new matter.

2. The affidavit informed his Honor either that there was an action then pending in Wilkes Court, (*Dula v. Young,*) in which the title of that land was directly in issue, or that it had been adjudged in that action, that John Witherspoon was a mere trustee of the land for his wife and her heirs. Upon the latter supposition, his order is in direct violation of a judgment of Wilkes Court, made upon the very issue upon which he now undertakes to decide, and between substantially the very parties to the case before him, and brought particularly to his attention by the plaintiffs.

For the same reasons we think his Honor was in error in allowing the second and third motions.

PER CURIAM. Judgment reversed and case remanded.

Cited: Frink v. Stewart, 94 N.C. 586; *Puryear v. Sanford,* 124 N.C. 281.

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(424)

DANCY, HYMAN & CO. v. O. HUBBS, SHERIFF, ETC.

A plaintiff, whose execution has been levied on the defendant's land, and a sale advertised, who postponed the sale, does not thereby waive or lose the priority of his lien in favor of a junior execution.

RULE on defendant, a sheriff, to show cause why the proceeds arising from the sale of certain land, under two executions, should not be appropriated to the junior execution in favor of plaintiffs, heard by *Clarke, J.*, at Chambers in CRAVEN County, 29th May, 1874.

At the hearing, his Honor found the following facts:

R. G. Lewis obtained a judgment in Craven County against H. J. B. Clark, *et al.*, which was docketed in said county on the 23d September, 1872; that on the 2d day of January, 1873, an execution was issued thereon and was levied on the land of Clark, and returned to Court; on the 18th April, 1873, an *alias* execution issued which was levied on the same land, and was in the hands of the sheriff on the 7th day of June, 1873, and which was also returned to Court with the following endorsement:

"The lands levied on, advertised according to law, and sold to R. W. Hyman, for the sum of $700, proceeds of sale paid into Court on the 3d day of October, 1873."

O. HUBBS, Sheriff."

That Dancy, Hyman & Co., had obtained a judgment against the said H. J. B. Clark, in Craven County, docketed on the 27th January, 1873; that on the 13th May, 1873, execution thereon issued and was in the hands of the sheriff on the 7th day of June, 1873, and was levied on the aforesaid lands. This execution was returned to Court with the following endorsement:

(425) "The lands levied on, advertised according to law, and sold to Robt. W. Hyman for the sum of $700," etc.

His Honor further found, that the judgment of Lewis was regularly transferred to W. Whitford on the 7th June, 1873, for value; and that at the instance of Whitford, the sheriff was directed to postpone the sale advertised on that day, the execution remaining in the sheriff's hands all the while.

Upon consideration of the foregoing facts, the sheriff was directed by the Court to appropriate the money in his hands to the satisfaction of the execution in favor of Lewis, and the balance, if any, to the execution of the plaintiffs.

From this order, the plaintiffs appealed.

Haughton and Smith & Strong, for plaintiffs.
Green and Mason, contra.

RODMAN, J. It is not denied by the plaintiffs, that Lewis at one time had a priority of lien over them, by reason that his judgment was first docketed. *Dougherty v. Logan,* 70 N. C., 548.

But it is contended that he waived or lost this priority by the direction which he gave the sheriff on 7th June, 1873, to defer the sale which had been advertised to be made on that day.

There are *dicta* in the cases cited by the counsel for plaintiffs, which say that if a plaintiff in a senior execution defers a sale in fraud of, or to the injury of, a junior execution, he thereby loses his priority of lien.

But it is difficult to see how by such conduct he could either defraud or injure the junior creditor, who had a right notwithstanding any directions to the sheriff from the senior creditor, to proceed to sell under his execution. Under such a sale, it was held prior to the Code of Civil Procedure, that the purchaser acquired a title to the property free from the lien of the senior execution, and it therefore in any (426) event sold for its full value. The contest between the two creditors was simply upon the distribution of the fund; and it would seem hard upon the senior creditor to hold that he had waived his right to the fund by a direction temporarily to defer the sale, when no waiver was intended, and when it does not appear that the property sold for any less than it would have done at an earlier sale.

In the present case, no injury to the junior creditor could have been intended, for it does not appear that Lewis knew of the plaintiffs' execution. And it cannot be said that the plaintiffs were in fact injured in any way. They were not delayed in making a sale. The execution of Lewis was not withdrawn, but remained in the sheriff's hands, and he actually did sell under both executions. So that however the law may now be in a case where a sale is made under an execution issued upon one only of several docketed judgments, no question of that sort arises here. The purchaser clearly got a title free from any lien, and there was nothing to prevent the property from selling for its full value.

We think Lewis did not lose his right to priority of payment out of the fund.

PER CURIAM. Judgment affirmed. As the fund is in the Court below, this opinion will be certified in order, etc.

(427)

C. H. WILLIAMS v. ALEX'R. AND GREEN WILLIAMS, ADM'RS., ETC.

Section 481, Code of Civil Procedure, is repealed by Sec. 134, Chap. 45, Bat. Revisal, which latter is the only and exclusive remedy to recover a distributive share of an estate.

A writ of *Certiorari* can only issue to the Court wherein the cause is pending. Therefore, when the cause has been carried by appeal to the Supreme Court, the petition for the writ to the Court below should be dismissed.

This was a PETITION for a *certiorari*, made to his Honor, *Judge Tourgee*, 5th March, 1874, at Chambers, upon the hearing of which the writ together with a *supersedeas* was issued returnable and heard at Spring Term, 1874, of PERSON Superior Court.

The points raised and the facts relating thereto, are fully set out in the opinion of the Court.

Upon the hearing, his Honor granted the writ and plaintiff appealed.

Jones & Jones, for appellant.
J. W. Graham, contra.

BYNUM, J. This case was here at the last term, and is reported in 70 N. C., 665. A brief history of it is this: Under Bat. Rev., Chap. 45, Sec. 134, a petition was filed in the Probate Court of Person County, by the plaintiff, as one of the next of kin of Haywood Williams, deceased, against the defendants, his administrators, for an account of the estate and the payment of his distributive share thereof. The defendants submitted to an account, and such proceedings were had in the case, that on the 17th September, 1872, a final judgment was rendered thereon against the defendants. On the 5th November, 1872, the defendants filed in the same Court a petition to re-open and
(428) re-hear the case, and let in more testimony. That petition was answered by the plaintiff, and upon a hearing of the parties, the Judge of Probate refused to re-open, and dismissed the petition; from which judgment the defendants appealed to the Judge of the district, who after fully considering the case, affirmed the decision of the Probate Court on the 8th February, 1873, and dismissed the appeal. From this judgment, the defendants appealed to the Supreme Court, and at the last term thereof, 70 N. C., 665, the judgment below was affirmed and the petition dismissed.

On the 28th February, 1873, and pending their appeal to the Supreme Court, the defendants filed this petition to the Judge of the district for a writ of *certiorari*, to be directed to the Judge of Probate, commanding him to certify to the Superior Court a full transcript of the record and proceedings in the cause, had in his Court. And in this petition some

new facts appear, which were not disclosed in the record of the case here at the last term, to wit; that an appeal was prayed and granted by the Judge of Probate from his rulings on the exceptions filed and from his final judgment, rendered on the 17th of September, 1872. That appeals were taken by both parties, and when they came on to be heard by the Judge of the district, on the 3rd Monday in October, 1872, his Honor refused to entertain the appeals, because they had not been perfected as the law prescribes, and no case was stated, although the report, exceptions and judgment, were before him. His Honor, at the same time, "proceeded to state certain rules of practice for the Court of Probate, and among others that a petition to re-open and re-hear causes might be preferred in that Court." When the case was thus remitted to the Court of Probate, and when the petition to re-open and re-hear, was afterwards made in that Court, it was not alleged to be in consequence of the suggestion of the Judge, nor does the application for the *certiorari*, allege that the petitioners were misled by his Honor, nor does it allege any reason why the appeal from the judgment of the Court of Probate, was not perfected and prosecuted, when the case was remitted to the Court, by the refusal of his Honor to hear it, (429) because it was not properly before him. But the case does disclose facts from which the legal inference follows, that the appeal was abandoned. For instead of appealing from the refusal of his Honor to hear the case, and remitting it back to the Court of Probate, and instead of attempting to perfect the appeal when the case came back, the defendants adopted another remedy which was open to them, and which they believed would afford them all the relief and more than could be attained by prosecuting the appeal. Their petition to re-open, therefore, set forth every material fact afterwards set forth in the petition for a *certiorari*. The whole case, whether of law or fact, as it now appears in this case, was presented in the proceedings on the petition to re-hear, was fully debated by counsel, carefully reviewed by the Judge of Probate, and from his judgment thereon, on appeal, was again passed upon by the district Judge, and finally by this Court, and the Judgment of the Court of Probate, was affirmed. In the argument Mr. Graham took the ground that the plaintiff was proceeding under Section 481, C. C. P., and that therefore the Court of Probate could only audit and record the account, and that no final judgment for the distributive share could be rendered. In this he is in error. Section 481, C. C. P., is repealed by Bat. Rev., Chap. 45, which has revised and consolidated the whole statute law on the subject of Executors and Administrators, and therefore Sec. 481, C. C. P., is omitted in the Revisal. The proceeding here is under Bat. Rev., Chap. 45, Sec. 134, which is the only and exclusive remedy to recover a distributive share

of an estate, and in that view the whole trial was conducted by both parties.

The case then stands thus: Pending the appeal to the Supreme Court in the application to re-open and re-hear, and which carried the record of the whole case to that Court, the defendants apply to the district Judge for a writ of *certiorari,* to be directed to the Court of Pro-
(430) bate, to certify the proceedings and judgment rendered in that Court, to the next term of the Superior Court.

Now a writ of *certiorari* can only issue to the Court where the cause is depending. F. N. B., 145, 242; and by the appeal the cause was no longer in the Probate Court, but was in the Supreme Court, and the Court will refuse to grant a *certiorari* to the defendant, pending an appeal by him. 2 T. R. 196 n. So it would seem the writ was improvidently issued in this case. In our practice the writ of *certiorari* lies for two purposes: 1st, as a writ of false judgment to correct errors of law, and 2d, as a substitute for an appeal. In either case, it can issue only to the Court where the judgment is.

No error of law is alleged as the ground for the writ in our case, therefore, it is applied for here as the substitute for an appeal from the judgment of the Court of Probate, rendered on the 17th of September, 1872.

In order to entitle them to the writ as a substitute for an appeal, the defendants must show, either that they were improperly deprived of the appeal, or that they have lost it without their default and have merits. *Burton ex parte,* 70 N. C., 135, and cases there cited.

In their petition setting forth the grounds of application for the writ, they do not allege that they have been improperly deprived of their appeal by the action of the Judge or otherwise. They are not then entitled to it on that ground. Neither are they entitled to the writ on the ground that they were deprived of their appeal by accident, for they make no such allegation. The only ground on which they claim the benefit of the writ, is that they have merits. But that of itself is an insufficient ground, for it is well settled that both merits and the improper or accidental deprivation of the right of appeal must concur.

The parties have had the full benefit of the remedies provided by law and according to the course of the Courts, except where they have lost them by their own default; and if the Courts should undertake to
(431) afford remedies for the defaults of suitors, there would be no end to litigation. *Interest reipublicæ ut sit litium finis.*

But if we should pass by these fatal objections to this action, and examine the merits of the case as presented by the defendants, we are still met by insuperable difficulties. The main ground for relief is that the Judge of Probate closed the account without allowing them an

opportunity to procure the testimony of one Grimstead, which would have materially changed the result in their favor. But the answer of the plaintiff and the affidavit of N. N. Tucker, the Judge of Probate, are conclusive.

1. That Grimstead was never summoned by the defendants. 2. He was examined as a witness by the plaintiff, and denied that he knew anything except what was contained in a certain book in the defendant's possession. 3. That he was discharged as a witness on the officious motion of the defendants themselves. 4. That the said book was produced on the motion of the plaintiff and after much prevarication and a fraudulent attempt of the defendants, to suppress and conceal its contents, was examined, and furnished the very evidence which they alleged they could disprove by Grimstead; and 5. The account was closed, on the motion of the defendants themselves. It was, therefore, an exercise of sound discretion in the Court, not to re-open to let in the evidence of that witness. The remaining causes assigned for the writ, are that the Judge of Probate improperly charged the defendants with the satisfied debt, and the Brooks and Robertson debts. The Court cannot see any error upon the record in this cause, and the petition fails to point out wherein the error consisted. But the whole evidence was a part of the case decided at the last term of this Court, and was then carefully examined and considered, and the conclusion of the Court was, that the judgment of the Court of Probate was sustained by the evidence.

Our conclusion is, that both upon the law and the fact of the case, the motion of the plaintiff to dismiss the *certiorari* should have been allowed.

It may be that this is a hard case, and that the accountability (432) of the defendants has been rigorously enforced by the Judge of Probate, but upon a thorough investigation of the case, it does not appear so to us.

The law must have its course, and there must be an end of the litigation.

PER CURIAM. Petition dismissed.

Cited: S.c., 74 N.C. 2; *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 737; *Pue v. Hood, Comr. of Banks*, 222 N.C. 312.

BENJ. AYCOCK, TO THE USE OF B. H. ISLER, v. F. B. HARRISON AND OTHERS.

Notice of an application to a Court for leave to issue a *ven. ex.*—the judgment having been obtained in 1861, and the last execution thereon returned more than three years from the date of such application, and the defendant therein being dead—must be served on the personal representative of such defendant.

Where a party to an action dies after judgment, the action abates, just as it would by his death before judgment, unless it be revived by or against his personal representative. All executions tested after its abatement and before its renewal, would be irregular, and any lien acquired by such executions would be destroyed.

This was a MOTION for a *venditioni exponas* to issue to the sheriff of Craven County, heard by his Honor, *Judge Clarke,* at the Fall Term, 1874, of WAYNE Superior Court.

The facts are substantially the following:

At August Term, 1861, of the Court of Pleas and Quarter Sessions of Wayne County, the plaintiff Aycock recovered a judgment against the defendants, F. B. Harrison, J. M. F. Harrison and W. A. Cox, for $7,488.41, upon which judgment the following executions issued:

(433) *Fi. fa.* to the sheriff of Jones County, tested August Term, 1861, returnable to November Term, 1861. This execution was never returned.

Alias fi. fa. to the sheriff of Wake, tested November Term, 1862, returnable to February Term, 1862.

Alias fi. fa. to the sheriff of Wake, tested November Term, 1862, and returnable to November Term, 1863.

Alias fi. fa. to the sheriff of Wake, tested November Term, 1863, and returnable to November Term, 1864.

Alias fi. fa. to the sheriff of Jones, tested November Term, 1864, and returnable to November Term, 1865. This execution was never returned.

Alias fi. fa. to the sheriff of Jones, tested November Term, 1865, and returnable to November Term, 1866. Upon which the sheriff returns that he transmitted the writ to the plaintiff, to be handed to his successor in office, etc.

Also an *alias fi. fa.* to the sheriff of Craven, tested November Term, 1865, and returnable to May Term, 1866. This execution issued against the goods and chattels of the defendant, J. M. F. Harrison, in the hands of J. D. Flanner, his administrator, he having died May, 1864. Under this the sheriff of Craven levied on 370 acres of land in that county, and several lots in Newbern, the levy being dated 1st May, 1856.

A similar *fi. fa.* against all the defendants, tested of the same term and returnable to May Term, 1866, issued to Jones County, under which

the sheriff levied on 2,600 acres of land as the property of F. B. Harrison.

At May Term, 1866, a *venditioni exponas* issued to sheriff of Jones, returnable to August Term, 1866, commanding him to sell the lands levied on, etc. Upon which sheriff returns, "No sale on account of Stay law."

A notice issued to Virginia Harrison, the widow of J. M. F. Harrison and guardian of his children and heirs-at-law, that the plaintiff would, at Fall Term, 1873, of the Superior Court, move for a *ven. ex.* to the sheriff of Craven to sell the land levied on 1st of May, 1866.

The motion was made, and objected to by her, the said widow, (434) for herself and children. His Honor allowed the motion and ordered the *ven. exponas* to issue. From this order defendants appealed.

Battle & Son and Seymour, for appellants.
Isler, contra.

RODMAN, J. This is an application to the Superior Court of Wayne at Fall Term, 1873, to be allowed to issue an execution upon a judgment taken in 1861, and the last execution upon which was returnable more than three years before. The object of the Code in forbidding an execution under such circumstances is to require the plaintiff to show, by his oath or otherwise, that the judgment has not been satisfied, and to give the adverse party an opportunity of showing that it has been. Hence notice to the adverse party is required. C. C. P., Secs. 255, 256, (Rev. Code, Chap. 31, Sec. 109.)

When the adverse party is dead at the time of the application, the same reason for notice to his personal representative exists as does for notice to him if he be living. In the present case there was no notice to the personal representative of Harrison, although there was to his widow and heirs. This of itself would be sufficient ground for refusing the motion, unless the notice to the administrator is rendered unnecessary by the circumstances, as the plaintiff contends that it is. The plaintiff contends that it is unnecessary, because he has a specific lien on certain lands in Craven County, which belonged to Harrison during his life, by virtue of a levy under execution tested of November Term, 1865, returnable to May Term, 1866, of Wayne Court, and levied by the sheriff of Craven on said lands. If that were so, it would not dispense with notice of the present motion to the administrator, to give him an opportunity of showing that the judgment had been satisfied.

But the sections of C. C. P. above cited are not the only law which applies where the defendant has died before any lien had been acquired

upon his property. As these proceedings (with the exception of
(435) the present motion,) were before 1868, their regularity and effect must be decided, upon the law in force at their dates. By that law if a defendant died after judgment and an execution issued tested before his death, the sheriff might before the return day, levy upon and sell his property, notwithstanding his death. But if the teste of the execution was after his death, the execution was irregular without a previous *scire facias* to the heirs. *Samuel v. Zachary,* 26 N. C., 377. And any levy made upon such an execution was a nullity.

When a party to an action dies after judgment the action abates, just as it would by his death before judgment, unless it be revived by or against his personal representative, as was provided by Rev. Code, Chap. 1, Sec. 1. Of course all executions tested after its abatement and before its revival would be irregular. The abatement would not destroy the lien acquired by a regular levy. The judgment of revival of the abated judgment would provide for its revival with the incident of the lien. *Smith v. Spencer,* 25 N. C., 526. As to such cases since C. C. P., see *Murchison v. Williams,* at this term. In the present case, the plaintiff has omitted to take the regular course to revive his judgment, which abated after the lapse of two terms from the death of the defendant. Supposing that he kept up a regular succession of executions, after obtaining his judgment in 1861, yet no execution issued to Craven County until the one tested in November, 1865. This was not connected with the preceding executions issued to Jones and Wake. It was, so far the property in Craven was concerned, an original *fieri facias. Smith v. Spencer,* 25 N. C., 526; *Hardy v. Jasper,* 14 N. C., 158. Being after the action had abated by the death of the defendant, it was irregular and the plaintiff acquired no lien by the levy under it.

Ordinarily, upon a motion for leave to issue execution under C. C. P., Secs. 255, 256, if it appears that the judgment has not been satisfied, the Court will allow the party to take out an execution which may be authorized by the judgment. It will not undertake to decide in
(436) advance what rights will be acquired by a sale under it, as such a decision would be necessarily *ex parte.* But in the present case, the motion is for a particular form of execution, which presupposes a lien on the land, and the Court, before allowing it, is obliged to consider whether there is any such lien as against the heirs of the defendant, although its decision would, of course, bind no one not a party.

We are of opinion that no lien exists.

Let this opinion be certified.

PER CURIAM. Judgment below reversed, and motion refused.

Cited: Lynn v. Lowe, 88 N.C. 481.

B. M. ISLER v. D. A. MURPHY, EX'R., ETC., AND OTHERS.

The receipt of an attorney, not entered of record as a part of the proceedings of the Court, nor by its direction, is no part of the record; and if such receipt was improperly placed on the record, the Court should order its erasure, as being no part of the record proper.

When an issue of fact is raised, involving the merits of the controversy, and the defendant, in apt time, demands a jury to try that fact, *it is error* in the presiding Judge to refuse such demand, and try the issue himself.

In a motion for an execution upon a judgment obtained in the lifetime of the defendant's testator, and which is a lien upon his lands, his heirs are necessary parties: and if some of them are infants, some discreet person who will act, should be appointed guardian *ad litem* for such infants, and defend as the law prescribes.

This was a MOTION in the cause to amend the record, and for leave to issue an execution, heard before *Clarke, Judge,* at the Spring Term, 1874, of WAYNE Superior Court. (437)

The facts are fully stated in the opinion delivered by Justice BYNUM

From the ruling of his Honor below, the defendants appealed.

Faircloth & Granger, for appellants.
Battle & Son, and W. E. Clarke, contra.

BYNUM, J. On the 5th of January, 1869, the testator of the defendants executed to the plaintiff, his bond for the sum of $4,312.26, and on the 25th of the same month confessed judgment thereon, and on the 27th day of January, executed a mortgage on land to secure the payment of $4,332.33 to be paid in two annual installments. On the 14th of August, 1869, S. W. Isler, the general agent of the plaintiff, and who had transacted the whole business, entered upon the judgment docket a receipt upon the said judgment in the following words, viz.:

"Received of J. T. H. Murphy the amount of this judgment and interest, and my fee and the plaintiff's cost.

S. W. ISLER, Attorney for Pl'ff."

The testator died in the Spring of 1873, leaving D. A. Murphy his executor, and the other defendants, his heirs-at-law. The plaintiff served a notice on the defendants, returnable to the Spring Term of the Court, 1874, and at that term, moved the Court to amend the record by striking out the said entry of satisfaction of the judgment, and for leave to issue execution thereon, pursuant to C. C. P., Section 256.

This was resisted by the executor on two grounds:

1. For that the infant heirs were not made parties to the proceeding; and

2. For that the judgment had been discharged by the mort-
(438) gage subsequently taken in satisfaction thereof, of which the foregoing receipt of the attorney was evidence.

The plaintiff introduced affidavits tending to show that the judgment had not been paid, and the defendant affidavits that it had been paid, and upon the issue thus raised the defendant demanded a trial by jury. His Honor refused a jury trial, but tried the issue himself, and on the affidavits filed, found, as a fact, that the judgment had not been discharged, but was still unpaid and due, and ordered the record to be amended by erasing the receipt of the attorney, and also that execution should issue upon the judgment. The defendant appealed from these several orders.

I. It is the duty of the Court to make its own record, and the receipt of the attorney thereon not having been entered as a part of its proceedings, or by its direction was no part of the record. *Austin v. Rodman,* 8 N. C., 71; *State v. Corpening,* 32 N. C., 58; *Patterson v. Britt,* 33 N. C., 383. If, however, the entry was improperly there, it was not error to order its erasure, as being no part of the record proper. *Phillipse v. Higdon,* 44 N. C., 383; Mayo v. Whitson, 47 N. C., 231; *Galloway v. McKeithan,* 27 N. C., 12.

The main question made by the parties, and the one which went to the merits of the whole case, was the issue of fact, to wit: whether the judgment had been satisfied, and when? Upon this issue, the defendant demanded a jury to try the fact, was he not, as matter of right, entitled to it?

The distinction between this case and *Foreman v. Bibb,* 65 N. C., 118, is that in the latter no jury was demanded upon the issues of fact, which were similar to this, but the issues there were submitted to the Court for trial upon the proofs. So the case of *Moye v. Cogdell,* 66 N. C., 403, is not in point, because there although both parties submitted the issues of fact to the Court, yet the Judge of his own motion submitted the issues to a jury, and it was held to be within his discretion to do so. In *Redman v. Redman,* 65 N. C., 546, it was held that although, under the old equity practice of granting of an issue, is a discretionary
(439) act of the Court, yet where it appears to the Court, upon the proofs, that the fact in controversy is very doubtful, the Court, in the exercise of a sound legal discretion, ought, upon the application of one of the parties, to direct issues, submitting the questions of fact to the jury, and that a refusal to do so, was error. In that case an account was ordered, and, in taking it a question arose, whether $500 in gold, belonged to the testator or to the defendant, Thomas, who

demanded a jury. The Court there say "that a mistake in the exercise of the discretion, is a just ground of appeal; and if an issue be refused and the appellate Court should think that the contrary decision would have been a sounder exercise of discretion, it will rectify the order of the Court below accordingly." In *Keener v. Finger,* 70 N. C., 35, cited by the plaintiff, the parties submitted to an account, and not having demanded a jury trial in *apt time,* were held bound by the finding of facts by the Court. In *Heilig v. Stokes,* 63 N. C., 612, the distinction is made between "questions of fact," which may be determined by the Court, and "issues of fact," which it is the constitutional right of parties to have submitted to a jury, if a trial is demanded in apt time.

The plaintiff here demands of the defendants, a large debt, and that an execution shall be issued to collect it. The defendants, in effect, plead payment or an accord and satisfaction. An issue of fact is thus raised involving the merits of the whole case—as much so as if the defendant had been sued on the bond, and had put in the plea of payment. We can hardly conceive a clearer case for the intervention of a jury. And when we look into the testimony which is made a part of the record, we find it to be conflicting and positive, and by no means the weakest, on the part of the defendants. The demand of a jury, therefore, having been made at the earliest stage of the case, and in apt time, it was error to disallow the motion, and that too, without reference to the fact that it was a motion in the cause only, for though it be a motion in the cause, it is one that goes to the ground of (440) the action and is conclusive of the whole controversy.

II. The judgment was obtained in the lifetime of the testator, and is a lien upon his lands, which descended thus to his heirs, *cum onore.* If the judgment cannot be satisfied out of the personal estate, the burden must fall upon the land; the heirs, therefore, have the right to show that this encumbrance upon their estate has been removed. They are directly interested and are necessary parties to this litigation. But a part of them are infants, and although they were served with notice, and although the Court appointed the defendant, D. A. Murphy, their guardian, *pendente lite,* he expressly refused to act; so their rights are not defended. It was the duty of the plaintiff to have had appointed as guardian some discreet person, who was willing to act and defend as the law prescribes. Bat. Rev., Chap. 17, Secs. 59 and 82.

There is error. The judgment is reversed, and the cause remanded, to the end that further proceedings be had, in accordance with the opinion.

PER CURIAM. Judgment reversed.

Cited: S.c., 83 N.C. 217; *Davis v. Rogers,* 84 N.C. 416; *Baker v.*

Cordon, 86 N.C. 120; *Pasour v. Lineberger,* 90 N.C. 162; *McCanless v. Flinchum,* 98 N.C. 363; *Faison v. Hardy,* 114 N.C. 61; *Goode v. Rogers,* 126 N.C. 63; *Cherry v. Woolard,* 244 N.C. 612.

OWEN G. SCHEHAN v. JOHN MALONE & CO.

Parties are concluded by facts contained in the statement of the case for this Court. Therefore, where a defendant excepts to the report of a Commissioner because he did not report certain evidence, and the case shows that the evidence was reported, his exception was properly overruled.

And where the exception is, that the Commissioner did not admit certain evidence, and the case does not show that such evidence was competent or material, the exception will be overruled.

Application for a jury, not made in apt time, is not a matter of right, but is addressed to the discretion of the Court, and is not the subject of review.

An answer denying "the said complaint and each and every allegation contained therein, and" demanding "judgment against the plaintiff for their costs," etc., is a sham plea, which the Court below should have stricken out on motion.

(441) CIVIL ACTION, on a contract, tried before *Mitchell, J.,* upon exceptions to the report of a Commissioner, at the Spring Term, 1874, of IREDELL Superior Court.

During the progress of the cause it had been referred to a Commissioner to state an account, and upon the coming in of his report, the defendants filed exceptions thereto. Upon the hearing, his Honor overruled the defendants' exception and denied his application for a jury, whereupon defendants appealed.

The facts necessary to an understanding of the points decided, are fully set out in the opinion of the Court.

Folk & Armfield, for appellants.
Caldwell and Furches, contra.

BYNUM, J. The case comes here by appeal from the judgment of the Court below, overruling the exceptions of the defendants to the report of the Commissioner.

1. The first exception is, that he failed to report the evidence of the defendant, Wilson, in regard to the account-book, and the absence of the clerk, Fennel.

The answer is, that the case stated for this Court, shows that the

evidence was reported, and the defendants are concluded thereby. But the omitted evidence, as set forth in the affidavit, discloses no fact material to the defence. This exception was, therefore, properly overruled.

2 and 4. The second and fourth exceptions, seem to embrace the same matter, to wit: That the Commissioner failed to report the evidence of Wilson, in regard to the usurious interest paid by him, to one Simonton, on a draft drawn by plaintiff on the defendants and payable to Simonton; or to allow him credit therefor. The answer to this is, that the case sent up contradicts this exception, by stating that (442) all of Wilson's testimony was reported. But taking Wilson's version of this omitted evidence, and it shows only that this interest paid by him, was on his own debt, for money which in effect, he borrowed in this way from Simonton, to make a payment on his debt to the plaintiff. These exceptions were properly overruled.

3. That the Commissioner, did not admit in evidence, the books referred to in the first exception.

Answer. The case does not show that they were competent, and if so, that they were material to the defence. This exception was properly overruled.

5. That he admitted in evidence, the contract between plaintiff and defendants, when it had been altered in a material part.

This exception is unsupported by the facts, nor is it even suggested wherein a material alteration, or any, was made, and by whom. Each party had duplicates of the contract, why did not the defendants correct the error or fraud, by introducing their duplicate in evidence? His Honor ruled correctly on this exception.

6. He allowed the plaintiff pay, before the estimates were made, as provided by the contract. The answer here is, that the case does not support this exception, and it should have been overruled, as it was.

At the final hearing, the defendants applied for leave to put in another and fuller answer to the complaint, and also asked leave to make an issue for the jury; both of which motions were disallowed.

It has been often held by this Court, that such applications, made at this stage of the case, and not in apt time, are not matters of right, but are addressed to the discretion of the Court, and are not the subjects of review here. It would have been an extraordinary indulgence, in the Court below, to have allowed these latter applications at the very last stage of the litigation.

Before concluding, we would call attention to the pleadings (443) in this case.

The complaint sets forth the cause of action with precision, detailing in separate allegations, the particular facts constituting the cause of

action, most of which were as much within the knowledge of the defendants as of the plaintiff. The answer of the defendants, nevertheless, is in these words: "They deny the said complaint and each and every allegation contained therein and demand judgment against the plaintiff for their costs in this action." This is the whole answer.

In *Flack v. Dawson,* 69 N. C., 43, the answer was substantially the same as in this case, to wit: "The defendants answer, for a first defence, that no allegation in the complaint is true." The Court there says, "The first plea is evidently not a compliance with *C. C. P., S.* 100. The answer of the defendant must contain,

1. "A general or specific denial of *each* material allegation," etc. That is to say, it must deny either the whole of *each* material allegation, or some material and specific part thereof.

The plea disregards the best known and most important rules of pleading. It professes to put in one issue, several matters of fact, some of which are triable by the Court and others by a jury. Such a plea is not issuable. It is a sham plea, which the Court below would have stricken out on motion. *C. C. P., Sec.* 104.

The very purpose of the Code is defeated, which is to produce an issue upon every material allegation, by having a distinct, separate and precise answer to each separate and material allegation. This object cannot be effected by lumping all the allegations together, and then by giving one lumping answer to the whole. As the complaint must contain a plain and concise statement of the facts constituting the cause of action; and each material allegation must be distinctly numbered, so the answer must be co-extensive, and contain a general or specific denial of each material allegation which is controverted,

(444) distinctly numbered in a corresponding manner with the allegations of the complaint. By this course, confusion will be avoided, immaterial matters eliminated, and issues produced with certainty and precision, and trials expedited.

Nothing less than this will satisfy the Code or comply with the rulings of this Court.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: S.c., 72 N.C. 58; *Vestal v. Sloan,* 83 N.C. 556; *McPeters v. Ray,* 85 N.C. 465; *Rumbough v. Imp. Co.,* 106 N.C. 465.

JAS. H. CHADBOURN AND ANOTHER v. THOS. R. WILLIAMS AND THE MECHANICS' BUILDING AND LOAN ASSOCIATION.

The lien of a plaintiff, who furnished materials for building, is not avoided, because in the notice thereof, filed with the Clerk, it is made to attach on two distinct lots separated by a street.

The notice of a lien required to be filed, since the Act of 1869-70, Chap. 206, Sec. 4, should be filed in the office of the Clerk of the Superior Court; although the materials began to be furnished before that act went into effect, when the law of 1868-69 was in force.

A lien attaches from the time the materials begin to be furnished, and the notice relates back to that time.

CIVIL ACTION, to enforce a lien for building materials, originally brought against Williams, tried before *Cloud, J.*, at the Special (January) Term, 1874, of NEW HANOVER Superior Court.

The following are the facts material to the questions raised in the Court below and decided in this Court:

The defendant, Williams, owned two half lots in the city of Wilmington, to wit, the Eastern half of lot, No. 5, of square 308, and the Western half of lot, No. 5, of square 309, which do not adjoin, but are separated from each other by Seventh street.

Desiring to build on them, he applied to the plaintiffs for lumber, which they agreed to furnish, and accordingly commenced (445) furnishing on the 16th October, 1869, and continued to furnish until the 24th September, 1870, when their bill for materials amounted to $1,420.12. With the lumber, etc., so furnished, Williams built upon the half lot on Square 309, three small dwelling houses, with separate inclosures; on the half lot on square 308, three small dwelling houses and a store, all with separate inclosures. On the 7th October, 1870, the plaintiffs filed in the Clerk's office a notice of lien, of which the following is a copy:

STATE OF NORTH CAROLINA,
County of New Hanover.

J. H. Chadbourn & Co., claim fourteen hundred and twenty 12-100 dollars, for materials furnished under contract for Thomas R. Williams, for houses on pieces of land situated in the Township of Wilmington, County and State aforesaid, say part lots 5, block 308, between 6th and 7th streets, and part of lot 5, block 309, between 7th and 8th, city of Wilmington.

Dated at Wilmington, this 7th day of October, 1870.

J. H. CHADBOURN & CO., [Seal.]

Certain persons in Wilmington were associated together as a joint stock company, under the name of The Mechanics Building and Loan Association, and by mortgage duly proved and registered, on the 5th day of January, 1870, the defendant, Williams, conveyed the western half of lot 5, square 309, and the western half of the eastern half of lot 5 of square 308 to three trustees, by way of mortgage to secure an advance of money then made to him by said Association. At the time of the execution of this mortgage, the officers of the said Association had information that plaintiffs had furnished materials for the buildings on the said lots. The said Association was duly incorporated under the act, 26th March, 1870, and by permission of the Court is allowed to defend this action. On the 19th June, 1872, the
(446) trustees assigned to the Association the mortgage made to them by Williams.

On the 27th July, 1870, Williams conveyed the eastern half of said eastern half of lot No. 5, of square 308, to said Association by way of mortgage, to secure the payment of an additional sum of money then advanced to him. And on the 16th day of August, 1870, he again conveyed the said eastern half of the eastern half of lot No. 5, of square 308, to the said corporation, by way of mortgage to secure the payment of still another sum of money then advanced to him. These mortgages were duly proved and registered.

On the trial, The Mechanics Building and Loan Association prayed the Court to charge the jury:

That plaintiffs could claim no priority of lien under the act of 6th April, 1869, because by the 2d and 9th sections thereof, their lien did not attach until the filing of notice of lien; which in this case was subsequent to the execution of all three of the mortgages. That they could claim no priority against any of the mortgages under the act of 28th March, 1870, for the following reasons:

1. Because the notice of lien was insufficient and void because of the vagueness and uncertainty in the description of the land;

2. Because it was insufficient and void in claiming a joint lien on two separate lots for a single sum, made up of the price of all the materials furnished for the buildings on both lots;

3. Because by the 2d section of the act, priority of lien is given only for materials furnished for work on crops or farms, and not for those furnished for buildings on lots in towns.

And if these positions should be held incorrect, it was contended:

1. That the act of 28th March, 1870, is not retro-active, and does not effect the first mortgage of 5th January, 1870, which was executed before its passage.

2. That if intended to be retroactive, in so far as it affects

the first mortgage, it is void, as violating the Constitution of the (447) United States and of this State.

3. That even respect to the two last mortgages, which were executed after its passage, it gives a priority for only so much of the materials as were furnished after its passage.

His Honor declined to give any of these instructions, and charged the jury, that by virtue of the act of 6th April, 1869, or of the act of 28th March, 1870, or both together, on filing the notice of lien on the 7th October, 1870, the plaintiff's lien reached back to the 16th October, 1869, when they first commenced furnishing the materials, and thus took precedence of all of the said mortgages.

There was a verdict and judgment for the plaintiffs; from which the Association appealed.

Smith & Strong, for appellant.
Strange, contra.

RODMAN, J. This action was originally commenced against Williams to recover of him about $1500 alleged to be owing to the plaintiffs for materials supplied by the plaintiffs to him for erecting buildings on certain lots owned by him in the city of Wilmington. The plaintiffs claimed and sought to enforce a lien upon these lots under the act of 1868-69, Chap. 117. Williams made no defence. The Association claimed an estate in the lots under sundry mortgages made to them by Williams, and was allowed to become a defendant.

It is found that plaintiffs at the request of Williams began to supply the materials on 16th October, 1869, and continued to do so until 20th September, 1870; that the prices charged are reasonable; that the materials were used upon the buildings put up on the lots in question, which in October, 1869, were the property of Williams; on 7th October, 1870, the plaintiffs filed a claim for lien in proper form with the Clerk of the Superior Court of New Hanover County.

1. It was objected to the sufficiency of this claim that it was for a lien on two lots separated by a street. We do not see that (448) this is material under the circumstances of this case. If the two lots had been sold or mortgaged to different persons, it might be necessary as between them, and to settle their respective liabilities to contribution, to ascertain as well as could be, the value of the materials used on each lot. But the lien of the material man for his whole debt would cover both lots. When materials are furnished under a single contract for buildings put up on two lots, it cannot be expected of the vendor to know how much is used on one of them and how much on the other. In this case as the Association is the assignee of

the whole property subject to the plaintiff's lien, it can scarcely be material to distribute the burthen between the several lots. If it becomes material, that can hereafter be done.

2. It is agreed that as the act of 1868-69, Chap. ___, which was in force in October, 1869, when plaintiff made his contract, and began to furnish the materials, required the notice of the lien to be filed with the Register of Deeds; and as the notice in the present case was filed with the Clerk of the Superior Court as directd by the act of 1869-70, Chap. 206, Sec. 4, (ratified 28th March, 1870), the proper notice was not given.

We are of opinion that in that respect the latter act repealed the former, and the notice being filed in conformity to the law existing when it was filed, was filed in the proper office.

3. The main question is whether the claim of the plaintiff has priority over the mortgages to the defendant.

The first mortgage to the Association was on 20th January, 1870, and two others were made on 27th July, and 16th August, respectively.

If it were a matter of importance, it might be a nice question whether the date of the attaching of plaintiff's lien was governed by the Act of 1868-69, or by that of 1869-70. But we do not think we need determine that question, for by a fair construction of both, the lien begins from the time when the materials were begun to be furnished. The filing of notice relates back to that time. This is expressly enacted by the act of 1869-70, Chap. 206, Sec 2; and we think it follows (449) from the provisions of the act of 1868-69.

The first section says: "1. A lein may be and is hereby created under the provisions of this act in the following cases. . . . 2. Where any person furnishes any material, etc." Section 3 provides where notice of the lien shall be filed. Section 4, that it shall be filed within thirty days after the furnishing of the materials. Section 12, enacts that the priorities created by the act are to be settled by the priorities of the notices filed.

It must be clear, that unless the claim when filed has relation back to the commencement of the furnishing the materials, the object of the act would be liable to be defeated at the pleasure of the vendee of the materials, by his selling or mortgaging his estate. The act would be idle and inefficacious against the very mischief it was intended to cause. The Assembly might have required notice to be filed of every dray load of materials as it was delivered, but this would have been inconvenient and costly. By allowing the notice to be filed after the whole has been delivered, it has put on a purchaser while the delivery is in progress, the duty of informing himself whether materials have been delivered or not, and under what sort of contract. This is in

conformity to the construction which has been put on similar statutes in other States. Phillips Mechanics' Liens, Sec. 215. *Nibbe v. Brawhn,* 24 Ill., 268.

We think the notice of lien had relation back and was prior to the claim of the defendant, as to the materials furnished before the date of the mortgage.

4. The right to priority of lien for those furnished afterwards, though equally clear, stands on a somewhat different foundation. If the mortgagee had immediately gone into possession and notified the material man to discontinue the furnishing of materials, a different case would have been presented from the present. It has been held, that in such a case, if the original contract for materials was *entire,* the vendor would have a right to go on and complete his contract notwithstanding the mortgage. It is not necessary for us to express any (450) opinion on such a case.

Here it does not distinctly appear whether or not the mortgagee knew that materials had been furnished by the plaintiff, and continued to be after the mortgage. We think he must be presumed to have known it. It was his duty to have informed himself of the condition of the property in this respect when he bought it. Yet he gives no notice to discontinue furnishing materials, but acquiesces in the continuance. He receives the benefit of the value of these materials in the increased value of the property, and is therefore bound to allow it as a prior lien. This rule seems to us reasonable, and is in conformity to the decisions of other States in like cases. Phillips, Sec. 228; *Watkins v. Wassall,* 15 Ark.. 73; *S.C.,* 20 Ark., 310; *Planters Bank v. Dodson,* 9 S. & M. (Miss.,) 257.

It is otherwise where a sale is made, or a mortgage duly registered, before the materials are begun to be furnished, although the mortgagor remains in possession. In such case, the material man has notice of the mortgage, and furnishes the materials on the sole credit of the mortgagor and his estate. *Jessup v. Stone,* 13 Wis., 466; *Hoover v. Wheeler,* 23 Miss., (1 Cush.,) 314.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

Cited: Burr v. Maultsby, 99 N.C. 265; *Pipe Co. v. Howland,* 111 N.C. 617; *McAdams v. Trust Co.,* 167 N.C. 497; *Granite Co. v. Bank,* 172 N.C. 357; *Assurance Society v. Basnight,* 234 N.C. 350.

(451)

WITTKOWSKY & RINTELS v. W. F. WASSON.

Whether there be *any* evidence, is a question for the Judge. Whether it is *sufficient evidence*, is a question for the jury.

A *scintilla* of evidence will not justify the Judge in leaving the case to the jury. There must be evidence from which the jury might reasonably come to the conclusion that the issue was proved.

A sale is a transfer of the absolute or general property in a thing for a price in money. The price must be certain; and there can be no executed sale, so as to pass the property, when the price is to be fixed by agreement between the parties afterwards, and the parties do not agree.

CIVIL ACTION, for the recovery of certain goods, with process of "claim and delivery," against the defendant, sheriff of Iredell, who claimed to hold said goods under certain executions against Shepperd & Wycoff, to whom the goods had belonged, tried before *Mitchell, J.*, at Spring Term, 1874, of IREDELL Superior Court.

It was in evidence for the plaintiffs, that they were creditors of Shepperd & Wycoff, to the amount of about $1,000; and that they sent their agent with an attachment to levy on the stock of goods; that the agent went to the store of Sheppard & Wycoff, accompanied by a deputy sheriff; found Shepperd in possession, and told him of their judgment and attachment, and of his intention to levy the attachment on the goods, but added, that if a satisfactory arrangement could be made, he would not levy. Shepperd expressed a desire to make an arrangement and prevent the levy. The agent then proposed to buy the stock of goods, or so much thereof, as might be necessary in payment of the debt. To this Shepperd assented, *provided,* they could agree on the price.

The agent, as a witness for plaintiffs, stated that he then offered Shepperd for the goods, what they cost. Shepperd refused,
(452) demanding an advance on prime cost, of ten *per cent* or more, which he refused to give. That they then commenced inventorying the goods, he, the agent, putting down the cost of each article; that they had proceeded but a little way in this, when Shepperd became angry, and said he could not stand such prices, when they stopped the inventory; and he and Shepperd agreed to box up all the goods without an inventory, and haul them to Troutman's depot, on the A. T. & O. R. R., next morning, which was Thursday; that on the next Monday, Shepperd was to go down with the goods to Charlotte, and there agree on the price with Wittkowsky; and if they agreed, the debt of the plaintiffs was first to be paid out of the price, and the remainder paid over to Shepperd for the benefit of his other creditors in Charlotte.

That they accordingly boxed up the goods, and they were hauled to the depot, where the depot agent was told that the goods were to go to the plaintiffs, in Charlotte, and that Shepperd was to go down with them, on Monday. That at the store of Shepperd & Wycoff, with the assent of Shepperd, he, the said agent, sold a small lot of guano and a pair of counter-scales to the depot agent, and received the money for those things.

It was admitted by the defendant, that he had seized the goods at the depot, on Monday night after they were taken there; and he showed several executions and judgments against Shepperd & Wycoff, in favor of various parties under which he had seized them. One of the judgments and executions being in favor of the plaintiffs on the same debt, for which they allege they had bought the goods, the said judgment being for the full amount of the debt, with no credit entered for said goods, and bearing date after the time of the alleged purchase of the goods by their agent.

It was also in evidence for the defendant, that at the time he made the said levies on Monday night, Wittkowsky, one of the plaintiffs' was present, urging defendant to levy this execution of his firm, on the goods along with his other executions; and that he then set up no claim to the goods; that the sheriff levied the plaintiffs' said execution on the goods, as the property of Shepperd & Wycoff, (453) having no notice of plaintiffs' claim as purchasers. That several days after the levy, the plaintiffs served a notice on defendant, that when he sold said goods under the said executions, they claimed that he should apply "it *pro rata* part" of the proceeds to their execution.

The defendant had no notice that plaintiffs claimed said goods by any purchase from Shepperd & Wycoff, or either of them, until the service of the process in this case upon him, which was a short time before the sale under the executions. That Wittkowsky, after the levies on Monday night, had complained, that if his agent had levied his attachment, as he directed him to do, it would have prevented all the trouble.

Wittkowsky, and another for him, testified that on the said Monday night, when the levies were made, he first offered his executions to the defendant and demanded that he should levy them on the goods; that when the defendant refused to do so, until he had first levied the executions which he had already in his hands, he, Wittkowsky, then claimed the goods as his own, and forbid the defendant's levying thereon; that after defendant had levied his other executions, he again offered him his executions and demanded a levy; that defendant took the executions, levied them, dating the levy six minutes after those of the other executions.

Defendant offered to prove by Shepperd, that on Saturday morning after the goods had been carried to the depot the evening previous, he, Shepperd, went to the depot, and ordered the Railroad agent not to send the goods to Charlotte, but to hold them up at the depot. To this evidence, the plaintiffs objected. His Honor admitted it, and the plaintiffs excepted.

Under the instructions of his Honor, the jury returned a verdict for the defendant. Judgment accordingly, and appeal by the plaintiffs.

Furches, for appellants.
Folk & Armfield, contra.

(454) RODMAN, J. As the Judge instructed the jury to find a verdict for the defendant, he must be taken to have decided that there was *no* evidence of a sale of the goods to the plaintiff. Where there is *any* evidence to support a plaintiff's claim, it is the duty of the Judge to submit the question to a jury, who are the exclusive judges of its weight. This doctrine must have been a part of the law from the earliest times at which the respective functions of the Judge and jury were discriminated. The earliest distinct expression of it that I know of was by BULLER, J., in Company of Carpenters, etc., 1 Doug. 375. "Where there be any evidence is a question for the Judge. Whether sufficient evidence is for the jury."

Since then it has been repeated innumerable times. Of course, after a while it became a question as to what was the meaning of the phrase, "*any* evidence." Did it mean the slightest scintilla of evidence, or such only as that from which a jury might *reasonably* infer the existence of the alleged fact. The latter view has been adopted in this State and in England, and so far as my researches have extended, in other States generally. This was the view taken by this Court in *State v. Vinson,* 63 N. C., 335, upon the authorities there cited. In addition to those are the following cases in this State, which speak an uniform language: *Jordan v. Lassiter,* 51 N. C., 130; *State v. Revels,* 44 N. C., 200; *Sutton v. Madre,* 47 N. C., 320; *Cobb v. Fogleman,* 23 N. C., 440.

There is a recent case in the English Court of Exchequer Chamber, which puts the doctrine so clearly as to excuse a quotation. The question in that case was, whether certain articles which had been sold to an infant were necessaries. WILLES, J., says: "There is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a non-suit if the

onus is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence (455) even a *scintilla,* in support of the case; but it is now settled that the question for the Judge (subject, of course, to review,) is, as stated by MAULE, J., in *Jewell v. Parr,* 13 C. B., 916; 76 E. C. L. R., not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. London and Brighton R. W. Co.,* 3 C. B. N. S., 150, (91 E. C. L. R.,) WILLIAMS, J., enunciates the same idea thus: "It is not enough to say that there was some evidence—a scintilla of evidence clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence"—the fact in that case to be established. And in *Wheelton v. Hardisty,* 8 E. & B., 262, (92 E. C. L. R.,) in the considered judgment of the majority of the Court, it is said: "The question is, whether the proof was such that the jury would reasonably come to the conclusion that the issue was proved?" This, "they say," is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence." *Ryder v. Wombwell,* (1868) L. R. 4 Exch., 32. By thus quoting from recent English cases we do not mean to extend or alter any rule of practice or evidence heretofore recognized in this State. The great importance of this understanding of the phrase, "any evidence," will be seen by considering it as it may be applied in criminal actions.

The question then is, was there any evidence in this case of a sale of the goods in question to the plaintiffs. A sale is defined by Benjamin as "a transfer of the absolute or general property in a thing for a price in money." To the completion of this contract, as of all others, there must be the mutual assent of the parties to its terms. Such mutual assent cannot exist unless the terms are definite. The thing (456) sold must be ascertained. Until the specific thing is agreed on, the agreement can only be executory. Benjamin on Sales, 227-8.

And for a like reason, the price to be paid must also be certain, or some guide must be agreed on by which it can be found with certainty. There may be a sale for a reasonable price, in which case, if the party afterwards differ, the price must be made certain by the verdict of a jury. Or there may be a sale at a price to be afterwards fixed by valuers. In such case, if the valuers refuse to fix the price, the sale is considered incomplete or else as rescinded by the refusal. If, indeed,

the thing sold has been delivered to the vendee and consumed, so that the parties cannot be put *in statu quo*, the vendee is liable for a reasonable price. Benjamin on Sales, 69; *Clarke v. Westroppe*, 18 C. B., 765. But there cannot be an executed sale so as to pass the property where the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree. One element of a sale is wanting, just as a different element would be if the thing were not ascertained. If in such case the thing was actually delivered and consumed, the vendee would be liable, not upon the special imperfect contract, but on an implied contract to pay a reasonable price. In *Devane v. Fennell*, 24 N. C., 36, it is said that if upon a contract for the sale of goods anything remains to be done by the vendor to ascertain the price, etc., the sale is incomplete, and if the actual possession has been delivered to the vendee, it is still constructively in the vendor.

To apply these principles to the evidence for the plaintiffs in the present case: The plaintiffs being creditors of Wycoff & Shepperd, sued out an attachment against them, and sent a deputy sheriff and another person as their agent, to the store of Wycoff & Shepperd. The attachment was not levied and no claim is set up on that account. The agent proposed to take the goods in question, or as much of them as might be required for the purpose, in payment of the plaintiffs' debt, but he and Shepperd did not agree upon the price. Thereupon, as the case
(457) states the testimony of the agent, who was a witness for plaintiffs, "the agent and Shepperd agreed to box up all the goods without an inventory, haul them to Troutman's depot on the A., T. & O. R. R., next morning, which was Thursday; that on the next Monday Shepperd was to go down with the goods to Charlotte and agree on the price with Wittowsky, and if they agreed, the debt to plaintiffs was first to be paid out of the price and the remainder paid over to Shepperd," etc.

The goods were accordingly hauled to the depot and the agent of the Railroad Company was told that they were to go to plaintiffs at Charlotte, and that Shepperd was to go with them. The plaintiffs' agent, with the consent of Shepperd, sold some guano and a set of counter scales which were at the store, and before the goods were carried to the depot, and received the price. The goods were not sent to Charlotte, but remained at the depot; no price was afterwards agreed on between plaintiffs and Shepperd, and on Monday night they were levied on by the defendant as sheriff.

In all the transaction, we think there is no evidence of an executed sale; nothing from which it could be reasonably or fairly inferred that it was the intent of the parties to it to transfer the absolute property in the goods to the plaintiffs.

There may be a doubt as to who had actual possession and control of the goods while at the depot, whether the plaintiffs or Shepperd. That question is not assumed either way, and no stress is put on it. But if the goods had happened to have been burned at the depot and Wycoff & Shepperd had sued the plaintiffs for the price as on an executed sale, by what rule would the price have been ascertained? Not by any furnished by the contract between the parties, which shows that the contract was incomplete.

PER CURIAM. Judgment affirmed.

READE, J. I assented to the decision as delivered in the opinion of brother Rodman, upon the explanation threin, that (458) it was not to be interpreted as an innovation upon the established rule, that the jury are the sole judges of the weight of evidence without any intimation of opinion on the part of the Judge.

BYNUM, J., *dissenting.* I concur in the judgment of the Court, because, in my opinion, there was *no* evidence offered tending to establish a sale, but on the contrary, the evidence disproved the idea of a sale altogether.

But I do not concur in the propositions laid down as the principles of evidence, in this State, or in the line of demarcation drawn between the rights of the Court and the rights of the jury in the administration of justice. I regard these propositions now distinctly announced for the first time, in our Courts as new, opposed to a long line of uniform decisions, and as subversive of that bulwark of all our individual rights, to wit, the right of trial by jury.

The opinion delivered admits the rule of evidence as announced in 1 Greenl., Sec. 49, to wit, that "whether there be any evidence or not, is a question for the Judge; whether it is sufficient evidence, is a question for the jury," but undertakes to give a construction to "any" which destroys the plain meaning of a plain word and thus introduces the new and dangerous proposition contended for. It is now announced that the true meaning of "any evidence" is that it must be such "as ought *reasonably* to satisfy the jury that the fact sought to be established is proved." That it is not enough to say that there was some evidence, but it must be evidence on which they might *reasonably* and *properly* come to the conclusion to be arrived at.

The very cases relied on admit that the rule now set up is a new one, established by a train of late English decisions, and that they have overturned the long established law of evidence, that if there was any evidence—even a *scintilla*—it was necessary, in all cases, that it should go to the jury. Now, when did this confessedly new doctrine of

(495) the Courts of England become the law in North Carolina, and what decisions of our Courts have formerly announced this innovation? The *State v. Vinson,* 63 N. C., is cited as having done so. That case certainly does not profess to establish the rule contended for, but after laying down the true principle, as well understood in our State, and as governing that case, the Court *obiter* proceeds thus: "We may go farther and say, that the evidence must be such as will support a reasonable inference of the fact in issue." A new proposition of such importance, announced in this tentative language, cannot be held as an authoritative exposition of the law. The *State v. Vinson,* has not met the approbation of the profession, and as an authority I think it must be confined to the case decided. It professes to be governed by the previous decisions of this Court, and so far as it may be inconsistent, it must give way to a long line of uniform adjudications upon this very question.

The rule laid down and uniformly adhered to in all the other cases, when properly understood, is that "where there is any evidence tending to establish a material fact in issue, the weight and sufficiency of the evidence are solely for the jury." So far has this Court gone in support of this rule, that in *McRae v. Morrison,* 35 N. C., 48, the Court say, that "the *impression* of a witness who professes to have any recollection at all, is certainly some evidence; the degree of weight to which it is entitled is a matter for the jury." And in the instructive case of the *State v. Allen,* 48 N C., 257, where the question is thoroughly discussed, the Court say, "Where there is a defect or entire absence of evidence, it is the duty of the Judge so to instruct the jury, but if there be any competent evidence, relevant and tending to prove the matter in issue, it is the true office and province of the jury to pass upon it, although the evidence may be so slight that any one may exclaim, 'Certainly no jury will find the fact upon such insufficient evidence.' Still the Judge has no right to put his opinion in the way of the free (460) action of the jury." And the Court there deprecates any error that may have crept into our practice, by reason of our Court not having attached due importance to the distinction between the condition of things in England, where the Courts are allowed to express to the jury their opinion of the weight and sufficiency of testimony, and the condition of things in our State, where the trial by jury is protected both by the Constitution and by legislative enactment. "In all controversies of law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Constitution, Art. I, Sec. 19. And to carry into effect this fundamental principle, it is provided, C. C. P., Sec. 237, that "no Judge shall give an opinion, in his charge to the jury,

whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." When our organic law has thus announced that the trial by jury is an institution to be cherished by every free people, as the best safeguard to their lives and property, and as such must remain sacred and inviolable, and when by legislative act the line of distinction is so clearly drawn between the rights of the Court and the jury, it becomes the solemn duty of this Court, while preserving its own rights, to be equally zealous to see that the Court shall commit no usurpation upon "the true office and province of the jury."

How the jury, whose exclusive province it is, can pass upon the "weight and sufficiency" of the testimony, when the Court may exclude it from their consideration altogether, because the evidence offered seems to it not "reasonably sufficient" to establish the fact sought to be proved, is to me, incomprehensible. The very weight and sufficiency must depend upon its reasonableness, and to say that the jury shall consider the weight and sufficiency of that testimony only, which the Court may consider reasonable and proper to produce belief in their minds, is in substance and effect to say that the *quantum* of evidence required by the jury to produce belief in their minds, is a question for the Court. The proposition thus broadly stated, of course, cannot (461) be maintained, and will not be affirmed by any one, yet it is the logical and inevitable sequence of the doctrine advanced in the opinion of the Court. *Cobb v. Fogleman,* 23 N. C., 440, is in harmony with these views, and the distinction is there drawn between "defect of evidence and evidence confessedly slight;" and in Allen's case, *Cobb v. Fogleman,* is reviewed, and defect of evidence is explained to be a failure of evidence or no evidence at all, but that any evidence, however slight, cannot be withheld from the jury, and this illustration is put: "it is proved that goods are found in the possession of the prisoner, twelve months after the larceny was committed; every one would say, this is not sufficient evidence to convict; but yet it is some evidence. And in the same case it is held, that a fact, calculated to form a link "in the chain, although the other links are not supplied, is, nevertheless, *some* evidence tending to establish the fact in issue, and its sufficiency must be passed on by the jury." Upon what principle, then, can the Court assume to pass upon the reasonableness of evidence to produce belief, and admit or reject it, as it may take the one or the other view of it? And upon what principle can it exclude any, even a *scintilla* of evidence, from the jury? A *scintilla* of evidence is *some* evidence, for it is a *scintilla* of evidence; and if the law is administered, it *must* go to the jury, and the Court has no more power to withhold it, than to withhold the most positive material fact offered in evidence. The

theory of the books is, and every practitioner knows, that the very slightest oral testimony before the jury, from the demeanor, character and surroundings of the witness, may, and often does, become potent and convincing proof. How then can this Court, which can only see the *recorded* testimony, which is no transcript of the living and visible evidence, as it appeared to the jury, and justly determined their verdict, undertake to say that the evidence was not reasonably sufficient to produce belief?

(462) The truth is, that whenever we depart from the plain letter of the law, and long and uniform interpretations of the law, we throw doubt and distrust upon its administration.

The Court and jury are distinct and independent, though co-operating tribunals, with this difference, that the jury is the especial favorite, and its rights are carefully surrounded by the solemn guarantees of the Constitution, as well as the laws. The rightful jurisdiction of the jury, then must be protected and enforced against every encroachment, open or concealed, as the one dearest to a free people.

It is admitted that the later English cases, cited in the opinion of the Court, do establish the principle asserted in the opinion, and the same principle may be found in some of the American cases, but it will be found that in all such cases the Court claims and exercises the right of expressing to the jury its opinion as to the weight and sufficiency of the evidence, a claim sternly forbidden by our Constitution and laws. Even in our State, the Courts have at times, prone to follow English precedents and forgetful of the injunction of our organic and statutory laws, deviated somewhat from the true principle here contended for, but these deviations have seldom occurred and have afterwards been acknowledged and corrected, as in Allen's case; and upon the whole, the Judiciary of North Carolina, while maintaining its own just rights, has vindicated the ancient and time honored jurisdiction and privileges of the jury, as the trier of facts.

Cited: S. v. Elwood, 73 N.C. 636; *Gregory v. Herring,* 73 N C. 521; *March v. Verble,* 79 N.C. 23; *S. v. McKinsey,* 80 N.C. 461; *Best v. Frederick,* 84 N.C. 181; *S. v. Massey,* 86 N.C. 661; *S v. White,* 89 N.C. 465; *Cohen v. Stewart,* 98 N.C. 101; *Phifer v. Erwin,* 100 N.C. 74; *Lumber Co. v. Wilcox,* 105 N.C. 39; *Osborne v. Wilkes,* 108 N.C. 665; *Bank v. Burgwyn,* 110 N. C. 276; *S. v. Chancy,* 110 N. C. 508; *Young v. R. R.,* 116 N.C. 937; *Young v. Alford,* 118 N.C. 221; *Riley v. Hall,* 119 N.C. 414; *Spruill v. Ins. Co.,* 120 N.C. 148; *Quinn v. Lattimore,* 120 N.C. 432; *Hodges v. R R.,* 120 N.C. 556; *Bank v. School Com.,* 121 N.C. 109; *Epps v. Smith,* 121 N.C. 165; *Caldwell v. Wilson,* 121 N.C. 466; *White v. R. R.,* 121 N.C. 489; *S. v. Satterfield,* 121 N.C. 560; *Coble v. R. R.,*

122 N C. 894; *S. v. Gragg,* 122 N.C. 1086; *Lyne v. Telegraph Co.,* 123 N.C. 133; *Thomas v. Shooting Club,* 123 N.C. 288; *Cox v. R. R.,* 123 N.C. 607, 612; *Dunn v. R. R.,* 124 N.C. 260; *Webb v. Atkinson,* 124 N.C. 453; *S. v. Rhyne,* 124 N. C. 853; *S. v. Truesdale,* 125 N. C. 698; *Neal v. R. R.,* 126 N.C. 651, 659; *Williams v. R. R.,* 130 N.C. 119; *S. v. Foster,* 130 N.C. 670; *Caudle v. Long,* 132 N.C. 678; *Lewis v. Steamship Co.,* 132 N C. 910, 918; *S. v. Cole,* 132 N.C. 1088; *McArthur v. Mathis,* 133 N.C. 143; *Walker v. R. R.,* 135 N.C. 741; *S. v. Smith,* 136 N.C. 690; *Byrd v. Express Co.,* 139 N.C. 276; *Kearnes v. R. R.,* 139 N.C 483; *Williams v. R. R.,* 140 N.C. 627; *Kyles v. R. R.,* 147 N.C. 396; *Busbee v. Land Co* , 151 N.C. 514; *Cabe v. R. R.,* 155 N.C. 423; *Ridge v. R. R.,* 167 N.C. 517; *Zollicoffer v. Zollicoffer,* 168 N.C. 328; *S. v. Bridgers,* 172 N.C. 882; *Moore v. R. R.,* 173 N.C. 314; *Little v. Fleishman,* 177 N.C. 25; *Williams v. Mfg Co.,* 177 N.C. 515; *S. v. Prince,* 182 N.C. 790; *S. v. Blackwelder,* 182 N.C. 905; *Bagging Co. v. Byrd,* 185 N.C. 142; *Hancock v. Southgate,* 186 N.C. 282; *Finance Co. v. Cotton Mills Co.,* 187 N.C. 241; *Godfrey v. Power Co.,* 190 N.C. 29; *S v. McLeod,* 196 N.C. 545; *Ivey v. Oil Co.,* 199 N.C. 453; *S. v. Gaddy,* 209 N.C. 35; *S. v. Harvey,* 228 N.C. 65; *S. v Collins,* 240 N.C. 131.

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(463)

M. P. BALDWIN v. R. W. YORK, L. BURNETT, AND T. W. GATTIS.

Pending an action for the recovery of land, an injunction does not lie, restraining the defendant from enjoying the fruits of his possession and claim of title; and especially when it does not appear that the plaintiff will lose the fruits of his recovery, if he establishes his title.

It is irregular for the plaintiff to move for judgment upon complaint and answer. If he admits the allegations of the answer, his proper course is to demur.

Whether a lien created by a levy prior to the docketing of a judgment, is continued by virtue of such docketing, without pursuing it by a *ven ex.*, or whether a *fi. fa.* issued on such docketed judgment, waives the lien created by the levy before docketing—*Quere?*

CIVIL ACTION for the recovery of a certain tract of land, and for an account of the rents, and in the meantime for an injunction against one of the defendants, restraining him from paying to his co-defendant certain rents, tried before *Tourgee, J.,* at the Spring Term, 1874, of CHATHAM Superior Court.

In his complaint, the plaintiff alleges that one Bell, at Fall Term,

1867, of Chatham Superior Court of Law, obtained a judgment against the defendant, L. Burnett and others, for the sum of $1,377, with interest on $850; that Burnett paid of this judgment $599, about 1st February, 1869, but that he never has paid the balance thereof. That Bell, for value, assigned this judgment to the plaintiff on the 25th of May, 1868. That an execution, tested of Fall Term, 1867, was issued on the judgment, returnable to Spring Term, 1868, which execution was levied on 670 acres of land on Haw river; and on another tract of 92 acres, and on his interest in 378 acres, known as the "Jane Burnett land," all as the property of L. Burnett.

Plaintiff further alleges, that after due notice, he had this judgment docketed in the Superior Court as authorized by law, from which
(464) Court execution issued the 1st day of April, 1873, under which the land known as the "Jane Burnett land," 378 acres, was sold at the Court House door in Pittsboro, on the 12th day of May, 1873, and purchased by the plaintiff, to whom the sheriff made a deed. That previous to this sale, but subsequent to the judgment, Burnett, being insolvent, which insolvency was known to York, sold to York the "Jane Burnett land" without a valuable consideration. That York knew of the judgment, and that the pretended sale of the land was done by Burnett to delay and defraud his creditors; and that the sale was made with the understanding that Burnett, as soon as he was relieved from his pecuniary embarrassments, should have the land back again. That the pretended consideration of the deed to York, was $500, which was never paid; that at the date of said deed the land was worth $800, and worth then $1,250. That York took possession of the land immediately after his pretended purchase, and rented the same to the defendant, Gattis, who is now in possession.

The plaintiff further states in his complaint, that York has obtained a judgment against Gattis for $400, for the rent of said land, and is about to collect the same. That defendants York and Gattis, withhold the possession of said land.

Plaintiff demands that the deed from Burnett to York may be cancelled; that York account for the rents and profits; that Gattis be enjoined from paying any rents to York, but that he be decreed to pay the same to the plaintiff; and that he, the plaintiff, have possession of the land, and have $500 damages.

York in his answer denies all the material allegations of the complaint, stating that the consideration of the deed from Burnett to him, was *bona fide*, consisting principally of professional services for Burnett in his application in the Court of Bankruptcy, and for expenses; denying that the deed was made to defraud creditors or any one else.

Burnett denies collusion with York, and asserts that his deed to him was for a valuable consideration.

His Honor granted the order restraining Gattis from paying over to York the rents, and appointed a receiver to receive (465) and invest the same. And at Spring Term, 1874, further adjudged that the deed from Burnett to York was fraudulent; that the plaintiff by his execution acquired a lien on the land attempted to be sold; and that the sale of said land by the sheriff of Chatham, was valid. His Honor further ordered, that it be referred to the Clerk to take an account of the rents and profits, and that the injunction on Gattis be continued.

From this judgment, York appealed.

Battle & Son and Batchelor, for appellant.
Manning, contra.

BYNUM, J. The deed of the plaintiff was executed the 12th day of May, 1873, and clearly he was not entitled to the rents and profis of the land, antecedent to his title. It was error, therefore, in his Honor to enjoin Gattis from paying them to York, or ordering him to pay them to the receiver. Nor can it be seen from the case, upon what ground a receiver was appointed at all, there being no allegation of the insolvency of the defendants. In effect, this is an action of ejectment, where both parties claim title, and the defendant is in possession. In such case, pending the action, an injunction does not lie, restraining the defendants from enjoying the fruits of his possession and claim of title, and especially when it does not appear that the plaintiff will lose the fruits of his recovery, if he establishes his title.

The plaintiff moved for judgment upon the complaint and answer. This was irregular. If he admitted the allegation of the answer, he should have demurred thereto, and then nothing but issues of law would have been presented to the Court. But the answer denies some material allegations of the complaint, which raised issues of fact, which should have been found either by the Court or a jury. The defendant denies all fraud, yet the Court, as a matter of law, declares the deed of the defendant, fraudulent and void. Whether it be so, may depend upon the existence of some facts which do not appear upon the (466) record.

It is clear that the plaintiff by his levy, acquired a lien upon the land, and that he could at any subsequent time, sue out a *Venditioni exponas*, and sell the same, and the purchaser thereunder would acquire a good title, against subsequent purchasers. *Kelly v. Spencer*, 25 N. C. 256. And in *Johnson v. Sedberry*, 65 N. C., 1; it was held

that Art. 4, Sec. 25, of the Constitution, which ordains that "actions at law and suits in equity, pending when this Constitution shall go into effect, shall be transferred to the Courts having jurisdiction, without prejudice, by reason of the change," applies to judgments. When the plaintiff's judgment was docketed, therefore, it became a lien on the land, from the docketing, just as judgments obtained since the adoption of the Code. But whether the lien created by a levy, prior to the docketing of the judgment, is continued by virtue of the docketing, without pursuing it by *ven. ex.* or whether a *fi. fa.* issued on said docket judgment waives the lien created by the levy, has not been determined by this Court, and is the main point here. And it is right here, that the facts appearing upon the record, are defective, in that it does not appear whether the execution was a *ven. ex.* issued upon the previous levy, or simply a *fi. fa.* issued upon a docketed judgment.

Nor does it appear whether the execution was issued by leave of the Court, and with the formalities required by *C. C. P., Sec.* 256, where the judgment is of longer standing than three years, which is our case.

As both parties are at fault, in not preparing the case for this Court, as the Code provides, in cases of appeal, the injunction will be dissolved, the judgment reversed and the case remanded, to the end that it may be proceeded in as the parties may be advised.

Injunction dissolved, and judgment reversed and *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: Long v. Bank, 81 N.C. 46; *Chasteen v. Martin,* 81 N.C. 55; *Parker v. Parker,* 82 N.C. 167; *Jeffreys v. Hocutt,* 193 N.C. 334.

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(467)

ALFRED ROWLAND AND OTHERS v. JOSEPH THOMPSON AND OTHERS.

Where there appears upon the record no waiver of trial by a jury, *it is error* for the presiding Judge to determine the facts.

This was a CIVIL ACTION, by the plaintiffs, former wards of the defendant, for the cancellation of a certain deed executed by defendant, and for an account and the appointment of a receiver, tried before his Honor, *Judge Clarke,* at the Special (January) Term, 1874, of ROBESON Superior Court.

The following is the statement of the case sent up to this Court.

"Upon the argument of counsel for plaintiffs and defendants before

his Honor, the defendants insisted that inasmuch as there was no replication filed, the answer must be taken as true, and asked that the case be dismissed. The Court decided that a general replication, not in writing, was sufficient.

The defendants asked leave of the Court to introduce evidence to prove each allegation in the 2d, 3d, 6th, 7th and 8th paragraphs of W. P. Moore's answer, and each allegation in the 2d, 3d, 6th and 7th paragraphs of N. J. Thompson's answer; the court declined to hear the evidence for the defendants, for the reason as the Court alleged, that the pleadings were sufficient for him to decide the case, and ordered the Clerk of the Court to enter the verdict and decree."

As the case went off in this court, upon the insufficiency of the record, his honor's decree in favor of the plaintiffs need not be stated.

Defendants appealed.

N. A. McLean, Faircloth, and Jones & Jones, for appellants.
Leitch, Strange and W. McL. McKay, contra.

SETTLE, J. The record in this case is confused and unsatisfactory, so much so as to leave us in doubt of some things necessary for an intelligent solution of the questions intended to be presented. (468)

The pleadings raised issues of fact, which could only be determined by a jury, unless the parties waived a trial by jury, and submitted the questions of facts, as well as of law, to be determined by his Honor.

But we cannot gather from the record, whether a trial by jury was waived or not waived, or indeed whether or not a jury was actually empannelled on the case.

The case states that "the defendants asked leave of the Court to introduce evidence to prove certain facts, and the Court declined to hear the evidence, for the reason, as the Court said, that the pleadings were sufficient for him to decide the case upon, and ordered the Clerk to enter the following *verdict* and decree," etc.

If it was a trial by jury, his Honor should not have taken the issues of fact from them. And if there was no waiver of a trial by jury, his Honor had no right to determine the questions of fact. In either point of view presented by the record, there appears to be error, when perhaps there may have been none at the trial.

But as we are bound by the record, let it be certified that there is error.

PER CURIAM. Judgment reversed.

Cited: Dunn v. Barnes, 73 N.C. 276.

(469)

J. FRANCIS KING v. J. E. WINANTS.

The law prohibits everything which is *contra bonos mores*, and therefore no contract which originates in an act contrary to the true principles of morality, can be made the subject of complaint in Courts of justice.

RODMAN, J., *dissenting.*

CIVIL ACTION for the dissolution of a co-partnership, for an account and the appointment of a receiver, and in the meantime for an injunction, restraining the defendant from receiving moneys due the co-partnership, heard before *Russell, J.*, at Spring Term, 1874, of NEW HANOVER Superior Court.

It was referred to a referee, who after finding certain facts, reported as his conclusion, that the parties were never at any time partners *inter se,* whatever may have been their *status* as to third person. And that the agreement between the parties, was in fraud of the city of Wilmington, illegal and void, and both parties being in *pari delicto,* no Court would lend its aid to either to enforce the contract in this case, to compel an account.

The plaintiff excepted to the report of the referee, and his Honor, on the trial below, sustained some of his exceptions, adjudging, among other things, that the plaintiff was entitled to an account, and referring it to the Clerk to take the account. From the orders and rulings of his Honor, the defendant appealed.

Strange and Battle & Son, for appellant.
A. T. & J. London, contra.

READE, J. The care and maintenance of certain sick persons in the service of the United States, and of the sick of the city of Wilmington, and of the county of New Hanover, were let to the lowest
(470) bidder by the several governments, and the plaintiff and defendant, who were rival bidders for the same, entered into a contract not to bid against each other, so as to enable one or both to get the contract at a much higher rate, and divide the profits between them. It is not denied that this was a fraud upon those governments, and against public policy, and that the contracts could not have been enforced against those governments. But the contracts having been performed by the governments, and the parties coming now to settle the profits between themselves, and being unable to agree, it is insisted that the aid of the Courts may be invoked. And whether that can be, is the question.

Ex turpi causa non oritur actio, is a maxim as old as the law itself.

The Courts will not lend their aid to enforce contracts founded upon considerations immoral or against public policy. And where the fault is mutual between the parties *in pari delicto, potior est conditio defendentis.*

Suppose, in the case before us, the parties had come to a settlement, and the defendant had given to the plaintiff his note for the amount due, could the plaintiff have recovered on the note? *Blythe v. Lovingood,* 24 N. C., 20, is an express authority that he could not. In that case, commissioners to sell land for the State proclaimed at the sale, that if the highest bidder did not comply, the next highest bid would be taken. The plaintiff and defendant were both bidders, the plaintiff the highest and the defendant next, and they entered into an agreement by which the plaintiff was not to comply with his bid, so that it might be given to the defendant, and the defendant was to give the plaintiff his note for $100 which he did, and the plaintiff sued him on the note. *Held,* that he could not recover. DANIEL, J. delivering the opinion said: "If the plaintiff intended to comply with the terms of the sale, but failed in consideration of the defendants executing to him the note, then the conspiracy had the effect of depriving the State of so much of the purchase money as made up the difference between the two bids; and such a transaction, we think, was fraudulent towards the State. The plaintiff's counsel contends, that, if the parties (471) intended to defraud the State, it could be taken advantage of by the State only, and not by the defendant, who has reaped the benefit, and was *particeps criminis* in the transaction. We are of a different opinion. The law prohibits every thing which is *contra bonos mores,* and therefore no contract which originates in an act contrary to the true principles of morality can be made the subject of complaint in the Courts of justice." And Judge DANIEL quoted from *Holman v. Johnson,* Cowper 343, where Lord MANSFIELD said, the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounded at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded upon general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, by accident if I may say so. The principle of public policy is this, *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise the action appears to arise *ex turpi causa,* or the transgression of a positive law of the country, then the Court says that he has no right to be assisted. It is upon this ground the Court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff." We are

of the opinion that the agreement in this case was in pursuance of a fraudulent design to deprive the State of a fair price for its land, and that the plaintiff ought not to recover.

Our case is much stronger than that. There the parties had settled their nefarious transaction and given a plain note on which the suit was brought; but here we are asked to aid them in their nefarious transaction to defraud the United States and the city of Wilmington and the county of New Hanover, not in the sale of a tract of land, but in the care of their sick. We are asked to go into all the transaction and to hear all the evidence and even their own conflicting statements as to the precise manner in which they bargained with each other,
(472) and which was most faithless to the other, and which got the best share of the spoils, and to help them make a just division. The case of *Blythe v. Lovingood, supra,* has been followed by many others in our Courts. *McRae v. R. R.,* 58 N. C., 395; *Sharpe v. Farmer,* 20 N. C., 255; *Ingram v. Ingram,* 49 N. C., 188; *Whitaker v. Bond,* 63 N. C., 290. In *Armstrong v. Toler,* 11 Wheat. R. 258, the subject was very much considered and it is a leading case in the Supreme Court of the United States. Mr. Justice WASHINGTON said: "The principle of the rule is that no man ought to be heard in a Court of Justice who seeks to enforce a contract founded in or arising out of moral or political turpitude." On appeal, the Supreme Court held that there was no error, and Chief Justice MARSHALL illustrates the cases in which the principle does and does not apply, and says: "The point of law decided is that a subsequent independent contract founded on a new consideration is not contaminated by the illegal importation," etc. And in a note to the case, found in Story on Agency, Sec. 348, we have this very clear statement of the principle: "The distinction between the cases where a recovery can be had, and the cases where a recovery cannot be had, of money connected with illegal transactions which seems now best supported is this: that wherever the party seeking to recover, is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him connected with that contract. But when the advances have been made upon a new contract remotely connected with the original illegal contract or transaction, but the title of the party to recover is not dependant upon that contract, but his case may be proved without reference to it, then he is entitled to recover." And this explains *Brooks v. Martin,* 2 Wallace 70, which was chiefly relied on by the plaintiff. There the parties were partners in buying up
(473) soldiers' claims contrary to law.

Mr. Justice, MILLER, delivering the opinion says: "When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership with money advanced by the complainant had been converted into land warrants and all the warrants had been located or sold. The original defect in the purchase had, in many cases, been cured by the assignment of the soldier after its issue, a large portion of the land so located had also been sold and the money paid for some of it and notes and mortgages for the remainder. There were then in the hands of the defendant, land, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds and a division of these proceeds that this bill is filed." And it is plain that in that case there could have been an account and settlement without any reference whatever to the original illegal transaction, and the decision is put upon that ground. With this interpretation, that case is consistent with all the text writers and with innumerable decisions. Any other interpretation puts it off to itself. But in our case, it is the very illegal contract itself between the parties, that we are called upon to examine into, settle up and enforce. We must hear the proof that if the plaintiff would not bid against the defendant, as he had intended to do, so as to enable the defendant to get seventy cents a day instead of forty, which he was getting to feed and nurse the sick, then the defendant would give the plaintiff half the profits. And then we are asked to compel the defendant to perform that promise. Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveller the other rifles his pocket of $1,000 and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now if these robbers had taken the $1,000 and invested it in some legitimate business as partners, (474) and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to enquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin, supra,* so much relied on by plaintiff. I do not mean by the illustration to class the parties before us with robbers, or otherwise to characterize their transaction than according to the facts of their case. It is not necessary that we should say more than that probably they thought it allowable to make a sharp bargain at the expense of the public, and that we cannot help them in it.

There is error in the order appealed from directing an account.

The plaintiff is not entitled to an account. The report of the referee ought to have been confirmed, declaring the alleged contract illegal and void, and that the Court will not lend its aid to enforce it.

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

RODMAN J., *dissenting.* I dissent from the opinion of the Court because I think this case cannot be distinguished from *Brooks v. Martin,* 2 Wall. 70. I think the plaintiff can make out his case without going into proof of the fraudulent transactions.

Cited: *Sc.* 73 N. C. 563; *Latham v. B. & L. Assoc.* 77 N. C. 148; *York v. Merritt,* 77 N.C. 215; *Lindsay v. Smith,* 78 N.C. 333; *Comrs. v. Marsh,* 89 N.C. 272; *Griffin v. Hasty,* 94 N.C. 440; *Burbage v. Windley,* 108 N.C. 362; *Wittkowsky v. Baruch,* 127 N.C. 318; *Culp v. Love,* 127 N. C. 462; *McNeill v. R. R.,* 135 N. C. 734; *Edwards v. Goldsboro,* 141 N.C. 72; *Vinegar Co. v. Hawn,* 149 N.C. 357; *Smathers v. Ins. Co.,* 151 N. C. 105; *Hardison v. Reel,* 154 N. C. 277; *Liquor Co. v. Johnson,* 161 N.C. 76; *Pierce v. Cobb,* 161 N.C. 302; *Pfeifer v. Israel,* 161 N.C. 410; *Marshall v. Dicks,* 175 N.C. 40; *Price v. Edwards,* 178 N.C. 496.

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(475)

R. S. PERRY AND OTHERS v. WESLEY WHITAKER AND OTHERS.

The election held in Raleigh Township, County of Wake, under the authority of the Act of 1873-74, Chap. 138, where there was no opportunity afforded the citizens to register, is void.

A certificate signed by a Justice alone, when the act requires the same to be signed by the "Inspectors and the Justice," and in which it is not stated that the votes were compared, is not the certificate required by the act to be registered.

This was a CIVIL ACTION to set aside an election, and for an injunction, heard and determined by his Honor, *Judge Watts,* at Chambers in the city of Raleigh, county of WAKE on the 13th day of May, 1874.

The facts, bearing upon the point decided in this Court, are substantially the following:

The plaintiffs, licensed retail liquor dealers, applied to his Honor,

Judge Watts, of the 6th District, for an injunction restraining the Justice of the Peace from certifying the result of a certain election, held in Raleigh Township, by virtue and under the authority of the act of the General Assembly, 1873-74, Chap. 138, entitled an "Act to prohibit the sale of spirituous liquors in Townships where the people so determine," and also to prohibit the Register of Deeds to record such certificate when it should be returned to him. In their complaint, the plaintiffs allege among other things, and it is the point in the case upon which the decision turned, that there was no registration ordered preceding the election, nor any means of registration opened to the voters, and that in consequence thereof the election was void. In addition to this, the plaintiffs contended that the certificate prescribed by the act aforesaid, was not properly signed and compared, etc.

V. Ballard, on motion, was permitted to defend, which he did by filing his affidavit, taken by the Court as an answer.

His Honor upon hearing the complaint and affidavits granted the restraining order until the 15th of May, at which time the answer, and further affidavits being in, the Court continued the (476) order to the hearing. From this judgment, the defendant, Ballard, appealed.

Battle & Son, Smith & Strong, and Pace, for appellant.
Busbee & Busbee, and Fuller & Ashe, contra.

READE, J. 1. We are of the opinion that the election in this case was void and of no effect, for the reason that a large number of the citizens of the city were not allowed to vote, for the reason that they were not registered and no opportunity was afforded them to register. The act of 1873-74, authorizing the election provides, "That any person allowed by law to vote for members of the General Assembly shall have the right to vote at such election," etc. And the general election law for members of the General Assembly, provides that every person qualified to vote "shall be entitled to registration upon application." Bat. Rev., Chap. 52, Sec. 12.

In our case no registration books were opened at all. This might not have worked any wrong if every person otherwise qualified had been allowed to vote without regard to registration; that is to say, if no registration books had been used at all, but they did use the registration of some years before and excluded all who were not upon that registration book. This was manifestly a fraud upon the popular vote, although doubtless, no fraud was intended.

2. Section 4 of the act under which the election was held provides "That on the day next after the election shall be held, the inspectors of

such election and a Justice of the Peace of the Township shall compare the vote polled in the Township, and certify the number of votes cast in favor of prohibition and the number in favor of license and the result of such election to the Register of Deeds of the County, who shall first copy such certificate in a book," etc.

That seems not to have been done. The certificate is not by the "*inspectors* and a *justice*," but by the justice alone. And it does (477) not set forth that the vote had been compared; nor does it set forth what the election was about. That is not such a certificate as the act requires the Register of Deeds to register.

We are of the opinion that to register such a certificate of an election thus fraudulently held to give it the force of a public law would produce irreparable mischief to the public and to individuals affected thereby.

There is no error in the order appealed from. Let this be certified.

We disclaim the power of the Court to restrain a ministerial officer from doing an act which he has been commanded to do by the Legislature, when acting within the scope of its authority. And we put our decision upon the ground that *the* act here restrained, is not *the* act which the Legislature contemplated.

PER CURIAM. Judgment affirmed.

Cited: Van Bokkelen v. Canaday, 73 N.C. 223; *McDowell v. Construction Co.,* 96 N.C. 531; *Smith v. Wilmington,* 98 N.C. 353; *DeBerry v. Nicholson,* 102 N.C. 471; *Jones v. Comrs.,* 107 N.C. 251; *Gill v. Comrs.,* 160 N. C. 184; *Hill v. Skinner,* 169 N. C. 412.

R. S. PERRY AND OTHERS v. WESLEY WHITAKER AND OTHERS.

A citizen of a township, representing a class, may bring an action for the purpose of testing the validity of a certain township election; and another citizen, for himself and others of the same class, upon the same principle, are allowed to come in and defend such action.

This is the same as the preceding case, the facts of which are therein fully stated. Upon the defendant, Ballard, being permitted by his Honor to defend, the plaintiffs appealed.

Busbee & Busbee and Fuller & Ashe, for appellants.
Battle & Son, Smith & Strong, and Pace, Contra.

READE, J. If one citizen of a township can come in for a class to oppose the certifying of a township vote upon the ground of the irregularity of the election, there can be no reason why another (478) citizen should not be allowed to maintain the regularity of the election, which is the only question in this case.

This is a branch of a case between the same parties at this term which is referred to for particulars.

There is no error. Let this be certified.

PER CURIAM. Order affirmed.

Cited: Smith v. Wilmington, 98 N.C. 353; *DeBerry v. Nicholson,* 102 N.C. 471; *Jones v. Comrs.,* 107 N.C. 251; *Barbee v. Comrs. of Wake,* 210 N.C. 719.

W. T. BRYAN TO USE OF JORDAN RICKS v. W. D. HARRISON AND ANOTHER.

A judgment against the sureties on a promissory note given in 1862, for land, for the full face of the note and interest, nothing else appearing, *is erroneous.* The liability of the sureties is either for the scaled value of the note, at its date, or the value of the land.

CIVIL ACTION, to recover the value of a note given by defendants, on the 10th day of September, 1862, tried before his Honor, *Judge Watts,* at Spring Term, 1874, of NASH Superior Court.

The question as to the measure of damages, being the only one decided in this Court, and the opinion of the Court containing all the facts relating to that, no further statement is called for.

On the trial below, the jury returned a verdict for the plaintiff for the full face value of the note and interest. Judgment accordingly. Defendants appealed.

Bunn & Williams, Davis and Batchelor, for appellants. (479)
Moore & Gatling, contra.

READE, J. One Earl was the principal in the bond sued on, and the defendants were his sureties. Consider the case as if Earl were the defendant. What would be his liability? Ordinarily, the amount of the bond. But in this case he would have the right to say, that he is not liable for the amount of the bond, because the statute provides, that it is presumed to be solvable in Confederate currency. And then,

nothing more appearing, the legislative scale would be applied at the date of the bond, September, 1862, and judgment would be given for the amount of the value of $1,200, of Confederate money at that time, say $600. But then the plaintiff would have the right to rebut the presumption that it was solvable in Confederate currency, by showing that the consideration was not Confederate money, but was a tract of land. And then judgment would be given, not for the amount of the note, nor for the value of Confederate currency, but for the value of the land.

But the principal debtor, Earl, is not the defendant. The defendants are his sureties. And the question is, what is their liability? The argument for the plaintiff sought to establish two propositions: 1. That the principal, Earl, is liable for the face value of the note; and 2. That the defendants are guarantors of his liability and for the same amount, the face value of the note. We have seen that the first proposition is not true; but that Earl's liability is the value of the land. And then, if we admit that the second proposition is true, that the sureties liabilities are the same, the plaintiff and defendants are together; for the defendants contend that their liability is the value of the land.

It is evident that the verdict and judgment were for the face value of the note; and that was erroneous. And for that error there must be a *venire de novo.* This gives the defendants all they asked for below. Whether upon another trial either party will insist that the measure of the defendants' liabilities, is the scaled value of their note at (480) its date, will be as they may be advised. We express no opinion upon that point. *Bryan v. Harrison,* 69, N. C., 151; *Robeson v. Brown,* 63 N. C., 554; *Terrell v. Walker,* 66 N. C., 256; *Sluder v. Woodfin,* 61 N. C., 200; *Sanders v. Jarman,* 67 N. C., 86; *Carter v. McGee,* 61 N. C., 431.

There is error.

PER CURIAM. *Venire de novo.*

G. A. WHITLEY, ADM'R., ETC., v. THE PIEDMONT & ARLINGTON LIFE INSURANCE COMPANY.

The premium upon a Policy of Life Insurance is considered paid to the Company, when, according to instructions, it is delivered to the Express Company, addressed to the Agent of the Insurance Company.

A Policy of Life Insurance is not binding until the premium is paid—such a clause being contained in the application. And it is the duty of the as-

sured to communicate to the Company, any material change in his health, in the interval between the application and the completion of the contract by the payment of the premium.

This was a CIVIL ACTION, on a policy of Life Insurance, tried before *Buxton, J.*, at the Spring Term, 1874, of STANLY Superior Court.

On the trial below many points were raised and decided by the presiding Judge, to whose rulings exceptions were taken, but as most of them are not material to the questions decided in this Court, they are omitted. The opinion of Justice RODMAN contains all the material facts of the case.

Under the rulings of his Honor in the Superior Court, the jury rendered their verdict against the plaintiff. Judgment in accordance therewith, and appeal by the plaintiff.

McCorkle & Bailey, for appellant. (481)
Montgomery and Battle & Son, contra.

RODMAN, J. There are many exceptions in this case as to the competency of evidence of which we do not think it material to consider. The material facts, and about which there seems to be no dispute, are these:

On 31st of March, 1872, Mathew Hahn, the intestate of the plaintiff signed and delivered to the agent of the company a written application for an insurance on his life for $2,000.

It is not denied that the representations therein as to the health of Hahn at that time were true. The application contained this language just above the signature of Hahn: "It is hereby declared . . . also that the policy of insurance hereby applied for shall not be binding upon this Company *until the amount of premium as stated therein shall have been received by said Company*, or some authorized agent thereof, on proper receipt of the Company, during the life time of the person therein assured. The undersigned further binds himself to pay the premium due on policy for which this application is made as soon as policy is issued by said Company, or in default of so doing, this is his obligation on which action may be brought at law to recover the same, etc. The application was forwarded to the Company by its agent, Courts, who received a policy dated 8th April, 1872. About the 20th April, Hahn received a letter from Courts, dated 12th April, informing him that the policy had been received and directing him, as he had previously done, to send the premium of $38.84, together with $1, his fee, either by express or by post office order, to him (Courts) at Ruffin, N. C. Some time early in May Hahn was taken sick; he was quite sick on 11th of May, and on that day he, or his relatives, (we

think it immaterial which,) delivered to the express agent at Concord a package containing the amount of the premium and fee, directed to Courts at Raleigh, N. C. Hahn died on 13th of May. Courts
(482) happening to be in Raleigh on 3d of June, received the package of money there on that day, and wrote to his son at Concord to countersign the policy and send it to Hahn. Courts was at that time ignorant of the sickness and death of Hahn. The policy was countersigned on 17th of June and forwarded to the late residence of Hahn. The premium soon after its receipt was forwarded to and received by the Company.

The policy contains the following: "And it is further agreed by the within assured that the *notice* contained on the back of this policy is accepted by the assured as forming a part of this contract," etc., and also "*Not binding on the Company* until countersigned, by its authorized agent or officer, D. W. Courts, or such sub-agent as may be designated by said agent or officer, *and the advance premium paid.*" The page headed "Notice" contains as follows: "The premium of this policy is payable at the commencement of this risk in one or more premiums as may be expressed," etc.

We may shortly dispose of some preliminary questions. We consider that the premium was paid to the Company when it was delivered to the express agent at Concord, directed to Courts. It is true the address was not in conformity with his directions, as it was to Raleigh, and not to Ruffin; but as he did actually receive it within a reasonable time, and accepted and forwarded it to the Company, who retained it without objection, we consider that any variance from the directed address, was waived. Under other circumstances such a variance might be material; we confine our opinion to the particular case before us. May, on Insurance, Sec. 345, p. 412.

We also consider that it is immaterial whether the premium was paid with the express knowledge and assent of Hahn, or by his relatives without his express assent. Such assent must be presumed under the circumstances. The payment was made for his benefit, and it will be presumed, in the absence of contrary evidence, that a person assents to what is so done; as for example, that he accepts a deed made to him and delivered to one who professes to be his agent, although
(483) in fact he is not.

The main questions are:

1. When was the contract of insurance consummated? Was it upon the acceptance and approval of the application by the Company, or upon the payment of the premium on the 11th of May?

2. Supposing it was consummated only on the payment of the premium, was the representation of health contained in the application

a continuing one up to the consummation of the policy? Because in this last case it would be the duty of the assured to disclose to the Company any material alteration in his health in the interval, and as this was not done, and the representation of his health contained in the application, although true at its date, was not true on the 11th of May, if the respresentation must be considered as made on that day, it would be false to the knowledge of the plaintiff, and he would not be entitled to recover.

I. *On the first question:* We think that the clear declaration in the application that the policy shall not be binding until the premium is made, followed by a clause in the policy to the same effect, is conclusive on this point. It is true that taking this be so, there seems to be no necessity for the words which immediately follow, and which bind the applicant to pay the premium when the policy is issued, because if the premium is paid before the policy is delivered, or if the two acts are exactly concurrent, this obligation could have no effect. We consider it, however, as having been introduced from great caution and to provide for a possible case in which the delivery of the policy might precede.

II. Was it the duty of the assured to communicate to the Company any material change in his health in the interval between the application and the completion of the contract by the payment of the premium?

No rule seems to be better settled than that upon a contract of insurance. It is the duty of the assured, at or before the making of the contract, to communicate all the facts within his knowl- (848) edge which may affect the risk. 1 Phil. Ins. Sec. 524; May. Ins. Sec. 200, p. 210.

This duty cannot be the less obligatory because the assured has shortly before represented or warranted a fact to be true, which then was true, but has since ceased to be so. In such case the insurer naturally and rightfully infers that the thing insured continues in the same condition as far as the assured knows.

In *Edwards v. Footner,* 1 Camp., 530, the action was on a policy of insurance on goods in the Fanny from London to Hayti. The ship was captured by a French privateer with the goods on board. About a week before the policy was signed, the broker for the plaintiff stated to the defendant that the Fanny was to sail with certain armed ships, and that she herself was to carry ten guns and twenty-five men. The Fanny in fact sailed by herself, and carried only eight guns and seventeen men. Lord ELLENBOROUGH said, "If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn."

In *Traill v. Baring*, 4 De. Gex., Jones & Smith, 318, the facts were: The International Life Assurance Society had assured the life of Lydia Taylor for a large sum. On 9th May, 1861, the Society assured her life for £3,000, (a part of the sum,) with the Clerk's Association, on 10th May the Secretary of the Association called on the Secretary of the Reliance Society, and proposed that that Society should take part of their risk on Lydia Taylor's life by way of re-assurance, stating that the Victoria office had agreed to undertake that risk to the amount of £1,000, *and that the Association would themselves retain* £1,000 *of it,* and proposing that the society would take the remaining £1,000. The proposal was accepted on the same day. On 18th May, a policy was accordingly issued, being the one on which the action was brought. It was afterwards discovered that the Association instead of retaining the risk themselves to the amount of £1,000, had on the 15th May,

(three days before the date of the policy,) assumed by way of
(485) re-assurance the *whole* of its risk with the Victoria office. Lydia

Taylor died, and the Society refused to pay.

Lord Justice TURNER said, "I take it to be quite clear that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation, to communicate to the party to whom the representation has been made, the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made, bound, unless such a communication has been made." May on Insurance, Secs. 190, 191, pp. 199, 201.

In both the cases cited, it was admitted there was no actual intent to deceive, and that the representations were *bona fide,* and true at the time they were made.

We think these cases stand on the ground of an admitted principle of equity, which substantially runs through the whole law of that class of contracts in which confidence is reposed in each other by the contracting parties.

The plaintiff is not entitled to recover on the policy. He is entitled to recover the premium paid, on the ground that as the risk never accrued, there was a total failure of consideration, but not in this action, as it is not demanded.

The shape of the issue which the Judge submitted to the jury, "Whether Hahn had paid the premium in his life time, *according to*

the contract," was objectionable, because it involved matter of law with matter of fact.

But the instructions which his Honor afterwards gave to the jury separated the two, and left to the jury on the determination of the facts.

PER CURIAM. Judgment affirmed.

Cited: Ormond v. Ins. Co., 96 N.C. 163; *Kendrick v. Ins. Co.,* 124 N.C. 320; *Ross v. Ins. Co.,* 124 N.C. 396; *Hollowell v. Ins. Co.,* 126 N.C. 402; *Page v. Ins. Co.,* 131 N. C. 116; *McCain v. Ins. Co.,* 190 N .C. 552; *McGee v. Ins. Co.,* 204 N.C. 425; *Butler v. Ins. Co.,* 213 N.C. 386; *Parris v. Builders Corp.,* 244 N. C. 38.

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(486)

VALENTINE MAUNEY AND OTHERS v. THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY AND OTHERS.

A Judge of a District, other than that in which a case is pending, has authority to issue in such cause a restraining order; although he cannot vacate or modify the same.

County Commissioners, by auditing and allowing debts contracted prior to the adoption of the Constitution, do not so change their character as to subject them to the restriction contained in the Constitution relative to taxation.

A *mandamus* issued against the Commissioners of a County, commanding them to assess, levy and collect taxes, sufficient to pay off the indebtedness of the county, does not warrant them in levying taxes in any other manner, or at any other time, than that prescribed by law; to wit: at their regular meeting on the first Monday in February.

The Constitutional limitation and equation of taxation do not apply to debts made previous to the adoption of the Constitution; to debts contracted since the adoption of the Constitution, they both apply.

MOTION to vacate a restraining order, heard before *Buxton, J.,* at the Spring Term, 1874, of MONTGOMERY Superior Court.

The defendants moved to vacate a restraining order, made at Chambers, by his Honor, Judge Tourgee, of 7th Judicial District, on the 16th day of February, 1874. This motion, after objection, was allowed by the Court, with costs.

The plaintiffs thereupon moved for an injunction order, in like terms

and of the same import as the distraining order just vacated. The Court upon consideration of pleadings, proofs, etc., issued an order restraining the defendants from collecting certain portions of the taxes levied, etc. From this order, both plaintiffs and defendants appeal.

The following are the points made and decided upon the hearing below, and at the request of the counsel for both parties, stated by the presiding Judge and presented to this Court as part of the transcript:

By the plaintiff:

(487) (1) As to the restraining order of Judge Tourgee. This order was made by him at Chambers, while holding a Special Court at Raleigh. He was thus not only outside of the 5th District, where the cause was pending, but also outside of his own, which is the 7th District.

The counsel for plaintiffs insisted that Judge Tourgee had jurisdiction, by reason of C. C. P., Sec. 188, by force of the words, "The order" (injunction) "may be made by *any* Judge of a Superior Court," etc.

The Court was of opinion that Section 188 must be construed in connection with Section 345; the injunction being by order in the cause, the application for the order is a *motion,* (see Sec. 345, subdivision 1,) and according to sub-division 3, "*motion* must be made within the district in which the action is triable." The Court was further influenced in opinion by the fact, that the Supreme Court had decided in *Bear v. Cohen,* 65 N. C., 511, that a district Judge could not vacate injunction, except in cases pending in his own district; also by the incongruity of having the same cause pending before different Judges at the same time. For these reasons, the Court held, that the restraining order in the cause, made by his Honor, Judge Tourgee, was *ultra vires* and without authority.

And secondly, should the Court be mistaken in this view, and the subject matter was within the jurisdiction of Judge Tourgee, the Court held, that the restraining order was too broad, and should be modified; and a modified order was accordingly made by the Court and entered upon the minutes.

Plaintiffs excepted.

(2) A second objection taken by the counsel for the plaintiffs to the order of the Court, wherein it differs from, and modifies the terms used in the restraining order, may be stated thus:

A portion of the claims against the county were for the services rendered previous to the adoption of the present State Constitution, and were audited and allowed by the County Commissioners after the adoption of the Constitution. The plaintiffs insisted, that auditing these claims and allowing them, was a novation of them, which

changed the character of the debts, making them new debts, to (488) all intents and purposes, instead of old, and subjecting them to the restriction, so far as the power of taxation is concerned, which are contained in the present Constitution, applicable to county indebtedness.

The Court ruled otherwise, being of opinion that the auditing a claim should not be allowed to have the effect of impairing its value, or detracting from its guarantees of payment. Plaintiffs again excepted.

(3) The next objection urged by the plaintiffs' counsel was, that the law did not admit of two taxes being assessed and levied by the county authorities in one year; and that as the County Commissioners had assessed a tax at the usual time, under the general State law, they could not be registered by the Court, through *mandamus,* to assess a second tax the same year.

His Honor ruled, that so far as the old debts of the county were concerned, that is, debts contracted before the present Constitution, it was the duty of the Commissioners to provide for their payment in full by taxation or otherwise; whether it took one or more assessments during the year. In regard to the new debts, his Honor ruled, that inasmuch as they were contracted with a knowledge of the constitutional restrictions upon the county authorities, in regard to taxation, the County Commissioners must observe the constitutional limitation, and not assess more than double of the tax for State purposes in any one year; and if the County Commissioners had not exhausted their authority by going to the full extent the law allowed, in making the first assessment, then it was their duty to reach that point by a second assessment, if necessary to pay off the just indebtedness of the county. This duty, his Honor was of opinion, it was in the province of the Court to enforce, after judgment, by *mandamus.* Plaintiffs again excepted.

By the defendants:

(1) The counsel for the defendants excepted to the order made by the Court, in so far as it made a discrimination between *"old* and *new"* debts against the county; defendants contending (489) that after debts were reduced to judgments, the debts were placed on the same footing; and that it became the duty of the County Commissioners to pay them without discrimination, and without regard to supposed constitutional limitations or restrictions; and in default of their doing so, it was the duty of the Court to compel payment absolutely by *mandamus.*

His Honor ruled otherwise, and the defendants excepted.

The following acts of Assembly were called to the attention of the Court:

Act 1872-73, Chap. 65, entitled "An act to authorize the Commissioners of Montgomery County to levy a special tax;" ratified 19th February, 1873. This act failed to be ratified by a vote of the people, as required in section four.

Also an act, 1871-72, Chap. 149, entitled "An act authorizing the Commissioners of Montgomery County to levy a special tax and issue bonds;" ratified the 8th February, 1872. This act failed to be ratified by a vote of the people as required in Section 8.

Also act of 1869-70, Chap. 87, entitled "An act to allow the County Commissioners of Montgomery County, to levy a special tax;" ratified the 17th March, 1870. The tax authorized not to exceed $1,000.

It was in evidence that the amount raised by taxation under this last act, viz: $7,000, was absorbed by county claims, other than those embraced in the judgments referred to in the pleadings.

It was conceded for the purposes of this action, that the *new* claims, *i. e.*, those contracted originally since the adoption of the present Constitution, are valid claims against the county. There was evidence of the validity of the rest of the claims, and no evidence to the contrary.

From the rulings of his Honor, the plaintiffs appealed, for the reasons set forth in the foregoing exceptions.

McCorkle & Bailey, for appellants.
Battle & Son, contra.

(490) SETTLE, J. I am of opinion with his Honor, Judge Buxton, and for the reasons given by him, which I will not repeat, as the reporter will set them, that his Honor Judge Tourgee had no power to issue the restraining order mentioned in the pleadings.

But as my associates are of a different opinion, the Court holds, that the power does exist, under Section 188 of the Code of Civil Procedure, and the argument of public convenience is also invoked in aid of this construction.

But practically, in this case, the exception amounts to nothing, for while an injunction by order may be made by any Judge of a Superior Court, yet it is conceded that the Judge of a district, and he alone, has authority to vacate or modify injunctions in causes pending in his own district; saving of course the exceptions which arise upon an exchange of districts, special terms, etc. *Bear v. Cohen*, 65 N. C., 511. Therefore the exception to the mere fact that his Honor modified the restraining order of Judge Tourgee cannot be maintained.

Let us now look to the order of Judge Buxton, which must stand or fall by itself.

1. We affirm his ruling in respect to what is called the novation of the old debt. Not to do so would be to adopt the absurdity that so long as one chooses to hold an old debt, it is better than a new debt, but the moment he tries to collect it, and gets a judgment, it becomes a new debt, no better than other new debts.

This idea, for reducing old indebtedness to the level of the new is at least entitled to the merit of novelty.

2. Have County Commissioners power to assess, levy, and collect taxes more than once in a year? "All taxes shall be levied at their regular meeting, on the first Monday of February." Bat. Rev., Chap. 27, Sec. 8, (1).

The fact that a writ of *mandamus* had issued against the commissioners, commanding them to assess, levy and collect taxes, sufficient to pay off the indebtedness of the county, could not warrant them in levying taxes in any other manner, or at any other time than is prescribed by law. The *mandamus* must be understood to (491) mean that they shall levy and collect, according to the general law governing the subject.

3. We concur in his Honor's views as to the constitutional limitation and equation of taxation to be applied to the different orders of debt.

They may be disregarded as to old indebtedness, but must be applied to the new.

So many cases involving the determination of these questions have been before this Court since the adoption of our present Constitution, that we do not feel called upon to discuss the matter further.

This disposes of all the exceptions presented by the record. Let this opinion be certified, etc. Modified and remanded.

PER CURIAM. Judgment accordingly.

Cited: Trull v. Comrs., 72 N.C. 391; *Comrs. v. Comrs.*, 79 N.C. 569; *Cromartie v. Comrs.*, 87 N.C. 139; *Barksdale v. Comrs.*, 93 N.C. 476; *Bd. of Ed. v. Comrs.*, 107 N.C. 112; *Herring v. Dixon*, 122 N.C. 423; *Betts v. Raleigh*, 142 N.C. 230; *R. R. v. Comrs.*, 148 N.C. 234; *R. R. v. Cherokee Co.*, 177 N.C. 90; *R. R. v. Comrs.*, 178 N.C. 452; *Person v. Watts*, 184 N.C. 538

VALENTINE MAUNEY AND OTHERS v. THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY AND OTHERS.

(For Syllabus see the preceding case.)

This was the defendants' appeal in the case preceding, as that was the plaintiffs. The facts are the same, and the defendants' exception to the ruling of the presiding Judge, is therein fully stated.

Battle & Son, for appellant.
McCorkle & Bailey, contra.

SETTLE, J. See opinion between same parties, (preceding case, *ante.*) on the same subject matter, at this term.

PER CURIAM. Judgment accordingly.

(492)

MURRAY, FERRIS & CO. v. R. B. BLACKLEDGE AND WIFE.

The equitable owner of land may maintain an action for its recovery, although the legal estate is in his trustee.

When a change of interest takes place during the progress of a suit, the plaintiff may make the change known, by a supplemental complaint, by which the new owner becomes practically substituted as plaintiff for the former one.

A deed made to O. P. & Co. by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity, which may be explained by parol.

The possession of a mortgagor is not adverse to the possession of the mortgagee, so as to prevent the assignment of the mortgage by the latter.

The negligence of counsel in not objecting, at the proper time, to the reception of incompetent evidence, from which the jury find that the grantor was mistaken when she executed the deed, as to its conveying a certain tract of land, is not necessarily fatal, and will not preclude the presiding Judge from giving judgment, of his own motion, *non obstante veredicto.*

CIVIL ACTION, for the recovery of the possession of land, tried before his Honor, *Judge Clarke,* at the Spring Term, 1874, of CRAVEN Superior Court.

On the trial below, the Court submitted certain issues without instructions to the jury, which, with the finding of the jury thereon,

and all other facts relating to the points discussed and decided in this Court, are fully set out in the following opinion of Justice RODMAN.

The jury found the issues for the plaintiffs. Judgment in accordance therewith, and appeal by the defendants.

Justice, Haughton, Smith & Strong and Hubbard, for appellants.
Mason, Green, Battle & Son and Bryan, contra.

RODMAN, J. This is an action to recover the possession of land, begun by H. R. Bryan as plaintiff, by summons dated (493) 29th August, 1872, against R. B. Blackledge. Afterwards (it does not appear when) the summons was amended so as to make the individuals composing the firm of Murray, Ferris & Co., plaintiffs, in the place of Bryan. The complaint is filed by those individuals.

1. The first point of defence was; that at the date of the summons, the legal estate in the land was in Bryan and not in Murray, Ferris & Co., whose title, if any, accrued afterwards.

The facts which may be gathered from the voluminous and confused record relating to this point are these.

On 11th January, 1870, R. B. Blackledge and Pinkie, his wife, conveyed the land to certain named individuals (who are the present plaintiffs) composing the firm of Murray, Ferris & Co., by way of mortgage, to secure $2,000.

On 16th August, 1872, the plaintiffs conveyed their estate to Bryan, and on 7th June, 1873, Bryan re-conveyed to them not as individuals, but by the firm name of Murray, Ferris & Co.

It is in evidence by Bryan that the deed to him was without consideration, and that at the commencement of this suit, he held the legal estate only as the agent and trustee of the individuals composing the firm of Murray, Ferris & Co.

We are of opinion that under C. C. P., an equitable owner may maintain an action for the recovery of land, and that if the suit had been originally brought by the present plaintiffs, they could have maintained the action, notwithstanding that the legal estate was at that time in Bryan, their acknowledged trustee. The effect of the amendment was simply to make the present plaintiffs such at the commencement of the suit, and consequently if they then had an equitable title, they are entitled to recover.

By the omission to join the trustee as a plaintiff, the defendants lose the benefit of no defence, which would be available against Bryan, if they had any such.

When a change of interest takes place during the progress of a suit, the plaintiff may make the change known by a supplemental

(494) complaint, by which the new owner becomes practically substituted as plaintiff for the former one. The amendment in the present case must be considered as having only the effect of a supplemental complaint, stating the conveyance by Bryan to plaintiffs.

2. (The first exception of defendants.) "That the deed to plaintiffs from defendants was void, because no grantees were named therein."

This is an oversight of defendants counsel. The deed on p. 13 of the record shows the contrary.

Probably the counsel meant to refer to the deed from Bryan which is made to "Murray, Ferris & Co.," and not to the partners by their individual names.

But a deed for land is not for that reason void, any more than a bond for the payment of money is. It is a latent ambiguity which may be explained by parol. This mode of making deeds is a careless one, may be insecure, but the deed is not void.

3. That the deed from Bryan to plaintiffs was void because the defendants were in adverse possession of the land when it was delivered.

The case shows that the defendants were not in adverse possession. They had mortgaged the lands to plaintiff on 11th January, 1870, and their possession was not adverse to plaintiffs, or to Bryan, the assignee of plaintiffs. The possession of a mortgagor is not adverse to his mortgagee, so as to prevent an assignment of the mortgage by the latter.

4. That plaintiffs were trustees, and could not purchase at their own sale.

The plaintiffs need not, and do not, claim any title under a purchase at the sale by Bryan. That sale had no effect. It did not operate to extinguish the equity of redemption in the defendants, which for ought that appears in this case, still exists.

5. "That from the evidence and the pleadings, it appeared that the Hatch lands were transferred to the plaintiffs by mistake, and
(495) that therefore no title to the same passed to the plaintiffs."

On this point the jury found, in reply to the first and second issues submitted to them, that Pinkie Blackledge executed the deed to plaintiffs by mistake, supposing it did not convey the Hatch tract of land; but that her mistake was not the consequence of misrepresentation by the attorney of the plaintiffs.

It *seems* to be conceded, (for in this case scarce anything is clearly stated), that the description of the lands in the deed from R. B. Blackledge and wife of 11th January, 1870, in fact covered the land which Mrs. Blackledge said was included by mistake.

The only evidence tending to show any mistake was that of Mrs.

Blackledge, who swore that when she executed the deed, Bryan told her that it did not cover the Hatch land, and that she executed it under that belief. Her testimony was received without objection.

The deeds themselves *seem* to furnish evidence that the intention of all the parties to the deed of 11th of January, 1870, was to convey all the lands which Blackledge and wife had conveyed by mortgage to W. P. Moore, and which he assigned to plaintiffs. No copy of this deed to Moore is in the record. There is a deed from Moore and wife to Mrs. Blackledge, dated 6th of December, 1869, for 1,160 acres described by boundaries but it does not clearly appear whether this deed embraces the Hatch land or not. This part of the case is left exceedingly obscure, and all ambiguities and uncertainties are to be taken most strongly against the appellants.

It does not appear that any substantial consideration was paid by Mrs. Blackledge for any of the deeds to her. It may be *supposed* that the whole object of them was to put the estate in her, so as to enable her to make the mortgage of 11th of January, 1870, to the plaintiffs, and to redeem the land for her own use by payment of the debt to them. But these things are merely evidence, and the jury found that the deed was executed by Mrs. Blackledge, under a mistake, and the Judge disregarded their finding and gave judgment for the plaintiffs. His Honor does not give the reason why he dis- (496) regarded the finding, but we conceive it could only be upon the ground that the *only* evidence tending to support it was incompetent. It is argued for defendants, that, supposing the evidence incompetent, the incompetency was waived by the failure of the plaintiff to object to it and by his failure to request instructions from the Court, and the jury being thus authorized to act upon it, and his Honor not having set aside the verdict upon that point as being against the weight of evidence, but having simply disregarded it, he was in error in so doing, and should have given a judgment in conformity with the fact as found by the verdict. There would be much force in this argument if there had been *any* competent evidence upon which the verdict as to the mistake could stand. But it would seem unjust that such a rule should prevail, when it is seen that there was no competent evidence upon which the verdict can stand. The negligence of counsel in not objecting to the evidence ought not is such a case to be fatal. And notwithstanding that it is not so stated, as properly it ought to have been, we must consider the action of the Judge in disregarding the verdict on the point of mistake, as in effect setting it aside and giving judgment that there was no mistake, because there was no competent evidence of any.

This brings us to the question whether the evidence of Mrs. Black-

ledge to vary the deed by excluding from it one part of the land which, it is here assumed, was covered by the words, was competent.

The general rule is familiar, that parol evidence of a contemporaneous agreement differing from the written one shall not be received to vary the latter as between the parties to it. It is equally well settled, that upon a bill in equity to reform a deed or other written contract on the ground of fraud or mistake, parol evidence *of facts and circumstances debars* the deed, may be received to prove the fraud or mistake.

(497) It is also clear that under the section of C. C. P., which removes the disqualification of interest, Mrs. Blackledge was a competent witness to prove *such facts and circumstances,* as for example, misrepresentation of the contents or meaning of the deed by the attorney of the plaintiff. But it by no means follows that she was therefore competent to prove that the deed covered more land than she thought it did, and thereby to avoid the deed or have it reformed according to her intention in executing it. Her incompetency from interest was removed, but her incompetency to vary a written contract by parol remained just as it was before C. C. P. To allow her to avoid or vary the deed by her own evidence of her secret thoughts and purposes in signing it, would place all written titles to property at the mercy of the grantor and effectually repeal the statute of frauds. We do not consider the point made by counsel, that a mistake to avoid a deed must be one common to both parties. It is immaterial in the view we take of the case.

We think in a case like this, the Judge *ex mero motu,* notwithstanding any implied waiver of his client's rights by the plaintiff's attorney, should have instructed the jury that the evidence of Mrs. Blackledge was incompetent for the purpose for which it was offered. Proof of a parol admission by an owner of land that he does not own it is inadmissible on a question of title, and much less can the mere acquiescence by his attorney in a suit of incompetent evidence in derogation of his title bind him.

We think there is no error in the judgment below.

PER CURIAM. Judgment affirmed.

Cited: Ryan v. McGehee, 83 N.C. 502; *Crawford v. Orr,* 84 N.C. 251; *Condry v. Cheshire,* 88 N.C. 378; *Taylor v. Eatman,* 92 N.C. 610; *Ely v. Early,* 94 N.C.6; *Geer v. Geer,* 109 N.C. 682; *Simmons v. Allison,* 118 N.C. 776; *Grabbs v. Ins. Co.,* 125 N.C. 394; *Watkins v. Mfg. Co.,* 131 N.C. 537; *Hinton v. Moore,* 139 N.C. 45; *Walker v. Miller,* 139 N.C. 453; *Perry v. Hackney,* 142 N.C. 371; *Daniels v. R. R.,* 158 N.C. 427; *Ball-Thrash v. McCormick,* 162 N.C. 476; *Gold Mining Co. v. Lumber*

Co., 170 N.C. 277; *Mull v. R. R.*, 175 N.C. 594; *Vaught v. Williams*, 177 N.C. 84; *Lodge v. Benevolent Assoc.*, 231 N.C. 526.

(498)

R. F. SIMONTON, CASHIER, v. J. B. LANIER AND OTHERS.

A motion to vacate a judgment and be allowed to plead on account of excusable neglect, under Sec. 133, C. C. P., is addressed to the discretion of the presiding Judge, whose decision is not subject to review.

The provision in the charter of the Bank of Statesville, that the Bank "may discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," does not authorize the Bank to charge more than the legal rate, 8 *per cent*, for money loaned.

The construction of statutes commented on and explained.

CIVIL ACTION on a promissory note given to the Bank of Statesville, tried at Spring Term, 1874, of IREDELL Superior Court, before his Honor, *Judge Mitchell.*

The summons sued out by plaintiff was returnable to Fall Term, 1873, and was duly served on defendants. The complaint was regularly filed within the first three days of the term, and on Saturday of the second week of the term, the defendants having filed no answer nor otherwise pleaded, judgment was assigned in favor of the plaintiff for the amount claimed in his complaint. Soon after the adjournment of the Court, a transcript of the judgment was docketed in the office of the Clerk of the Superior Court of Davie County, and an execution issued thereupon. About the 10th of May thereafter the defendant Lanier applied to Judge Mitchell for an order restraining the plaintiff and sheriff of Davie County from enforcing said execution; and also requiring the plaintiff to show cause at the next term of Iredell Superior Court why the judgment should not be set aside, and the defendants allowed to plead. The order was granted upon the affidavit of the defendant, and the plaintiff notified thereof.

At the return term of the notice, the defendant moved to (499) vacate the judgment, under Section 134, C. C. P. His Honor from the affidavits of the parties and the pleadings, found the following facts:

That defendant, Lanier, had written to R. F. Armfield, Esq., an attorney of the Court residing in Statesville, to appear for the defendants in the suit instituted by the plaintiff; and that he, Mr. Armfield, from some cause, did not receive defendant's letter. That defendant, Lanier, had also spoken to W. H. Bailey, Esq., another attorney of the

Court, residing in Salisbury, to appear in the case; that Mr. Bailey was present during some part of the term, but from some misunderstanding, did not appear for defendants. That the defendants live in Mocksville, about twenty-six miles from Statesville; and that none of them were present at any time during that term of the Court, nor had any correspondence with the attorneys named.

Upon the foregoing facts, his Honor was of opinion that the defendants had not shown such excusable negligence, as to entitle them to the benefit of Sec. 133, C. C. P., and so decided.

The defendants further contended, that the note sued on was usurious, and moved to vacate the judgment on that account, and if the Court refuse to grant this motion, it was moved that the judgment be corrected by striking from the sum recovered all interest.

It was admitted by plaintiff that the interest was computed at the rate of one and one-half *per cent* per month, and that the judgment was intended to draw that rate until paid. And it was found by the Court as a fact, that the note sued on was due the plaintiff as Cashier of the Bank of Statesville, and that the rate charged, one and one-half *per cent*, was that agreed on between the parties. Upon these facts, his Honor, not considering the note usurious, refused both motions. The judgment was corrected by allowing certain credits.

From the rulings of his Honor, upon the points above presented, the defendants, after judgment against them, appealed.

(500) *McCorkle & Bailey, for appellants.*
Folk & Armfield, and Furches, contra.

BYNUM, J. 1. The first motion of the defendants was to set aside the judgment theretofore rendered in this action, and allow them to answer and defend. This motion was founded upon C. C. P., Sec. 133. The facts relating to this motion, as found by the Court are, that prior to the Court, when judgment was taken, the defendants spoke to an attorney, in Statesville, and also wrote to another to appear and defend the action, but that neither of them did appear, and that judgment was entered by default, in the regular course of the Court. The defendants do not otherwise show why they did not personally attend Court, nor do they now allege that they have a meritorious defence to the action. His Honor refused to allow the motion, because no legal excuse was rendered for the neglect to appear and defend. The facts found do not constitute it error in law, in his Honor, to refuse the motion, but under the section of the C. C. P. cited, the application was addressed to the discretion of the Court, and his decision thereon was final, whether refusing or allowing the motion. *Hudgins v. White,* 65 N. C., 393; *Clegg v. Soapstone Co.,* 66 N. C., 391.

2. The first motion having been disallowed, the next was to correct and reform the judgment by striking out the amount of the alleged usurious interest computed in it.

The facts found as to this point are, that the note sued on was given to the plaintiff as Cashier of the Bank of Statesville for money loaned, at the rate of 1½ per cent per month interest, and that the judgment included such interest to its rendition, and the principle was to bear the same rate of interest until the judgment was satisfied. His Honor refused this motion, holding that the contract was not usurious, under the act of the Assembly ratified the 22d March 1870, as amended by an act ratified 4th February, 1871, by which this "Statesville Bank," is claimed to be incorporated. Was this ruling correct, (501) in law, is the question.

After enacting that a bank be established in the town of Statesville, to be styled the "Bank of Statesville," the third section of the act is in the following language, as amended by the amendatory act, viz.: "That the said Bank may discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon, receive and pay out the lawful currency out of the country, deal in exchange, gold and silver coin and bullion, and purchase and hold a lot of ground for a place of business, and may, at pleasure, sell or exchange the same, and may hold such other real property and estate as may be conveyed to secure debts, and may sell and convey the same. It may receive on deposit any and all sums of money on terms to be agreed on by the officers and depositors, and may receive on deposit moneys held in trust by administrators, executors, guardians or others, and issue certificates therefor, having such interest as may be agreed on by the officers and depositors, not to exceed the legal interest, which certificates shall be assignable and transferrable under such regulations as may be prescribed by the President and directors, and all certificates and evidences of deposit, signed by the proper officers of the bank, shall be as binding as if under the seal of the bank." Private Acts, 1869-70, Chap. 64.

The public law regulating and fixing the legal rate of interest, Bat. Rev., Chap. 114, declares that "the legal rate of interest upon all sums of money where interest is allowed shall be six *per cent* per annum for such time as interest may accrue, and no more: *Provided, however,* That any person may, for the loan of money, but upon no other account, take interest at a rate so great as eight *per cent,* if both the consideration and rate of interest shall be set forth in an obligation signed by the party or his agent," and then the act provides that if the lender agrees to take a greater rate of interest than eight *per cent* when the rate is named, or six *per cent* when it is not named, the interest (502) shall not be recoverable at law.

The plaintiff contends that the following language in his alleged act of incorporation, to wit, "May discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," confers the right to exact the rate of interest here agreed upon, although greater than eight *per cent,* the legal rate by the public law. The defendants deny this, and the case turns upon the proper construction of that part of the act just recited.

It is a cardinal rule that if a statute is plain and unambiguous, there is no room for construction; the Legislature has spoken and its will must be obeyed. The duty of the Court is peremptory and inflexible. It can look neither to the right or left, neither to the policy, wisdom or expediency of the act. But when the meaning of the act is ambiguous and doubtful it is the object of judicial investigation and the duty to ascertain the intention of the Legislature which framed the statutes. *Fisher v. Blight,* 2 Cr. 358, 399.

That there is room for construction here cannot admit of a doubt. The statute nowhere confers an *express* power to exceed the legal rate of interest, and the power can be derived by *implication* only. The operative words, "any rate of interest that may be agreed on," may mean any rate of interest *above* eight *per cent,* or they may mean any rate of interest *not greater* than the legal rate. Can it be a question that it was not the legislative intent to confer upon this private bank the power to exact 18, 25 or 50 *per cent* interest on the loan of money, and thus utterly subvert the public law and well settled policy of the State upon the subject of usury, and that, too, not for the common advantage, but for the exclusive benefit of a single private company. Ordinarily, a grant of corporate privileges, even to a private company, imports some public advantage as a compensation for the grant. If a turnpike, canal or railroad company is incorporated, the compensation to the public for the grant is, that by paying the tolls the people
(503) have the right to their use, and can compel the recognition of their rights. But this is a grant of extraordinary privileges and exemptions, without any compensation to the public whatever.

If the right to take the interest claimed were plainly and expressly given, would not the act be unconstitutional? Art. 1, Sec. 7, of the Constitution, declares that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." What public services has this bank rendered in consideration of the grant? It agrees to pay taxes, but carefully guards against paying more than other tax payers on the same valuation of property. If neither has paid or agreed to pay any consideration for the extraordinary and exclusive emoluments and privileges it claims to be conferred upon it by the State, not for a definite

period, but in *perpetuity,* as the charter is of indefinite duration. Art. 1, Sec. 31, Constitution, expressly prohibits such a monstrous pretention: "Perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed." The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever working foes of free and equal government.

But, passing by the constitutional objection, which we believe is fatal to the claim of the plaintiff, the construction he contends for cannot be maintained. When the language of a statute is ambiguous, construction is resorted to to ascertain the legislative intent, and to this end,

1. The first rule is that statutes, *in pari materia,* though made at different times and not referring to each other, are to be taken together as one system and as explanatory of each other. *Earle of Ailesbury v. Patterson,* Dong. 30. *State v. Melton,* 44 N. C., 49.

In the latter case, Melton, a man of Indian descent, and Byrd, a white woman, claimed to be married, but were indicted for living in fornication and adultery, under the act of 1838, which de- (504) clared that "It shall not be lawful for any free negro or person of color, to marry a white person," and that any such marriage should be void. The parties came within the literal meaning as well as words of the act, yet the Court held that it was not the legislative intent to punish such parties, however remote the degree of color, and this construction was given because a prior statute of 1836 had affixed a penalty to such marriages, if such colored person were within the third degree, and putting both statutes together, it was held not the intention of the law to make such marriages indictable, however remote the degree.

State v. Woodside, 31 N. C., 496, is to the same effect.

Taking, therefore, the public act, fixing the rate of interest for the State at large, with this private act, providing in words for taking "such rate of interest as may be agreed upon," the equitable and fair construction of the legislative intent, in the latter act is, that "the rate of interest may be such as the parties agree on, not greater than the legal rate."

2. A private statute will not, by *implication,* repeal a public statute. It is true that every affirmative statute is a repeal of a prior affirmative statute, so far as it is contrary to it, under the maxim, *legis posteriores priores abrogant,* but the law does not favor implied revocations, nor is it to be allowed, unless the repugnancy be plain; and where, in the latter act, there is no clause of *non obstante,* it shall, if possible, have such construction, that it shall not operate as a repeal. *State v. Woodside,* 31 N. C., 498.

There is a marked difference in the rules of construction applicable to public and private statutes. Public laws are founded on the gravest

considerations of public benefit. They are deliberately enacted, are permanent in character, are for the equal benefit of all, and of universal application. Not so with private statutes. These are not of common concern, and do not receive the watchful and cautious scrutiny of the legislature, which is devoted to those of a public character. They
(505) are often procured by agents, and for a purpose, who are watchful to take advantage of any relaxation in legislative vigilance. Hence, the grant to one citizen and the restriction upon another, should be limited to the persons, and the extent therein plainly set down. The Court, therefore, will not by construction, carry a private act, beyond its words or a necessary implication from them, but on the contrary, there is an implication in favor of the general law and the rights of the public. *Drake v. Drake,* 15 N. C., 110; *State v. Petway,* 55 N. C., 396; *Attorney-General v. Bank,* 57 N. C., 287.

If we look beyond the rules of construction as established in our Courts, we find both the English and American authorities, uniform to the same point, that all grants of privileges are to be construed literally in favor of the public and strictly against the grantor of the monopoly, franchise or charter, and that whatever is not unequivocally granted in such act, is taken to be withheld.

For instance, LIEBER announces the following, among other rules of interpretation of statutes:

1. "The particular and inferior cannot defeat the general and superior."

2. "Privileges or favors, are to be construed so as to be least injurious to the non-privileged or un-favored."

3. "The general and superior, prevails over the specific or inferior; no law, therefore, can be construed contrary to the fundamental law. If it admits of another construction, it must be adopted."

4. "If the law admits of two constructions, that is to be taken, which is agreeable to the primary law." *Hermeneutic,* 120, 16.

"If laws of doubtful meaning be connected with or related to other laws which throw any light on their purport, the interpretation thus derived, is to be adopted." *Doneat,* as cited in *Ledgw. on State. & Const. Law,* 284.

The same principles of construction will be found in *Scales v. Pickering,* 4 Bing.; 11 East., 652; 4 Pel., 514; Sedgwick, 339; 1 Kent, 500.

(506) Without further criticism upon the provisions, and the omission of provisions, for the just protection of its customers, in this bank charter, we only decide now, that the act purporting to establish the "Bank of Statesville," does not confer upon it, the right to charge a greater rate of interest, than that established by the general law.

While, therefore, the Court below, under Section 133, C. C. P., and the discretionary powers there conferred, could rightfully refuse to set aside the judgment, *in toto*, it was error in law, to give judgment for this usurious interest, and it was error, not to allow the motion to correct the judgment so as to make it conform to law.

As the defendants come into this Court to ask favors, and this is a Court of equity as well as law, they will be required to do equity; that is, to pay the debt and legal interest thereon, for the loan of money, to wit: 8 per cent. The Court below will reform the judgment according to this opinion, and upon the payment of the judgment, thus reformed, it will cause satisfaction thereof to be entered of record.

To that end the cause is remanded. Judgment reversed and case remanded.

PER CURIAM. Judgment reversed.

Cited: S.c., 71 N.C. 507; *Bank v. Williams,* 79 N.C. 134; *Purnell v. Vaughan,* 82 N.C. 136; *Warren v. Harvey,* 92 N.C. 141; *Brown v. Hale,* 93 N.C. 190; *Bank v. Mfg. Co.,* 96 N.C. 303; *Cook v. Patterson,* 103 N.C. 130; *Carver v. Brady,* 104 N.C. 221; *Meroney v. B. & L. Assoc.,* 116 N.C. 911, 922; *Winslow v. Morton,* 118 N.C. 491; *Stith v. Jones,* 119 N.C. 431; *Thrift v. Elizabeth City,* 122 N.C. 38; *Marsh v. Griffin,* 123 N.C. 667; *Motley v. Finishing Co.,* 124 N.C. 234; *Wilson v. Jordan,* 124 N.C. 688; *Greene v. Owen,* 125 N.C. 219; *Morris v. Ins. Co.,* 131 N.C. 213; *S. v. Patterson,* 134 N.C. 620; *S. v. Perkins,* 141 N.C. 807; *S. v. R. R.,* 141 N.C. 853; *Wharton v. Greensboro,* 146 N.C. 359; *Owens v. Wright,* 161 N.C. 132; *Hardwood Co. v. Waldo,* 161 N.C. 198; *Cuthbertson v. Bank,* 170 N.C. 532; *Corey v. Hooker,* 171 N.C. 231; *Kornegay v. Goldsboro,* 180 N.C. 458; *Kornegay v. Goldsboro,* 180 N.C. 462; *Power Co. v. Elizabeth City,* 188 N.C. 288; *S. v. Fowler,* 193 N.C. 292; *Hinton v. State Treasurer,* 193 N.C. 504; *Plott v. Ferguson,* 202 N.C. 452; *Edgerton v. Hood, Comr. of Banks,* 205 N.C. 822; *Cowan v. Trust Co.,* 211 N.C. 21; *S. v. Harris,* 216 N.C. 753; *Raleigh v. Jordan,* 218 N.C. 59; *Duncan v. Charlotte,* 235 N.C. 93; *S. v. Felton,* 239 N.C. 585; *Taylor v. Racing Assoc.,* 241 N.C. 96.

R. F. SIMONTON, CASHIER, v. L. G. GAITHER AND OTHERS.

(The Syllabus in this is the same as it is in the preceding case of *Simonton v. Lanier* and others—page 498.)

In this case, the defendants appealed upon the same grounds and for the same reasons as did the defendants in the preceding case, *ante.*

McCorkle & Bailey, for appellants.
Folk & Armfield and Furches, contra.

(507) BYNUM, J. The same motions were made and overruled in this case, as in the case of *Simonton v. Lanier,* decided at this term of the Court. The facts in the two cases, are almost identical, and therefore for the reasons given in the case of *Simonton v. Lanier,* we hold the ruling of his Honor below, on the motion to arrest the judgment, erroneous.

The case is remanded to the end that the proper correction be made, and that upon the payment of the judgment and legal interest, satisfaction be entered of record.

PER CURIAM. Judgment reversed and case remanded.

WILLIS P. BARNES AND OTHERS v. W. J. BROWN AND WIFE AND OTHERS.

When an issue is made up in this Court and sent down to the Superior Court for trial, if on the second trial, in the opinion of the presiding Judge, such issue is too particular and special to meet the merits of the case, he has the power to alter and change the same, so as to embrace all the matters in controversy.

A mortgagor has the right to release his equity of redemption to the mortgagee, though the Courts look with suspicion on such release, and require proof that the same is free from fraud and for a fair and adequate price. In the case of an assignment of his right of redemption to a stranger, there is no such jealousy, and if the mortgagor would avoid his assignment, he must prove fraud as in other cases.

A mortgagee may purchase the equity of redemption from any person to whom the mortgagor has assigned it, or at an execution sale had at the instance of such stranger.

When a vendee, upon a parol contract to convey lands, which the vendor afterwards refuses to perform, has made payments of the purchase money, or being put into possession has expended money in improvements, he is entitled to be reimbursed.

This was a CIVIL ACTION to compel defendants to convey to plaintiffs the legal title to two lots in Lumberton, originally tried by (508) *Buxton, J.,* at the Special (January) Term, 1874, of the Superior Court of ROBESON, and from thence brought by appeal to this Court, in which it was argued at June Term, 1873, and sent back to the Court below to have tried certain issues framed here. The cause having been removed to the Superior Court of Columbus, upon the affidavit of

the plaintiff, where it was tried before *Russell, J.*, at Spring Term, 1874, upon the issues sent down from this Court.

The facts of the case as sent up with the record, are the same as those set out in the statement of the case in 59 N. C., 439; and the evidence relating to the issues on the last trial, and all the facts pertinent thereto are set out in the opinion of Justice RODMAN.

N. McLean and W. McL. McKay, for plaintiffs.
Strange, Leitch, French and N. A. McLean, for defendants.

RODMAN, J. 1. The defendants insist that they are entitled to a new trial of the issues upon which the jury passed at the last trial, because during the trial the Judge altered the issue directed by this Court to be submitted, and submitted others more general, which they had not come prepared to try. The issue which this Court at June Term, 1873, directed to be tried, (69 N. C., 439,) seemed, upon the case then before us, to embrace all the matters in controversy between the parties which had not been determined by the finding of a jury. As it appeared upon the second trial, it was too special and particular to meet the merit of the case. We think the Judge had the power to change its form, so as to make it more general, or to add other issues more general to meet the merits. Of course it was immaterial whether King had been paid *through the hands of Mr. Barnes.* The material question was; had he been paid? The defendants have no reason to complain that the Judge required them to try at the term at which the form of the issues was modified. Issues are made *by* the pleadings, or *out of* the pleadings.

Those questions only should be put to a jury which are in issue and which are material, and those, the parties should in general (509) be at all times prepared to try. No form of issue which presents only such questions, can be considered a surprise. The defendants are not entitled to a new trial on that ground.

2. In order to get at the merits of this case, it is necessary to examine the complaint which was filed at Spring Term, 1872. The case there set forth is in substance this: On the 13th December, 1853, Hardy Barnes, the father of plaintiffs, conveyed to King two lots in Lumberton by way of mortgage to secure a debt of $800, which he owed to King. On 27th December, 1853, Barnes conveyed to French, the same lots and another piece of land, in trust to sell and pay certain other debts; French duly sold both the lots and the land, and King purchased the whole at public sale for $1,995, and French conveyed to him accordingly. It is material to inquire what was the nature of King's estate in the two lots, after his purchase of the equity of redemption, which was the only right that French had, or could assign. The learned counsel for the plaintiffs con-

tends that as King was a mortgagee, he could not under *any* circumstances, purchase the equity of redemption, so as to hold the land freed from the mortgagor's right to redeem. The relation of mortgagor and mortgagee he says can only be changed by a foreclosure, or by a payment of the debt. This proposition is evidently too broad, as it excludes any right on the part of the mortgagor to release his right of redemption to the mortgagee, or to assign it to a stranger. These rights he undoubtedly has. It is true, that a Court looks with suspicion, on any release to the mortgagee, upon the idea that he has a certain power over the mortgagor, which he may abuse, and it requires proof that the release was free from fraud, and for an adequate price. But in the case of an assignment to a stranger there is no such jealousy, and if the mortgagor would avoid his assignment, he must prove fraud, as he would in a case of other property. In the present case, the assignment to French is not impeached. If a stranger had purchased of
(510) French he would have acquired the right of redemption; that is to say, an absolute estate in the land on paying off the mortgage debt. In the absence of fraud, and of any valid agreement to the contrary, King must have acquired precisely the same right; that is to say, he acquired an absolute estate in the land, and his mortgage debt was extinguished. He ceased to have any personal claims on Barnes by reason of the mortgage debt. No authority can be found to the contrary of this. In *Camp v. Cox,* 18 N. C., 62, it was held that a mortgagee cannot sell the equity of redemption under execution for the mortgage debt. It was doubted in that case, and also in *Thompson v. Parker,* 55 N. C., 475, whether the mortgagee could sell under execution for any other debt to him. If we consider that upon such a sale, the sum bid is the value of the land above the mortgage debt, and that if he becomes the purchaser, his mortgage debt is extinguished, we see no reason for the doubt; but it is unnecessary to express any opinion on the point. But as far as we know, it never has been doubted that a mortgagee may purchase from a person to whom the mortgagor has assigned, or at an execution sale at the instance of a stranger. Of course the effect of such a purchase might be affected by proof of fraud, etc. The counsel refers us to *Boyd v. Hawkins,* 17 N. C., 329, but that case differs so widely from the present as to make comment unnecessary. Here there was no dealing for the equity of redemption by King with the mortgagor, there is no allegation that the sale was injuriously affected by the bidding by King, or that the purchase was at an under value.

The plaintiffs in their complaint, put their case upon an agreement by King to allow Barnes to redeem, or to convey to Barnes on payment by him of the sums which the property cost King, being about $2,800. They allege that such agreement was made orally, or at least they do

not allege that it was in writing, (which as a matter of pleading, they were not bound to do,) and there is no evidence from which a written agreement to the effect of that alleged, can be inferred. They allege that the sum agreed on was fully paid; that King conveyed (511) the 350 acres to one of the heirs; that he repeatedly admitted that he had been paid for the lots; and that his death prevented the conveyance as to them. It is not said that the agreement was before or at the sale, or that the sale was influenced by it at all, and the only evidence to establish the agreement is as consistent with one made after the sale, as with a prior or contemporary one.

The enquiry then is, supposing such an agreement, not in writing, can it be enforced consistently with the statute of frauds, Rev. Code, Chap. 50, Sec. 11? By this well known act, all contracts to sell lands, etc., are declared void unless the same shall be put in writing and signed by the party to be charged, etc. There are several classes of cases, which might at first seem to come within the words of the act, which it is well settled do not. These exceptions are well known and clearly defined. The general rule requires a writing, and any one who contends that his case is an exception must show that it comes within some excepted class. The excepted class which the plaintiffs' case seems most nearly to resemble is that which is illustrated by the following cases: In *Vannoy v. Martin,* 41 N. C., 169, the defendant had purchased the plaintiff's land at execution sold *for less than its value by means of representations at the sale* that he was buying merely to secure certain debts to himself, on the payment of which the plaintiff might redeem. The plaintiff was permitted to redeem, though there was no writing. In *Neely v. Torian,* 21 N. C., 410, the sale was under a deed in trust, and the purchaser promised *at the sale* that the plaintiff might redeem, which *had the effect to stifle competition.* Neither the allegation nor the evidence liken the plaintiffs' case to these. *Trice v. Pratt,* 21 N. C., 626, and *Hargrove v. King,* 40 N. C., 430, are cases where the defendants purchased the lands as agents of the plaintiffs and with their means or credit, and do not apply here. The plaintiffs' case as set forth, is the naked one of an oral agreement to convey for a certain sum, and the payment of that sum, which it seems to us is clearly (512) within the statute.

We make no comments on the evidence of the alleged payment, because in the view we take of the case, there may be a new trial as to the fact, and we have no right to prejudice either party before a jury.

We feel obliged to hold that the plaintiffs cannot sustain their demand for judgment that defendants convey to them the two lots.

3. It is settled in this State that when a vendee upon a parol contract to convey lands, which the vendor afterwards refuses to perform,

has made payments of the purchase money, or being put in possession, has expended money in improvements, he is entitled to be reimbursed. *Albea v. Griffin,* 22 N. C., 9; *Winton v. Fort,* 58 N. C., 251.

But the complaint in the present case is not framed with a view to any such relief, neither could a recovery of monies paid as above supposed, be had in this action without an amendment. The personal estate of a decedent can only be sued for by his executor, etc., and the executor of Barnes is not a plaintiff. A debt must primarily be recovered from the executor, etc., of the debtor, and the executor of King is not a party to this action.

4. This view of the case renders it unnecessary to consider the inconsistent verdicts rendered by the two juries. For if the second verdict, which finds that Barnes paid about $2,800 on the alleged contract, were otherwise binding, it is defective in that the executor or administrator of King was not a party to the action, and could not contest it.

The judgment below is reversed and the case remanded to the Superior Court of Columbus County, to be proceeded in, etc. Neither party will recover costs in this Court.

The Judge below has power to permit the plaintiffs to amend but may require them to pay all the costs of the action.

PER CURIAM. Judgment reversed.

Cited: Gulley v. Macy, 84 N.C. 443; *Edwards v. Tipton,* 85 N.C. 481; *Simmons v. Ballard,* 102 N.C. 109; *Deal v. Wilson,* 178 N.C. 604; *Ebert v. Disher,* 216 N.C. 47; *Jamerson v. Logan,* 228 N.C. 543; *Rochlin v. Construction Co.,* 234 N.C. 445.

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(513)

ELI BRUMBLE v. W. J. BROWN, EX'R. OF R. KING, DECEASED.

It is a rule of this and all other Courts of error, that an exception will not be considered, which does not specifically and distinctly point out the error alleged and show wherein the error is conceived to consist.

A plea of set-off or counter-claim refers to the commencement of the action, and must be true and good at that date; and if it is not barred by the statute of limitations at that time, it does not become so afterwards, during the pendency of the action.

An officer, who receives notes for collection is bound on demand of settlement:

(1) Either to return the notes, or to show some sufficient reason for not doing so;

(2) If the notes were solvent when received by him, even if he offers to

return them, he is liable, unless he shows that he used reasonable diligence, and failed to collect them;

(3) If it be shown that he received any given note, although it be not shown that it was insolvent, yet if he fails to return it, there is a presumption of fact, that he either collected it or converted it to his own use. This presumption may be repelled by evidence, that the note could not have been collected, or that it has been accidentally lost or destroyed, or any other evidence tending to repel the presumption of its collection or conversion.

This was a CIVIL ACTION against the defendant, as executor of one R. King, sheriff, tried on exceptions to the report of a referee, before *Clarke, J.*, at the Special (January) Term, 1874, of ROBESON Superior Court.

The plaintiff had, from 1853 to 1858, placed in the hands of the defendant's testator, R. King, who was sheriff of Robeson County, a large number of notes, accounts and judgments against sundry citizens for collection, and this suit is brought to recover the amounts collected, or ought to have been collected, on the same. It was originally brought on the official bond of King, but subsequently the pleadings were amended and the bond withdrawn.

At the Special (January) Term, 1873, it was referred to W. S. Norment to state an account between the parties, whose report (514) was filed, Fall Term, 1873, and time allowed to the ensuing term to except thereto. The exceptions were argued, and the plaintiff being dissatisfied with the rulings of his Honor, appealed.

The facts pertinent to the points considered in this Court are stated in the opinion of Justice RODMAN.

French, Jones & Jones and N. McLean, for appellant.
N. A. McLean and Leitch, contra.

RODMAN, J. The report of the referee is carefully and intelligibly drawn up. But this Court has a right to complain that there is no clear statement of the exceptions which the plaintiff (who is the appellant) takes to the decision of the Judge below upon the several exceptions to that report. They are so general and indefinite as to make it impossible to say with certainty in what particulars it is contended that his Honor erred. When an appellant excepts to and appeals from the decision of a Judge upon an exception to a report, it is his duty to refer to the particular exception, and if necessary to an understanding of the case, to recite so much of the report as finds the facts bearing on the exception. In the present case the plaintiff's exceptions to the judgment below are as follows:

"To the rulings of the Court as above stated, plaintiff's counsel excepted as follows:

"1st. That the counter-claims offered by said defendant, except Nos. 9 and 10, are not barred by the statute of limitations.

"2d. That in this action it is incumbent on the plaintiff to show payments and that the defendant is bound only to account for such, and no payments being shown, no balance can be ascertained."

The contradiction of these to what precedes is apparent, when it is seen that plaintiff *must* have contended that the counter-claims *were* barred, and that it was *not* incumbent on plaintiff to show that
(515) the defendant had received payment of the claims given to him to collect, but that the burden was on him to show that he had not received payment, and could not by reasonable diligence have done, and that it was his duty in such case to have returned the notes. That this was the meaning intended, we gather partly from the proceedings and partly from the arguments of plaintiff's counsel. But, at least, it is conjectured.

We may infer, contrary to the language of the exceptions, that they are intended to set forth the rulings of the Judge which are excepted to. But that is done in an indefinite way, and requires of this Court to go through the whole report and all the exceptions thereto and pick out all the facts bearing on each, and to examine his Honor's conclusions on each. For example, we are required to find and note the facts in detail respecting each counter-claim.

We have made this criticism in order to show the occasion for the rule, which is not peculiar to this Court, but prevails universally in Courts of error, *that an exception will not be considered which does not specifically and distinctly point out the error alleged, and show wherein the error is conceived to consist,* without the necessity of referring to the pleadings or proceedings, except for the purpose of verification of what is stated in the exception.

When we go back to the exceptions of defendant to the report, they are indefinite. Exception VII, which was sustained by the Judge, is as follows: "Defendant excepts to the report of referee in this: That he excludes all the counter-claims of the defendant, notwithstanding the fact that they were of a date subsequent to the claims of the plaintiff." No particular counter-claims are designated to which attention is directed, and the only reason assigned why the referee should not have excluded the counter-claim is the indefinite one that it was of date subsequent to the claim of the plaintiff. The reason is certainly
(516) an insufficient one. A counter-claim may be later in date than the plaintiff's claim, and yet bad on many accounts.

We turn to the counter-claim in the report. It is of a note not under seal for $142.32, dated 2d October, 1858, payable one day after date, made by Brumble to King. The objection to this is, that it was barred

by the statute of limitations. By calculation, we ascertain that three years (excluding the time excluded by statute,) had not elapsed at the date of the action, but more than three years had elapsed when the counter-claim was pleaded. This presents us with a tangible point of difference between the parties.

We think the law is clear that a plea of set off (as the plea in reference to this note is,) or of counter-claim, refers to the commencement of the action, and must be true and good at that date. *Haughton v. Leary*, 20 N. C., 14. And if not barred by the statute at that time, it does not become so afterwards during the pending of the action. *Walker v. Clements*, 15 A. & E.; N. S., 1046; 69 E. C. L. R.

We think the defendant should have been allowed this set off. We think the decision of the referee excluding this set off, is covered by the VII exception of the defendant, which the Judge sustained. His Honor committed no error in this respect. This decision will probably cover many of the counter-claims. It is not our duty to pick them out.

It may not be useless to say here that a *payment* can never go out of date.

The next point which probably was intended to be made, seems to arise upon the Judge's ruling on exception IX of defendant to the referee's report. The exception was that the report found $2,649.75 due plaintiff, when his claim was barred by the statute of limitations, by reason that the agency of defendant's testator terminated with his office; and when "it did not appear that as agent his testator either did, or could by the utmost diligence, have collected all or any of the claims mentioned in plaintiff's complaint."

On this exception, the Judge held that the statute did not bar (517) the plaintiff.

In this we concur with him, the statute began to run only from the demand.

He further held "that it was incumbent on the plaintiff to show payment, and that defendant is bound only to account such, and no payments being shown, no balance can be ascertained."

We do not profess to be able to understand this language with certainty, but we may without injustice suppose it to mean, that the defendant should not be held liable for any of the claims placed in his hands for collection, unless it was proved that he had actually collected it.

We think upon this construction, his Honor's ruling was erroneous.

An officer who receives notes for collection, is bound on demand of settlement:

1. Either to return the notes, or to show some sufficient reason for not doing so.

2. If the notes are proved to have been solvent when received by him, he is liable, unless he shows that he used reasonable diligence, and failed to collect them.

3. He is liable for any sum he is proved to have collected on any given note.

4. If it be shown that he received any given note, although it be not shown that it was insolvent, yet if he fails to return it, there is a presumption of fact, that he either collected or converted it to his own use.

5. This is a mere presumption of fact, and may be repelled, as for example, by evidence that the note could not have been collected, or that it has been lost or destroyed by accident, or by any other evidence tending to repel the presumption of its collection or conversion.

These principles are drawn from a comparison of the numerous cases in our Reports on the liability of collecting officers. They are necessarily general, and may be subject to exceptions, because the
(518) question which appears to be presented is general, and without details permitting of a minute application of the law.

We think his Honor was right in his judgment respecting the receipts given by the Clerk of Cumberland Court, and that by French. If King paid the first of these as surety of Brumble, he is entitled to credit for it. So if French was the agent of Brumble and King paid him the amount stated in the receipt, we think there was the error stated in his Honor's rulings.

PER CURIAM. Judgment reversed in the respect indicated. Case remanded to be proceeded in, etc. Let this opinion be certified.

Cited: Harris v. Harrison, 78 N.C. 218; *Paschall v. Bullock,* 80 N.C. 9; *Morrison v. Baker,* 81 N.C. 82; *Moore v. Hill,* 85 N.C. 219; *McPeters v. Ray,* 85 N.C. 465; *Greenleaf v. R. R.,* 91 N.C. 38; *Worthy v. Brown,* 93 N.C. 347; *Greensboro v. McAdoo,* 110 N.C. 430; *R. R. v. Dill,* 171 N.C. 178; *Anthony v. Express Co.,* 188 N.C. 411; *Cotton Growers Assoc. v. Tillery,* 201 N.C. 533.

STATE v. HENRY HAUSE.

If a defendant enter upon land, or travel an open way, (the trespass charged,) under a *bona fide* claim of right, he is not criminally guilty of a trespass on land under the statute.

And he is not guilty, if at the time it was done, he believed he had the right to enter, or travel on or over the road, because he, and the former owners of the land had done so for sixteen or seventeen years.

STATE *v.* HAUSE.

INDICTMENT, for a trespass on land, tried before *Logan, J.*, at Spring Term, 1875, of LINCOLN Superior Court.

The land on which the trespass was alleged to have been committed, is an acute angle between the defendant's land and a public road which runs by his place. From defendant's land to the public road, runs a road, which crosses this land at the largest opening of the angle, a distance of about forty yards.

This road was cut fifteen or sixteen years ago, the prosecutor not objecting, and has been used by the defendant and prior owners of defendant's land without any objection from the prosecutor, (519) until defendant was notified a short time before the finding of this indictment not to come on or trespass on any lands of the prosecutor, in the said county of Lincoln. There was another road from defendant's land to the public road, used as a mill road, crossing the angle of land above alluded to at its apex, or where the public road and defendant's land joined. The title to the land over which this road ran is in dispute between the prosecutor and the defendant. This road had been cut fifteen or sixteen years, and used by defendant and the prior owners of his land without objection, until the notice before mentioned.

It was in evidence, that the former owners and occupants of the defendant's land and himself had been crossing this angle of the land at different points in getting to the public road for more than thirty years, and that through this angle of land was the only way they could get to the public road without great inconvenience.

It was also in evidence, that after the defendant had been notified not to trespass on the land of the prosecutor, he continued to travel these roads, and where a tree had been felled across the road near the apex of the angle, he had cut the top of the tree off to make a road around the felled tree.

The defendant's counsel asked the Court to instruct the jury that it was not necessary for the defendant to have the legal right to travel the roads above described, but that if he believed he had the right because he and the former occupants of his land had been using the road fifteen or sixteen years, and that former owners had been crossing this land for thirty years, without any objection on the part of the prosecutor, that if he believed this long usage gave him a license to travel these roads, notwithstanding he might be mistaken, he would not be guilty.

His Honor charged the jury, that if the defendant had used the road for thirty years, it gave him a license to travel over it, but that fifteen or sixteen years would not. That the defendant had reasonable ground to believe that the land was his, and did so believe, he (520)

had a right to cut timber on the land; otherwise, he did not. Defendant again excepted.

There was a verdict of guilty. Motion in arrest of judgment; motion overruled. Judgment and appeal by the defendant.

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

SETTLE, J. The manifest object of the act entitled "An act to prevent willful trespasses upon lands and stealing any kind of property therefrom," in the forcible language of Judge BOYDEN, in the *State v. Hanks*, 66 N. C., 612, was to keep off "interlopers" and to subject them to indictment if they invaded the possession after they had been forbidden to do so. If one commits 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 consequences 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. *State v. Dodson*, 6 Caldwell. The record in this case states that the title to the land on which the alleged trespasses have been committed is in dispute between the defendant and the prosecutor.

An attempt to try the title to land by an indictment under the statute in question, would be a perversion of its use and an abuse of the State's prerogative, which should not be tolerated by the Courts.

The defendant's counsel requested his Honor to instruct the jury, "that it was not necessary for the defendant to have the legal right to travel the roads described in the evidence, but that if he believed
(521) he had the right because he, and the prior occupants of his land, had been using the road for fifteen or sixteen years, and that prior occupants had been crossing this angle of land at different points for thirty years, without any objection on the point of the prosecutor—that if he believed that this long usage gave him a license to travel these roads, notwithstanding he might be mistaken, he would not be guilty."

To these instructions we think he was entitled. For, conceding it to be a civil trespass, still if the guilty intent was wanting and the entry was made under a *bona fide* claim of right, the defendant was not criminally guilty.

But his Honor charged the jury, "that if the defendant had used the road for thirty years, it gave him a license to travel over it, but that fifteen or sixteen years would not," thus cutting off from their consid-

eration the view that the defendant may have acted on a *bona fide* belief that the user of the road for fifteen or sixteen years gave him a license to travel over it. Nor is this error cured by what follows in the charge, "that if the defendant had reasonable ground to believe that the land was his, and did so believe, he had a right to cut timber on the land; otherwise, he did not."

This instruction was not responsive to the prayer, but was calculated to mislead the jury. We have often said that the Court need not respond in the exact language of the prayer, but a failure to give, in substance, the instruction prayed for, if the defendant be entitled to it, is error.

There must be a *venire de novo. State v. Ellen,* 68 N. C., 281; *State v. Whitehurst,* 70 N. C., 85.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Bryson,* 81 N. C. 598; *S. v. Whitener,* 93 N. C. 593; *S. v. Lawson,* 101 N.C. 718; *S. v. Jacobs,* 103 N.C. 403; *S. v. Faggart,* 170 N.C. 739; *S. v. Baker,* 231 N.C. 141.

(522)

STATE v. P. W. PERRY AND MATTIE BRIGGS.

The Superior Courts were deprived of their jurisdiction over the offence of Fornication and Adultery, by the act of 1973-74, Chap. 176; and although a bill was found at the January Term, 1874, before that act was ratified, still the Court could not proceed with the trial.

INDICTMENT for fornication and adultery, tried before his Honor, *Judge Watts,* at the Spring Term, 1874, of WAKE Superior Court.

On the trial below, his Honor dismissed the indictment on motion of defendants holding that the Court did not have jurisdiction. Solicitor Cox appealed.

Attorney General Hargrove, for the State.
Fuller & Ashe, contra.

RODMAN, J. The case is this: At January Term, 1874, of Wake Superior Court the defendants were indicted for fornication and adultery.

At February Term, 1874, the sheriff returned the capias against Briggs (the female defendant) not to be found, and that against Perry executed. Perry then moved to dismiss the cause and quash the indict-

ment for want of jurisdiction in the Court to try it. His Honor allowed the motion, and judgment was entered accordingly, from which the State appealed.

Two questions are raised:

1. Whether the Court at February Term, 1874, had jurisdiction to try the action under the several acts of Assembly relating to it.

2. Whether if it had jurisdiction when the bill was found, and had been deprived of it by an act of the Assembly, passed subsequently, but before the motion to dismiss and quash it could proceed to try the case, notwithstanding such act. To determine the first ques-
(523) tion requires a chronological statement of the legislation on the subject.

By the law in force up to the ratification of the act of 1873-74, which was on 16th February, 1874, and which took effect on its ratification, the offence described was a misdemeanor punishable by fine and imprisonment *at the discretion of the Court,* (Bat. Rev., Chap. 32, Sec. 46.) and, consequently, the Superior Court had exclusive jurisdiction of a criminal action to punish it.

By the act of 1873-74, Chap. 176, Sec. 3, Sec. 46 of Chap. 32 of Bat. Rev. which makes fornication and adultery a criminal offence, was amended by adding to it these words: "The punishment for this offence shall not exceed a fine of fifty dollars, or imprisonment for one month." Now, the Constitution, Art. IV, Sec. 33, enacts that, "Justices of the Peace shall have exclusive original jurisdiction *under such regulations as the General Assembly shall prescribe* . . . of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for one month." As the act of 1873-74 did enact that the punishment of the offence in question could not exceed the limit named in the Constitution, it would seem clearly to follow that by virtue of the act and the Constitution, the exclusive jurisdiction at once appertained to a Justice.

The Assembly had a right by regulations to prescribe under what circumstances the Justice should take jurisdiction, and what should be the forms of proceedings before him. If none had been previously prescribed, it was the duty of the Assembly to do so. If the Assembly had omitted to do so, the Justice would nevertheless under the Constitution have had jurisdiction under such forms as had been prescribed by common law, or by previous acts of Assembly.

The Assembly, however, by Sec. 12 of the act of 1873-74, did enact: "That Chap. 33 of an act known as Battle's Revisal, shall be amended by adding thereto as follows: 'Justices of the Peace shall have juris-
diction to try, hear and determine *in the manner prescribed in*
(524) *this chapter,* criminal actions for the offences described in

sections,' etc., including Section 46 of Chapter 32 of Battle's Revisal."

Now it is contended that by the act, Chap. 33 in Bat. Rev., Sec. 119, (act 1868-69, Chap. 178, sub. Chap. 4, Sec. 67, ratified 12th April, 1869, the Assembly has prescribed the circumstances under, and the proceedings by which, a Justice shall exercise his jurisdiction over the offences over which by the Constitution he has jurisdiction; and that one of the circumstances prescribed is, that the complaint must be made by the party injured by the offence; and that as by this offence as one in particular is injured, so that that form of proceeding cannot be complied with, therefore, a Justice cannot have jurisdiction of this offence at all. In answer to this:

1. As the Constitution prescribes that whenever the punishment of an offence shall not exceed a certain limit, a Justice shall have jurisdiction to try it; then, whenever the Assembly reduces the punishment below that limit, it follows that a Justice has jurisdiction, even although the Assembly should expressly declare that he should not have. The Constitution is superior to any act of Assembly.

2. But in this case the Assembly by the act of 1873-74, has expressly declared that a Justice shall have jurisdiction in conformity to the Constitution, and if there be anything in the act of 1868-69 which may be construed as contradicting the act of 1873-74, in that respect it is repealed *pro tanto* by the last act, or must be construed in harmony with it. The last act must have its way, anything in prior acts to the contrary notwithstanding.

3. It is easy and natural to construe the provision in the act of 1868-69, requiring complaint to be made by the party injured, so as to harmonize it with the act of 1873-74, by holding that complaint must be made by such person, when such person exists, but if from the nature of the offence, there can be no person particularly injured and thus qualified to complain, the Justice may issue the warrant on (525) the complaint of any person, or upon his own knowledge.

When there are several statutes relating to the same subject, and referring to each other, the several statutes are construed as if they formed but one, giving due force to the latest expression of the legislative will, as qualifying former ones, for, as a later statute may repeal, it can of course qualify a former one. By applying this familiar rule of statutory construction, all the various statutes are harmonized.

The Constitution has its full force: The act of 1868-69, has its full force as to all offences originally embraced in it; and the act of 1873-74, has its full force, except that as to this particular offence, the more general intent that a Justice shall have jurisdiction, prevails over the particular intent as to the form with which it shall be exercised. This

rule that the general intent prevails over the particular one is familiar in the construction of all instruments.

4. To give any other construction to these two statutes would be to make the last as far as concerns this offence, totally null, and of no meaning, whereas the Assembly did certainly have a meaning, and there can be no doubt that its meaning was to give a Justice jurisdiction of this offence.

In *State v. Davis,* 65 N. C., 299, it was held that under the act of 1868-69, a Justice had jurisdiction of an affray which consisted of mutual assaults and batteries, because jurisdiction was given of assaults, if a party injured complained, and in such case there was a party injured who might complain. But a Justice had no jurisdiction of an affray where there was no party specially injured, and therefore no one who as such could complain, as in a case of persons riding riotously through a town. This was because the act did not give jurisdiction of affrays *eo nomine,* but only of assaults, etc. If the act had given jurisdiction of affrays *eo nomine,* then the question would have arisen, which arises in this case: Whether when the Constitution comes into play, and gives jurisdiction, by the completed condition of a legislative act limiting the punishment, that is not to be supreme over all incon-
(526) sistent legislative provisions as to forms and circumstances. For these reasons, the *State v. Davis* has no bearing on this question.

II. Assuming as we think was clearly the case, that the Court had jurisdiction when the bill was found; but had been deprived of it by the act of 1873-74, as we think was also the case when the motion to dismiss was made.

We think it clear that the Court could not proceed any farther in the case. The Attorney General argues that costs having been rightfully incurred by the State, it had a right to go on with the trial and recover the costs against the defendants. But the State had a right to remit these costs, and the question comes back, whether the effect of the act was to deprive the Court of jurisdiction. It is difficult to see how a Court can proceed to try an offence after it has been deprived of jurisdiction to that end.

Griffin v. Ing, 14 N. C., 358, was cited by the Attorney General on this point. We think that case an authority against his position. In that case the Court says: "Nor can a general jurisdiction be ousted but in plain words or as plain implication. Such an implication I should deem to arise if a special Court were constituted to try conclusively and finally, a particular set of controversies."

A Court which has lost jurisdiction of a case, is thenceforth in the same position as if it never had it. But as there is not any difference of opinion on this point, it is unnecessary to elaborate it.

PER CURIAM. Judgment affirmed.

Cited: S. v. Upchurch, 72 N.C. 150; *S. v. Presly,* 72 N.C. 206; *S. v. Quick,* 72 N.C. 243; *S. v. Littlefield,* 93 N.C. 616; *S. v. Fesperman,* 108 N.C. 772; *S. v. McAden,* 162 N.C. 577.

(527)

STATE ON THE RELATION OF J. N. WHITFORD AND WIFE v. WILLIAM FOY AND OTHERS.

(There are two other suits on the same guardian bond as that in the above case. *State ex rel., Hardy Whitford and Wife v. Foy and Another,* and *State ex rel. J. N. Whitford, Adm'r., etc., v. Foy and Another.* The facts and the points raised are the same in all of them.)

A party excepting to the report of a Commissioner, to whom it was referred to take an account, must designate particularly the charge or credit excepted to, and refer the Court distinctly and clearly to the ground of his exception. Exceptions, unaccompanied by such statement of facts will be overruled; as this Court will not, nor will any Court of appeal, examine every item in the account, and the evidence bearing on it, upon a general allegation of error.

A guardian may, without special reason to the contrary, discharge himself by delivering over to the ward upon a settlement, the notes he has taken as guardian.

This Court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous.

This is the same case as was before the Court at January Term, 1871, (see 65 N. C., 265,) in the statement of which by Justice RODMAN, the whole facts are fully set out.

At the last Term it was re-referred to the Clerk of this Court to modify and correct his report, which was done, when both parties excepted. The exceptions are stated in the opinion of the Court.

Smith & Strong, for the plaintiff.
Haughton and Battle & Son, for defendant.

RODMAN, J. When the case was before us at January Term, 1871, (65 N. C., 265,) we considered and decided on all the exceptions to the report of the commissioners then made. It was reasonably supposed that in the matters not excepted to, the report was correct and satisfactory, and that by correcting the errors pointed out it would pre-

(528) sent a true result of the defendant's dealings as guardian. The order of the Court was made upon that idea and directed its Clerk to reform the account by rectifying the particular errors. If this order failed to meet the merits of the case, if the original report was so radically wrong that when reformed as directed, it would not legally and fairly exhibit the relative rights of the parties, it was open to either party to move to change the form of the order and to have an account taken *de novo* upon the testimony previously taken, and such other as the parties might bring forward. The Court would have heard any application of this sort favorably, as tending to the ascertainment of the truth, but none such was made. The Clerk now reports that he has reformed the former report in the matters in which it was held to be erroneous. His report is presumed to be correct, and a party excepting must show the error specifically.

Without reference to any limitations which are imposed on this Court as to trying questions of fact, it cannot be expected that any Court of appeal, upon a general allegation of error, will examine every item in an account and the evidence bearing on it. The party excepting must designate particularly the charge or credit excepted to and refer the Court distinctly and clearly to the grounds of his exception. Both parties in this case have filed exceptions. Of all of them it may be said that they are so wanting in particularity of statement and reference as to be unintelligible without an examination of both the reports and of all the testimony. It cannot be said whether they raise questions of fact or of law, and if of law, they are not accompanied by any such statements of the facts found as would enable the Court to pass on them. It is hardly necessary to say that we have not made the examination which seems to have been expected of us; it would be impossible for the Court to do it, and it is neither the duty or the right of any member to do it.

Plaintiffs' exceptions, in substance:

1. That plaintiff is required to receive payment of part of his demand in notes and judgments in the hands of defendant.

(529) It cannot be doubted that a guardian may discharge himself by delivering over to the ward upon a settlement, the notes which he has taken as guardian, provided there be no special reason to the contrary. Here no reason whatever is alleged against the applicability of the general rule. It is not even specified in particular what notes the plaintiff objects to receiving. Nothing is stated from which it may be seen that the report is erroneous, and the exception is accordingly overruled.

2. That it is found that plaintiff is entitled in cash to $2,304.27, when by the former report he was found entitled to $2,500.

The same observation may be made as was made to the former exception. No statement of facts is made from which the matter excepted to can be inquired into. No reason is assigned except that the present report differs from the former one, which it may do, without being necessarily erroneous. This exception is overruled.

3. That the amount due plaintiff should be increased by $525.17 which defendant should have collected on the Hill notes.

There is no statement of the facts relating to these notes from which the Court can judge of the merits of the exception. No part of the report is referred to in which such a statement is contained. No error is shown, and the exception is therefore overruled.

Defendants' exceptions, in substance:

1. That defendant is found by the first report to have on hand notes, etc., to a large amount, but in the present report he is only credited with a small part of them, and that the residue of the notes is not disposed of in any manner.

If the defendant means to put in issue his right to pay his ward in any particular note instead of in cash, he ought to have presented such a definite and particular statement of facts as would have enabled the Court to pass intelligently on the question. Though the two reports be as stated, the last is not necessarily erroneous.

If a guardian has received for his ward an amount of notes (530) which have become worthless without his fault, they belong to his ward. If he also received money, that money subject to the proper credits for disbursements, etc., also belongs to the ward.

Perhaps the guardian has on hand notes payable to him as guardian for a larger amount than his indebtedness to the ward. That state of things can arise only in two ways that occur to us at present. He has either loaned out money or sold property of his own, and taken notes payable to himself as guardian. Or it may be, that he has paid debts for his ward out of his own money. It was said when the case was here before, that in such a case as the last supposed, questions of difficulty would be presented, and the attention of counsel was invited to their consideration in case they should arise. It might have been expected that if it was desired to present any such questions, the facts would have been plainly and exactly stated, so that the equities between the parties might be made to appear. But there is no such statement, and we are unable to see what is the question intended to be presented. No error is shown, and the exception is overruled.

2. That defendant is required to pay a certain sum in cash, although he has notes to a larger amount than his indebtedness. This is not necessarily erroneous, and there is no statement of facts from which error, if it exists, may be seen. If the guardian has received money, he

ought to pay it, unless he shows some valid reason for retaining it. He states no facts furnishing any reason. No error is shown, and the exception is overruled.

3 and 4. Relate to the amount of commissions. This Court will not review the finding of a referee on that matter, unless shown to be grossly erroneous. In the present case they are not shown to be insufficient. Exception overruled.

PER CURIAM. Report confirmed. A judgment may be drawn accordingly. Neither party will recover costs in this Court.

Cited: Currie v. McNeill, 83 N.C. 181; *Worthy v. Brower,* 93 N.C. 347; *Battle v. Mayo,* 102 N.C. 437; *Cobb v. Fountain,* 187 N.C. 337.

R. J. MILLSAPS v. REBECCA McCORMICK AND ANOTHER.

An obvious and palpable mistake, which a Court would correct of course on motion, needs no correction and may be disregarded.

The burden of proving an affirmative defence is on the party who makes it. Therefore, it is necessary for the heirs to prove, that their possession of certain land, outside of the dower, was adverse to the plaintiff who claimed under a Sheriff's deed, when they allege such a fact.

CIVIL ACTION for the recovery of real property, tried before *Clarke, J.,* at the Special (January) Term, 1874, of ROBESON Superior Court.

All the facts relating to the points decided are fully stated in the opinion of the Court.

Leitch and N. A. McLean, for defendant.
N. McLean and McKay, for the plaintiff.

RODMAN, J. The plaintiff claims the land in controversy under a sale by the sheriff of Robeson County, under an execution from the County Court of that county, at the instance of McLean against John McCormick, the father of the defendants. The sale was 22d of August, 1842. Jacob Blount became the purchaser and the sheriff made a deed to him, the sufficiency of which is one of the questions made on this appeal. The deed is dated 20th September, 1842. The particular matter in which it is alleged to be insufficient will be stated hereafter.

It does not appear when or how the plaintiff obtained the title of Blount, but it seems not to have been questioned on the trial that he

had obtained it. As the case discloses no question on this point, we assume that none was made below.

John McCormick, the ancestor of defendants, died after the teste and before the return day of the execution, and the sale was before the return day. It does not appear, therefore, to have been irregular.

Among the exhibits attached to the record is a return by the (532) sheriff, that on the 22nd of November, 1842, he assigned dower in the lands of the said John McCormick to his widow Milly, who, it was proved, died shortly before the commencement of this action, which was on 4th of February, 1873.

It does not appear that this report was ever confirmed by the County Court. But as no question was made on that point, we assume that the assignment of dower was regular.

The plaintiff proved that the widow and the defendants had lived upon the land ever since the death of John McCormick in 1842.

The defendants, by their answer, alleged that they had held and occupied the lands described in the complaint since 1842, adversely to the plaintiff, and that he was thereby barred of a recovery.

It is not stated anywhere in the record, and it seems not to have been in evidence upon the trial below, whether the defendants occupied the part of the land assigned to the widow for dower only, or that and the residue also.

The defendants requested the Judge to charge the jury:

1. That the deed from the sheriff was insufficient to convey the estate of John McCormick to Blount.

2. "And that having failed to prove that defendants were occupying the premises within the lines of the dower land, that this possession was adverse to that of the plaintiff, and being barred by lapse of time, the plaintiff could not recover."

The Judge declined so to charge. The instructions which the Judge did give the jury are not set forth, and as the appellant makes out the case, it must be presumed that there could be no exception taken to the instructions given, except that they did not contain those asked for and declined.

The jury found a verdict for plaintiff for the whole of the land included in the sheriff's deed.

1. As to the first point respecting the sufficiency of the sheriff's deed:

The deed is in the usual form except as presently stated. It recites the judgment, execution, sale and purchase by Blount, (533) and the payment of the price by him, and then conveys to him and his heirs "all the right, title, claim and demand *of him the said John A. Rowland, sheriff,* in the lands aforesaid, lying and being," etc., describing the lands.

The argument for the defendant is that the estate of their ancestor, John McCormick, was not conveyed.

The meaning of a deed is to be gathered from the whole of its language, and we think that, considering the recitals, it must be evident that the sheriff intended to convey, not his own estate, which was confessedly nothing, but that of the defendant in the execution, McCormick, and that his own name was inadvertently and by mistake written for that of McCormick.

The deed of a sheriff is in execution of a power given to him by the process of the Court. It must be, therefore, under the control of the Court.

It cannot be doubted that if this mistake had been discovered during the lifetime of the sheriff, and before he went out of office, it could have been corrected by him, and that the County Court of Robeson would have compelled him to give the purchaser a deed correct in form.

The act of 1838, Rev. Code, Ch. 37, s. 30, provides that if a purchaser at a sheriff's sale fails to get a deed before the sheriff who sells goes out of office, the sheriff may make it afterwards; and that if the sheriff dies or goes out of the State, his successor may make the deed. *Isler v. Andrews,* 66 N. C., 552. It would seem to be clear, therefore, that if the present deed is defective, the successor of the sheriff who executed it, could be compelled by the Superior Court of Robeson to execute a new deed to the purchaser. It follows that the Court can now correct this deed, and no reason is seen why it could not have corrected, it on motion during the trial of this suit.

An obvious and palpable mistake which a Court would correct of course on motion, needs no correction, and may be disregarded.

(534) We think the Judge was justified in declining the instruction requested respecting the sheriff's deed.

2. As to the proof of adverse possession.

The instruction asked by defendants, assumes that inasmuch as the plaintiff having shown that the defendants were in possession of some part of the premises when the action began, (as he was bound to do,) and not having shown that they had not been in possession of the part outside the dower limits since 1842, it was to be presumed that they had been in such possession.

Clearly there had been no adverse possession of the dower land for twenty years. The possession of the widow, and of her children living with her by her consent, was consistent with the title of the plaintiff, and not adverse during her life.

As to the rest of the land. The burden of proving an affirmative defence is on the party who makes it. Here the defence of the heirs was an adverse possession of this land by the heirs for twenty years.

The burden was on them to prove that they had so possessed this part of the land.

The occupation by the widow of any part of her dower land, was an occupation of the whole of that but of no more; and so of the occupation of any one else under her, it could not extend *by construction of law* beyond her dower lines. If in fact it extended beyond those lines, it was a distinct possession adverse to the plaintiff which, if continued long enough, might have ripened into a title. But it was for the defendants to prove the fact of the possession affirmatively, and not for the plaintiff to disprove it.

We see no error in his Honor in declining to give the instructions asked for.

PER CURIAM. Judgment affirmed.

Cited: Bowser v. Wescott, 145 N.C. 63; *Walker v. Parker,* 169 N.C. 155; *Wells v. Clayton,* 236 N.C. 107.

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(535)

LEVI WEINSTEIN AND OTHERS v. THE COMMISSIONERS OF THE CITY OF NEWBERN.

The Commissioners of the city of Newbern have the power under their amended charter to levy and collect for current expenses, taxes to the amount of $6,000, observing in such collection the equation and limitation prescribed in the Constitution. But they have no authority to collect taxes to pay "new debts," unless the proposition is submitted to the voters of the town, even though commanded by *mandamus.*

This was an application for an INJUNCTION by the plaintiffs to restrain the defendants from collecting certain taxes, heard before *Clarke, J.,* in the county of CRAVEN, at Chambers, June 2d, 1874.

His Honor vacated the first restraining order granted, whereupon the plaintiffs appealed.

The facts are fully set out in the opinion of the Court.

Smith & Strong and Haughton, for appellants.
Seymour and Pou, contra.

BYNUM, J. The amendment to the charter of the city of Newbern, ratified the 6th of April, 1871, limiting the taxation for all purposes to $6,000, and for other purposes, if valid, might defeat the objects of the charter itself by putting an end to all city government, for the want of means for its due support and efficient administration. We express no

opinion upon its validity, because the case turns upon the provisions of the Constitution.

Article VII, Sec. 7, of the Constitution provides that "no county, city, town or other municipal corporation, shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers or the same, except for the necessary expense thereof, unless by a vote of a majority of the qualified voters therein."

(536) If the defendants had demurred to the complaint, which alleges only the violation of the amendment limiting the taxation to $6,000 for all purposes, and does not allege that the tax levied is more than is required for the current expenses of the city, the question would have been presented, whether that amendment is not null and void, as much so as a similar act would be, limiting the annual State taxation. But the answer has supplied the sufficiency of the complaint. The answer, in substance, admits the allegations of the plaintiffs, and then proceeds to state the amount and purposes of the tax levied; from which it appears that the city government has levied for current expenses one-half of one *per cent* upon real property, which is estimated to yield $4,000, and taxes upon licenses, which will aggregate $2,000 one-half of which is appropriated to current expenses and the other to the payment of debts contracted prior to April, 1871, and one dollar upon the poll, estimated at $200, which is not specifically appropriated.

The answer further discloses the fact that additional taxes have been levied upon the taxable property of the city, amounting to over $6,000 for the purpose of paying debts contracted prior to 1871, and to discharge certain sums commanded to be paid by virtue of sundry writs of *mandamus*, issued against the city.

It thus sufficiently appears that the current expenses of the city are about the sum of $6,000. Unquestionably the city has the right to levy and collect that sum to defray the necessary current expenses of the city government. In the collection of that tax the equation and limitation, prescribed by the Constitution, are to be observed.

The residue of the taxes, assessed for the payment of debts contracted prior to the 6th of April, 1871, as the case now discloses the facts, cannot be collected, nor can they be collected to meet the requirements of the writs of *mandamus*.

The answer sets forth that these debts were contracted prior to 1871.

(537) If it had appeared that they accrued prior to the adoption of the Constitution, that would have constituted them what is called "old debts," and for their payment the city has the right to levy and collect taxes without regard to either equation or limitation.

Whether this indebtedness was of that character, was a fact peculiarly within the knowledge of the defendants; and their answer, which,

by the rules of pleading, is to be taken most strongly against them, having failed to show the fact, this Court cannot intend that the debts were created prior to the adoption of the Constitution. We are bound, then, to assume that they were made since, and are what are called new debts. Their payment, then, is to be governed by the before recited 7th section of the 7th article of the Constitution—that is, the tax cannot be levied or collected, unless by a vote of the qualified voters in the city.

Doubtless this wise provision of the Constitution was intended to prohibit these corporations from burdening the citizens with debts contracted without their knowledge or consent. It therefore, by this action, requires these corporations hereafter, *"pay as they go,"* unless it is otherwise directed by the tax-payers at the ballot-box.

But suppose these corporations do not pay as they go, but allow deficiencies to accumulate from year to year by collecting annually a less tax than is sufficient to meet the current expenses. This they call a "floating debt," and such may be the character of the debt in our case. Is this not "contracting a debt" in the sense of the before quoted section of the Constitution, and therefore prohibited, unless allowed by the vote of the tax payers? If by inadvertence or other unexpected contingency, the tax of one year should fall short of defraying the necessary current expenses, such deficit could hardly fall within the prohibition, and it would be within the power and it would be the duty of the corporation to cover the deficiency by the assessment of the succeeding year. But when these municipal bodies, instead of pursuing this course, intentionally allow and encourage these annual accretions of debt, until they become "a debt" in the sense of the law, the (538) interesting question is presented, whether this is not the very evil provided against by the Constitution, and therefore, that this contracted debt is void, unless it shall be assumed by a popular vote. If these debts may be contracted by indirection and be valid, it would be difficult to see the use of the prohibition in the Constitution. How it would be, we do not decide, and we throw out the suggestion because this may be a debt of that character, and as such must be dealt with by the corporation and the tax payers.

We have said that no tax can be levied and collected to pay the debt incurred prior to 1871, because it does not appear to be an "old debt," and, for the same reason, taxes cannot be assessed for the payment of the debts which are called for by the writs of *mandamus*. It does not appear that they were contracted prior to 1868, the date of the Constitution. The fact that the corporation, by neglect or design, has allowed these mandatory writs to issue, cannot have the effect of dispensing with a constitutional provision. That is a matter between debtor and creditor, not now before us. Our duty is to enforce the law as it is written.

It was error in his Honor to dissolve the injunction altogether, and therefore his judgment must be reversed and the injunction continued as to the assessment and collection of all taxes in excess of $6,000, the estimated amount of the current expenses. In the assessment of that tax the city corporation is to be governed by the rule of equation and limitation prescribed by law.

Judgment reversed in part, and the cause remanded.

PER CURIAM. Judgment accordingly.

Cited: Mitchell v. Comrs., 74 N.C. 490; *Wilson v. Charlotte*, 74 N.C. 765; *Cobb v. Elizabeth City*, 75 N.C. 7; *Young v. Henderson*, 76 N.C. 423.

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(539)

ED. H. HICKS, EXEC'R., v. THOS. E. SKINNER AND WIFE AND OTHERS.

A purchaser at execution sale does not occupy the same ground that a purchaser of the legal title for value and without notice, does; the former buys subject to all equities against the defendant, whether he knows of them or not.

An ante-nuptial contract, entered into between a husband whose domicil was in North Carolina and a wife whose domicil was in New York, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband, although the property was removed to North Carolina, and changed from what it originally was when the contract was signed.

This was a CIVIL ACTION, to subject a certain fund in the hands of B. F. Moore, Esq., to the payment of a judgment obtained by the plaintiff, and for other purposes, tried before his Honor, *Judge Tourgee*, at the Special (January) Term, 1874, of WAKE Superior Court.

It had been referred to Commissioner J. J. Davis, who reported the facts, and the case was tried in the Court below on exceptions to that report. His Honor being of opinion with the plaintiff, decreed accordingly, from which decree the defendants appealed.

In this Court, the principal inquiry was as to the equities of the *feme covert* defendant, to the fund reported; and all the facts bearing on that question are fully set out in the opinion of Justice RODMAN, and in the dissenting opinion of Justice BYNUM.

Moore & Gatling, for appellants.

Smith & Strong, Fowle, Haywood and Batchelor, contra.

RODMAN, J. The fund in controversy represents by agreement of the parties, a certain lot in Raleigh and certain furniture. The plaintiff claims title by purchase at a sale under execution at the instance of one Holleman, who recovered judgment against Thomas E. Skinner at March Term, 1867, of Wake Superior Court. The (540) sale was on 30th March, 1868. The plaintiff is also a judgment creditor of Thomas E. Skinner and of Charles W. Skinner.

This is the plaintiff's title, and it is clear, that if the property was legally in Thomas E. Skinner, as plaintiff contends it was, his title is good, unless it is defeated by some equity which the law will uphold against him. It must be borne in mind that he is a purchaser at execution sale, and that such a purchaser does not occupy in this State, the same ground that a purchaser of the legal title for value, and without notice, does. Such a purchaser gets a title unaffected by any contrary equity; but a purchaser under execution, buys subject to all equities against the defendant, whether he knows of them or not. If therefore there had been no conveyance to Womble, and the legal title had been in Thomas E. Skinner at the time of the plaintiff's purchase, he would have bought just as he did, subject to all equities against Thomas E. Skinner. *Freeman v. Hill,* 21 N. C., 389; *Polk v. Gallant,* 22 N. C., 395; *Vannoy v. Martin,* 41 N. C., 169; *Johnson v. Lea,* 45 N. C., 43.

Of course this does not mean literally *all* equities which would be good against the defendant in the execution. It must be limited to equities *bona fide* created by him, and not fraudulent either in fact or by construction of law, as to his creditors. *Davidson v. Cowan,* 16 N.C. 470.

The defendant, Mrs. Anne E. Skinner, contends that she had an equitable claim to the property, which was valid against her husband, Thomas E. Skinner, which was *bona fide,* and not fraudulent as to his creditors; and which was consequently valid against them, and will be upheld against the title of the plaintiff.

This equity she bases upon the facts found by the referee; and in order to pass on it, it will be necessary to review the material facts which he finds.

The lot was conveyed to Thomas E. Skinner in September, 1859, by deed from A. M. Lewis and others. The consideration (541) recited is $6,000. We will not stop here now to consider with whose money this consideration was paid, or any consequences which may flow from its payment by one person or another. On 30th October, 1865, Thomas E. Skinner conveyed the lot and certain furniture then in the dwelling on it, to Jordan Womble in trust for the separate use of the said Anne, his wife. At that time Thomas E. Skinner was insolvent, and the plaintiff contends that this deed was fraudulent and void as to

his creditors, as being either without consideration, or upon a false and fraudulent consideration.

Without going at present, into a farther statement of the facts on which Mrs. Skinner grounds her equity, we stop here to examine this deed to Womble, and ascertain its exact weight and bearing in this controversy. The deed (which is made an exhibit) recites, in substance, that "*Whereas*, when Thomas E. Skinner contracted to buy the lot, and to build thereon, it was agreed between him and his wife, that she should furnish the funds to pay for the same out of her separate estate, secured by a marriage settlement dated 8th May, 1854, and that the lot should be secured to her separate use, which was never done, but the deed was by oversight made to him. *And whereas*, the furniture was purchased with her money, and as her sole property.

"*And whereas*, his father, Charles W. Skinner, had assigned to Womble, as trustee for the said wife, certain notes made by him (Thomas E. Skinner) as principal, and by Charles W. Skinner, Jr., as his surety of large amount, and certain other notes to which Charles W. Skinner, Jr., was principal, and Thomas E. Skinner, surety, and the said wife had agreed to surrender said bonds to said Thomas E. Skinner, and to release him from the same.

"*Therefore*, he (Thomas E. Skinner) conveys to Womble the said lot and furniture, in trust for the sole and separate use of his said wife Anne," etc.

The plaintiff contends that so much of the consideration re-
(542) cited as consists of the surrender of the notes of Thomas E. Skinner is fraudulent and part of the conspiracy between the parties to defraud the creditors of Charles W. Skinner.

It is clear and is conceded that the assignment of the notes of Thomas E. Skinner to Womble by Charles W. Skinner, who was insolvent at the time, was voluntary, and was therefore fraudulent and void as to *his* creditors. Neither Womble or Mrs. Skinner owned or could lawfully release or surrender the notes. The surrender which was actually made was void, and the parties to the notes, (notwithstanding they have probably been destroyed,) are still liable to the personal representative of Charles W. Skinner for the benefit of his creditors. To that extent the consideration for the deed failed. But the agreement to surrender the notes was not a fraud upon any party to the deed *nor upon the creditors of Thomas E. Skinner, which character alone the plaintiff claims in this action.* It is clearly distinct and separate from the other consideration recited, viz.: the equity of Mrs. Skinner, and did not necessarily infest and vitiate the whole deed. It neither supported or impaired the deed. If Mrs. Skinner had an equity by virtue of which a Court would have enforced the execution of a settlement of the property to her separate

use, she did not lose that equity, because in the deed by which her husband undertook to do what a Court of equity would have compelled him to do, he recited a false consideration in addition to the true one. With that recital she had nothing to do. If, on the contrary, Mrs. Skinner had no equity for a settlement which a Court would have enforced, then it is admitted that the deed to Womble was voluntary, and therefore fraudulent and void as to the creditors of her husband.

It is thus seen that the deed to Womble may be put out of the way as not affecting the *real* merits of the controversy.

The main question is, did Mrs. Skinner have an equity to have this property settled on her?

That question we proceed to consider. The material facts concerning it are fully reported by the referee, whose report we take occasion to say is creditable to his ability and industry. In brief (543) they are these:

On 8th of May, 1954, Thomas E. Skinner being about to marry Anne S. Ludlow, then a resident of New York, the two entered into a written contract, by which (in substance and as accurately as there is any occasion here to state it,) he agreed that her property should continue hers, notwithstanding the marriage, and that she should have power to control and dispose thereof as if she were a *feme sole.* The property consisted exclusively of bonds and mortgages, which were in the possession of her guardian, who was her father and resided in New York.

The marriage took place in New York on the day of the execution of the contract. The contract was duly recorded there. It gave to the wife substantially or precisely the rights in and over her property which she would have had by the laws of New York if no express contract had been made. It was never registered in North Carolina, but contained no provision unlawful in that State, or contrary to its policy.

The domicil of origin of Thomas E. Skinner was North Carolina, and that domicil remained unchanged at the marriage. There is no evidence that the parties contemplated or contracted in reference to any particular domicil or place of residence after marriage. The husband had just become a licensed minister, and was probably open to any acceptable call from any quarter. He and his wife did in fact go to Petersburg and remained there for a year before coming to North Carolina. It must be held, however, that upon the marriage, the domicil of the wife by construction of law, became that of the husband, viz.: North Carolina. *Smith v. Morehead,* 41 N. C., 360; Story Confl. of Laws, Sec. 195; *Ford v. Ford,* 14 Mart. La., 574.

In 1855 the husband and wife took up their residence in Raleigh, North Carolina. In 1856 she executed to him a power of attorney to

collect all debts due to her, and under this he did receive at various times up to 4th December, 1860, sums amounting in all to
(544) $45,469.62. The first time the husband received any of the wife's money was on 8th May, 1857.

We pause here again in the statement of the facts, for the purpose of determining what was the effect of the ante-nuptial contract of May, 1854, upon the property of the intended wife.

It is admitted that it was valid in New York to all intents and purposes. By force of it, as well as of the general law of that State, the estate of the wife in her choses in action remained just what it was before her marriage. The husband was not even a trustee for his wife. He acquired no estate legal or equitable. He was not authorized to receive payment of her choses in action except by her consent, and as her agent.

It is also admitted that it was binding on the parties everywhere. Story Confl. Laws, Sec. 184, 1, Sec. 241. *Trimbey v. Vignier,* 1 Bing., N. C. 151.

It must also be admitted, and we suppose it to be, that but for the act of 1785, (Rev. Stat., Chap. 37, Sec. 29,) the contract in question would have had the same force and effect in North Carolina, after the removal of the parties and of the property here, which it had in New York.

We conceive that it must also be admitted that if the wife had personally, or by any agent, brought her money to this State, and purchased land with it, taking a deed to her separate use, such deed would have been valid.

The learned counsel for the plaintiff contends however:

1. That the matrimonial domicil of Thomas E. Skinner and of his wife was North Carolina.

2. That the ante-nuptial contract is presumed to have been made in reference to the laws of this State, and to have been intended to be, and was governed by the laws of this State in reference to its construction, and also as to the formalities of its proof and registration; and

3. That as it was not registered in North Carolina, by the act of 1785, it was void as to the creditors of Thomas E. Skinner, and that the property of the wife was brought into this State and put (it must be with or without her consent) in a tangible shape so as to be
(545) susceptible of levy under execution, it became liable to such levy for the debts of her husband.

We have already said that upon the marriage the domicil of the husband became *by construction of law,* that of the wife.

The rule of law is, that the *construction* of a contract is in general to be governed by the law of the place where it is made. Story Confl.

Laws, s. 278 and 278a. But if it appears clearly to have been intended to be performed elsewhere, then the construction is to be governed by the law of the place where it is *intended* to be performed. *Le Beton v. Miles & Paige,* 261; *Le Beton v. Nourchet,* 3 Marl. La., 60. But this means nothing more than that where it can be gathered from the terms of the contract, or from the circumstances attending it, that the parties intending it to be governed by the law of some certain place other than that of its making, the law of such place as to its construction, becomes a part of the contract as if it had been inserted in it. It is only a question of intent, and not one of positive law.

I am not aware of any case that holds that where the domicil of the husband becomes *merely by construction of law* that of the wife, and there is no other evidence that the law of his domicil was looked to as the place where the contract was to be performed, such domicil governs the construction of the contract.

The question however here is not one of construction, but of registration; and not only am I not aware of any authority that the law of the constructive matrimonial domicile governs in that respect, but I think there is some authority, and conclusive reason, to the contrary, and that as to such matters, the *lex loci contractus* governs. Story Confl. Laws, s. 242, (1) 242a. *Trimbey v. Vignier,* 1 Bing. N. C., 151; *Waunder v. Waunder,* 9 Bligh. R. III; Story Confl. Laws, s. 276, 276a; 372, 372a.

In s. 282, Story says: In general it may be said that if no place of performance is stated, or the contract may indifferently be performed anywhere, it ought to be referred to the *lex loci con-* (546) *tractus. Don v. Lipman,* 5 Clarke & Fin. R., 1.

In *Wilder,* succession of 22 La., An. 219, the husband was domiciled in Louisiana and the wife in Mississippi where the marriage took place. Immediately after the marriage they removed to Louisiana, and resided there until the husband's death. The Court say that *the form* of the contract was to be governed by the *lex loci actus,* but its effect by that of Louisiana.

In Wharton, Confl. Laws, s. 419, it is said, "Where by local legislation certain forms are necessary to the validity of certain contracts (2, 9, registry, enrollment, acknowledgment before a magistrate or notary,) there the place where those forms are complied with, is to be regarded as the place of contract." He cites Lavigny VIII, 371. In Sect. 429 he says, where there are several possible local laws, that is to be applied which is most favorable to the contract. In Sec. 676 he says, that all modern jurists concur, that it is sufficient if a contract be authenticated according to the law of the place where it is made.

In the *United States Bank v. Lee,* 13 Peters, the Supreme Court of

the United States expresses the opinion that a statute of Maryland similar in its supposed effect to ours of 1785, was not intended to operate on contracts made out of the State.

See also *Adams v. Hayes,* 24 N. C., 361.

Now as to the reason of the proposition. Where there is a place clearly fixed by the contract in which it is to be performed, it may not be unreasonable to suppose that the parties intended to authenticate it according to the law of that place, and if they have omitted to do so, it may be because they have abandoned the contract. But where no such place is fixed in any way, and the contract is one which by its nature must be performed wherever the parties may at any time be, no such presumption of intent can be made. To hold that the law of the constructive domicile after marriage governs the authentication and publication of an ante-nuptial contract, as by registration, would in most cases be a fraud upon the wife. She is presumed to know
(547) the law of the State of her domicil at the time she contracts, but she cannot be presumed to know the law of another State, because it is the domicil of her intended husband. The marriage may not take place for months after the execution of the contract, and in the meanwhile the actual domicil of the husband may change without her consent, or even knowledge, and she cannot justly be held to contract with an intent to subject the contract to the law of a place which she may not know.

We conclude that the contract did not require registration in North Carolina, to make it valid here, but was governed in that respect by the law of New York where the domicil of the wife was when it was made.

This point being established, it is an adjudged question, that the removal of the property by the parties to North Carolina in 1855, did not invalidate the wife's right.

The question was decided in *United States Bank v. Lee,* 13 Peters, 107. In 1809 Richard Bland Lee and his wife Elizabeth resided in Virginia. He was then largely indebted to Judge Washington, and he and she joined in a deed whereby she relinquished her right of dower in certain lands belonging to him, and also conveyed lands belonging to her to trustees to secure that debt, which was afterwards paid by a sale of her land. In consideration of her execution of that deed, the husband conveyed to trustees certain slaves for her separate use, and this deed was duly recorded in Virginia. In 1814 Lee and his wife removed to the District of Columbia, taking with them the slaves, which remained in his apparent possession with the acquiescence of his wife, and he obtained credit upon their supposed ownership. Some of them he sold to supply the wants of his family, with her like silent acqui-

escence. In 1817 he borrowed $6,000 from the U. S. Bank, and gave a deed in trust on the slaves to secure it. He died insolvent in 1827, and in 1834, the Bank filed a bill against Mrs. Lee and her trustees to compel a surrender and sale of the slaves to pay the debt to it. It was contended, and although the deed of 1809 was valid in Vir- (548) ginia, yet when the parties removed with the property to the District of Columbia, the property became liable to the creditors of the husband in the District, because of a law of Maryland in force in the city of Washington, (where the parties and the slaves lived,) which declared that no goods, etc., whereof the vendor shall remain in possession shall pass, or any property therein be transferred to a purchaser, etc., unless the sale be by writing proved and recorded in the county where the seller resides within twenty days after the making thereof. (Act of Maryland 1729, Chap. 8, Sec. 5.)

CATRON, J., delivering the opinion of the Court, says: "The statute has no reference to a case where the title has been vested by the laws of another State, but operates only on sales, mortgages and gifts made in Maryland. The writing is to be recorded in the same county where the seller shall reside when it is executed. The seller, R. B. Lee, residing in Virginia, it was impossible for Mrs. Lee to comply with this act. That the Virginia deed secured to Mrs. Lee the same rights here that it did in Virginia we apprehend to be, to some extent, an adjudged question." He then cites *Smith v. Burch*, 3 Har. & Johns. (Md.), and *Crenshaw v. Anthony*, Martin & Yer. (Tenn.), 110.

The plaintiff's bill was dismissed.

In *DeLane v. Moore*, 14 Howard S. C., 253, decided in 1852, the facts in substance were, that Mrs. DeLane, a widow residing in South Carolina, in contemplation of marriage with John Yancey, entered into an ante-nuptial contract, whereby certain slaves were agreed to be settled to her separate use. There was no conveyance to a trustee. The marriage took place and the deed, or a copy of it, was recorded in South Carolina, but not, it seems, in exact compliance with the laws of that State. Afterwards the parties removed to Alabama, where after the death of the wife the husband sold the slaves to one Gover. The bill was brought by the representative of the wife against the administrator of Gover to remove the slaves. The Court (by DANIEL, J.,) say: "It has been made a ground of defence in the answers (549) in the Court below, and it has also been insisted on in the argument here, that admitting the ante-nuptial contract to have been recorded in the State of South Carolina, and in consequence thereof to have been so operative as to affect with notice creditors and purchasers within that State, yet that upon the removal of the parties carrying with them the property into another State or jurisdiction, the influence

of the contract for the protection of the property would be wholly destroyed and the subject attempted to be secured would be open to claims by creditors or purchasers subsequently coming into existence. The position here advanced is not now assumed for the first time in argument in this Court. It has upon a former occasion been pressed upon its attention and has been looked into with care, and unless it be the intention of the Court to retrace the course heretofore adopted, this may now be, as it formerly was called, an adjudged question." He then cites with approval the case of *U. S. Bank v. Lee.* In *Adams v. Hayes,* 24 N. C., 361, it is admitted that a parol gift of slaves made in South Carolina, good at common law which prevails in that State as to such gift, would be good after the property is brought here, notwithstanding our law requiring such gifts to be in writing and registered, and it does not seem to have been thought that it would make any difference whether at the time of the gift the property was intended to be brought here or not. In our opinion it is not a matter of any importance whether the contract was technically executed or executory, so far as it concerns the question now before us. In equity, what is agreed to be done is considered as done, whenever such a conclusion is necessary to support the rights of the parties under it.

No doubt nice distinctions may be drawn between those cases and the present, but none we think that are essential. The principle at the bottom of them all is, that by the contract the property remained in or passed to the wife in the State where it was made; that it was *her* (550) property, and her estate did not change its character on being carried with the parties into another State, although by the laws of the latter State, registration is required of such instruments executed there or taking effect upon property situated there.

There remains the enquiry which is mainly one of fact, did Thomas E. Skinner receive the money of his wife and bring it into this State as her agent, upon an agreement to invest it in her name, and did he purchase and improve the lot in question with it, and in violation of his agreement, take the title to himself? There can be no question that the husband received a very large sum as the agent of his wife, and the referee finds that he received it upon an understanding that he would return it or invest it in her name, and especially that he would invest a part of it in buying and improving the lot in question. The whole lot was conveyed by Cook to Lewis, Williams, Jones and Thomas E. Skinner on 1st April, 1856. The part of it now in question was conveyed to Thomas E. Skinner by his co-tenants on 17th September, 1859. The referee finds that it does not appear by whom the consideration of the deed of 1856 was paid, but that it was not paid with the money of Mrs. Skinner. This is immaterial.

He also finds that it does not appear by whose means the consideration of $6,000 recited in the deed of 1859 was paid.

The deed to Womble recites that the consideration of the deed of 1859 was paid by Thomas E. Skinner from his wife's estate. This recital would support an equity in his wife against him, to have the title conveyed to or for her; but is admittedly no evidence against his creditors. We think, however, that although the referee does not directly find this fact, he does find other facts from which this must necessarily be inferred.

A principal who undertakes to follow his money into property, into which it has been fraudulently converted by his agent, is not required to show that the identical bills of exchange or bank notes which he gave to the agent with directions to pay for certain property, were paid for that property. If this were so, the agent need only convert the bills of exchange into bank notes, or the bank notes (551) into others, in order to make his fraud successful. Fraud cannot so easily evade pursuit. The principal need only show that he gave money to the agent upon a promise to invest it in the purchase of certain property, and that the agent did afterwards purchase that property and take the property to himself. Upon this proof there is a clear equity to follow the property and have it conveyed as it ought to have been.

That is just the case here. The referee finds that between _____ and _____ the husband received large sums as agent of the wife; that he agreed to invest a part of that money in this lot in her name; that in 1859 he did purchase the lot, and at first directed Mr. Lewis to make the deed to his wife, as the payment was to be from her means; that he afterwards told Lewis to draw the deed to him, as it would injure his credit if made to his wife; and that it was accordingly so drawn. Can a Court of equity doubt, upon these facts, that the land was paid for with the principal's money? If it will refuse to allow a principal to follow his money under these circumstances, upon what proof can he do so?

We think that we are bound to draw the conclusion from these facts, and without reference to the recital in the deed from the husband to Womble that in contemplation of law, Mrs. Skinner's money went to pay for the lot.

The referee directly finds that her money, to the sum exceeding $10,000, paid for the buildings, etc.

If it were not clear that Mrs. Skinner's money paid for the lot, as well as for the buildings *and furniture*, there might be a question of the apportionment of the fund. But in the view we take of the case, no such question arises.

On these facts, the equity of Mrs. Skinner against her husband and his creditors is indisputable. It rests on a valuable consideration, is *bona fide,* and there is nothing in the circumstances attending it, to make it fraudulent as to her husband's creditors.

(552) As to any conclusions of fraud to be drawn from her silent acquiesence in the dealings of her husband so far as they were known to her; as for example, his sale of a part of the lot to Dr. Johnson; that is disposed of by the observations of CATRON, *J.,* in the *U. S. Bank v. Lee,* p. 119. The learned Judge says in substance: "If a party having title to property stands by, and sees another deal with it as his own, and does not make his title known under circumstances which require him to do so, that is a fraud which estops him from setting up his title afterwards. How far that principle would apply to a wife standing by, and seeing her husband deal with her property, the Court does not decide. But Mrs. Lee was only passive and silent, although she may have known that Lee was obtaining credit on the strength of her property. A Court of Chancery will not hold her responsible because of her silence."

In the present case it does not appear when Mrs. Skinner first knew that her husband had taken a deed for the lot in his own name.

We are of opinion that the plaintiff purchased subject to the equity of Mrs. Skinner, and that her equity is paramount to the claim of the creditors of her husband.

PER CURIAM. A decree may be drawn in conformity with this opinion.

BYNUM, *J., Dissenting.* I am compelled to dissent from the opinion of the majority of the Court.

1. It is not denied that if Anne S. Ludlow domiciled in New York, had come to North Carolina, entered into this marriage contract, and married Thomas E. Skinner, domiciled in this State, the contract, to be good against his creditors, must have been registered in North Carolina, in comformity to our law. Rev. Stat., Chap. 37, Sec. 29.

It is not denied that in such case, the deed in trust, for her benefit, to Jordan Womble, by the insolvent husband, would have been

(553) void as to creditors, as a voluntary deed, made without consideration.

It is not denied that if the ante-nuptial contract, through executed in New York between Anne Ludlow, domiciled there, and Thos. E. Skinner, domiciled in North Carolina, had been entered into with the intent to be performed in North Carolina, the law of this State would govern its validity, and it would be void for want of registration.

The question then is narrowed down to a single point, viz: with what *intent* was the marriage contract entered into by the parties? And the question is reduced to still narrower limits by the admission of the other side, that here no *express* intent appears one way or the other. So we have this question, does the law, in such cases, *imply* an intent in the parties as to the place of performance, and if so, by what rule is that intent to be ascertained and declared.

No one disputes the general proposition that, in the absence of any contrary intent, express or implied, the *lex loei contractus,* governs the validity and construction of the contract, and therefore, if Skinner had gone to New York and entered into a contract, not a marriage contract, that the law of New York would govern it, nothing else appearing.

But no principal of international law is better settled, than that marriage contracts, constitute a well known exception to the law of contracts and rest upon principles peculiar to that relation.

In regard to such, the rule is, "That the wife's rights, capacities and disabilities, under the contract of marriage, are determined by the law of the husband's domicile when the marriage took place." Burge, Vol. 1, 244-260, and Kent, Vol. 2, 594, note 6, cites this passage with approbation, and thus continues: "This is the law in this country if the parties had not in view, at the time, another place of residence. If the husband and wife have different domicils at the time of marriage, the law of the husband's domicile governs the marital rights; and if neither party have any determinate domicile at the time, the *lex loci contractus* governs," and *Knewland v. Ensley,* Meigs (554) 620, and *Whitcomb v. Whitcomb,* 2 Curters, 351, are cited.

If the parties agree previously to their marriage upon a place of residence after it, and actually settle there, it becomes the place of their matrimonial domicile, and the marital rights of the husband to the wife's property are determined by the law that of domicile. Meigs 620, *Le Breton v. Miles,* 8 Paige, 261, 26 Miss. 548.

No authority has been cited, in the opinion of the Court, or, we believe, can be found, conflicting with the propositions thus established.

1. That the husband's domicile is that of the wife. 2. That his domicile governs the law of the contract. 3. That this is always so, unless the parties, at the time agree otherwise, which is not pretended in our case.

If more authority is required, Story in his Conflict of Laws, 164-167, after a thorough review of all the jurists, announces the same doctrine to be: "That where the domicile of the husband and that of the wife are not the same, the law of the husband's domicile is to prevail, unless he means to establish himself in that of his wife," and the very section,

Story 195, cited by Justice RODMAN, affirms the opposite doctrine, to the one he contends for, and establishes the rule I contend to be the true one. That author adopts the language of the Supreme Court of Louisiana, in *Ford v. Ford,* 14 Martin, 574, 578, to wit: "We think that it may be safely laid down as a principle, that the matrimonial rights of a wife who marries with the intention of an instant removal to another State for residence, are to be regulated by the laws of her intended domicile, when no marriage contract is made, *or one without any provisions in this respect,*" and in the same case the Court also recognized the general rule that when the husband and wife have different domicils, the law of that of the husband is to prevail, because the wife is *presumed* to follow her husband's domicile. And Justice STORY concludes the whole subject, in this emphatic language:
(555) "Under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm, that a contrary doctrine will scarcely hereafter be established." Sec. 198.

Not a single case cited in the opinion of the Court, which I have been able to examine, sustains that opinion, or has any application, unless to confirm my position. In *U. S. Bank v. Lee,* Pet. 107, the husband and wife, residing in Virginia, the husband, to secure a debt which he owed to the wife, conveyed certain slaves to secure the debt. Both removed to Maryland where the husband conveyed the slaves in trust and died. The law of Maryland required the deed of the husband to be registered there. The wife recovered the slaves, and why? Because the contract with her husband was made in Virginia, where *both were domiciled,* and according to the law of that State. In *DeLane v. Moore,* 14 How., 253, Mrs. DeLane contemplating marriage with John Yancey entered into a marriage contract, in South Carolina, which was there recorded. They removed to Alabama where the wife died and the husband sold the property. The representatives of the wife recovered, and why? Because both parties were domiciled in South Carolina when the marriage contract was made and it was made and recorded according to the laws of that State, and was therefore valid every where. So in *Adams v. Hayes,* 24 N. C., 361, it was held that a parol gift of a slave, made in South Carolina, would be held valid here, although our laws required a registration of the deed of gift. Why? Because the gift was made in South Carolina, in reference to, and according to the laws of that State, and the donee resided there. In *Smith v. Morehead,* 59 N. C., 360, not cited in the opinion, this Court said, " the only remaining inquiry is, what effect the marriage had upon the domicile of the parties. Upon this question we think the law is well settled; in the case of *Waunder v. Waunder,* 9

Bligh. 89, the House of Lords laid down in the strongest terms that the domicile of the husband drew to it the domicile of the wife." In that case it was held that the domicile of the wife was Guilford, 556) where the husband resided and not in Wake where she then and always had resided.

In our case, the referee found that North Carolina was the domicile of Thomas E. Skinner, at the time of the contract and marriage. A domicile once acquired, remains until a new one is acquired, *facto et animo*. Story Confl. Laws, s. 47.

The conclusion then, to my mind, is irresistible that the marriage contract, not having been registered, according to the laws of this State, was void as to creditors, and therefore there was no consideration, legal or equitable, to support the deed to Jordan Womble, for the benefit of his wife, and that the deed for the house and lot in controversy, was fraudulent and void, as to the creditors of Thomas E. Skinner.

II. But, assuming that the marriage contract was valid in North Carolina, and that the debt due to the wife, was sufficient consideration for the deed to Womble, in my opinion the deed was executed for the purpose of hindering, delaying and defrauding the creditors of Thomas E. Skinner.

It is found by the referee, that the deed was executed by Skinner, with the intent to hinder, delay and defraud his creditors, so we are relieved of all inquiry as to his purpose, and will confine the inquiry as to the fraudulent intent of Mrs. Skinner, the only other party to the deed beneficially interested. The referee does not, in so many words, find that she was a party to this fraudulent purpose, but such is his finding, in substance and effect.

In this aspect of the case, the facts found by the referee, are that Thomas E. Skinner, on the 30th October, 1865, was indebted, by bond, to his father Charles W. Skinner, who was insolvent, and his whole estate then consisted in these bonds. On that day, Charles W. Skinner, the father, by deed and endorsement, assigned these bonds to Womble, in trust for the use and benefit of Anne, the wife of Thomas E. Skinner, with power to her to collect and dispose of, by a writing signed by her and witnessed. That this assignment was without valu- (557) able consideration, and that on the same day, Anne, the wife, by deed directed the bonds to be delivered to Womble, and therein stating that he had fully satisfied her for them, and on the same 30th October, Thomas E. Skinner conveyed the house and lot to Womble, in trust for his wife, reciting, as the consideration of the deed, the ante-nuptial contract, and these bonds, amounting to $15,560.

The referee further finds, that at the state of the execution of the

deed, Anne S. had reason to know that Charles W. Skinner was insolvent, and that these bonds were his entire estate, and that she also knew her husband was insolvent. So, Mrs. Skinner, when she received these bonds from Charles W. Skinner and transferred them to Womble and acknowledged payment for them, as part consideration of the deed, knew of the insolvency of Charles W. Skinner, and that the assignment of the bonds to her, being without consideration, was a fraud upon his creditors, and also upon the creditors of Thomas E. Skinner. If then this transaction on the part of Thomas E. was with intent to defraud his creditors, as the referee has found, and as is admitted, why it is not fraudulent on the part of Mrs. Skinner, who, with a full knowledge, received the corrupt consideration and passed it to her husband as an inducement and consideration for the conveyance of this property to her, is inconceivable to me. She was a party to the whole transaction, between Thomas E. and Womble, and acted with full knowledge of all the facts. Both, the husband and wife, having equal knowledge and the same motive, and participating in the same illegal acts, it is impossible to say his intent was fraudulent and hers was not. In *Lassiter v. Davis,* 64 N. C., 498, the Court say "there were badges of fraud upon the face of the deed between the parties, and of course, whatever was thus apparent, both parties were cognizant of and participated in." So here, the husband and wife, were cognizant of and participated in the whole transaction, and must be held to the measure of criminality.

(558) It is admitted that the bonds which entered into the consideration of the deed was a fraudulent consideration, but it is insisted that the deed is supported by the other part of the consideration, to wit, the debt due, under the ante-nuptial contract.

The principle which governs this part of the case is this: If A makes a conveyance to B in trust to pay C a *bona fide* debt and to pay D a fraudulent one, the fraudulent consideration to the one shall not defeat the deed as to the good debt to the other, because the good is separable from the bad. See *Hefner v. Irwin,* 23 N. C., 490, and that class of cases. But where the considerations move from the same person, who is to get the entire benefit of the deed, a part of which is good and part fraudulent, then the whole deed is vitiated and void, because the corrupt consideration moves from the person who claims the entire benefit. It would be monstrous morals if a Court of Equity, whose highest functions is to denounce fraud, should hesitate to declare void a deed whose entirety is based on a contrived and premeditated fraud of both parties to it. It is no part of the duty of this Court to wash the dirty linen of suitors, or to act the part of casuists by going into the mind of the individual and separating the pure from the impure

part, if it can be done, and then bestowing upon it the rewards of virtue. It would be as reasonable for the Court to refuse to punish the murderer because he is a man of truth. How is this Court, or any tribunal or person, to know which consideration, the good or the bad, was the moving cause to the deed, and how can this Court separate them when they both moved, not from different, but the same heart? The law denounces the whole transaction as a fraud. *Brannock v. Brannock,* 32 N. C., 428; *Stone v. Marshall,* 52 N. C., 300; *Shober v. Hauser,* 20 N. C., 222; *McNeil v. Riddle,* 66 N. C. 290.

III. The wife here permitted the husband to use and treat her money as his own, and having thus by her connivance aided him in obtaining a false credit, she will not now be heard to say the property was hers, to the detriment of honest creditors. (559)

Upon this part of the case the referee has found the following facts: "That the defendant, Anne S. Skinner, permitted her husband to receive from New York, in money, the proceeds of the choses in action, which were hers before marriage. That he used the money so received freely and without question by her, and with her assent; that she confided and committed her funds to the control and management of her said husband upon the general understanding that he was 'to return or re-invest' for her, but the understanding was not in writing and there was no clear, definite or specific contract in regard to it, or of the manner in which it was to be done. That the defendant, Thos. E. Skinner, used this fund as his own; that from 1855 to 1861, he invested a portion of it in his own name, and none in the name of his wife; that the general understanding that he was to return or re-invest it for his wife was never executed; that he spent a portion; that during the period mentioned above and down to the time, the defendant, Thos. E. Skinner was known to be insolvent, no attention was given to the matter by Anne S. Skinner, no notice was taken by her of the same, and no complaint made on account thereof."

When it is considered that this entire fund consisted of money, the most fleeting and unsubstantial of all property and incapable of identification; that it was received by him from time to time through a period of many years, and used by him for every purpose of life, whether of pleasure or profit, and that, too, without question or complaint on her part, to my mind it is difficult to conceive a more complete gift and dedication to his use than is furnished by the simple narrative of the referee above set forth.

To hold that the wife can follow the money and fasten an equity upon the thousand from which it may have been invested in the travels of the husband in Europe and America is absurd and shocking to every idea of free dealing in the commodity of money. Yet

(560) that is the proposition and that is the equity of Mrs. Skinner in this case. Having allowed her husband to sail under false colors and to incur debts upon the credit of property to which he had the legal title, she should be estopped now from asserting a claim to the prejudice of *bona fide* creditors.

Cited: *S.c.*, 72 N.C. 1; *S. v. Ross,* 76 N.C. 244; *Burgin v. Burgin,* 82 N.C. 201; *Hornthal v. Burwell,* 109 N.C. 16; *Comrs. v. Lumber Co.,* 116 N.C. 745; *Weathers v. Borders,* 124 N.C. 611; *Wood v. Wood,* 181 N.C. 229; *In Re Ellis,* 187 N.C. 843; *S. v. Sneed,* 197 N.C. 670.

E. J. LARKINS AND OTHERS v. P. MURPHY AND OTHERS.

Every case of an administrator or other fiduciary, who received depreciated Confederate currency, must, to a considerable extent, be judged of by its own surroundings. Before 1863, it might be received. During 1863 its reception was debatable. Since 1863, it could not be received.

An administrator, who had in hand an *ante-bellum* bond, apparently well secured, and there appeared no necessity for collecting it, and yet did collect it in part payments at different times during the years 1863 and 1864, is liable for the amount of the same. (By agreement in this case, less was taken.)

EXCEPTIONS by both plaintiffs and defendants to the report of a referee, heard by his Honor, *Judge Russell,* at the Spring Term, 1874, of NEW HANOVER Superior Court.

The facts of the case are stated in a report of the same, at January Term, 1873, when it was in this Court upon another ground, and remanded. The exceptions to the report are sufficiently noted and explained in the opinion of the Court.

A. T. & J. London, for the plaintiffs.
Smith & Strong, for the defendants.

READE, J. We have found it impossible to lay down any rule (561) to govern all cases as to the liability of administrators and other fiduciaries, who received depreciated Confederate currency. The nearest we could come to it, was to say that it might be received before 1863, and not after, and that 1863 was debatable ground. *Emerson v. Mallett,* 62 N. C., 234. Every case must to a considerable extent be judged of by its own surroundings. The first exception on the part of

the plaintiff presents this case: The defendant had in his hands, as administrator, an *ante bellum* bond which was apparently well secured, and there was no apparent necessity for collecting it; and yet he did collect it, in part payments at different times in February, March, June and October, 1863, and in March, 1864. If we could lay down any inflexible rule it would seem that the defendant is clearly liable. *Donnell v. Donnell,* 62 N. C., 148. And yet there was evidence that in that section, prudent business men received Confederate money at the time when the defendant received those payments, and the referee found the fact that the defendant had acted with prudence, and refused to charge him with anything on account of that transaction. His Honor, however, divided the matter and charged him with the amounts received in October, 1863, and in March, 1864, and refused to charge him with the amounts received prior to October, 1863. We are inclined to the opinion that he ought to be charged with the whole amount, because he converted a good security into a currency greatly depreciated when there was no necessity for it. And especially because he had reduced the security to judgment which he might have levied and kept alive on the lands of the obligors, of which they had a considerable quantity of considerable value. So it would seem that he is clearly liable for the whole amount of the security, if the lands were worth so much, or else for the value of the lands, if that was less than the amount of the security. Settling it upon this principle, it would be necessary to have an enquiry as to the value of the lands. But the counsel on both sides inform us, that rather than have the delay and vexation and uncertainty of an enquiry, they had rather have the ruling of his Honor upon (562) this part of the case confirmed, and therefore it is confirmed; which charges the defendant with the October, 1863, and the March, 1864, payments.

2. The plaintiff's second exception, that the defendant is not charged with interest upon balances in his hands is admitted by defendant's counsel to be well founded and is allowed.

3. And so with the plaintiff's third exception.

4. The plaintiff's fourth exception is withdrawn and disallowed.

We approve of his Honor's ruling upon all the other exceptions of the plaintiff, except the seventh, which he disallowed and which we allow.

We approve the rulings of his Honor on all the exceptions on the part of the defendant, and his rulings in all other matters.

The Clerk of this Court will make the calculations and reform the account in conformity with this opinion. And there will be judgment accordingly.

The Clerk of this Court will be allowed ___ for his services to be taxed in the costs, and the costs will be paid by the defendant out of the funds of the estate.

The defendant must have commissions on so much of the Confederate money collected in 1863-64 as he is charged with.

PER CURIAM. Judgment accordingly.

Cited: Longmire v. Herndon, 72 N.C. 633; *Jennings v. Copeland,* 90 N.C. 578.

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(563)

R. S. PULLEN, AS EXEC'R. AND TRUSTEE AND ANOTHER v. THE HERON MINING COMPANY AND OTHERS.

A party who purchases the equity of redemption in a first mortgage, with full knowledge of the rights of the assignees of the mortgagee, and who, as mortgagee under a second mortgage, is tenant in common with the assignees of the first, in the lands therein conveyed, which lands are charged with an incumbrance under a decree of partition, is primarily bound to extinguish such incumbrance, as well as all others existing or afterwards accruing.

This was a CIVIL ACTION, to foreclose a mortgage, tried before his Honor, *Judge Tourgee,* at the Special (January) Term, 1874, of WAKE Superior Court.

On the trial below, his Honor being of opinion that the title to the lands conveyed in the mortgage attempted in this proceeding to be foreclosed, being absolutely in one of the defendants, gave judgment against the plaintiffs for costs, etc., whereupon they appealed.

All the facts pertinent to the points raised and decided, are fully stated in the opinion of the Court.

Moore & Gatling, for appellants.
Mason and Fowle, contra.

RODMAN, J. This action is for the foreclosure of a mortgage on a moiety of certain lands executed on 8th September, 1859, by the Heron Mining Company to Winder, to secure certain debts, which with the mortgage were shortly afterwards assigned by him to Penelope Smith and Mary A. Smith, whom we will assume for the present, that the plaintiffs sufficiently represent.

The defendant Murray contends that he is the sole owner of the mortgaged lands by title paramount to the mortgage.

(564) His claim is this:

On 7th October, 1872, the sheriff of Wake County had three executions in his hands.

The first was tested of June Term, 1872, of the Supreme Court of this State, under a decree of that Court of June Term, 1869, in a suit for partition between the Company and Wiseman. This execution will be more particularly considered presently.

The second was tested of the same term of the Supreme Court, and was upon a decree for costs against the Company on a cross bill which Wiseman had filed against the Company in the suit for partition.

The third was upon a judgment in favor of Mason against the Company in Wake Superior Court given April, 1870. All the above judgments were duly docketed in Wake County.

It is not contended that the two last named judgments constituted any lien on the land in question, except in subordination to the mortgage to the plaintiffs. They may therefore be put out of view. Or if it is contended that the second named execution, viz.: that on the cross bill, stands on a footing equal to that of the first named; then the same considerations which are applicable to the first are also applicable to that, and no distinct notice need be taken of it.

We will consider now the effect of the first named execution.

In 1857, the Heron Mining Company and Wiseman were tenants in common of a tract of land, parts of which were covered by the mortgages above referred to. In that year the Company commenced a suit against Wiseman for a partition of the common property, in the Superior Court of Wake. In the course of this suit, viz.: on 24th September, 1857, Wiseman filed the cross bill above mentioned.

It will be observed that the original suit and cross bill were both begun before the date of the mortgage to plaintiffs, which was on 8th September, 1859. On 3d June, 1869, the parties agreed on terms of partition, to the effect that the Company should have certain described lands, and Wiseman certain other described lands, and that the Company should pay Wiseman $1,000, and the costs of the suit. (565)

In pursuance of this agreement the decree of the Supreme Court of June Term, 1869, was made which conformed to the agreement, and ordered that plaintiffs (the Company) pay the costs of the suit. The $1,000 was paid by the Company. The officers of the Court mainly interested in the judgment for costs assigned their rights to Parsons, who afterwards and before the sale in October, 1872, assigned to Murray. An execution issued on this decree from January Term, 1870, which in May, 1870, was levied on the share assigned to the Company by the decree.

It is contended on behalf of Murray: That as the decree of June Term, 1869, was made in pursuance of an agreement of the parties, it must be construed in reference to that agreement, and that the costs agreed to be paid by the Company being more than would in the absence

of such agreement, have been imposed on it, must be regarded as so much paid for equality of partition; and consequently by the act, Rev. Code, Ch. 82, Sec. 3, was not merely a personal judgment against the Company, but a specific charge on the lands; and that consequently a sale of the share of the Company under that decree, passed to the purchaser a full title, paramount to any rights in the property created, as that of the plaintiffs in this action was, *pendente lite,* and extinguished the plaintiffs' title, both legal and equitable. *Wynne v. Tunstall,* 16 N. C., 23; *Jones v. Sherrard,* 22 N. C., 179; *Sutton v. Edwards,* 40 N. C., 425; *Coble v. Clapp,* 54 N. C., 173.

We are willing to receive this proposition as true, if applied to a purchase at execution sale by a stranger who was under no obligation to extinguish any incumbrances upon the estate of the Company.

But this was not the condition of Murray at the time of his purchase in October, 1872.

On 8th September, 1859, the Heron Mining Company executed a second mortgage to Winder to secure certain lands other than
(566) those secured by the first mortgage which was assigned to Penelope Smith and Mary Smith. This second mortgage was upon the Moiety theretofore mortgaged to the Smiths, and also upon another one-fourth of the common lands. It was expressly provided in it, that as to the moiety, it should be secondary to the prior mortgage assigned to the Smiths. On 29th September, 1860, Winder assigned this second mortgage to Parsons, who obtained a decree of foreclosure at June Term, 1870, of the Circuit Court of the United States, and on the 16th August, 1871, assigned all his estate under said second mortgage to Murray, who on 12th December, 1871, purchased at a sale under the decree of foreclosure, all the estate of the Company, subject nevertheless to the first mortgage.

In October, 1872, therefore at the time of the purchase by Murray under the execution issued upon the decree for partition, he was the owner of the equity of redemption in the Company after payment of the first mortgage: he was also as second mortgagee, a tenant in common with the Smiths of the one-fourth conveyed by the Company in the second mortgage. For no partition had been made between him and the Smiths. He had obtained these rights *pendente lite,* as the Smiths had obtained theirs, and he had purchased with full knowledge of the prior rights of the Smiths as to the moiety. From this it follows, that his estate in that moiety, was primarily bound to extinguish the incumbrances upon it, created by the decree or decrees in the partition suit and cross bill. The estate of the Company as it was in 1857, was bound to Wiseman to satisfy the decree in his favor for costs. But as between the first and second mortgages, the second took nothing in

the mortgaged property until the first mortgage was paid off, with all incumbrances then existing, by relation (as in this case) or otherwise, against the mortgagor. The purchase at the execution sale was only the extinguishment of an incumbrance, which as between the two mortgages, was a prior one on the estate of the second. The Company were unquestionably bound in favor of the first mortgagee, to extinguish this incumbrance, as well as all others then existing or afterwards accruing; as taxes, for example; and Murray coming in as (567) its assignee, with notice, took subject to its obligations. In extinguishing the incumbrance, he did only what the first mortgagee could have compelled the Company, and could have compelled him as the assignee of the Company's equity of redemption to do. *Henderson v. Stewart*, 11 N. C., 256. That case, so far as it relates to the present point, was this: Casso agreed to purchase land from Alfred, and took a contract to that effect. Before paying the price he mortgaged to Moore, who paid off the debt to Alfred. The defendant Stewart was the assignee of Moore, and the plaintiff Henderson claimed under a purchase at execution sale of the equity of redemption of Casso. The Court held that the sum so paid by Moore was a charge against the owner of the equity of redemption.

We think the plaintiffs entitled to a decree of foreclosure on making Mary A. Smith a party. We take it to be clear that the mortgagees are necessary parties to a bill to foreclose, in order that the legal title may pass to the purchaser. If let outstanding, it might perhaps produce inconvenience hereafter.

PER CURIAM. Judgment below reversed, and upon the bill being amended in the way indicated, a decree may be drawn in conformity to this opinion.

R. S. PULLEN, AS EXEC'R. AND TRUSTEE AND ANOTHER v. THE HERON MINING COMPANY AND OTHERS.

In an action to foreclose a mortgage, the mortgagees are necessary parties, in order that the legal title may pass to the purchaser. A mortgagee who has assigned his interest is not a necessary party.

This is but another branch of the preceding case, being the defendants' appeal therein. For the facts necessary to an understanding of the points takes by defendants, see the statement and (568) opinion in the preceding case.

On the trial below, the defendants insisted that certain other persons

were necessary parties. His Honor ruling differently, the defendants appealed.

Mason and Fowle, for appellants.
Moore & Gatling, contra.

RODMAN, J. 1. We are unable to see how the heirs of Richard Smith are necessary parties. The title to the Company begins with the deed from Penelope and Mary Smith.

2. Wiseman is not a necessary party. Inasmuch as all the parties acquired their present estates during the pendency of the action for partition between the Company and him, they are all concluded by the decree in that suit.

3. Winder is not a necessary party. All his estates and interests have been assigned to the present parties.

4. Mary A. Smith is a necessary party. It does not appear that the legal estate in the land conveyed to her by the assignment from Winder has ever passed to anyone else, and this legal estate should be represented in this action, in order that the purchaser, under a decree of sale for foreclosure may acquire a full legal estate.

5. The counter-claim for breach of the covenants in the deed from Penelope Smith and Mary A. Smith to Winder is a good one so far as now appears. Such covenants run with the land to a purchaser. It may be doubtful whether upon a deed made since the Revised Code, (Chap. 44, Sec. 10,) the heirs of Penelope Smith or her executor would be the proper person to be defendant in an action upon her warranty. But this is of no importance in this case, as Pullen represents both characters, and as between the two the primary liability is on the personal estate. The fact of Mary A. Smith's liability for any breach of this covenant is an additional reason why she should be a party.

(569) The admission by Winder that he had been satisfied for the breach was not evidence. He was not introduced as a witness, he was not sworn or liable to cross-examination. If he had been a party, such admission in his answer would not have been evidence against his co-defendants. If the fact of satisfaction to Winder or of a release by him before he parted with his estate in the land was established, it might be of weight.

PER CURIAM. There is error in the judgment below and the case is remanded.

Cited: Hughes v. Gay, 132 N.C. 51.

APPENDIX.

The following cases decided at the last June Term, (1874,) of the United States Circuit Court for the Eastern District of North Carolina, Chief Justice WAITE and Judge BOND presiding, are not only interesting to the profession, as adjudications of questions of vast importance, but the decisions are intimately connected with the interest of every taxpayer in the State. These considerations alone would justify their publication in this place. Add, however, that the opinions delivered were well considered, after able arguments *pro* and *con,* and are those of the highest judicial officer in our government, the Reporter more cheerfully accedes to the expressed wishes of the Circuit Court Bar, that the cases should appear in this volume of our own reports.

SWASEY v. NORTH CAROLINA RAILROAD CO. AND OTHERS.

JURISDICTION OF THE UNITED STATES COURTS IN RESPECT OF STATE PROPERTY.

All the necessary facts are stated in the opinion of the Court, delivered by

WAITE, C. J. The North Carolina Railroad Company was incorporated by an act of the General Assembly, passed January 27, 1849, to construct a railroad to commence at the Wilmington & Raleigh Railroad, and proceed to Charlotte. To aid in building the road, the Board of Improvement was, by the act of incorporation, authorized to subscribe, on behalf of the State, $2,000,000 to the capital stock of the company.

Sections 38 and 41 of the act are as follows:

"SEC. 38. That in case it shall become necessary to borrow the money, by this act authorized, the public treasurer shall issue
(572) the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the treasurer may appoint; the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued, but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the instalment required to be paid at that time."

"SEC. 41. That as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto, all the stock held by the State in the North Carolina Railroad Company, hereby created, shall be and the same is hereby pledged for that purpose, and any dividends of profit which may from time to time be declared on the stock held by the State as aforesaid, shall be applied to the payment of interest accruing on said certificates; but until such dividend of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest, as the same may accrue out of any moneys in the treasury not otherwise appropriated."

The authorized subscription was made and certificates of debt issued to the amount of $1,858,000, on which the money was borrowed to meet the payments. By these certificates it was "certified that the State of North Carolina justly owes _____, or bearer, $1,000, redeemable in good and lawful money of the United States, at, etc., on the 1st day of July, 1884, with interest thereon at the rate of 6 per cent per annum, payable half yearly at, etc., on, etc., until the principal be paid, on surrendering the proper coupon hereto annexed." On the 14th of February, 1855, the General Assembly passed another act, entitled "An act for the completion of the North Carolina Railroad," by the terms of which the public treasurer was authorized and instructed to sub-
(573) scribe for $1,000,000 more to the capital stock of the company, and to make payment therefor by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions prescribed for the sale of the bonds theretofore issued and sold to pay the State's original subscription, and the same pledges and securities were thereby given for the faithful payment and redemption of the certificates of debt then authorized, as were given for those issued under the direction of the first act.

This stock was by the terms of the act to be a preferred stock. The subscription was made and certificates of debt, in the same general form as the first, issued to provide the means of payment.

The plaintiff is the owner of five certificates of the first issue and two of the second. The interest on the first issue, payable January 1st, 1869, and after, and on the second, payable April 1st, of the same year and after, was unpaid, when this suit was commenced.

This action is prosecuted for the benefit of all bondholders, who may come in and make themselves parties. About $1,800,000 of the indebtedness is now represented. No certificate for the stock, upon either of the subscriptions, had been issued by the company at the time of the commencement of this action. Since that time, upon the order of the Court, the proper certificates have been issued and placed in the hands

of a receiver appointed in this cause, who has collected the dividends thereon as they have from time to time been declared and paid. These dividends, as far as received, have been applied to the payment of interest, but there is still a large amount in arrear, and the plaintiff now asks that a sufficient amount of the stock may be sold to pay what is past due.

It is first insisted by the defendants that the State of North Carolina is in fact a party defendant, and consequently that this Court cannot entertain jurisdiction of the cause.

The State, although directly interested in the subject matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides, that no (574) suit can be prosecuted in this Court against a State, by the citizens of another State, or by citizens or subjects of a foreign State. It has long been held, however, that this amendment applies only to suits in which a State is a party to the record, and not to those in which it has an interest merely.

It is next urged that, if the State is not actually a party to the suit, it is a necessary party, in whose absence the cause cannot proceed, and that as a State cannot be brought into Court, no relief should be granted upon the case made.

If the State could be brought into Court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborn v. The Bank of the United States*, reported in 9th Wheaton, 739, it has been the uniform practice of the Courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents, without making the State a party, when the property or the agent is within the jurisdiction. In such cases the Courts act through the instrumentality of the property or the agent.

The real question, therefore, presented for our determination is, whether the Court has jurisdiction of the property which it is sought to charge, or of the agent of the State having it in possession.

The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt of the State contracted on its account. This was part of the law of its creation. It has always been pledged.

The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the State, in trust, as well for the stockholders as for the State. The charter made the company the depository of the pledge to hold it for both parties according to their respec-

(575) tive interests. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained in the absence of the State as a party. This was evidently the understanding of the parties when the pledge was made. It was then the case, as now, that a State could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the Courts in proper cases, notwithstanding the ownership by the State. The faith of the State had been pledged. This pledge the Courts could not enforce. The stock to be obtained with the money borrowed could not be reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose.

Understanding this, a lien was given upon the stock as security, "in addition" to the pledge of faith. But it was no addition, if the bondholder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the State not only should, but that it in fact did, grant to the bondholders the power to use the machinery of the Courts to subject this portion of their security, if default should be made in the payment of the debt.

In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed.

The next objection is that the stock was pledged as security for the payment of the principal of the debt alone, and not the interest, and that as the principal is not yet due there can be no decree for a sale.

The stock was pledged for the "redemption of the certificates of debt." The certificates bound the State "for the payment of the sum therein mentioned, with interest thereon." Thus it is apparent that the interest is as much a part of the obligation of the certificate as the principal. If more is necessary to sustain this view, it is to be
(576) found in a subsequent part of the section, where it is provided that "the *principal* of the certificate shall be redeemable," etc. If it had been supposed that the certificate only related to the principal, it would have been sufficient to provide for the time of the redemption of the certificate, the same as when in Sec. 41, "the security for the redemption of the certificates" was designated and granted.

If then the certificate bind the State for the payment of both principal and interest, it would seem to follow most unquestionably that whatever was given as security for its redemption could be held for the performance of all its obligations.

But it is argued that the dividends are specially designated as security, and the only security, for the payment of the interest. The language of the act is that the dividends "shall be applied to the payment of the interest accruing on such certificates." This is additional secur-

ity. Without it (as the State could not be sued) there was no power to compel this application. With it, there was. The officer in whose custody the dividends were placed, was, so long as the fund remained in his hands, amenable to the process of the Courts to compel him to do what the law required of him.

It is again claimed that, as it was made the duty of the treasurer, until dividends were declared to pay the interest as it accrued out of any moneys in the treasury not otherwise appropriated, it could not have been intended that the stock should be held for anything but the principal. This, too, was additional security. Without it the bondholder had no power to enforce the payment of the interest. With it, after default, upon a proper showing, the treasurer could be compelled to apply the unappropriated moneys in his hands to discharge that obligation.

Neither can an argument in favor of the claim of the defendant be drawn from the fact that the stock is pledged for the redemption of the certificate. It is true the principal of the certificate was made redeemable at the end of thirty years, and that the interest thereon was payable semi-annually. The certificate could not be redeemed (577) until both principal and interest were paid.

Redemption and redeemable are therefore, in this connection, only other names for payment and payable, and the General Assembly appears to have used the words as though they conveyed the same meaning.

If the stock was not given in security for the interest, then the faith of the State was not pledged for its payment, for that, like the stock, was only pledged for the redemption of the certificate. So, too, if no payment of interest should be made during the whole thirty years, no part of the stock could be applied to its payment then, even though its value should be sufficient to discharge both principal and interest. If the stock is held at all for the payment of the interest it may be subjected at any time after a semi-annual instalment falls due.

For these reasons we are clearly of the opinion that the plaintiff and those whom he represents are entitled to have their proportion of the stock, or so much thereof as may be necessary, sold in order to pay the past due interest upon their bonds. They can act, however, only for themselves. So much of the stock as equitably belongs to them as security, they can control in this action, but no more. The security is divisible and should be apportioned to the various bondholders according to the amount of their respective claims. Each bondholder should have an amount of stock, which bears the same proportion to the whole stock that his bonds do to the whole amount outstanding. We are not willing, however, to order that a sale be made until ample time has been

given the State to provide, by levy and collection of taxes, the necessary funds for the payment of the interest now past due, and such as may fall due before the money can be realized and applied. An account may be taken of the amount due for unpaid interest upon the bonds represented in this cause, and of such as will mature on or before the first day of April, 1875, and a decree entered that if full payment thereof is not made by that day, so much of the stock apportioned as security to the plaintiff and those he represents as may be necessary to pay the same, be sold. If on or before the day of sale it shall be made to appear to the Court that the State has in good faith levied a tax to pay the arrears of interest on the debt, and provided for its collection, the sale will be further suspended until a sufficient time shall have elapsed for the collection to be made.

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SELF v. JENKINS.

INJUNCTION—PUBLIC TREASURER—MISAPPLICATION OF APPROPRIATIONS FOR SPECIFIC PURPOSES.

The facts are fully set forth in the opinion of the Court, delivered by

WAITE, C. J. Article V, Section 5, of the Constitution of North Carolina is in these words:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Article V, Section 8, is in these words:

"Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

(579) The Wilmington, Charlotte & Rutherford Railroad Company was incorporated in 1855, to construct a railroad from Wilming-

ton to Rutherford. This railroad was unfinished at the time of the adoption of the Constitution.

By an act of the General Assembly, passed on the 29th January, 1869, the capital stock of this company was increased to seven millions of dollars, and, in order to complete the road, the public treasurer was directed to subscribe four millions of dollars to the stock. Payment of this subscription was to be made in the bonds of the State having thirty years to run, the interest, at six per cent being payable semi-annually. To provide for the payment of the interest and the principal at its maturity, the act imposed an annual tax of one-eighth of one per cent upon all the taxable property of the State, to be levied, collected and paid into the treasury as other public taxes.

This authorized subscription was made, and bonds to the amount of $3,000,000 delivered to the president of the company in part payment thereof.

The special tax provided for was levied in 1869, and $151,491.13 collected therefrom and paid into the State treasury. Out of this, $29,400 was paid on account of the interest accruing upon the bonds, but on the 20th of January, 1870, a resolution was adopted by the General Assembly instructing and directing the treasurer not to pay any more until authorized by the General Assembly, and he thereupon suspended the payment.

On the 8th of March, 1870, the General Assembly repealed the act making appropriations to the railroad company, and directed all the bonds then in the hands of the president to be returned to the treasurer.

On the 12th of the same month, the General Assembly, by a law duly enacted, directed the treasurer to use $150,000 of the special tax funds, in payment of the ordinary expenses of the State government, and to repay advances theretofore made by the board of education, and authorized him to replace the same out of the first moneys which might come into his hands by way of dividend of corporations or (580) of taxes theretofore or thereafter to be levied.

By another act passed December 20, 1870, he was directed to use $200,000 more of the same funds, in payment of the ordinary expenses of the State government, and the appropriations for the charitable and penal institutions, and to replace the same from the first moneys paid into the State treasury from dividends or taxes levied and collected for general purposes.

In obedience to these directions, the treasurer used $122,091.13 of the fund collected to pay interest on these bonds, for the purposes specified in the acts.

On the 20th of December, 1871, the treasurer was forbidden by the General Assembly to apply any money collected under the revenue act

of 1871, to the repayment of any moneys borrowed under the act of December, 1870.

On the 3d of March, 1873, another act was passed, entitled "An act to raise revenue," and by its terms the taxes therein levied were applied to defray the expenses of the State government, and to pay the appropriations for charitable and penal institutions. A similar act, with similar application of the funds to be raised, was passed in 1874.

The plaintiff is the holder of certain of the bonds issued to the above named railroad company, on which no interest has been paid, and in this bill he asks that the treasurer may be restrained from the payment of any moneys out of the treasury of the State, until he has replaced the $122,091.13 borrowed by him from the special tax fund, applicable to the payment of the interest on the bonds issued to the said company.

The facts are all admitted by the pleadings, and the simple question presented for our determination, is, whether upon such facts, the relief asked for can be granted.

The use of the special tax funds to pay the general expenses of the State government was in violation of the Constitution, and therefore unlawful; but the wrong, if any exists, has been done. We are
(581) not now called upon to prevent the act, but to relieve against its consequences. The first, upon a proper application made in time, we might have done. The question now is, whether upon this application, the latter is within our power.

The treasurer is a public officer. His office belongs to the executive department of the State. His duty is to execute the laws, not to make them. He, within his official sphere, carries into effect the will of the Legislature, and can only do what the law permits.

The Courts will not by *mandamus* compel a public officer to do that which the law does not authorize. Neither will they restrain him from doing that which the law requires. An unconstitutional law is no law, and the Court will, when properly called upon, restrain its execution, because it cannot authorize action by anyone. It is for this reason that the wrongful application of this money might have been prevented. The law directing it, being unconstitutional, conferred no authority upon the treasurer to do what was required. It is quite another thing, however, to compel him, in his official capacity, to substitute other moneys now in the treasury for that which he has improperly used.

That, in substance, is what we are called upon to do in this case. True, the form of the prayer is that the treasurer be restrained from paying out money from the treasury, but the real object is to compel him to retain in the treasury an amount equal to that which he has misapplied. This requires a refusal by the treasurer to pay the orders drawn upon him by the proper authorities, pursuant to law. He is but

the custodian of the public money. He has no discretion as to its use. It is held to be paid out and appropriated as the law directs.

The immediate question for our determination, therefore, is, not whether the State should provide the means and require the treasurer to replace this fund, but whether it has so done. When the order to use the $150,000 was made, the treasurer was authorized to replace it out of the first moneys which came into the treasury by way of dividends or taxes. When that of the $200,000 was ordered, he (582) was authorized to replace it from dividends and taxes for general purposes. The revenue act of 1871, however, expressly prohibited him from using for that purpose any money collected under its authority. The acts of 1873 and 1874, do not contain any such express prohibition, but they each direct that the taxes levied shall be applied to defray the expenses of the State government, and to pay appropriations for charitable and penal institutions. This is the statement of the special object to which the tax is to be applied, required to be made in every law levying taxes, and the Constitution expressly prohibits its application to any other. While, therefore, the law does not prohibit the reimbursement of the special tax fund out of the money raised under its authority, the Constitution does. The expenses on account of which the money was taken from the fund, have already been paid with the money of the State. It is true, the money paid ought not to have been so used, but it was none the less on that account the money of the State. The bondholders might, perhaps, if the money still remained in the treasury, compel its application to the payment of the interest on their bonds, but until so applied it did not become their property, and remained that of the State.

It is not claimed that there is now any money in the treasury, except that which has been collected from taxes levied under the revenue laws of 1873 and 1874, and it is clear to our minds that there is no existing law which requires, or even authorizes, the treasurer to reimburse the special fund from that. The State may be under obligation to provide for such reimbursement, but the State and the treasurer occupy different positions. The State is the debtor and bound by its pledge of faith to provide means and pay its debts. The treasurer is but an agent of the State, and bound only to pay its debts when required to do so by a valid law. If such a law exists and he refuses to act, a proper Court will by *mandamus* compel him to perform his duty. If he threatens to divert money appropriated for the payment of a debt, on proper (583) application, he may be restrained. But to authorize interference in either case, it must clearly appear that he wrongfully refuses to execute a valid law which has been enacted by the legislative department for his guidance. The Court cannot make laws for him. It can

only compel him to execute such as have been made.

As there is therefore no money in the treasury which the treasurer is authorized or required by any existing law to appropriate for the reimbursement of the special tax fund, we cannot restrain him from paying out the funds in his hands until the reimbursement has been made. The principal in this case cannot be reached through the agent now before the Court.

The bill is dismissed with costs.

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EVIDENCE.