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VOL. 74

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1876.

REPORTED BY

TAZEWELL L. HARGROVE, Attorney General.

Annotated Through Vol. 243.

RALEIGH:
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1957

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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

JANUARY TERM, 1876.

C. H. WILLIAMS v. ALEX'R AND GREEN WILLIAMS, ADMINISTRATORS OF HAYWOOD WILLIAMS.*

Any judgment rendered in a Court of Probate, is only binding on the parties to the action: *Therefore*, where the plaintiff, one of ten distributees, alone sued the defendants, Adm'rs, etc., it was irregular for that Court to do more than to adjudicate the rights of the parties before it, and give the plaintiff a several judgment for the amount of the estate due him. (See *same case*, 70 N. C., 665, and 71 N. C., 427.)

PETITION to re-hear the action, in the nature of a special proceeding, between the same parties plaintiff and defendants, originally brought in the Probate Court of PERSON County, and heard upon appeal by his Honor, TOURGEE, J., at Chambers, June 10th, 1873; from the judgment of the court below, the defendants appealed, and the case was decided in this court at January Term, 1874. (70 N. C., 665.) (2)

The case was again before this court, upon a petition for a *certiorari*, granted by Judge TOURGEE, and was decided at June Term, 1874. (71 N. C., 427.)

All the facts relating to the case and to the points therein raised and decided, may be found fully stated in the two reports thereof cited above, and in the following opinion of Justice BYNUM delivered at the last (June) Term of this court.

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*NOTE.—This case was decided at the last (June) Term of this Court.

Jones and Jones, for the plaintiff.

W. A. and J. W. Graham, for the defendants.

BYNUM, J. When this case was first before this court, it was upon the appeal of the defendants from the judgment of the Court of Probate, refusing to re-hear, upon a petition filed there for that purpose. 70 N. C., 665. It was there held, that where parties to a final judgment fail to appeal by their own default, a re-hearing is not a matter of right, but rests in the sound discretion of the court; and the appeal was dismissed.

The same case was again before this court by appeal on a petition for a *certiorari*. 71 N. C., 427. It was then *held:* 1st. That no error of law was alleged in the petition, and therefore it did not lie as a writ of false judgment to correct errors of law; 2d. That it did not lie as a substitute for an appeal, because the defendants did not show that they were improperly deprived of the right of appeal, or that they lost it without their default; and 3d. That the writ of *certiorari* did not lie pending the appeal to the Supreme Court, on the petition to re-open and re-hear. The appeal, therefore, was again dismissed. It is thus seen that the case has both times, been before this court upon questions of practice only, and that the judgment rendered by the Court of Probate is still in that court and has never been brought
(3) directly before this court for review. It is true, that when the case was here upon the points just named, we incidentally but fully discussed the merits, because the record sent up contained a full statement of the proceedings in the Court of Probate; but the decision of this court did not and could not turn, in the least, upon the merits of the judgment given in that court. No judgment has been given in this court, except judgments dismissing the appeals, which left the original judgment standing in the Court of Probate. This court has acquired no control over it; and for the same reasons assigned for dismissing the appeal, when the case was last here, (71 N. C., 427,) the judgment then rendered must be affirmed now.

But our attention is now for the first time called to the form of the judgment given in the Court of Probate, and to the parties plaintiff, who were before the court. It seems that the citation directed to the defendants, (which the subsequent complaint filed and the proceedings thereon, show was treated as a summons,) was at the instance of the plaintiff alone, and the case conducted as one between him and the defendants.

It now appears for the first time, that the plaintiff is one of ten distributees of the estate in the hands of the defendants. Had this objection been raised before the proper court, in apt time, that court

would have directed all the parties in interest to be made parties to the action before proceeding with the cause. But the defendants failed to make the objections in apt time, and cannot be heard now to raise it to the prejudice of the plaintiff, who was actually before the court as a party to the action. In *Burns v. Ashworth,* 72 N. C., 496, and cases there cited, *it is held,* that a defect of parties is cause of demurrer, but can be taken advantage of in no other way. It is then too late to make the objection now, even if this were the proper court in which to raise it. But it is clear, that any judgment rendered in the Court of Probate, is only binding upon the parties to the action. The other distributees cannot be bound by proceedings to which they were not (4) a party and where they had no day in court; nor are the defendants bound as to them, because an estoppel must be mutual. It was then, evidently irregular, for the court to do more than adjudicate the right of the parties before the court, and to give the plaintiff a several judgment for the amount of the estate due to him. But the court undertook to do more, and declared the sum due by the defendants to all the distributees, not singly but collectively. Such a judgment was not warranted by the case, but it is one which can be easily corrected; not here, but in that court, on a proper application in the cause. It will then be the duty of the Court of Probate, to modify and change the judgment, so as to make it a judgment in favor of the plaintiff against the defendants for a sum certain, which should be his distributive portion of the amount found to be due to all the distributees, by the present judgment.

It now also appears for the first time, by the affidavits of the defendants, which in great part is admitted in the counter-affidavits of the plaintiff, that in taking and stating the account, certain payments on account of his distributive share, made by the defendants to the plaintiff, and certain notes given by him to the administrators as such, were not taken into the account. In correcting the judgment it will be proper for the court, after dividing off the plaintiff's tenth, or distributive portion of $21,098.41, the amount found to be due to all, to give the defendants credit for all payments made to the plaintiff on account of his distributive share, and for all sums otherwise due the estate by him and not accounted for in the account stated. The credits thus claimed by the defendants are set forth in their affidavit filed with their application for a rehearing, and the plaintiff's answer thereto is set forth in a counter-affidavit filed by him. The issues raised by these affidavits form the only proper subjects of investigation in ascertaining the amount due the plaintiff. So far as this plaintiff is concerned, the account as stated by the Court of Probate, should not be re-opened. As to the other distributees, not parties to this litigation, (5)

it must go for nought. It was great mismangagement not to have joined them as parties.

The suggestions here made are not necessary for the decision of this court upon the point presented for our decision, but are thrown out as aids to the court below in bringing to a conclusion this expensive litigation.

The former judgment of this court is affirmed and the petition dismissed.

PER CURIAM. Petition dismissed.

Cited: Durham v. Hamilton, 181 N.C. 233.

GWATHNEY, DEY & CO. v. C. W. CASON.

In order to remove a contract for the sale of lands from the operation of the statute of frauds, there must be a writing signed by the party to be charged therewith, or by his agent thereto lawfully authorized, containing expressly or by implication all the materials of the contract.

Therefore, where B bid off a tract of land at an auction sale, and the auctioneer immediately went to his office, some two hundred yards distant, and in the absence of B began to prepare a deed, and had reached the *habendum,* when B came in and informed him that he would not comply with his bid; in an action brought by A, the owner of the land, sold at auction, to recover the amount of B's bid; *It was held,* That the requirements of the statute had not been complied with, and the plaintiff was not entitled to recover.

CIVIL ACTION, tried before *Eure, J,* at Fall Term, 1875, of the Superior Court of CHOWAN County.

In 1872, one Burton conveyed to the plaintiffs a house and lot in Edenton, N. C., to secure certain debts, and having failed to pay
(6) the same, the trustees, on thte 14th day of March, 1874, after due notice, etc., offered said lot for sale. On that day their agent, one Petteway, offered the interest of Burton in the lot for sale at public auction, and proclaimed to the bystanders the terms of the sale, the defendant being present. After several bids the interest of Burton was bid off and knocked down to the defendant for the sum of four hundred and eighty-six dollars.

There was no memorandum made at the time of the bidding, but immediately after the property was knocked down, the attorney of the plaintiff, Octavius Coke, Esq., went to his office two hundred yards distant, and began to draw a deed therefor in the absence of the defendant, and when he had got to the *habendum,* he was informed

that the defendant declined to comply with his bid, because he had been deceived by the plaintiff as to the title to the property. The deed however was drawn and tendered to the defendant on the day of sale, and the purchase money demanded, which he declined to pay.

This action was brought to recover the sum of $486, the purchase money for the lot.

Upon the trial his Honor intimated that the plaintiffs could not recover, because the agreement to purchase was void under the statute of frauds, whereupon the plaintiff submitted to a non suit and appealed.

Walter Clark, for the appellant.
Gilliam and Pruden, contra.

RODMAN, J. The only question presented in this case is, was the contract by defendant to purchase land, "or some note or memorandum thereof, put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized," as is required by the statute of frauds. Bat. Rev., chap. 50 sec. 10.

The contract was not signed by the defendant personally. It (7) is properly admitted however, that upon a purchase of land at auction, a signature of the defendant's name by the auctioneer, in the presence of the defendant and with his consent, to any writing containing the terms of the sale, and stating him as the purchaser, will suffice. *Cherry v. Long,* 61 N.C., 466.

Whether the auctioneer is authorized to sign the name of a purchaser not in his presence, and at an indefinite time after his bid has been accepted by the fall of the hammer, was discussed by the counsel. There are decided authorities that the signature must be strictly contemporaneous with the sale. *Mews v. Carr,* 1 Hurl. and Nor. 486, (S. C. 38, E. L. & E. R.) Browne on Statute of Frauds, sec. 352a, 353. *Smith & Arnold,* 5 Mason, (C. C.) 419. *Walker v. Herring,* 21. Grat. 678; *Horton v. McCarty,* 53 Maine, 394.

But, without expressing any opinion on this point, we assume that the effect of what Coke wrote, is not impaired by the fact that it was written out of the presence of the defendant, and some short time after the bid of the defendant had been accepted.

The case states that immediately after the sale, Coke (the auctioneer) went to his office, about two hundred yards distant from the place of the sale, and began to draw a deed for the land to the defendant, and had proceeded as far as the *habendum,* when he was informed that defendant declined to comply with his bid for certain reasons, which he assigned. The deed was however drawn and tendered to defendant on the day of the sale, when he refused to accept it. The

case states that a copy of the deed is annexed, but in fact, it is not. It was, however, conceded by counsel, that the deed was in the usual form. We may assume, therefore, that it professed to be made between the plaintiffs and the defendant as parties of the first and second parts respectively; that it recited the conveyance from Burton to plaintiffs, the sale, the bid of $486 by the defendant and its acceptance by
(8) the auctioneer; the payment of the consideration, and that plaintiffs conveyed the land to the defendant.

Two objections are made to this instrument as a compliance with the statute:

1. Before the sale the auctioneer announced orally its terms. But it does not appear that the terms, which it may be supposed should state the identity of the land, and either expressly or impliedly the estate of the vendor, as in fee or otherwise, whether the sale was for cash, with or without warranty, etc., had ever been put in writing and read or exhibited to the bidders before the sale. Although an auctioneer is authorized by a bidder to sign his name as purchaser to a contract previously written, or to a writing referring to such contract, it is argued that it does not follow that the auctioneer is authorized to write out, after the sale, the terms which he may remember or suppose to have been orally stated by him. No authority has been found to extend the agency of an auctioneer so far, and to do so would open the door to the uncertainty and perjury, which it was the design of the statute to exclude. This objection is sustained by the cases above cited. We conceive it however unnecessary to express any opinion on it, and state it merely to show that it has not escaped our notice.

2. Granting that Coke had authority as agent of the defendant, not only to sign defendant's name to a contract written and read or exhibited to him before the sale, but also to reduce the oral contract into writing after the sale; yet what Coke wrote did not contain, or profess to contain, *all* the material terms of the contract, and did not profess to be written, and was not in fact written, as agent of the defendant or with any intent to bind him, and consequently it did not contain defendant's signature to a written contract in compliance with the statute. We think this objection a good one. If it were conceded that the defendant had no right to revoke the presumed agency of Coke, and that Coke had a right, notwithstanding the refusal of defendant to comply with his bid, made known to him when he
(9) had reached the *habendum* clause in the deed he was drawing, to go on and finish his draft, yet it must be observed that the completed draft would not necessarily or usually contain *all* the material terms of sale. In executing a contract for the sale of land, it is held in this State, that it is the duty of the vendor to prepare and tender the

deed of conveyance. *Christian v. Nixon,* 33 N.C., 1; *Hardy v. McKesson,* 52 N.C., 567. In the performance of this duty, Coke, as the agent of the plaintiffs, prepared the draft of a deed. The instrument when perfect was not to have been, or need not to have been signed by defendant. It was to be the act and deed of the plaintiffs alone. Consequently it did not contain any words to charge the defendant. When finished it would not contain *all* the material terms of the contract of sale, as to comply with the statute it must. *Boydell v. Drummond,* 11 East., 142; 10 Paige, 526; 13 Metc., 385. For example, it would usually recite that the consideration had been received, although in fact a credit had been given for it. But however it may be in the case of auction sales not within the statute, where the bidder is bound from the fall of the hammer, yet in the case of sales of land which are within the statute, we consider that the bidder cannot be bound until his signature is affixed to the contract of sale. This may be done by the auctioneer or his clerk immediately upon the fall of the hammer; but until it is done, the bidder must have a *locus penitentiæ.* Otherwise he is bound without his signature, contrary to the statute. *Pike v. Balch,* 38 Maine, 302.

It is needless to say that if the finished draft would not have bound the defendant, a draft which stopped at the *habendum* would not. The writing up to that point clearly did not profess to contain all the material terms of the contract of sale. It is the office of the *habendum* to state with precision the quantity of the estate conveyed. It may enlarge or limit or qualify the estate granted in the premises, though it cannot be absolutely repugnant to it. Then follow the (10) covenants for title, etc., if any have been contracted for. All these usual provisions in a contract are absent from the draft which Coke had written. There was clearly no written contract of sale; that is, no writing containing expressly or by implication all the material terms of the alleged contract signed by the party to be charged, or by his agent lawfully authorized thereto.

Our conclusion is supported by numerous authorities. *Stokes v. Moore,* 1 Cox, 219; 14 Johns, 15; *Givens v. Calder,* 2 Den., 171; *Horton v. McCarthy,* 53 Maine, 394; *Mews v. Carr,* 38 E. L. & Eq. Rep., 358; *Morton v. Dean,* 13 Metc. (Mass.) 385.

The cases cited by plaintiff's counsel are not cases of sale by auction, and hence have no application.

PER CURIAM. Judgment affirmed.

Cited: Proctor v. Finley, 119 N.C. 539; *Davis v. Yelton,* 127 N.C. 348; *Hall v. Misenheimer,* 137 N.C. 186; *Dickerson v. Simmons,* 141 N.C. 327; *Brown v. Hobbs,* 154 N.C. 548, 556; *Love v. Harris,* 156 N.C. 91, 93; *Keith v. Bailey,* 185 N.C. 263; *Smith v. Joyce,* 214 N.C. 604, 605, 606.

(11)

F. BORDEN MACE v. ISAAC RAMSEY.

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

Therefore, where A contracted to furnish B a boat at a specified time, to be used by B in conveying excursionists to and from different points in Beaufort harbor—an excursion train being expected to arrive at such specified time—in an action against A for damages on account of the breach of his contract: *It was held*, That the measure of damages would be what a boat like A's would be worth at such time, if he, (A,) knew of the excursion and the use to which B intended to put the boat. And in arriving at that value, the jury might consider the capacity of A's boat, state of the weather, etc.

Held further, That evidence was admissible to show that the plaintiff had engaged enough passengers for this boat and his other boats on the occasion.

This was a CIVIL ACTION, tried before *McKay, J.*, at Spring Term, 1875, of CARTERET Superior Court.

The plaintiff alleged that the defendant contracted with him on July 5, 1873, to furnish a flat-boat and hands on the 16th of July, 1873, for the plaintiff's use on the 16th, 17th and 18th days of that month, to transport passengers or excursionists from Morehead City to Beaufort and different points about the harbor, an excursion train being expected at Morehead City on the morning of the 16th, and that the defendant failed to comply with his contract.

There was a conflict between the testimony of the plaintiff and that of the defendant, the plaintiff swearing that it was an unconditional contract and the defendant swearing that he agreed to furnish the boat and hands if the boat was at home on that day. Other witnesses
(12) testified as to the contract. The price agreed upon between the parties for the use of the boat was $4.00 *per diem*, which was proved to be the usual price of such boats.

The case as decided in this court is so fully stated in the opinion of Justice BYNUM that any further statement is deemed unnecessary.

The jury rendered a verdict in favor of the plaintiff, assessing his damages at $210.

The defendant moved the court to grant a new trial upon the following grounds:

1. The admission of improper testimony;
2. Misdirection to the jury;
3. Refusal to give instructions asked.

The motion was overruled by the court, and judgment rendered in favor of the plaintiff; thereupon the defendant appealed.

Green, for the appellant.
Hubbard and Haughton, contra.

BYNUM, J. The terms of the contract were disputed and it was left to the jury to ascertain what was the contract. Their finding establishes that it was unconditional and as follows: On the 5th of July, 1873, the defendant contracted with the plaintiff to furnish a flat boat and hands, on the morning of the 16th July for the plaintiff's use on the 16th, 17th and 18th of July to transport passengers, or excursionists from Morehead City to Beaufort, and different points about the harbor, an excursion train being expected at Morehead on the morning of the 16th of July. The price agreed upon for the use of the boat was $4.00 per day. The boat was not furnished, and the question was as to the amount of damages the plaintiff was entitled to recover.

As evidence of his damages the plaintiff offered to prove that an excursion train was expected to arrive with a large number of (13) excursionists at Morehead City on the morning of the 16th of July, and that the plaintiff had engaged passengers for this and his other boats, and had received money to the amount of $600 dollars, which he was compelled to refund.

The defendant objected to the admission of this evidence, and the court rejected so much of it as related to the receipt and repayment of the $600, but admitted so much as related to the excursion for the purpose of showing that the plaintiff had engaged passengers enough for this and his other boats.

The defendant asked the court to give the jury the following special instructions:

1. That the damages should not exceed the trouble and expense of hiring such a boat as the defendant's, at the Morehead City wharf, on the arrival of the party.

2. That he could recover only such amount as would cover the loss he would have suffered, in a fair competition that morning with other boats for the public patronage, irrespective of the forestalling resorted to by him, in the previous engagement of passengers.

3. That the damages should be measured by an indemnity for the moneys actually expended, and a reasonable compensation for work and services performed in preparing for the transportation of passengers.

The court without responding to each instruction asked for, gave a general charge to this effect: The measure of damages would be only

what a boat like the defendant's would be worth at such a time, if they were satisfied that the defendant knew of the excursion and the use the plaintiff intended to put the boat to; as the damages must be such as were in the reasonable contemplation of the parties at the time the contract was entered into; that the defendant was not liable for more than the ordinary earnings of the boat on such occasions, and to arrive at that they could consider the capacity of the boat, the state of the weather and the tide, as well as the evidence that the
(14) plaintiff had engaged enough passengers for this and his other boats.

We think these instructions are as favorable to the defendant as he could ask, and are responsive to his prayer for instructions. It is, however, contended by his counsel in this court, that the rule of damages laid down by his Honor is incorrect, in that it authorized the jury to assess damages too remote in law. In answer to this it is to be observed that his Honor substantially followed the rule laid down by this court in *Ashe v. DeRosset,* 50 N.C., 299: "Where one violates his contract he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties at the time the contract was made." No safer rule than this has as yet been discovered by which to distinguish proximate damages, which may be recovered, from remote damages which may not be, in an action for breach of contract. General rules there are in abundance for estimating damages for breach of contract, as that "the amount should be what would have been received if the defendant had kept his contract." *Alden v. Keighly,* 15 M. & W., 117. Or "when a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed." *Robeson v. Harman,* 1 Ex., Ch. 855-56. Or, "the true measure of damages is that which will completely indemnify the plaintiff for the breach of the engagement." *Shepherd v. Johnson,* 2 East., 210. All will concede these to be sound equitable principles, but most cases of contract vary from each other, and whatever general rules there may be for awarding damages, they must be modified by the particular cases to which they come to be applied. None of the above rules afford a criterion for discriminating between remote and proximate damages, and to meet our case, which turned upon the distinction, a more specified in-
(15) struction was required to restrain the jury from considering remote and conjectural loss on the one hand, and on the other allowing them to estimate the actual loss which followed as an immediate and necessary consequence of the breach of contract.

It was a special occasion, and the contract was made solely in reference to that occasion, and so made known to the defendant at the time of the contract. An excursion train with a large number of passengers seeking amusement or recreation at a summer resort, was expected at Morehead City on the morning of the 16th of July, and to remain for three days in the vicinity. The plaintiff undertook to provide boats for their accommodation, and did engage this boat and passengers to fill it. The immediate and necessary consequence of the failure of the defendant to furnish the boat was the loss to the plaintiff of the fares of the passengers engaged by him for the trip to Beaufort, and excursions in the harbor.

The contract was thus for a specific occasion and specific purpose, and the damage immediately and necessarily follows the breach, and was reasonably contemplated by both parties. The amount of damage incurred was a question for the jury. The defendant, had the fact been so, could have shown in mitigation, that the plaintiff hired, or could have hired, other boats in place of his, but he failed to do so, and we must assume that the plaintiff did not provide, and could not reasonably have provided, a substitute for this boat. The actual, immediate and necessary loss was for the jury, and if excessive damages were rendered by their verdict, as it rather appears to us was the case, the remedy was by an application to the Judge trying the case for a new trial, because of excessive damages assessed by the jury. This court is precluded from interfering with the action of the court below in matters solely within their discretion.

This case is easily distinguished from *Foard v. Railroad Company,* 53 N.C., 235; *Ashe v. DeRossett,* 53 N.C., 241; *Boyle v. Reeder,* 23 N.C., 607, and *Sledge v. Reid,* 73 N.C., 440, and similar cases, (16) in that, in these cases the damage was accidental and unforseen, or merely vague, uncertain and conjectural; and in this they are immediate, necessary and reasonably certain, and such as were in the contemplation of the parties to the contract.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Oldham v. Kerchner, 79 N.C. 112; *Lewis v. Roundtree,* 79 N.C. 125; *Roberts v. Cole,* 82 N.C. 295; *Lindley v. R.R.,* 88 N.C. 553; *Willis v. Branch,* 94 N.C. 149; *Jones v. Call,* 96 N.C. 345; *Spencer v. Hamilton,* 113 N.C. 51; *Neal v. Hardware Co.,* 122 N.C. 106; *Reiger v. Worth,* 127 N.C. 236; *Lumber Co. v. Iron Works,* 130 N.C. 588; *Sharpe v. R.R.,* 130 N.C. 614; *Critcher v. Porter Co.,* 135 N.C. 549; *Owen v. Meroney,* 136 N.C. 478; *Machine Co. v. Tobacco Co.,* 141 N.C. 289, 291; *Furniture Co. v. Express Co.,* 148 N.C. 92; *Storey v.*

Stokes, 178 N.C. 414, 415; *Newby v. Realty Co.,* 180 N.C. 54; *Builders v. Gadd,* 183 N.C. 449.

HARRIET SMALL, ADM'X, v. CHARLES W. SMALL AND OTHERS.

Where a guardian purchased his ward's land at a sale by the Clerk and Master, in a petition for partition filed by himself, and received a deed therefor, he holds the legal title to said land, subject to the equity of the wards, of his paying the purchase money, as a condition precedent to his becoming the owner of it.

The creditor who takes a deed of trust, stands in the shoes of the debtor, and takes subject to any equity binding the lands in the hands of the debtor.

This was a SPECIAL PROCEEDING, commenced in the Probate Court of PERQUIMANS County, where issues of fact arising upon the pleadings, the case was transferred to the Superior Court, and tried before *Eure, J.,* at Fall Term, 1875, upon the following statement of facts:

Before 1856, William Small, the plaintiff's intestate, had married the plaintiff, who was the mother of the defendants, Wilson, William and Joseph Mardre, by a former marriage, and had been appointed their guardian by the proper court. All were infants, Joseph being also a lunatic. These infants owned as tenants in common a tract of land hereinafter known as the "White House" tract.

(17) At the Fall Term, 1856, of PERQUIMANS Court of Equity, the said guardian, in his capacity as guardian, filed his petition to sell the said tract of land for partition. A sale was ordered by the court, and after notice the sale was made by the Clerk and Master at public bidding, when the same was bid off by the guardian, the plaintiff's intestate, at the price of $1,060, who gave his bonds therefor, with good sureties, payable to the Clerk and Master according to the order of sale. The Clerk and Master reported the sale, the purchase by the guardian and the execution by him of his notes, with good surety, to Spring Term of said court.

At Spring Term, 1857, is the following entry upon the Equity trial docket:

"The report of the Master in this case is filed, and it appearing therefrom that the real estate, in the proceeding mentioned, sold for a fair price, it is thereupon *ordered* that the said sale be confirmed; that the notes be paid over to the guardian, and that the Clerk and Master make title to the purchaser; and that the Master be allowed $25 for his services." This was the last order in the court.

Thereupon the Clerk and Master surrendered to the guardian his notes given for the purchase of the land, and on the 1st of January, 1858, executed a deed conveying the land to the guardian, who had taken possession of the same on the day of sale, and held it in continual possession and cultivation until his death in 1873.

In his returns as guardian, made to the February Term, 1857, of the County Court of Perquimans, he charges himself in favor of each of his wards, with the sum of $331, their respective shares of the proceeds of sale of the land.

Wilson L. Mardre attained the age of twenty-one years in the fall of 1860, and no payment was made to him by his guardian until after the war.

William Mardre became of age in 1865. Joseph Mardre had
(18) been declared *non compos mentis* by a jury, and the defendant, Wilson, is his guardian in lunacy.

At Spring Term, 1874, the defendants Mardre, instituted suit upon the bond of their guardian, and at Fall Term, 1874, recovered judgment, as follows: William Mardre, in the sum of $2,606.71, with interest on $1,785.42 from September 1st, 1874, till paid. W. L. Mardre, in his own right in the sum of $1,227.04, with interest on $674.24 from September 1st, 1874, until paid. Joseph D. Mardre, by W. L. Mardre, his guardian, in the sum of $1,389, with interest from May 1, 1874, until paid. These judgment's included the sums due each as the purchase money of the land.

On the 29th of October, 1867, the guardian, William Small, and the plaintiff, his wife, conveyed the said land to the defendant, P. H. Small, his son; and on the —— day of ——, following, he filed his petition in bankruptcy and thereafter was duly discharged in the Bankrupt Court on the 8th day of February, 1872. William Small and his sons, P. H. Small and C. W. Small, conveyed the land in trust to Elliott Brothers, to secure a debt due by William Small, deceased, intestate and insolvent, and in possession of said land in 1873.

The sureties upon the guardian bond and the sureties to the notes, executed by Small to secure the purchase money for the tract of land were insolvent at the close of the war, but good when given.

On the 15th April, 1874, P. H. Small conveyed the said land in trust to the defendant T. G. Skinner, to secure a debt due by him to Ginkin & Co. Neither Elliott nor Skinner had any knowledge of fraud in the transfer from William Small to P. H. Small. The debts recited in those trusts are *bona fide* and the Ginkin debt was assigned before due.

The plaintiff brought this action against the heirs at law of William Small to subject and land, as assets to the payment of his debts. The defendants, Mardre, Elliott Brothers, and Skinner by leave of

(19) the Probate Court filed their pleas, setting up their respective rights in the premises.

The Probate Court not having jurisdiction to try the issues raised by the pleadings, the cause was transferred to the Superior Court.

Upon consideration of the facts agreed, his Honor adjudged that the land be sold by a commissioner named, and that the defendants Mardre, were entitled to have the general assets of the intestate's estate applied to their judgments with the other indebtedness of the intestate, and that they had a lien upon the land and upon the proceeds of its sale, to satisfy any part of the principal or interest of the unpaid sum bid by the intestate after the *pro rata* payment of the intestate's assets, and the court directed an account for that purpose. The defendants, Elliott Brothers and Skinner, moved the court to dismiss the application of the Mardres' on the ground that the decree of the court at Spring Term 1857, could not be collaterally impeached in this proceeding, and for other reasons.

The motion was overruled by the court, whereupon the defendants Skinner and Elliott Brothers appealed.

Busbee and Busbee, Smith and Strong and Batchelor, for the appellants.

Gilliam and Pruden, contra.

PEARSON, C. J. In the argument before us, the counsel for "the Mardres" did not impeach the decree ordering a sale of the land for partition, or draw in question the validity of the deed executed by the Clerk and Master, so far as it had the effect to pass the legal title to William Small; but he put the equity of his clients to have a preference over the other creditors of Small in respect to the fund arising from the sale of the land, on the ground of the fiduciary relation of Small as their guardian. He filed the petition to have the land (20) sold for partition as their guardian, and in that capacity procured every order in the proceeding to be made, the result of which was, whether upon a preconceived intention on his part to defraud his wards out of a tract of land that adjoined his own land, or as a mere incident of his subsequent insolvency, is an immaterial question, for so it is, Small, the guardian has procured the legal title of his wards land without paying for it.

The question is, could he in conscience rely upon the legal title thus acquired by his own acting and doing, without any agency or concurrence on the part of his wards to deprive them of their land, or was he not bound in equity, when he found he was not able to pay for the

land, either to reconvey the land, or to give them a priority in respect to it over his general creditors.

The Constitution, in its provisions in regard to homesteads, refuses to recognize a vendee as the owner of lands which he has not paid for, as against the vendor, although he may have executed a deed as against the general creditors of the vendee or a subsequent purchaser, with notice of the fact that the land has not been paid for. Our courts acts upon the principle that where the parties are "at arms length" and the vendor, instead of retaining the title to secure the purchase money, choses to make title and trust the vendee for the money, it becomes a mere personal debt, and the vendor having, of his own folly, let go his security, must be content to stand on the same footing with other persons.

But our case does not rest upon that doctrine, and is put on a plain equity arising out of the fiduciary character of Small as guardian. He and his wards were not parties acting "at arms length." He was the only actor on the stage and the whole proceeding was managed by him; so as against his wards, although he had acquired the legal title, still he held it subject to the equity of his paying for the land as a condition precedent to his becoming the owner of it.

Granting this position, it was contended that the equity of the Mardres was barred by the fact that Small had held adverse possession of the land, under the deed of the Clerk and Master, (21) for seven years; the question intended to be presented depended upon whether in counting time it began *at the date of the deed,* or at the time when the wards respectively became of age. The idea that a guardian could hold adversely to his ward before the ward became of age, was so absurd that this position was abandoned.

3. It is settled in this State, that a deed in trust to secure creditors is not a voluntary conveyance within the meaning of the statute of Elizabeth; but the counsel of the appellants did not refer to any case or give any reason in support of the position that a creditor who takes a deed of trust conveying a tract of land, to secure an existing debt, stands in a better condition than the debtor in regard to an equity which has attached to the land in the hands of the debtor. The creditor who takes a deed of trust is not out of pocket one cent, so he stands in the shoes of the debtor and takes subject to any equity binding the land in the hands of the debtor.

This is too plain for discussion, and the facts set out do not raise what would have been an interesting question, viz: is one who takes a deed to secure advancements to be afterwards made subject to an equity of which he had no notice.

There is no error.

PER CURIAM. Decree below confirmed.

Cited: Todd v. Outlaw, 79 N.C. 242; *Day v. Day,* 84 N.C. 410; *Davis v. Rogers,* 84 N.C. 416; *Southerland v. Fremont,* 107 N.C. 572; *Bank v. Adrian,* 116 N.C. 548; *Carpenter v. Duke,* 144 N.C. 293; *Sykes v. Everett,* 167 N.C. 607; *Starr v. Wharton,* 177 N.C. 325; *Weil v. Herring,* 207 N.C. 9; *Wallace v. Wallace,* 210 N.C. 657, 658; *Owen v. Hines,* 227 N.C. 239; *Finance Corp. v. Hodges,* 230 N.C. 582.

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(22)

RORY BARNES, ADM'R, v. THE PIEDMONT & ARLINGTON LIFE INSURANCE COMPANY.

The intestate of the plaintiff contracted with the agent of the defendant for the insurance of his life. The agent agreed to insure his life for a period of six months, in the sum of five thousand dollars, in consideration of the payment of the sum of fifty dollars. The intestate paid to the agent forty-five dollars. No written application for a policy was ever made, and no policy was ever issued. The balance of the fifty dollars was never paid, and no reason was assigned for the failure to pay the same. Upon a demurrer to the complaint: *It was held,* that the plaintiff was not entitled to recover.

CIVIL ACTION, tried upon demurrer, before *Buxton, J.,* at Spring Term, 1875, of HARNETT Superior Court.

The complaint alleged: That J. B. Barnes is dead and the plaintiff has been duly appointed, and qualified as his administrator.

That on or about the 25th day of June, 1873, the intestate of the plaintiff, and the defendant through its authorized agent agreed, that if the intestate would pay the defendant the sum of fifty dollars, the defendant would insure the life of the intestate for a period of six months, and in case the intestate should die within said period, the defendant would pay to the personal representative of the intestate, the sum of five thousand dollars.

That shortly after this agreement, the intestate paid to the defendant, through its agent, about forty-five dollars, all that he agreed to pay, except $5.67, which was received on said agreement by the defendant, and no part thereof has ever been returned, either to the intestate during his lifetime, or the plaintiff since his death.

That before the expiration of said six months, the intestate died, and the defendant was notified of his death, and demand duly made upon the plaintiff to pay the five thousand dollars, or a ratable part thereof, which the defendant refuses to do.

That no policy of insurance was ever issued by the defendant (23) to the intestate, and if any written application was ever made by the intestate to the defendant, the plaintiff has no copy of it, and has never seen the same.

To this complaint the defendant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action:

1. In that it does not set forth in said complaint the application made by said J. B. Barnes, which is a material and necessary part of the contract, if any, made between the parties, and the basis of said complaint, and the plaintiff should allege and prove the truth thereof.

2. That said complaint does not allege that the first premium was paid by the plaintiff's intestate, or a proper receipt from any authorized agent of the company given therefor.

3. That said complaint does not allege that any policy was ever delivered to the plaintiff's intestate, or that he was legally entitled thereto, and such allegation is a material and necessary part of said complaint, to show that any contract was in fact or in effect consummated or entered into by the said parties.

Upon the hearing, his Honor in the court below, sustained the demurrer, and gave judgment in favor of the defendant; thereupon the plaintiff appealed.

Merrimon, Fuller and Ashe, for the appellant.

No counsel in this court, contra.

SETTLE, J. The demurrer must be sustained. The plaintiff does not allege that his intestate complied with his contract, or that he offered to do so.

By the contract the intestate agreed to pay the defendant "fifty dollars," as a consideration for a policy of insurance on his life for six months. He paid only forty-five dollars, and gives no excuse for his failure to pay the full amount.

The complaint states that no policy of insurance was ever (24) issued by the defendant to the intestate; and that if any written application for insurance was ever made by the intestate to the defendant, the plaintiff has no copy, and has never seen the same. As the intestate failed to comply with his part of the contract, his representative cannot call upon the defendant to perform his part.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

R. Y. McADEN v. OCTAVIUS HOOKER, GUARDIAN OF JOSIAH TURNER, SR., AND JOSIAH TURNER, JR.

A judgment confessed (by the Guardian of one who is *non compos mentis,*) under the provisions of sections 325 and 326, C. C. P., if the statement required be verified by the guardian, in the absence of fraud, is not irregular.

MOTION in the cause heard before his Honor, *Judge McKoy,* at Spring Term, 1875, of the Superior Court of ORANGE County.

One Evans Turner, administrator of Josiah Turner, Sr., and John W. Kirkland, a creditor by junior judgment, moved the court to set aside the judgment in this action, confessed by the defendants. O. Hooker, guardian of Josiah Turner, Sr., and Josiah Turner, Jr. The facts in the case are so fully stated in the opinion of the court that any further statement is deemed superfluous.

Upon the hearing the motion was allowed by the court, and the plaintiff appealed.

Merrimon, Fuller and Ashe, for the appellant.
J. W. Graham, contra.

RODMAN, J. On the 26th October, 1868, Josiah Turner Sr., (25) and others executed the following instrument

STATE OF NORTH CAROLINA, *Orange County.* } October 26th, 1868.

Know all men by these presents that we, Josiah Turner, Sr., Josiah Turner, Jr., William Turner, Julian S. Turner, John Turner, are held and firmly bound unto George W. Swepson in the sum of five thousand dollars, good and lawful money of the United States, to the true and faithful payment whereof to him, the said George W. Swepson, his heirs, executors and administrators, jointly and severally, signed with our hands and seals the day and date first above written.

The condition of this obligation—that George W. Swepson having agreed to loan, at the rate of eight per cent, interest *per annum,* five thousand dollars to Josiah Turner, Sr., to purchase a printing press and material for a paper to be conducted by Josiah Turner, Jr., it is agreed and understood that Josiah Turner, Jr., is to draw on or receive from said Swepson, as the wants of the printing establishment may require, an amount not to exceed five thousand dollars, and we and each of us do agree, and by this bond bind ourselves to pay according to this bond

such sum or sums as may be loaned or furnished by said Swepson to said Josiah Turner, Jr., not exceeding five thousand dollars.

(Signed.) JOSIAH TURNER, SR., [SEAL.]
JOSIAH TURNER, JR., [SEAL.]
JULIAN S. TURNER,
JOHN TURNER.

On 20th March, 1869, a petition was filed in the Probate Court of Orange County to have the said Josiah Turner, Sr., declared *non compos mentis*, and on 22d of March, 1869, he was so declared by an inquisition, and O. Hooker was duly appointed his guardian. At some time thereafter, (the date is not given,) the following pro- (26) ceedings were had before the Clerk of Orange Superior Court:

R. Y. McAden *vs.* O. Hooker, guardian of J. Turner, Sr., and J. Turner, Jr.

IN THE SUPERIOR COURT, ORANGE COUNTY.
Statement and affidavit and confession of judgment.

The defendants allege:

1. That Josiah Turner, Sr., is a lunatic, and O. Hooker is his guardian.

2. That there is due the plaintiff from these defendants, by bond, five thousand dollars with interest at eight per cent. from the 26th of October, 1868.

3. That the money, $5,000, was borrowed from the assignee of the plaintiff by the defendants, and a bond was given therefor, and is justly due the plaintiff.

4. These defendants authorize the entry of judgment against them for five thousand dollars, with interest thereon from the 26th October, 1868.

JOSIAH TURNER, JR.,
O. HOOKER, Guardian.

Personally appeared before me, George Laws, Clerk of the Superior Court of Orange, J. Turner, Jr., and O. Hooker, guardian of J. Turner, Sr., who being duly sworn, maketh oath that the above statement is true.

JOSIAH TURNER, JR.,
O. HOOKER, Guardian.

On filing the within statement and affidavit, it is adjudged by the court that the plaintiff recover of the defendants five thousand dollars,

with interest on five thousand dollars from 26th October, 1868, until paid, together with three dollars, cost of this confession of judgment.

(Signed.) GEORGE LAWS,
Clerk of the Superior Court.

On 30th October, 1871, the Clerk of Orange Superior Court
(27) made the following entry on his judgment docket:

R. Y. McAden *vs.* O. Hooker, guardian of Josiah Turner, Sr., and Josiah Turner, Jr.	Judgment $5,000.00. Interest from 26th Oct. 1868, at eight per cent.

On 2d December, 1872, an execution issued on said judgment, under which certain lands of Josiah Turner, Sr., were sold by the Sheriff of Orange county, and the net proceeds were paid to McAden, the plaintiff. Josiah Turner, Sr., died in November, 1874. At Spring Term, 1875, of Orange Superior Court, the administrator of Josiah Turner Sr., and Kirkland, who describes himself as a creditor of Josiah Turner Sr., by junior judgment, moved to vacate the judgment above mentioned, upon the following grounds:

1. That said statement is not signed by Josiah Turner Sr., or verified by his oath.

2. That O. Hooker as guardian of Josiah Turner Sr., could not confess a judgment against his estate.

3. That no recovery could be had against the estate of Josiah Turner Sr., except by an action commenced by a summons served as prescribed by sec. 82, Code of Civil Procedure.

4. That at the time the debt was contracted upon which said judgment was entered, Josiah Turner Sr., was incapable of understanding or transacting business on account of old age and mental imbecility, and a further motion will be made that you, (McAden) return all monies collected upon executions issued on said judgment.

On this motion, the Judge made the following order:

"1. That upon the first three grounds set forth in the notice given in this proceeding, the said judgment should be set aside and vacated, as far as the same affects the estate of the (said) Josiah Turner Sr., the same being irregular for the want of the oath of the said Josiah Turner Sr.; and that all proceedings to establish a debt against the
(28) estate of a person who is *non compos mentis,* should be by an adversary suit, and the summons served on both, on the lunatic or person *non compos mentis,* and also his guardian or committee.

2. That R. Y. McAden return the amount for which he receipted the execution issued on the said judgment for $5,000 to the Sheriff of

Orange county (who had other executions in his hands against the said Josiah Turner Sr., on the day of sale,) on or before the first day of the next term to be held subject to the further order of this court."

From this judgment the defendant, (so says the record, but it probably means McAden the plaintiff,) prayed an appeal to this court.

It will be noted that his Honor puts his judgment not upon the ground that Turner was *non compos* when the contract was made, but entirely upon the ground that the judgment confessed was irregular because it was not, (and of course could not be,) sworn to by Turner personally, but by his guardian.

There was no evidence that Turner Sr., was *non compos* when the contract was made, and none that any fraud was practiced on him, or that the debt was not honestly owing.

The judgment was confessed under secs. 325, 326, 327, of Code Civil Procedure section 326, requires that "a statement must be made, signed by the defendant and verified by his oath to the following effect, etc."

1. Was the judgment irregular? That is to say, was it unauthorized by the Code? The counsel did not refer us to any authority on this point, and we are not aware of any. When a person becomes lunatic, he does not thereby become exempt from the payment of his antecedent debts, and any creditor may bring an action on his claim. The summons in such action would be served upon the lunatic and also upon his guardian. The guardian might appear for the lunatic and defend. Perhaps if he refused to appear, the court might appoint a guardian *ad litem,* though I know of no precedent for such a proceeding. At (29) all events, if the guardian pleaded, there might be a valid judgment, *in invitum,* rendered against the lunatic. But if the guardian, after appearance, thinks that there is no defense, and that the creditor ought to have judgment, may he not permit judgment to go by *nil dicit?* In *White v. Albertson,* 14 N.C., 241, the process had been served on the guardian above, and not on the infants also, as it should have been, and the guardian permitted judgment against the infants by *nil dicit;* yet it was held that the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him in that case. The analogy between infants and lunatics is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular.

If a guardian can permit such a judgment, which is apparently only *in invitum,* but in substance a judgment by confession, it is difficult to see any reason why the guardian cannot, in form, confess a judgment against the lunatic. The object of the section, cited from the Code, was to permit a debtor who could not dispute the debt to

submit to a judgment at a moderate expense in costs, and without waiting for term time. It enabled the parties to dispense with all unnecessary formalities. It is contended, however, that the personal signature and oath of the lunatic defendant are required, and that his guardian has no authority to substitute his own signature and oath; and this is true if we must adhere literally to the law.

But, in construing it, we are entitled to enquire what was the object of the act, and whether that object requires a literal construction, or will be best attained by one more liberal.

A person, *sui juris*, may confess a judgment in court, in term time by attorney, properly authorized, and we conceive one object of the act to have been to enable such persons to confess judgment
(30) in like manner out of term. A literal construction would prohibit this and deprive the act of much of its utility. The object in requiring an oath as to the verity of the debt, was to restrain the confession of false debts in fraud of creditors. This object is as well attained by the oath of a person authorized to act for the debtor, and knowing the essential fact, as by that of the debtor himself. In this case both the guardian and the other defendant swear to the statement of their own knowledge.

In our opinion the judgment was not irregular. If the judgment were sought to be reversed on the ground that either the original contract or the judgment was fraudulent, or without consideration, and therefore fraudulent, as to other creditors, the question would be different.

But as there is no allegation of that sort, it is useless to discuss the question. The allegation that Turner, Sr., was *non compos* at the time of making the contract, is not sworn to by the petitioners, and there is no evidence in support of it.

Let this opinion be certified.

PER CURIAM. Judgment below reversed.

Cited: Moore v. Gidney, 75 N.C. 41; *Blake v. Respass*, 77 N.C. 197; *Sharp v. R. R.*, 106 N.C. 321.

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(31)

ELIZA A. MIAZZA v. JAMES CALLOWAY AND OTHERS.

In granting an order for a person to sue *in forma pauperis*, it is sufficient compliance with the statute, Bat. Rev., chap. 17, sec. 72, for the presiding Judge to be satisfied by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover.

MIAZZA *v.* CALLOWAY.

An affidavit, certified by the Clerk of a Chancery Court of another State, without having the testimonial of the Judge of said Court, that the person so professing to be Clerk was such officer, and that he had authority to administer oaths, is not so legally authenticated as to authorize a Judge of this State to act under it.

CIVIL ACTION, tried before his Honor, *Judge Furches*, at Fall Term, 1875, of the Superior Court of WILKES County.

The following is substantially a statement of the case as sent to this court as a part of the record. The action was brought by the plaintiff against the defendants for the partition of a tract of land situated in Wilkes County, N. C. The plaintiff alleged that the plaintiff and defendants were tenants in common, and demanded an account of the rents and profits. The summons was returnable to Fall Term, 1875, of the Superior Court of said county, at which term, and before answering the complaint, the counsel for the defendants moved the court to revoke the order heretofore made allowing the plaintiff, who is a resident of the State of Mississippi, to sue *in forma pauperis*, upon the ground that the same had been improperly granted, as there was no sufficient affidavit of the plaintiff, as required by law, upon which to ground the order, and for other reasons, which will fully appear by reference to said affidavit, petition and order. The defendants also moved the court to require the plaintiff to give the undertaking required by law or dismiss the action.

The complaint alleges that a partition of said land had been made in the year 1851, by order of the Court of Equity of Wilkes County on a proceeding in said court, in which the plaintiff's (32) name had been used as a party plaintiff and as a *feme sole*, when she was at the time a *feme covert*, and that her name had been used in said action without her knowledge or consent.

His Honor refused to allow the motion, and the defendants appealed.

The following is a copy of the affidavit of the plaintiff:

"The plaintiff maketh oath that she is unable to give the sureties or make the deposit required by the laws of the State of North Carolina to enable her to prosecute the above entitled action against the defendants, and further that she is advised and believe that she has good cause of action against them. She therefore prays the honorable Court that she may be allowed to sue *in forma pauperis*.

Sworn to and subscribed before me this 29th day of May, A. D. 1875.

MURRAY PEYTON,
Chancery Clerk Hinds County, Miss."

The following is the certificate of counsel:

"We, the undersigned practising attorneys, hereby certify that we have examined the case of the plaintiff and believe that she has a good cause of action against the defendants in law and in fact. This 16th day of August, 1875.

THOS. J. DULA,
S. S. WITHERSPOON."

The following is the order of the Court made upon the affidavit:

In the above entitled action, upon reading the affidavit of plaintiff and the certificate of counsel, it is ordered that the plaintiff, Eliza A. Miazza, be allowed to prosecute her said action against the de-
(33) fendants, James Calloway and others, without giving security or making the deposit required by law. No officer shall require of her any fee, neither shall she recover any cost.

Armfield and Folk and Johnstone Jones, for the defendants.
Smith and Strong, contra.

RODMAN, J. The plaintiff was allowed by the Judge to prosecute her action *in forma pauperi,* upon her presenting to him a certificate of two counsel to the effect that they had examined her case, and were of opinion that she had a good cause of action, and her affidavit of her poverty. The affidavit purported to have been sworn to before the clerk of the Chancery Court of Hinds county, Mississippi, and was authenticated by what purported to be the seal of that court. The defendant contends that the Judge exceeded his powers, because the statute, Bat. Rev. chap. 17, sec. 72, (Act of 1868-'69, chap, 96) was not complied with.

That statute is in these words: "Any Judge, Justice of the Peace, or Clerk of the Superior Court, may authorize any person to sue as a pauper in their respective courts, when he shall prove by one or more witnesses that he has a good cause of action, and shall make affidavit that he is unable to comply with the provisions of the last section," which requires a bond with security, or a deposit of money with the Clerk.

The defendant contends:

1. That it appears that no witnesses were examined by the Judge.
2. That the affidavit was not sufficiently authenticated.

As to the first point: The Code of Civil Procedure, section 72, provided that a Judge might allow any person to sue as a pauper upon a certificate from any attorney that in his opinion such person had a

good cause of action, and upon his statement *that he would prosecute the demand without fee.* This last requisition was an inconvenient impediment to the bringing of pauper actions. From its (34) having been omitted, we may suppose that one, if not the main object of the Act amending the Code, was to get rid of this restriction, which was obnoxious to members of the bar. The intention then was to facilitate pauper actions. A literal construction of the Act would make them almost impossible, and would moreover lead to absurdities which we cannot, without disrespect to the Legislature, suppose that they intended. The pauper is required to prove before the Judge his right to recover, by *witnesses*: that is, by persons who personally know the facts, and whose evidence would be sufficient on a trial to make out a *prima facie* case. Yet he cannot compel the attendance of his witnesses for this purpose by process, and by the hypothesis that he is a pauper, he cannot procure their attendance by paying their expenses. Nor is any provision made for taking their depositions if they be sick or non-residents. In addition to this, the Judge who should try a case wholly without prejudice and without having received a bias from any one-sided statement, is required to hear the plaintiff's version of the facts, and to express an opinion that *prima facie* he is entitled to recover. For a Judge to permit himself to be "talked to" privately by parties or their attorneys about a case pending before him, is indecent, and perhaps criminal. The Legislature never could have intended this and we are compelled to conclude that it never intended anything more than that the Judge should be satisfied by a certificate of counsel or otherwise that the plaintiff had an honest cause of action, on which he might reasonably expect to recover. No doubt this is substantially the law of every State in the Union, and we cannot believe that the Legislature intended to alter a practice sanctioned by convenience and by long and universal usage.

As to the second objection: We think that the affidavit was not legally authenticated so as to authorize the Judge to act on it. There was required, in addition, a testimonial from the Judge of the Court that the person professing to be Clerk of the Chancery (35) Court was such officer and that he had authority to administer oaths. Bat Rev., chap. 43, sec. 9.

The Judge below need not necessarily dismiss the plaintiff's action by reason of this informality in the authentication of her affidavit. He may, if he shall think proper, continue the cause until she has reasonable time to supply the defect, either by procuring the testimonial of the Judge or by swearing to her affidavit before a Commissioner for this State in Mississippi, which latter may be the more prudent course.

PER CURIAM. The order allowing the plaintiff to sue as a pauper is reversed, and the case is remanded to be proceeded in accordance to law. Neither party will recover costs in this court.

Let this opinion be certified.

Cited: Stell v. Barham, 85 N.C. 89; *Ogburn v. Sterchi Brothers Store,* 218 N.C. 509.

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(36)

RICHARD POTTER v. W. L. MARDRE, AND OTHERS.

If a person bestows his labor upon the property of another, thereby changing it into another species of article, (as if corn be made into whiskey, etc.,) the property is changed, and the owner of the original material cannot recover the articles in its altered condition; but is only entitled to its value in the shape in which it was taken from him.

In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the Clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons, is no justification to the sheriff or the defendant for any action in the premises.

This was a CIVIL ACTION, tried before his Honor Judge *Eure,* at Spring Term, 1875, of the Superior Court of PERQUIMANS County.

The following statement of the case accompanies the record sent up to this Court:

The plaintiff's wife is the owner of a life estate in right of dower in a tract of land in the county of Perquimans, and the plaintiff is, and has been, in possession of the same for many years.

The defendants own the reversion in said land after the termination of the life estate of the plaintiff's wife.

In 1873, the plaintiff cut down two trees on said land, and used the timber therefrom, partly to build a boat or canoe for fishing, and partly to make shingles for repairing the houses on the farm. Shortly thereafter the defendants made demand for the canoe, which being refused, they commenced an action "for the claim and delivery of personal property" for the same. Under the proper process issued from the Superior Court in said action, they went upon the premises
(37) of the plaintiff with the sheriff of the county, who took the canoe out of the plaintiff's possession and delivered it to the defendants, who carried it away and still have it in their possession.

The defendant in that action, Potter, did not replevy or offer to replevy the canoe. No copy of a summons or other paper or process was

then, or at any time, left with Potter. No record of the action was made in the Superior Court, and there was no appearance of either plaintiffs or defendants in the action, nor any judgment demanded or rendered in the same. The only return made in the action was of the original affidavit and order of the Clerk, with the following endorsement by the Sheriff:

Executed July 22d, 1873, by taking one boat or canoe from Mr. Potter and delivering to Mardre. Sheriff's fee $1.00, paid by the plaintiff.

(Signed.) H. WHITE, Sheriff.

There was no farther prosecution of the action by the plaintiff, Mardre.

The Plaintiff in this action claims five hundred dollars damages against the defendants for the trespass committed by them in entering the plaintiff's premises and taking the canoe.

The plaintiff proved his title and possession of the *locus in quo*, and the taking of the canoe by the Sheriff and the defendants. Also that the location of his land was valuable and convenient for fishing purposes, and that in consequence of his canoe being taken from him he was much hindered and damaged in fishing during the Spring of 1873.

The defendants offered to prove that the taking of the canoe was under "due process in said action for claim and delivery."

The plaintiff objected, on the ground that the defendants had abandoned that action, and should not be allowed to protect themselves under any process issued in it. His Honor overruled the objection and admitted the evidence. (38)

The plaintiff requested the court to charge the jury, that if they believed the defendants did so take the property, they were trespassers, and they must find for the plaintiff; and that if they believed the defendants used the power of the court to accomplish a wanton trespass on the property of the plaintiff, and afterwards failed to prosecute their action to judgment, they would be justified in giving a verdict against the defendants for vindictive damages.

The court refused to give the instruction, and charged the jury, that there was no evidence of such wanton abuse of the process of the court, and that the plaintiff had no right to apply the timber on the land to building boats, and that the defendants, as reversioners, were entitled to the trees after they were cut for that purpose.

The plaintiff then asked the court to charge the jury that even if defendants were entitled to the trees, that they were not entitled to the canoe, after the trees were worked up as such, and if the plaintiff

committed a wrong in cutting the trees, the defendants' remedy was not "claim and delivery of personal property," but a civil action for waste.

The court refused so to charge, but instructed the jury that the defendants had a right to the canoe, and to recover it in such action.

Under these instructions the jury rendered a verdict for the defendants. Motion for a new trial; motion refused. Judgment for defendants and appeal by plaintiff.

Gillam and Pruden, for the appellant.

No counsel, contra, in this court.

RODMAN, J. 1. The plaintiff had a right to cut trees for the necessary repair of the farm buildings, but none to cut trees for building a boat to be used for fishing. When the trees were felled, the property in them vested at once in the reversioners, who could have maintained trover, or by our statute replevin, for the timber, and could have
(39) recovered for so much as the plaintiff could not show that he had applied, or was about to apply, to a lawful purpose, such as the repair of the buildings, etc. These propositions were resolved in *Bowles' case*, 11 Rep., 79, and have been recognized as law ever since.

2. It does not follow, however, that the reversioner could maintain trover or replevin for the canoe which was made from the trees.

It is not necessary to decide this question at this time; but it is proper to do so, because, as under our opinion, there must be a new trial, and the plaintiff on the present state of facts, is entitled to recover, the question as to the measure of damages will then necessarily arise. On the question stated, there is a discord between the authorities that cannot be reconciled. The most important of them will be found in 2 Kent. Com., 361; Sedgwick on Dam., 483, and in the very recent case of *Heard v. James*, 49 Miss., 236. It is unnecessary further to refer to them. We are not aware of any decision in this State directly in point.

It seems to be generally agreed that if the person who bestows his labor on the property of another, thereby changes it into another species of article, as if corn be made into whiskey, or silver coin into a cup, or timber into a house, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but must content himself with the value of the article in the shape in which it was taken from him. In the civil law it is said that the property is changed whenever the species is so far changed that it cannot be reduced to its former rude materials—examples of which are when timber is made into a bench, or chest, or ship. The common law differed from this, and it was held that so long as the owner of the original materials could identify them, he could follow them into

the manufactured article, as if leather be made into shoes, or (40) cloth into a coat, or a tree be squared into timber.

In some of the decided cases much weight seems to be given to the fact whether the manufacturer was a conscious and wilful trespasser, or took possession of the raw material in good faith and under an honest mistake as to the title.

Sometimes the decision as to the measure of damages is made to turn on the form of the action, as to whether in trespass for entering on plaintiff's land and cutting and carrying away timber, which defendant afterwards manufactured; or in trover for the conversion of the manufactured article, or in replevin for its possession in specie, as in the case cited from Mississippi.

We think that most of the American cases hold that when the alteration of the timber taken by a trespasser has gone no farther than its change into boards, or shingles, or staves, the owner of the timber may follow his property into the manufactured article, and recover its value in that shape. But we have found no case where the change of species was greater than that. Such we think was the current of American decision prior to 1851, when the case of *Bennett v. Thompson*, 35 N.C., 146, which will hereafter be noticed, was decided.

In this conflict of opinions, which when united we are accustomed to consider authority, we can only adopt that rule which seems most reasonable. In our opinion the equitable rule is that stated from the civil law. The property is changed by a change made in its species or substantial form, if made by one who was acting in good faith and under an honest belief that the title was in him.

This doctrine is not based on the idea that a trespasser, although he may act under an honest but mistaken belief in his own title, can lawfully transfer the property in timber from the owner to himself by changing it into some more valuable species; but on the idea that the trespasses by so doing destroys the original article, as if he had burned it, and is responsible to the owner as if he had burned it; (41) and on the idea that the principle adopted is more likely to do justice to the parties concerned than any other.

By this rule the owner of the original material will recover the value of his material which is the extent of his loss, with such additions as a jury may think proper to make if the taking or conversion was wilful, or attended by circumstances or aggravation. Whereas, if the owner of the materials could always follow them, however much their value might have been enhanced by the labor of the manufacturer, it would lead to results unjust and even absurd. For example, if the owner of the trees can recover the staves made from them, why not the casks

made from the staves; and if in replevin he can recover the planks, why not the ship built with the planks, etc.

This principle of equity is supported by the analogy of the rule established in this State by the decisions, which hold that a vendee of land by a parol contract of sale who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. *Albea v. Griffin,* 22 N. C., 9. So if one who has purchased land from another not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation.

In both these cases, one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz: by being allowed the value of his improvements in the raw material. The case of *Bennett v. Thompson, ubi, supra,* was an action of trespass for entering on plaintiff's land and felling timber which was afterwards converted into boards and shingles. This court held that the measure of damages was the value of the trees when felled, and not the value of the manufactured article. This case does not profess to go upon the form of the action. There is no reason except technical ones, why greater damages should be
(42) allowed in trover than trespass. The injury is the same whatever may be the form of action, and it would seem to have been the opinion of the court, that the plaintiff could not follow the material in its manufactured condition.

Upon the principle stated, we are of the opinion that although the defendant might have maintained trover for the conversion of the trees, he had no property in the canoe, and was not entitled to maintain replevin or its substitute, process of claim and delivery for it. Our opinion on this point, however, will only affect the question of damages on a future trial.

3. If the defendant obtained possession of the canoe under regular process of a court having jurisdiction, he can maintain his plea of justification, notwithstanding his want of title, and although he could not have recovered in the action.

The case agreed states that defendant went upon plaintiff's land with the sheriff and took the canoe after having "commenced an action for the claim and delivery of personal property for the canoe, under the proper process issued from the Superior Court of said county in said action." The action, if ever commenced, was afterwards abandoned, and the only paper found on record is the affidavit of the defendant, the Clerk's order to the Sheriff, under sec. 178 of C. C. P., and the return of the Sheriff endorsed thereon, that he had delivered the canoe to the plaintiff in that action, who is the defendant in this. The case

further states that "no copy of a summons or other paper or process was then, or at any time, left with Potter," (the present plaintiff.) It does not appear that any summons was ever issued. We are of opinion that under sec. 176 of C. C. P., the issuing of a summons was necessary to give the Clerk jurisdiction to make the order to the Sheriff, requiring him to take the property and to deliver the same to the plaintiff in that action. And such summons ought to have been served on the present plaintiff, (the defendant,) if possible, at or before the taking of the property. We do not say that such service was necessary to give the Clerk jurisdiction, but the (43) issuing of the summons was. The order of the Clerk was no justification to the present defendant.

4. We concur with the Judge below, that there was no evidence to warrant the jury in giving vindictive damages. The damages to which the plaintiff is entitled are the injury to his land, which seems to have been only nominal, and the value of the canoe, from which the defendant is entitled to deduct or recoup, by way of counterclaim, the value of the timber which was manufactured into the canoe, just after it was felled and converted into a chattel.

Let this opinion be certified.

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

Cited: Wall v. Williams, 91 N.C. 481; *Dorsey v. Moore,* 100 N.C. 44; *Gaskins v. Davis,* 115 N.C. 89.

HENRY W. FAISON v. HALSTEAD BOWDEN, EX'R.

The exclusion of evidence of parol promises to pay a debt, otherwise barred by the statute of Limitations, when a right of action had accrued to the plaintiff, before the adoption of the Code of Civil Procedure, is error in the court below, and entitles the party offering the same to a *venire de novo.*

CIVIL ACTION, tried before *Kerr J.*, at Spring Term, 1875, of DUPLIN Superior Court.

The action was brought by the plaintiff against the defendant who is the executor of Buckner L. Hill, to recover the sum of $1,565.57, alleged to be due the plaintiff for professional services rendered the deceased by the plaintiff as a physician. The items of the bill commenced in the year 1854, and continued up to the time of the death of the testator of the defendant, in the month of November, 1861,

(44) and also continued for some time after his death. The items after the death of the testator are alleged to be due for professional services rendered at the request of the defendant.

The defendant in his answer denied the account and relied upon the statute of limitations. As a farther defense the defendant alleged that he had fully administered the assets of the testator.

The plaintiff in his reply alleged a new parol promise from the testator, relying upon the same to repel the statute of limitations.

Upon the trial the plaintiff was introduced as a witness and proved a debt of sixty dollars, under the book debt law, and forty dollars for services rendered the slaves of the estate at the request of the defendant after the death of his testator.

The plaintiff then offered to introduce testimony of new parol promises by the testator, to pay the plaintiff the said bill, amounting to about fifteen hundred dollars.

The court ruled out the testimony under the provisions of title IV, chap. 4, sec. 51, C. C. P., holding that under said section, the plaintiff could not prove a new promise by parol that was made prior to three years next preceding the commencement of the action, but that the new promise must be in writing. The action was commenced October 25th, 1869.

To this ruling of the court the plaintiff excepted.

There was a verdict and judgment thereupon in favor of the plaintiff for the sum of one hundred and ninety-two dollars and seventy-five cents. The plaintiff moved for a new trial. The motion was overruled by the court and the plaintiff appealed.

W. S. & D. J. Devane, for the appellant.

Stallings, contra.

(45) RODMAN, J. This action was commenced on 5th October, 1869, to recover for medical services to the testator, beginning on 19th April, 1854, and continued until 22d December, 1860. The complaint also contained a demand for medical services to the slaves of the testator, rendered after his death at the request of the executor. On this last demand no question is presented. A large part of the plaintiff's demand was barred by the statute of limitations, and to rebut this bar he offered in evidence parol promises by the testator to pay the whole demand against him, made in 1858, 1859 and 1860. The Judge excluded the evidence, because the promises were not in writing as required by C. C. P. sec. 51. (Bat. Rev. chap. 17, sec. 51.)

We consider it clear that this section has no application to the plaintiff's case. Section 16 provides "this title (Limitations) shall

not extend to actions already commenced," etc. Here the right of action had accrued as well upon the new promise as upon the old, before the adoption of the C. C. P. in August, 1868. *Knight v. Braswell*, 70 N.C. 709; *Libbett v. Maultsby*, 71 N.C. 345.

There was error in the refusal to receive the evidence.

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

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(46)

JOSEPH C. BELLAMY v. JOSEPH H. PIPPIN.

Upon a motion by the defendant for a new trial in an action for damages, *it is not error* for the Court to refuse to hear the evidence of a juror, for the purpose of showing that in ascertaining the amount of damages the jury did not consider that some of the property was probably damaged before the cause of action arose, there being no evidence to that effect.

Whether a sale of trees for saw logs carries anything more than the body of the tree, in the absence of a special agreement to the contrary, *Quere?*

This was a CIVIL ACTION, tried before *Seymour, J.*, at July Term, 1876, of EDGECOMBE Superior Court.

The statement of this case sent up to this court as a part of the record is voluminous, and contains much matter not pertinent to the points decided. All the facts necessary to understand the decision of this court are fully stated in the opinion of Justice READE.

In the court below, there was a verdict in favor of the plaintiff, whereupon the defendant moved for a new trial. The motion was overruled and judgment rendered; from which judgment an appeal was craved and granted.

W. H. Johnson, for the appellant.
Fred. Phillips, contra.

READE, J. The plaintiff owning a timbered tract of land and the defendant owning a saw-mill, it was agreed between them that the defendant should have all the trees on the land suitable for saw logs, at fifty cents a tree, and saw them into lumber.

The defendant cut and sawed a large number of the trees, some of which he did not pay for, and left a considerable number standing, which he declined to take or pay for. The plaintiff had a verdict for the unpaid for cut trees at the price agreed on, and for the standing trees at twenty-cents each. (47)

The defendant does not complain of any error in the charge of the Judge, upon which this verdict is founded, but does complain that the jury in fixing the price of the standing trees, did not consider that some of them were probably doty. Whether they did or did not, does not appear. But the defendant offered to prove that they did not, by some of the jurors, and his Honor refused to hear the evidence on the motion for a new trial; and of this the defendant complains. We think his Honor was right.

2. The defendant put in a counter claim, that in buying the trees for saw logs he was entitled not only to the body of the trees, but to the laps also, and that he left the laps upon the land; and that the plaintiff took some of them for wood; and that he then forbad the plaintiff to take any more; and that they remain upon the land now; and so he claims not only the value of the laps which the plaintiff took, but the value of those which remain and which he was forbidden to take. The jury allowed his claim for what the plaintiff took, and refused to allow his claim for what remained.

The defendant has no right to complain. He got all that he was entitled to, to say the least. How could he be entitled to recover for what the plaintiff did not take, and which he was forbidden to take. But besides that, it is at least questionable whether a sale of trees for saw logs carries anything more than the *body* of the tree. It is stated in the case that there was no agreement about the laps. But let it be that the laps were the defendant's, still he has nothing to complain of, because he has been allowed for what the plaintiff took, and what remains are the defendant's still. If the plaintiff shall take them, or refuse to let the defendant take them, as is stated he has done, since the commencement of this action, then the defendant may bring his action and try his title if he thinks proper to risk it.

There is no error.

PER CURIAM. *Judgment affirmed.*

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(48)

JOHN R. MERCER v. JAMES WIGGINS, ADM'R.

Evidence, that the witness, from two notes he held in his hand, which were written and tested by himself, had an indistinct recollection that at the time the notes were given, he, the witness, wrote a deed, alleged to be lost, from the defendant's intestate to the plaintiff for a tract of land, and the notes were the consideration therefor; that the deed contained the usual clause of warranty or covenant of quiet enjoyment, the witness being of opinion that if any special instructions had been given, or if the deed had varied from an ordinary deed, or had there arisen any question as

to the title, he would have recollected it; that said intestate was a prudent man in his business transactions, and would not have executed a paper that he did not understand; that from a conversation with the plaintiff, he saw said intestate several years after the execution of the deed, and asked him if he had any idea what had become of the same, and the witness thinks the intestate said he knew nothing about it after the execution and delivery, is competent to be considered by a referee, as tending to prove the existence of a deed from the defendant's intestate to the plaintiff, and also its covenants and its loss.

A payment in Confederate money, tendered and accepted by the parties as a payment, amounts to a discharge of the debt.

This was a CIVIL ACTION to recover damages for a breach of warranty contained in a deed, tried before *Moore, J.*, at August Term, 1875, of EDGECOMBE Superior Court.

The case was referred, by consent, at Fall Term, 1874, and at Spring Term, 1875, the report of the referee was filed, and the defendant filed the following exceptions thereto:

1. That the evidence as to the existence of a clause of warranty in the alleged lost deed, is too vague and indefinite to warrant the finding of such fact by the referee;

2. That if he is mistaken, he insists that the measure of damages ought to be the value of the payments made by plaintiff, of which according to the evidence, $811.03 was on the 13th of July, 1862, and $500.00 on November 1st, 1862, which should have been (49) reduced according to the scale of depreciation of Confederate money as of those dates.

His Honor overruled the exceptions and sustained the report of the referee.

The following is the evidence upon which the finding of his Honor, and also of the referee, is based:

George Howard testified, substantially, as follows: "From the notes which I hold in my hand, being notes given by John R. Mercer to James G. Armstrong, dated June 7th, 1859, one for $1,000.00, and one for $500.00, the same being in my hand-writing and tested by me, I am certain that they were given at the time, and in the town of Wilson; and I have an indistinct recollection that at the time said notes were given, I wrote a deed from J. G. Armstrong to John R. Mercer for a tract of land for which they were the consideration. My only recollection of the tract of land is that it was somewhere in said Mercer's neighborhood, and the deed contained the usual clause of warranty, which has been construed to be a covenant of quiet enjoyment. I have no recollection of any special instructions in the case, and do not think any were given. I have no recollection of what became of the deed afterwards, executed by Dr. Armstrong. From a conversation of

Dr. John R. Mercer, I saw J. G. Armstrong several years after the execution of the deed, and asked him if he had any idea what had become of it. I think he said he knew nothing about it after its execution and delivery. Dr. J. G. Armstrong was a quiet man, and I considered him prudent in his transactions, and he would not have executed a paper he did not understand. I think if any special instructions had been given me, or it had varied from an ordinary deed, or any question had been raised as to title, I would have recollected it.

It was admitted that the land was devised to J. G. Armstrong and others in fee simple, determinable on each dying without heirs, and that Armstrong and his co-devisees had partition in the land, and
(50) that the plaintiff bought the portion allotted to Armstrong. It was also admitted that the notes, spoken of by George Howard, were given for the purchase of the land, and that the sum was a fair price for the same at the time, and that the tract contained one hundred and ninety-six acres. The land adjoined Dr. Mercer's land, and the deed was written by said Howard.

J. G. Armstrong died in February, 1873, without issue. The sum of $300 was paid on the $1,000 due February 28th, 1860, before the commencement of this suit. Suit was brought and judgment obtained upon the notes severally at August Term, 1861. An *alias* issued in each case returnable to November Term, 1862.

On the latter execution, the plaintiff paid in July, 1862, $811.03 in full satisfaction on the larger judgment, and on August 12th, 1862, he paid on the execution on the $500 debt, the amount with interest from the 1st day of January, 1860. These last two judgments were paid in Confederate money.

The defendants excepted to the finding of his Honor, to this effect:

1. There was no evidence of any covenant of warranty in the deed alleged to have been lost.

2. The judgment paid by the plaintiff were subject to the legislative scale.

There was judgment for the plaintiff, whereupon the defendant appealed.

Fred Phillips, for the appellant.

Perry, contra.

SETTLE, J. By consent of parties, this case was referred to W. H. Johnston, to find and report the facts, and declare the law arising thereon. His report, both as to facts and law, was adopted and confirmed by his Honor, from which judgment the defendant appeals, alleging:

1. That the evidence as to the existence of a clause of warranty or covenant or quiet enjoyment in the alleged lost deed (51) is too vague and indefinite to warrant the finding of such fact by the referee.

2. That the measure of damages is the value of the Confederate money at the date of its payment by the plaintiff to the defendant's intestate. Neither of these exceptions can be sustained.

There was evidence, fit to be considered by the referee, tending to prove the existence, of a deed from Armstrong to the plaintiff, and also its covenants, and its loss. Consequently the court will not undertake to review the findings of the referee on these points.

It is well established by the adjudications of this court, that a payment in Confederate money, tendered and accepted as a payment by parties, dealing at arms length, amounts to a discharge of the debt.

PER CURIAM. Judgment affirmed.

Cited: Norment v. Brown, 79 N.C. 366; *Nelson v. Whitfield,* 82 N.C. 53.

C. B. CURLEE v. ANNICE THOMAS.

A recovers a judgment against B for $193, who subsequently obtains judgment against A for $60, upon a cause of action existing at the time of A's judgment, but which was not pleaded as a counter claim. On a motion in the Superior Court, in which both judgments were docketed, to allow the judgment of B to be credited on that against him: *Held* that A's personal property exemption protected his judgment against B, from any such proceedings; as it is, in the sense of Art. 10, sec. 1, of the Constitution, final process.

This was a MOTION to apply a judgment held by the plaintiff (52) against the defendant in satisfaction *pro tanto,* of a judgment held by the defendant against the plaintiff, heard before *Buxton, J.,* at Spring Term, 1875, of UNION Superior Court.

The following are the facts in this case as disclosed by the record:

In 1859, the defendant, who was the widow of one John R. Thomas, brought suit against the plaintiff, C. B. Curlee, as administrator of her husband, to enforce the payment of a year's allowance which had been previously laid off for her by commissioners appointed by the late county court, and which had been paid in part. The case was pending until Spring Term, 1872, when the plaintiff recovered judgment for the

sum of $193, the balance due, and execution issued thereon returnable to Fall Term, 1872, which execution was returned unsatisfied.

On the 8th day of April, 1873, C. B. Curlee, sued the defendant before a Justice of the Peace of Union County upon an alleged lost receipt for $60, paid on the year's allowance previous to the rendition of judgment against him at Spring Term, 1872, and not brought forward by him or allowed by the court as a credit on the judgment against him for $193.

The complaint before the Justice was that the judgment of the Superior Court was too large by $60, in consequence of this judgment having been lost sight of and omitted. The answer denied any such payment of the existence of any such receipt. The Justice rendered judgment in favor of C. B. Curlee for $60 and interest thereon from the 1st day of May, 1868. From this judgment the defendant Annice Thomas, asked an appeal to the Superior Court, but on account of her failure to tender the Justice his fee, he refused to send up the appeal.

In October 1873, C. B. Curlee had this judgment docketed in the Superior Court of Union County, and after paying upon the judgment against him an amount sufficient to reduce it to the amount of his judgment against Annice Thomas, caused a notice to be served
(53) on her returnable to Spring Term, 1875, to show cause why his judgment against her should not be applied to the satisfaction of her judgment against him, *pro tanto*.

In accordance with said notice the defendant appeared and showed for cause:

That the defendant Annice Thomas was entitled to the benefit of the personal property exemption allowed by law.

It was admitted that she did not own $500 worth of personal property, exclusive of the judgment against Curlee. Therefore he ought not to be permitted to defeat the constitutional right which had become attached to her judgment against him by a subsequently recovered judgment against her.

The plaintiff's counsel insisted that as his claim existed at the time she recovered judgment, and ought properly to have been deducted then, the case was one in which there were mutual claims existing at the same time and that the balance only constituted the debt. That there was a distinction between such a case and one in which judgment was rendered against a defendant who shall afterwards acquire a debt subsequently incurred against the plaintiff and cause it to be reduced to judgment.

His Honor being of the opinion that the plaintiff was entitled to the motion, ordered that the judgment of C. B. Curlee against Annice

Thomas be applied to the satisfaction of the judgment of Annice Thomas against C. B. Curlee *pro tanto.*

From this order the defendant prayed an appeal to the Supreme Court.

No counsel in this court for the appellant.

Wilson & Shaw and J. D. Son, contra.

BYNUM, J. The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or (54) other final process of any court, issued for the collection of any debt." Const. Art. X, sec. 1.

We cannot go behind the judgments to examine the merits of the consideration upon which they are founded. If the plaintiff had issued an execution against the defendant upon his judgment, it is clear that she would have been entitled to her personal property exemption against it. Her judgment against the plaintiff was personal property, and if it was required to make up the amount to which she was entitled under the Constitution, it would have been the duty of the officer having the execution, to allot it to her. Bat. Rev. chap. 55, sec. 12. The plaintiff can be in no better situation and the defendant is no worse, by this short-hand way of getting the benefits of an execution without its burdens.

To give effect to such motions as this, would be in many cases, to deny this benign provision of the Constitution. "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, even by an attempt to make a fraudulent conveyance. It is confirmed by the Constitution and is inviolable." *Duvall v. Rollins,* 71 N. C. 218. *Crummen v. Bennett,* 68 N. C. 494. *Lambert v. Kinnery,* post 348.

If an execution could not reach the defendant, how can the present proceeding, which is only a substitute for an execution? In the sense of Art. X, sec. 1, it is "final process."

There is error.

PER CURIAM. Judgment reversed, and judgment here for the defendant.

Cited: Comrs. v. Riley, 75 N.C. 146; *Gaster v. Hardie,* 75 N.C. 463; *Smith v. McMillan,* 84 N.C. 595; *Butler v. Stainback,* 87 N.C. 220; *Albright v. Albright,* 88 N.C. 242; *Leak v. Gay,* 107 N.C. 476; *Lynn v. Cotton Mills,* 130 N.C. 622; *Edgerton v. Johnson,* 218 N.C. 301.

(55)

E. O. ELLIOTT v. J. G. WYATT, AND OTHERS.

If a mortgagor and mortgagee join in conveying the mortgaged estate to a third person, the mortgagee is only entitled to receive out of the price the amount of the mortgage debt; and the fact that the parties separately or jointly agree to sell to the third party, and took separate notes, does not alter the relation between them.

Whether, if the notes had been paid in full, would change the relation, *Quere?*

This was a CIVIL ACTION, tried before *Furches, Judge* at Fall Term, 1875, of the Superior Court of CATAWBA County.

The suit was commenced at Fall Term, 1871, and the complaint is substantially as follows:

The plaintiff was, in 1859, the owner in fee simple of two adjoining tracts of land in Catawba County, containing about two hundred acres, and known as the White Sulphur Spring tract; the said springs and buildings being situated upon the land.

In 1859, he contracted to sell the land, springs and buildings to Horace Robards, the husband of E. J. Robards, one of the present defendants, and executed to him a bond conditioned for the execution of a deed upon the payment of the purchase money, and Robards executed his bond for the payment of the same.

About the year 1861, upon the failure of Robards to pay, the plaintiff agreed with him to rescind the contract, upon terms mutually satisfactory, and the respective bonds were surrendered and cancelled, and the plaintiff contracted to sell to Mrs. E. J. Robards, wife of said Horace, for the sum of ten thousand dollars, and executed to her a bond to make title when the purchase money should be paid, her husband being trustee.

The said Horace died in the year 1863, and after his death the defendant, E. J. Robards, in 1864, contracted to sell her interest
(56) to the defendants, J. G. Wyatt and Thos. H. Wynne, composing a firm under the name of Thomas H. Wynne & Co., they agreeing to pay for her interest the sum of ten thousand dollars; and on the 16th of January, 1865, they agreed, in writing, to take her contract with the plaintiff, and pay to him the purchase money which she had agreed to pay, and to make to him a bond on a credit of five years to pay the same in gold, which, with the interest for five years, amounted to ten thousand and nine hundred dollars. The plaintiff and the defendant, E. J. Robards, mutually agreed to have the land sold under a decree of a court of equity, so as to conclude their respective titles; and Wyatt and Wynne agreed, in writing, to buy the plaintiff's title at the said sum in gold, on a credit of five years, and E. J. Robard's

title at the sum of ten thousand dollars in currency. In pursuance of said agreement the plaintiff and the defendant, E. J. Robards, joined in a petition to the court of equity for Catawba county for a sale of the said springs and land; and at Spring Term, 1865, a decree was made to sell the land, in pursuance of which the Clerk and Master sold the same on the 20th day of June, 1865, when the land was bid off for or by the defendants, Thomas H. Wynne and J. G. Wyatt, who gave their bond to pay the plaintiff, on the 20th day of June, 1870, ten thousand nine hundred dollars in gold, and also gave bond to pay the defendant, E. J. Robards, ten thousand dollars in currency, which sale was confirmed by the court at Spring Term, 1866, and no order for collection or to make title was afterwards made. The bonds were left in the hands of the Clerk and Master.

That this agreement was in writing, and that the agreement in writing and the petition and decree in equity, the sale and confirmation and the execution to the plaintiff and the defendant, E. J. Robards, of the bonds for the purchase money, together constitute a contract between the plaintiff and the defendants Wyatt and Wynne.

The defendants Wyatt and Wynne, under their contract with (57) the defendant E. J. Robards, took possession of the land and springs, and after the purchase at the sale of the Clerk and Master, they continued in possession and used and occupied the land and springs with great profit to themselves, and in August, 1868, the defendant Wynne sold and by deed conveyed to the defendant Wyatt, his interest in the land and springs, for the sum of six thousand dollars, Wyatt undertaking to pay the debt for the land and springs; and to secure Wynne, Wyatt made a deed purporting to convey the whole of said land and springs to the defendant McCarthy, in trust for the benefit of Wynne, and the defendant Wyatt has been in the sole possession of the land and springs since August, 1868, making therefrom great profits. That the deed of trust above mentioned is fraudulent as to the plaintiff.

That the report of the Clerk and Master states, that at the sale the lands were bid off by Wynne, but that the plaintiff alleges that the purchase was in fact for both Wyatt and Wynne.

That the defendants Wynne (who is insolvent) and McCarthy are not residents of this State, but reside in Virginia, and that the defendant Wyatt is notoriously insolvent.

That the plaintiff's bond became due in 1870, and no part of it has ever been paid, but that suit was brought upon it and judgment given against the defendants Wyatt and Wynne, at Spring Term, 1871, of Catawba Superior Court, and that he had issued an execution which has been levied upon some personal property of small value, in the

possession of the defendant Wyatt, but claimed now by the defendant McCarthy, the sale of which, by an arrangement between the plaintiff and the defendant Wyatt, has been for a time postponed, and plaintiff offers to account for whatever he may actually realize therefrom.

The defendant E. J. Robards has a judgment of the same date as that of the plaintiff, and claims to be paid out of said lands in the
(58) character of second mortgagee, the plaintiff being the first mortgagee, and that the defendant McCarthy claims by virtue of the deed from the defendant Wynne, to hold a third mortgage; and the plaintiff is advised that a sale of said land and springs, and the interest of the plaintiff and of all the defendant's therein is necessary to give a good title to any purchaser and conclude the several equitable and legal rights of the parties.

The complaint demanded that the defendants be decreed to specifically perform their contract with him, by paying to him the purchase money and interest, and after paying to the defendant Robards her claim, accept a deed from the clerk of the court, or some commissioner to be appointed by the court. Or that the court decree a sale of the lands by a commissioner to be named by the court, who shall sell and convey all the right, title and interest of the plaintiff and each and all of the defendants therein, on such terms as to the court may seem proper, and apply the proceeds of the sale:

1. To pay off the plaintiff, the purchase money for the legal estate in the lands.

2. To pay the defendant Robards, the owner of the equity sold by her.

3. The surplus to the defendants, or each of them, as the court may direct.

The several deeds and contracts mentioned were annexed to the complaint as a part thereof, also the petition to the Court of Equity, but it is deemed unnecessary for the same to be set forth in this statement.

The defendant J. G. Wyatt demurred to the complaint and for cause of demurrer alleged:

I. That the court has no jurisdiction of the action, because the plaintiff has a full and complete remedy by motion in the cause pending of E. O. Elliott and E. Roberts, *ex parte,* where the court can make an order to relieve the plaintiff.

II. The defendant sets forth a copy of the deed of trust to
(59) McCarthy, which was on record when the plaintiff filed his complaint, and demurs for multifariousness, as McCarthy has no interest in the real estate in controversy.

III. The defendant demurs because of the contract of Thos. H. Wynne & Co., with the plaintiff, he (the plaintiff) was to execute a deed to the defendant, when they executed the notes to the plaintiff, and the plaintiff was to receive a mortgage to secure the notes, whereas the plaintiff has never complied with the stipulation, though the defendants have executed the notes as stipulated by them. To sustain this construction the defendant files the receipt of the Clerk and Master, which states that he was to retain them until the defendants obtained title.

IV. That the plaintiff's judgments are void for want of jurisdiction. The remedy on them being by notice and motion in the cause pending, and because they were not to be delivered until the plaintiff executed a deed to the defendants.

The defendant, E. J. Robards, demurred to the complaint, and alleged for cause of demurrer:

That there is a suit now pending for the subject matter in controversy in which the plaintiff can have adequate relief by motion, to-wit: In the case of E. O. Elliott and E. J. Robards, *ex parte*, petition to sell land. Wherefore, she prays that she may be dismissed, etc.

The cause was continued until Spring Term, when the same came on to be heard upon the demurrers of the defendants Robards and Wyatt, and the following decree was made.

This action coming on to be heard upon the demurrer of the defendants, J. G. Wyatt and E. J. Robards, was tried at this term of the court upon the issues of law therein, on the agreement of counsel on both sides, and it appearing that the defendants, T. H. Wynne and Edward McCarthy, failed to answer:

It is decreed by the court, that the legal estate in the lands in the pleadings mentioned and described, is in the plaintiff, E. O. Elliott.

That the defendant, E. J. Robards, on the 16th day of August, 1861, contracted, in writing, with the plaintiff, to purchase the (60) same. That afterwards, to-wit, in December, 1864, the defendants, J. G. Wyatt and T. H. Wynne, contracted, in writing, to purchase said land, and agreed to pay the plaintiff $10,900 in gold, with interest from the 1st July, 1870, for the legal title, and the plaintiff is entitled to be paid by them in gold, or its equivalent in currency. That they agreed to pay to the defendant, E. J. Robards, the sum of $10,000 in currency, with interest from the 20th of June, 1865, for her equitable interest, and that she is entitled to be paid the same.

That the defendants, Wyatt and Wynne, have failed to comply with their contract, and to perform the same by paying said sums of money.

It is therefore considered, ordered and adjudged by the court that the demurrers are overruled, and it is ordered, adjudged and decreed, that

the defendants, J. G. Wyatt and Thomas H. Wynne, do specifically perform their said contract and pay the said sums of money and interest on or before the first day of April, 1872; and it is further ordered, adjudged and decreed, that upon their failure so to do, that the said lands, buildings and springs, be sold absolutely, and that M. L. McCorkle, W. P. Caldwell and D. Schenck, are appointed commissioners to sell the same, after advertising in such newspapers as they may see proper, in the State or out of the State, for at least thirty days, at public auction, at the courthouse, in Newton, or such other place in the county of Catawba as they may select, upon the following terms, to-wit: One-fourth cash, one-fourth on a credit of six months, one-fourth on credit of twelve months, and the last fourth on a credit of eighteen months, and that they take good notes and security for the purchase money. When the purchase money shall all be paid, they shall make a deed to the purchaser.

It is further ordered, adjudged and decreed, that the defendant, J. G. Wyatt, surrender possession of said lands, buildings and
(61) springs to said commissioners or their agent, within ten days after the sale thereof, and that the Clerk send a copy of this decree to his post office, and that the said sale be a final sale and conclusive and absolute, and that the purchaser have possession.

That this decree is, without, prejudice, as to the rights between the plaintiff and the defendant, E. J. Robards, as to the disposition of the funds arising from said sale, and the same is reserved until the coming in of the report of the sale, and the case is retained for further orders.

At Fall Term, 1872, the report of the commissioners having been filed and confirmed, the cause was referred to the Clerk of the Court to inquire and report the amount of the debt of the plaintiff against the defendant, Mrs. Robards, and of the other defendants, Wyatt and Wynne, and of the principal and interest, and of the debt due from Wynne and Wyatt to E. J. Robards.

The commissioners reported that they had sold the property for the sum of $10,700.00, and that E. O. Elliott became the purchaser.

At Fall Term, 1873, the report of the Clerk was filed, and he reported to the following effect:

1. That Wyatt and Wynne are indebted to the plaintiff in the sum of $11,391.40 in specie, and interest on $10,900.00 from March 6th, 1871, until paid.

2. That Wyatt and Wynne are indebted to the defendant, Mrs. Robards, in the sum of $11,025, with interest on $10,000.00 from March 6th, 1871, until paid.

The Clerk's report was voluminous, and therefore not inserted. The plaintiff excepted to the report, in this: That he finds facts and makes

conclusions not referred to him. It having been referred to him only to find the amount of the debt of the plaintiff to E. J. Robards and the amount of the debt of the plaintiff to Wyatt and Wynn, and only this, and that the Clerk has exceeded his authority as (62) given by the terms of the reference on the record.

The exceptions of the plaintiffs were sustained, and the report was set aside. A motion was then made for leave to file an amended answer; the motion was overruled, and the defendant, E. J. Robards appealed.

At Fall Term, 1873, the following decree was made:

This action coming on for further orders, on the complaint, former decree, report of sale, confirmation of the same, and upon the report of the Clerk and the exceptions filed thereto, it is considered and adjudged that the exceptions to the report of the Clerk filed, be sustained, and that the report, as made, be set aside, and that it be reformed by striking out all except the amount of the debt from E. J. Robards to E. O. Elliott, to-wit, $11,391.80, and the amount of the debt from Wyatt and Wynne to E. J. Robards, to-wit, $11,025, which is due.

And it is considered and adjudged that the plaintiff, E. O. Elliott, is entitled to priority of payment out of the fund arising from the sale of the lands, in the complaint described, and that the funds arising from the sale, in the hands of the commissioners, after deducting the amount of the cost, and paying the cost, to be taxed by the Clerk, be applied by the commissioners to the payment of the debt due the plaintiff, Elliott, from the defendants, Wyatt and Wynne; and if there is a surplus after so doing, that they pay the same to the defendant, E. J. Robards, on the debt due her from the defendants, Wyatt and Wynne. From this judgment, an appeal was prayed and granted. (See 70 N. C. Rep., 181.)

At Fall Term, 1874, in accordance with the opinion of this court, the case was referred to the Clerk to ascertain how much was due Elliott from Mrs. Robards on the original purchase money. How much he had received and what is now due; and to report to that term of the court.

The Clerk filed his report in accordance with the order of reference, and the plaintiff filed exceptions thereto. The report (63) is substantially stated in the following decree, made at Fall Term, 1875.

The court is of the opinion that the plaintiff's action was based upon the original contract with the defendants, Robards, which enabled him to pursue the land as a security for debt. And that Wynne and Wyatt purchased the defendant's Robards' equity with the knowledge and consent of the plaintiff, and that whatever they paid the

plaintiff or was realized from their property, should go towards the satisfying the defendant Robards' debt; and it being found by the report that the plaintiff received $2,042 by a sale of Wynne and Wyatt's property, which, together with the payment of $3,000 made by the defendant, Robards, and the $10,700 on the price paid for the land by the plaintiff, discharges the defendant Robards' debt, and leaves a surplus of $952 in the hands of the Clerk. The exceptions therefore, of the plaintiff are overruled and disallowed, and it is considered and adjudged by the court that the plaintiff surrender up the notes of the defendant Robards for cancellation, and that the Clerk of this court pay to the defendant, Robards, or her attorney, the sum of $952 less the cost of this action, this being surplus arising from the sale of the lands, mentioned in the pleadings, after satisfying the plaintiff's debt against the defendant, Robards.

And it is further ordered by the court, that upon the defendant (Robards) receiving said notes and the $920.00 less the cost of this action, which are to be paid out of the funds arising from the sale, the Clerk of this court make and execute to the plaintiff a deed, in fee simple, for said lands.

From this judgment the plaintiff appealed.

Armfield, W. P. Caldwell and Johnstone Jones, for the appellant.

M. L. McCorkle, contra.

(64) RODMAN, J. The plaintiff held the legal estate as a security for the unpaid part of the purchase money, and upon such payment in trust for the defendant, he was entitled to his debt and to nothing more. If the defendant alone had assigned her estate to Wyatt and Wynne, they could have compelled the plaintiff to convey to them on the payment of what defendant owed him. If Wyatt and Wynne had paid the defendant $20,000 for her estate, the whole excess over the unpaid purchase money would have been justly hers. If they had paid the plaintiff $20,000 they would have got the legal estate with a liability to convey to the defendant on payment or her debt. Everything they paid to the plaintiff beyond that debt would have been a sheer gratuity. The plaintiff was substantially a mortgagee, and can it be contended that if a mortgagee and mortgagor join in conveying the estate to a third person, the mortgagee is entitled to receive out of the price anything beyond the mortgage debt.

That the parties separately or jointly agree to sell to Wyatt and Wynne, and took separate notes, did not alter the relations between them: though perhaps, if Wyatt and Wynne had paid their notes in full, it might have been different. The plaintiff never released the

defendant from the note. The contract between them was never rescinded. The equity of the case is too plain to need discussion.

Judgment below is affirmed. The defendant will recover her costs in this court.

Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: Walker v. Mebane, 90 N.C. 265; *Mfg. Co. v. Malloy,* 217 N.C. 668.

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(65)

HORNER & GRAVES v. JOSEPH H. BAKER.

In an action brought by the keepers of a public school to recover the amount due for the board and tuition of a student; *It was held,* that the fact that the plaintiffs were conductors of a public school, and had advertised extensively the terms and regulations thereof, taken in connection with the fact that the defendant had sent his son to this school for one session, and also sent him a second session, was competent evidence for the consideration of the jury, as tending to show that the defendant had notice of the terms and regulations, and had assented thereto.

This was a CIVIL ACTION originally commenced in the court of a Justice of the Peace, and carried upon appeal to the Superior Court of EDGECOMBE County, where it was tried before *Seymour, Judge,* and a jury, at July Term, 1875.

On the trial in the court below, one Hamilton, a witness for the plaintiffs testified, that the plaintiffs kept a public school open to students from any quarter. The school is military in its organization. The terms were $157.50 per session of twenty weeks, to be paid in advance. Tuition and board were all included in one amount at Spring Term, 1875. Formerly they were furnished as separate charges.

The plaintiffs offered to prove by the witness that these terms were extensively advertised, and offered in evidence a circular issued to the public by the plaintiff, containing the clause "that payment must be made in advance," all of which the court ruled out, on the ground that there was no evidence that the same had been brought to the attention of the defendant.

It was also in evidence that the plaintiffs were at expense in preparing for the board and tuition of students at each session. It was further in evidence, that Julian, the son of the defendant, attended the plaintiffs' school as a student at the Spring Term, 1875, which began in January and ended in June, and was a student the preceding

(66) session, for what part of it did not appear. The defendant admitted a balance of $21.00 due upon the preceding session. Julian was about a week late in entering at the Spring session. He stayed about four weeks, the witness could not say positively how long. He was expelled for an entire disregard of the rules of the school. A copy of the regulations were hung up in his room. "I don't know whether they were there when the offences were committed, or not. The offences were: 1. A general disposition to disobey orders. 2. A general disposition to disobey my orders. I was commandant of cadets.

a Fell into ranks with his hands in his pockets.

b Being ordered to take his hands out, did so offensively.

c A repetition of the same.

Thereupon he was admonished.

3. Leaving company and breaking ranks and going to the hotel while on the way to church. Did same returning, having been specially warned."

There was other evidence as to general conduct, which is not considered material to the case as decided.

The usual price for board in private boarding houses in Hillsboro is thirty dollars per month.

The court charged the jury, that there was no evidence of an express contract, and the plaintiffs were only entitled to recover the board and tuition actually furnished; and there being no controversy with respect to the amount, they would find a verdict for the plaintiffs for $21, and $9.50, being items admitted by the defendant, and $39.40, being one quarter of the amount, $157.50, claimed.

The jury rendered a verdict in favor of the plaintiff for the sum of $70.06, with interest from the 18th of January, 1875. The court gave judgment in accordance with the verdict and the plaintiffs appealed.

Howard and Perry, for the appellant.

J. L. Bridgers, Jr., contra.

PEARSON, C. J. The fact that plaintiffs were conductors of a (67) public school and had advertised extensively the terms and regulations of their school, taken in connection with the fact that defendant had sent his son to this school for one session, and had also sent him to a second session, was some evidence the defendant had notice of the terms and regulations of the school, and had assented thereto. This evidence ought to have gone to the jury. There is error. We do think the cases in which it is held that a common carrier, in order to limit his liability according to the common law, must fix the bailor with direct notice, are applicable to a case like that under

consideration. Upon this point some of the members of the court hold a different opinion, but the majority think it proper to give a new trial, to the end that the terms of the contract, whether express or implied, may be set out as part of the evidence.

But the defendant says, the plaintiffs were not prejudiced by the error, because they have judgment for all they are entitled to, upon a *quantum meruit*. To this the plaintiffs reply: We insist that had defendant paid in advance he would not be entitled to recover back for the time that his son was not permitted to have board and tuition during the residue of the session, and by the rejection of the evidence we were precluded from making this point. It is an interesting question, whether a parent is chargeable for board and tuition for the entire session, his son not being taken away by the act of the parent or by the act of God, but being expelled by the conductors of the school, there being no express agreement to that effect or any agreement by implication, save only the payment of board and tuition "in advance;" but this was excluded by the rejection of the evidence tending to show the terms and regulations of the school. There will be a *venire de novo*.

PER CURIAM. *Venire de novo.*

Cited: Horner School v. Wescott, 124 N.C. 520; *Teeter v. Military School,* 165 N.C. 571; *University v. Ogburn,* 174 N.C. 432.

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(68)

JOHN D. WILLIAMS AND WIFE AND OTHERS, EX PARTE.

Where a testator devised the one-half of a house and lot to A, and the other half to B, to be held to her separate use for life, and at her death to go to her children, "or the proceeds of said lot, if the same should ever be sold, to be held for the benefit of her children, the said B receiving the annual interest of said proceeds." The land having been sold; *It was held*, That B was not entitled to have the value of her life interest in the fund assessed according to the annuity tables and paid over to her at once, as that would defeat the trust and the express provisions of the will.

It was further held, That the fact that the money was only bearing six per cent, interest, and that B desired to use it in the improvement of a farm, was not a sufficient ground to warrant the interference of the court.

This was a PETITION in the above cause, heard before *Moore, Judge,* at Fall Term, 1875, of BEAUFORT Superior Court.

The following are the facts as set forth in the record, and sent upon appeal, to this court:

Mary E. Hawks devised a house and lot, in the town of Washington, as follows: "Item 1st. I give and devise to my daughter, Hannah E. Latham, wife of Samuel C. Latham, one undivided half of my house and lot, situated in the town of Washington, at the corner of Market and Third streets, adjoining the lands, etc., to be held by her, free from the debts, liabilities and control of her husband.

"Item 2. I give and devise to my daughter, Mary E. Williams, wife of John D. Williams, the other undivided half of my said house and lot in Washington, etc., to be held by her free from the debts, contracts, liabilities or control of her said husband, during the term of her natural life, and after her death this said lot to belong to her children, or the proceeds of said lot if the same shall ever be sold, to be held for the benefit of her children, the said Mary E. Williams receiving the annual interest of said proceeds."

(69) The house and lot has been sold by order of court in the above entitled cause, and the sale approved. One-half the proceeds of the sale have been paid to Mrs. Latham, and the remaining half is now in court. This petition was filed by John D. Williams and his wife, Mary E. Williams, praying that by a decree of the court, the plaintiff's interest in said fund may be assessed according to the annuity tables, and that the same may be paid to her.

The petition coming on to be heard, it was adjudged by the court:

1. That under the provisions of the will of Mrs. Mary E. Hawks, the petitioners are not entitled to the relief asked in this petition, as a matter of right, and the same is refused.

2. That if the relief prayed for is at the discretion of the Judge to grant or withhold, it is likewise refused in the exercise of that discretion.

From this judgment the petitioners appealed.

D. M. Carter, for the appellants.

No counsel in this court, contra.

BYNUM, J. The right to the relief asked for depends upon the construction of the will. Mary Hawks devised the one-half of a house and lot in the town of Washington, to Hannah E. Latham, and the other half to Mary E. Williams, to be held to her sole and separate use for life, and at her death to her children; or, "the proceeds of said lot, if the same should ever be sold, to be held for the benefit of her children, the said Mary E. Williams receiving the annual interest of said proceeds." The land has been sold, and Mrs. Williams, the plaintiff, is entitled to the annual interest of the fund. To grant her prayer to the order the payment to her, at once, of the value of her entire life interest, would obviously be to defeat the trust and express provisions of the will. No

sufficient cause is set forth to authorize the interference of the court. The only causes alleged are, that the money is bearing (70) only six per cent interest, and that she desires to expend it in improving a farm. Such reasons are insufficient.

There is no error.

PER CURIAM. Judgment affirmed.

BLACKMAN LEE v. GARDNER LEE AND OTHERS.

Where, by the death of an intestate, lands descend to the heir at law, a collector has no power to enter upon and make leases of said land.

CIVIL ACTION, in the nature of *Ejectment*, tried before *Kerr, Judge*, at Spring Term, 1875, of SAMPSON Superior Court.

The plaintiff sued to recover possession of lands alleged to have been leased to the plaintiff for the term of one year, and for damages for its detention.

The following statement accompanies the record sent up to this court:

1. The plaintiff showed in evidence an order of the Probate Court of Sampson County appointing one Whitfield Fort collector of the estate of Pharaoh Lee. That said Fort qualified and entered upon the duties of his office, and by virtue thereof took control of the estate, both real and personal of Pharaoh Lee, and rented out the land of said estate for one year, to-wit, from January 1st, 1872, to January 1st, 1873, to the plaintiff, at public sale, taking his bond and security for the same.

2. That the defendants were in possession of said land as tenants of said Pharaoh Lee, from whom the plaintiff had demanded possession prior to the commencement of this action.

Upon the evidence, his Honor being of the opinion that a collector, under existing law, had no control over the real estate (71) of the deceased, the plaintiff submitted to a non-suit.

Judgment for the defendant, from which judgment the plaintiff appealed.

Kerr and Kerr, Smith and Strong, for the appellant.

W. McL. McKoy and Guthrie, contra.

BYNUM, J. 1. Admitting for the argument that the collector of the estate had the power to make a lease, the case shows that the defendants were in the possession of the premises, and still are, and that the plaintiff has made no entry upon the demised land.

A bare lease does not vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini;* but when he has actually so entered and thereby accepted the grant, the estate is then, and not before, vested in him. 2 Bl., 144. Therefore, the plaintiff having no estate before entry, cannot maintain trespass or ejectment. 1 Inst., 46; 2 Lil., 160.

2. But the question made in the court below and here is, whether the collector of an estate can make a valid lease of the realty. The extremely defective statement of the case does not show whether Pharaoh Lee died testate or intestate, or whether his estate in the land was a fee simple, which descended to his heirs, or a term of years, which went to his personal representative; but as every intendment is to be taken most strongly against the party alleging error in the record, *Rush v. Steamboat Co.,* 67 N. C., 47, we are to assume that he died intestate, and that his interest in the premises was a fee simple. We hold it then entirely clear, that the collector of his estate had no power to make leases. It is a novel proposition, that the heirs, upon whom the land has descended, (it may be unencumbered by debt or otherwise) can be thus kept out of their inheritance and means of support.

In support of this alleged power of the collector, the plaintiff
(72) relies upon Bat. Rev. chap. 45, secs. 11, 13, 37 and 38. Section 11 provides for the appointment of a collector for the collection and preservation of the property of a decedent "whenever for any reason a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration or letters of administration with the will annexed."

Section 13 gives the collector power only to "collect the personal property, take possession and receive the rents and profits of the real property, preserve and secure the debts and collect the debts and credits of the decedent."

Section 37 provides that "the proceeds of all sales of personal estate and rentings of real property by public auction, shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable, otherwise the executor, administrator or collector, shall be answerable for the same."

The 38th section merely designates the time when sales or rentings shall be made and makes it penal in these several officers, if they sell or rent otherwise than is provided in sec. 37.

If a lessee for years dies intestate leaving the term unexpired, it would probably be the duty of the collector under the above provisions of the statute to make leases from year to year, of the remainder of the term, until a regular administration. So if a collector is

appointed pending a contest as to who shall be administrator *cum testamento annexo,* or executor of a will, which directed the renting of the testator's land, this would present another case where it would be the duty of the collector to make leases from year to year, or pursuant to the will. Doubtless such is the class of cases contemplated by the statute, and such a construction meets all the requirements of the sections of the statute relied upon by the plaintiff as before cited, without resorting to the strained and unnecessary construction contended for by the plaintiff. We see nothing in the statute (73) which confers upon a collector a greater power than that possessed by the administrator, or an administrator with the will annexed. Therefore, where by the death of an intestate the land descends to the heirs at law, the collector has no power to enter upon and makes leases of such land.

8. But this was a lease from the first of January 1872, to the first of January 1873, and the action is brought only two months before the expiration of the lease. If the lease had been valid, the plaintiff could not have judgment, after the expiration of his term. This is elementary law.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Reeves v. McMillan, 101 N.C. 482.

STATE TO THE USE OF THE BOARD OF EDUCATION v. ALBERT C. MOODY, AND OTHERS.

The Superior Courts have authority, under chap. 33, sec. 83 of Battle's Revisal, to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. The decision is a matter of judicial discretion which this court cannot review, except upon a legal error in law or legal inference.

The evidence upon which the finding of the court below is based, is not subject to review. This court can only consider the facts found.

CERTIORARI, upon a judgment rendered at Spring Term, 1875, of the Superior Court of ROBESON County, his Honor *Judge Kerr,* presiding.

The defendants, A. C. Moody, W. C. Troy and W. J. Brown, had entered into a recognizance for the personal appearance of A. C. Moody at Fall Term, 1871, of the Superior Court of Robeson (74) County, to answer an indictment which might then be found against him.

A *scire facias,* reciting that A. C. Moody had failed to make his appearance at that term of the court, was issued returnable to Spring Term, 1872, summoning the defendants to appear and show cause why judgment absolute should not be entered upon the forfeited recognizance. The case was continued from term to term until Spring Term, 1875, when judgment absolute was rendered against the defendants. At that term a petition was filed by the defendants alleging that A. C. Moody did make his personal appearance in accordance with provisions of the recognizance, and that he had been sent before the grand jury as a witness against another party charged with the same offence alleged against himself, and that Moody and his co-defendants had been informed by the Solicitor that he was discharged. Subsequently Moody, together with one John Brown, was indicted. Moody, after having been discharged, as alleged in the petition, did not appear to answer this indictment. The cause coming on to be heard upon the petition, his Honor found the facts as alleged, and thereupon in accordance with the prayers of the petitioners, the court rendered judgment, remitting the forfeiture of the defendants to one penny and costs.

All other facts pertinent to the case as decided, are stated in the opinion of the court.

From this judgment the plaintiff craved an appeal to the Supreme Court, which was refused.

The case was brought to this court upon a writ of *certiorari,* granted at June Term, 1875.

Attorney General Hargrove, for the appellant.
Wright and Steadman, contra.

READE, J. The statute is so broad that there can be no doubt that the Judges of the Superior Courts have the power to remit or
(75) lessen forfeited recognizances, either before or after final judgment, upon the petition of the party aggrieved. Bat. Rev., chap. 33, secs. 83, 84, 85. And this is a matter of judicial discretion in the Judges below, which we cannot review, except for some error in a matter of law or legal inference.

Admitting that to be so, still it is insisted that his Honor had no power to grant the relief sought in this case, because it was *res adjudicata.* That at a prior term of the court the defendant had made the same application, when another Judge was presiding, and that it was refused.

If this alleged fact had appeared to his Honor, it would have been indecent, if not beyond his power, to reverse what his predecessor had

done. But there is nothing in the case sent us to show that this fact did appear to him. His Honor found and stated, as it was proper that he should have done, the facts upon which his judgment was based, and no such fact is stated by him. Nor was there any exception taken to his statement of the facts; but simply an appeal from his judgment. It is true the case shows, that there was *evidence* before his Honor tending to show the fact; but we have to look at the *facts found*, and not at the evidence. If the fact existed, it existed of record, and the record ought to have been produced before his Honor; and it ought not to have been made to depend upon parol testimony, which his Honor had a right to disregard.

Our attention was called to the case, as reported in 69 N. C. 529, *State v. Moody*, where the State moved for execution against the defendant, Moody, upon the forfeited recognizance, and the defendant relied upon the facts now set forth as a *plea in bar*. The Judge then presiding, *held* that it was not a good plea in bar; and upon appeal, this court sustained him. And in giving the reason for his decision, the presiding Judge said, that it could only be allowed the defendant, upon an application for remitting the forfeiture, which he declined.
But it does not appear that such application was made by (76) defendant. It may have been made, or that remark of the Judge, that he declined to remit it, may have prevented the application from being made. At any rate, it does not clearly appear that it was made. And so this court said, in delivering its opinion, that the statement was obscure, and that the defendant might move thereafter. And we suppose that his Honor was of the opinion upon this application, that it was not *res adjudicata.*

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

STATE TO THE USE OF THE BOARD OF EDUCATION v. ALBERT C. MOODY, AND OTHERS.

(Same syllabus as in *State* to the use of the *Board of Education* v. *Albert C. Moody*, and others *ante* page 73.)

CERTIORARI, upon a judgment rendered at Spring Term, 1875, of the Superior Court of ROBESON County, his Honor, *Judge Kerr*, presiding.

This is one of three actions against the same parties, and involving the same questions, all of which are fully stated in the case of *State* to the use of the *Board of Education v. Albert C. Moody*, and others, *ante* page 73.

Attorney General Hargrove, for the appellant.
Wright and Steadman, contra.

(77) READE, J. There are three cases between the same parties involving the same questions, in one of which an opinion is delivered. The decision in this case is the same.

PER CURIAM. No error.

STATE TO THE USE OF THE BOARD OF EDUCATION v. ALBERT C. MOODY, AND OTHERS.

(Same syllabus as in *State* to the use of the *Board of Education v. Moody*, and others, *ante* page 73.)

CERTIORARI upon a judgment rendered at Spring Term, 1875, ROBESON Superior Court, *Kerr, Judge,* presiding.

The facts in this case are the same, and the same points are involved, as in the case of *State to the use of the Board of Education vs. Moody* and others, reported ante page 73.

Attorney General Hargrove, for the appellant.
Wright and Steadman, contra.

READE, J. There are three cases between the same parties involving the same points. An opinion has been delivered in one, and the decision in this is the same.

NOTE.—Why was not one case brought up and the others allowed to await the decision of the Court?

PER CURIAM. Judgment affirmed.

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(78)

BOYLSTON INSURANCE COMPANY AND OTHERS v. JNO. D. DAVIS.

The C. C. P. does not repeal or suspend the Rev. Code in respect to practice and procedure, except where its provisions are inconsistent therewith.

The provisions of the Rev. Code, with regard to the remedy against the sureties on a replevin bond, are not inconsistent with the provisions of the C. C. P., and therefore *it is not error* in the Court below to render summary judgment against the sureties upon a replevin bond, the plaintiff having obtained judgment against the defendant in the action.

CIVIL ACTION for the claim and delivery of personal property, tried before *McKoy, Judge,* at August Term, 1875, of CARTERET Superior Court.

The suit was brought to recover certain iron, alleged to be the property of the plaintiffs. The case was before this court at January Term, 1873, upon an appeal by the defendant, and is reported in 68 N. C., 17, and was before the court again at January Term, 1874, upon an appeal by the plaintiffs, and was reported in 70 N. C., 485. Upon the hearing of the case in this court at January Term, 1874, a new trial was granted the appellants.

The cause was thereupon continued from term to term in the Superior Court until August Term, 1875, when it was again tried, and the jury assessed the damages of the defendant at the sum of $459.80. Thereupon the court rendered judgment against the present plaintiff for that amount. It was further adjudged by the court, that the defendant have judgment on the bond given by the plaintiff and against the sureties thereto, to be discharged by the return of the property to the defendants, or the payment of the amount of the judgment against the plaintiff.

The sureties excepted to any judgment against them upon the (79) undertaking in this action, as unauthorized and contrary to law. The exception was overruled by the court, and thereupon they appealed.

All other facts in the case may be fully stated in the case as reported in the reports above cited.

Hubbard, for the appellants.

Green, contra.

PEARSON, C. J. At common law an action of replevin could only be maintained *when the defendant had taken the property out of the possession of the plaintiff,* and was in possession at the commencement of the action; in which case the property was put back into the possession of the plaintiff, he giving bond to return it to the defendant if he failed to show on the trial of the action that the defendant had wrongfully taken the property.

The statute, Rev. Code, chap. 98, "Replevin," extends the action to cases in which, detinue or trover will lie, when the defendant is in possession at the commencement of the action, and makes an important modification of the remedy, by allowing the defendant to keep possession pending the action, provided, he gives a bond for its forthcoming, if the action be decided against him; and directs a summary judgment against the sureties.

The C. C. P. under title IX, "provisional remedies in civil actions," chap. 1, makes provisions for bail and enacts, sec. 160: "in case of failure to comply with the undertaking, the bail may be proceeded against *by action only.*

Chapter 11, "Claim and delivery of personal property," makes provision for undertaking for the return of the property in effect the same as Rev. Code, chap. 98, Replevin, with some minor details as to the justification of the sureties, and directs the Sheriff to file the
(80) notice and affidavit, with his proceedings thereon with the Clerk; sec. 187, but omits to direct a summary judgment against the sureties for the forthcoming of the property. It is not ours to account for this omission. It may be that the directors to have *the undertaking* filed with the Clerk, in the absence of an express prohibition as in the case of bail, furnish a sufficient authority by implication for a summary judgment, as in the case of prosecution bonds and appeal bonds, but "praying this implication in aid," we put our decision upon the broader ground, that C. C. P. does not repeal or suspend the Rev. Code in respect to practice and proceeding, except where the provisions are inconsistent; and in this instance, as in the instance of prosecution and appeal bonds, so far from presenting an inconsistency, it is absolutely necessary to preserve uniformity, to assume that C. C. P. is a mere supplement to the practice and procedure established and acted on by the Rev. Code.

This matter was considered and acted upon in *Clerk's office v. Huffstetler, et al,* 67 N. C., 449, to which we refer for a more full criticism and exposition of the view in which we consider C. C. P.

No error.

PER CURIAM. Judgment affirmed.

Cited: Harker v. Arendell, 74 N.C. 87; *Sims v. Goettle,* 82 N.C. 272; *Hollingsworth v. Harman,* 83 N.C. 155; *Council v. Averett,* 90 N.C. 169; *Patton v. Gash,* 99 N.C. 284; *Hall v. Tillman,* 103 N.C. 280; *Featherston v. Wilson,* 123 N.C. 626.

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(81)

AMOS WADE v. THE COMMISSIONERS OF CRAVEN COUNTY.

The subject of taxation is regulated entirely by statute, and the revenues of this State are collected under the operation of what is known as the machinery act.

The County Commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation; and from their

decision, upon a petition for that purpose, there is no appeal, unless it appears from the facts found by them as to the valuation of property, that they have proceeded upon some erroneous principle; for the reason that the statute gives no appeal.

This was originally a *Petition* by the plaintiff to the defendants, praying that he might be relieved from certain taxes, which the plaintiff alleged were excessive. From the ruling of the Board of Commissioners, the plaintiff appealed to the Superior Court. The cause was removed to the county of CARTERET, and there heard before *McKoy, Judge,* at August Term, 1875.

The following is the statement of the case sent up as part of the record. The plaintiff on the 8th day of July, 1873, presented to the defendants a petition for relief from excessive taxation, upon certain lands in Craven County. Upon the hearing of the petition, the Board of Commissioners found as a fact, that nine hundred and fifty acres of the land, valued at five thousand dollars, should be reduced to four thousand. That another tract, containing one hundred acres, valued at three hundred dollars, should be reduced to two hundred dollars. That another tract, containing three hundred and eighty-four acres valued at one thousand dollars, should be reduced to eight hundred. At the same time the Board refused to make any deduction as to other property embraced in the petition, upon the ground that the same was properly valued.

From the order of the Board refusing further reductions, the plaintiff appealed to the Superior Court of Craven County. (82) At Spring Term, 1874, of that court, upon affidavit of the plaintiff, the cause was removed to the Superior Court of Carteret.

At August Term, 1875, of Carteret Superior Court, the defendants moved to dismiss the appeal upon the following grounds:

1. That the determination of the Board of Commissioners is conclusive as to the facts found by them as to valuation.

2. That the said Board, not possessing judicial powers, is incapable of rendering a judgment, and that the law has provided no mode of reviewing a judgment or order of said Board, by the way of appeal.

3. That the proceeding was not commenced by summons, and therefore, is not an action, and the venue cannot be changed.

The motion was refused, and thereupon the defendants appealed.

Lehman, for the appellant.
Green, contra.

SETTLE, J. The subject of taxation is regulated entirely by statute, and the revenues of this State are collected under the operation of what is known as the machinery bill.

By this bill, Battle's Rev., chap. 102, the Township Board of Trustees are required to assess the value of the real and personal property within their respective townships on the first day of April, in each year, and they are required to return an abstract and tax list to the Clerk of the County Commissioners on or before the first Monday in May in each year.

The County Commissioners of each county are required to meet on the third Monday in May, and revise the tax list and valuation reported to them; and in doing so, they are required to hear the complaint
(83) of any one alleging that his property has been improperly valued, or that he is charged an excessive tax. From the facts found by them as to the valuation of property, unless it appears that they have proceeded upon some erroneous principle, there is no appeal, simply for the reason that the statute gives none.

The act of 1869-'70, chap. 225, sec. 17, did allow the complainant an appeal to the Superior Court, from the decision of the commissioners, "upon or involving any matter of legal liability;" but this provision is omitted from the machinery bill of 1870-'71, chap. 195, and is not to be found in Battle's Rev., chap. 102.

In the *Wilmington, Columbia and Augusta R. R. Co. v. The Board of Commissioners of Brunswick County*, 72 N. C. 10, this court says, "If it was made to appear that they, the township or county officers, proceeded on an erroneous principle, we might perhaps correct their valuation, but an error in the fact of the value of the property is beyond our power to correct.

There is error. Let judgment be entered here dismissing the proceeding at the cost of the plaintiff.

PER CURIAM. Judgment accordingly.

Cited: R. R. v. Comrs., 74 N.C. 84; *Comrs. v. Murphy*, 107 N.C. 38; *Guano Co. v. New Bern*, 172 N.C. 260; *Mfg. Co. v. Comrs.*, 189 N.C. 104; *Mfg. Co. v. Comrs.*, 196 N.C. 748; *Belk's Department Store v. Guilford County*, 222 N.C. 448.

CAROLINA CENTRAL RAILWAY CO. v. COMMISSIONERS OF RICHMOND COUNTY.

(Same *syllabus* as in the next preceding case of *Wade* v. *The Commissioners of Craven*, which is cited and approved.)

This was an APPEAL from the decision of the defendant, the Board of Commissioners of Richmond County, heard before his Honor, *Judge Buxton*, at Fall Term, 1785, of the Superior Court of (84) RICHMOND County.

As the case was decided in this court upon a question of law, it is unnecessary to report the facts.

The ground upon which the appeal was based was, an excessive valuation of the property of the plaintiff for taxation. No error in matter of law was alleged as ground for the appeal.

Upon the hearing, his Honor, upon motion of the defendant's counsel, dismissed the proceedings on the ground that the court had no jurisdiction thereof. From this judgment the plaintiff appealed.

Steel & Walker, Strange and Busbee & Busbee, for the appellant.
Shaw and Hinsdale, contra.

SETTLE, J. The only points presented by this record are decided in *Wade v. Commissioners of Craven County*, ante, 81.

We refer to that decision for the reasons which induce us to declare, that the judgment of his Honor in this case is affirmed.

PER CURIAM. Judgment affirmed.

(85)

SAMUEL HARKER v. W. L. ARENDELL.

A brought an action against B to recover a horse, and the sheriff replevied the horse, but delivered him to the defendant again upon the filing of the statutory bond by C, from whom B claimed title. C was not made a party to the action. Upon the trial there was a verdict for the plaintiff, and the court gave judgment against the defendant for the recovery of the horse and damages as assessed by the jury. At the same time, the court rendered summary judgment against the parties to the replevin bond. B then filed an affidavit, alleging that he had refused to file any bond for the re-delivery of the horse, and had informed C that he would not defend the suit; and that unless C became defendant in his stead, he would deliver the horse to the plaintiff, and that he made the same statement to the plaintiff; that it was understood between A, B and C that the suit was no longer to continue against B but that C was to become the defendant,

and in consequence of this understanding B did not employ counsel, and did not know that he was still a party to the suit until he came into court as a witness in the cause. Upon the filing of this affidavit, it was ordered that no execution issue upon the judgment against B, until the further order of the court. Upon an appeal to this court:

It was held, 1. That there was no error in the court below rendering summary judgment upon the replevin bond; and

2. That the order of the court staying execution of the judgment against B, was error.

This was a CIVIL ACTION for the claim and delivery of personal property, tried before *McKoy, Judge*, at August Term, 1875, of CARTERET Superior Court.

The action was brought by the plaintiff to recover possession of a mare, alleged to be unlawfully detained by the defendant. The mare was replevied by the sheriff, and re-delivered to the defendant, upon an undertaking being filed in accordance with the statute, by one Edward E. Perry, from whom the defendant claimed to derive his title. Upon the trial of the cause, the jury found all the issues in
(86) favor of the plaintiff, and assessed the value of the mare at sixty-five dollars, with damages to the amount of thirty dollars. Thereupon the court gave judgment against the defendant and the sureties to the undertaking above mentioned.

The defendant filed the following affidavit:

W. L. Arendell being duly sworn, says: "When the writ in this case was served on him and the horse was taken into possession by the sheriff, affiant refused to give a bond for her delivery, and informed Edward Perry, of whom he had purchased the horse, that he would not defend any suit for the horse, and that unless he, Perry, took his place and defended the suit, he would deliver up the property to the plaintiff; that said Perry gave bond and said he would defend the suit, and this affiant made the same statement to plaintiff, and it was distinctly understood by the affiant and the plaintiff and said Perry, that the suit commenced by plaintiff against this affiant was no longer to continue against him, but that said E. Perry was to take his place; and under these circumstances affiant considered himself out of the case and took no farther concern about it, and had not the most remote idea that any suit was pending against him after the understanding between plaintiff and affiant and said Perry—never employed any counsel in the case and never took any further step in the case, and to his great surprise, upon coming into the court house this morning as a witness, he having been requested by Mr. J. M. Perry, counsel of E. Perry, to attend there as a witness in the case, supposing he was only a witness and not a party at all."

Whereupon his Honor directed the Clerk to enter upon the judgment docket as a memorandum, the following instructions for the Clerk: "It being made to appear to the court that W. L. Arendell surrendered the horse in controversy to the Sheriff, and Edward E. Perry replevied the same and that the writ has been defended by and for the benefit of E. E. Perry, and that he furnished the bondsmen: Therefore it is ordered that no execution issue against W. L. Arendell until (87) the further order of this court."

The defendants A. C. Davis and J. M. Perry, the sureties to the undertaking, except to the judgment against them, and to the order above mentioned:

1. Because no judgment can be rendered in the above action against said sureties.

2. Because said instructions to the Clerk are unauthorized and prejudicial to said sureties, and in derogation and violation of the terms of their undertaking.

The exceptions were overruled, whereupon the defendants Davis and Perry, sureties upon the undertaking appeal.

Green, for the appellants.

Hubbard, contra.

PEARSON, C. J., The power of the court to render a summary judgment against the sureties on the undertaking, is settled by the case of *Boylston Insurance Co. v. Davis,* ante, 78.

We are not aware of any precedent either at law or in equity, or under the mixed model of procedure introduced by C. C. P., which will sustain the order made by his Honor, on affidavit, directing the Clerk not to issue execution against Arendell (the defendant in the action) until further order.

The plaintiff had obtained a judgment against Arendell *for the pony,* and was entitled to the specific article and the damages assessed for its detention, and in case the property could not be had, then to the damages assessed for its valuation as well as the damages assessed for its detension. It is established by the judgment, that Arendell wrongfully held possession of the pony, which was the property of the plaintiff. Can any sound reason be suggested why the plaintiff should not have the fruit of his recovery?

But if upon any supposition the court had power to say to the plaintiff, you must give up your property and accept damages (88) in lieu thereof, for it can make no material difference to you whether you get your pony or its value in money, and your accepting its value will enable the court to do justice all around and settle a

controversy that will grow up between Arendell and E. E. Perry, from whom (taking the affidavit to be true) he purchased, then other difficulties arise. E. E. Perry will say, you are seeking to make me liable to Arendell, upon a warranty of title, in a proceeding on affidavit, and in an action to which I am not a party of record and have no right to be heard; which is contrary to the laws of the land and against the Bill of Rights.

The sureties will say, admit that E. E. Perry sold the pony to Arendell, and that it was at the request of Perry he signed the undertaking of Arendell to surrender the pony if plaintiff recovered in the action, still we were the sureties of Arendell, although we became so at the request of Perry, and by reason of our becoming the sureties of Arendell the pony was put back into his possession *and he still has the pony.* We signed the undertaking that Arendell would surrender the pony in the event that the plaintiff proved title, because of the fact that the pony was liable in the first instance, and we became his sureties relying on that fact. This is a manifest alteration of the obligation of the contract, if Arendell can be allowed to keep the pony, and by the action of the court throw upon us the burden of paying the damages in the first place, and then seeking relief against E. E. Perry who is not a party of record or bound in any way by the action of the Judge. In other words the sureties insist that the Judge has put the boot on the wrong foot and ought to have allowed the action to take its regular and ordinary course, viz: let Arendell, the defendant of record, who has received the benefit of retaining possession of the pony, by the fact that he was enabled to do so, by our undertaking for him to see the pony delivered up, if plaintiff succeeded in the action, surrender the pony to the plaintiff and pay the
(89) damages for its use, while he had the benefit of its services; that is the foot to put the boots on, and then let him and E. E. Perry settle the matter as to warranty of title.

There is no precedent to support the ruling of his Honor, and I have treated it in a familiar way for the purpose of illustrating the danger of departing from the settled precedents and forms of the law, upon broad notions of doing complete justice under C. C. P.

Error. Judgment below modified so as to strike out the order to the Clerk, and allow execution on the judgment against the defendant.

PER CURIAM. Judgment accordingly.

Cited: Thomas v. Campbell, 74 N.C. 790; *Council v. Averett,* 90 N.C. 169; *Hall v. Tillman,* 103 N.C. 280; *Nimocks v. Pope,* 117 N.C. 319; *Wallace v. Robinson,* 185 N.C. 532.

SAMUEL FOWLER v. OLD NORTH STATE INSURANCE COMPANY.

In case of the destruction by fire of a stock of goods which the defendant had insured for an on account of the plaintiff, the proper measures of damages against the defendant is the market value of the goods, (within the amount insured,) at the time and place of the fire.

The failure of the plaintiff to call as a witness one who was his clerk at the time of such fire, to prove the value of the goods, was a proper subject of remark by the counsel of the defendant, before the jury. The reasons of the plaintiff for not introducing the clerk, were also properly called to the attention of the jury by his Honor, presiding.

CIVIL ACTION to recover upon a policy of insurance, tried before *Kerr, Judge,* at Fall Term, 1875, of PERSON Superior Court.

The following statement of the case is sent up on appeal to this court, as a part of the record: The action was (90) brought upon a policy of insurance issued by the defendant to the plaintiff to secure him against the loss by fire of a certain stock of goods and merchandise, and in the event that the goods were destroyed by fire, to pay him two-thirds of the value of the goods at the time of destruction.

In the application, the plaintiff had stated the value of the stock at the time he effected the insurance, at $2,800.00 and claimed that the value of the stock was $2,500.00 at the time of the fire. The defendant, on the trial, contended that in stating the value of the stock at the time of the fire, the witnesses should be confined to the prime cost and freight of the goods, and not the value of such goods at the place of business. The objection was overruled by the court, and the defendant excepted.

After his Honor had concluded his charge, he was requested by the counsel for the defendant to charge the jury: That inasmuch as one Elijah Sherman, who was plaintiff's clerk at the time of the fire, was present in court, and, though sworn, had not been called and examined as a witness by the plaintiff to prove the value of plaintiff's stock of goods destroyed by fire, that this was a circumstance of suspicion against him; especially as there was much diversity of opinion among the nine witnesses examined as to the value of the goods in plaintiff's store shortly before the fire, varying in their estimates from five hundred dollars as the value of the goods in sight above the counter, to twenty-five hundred dollars as the value of the whole stock; and that the plaintiff thus having it in his power to remove the circumstance of suspicion, if it was unfounded, by examining his clerk, and failing to do so, it was a strong circumstance to show that the goods destroyed were not of the value claimed by the plaintiff." To which

his Honor replied: "That is true, and has been commented on at length by the counsel in his address, and your attention is
(91) called to his argument on the point, and you will give the circumstance due consideration in making up your verdict. You will also give the plaintiff's reply such weight as you think it deserves. That the plaintiff had not only sworn Sherman, but had called and tendered him and other witnesses to the defendant, who declined to examine them. You may also consider the circumstances as testified to by the defendant's agent, that shortly after the fire the plaintiff, with the aid of his clerk, Sherman, recollected and put down from memory, at the request of said agent, specifying each article and its value, goods to the amount of $1,800, and that the plaintiff now alleges that by refreshing his memory by his duplicate bills of purchase, he arrives at the amount he claims. You are to decide the case after giving due attention to the arguments addressed to you, and taking all the circumstances and testimony into consideration, and endeavor to arrive at a fair and impartial verdict.

To this portion of his Honor's charge, the defendant excepted.

His Honor had already charged the jury, that it was incumbent upon the plaintiff to prove the truth of the allegations made in the application and the policy, and if the jury believed he made a fraudulent over-valuation of his goods at the time of the fire, he was not entitled to recover.

There was a verdict for the plaintiff, whereupon the defendant moved for a new trial, upon the ground that the verdict was against the weight of the evidence. Motion overruled, and the defendant appealed.

No counsel for the appellant in this court.

J. W. Graham, contra.

READE, J. I. The market value of the goods at the time and place of the fire, is that which the plaintiff has lost by the fire, and is the measure of his damage against the defendant, within the
(92) amount insured. May on Insurance, p. 525, *et seq.* *Wynne v. Liv., Lon. and Globe Ins. Co.*, 71 N. C., 121.

II. The failure of the plaintiff to call as a witness one who was his clerk at the time of the fire, to prove the value of his goods, was a proper subject of remark by the defendant's counsel. But what we suppose, the defendant complains of is, that his Honor also called the attention of the jury to the reasons which the *plaintiff* had for not introducing the clerk. Surely no one but the defendant, who is supposed to see only his own side, could see error in this.

The refusal of his Honor to grant a new trial, because of the verdict, as alleged, was against the weight of the evidence, is not applicable.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: *Grubbs v. Ins. Co.*, 108 N.C. 480; *Cox v. R. R.*, 126 N.C. 106; *Hart v. R. R.*, 144 N.C. 92; *R. R. v. Houtz*, 186 N.C. 49.

JAMES M. FOSTER v. A. K. PARHAM AND FRANKLIN BOYD.

A deed from A to B conveying a tract of land, "the waters of a dam giving twelve feet over the wheel to establish the line," does not convey a right to pond the water upon another and different tract of A., distant three-quarters of a mile from the land conveyed, and separated therefrom by the lands of another person. Especially is this so, where the parties to the deed had no idea, and were, in fact, surprised to find that the dam would pond the water upon the second tract.

Such deed works no estoppel as to A, to prevent him from recovering damages for the injury arising therefrom.

This was a CIVIL ACTION for the recovery of damages, tried before *Henry, Judge* at Fall Term, 1875, of BUNCOMBE Superior Court.

The following statement of the case, signed by the counsel, is sent up as a part of the record. The action was for the (93) recovery of damages, by reason of the erection of a mill-dam on New Found Creek, below the plaintiff's land in Buncombe County.

The defendants denied the allegations in the complaint, and further insisted that the plaintiff was estopped by his deed from maintaining this action. A copy of the deed is hereinafter set out.

The plaintiff replied to the answer, and the issues joined were sent by the Clerk to his Honor, the Judge of the district. The question of estoppel raised by the pleadings was retained by his Honor, who returned the following issues of the fact to be tried by a jury at a regular term of the court:

1. Has there been an arbitration of the matter in dispute?

2. Has the plaintiff's land suffered damage by reason of the defendants' dam as alleged?

3. Does the amount of water of said dam exceed "twelve feet over the wheel of said mill?"

When the case was called at the next term of the court, the following order was made: Trial by jury is waived by the parties. By con-

sent it is agreed that the issues on file in the cause shall be tried by his Honor, J. L. Henry at a time to be fixed by him.

The case was continued. Subsequent to this term of the court his Honor went upon the premises, heard the testimony offered by the parties, with the argument of counsel, and at Fall Term, 1875, reported that he had found the first issues in favor of the plaintiff and the other (3d) issue in favor of the defendant. Thereupon he adjudged that the plaintiff had been damaged by reason of the mill and dam, as set forth in the complaint and was entitled to relief, and three commissioners were appointed to assess the damages.

His Honor also held that the deed set up in the answer of the defendants did not bar the right of the plaintiff to recover.

From his Honor's ruling the defendants appealed, and it was
(94) agreed with the sanction of the court that the appeal should await the final determination of the case, so that the whole case could be finally disposed of by the Supreme Court at the same time.

The commissioners appointed to assess the damages, reported that the plaintiff was entitled to recover sixty-five dollars per year, and judgment was rendered accordingly. Whereupon the defendants appealed.

The following is a copy of the deed referred to:

"This indenture made and entered into this 16th day of August, one thousand eight hundred and sixty-one between John W. Foster's heirs of the one part and J. M. Hayes and A. K. Parham of the other part, all of the County of Buncombe and State of North Carolina witnesseth: That the said heirs for and in consideration of the sum of six dollars to them in hand paid the receipt and payment of which is hereby acknowledged, paid by the said J. M. Hayes and A. K. Parham, have by these presents, given, granted, bargained and sold, and by these presents do give, grant, bargain and sell unto the said J. M. Hayes and A. K. Parham a certain piece or parcel of land in the county aforesaid, on the west side of French Broad river, on New Found creek, joining the said heirs and said A. K. Parham's lands, *the waters of a dam giving twelve feet over the wheel to establish the lines*, containing one acre more or less, together with all and singular appurtenances thereunto belonging or in any wise appertaining to them the said J. M. Hayes and A. K. Parham, their heirs, executors, administrators and assigns forever. And we the said heirs, for our part, our heirs, executors, administrators and assigns, do and will warrant and forever defend the title to the above described land, from the lawful claim or claims of all and any person or persons

whatever. In testimony whereof, we have hereunto set our (95) hands and seals the day and date first above written.

J. W. FOSTER, [SEAL.]
GHAMES F. FOSTER, [SEAL.]
WM. FOSTER, [SEAL.]
his
J. M. (X) FOSTER, [SEAL.]
mark.
[SEAL.]
E. S. FOSTER, [SEAL.]

J. H. Merrimon, for the appellants.
Smith and Strong, contra.

PEARSON, C. J. The defendants are the owners of a tract of land on the east side of "New Found Creek," and wishing to erect a mill thereon, procured the plaintiff to execute a deed, to the effect that in consideration of $6.00 the plaintiff sells and conveys to defendants a piece of land on the west side of the creek, supposed to contain one acre, more or less. *"The waters of a dam giving twelve feet over the wheel to establish the lines."* (The reporter will set out the deed.)

Accordingly, the defendant makes his dam. The water not coming up "to twelve feet over the wheel," but it so happens that a different tract of land owned by the plaintiff, situate on the creek about three quarters of a mile above, and separated from his lower tract by the land of another person, is injured by the ponding back of the water by reason of the dam. For this injury the action is brought.

The defendants say the plaintiff is estopped by his deed from complaining of this injury to the upper tract, for by force of the deed, he has a right to raise the water twelve feet over his wheel, and if he cannot enjoy this right without injury to the upper tract the plaintiff must submit to the consequences.

We concur with his Honor in the opinion, there is no estop- (96) pel, and no grant of an easement to which the upper tract is servient, either express or implied, by which the defendant acquired a right to cause the water to be ponded back to the injury of the upper tract.

The deed makes no reference to the upper tract. An injury to it was not foreseen by the parties, and is not provided for. Had the injury been foreseen, the defendant would not have built his dam without securing an easement, as well on the upper tract as on the intervening tract.

With nothing to depend upon except a deed for the small parcel of land taken off of the lower tract, at the abutment of the dam, the quantity of land "to be established by the waters of the dam, giving twelve feet over the wheel, the defendant builds his dam and finds, contrary to all expectation, that the upper tract is injured. To meet this emergency he was bound to do one of three things, agree with the plaintiff and get a grant of an easement in respect to the upper tract, or if the injury was caused by the "big log and drift wood and mud, etc., set out in the answer, which obstructs the channel of the creek, have the raft removed and keep the channel clear, or if the injury is the result of a natural cause, to-wit: there is not fall enough in the creek to allow the dam to be kept up to its present height, then lower the dam, or take it away, if the mill cannot be run with a less head of water. The defendant was obliged to do one of these three things or violate the maximum, "Use your own so as not to abuse the property of another," which is a corollary from the diverse rule, "Do unto others as ye would they should do unto you."

The brief of the counsel for defendant refers to *Merriman v. Russel*, 55 N. C., 470; *Whitehead v. Garris*, 48 N. C., 171. These are interesting cases on the question when *the land* passes, and where only an easement, but do not bear on our question, which is, on what ground can an easement to pond water back to the injury of the upper tract
(97) be implied from a deed for a parcel of the lower land? The quantity to be established by the water mark at twelve feet over the wheel.

Upon consulting among the Justices, it was suggested, may not the grant of an easement to pond the water on the upper tract be implied from the fact, that otherwise the defendant will not be able to enjoy the benefit of the parcel of land conveyed in as full a measure as the parties contemplated. Reply: This result was not foreseen or provided for by the parties to the deed, and the court cannot add to its provisions.

It occurred to me in writing out the opinion, how can our case be distinguished from the case of one who buys one acre in the centre of a ten acre tract? It is settled that the purchaser has a right of way by *implication, ex necessitate* doing as little damage as may be. Upon reflection, I am satisfied that his Honor made the true distinction. In the instance of the one acre in the center of a ten acre field, the need for a right of way was patent, and *ex necessitate,* the grant of a right of way is implied. In our case the need for an easement to pond the water back upon the upper tract was not patent, but so far from it, the injury to the upper tract by the ponding of the water was un-

expected and took both parties by surprise. So in the absence of an express grant of the easement, the court cannot imply one.

No error.

PER CURIAM. Judgment affirmed.

Cited: Power Co. v. Navigation Co., 159 N.C. 395.

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(98)

STATE v. ADOLPHUS MOONEY.

Fees due officers of the court are vested rights by law; and are not discharged when a defendant receives an unconditional pardon, after conviction and sentence, from the Governor of the State.

This was a MOTION, by the Solicitor, for a rule on the defendant to show cause why execution should not issue against him for the cost in *State v. Adolphus Mooney,* tried at Spring Term, 1875. The motion was heard before *Schenck, Judge,* at Fall Term, 1875, of RUTHERFORD Superior Court. The facts necessary to an understanding of the cause, as decided in this court, are fully stated in the opinion of Justice BYNUM.

There was judgment against the defendant, whereupon an appeal was craved and granted.

R. C. Badger, for the appellant.

Attorney General Hargrove, contra.

BYNUM, J. At the Spring Term, 1875, of the Superior Court of Rutherford County, the defendant, Mooney, was indicted, submitted for an assault and battery upon Elias Carrier, and was by the court sentenced to one month's imprisonment in the county jail, and judgment was given against him for the costs of the prosecution. Before his term of confinement had expired, the defendant obtained an unconditional pardon from the Governor of the State, and was discharged from jail without having paid the costs. At the instance of the Solicitor, a rule was taken on the defendant, returnable to the next term, to show cause why execution should not issue for the costs. In answer to the rule, he set forth his said pardon and pleaded the same as a discharge from the payment of the costs. His Honor held that such was not the effect of the pardon, and ordered that the execution do issue; and the defendant appealed to this court. (99)

There is no error. By Art. III, sec. 6, of the Constitution, the Governor is invested with power to grant reprieves, commutations and pardons, after conviction, for all offences except in cases of impeachment. In the *State v. Underwood,* 64 N. C., 599, it was held that where the pardon is pleaded after verdict and before judgment, it will discharge the defendant from the costs. How it would be if the pardon had been granted after judgment, was left an open question, and it is now presented for our decision.

The costs and fees in criminal prosecutions are regulated by statute. Bat. Rev. chap. 105, and the acts of 1873-'74, chap. 175. It is expressly provided in chap. 33, sec. 80, Bat. Rev., that "every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of the prosecution."

The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to receive them. The judgment, though nominally in the name of the State, is, in effect, in favor of those performing services in the case for which fees are given as a compensation. An absolute pardon discharges a fine imposed, because that goes to the public, and the Governor represents the public, but the costs belong to private persons, and the pardon can no more discharge the costs, than it can discharge a debt due by the defendant to a third person. In *Holliday v. The People,* 5 Gill., 214, the defendant was convicted and sentenced to thirty days imprisonment and one hundred dollars fine. He was afterwards pardoned by the Governor, and it was held that the fine was thereby discharged, but that the prisoner was not released, either from the payment of the costs incurred by him, or the costs of the prosecution. So in *Estop v. Lacy,* 35 Iowa, 419, an action of replevin was brought against the sheriff for seizing the property of the plaintiff by virtue of an execution for costs in a case of the State of Iowa against the plaintiff. The plaintiff alleged
(100) that he had received a full pardon from the Governor, and that this operated as a remission of the judgment for fine and costs. But the court held that although the costs follow the conviction as a necessary incident, yet they continue a fund distinct from the fine, and eventually due the witnesses and the various officers of the law.

In *Rowe v. State,* 2 Bay. 565, one Kelly had been convicted of crime and fined by the court £50, of which one-half went to the informer. The sheriff who had the execution for the fine being called on by a rule to show cause why the money had not been collected and paid over, produced the Governor's pardon for the whole, as well for the moiety which went to the informer as for the other moiety which went to the State. It was, however, held by the court that the Governor had no right to remit any fine or forfeiture specifically ap-

propriated, and that the fees due the officers of the court were vested rights by law as much as the moiety of the fine to the informer, and equally beyond the Governor's power of remission.

This is but an affirmance of the principles of the common law, which allows the King the right of pardoning forfeitures, etc., but not so as to affect private rights vested in third persons by law. 2 Durn. and East., 569; 5 Co. 51; 3 Inst. 238. Also 46 Penn. 446; 8 Black, 229; 2 Whart. 440.

PER CURIAM. Judgment affirmed.

Cited: S. v. Crook, 115 N.C. 765.

(101)

ELISHA GRADY AND OTHERS v. THE COUNTY COMMISSIONERS OF LENOIR COUNTY.

The creation or alteration of Townships in the several counties of the State, after the first division by the County Commissioners under Art. VII, sec. 8, of the Constitution, is left with the Legislature.

This was a CIVIL ACTION tried before *Seymour, J.*, at Spring Term, 1875, of the Superior Court of LENOIR County.

The plaintiffs, Elisha Grady and others, suing in behalf of themselves and "all other voters of that portion of Kinston township on the south side of Neuse river," brought this action to enjoin the defendants, the County Commissioners of Lenoir County, from providing for an election of officers, under the act of the General Assembly entitled "An act to create a township in the County of Lenoir, to be known as Woodington township," ratified the 26th day of February, 1875, upon the ground that said act was unconstitutional.

Upon the affidavit of the plaintiffs, a restraining order was issued by his Honor, Judge Seymour, and the defendants were ordered to show cause at Trenton, on March 27th, why the injunction should not be continued.

At Spring Term, 1875, J. C. Wooten and others filed a petition in behalf of themselves, "and a large majority of that portion of Kinston township on the south side of Neuse river now known as Woodington township," etc., praying that they might be made parties defendant in this action.

This was objected to by both plaintiffs and defendants in the action as originally commenced. The objection was overruled by the court, and thereupon both the plaintiffs and the defendants appealed.

Haughton and Smith & Strong, for the appellants.
Green, contra.

(102) READE, J. 1. In a matter of public concern there is manifest propriety in allowing any one who has a common interest to become a party, and it is the duty of the court to see that a class is fairly represented whenever one or more sue for a class.

2. The plaintiffs allege that the act of 26th February, 1875, laying off the township in question and directing the County Commissioners to provide for an election of officers for the township is unconstitutional, because they say the Constitution confers the power upon the County Commissioners to lay off townships.

Art. VII, sec. 3, of the Constitution does provide that the *first* division of counties into townships shall be by the County Commissioners, but it does not authorize them to make any *subsequent* division or alteration. And so the subsequent creation or alteration of counties is left with the Legislature. The act in question is therefore constitutional. And it was the duty of the County Commissioners to provide for the election of officers, and therefore the injunction ought not to issue.

We suppose that when the Commissioners ascertain their duty to provide for organizing the township which has been created and now exists, they will be ready to perform it, but they will *now* be met with the difficulty that the time named in the act for holding the election has passed. Can they order an election at some time to be fixed by them? This is not directly before us and may never be, as the township may prefer to wait until the next regular election; but we have considered it, and incline to the opinion that as time was not *essential* and the failure to observe it was *unavoidable*, and as the *public good* may require the offices to be immediately filled, the Commissioners may order an election upon reasonable notice.

The injunction will be refused. Let this be certified.

PER CURIAM. Judgment accordingly.

Cited: Buckman v. Comrs., 80 N.C. 125; *McCormac v. Comrs.*, 90 N.C. 450; *McNair v. Comrs.*, 93 N.C. 371; *R. R. v. Comrs.*, 116 N.C. 565; *Battle v. Rocky Mount*, 156 N.C. 334; *Chimney Rock Co. v. Lake Lure*, 200 N.C. 176.

(103)

STATE ON THE RELATION OF JAMES CAMPBELL AND OTHERS v. J. J. WOLFENDEN AND OTHERS.

The Judge below *erred* in granting an injunction, by which the persons in possession of the offices of Mayor and Aldermen of a city, and actually performing the duties of those offices, are restrained from all official acts.

It is not sufficient to allege that the persons filling the offices were not regularly or rightfully elected; but it must also appear that they are abusing or about to abuse their possession of official power to the public injury; and that the public will sustain no damage by the suspension for an indefinite time of all city government.

SETTLE, J. Dissenting.

This was a MOTION in the cause heard before *Seymour, Judge* at Fall Term, 1875, of the Superior Court of CRAVEN County.

The defendants moved the court to vacate the restraining order heretofore granted. His Honor upon the hearing, allowed this motion, whereupon the plaintiffs appealed. All other facts necessary to an understanding of the case as decided in this court, are stated in the opinion of Justice RODMAN.

Green and Lehman, for the appellant.
Hubbard and Smith & Strong, contra.

RODMAN, J. This is a proceeding in the nature of a *quo warranto*, calling on the defendant Wolfenden as Mayor, and the other defendants as Aldermen of the city of Newbern, to show by what right they hold their respective offices, and demanding judgment that they be declared usurpers and amoved; and also asking for an injunction against their exercising the rights and powers of their offices until the final hearing of the case. WATTS, J. granted a restraining order, with liberty to defendants to move before SEYMOUR, J. to vacate it, which he did upon the pleadings. From his order to that effect, plaintiffs appealed to this court. The plaintiffs have demurred to the answer, and (104) we assume for the present purpose the facts therein pleaded to be true. The Judge below might in this state of the pleadings, have proceeded to decide the case on its merits, but he did not. All that we have to consider therefore is, the propriety of his interlocutory judgment vacating the restraining order. We concur with the Judge that the restraining order was improvidently granted and ought to be vacated. To grant an injunction by which the persons in possession of the offices of Mayor and Aldermen of a city, and actually performing the duties of those offices, are restrained from all official acts, is to leave the city without a government, and a prey to all the evils

which a city government is designed to prevent. It cannot be considered a trivial or indifferent thing. In the present case no bond at all was required from the relators. But any bond which might have been given, would have been only for the indemnity of the defendants, and not of the public. If a city government had not been deemed necessary to the public welfare, the legislature would not have established it. All courts are bound to assume that it is useful and necessary, and that the circumstances must be rare and peculiar which will justify a court in suspending it. It cannot be sufficient that it shall be alleged and be made to appear probable, or even clear, that the persons filling the offices were not regularly or rightfully elected; but it must also appear that they are abusing or about to abuse their possession of official power to the public injury, and that the public will sustain no damage by the suspension for an indefinite time of all city government.

It appears that the realtors were elected to the offices in question in May, 1874, to hold for one year, and (we will assume) until their successors were regularly elected. In May, 1875, an election was held under an act of the Legislature, ratified on March 11th, 1875, at which the defendants were elected. The realtors allege that the act referred to contained provisions which have been held to be contrary to
(105) the Constitution; *Canada v. Van Bokelen*, 73 N. C., 198, and that consequently the election of 1875 was void, and that they are entitled to hold over. They also alleged that defendants are collecting taxes, etc., but they do not allege that defendants have done, or about to do, any specific unlawful act to the public injury. It is admitted that after the election, in 1875, the relators voluntarily gave up the corporate seal of the city and all the city property to the defendants; and one of the relators, being a Justice of the Peace, without objection from the others, administered their official oaths to the defendants. If the question before us was on the respective rights of the relators and of the defendants to the offices, the argument that the relators, if they otherwise had a right to hold over, abandoned it, would be pertinent, and we should consider it a weighty one. But, as we have said, the question before us is only as to the continuance of the injunction. There is no reason why it should be continued. It is not necessary to the trial of the question of right between the parties. And certainly it cannot be permitted to litigants so to conduct their personal controversies as to injure or inconvenience the public. The people of Newbern cannot be deprived in the interest and upon the motion of one set of rival claimants of the city offices, of the benefits of a city government. They are entitled

to have the city offices constantly filled by persons capable of performing the official duties, and responsible for their non-performance.

PER CURIAM. Judgment affirmed. The defendants will recover costs in this court. Let this opinion be certified.

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(106)

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

Where upon an appeal to this court, it appears that the appellant has failed to prepare and serve upon the appellee a statement of the case, within the time prescribed by the statute, and objection is taken by the appellee on that ground, the appeal will be dismissed, unless there has been a waiver of the irregularity. Upon a motion to dismiss the appeal in such case, this court cannot hear contradictory evidence, and the motion will be allowed if the waiver is denied, unless it appears from the affidavits filed by the appellee, that there has been such a waiver.

If in such case there be a waiver, and the parties fail to agree upon a statement of the case upon appeal, and the presiding Judge goes out of office before settling the case, the only remedy is, to remand the case for a new trial.

This was a MOTION made upon affidavit, in this court at this January Term, 1876, for a *venire de novo.*

The case was originally tried before his Honor Judge *Wilson* at Fall Term, 1874, of DAVIDSON Superior Court. The record sent up to this court from the Superior Court of Davidson County, shows that judgment was rendered at the term in favor of the plaintiff, and that the defendants thereupon moved for a new trial. The motion was overruled and the plaintiff appealed. No statement of the case upon appeal accompanies the record.

At June Term, 1875, of this court the defendants served notice upon the plaintiff that they would move the court for a *venire de novo* and new trial, without a case settled, and if the motion should be refused, they would then move in the alternative for an order to the Hon. *Thomas J. Wilson, Judge* to settle said case.

In support of the motion the defendants filed the following affidavits:

"R. E. Reeves one of the above named defendants maketh oath: (107)

I. That at Fall Term, 1874, of the Superior Court of Davidson County, the above entitled cause was tried and submitted to a jury and a verdict therein found for the plaintiff; that thereupon this defendant moved for a new trial, the motion was entered and adjourned, to be heard during the term of Forsythe Superior Court,

when the same was heard and argued, when his Honor Judge *Wilson,* the presiding Judge reserved his opinion, but decided some weeks thereafter against the motion of the defendant from which decision of Judge *Wilson,* the above named defendants appealed to the Supreme Court; gave notice of appeal to plaintiff's counsel and filed a proper appeal bond.

II. That as soon thereafter as defendants counsel, who resided in remote parts of the 7th and 8th districts from each other, could conveniently get together, to-wit: on the 15th day of January, 1875, the case for appeal on behalf of the defendants was made out at Wilson, N. C., and served on Col. Joseph Masten, of counsel for the plaintiff, who upon consideration of the same declined to accept it, but indicated his purpose to make out and present his amendments thereto within a short time, but owing to the sickness of said Masten's family, as he learns, did not do so until two weeks thereafter, when by consent of counsel both the original case of these defendants so served on Col. Masten and the amendments made out by him were presented to Judge *Wilson,* who was the then acting Judge for the settlement of the case, but for some reason the same was not finally settled by the Judge, who shortly thereafter by a decision of the Supreme Court, was declared not to be the rightful Judge of the district.

III. That since the re-instatement of the rightful Judge, this affiant and his co-defendant through their counsel have urged the counsel for the plaintiff (as they fail to agree thereupon) to allow the
(108) then acting Judge *Wilson* to complete his statement of the case, which said counsel of the plaintiff have declined to do.

IV. "That he is advised that in this way he and his co-defendants, without any default on their behalf, have been deprived of their appeal to the Supreme Court, and they respectfully present this their case to the consideration of the Honorable Supreme Court to the end that the case of appeal may be heard and a new trial granted, or such other relief be afforded them as to the court shall be meet and proper."

C. B. Watson being duly sworn, says that he "was one of the counsel of the defendants on the trial of the above named cause. That the same was tried at Fall Term, 1874, of the Superior Court of Davidson County. That a verdict was rendered for the plaintiff late in the night of Saturday of the second week of court. That as soon as the verdict was entered the defendant moved the court for a new trial, which motion by consent was adjourned over to be argued the next week at Forsythe Court, but his Honor, Judge *Wilson,* held the matter up for consideration and made no decision until about the close of the Superior Court of the County of Stokes, which was the next court succeeding that of Forsythe. Upon the announcement of the decision

of his Honor, overruling the motion of defendants, it was agreed by counsel for the plaintiff and defendants that the case for the Supreme Court should be settled at some convenient time at Winston, where his Honor resided. In accordance with this arrangement, about the 15th of January, 1875, Stokes court having closed about the 1st of December preceding, J. F. Graves, Esq., and affiant made out a statement of the case on appeal and served the same on J. Masten, Esq., of counsel for the plaintiff, and he disagreeing thereto, it was then agreed that he should make out a substitute and submit the same to affiant, Mr. Graves not expecting to be present, and then in case of disagreement the two cases were to be handed to Judge Wilson to settle. That owing to sickness in the family of Mr. Masten, as affiant was informed by him, he failed to make out the case (109) until some two or three weeks had elapsed; and as soon as the case was made out and presented to affiant, affiant not willing to agree thereto as made out, handed the same, together with defendant's case, to his Honor Judge *Wilson*, informing him of the disagreement there was, during the first days of February, 1875. His Honor, for some cause to affiant unknown, failed to take any action in the premises, and in a short time thereafter went out of office."

J. F. Graves makes oath: "That he was of counsel for the defendants, and was present at the trial before Judge *Wilson*, at the Fall Term, 1874, of the Superior Court of Davidson County; that the trial ended late at night of the last day of said term, and upon the rendering of the verdict the defendants moved for a new trial and assigned several grounds, and the motion was continued to be heard at Chambers at Winston, on some day during the second week of Forsythe Superior Court; that the motion was taken up and discussed at Chambers at Winston, and some affidavits on the part of the defendants were read. The motion was then continued over to Stokes court, at Danbury, and there the plaintiff offered counter affidavits, and the Judge had the matter under consideration. My recollection is that I inferred from some intimation from the Judge that he would not grant the new trial, but his official decision was not then announced, but was to be made on his return to Winston. It was understood by counsel for defendants that in case the motion for a new trial was overruled, the defendants desired an appeal from the ruling of the Judge to the Supreme Court. My recollection is that when the Judge announced his determination (which was to be done on his return from Danbury to Winston) that if unfavorable to the defendants, Mr. Watson was to prepare the case for defendants, and submit it to Gen. Scales or Gilmer or myself. I had no notice of the final decision of the matter, other than the inference above stated, until about the 1st of

(110) January, 1875. About the 1st of January, 1875, I received from Judge *Wilson* a notice to appear at his offices to settle some cases (and I think this case was one of the cases named to be settled on the 10th of January.) I went over to Winston, and Mr. Watson and I then made up the case for defendants and presented it to Col. Joe Masten, counsel for plaintiff, and he said he would examine and see if he could agree to it. The next morning I called on Col. Masten about the matter, and he said he would not agree to our case. I asked him to make his exceptions. He said he would have to write out his case, for our views were so different he could not file his exceptions in any other way. I understood that he had been busy in the preparing of his case. No exceptions were taken on account of delay, but Col. Masten was to prepare his case, and if we could not agree we were to submit it to Judge Wilson, who was then in Winston. I then left the matter in Mr. Watson's hands and returned to Mount Airy, and remained a few days, and then went again to Winston, I called on Col. Masten again, and he said he had not prepared his case, in consequence of the sickness of one of his children. Judge *Wilson* had then gone to Raleigh, where I met him a few days thereafter."

The plaintiff filed the following counter affidavit: The plaintiff E. M. Adams, in answer to the rule to show cause, etc., says:

That the statements in item I of defendant's affidavit in this case filed are true except in the statements, viz: "but decided some weeks thereafter," the facts are that the motion was argued before his Honor about the 28th of November, and the decision was rendered about the 9th of December, and also in this, viz: "Had filed a proper appeal bond." The facts are, that no notice or copy of any appeal bond or undertaking has been served on the plaintiff or any of his attorneys as they inform him.

(111) II. That the statements of the defendant, R. E. Reeves, made in item II of his affidavit are not a full and true statement of the facts in the case. That the facts are: 1. That defendant's counsel then resided, Mr. William H. Baily, in Salisbury. Gen. A. M. Scales and Col. J. A. Gilmer, in Greensboro, and Mr. C. B. Watson in Winston, all within a few hours ride of Winston by railroad. J. F. Graves resides in Mt. Airy, within ten hours ride by horse-back of Winston, and the defendants both resided within eight hours ride by horse-back of Winston, so that the defendants and all of their counsel could have assembled at Winston, where the Judge resided at any time upon a ten hours notice, so that the defendants have shown no good reason why they did not assemble all of their counsel in Winston, if they desired the presence of all, and make out and serve their case upon plaintiff's counsel, one of whom resided in Winston, on or before

the expiration of ten days from the date of the notice of appeal. Plaintiff avers that defendants could easily have done so if they had desired it.

III. That defendants well knew that three days and a part of three nights were occupied in the trial of the case, that over one hundred witnesses were examined, and that the defence was very bitter and that much feeling was manifested by both sides during the whole trial, and upon the motion for a new trial.

IV. That defendants were notified that plaintiff had instructed his counsel not to yield anything whatever.

V. That defendants and their counsel knew the uncertain tenure by which Judge *Wilson* held his office and that there was a suit then pending, *Cloud v. Wilson,* to decide the question of who was the rightful Judge; and that the case had gone up to the Supreme Court from the 7th district, and that the 7th district would be called on the 21st of January, 1875, at which time the case of *Cloud v. Wilson* would stand for hearing, and that the 8th district would be called on January 28th, 1875.

VI. That Judge Wilson, in the latter part of December, 1874, on the first days of January 1875, notified both the counsel for (112) the plaintiff and the defendants in this case, to attend at his office in Winston, on a specified day in January, 1875, which day was either the 13th or 14th, as he would on that day, make up and settle the appeal of the defendants in this case, so that the same might go up to the Supreme Court. That this article was in writing.

That plaintiff is informed, that upon the reception of this notice from Judge WILSON, which was within a day or two after its date, by Col. Masten, one of plaintiff's counsel, he at once called upon his Honor to know why it was that the plaintiff's counsel, were notified to attend on the day specified to settle the case on appeal in this case, when nothing of the kind had been served on him nor on the plaintiff or any of his counsel, as he was informed by defendants or their counsel. His Honor stated that he had had no notice that defendants had served any case of appeal on plaintiff or his counsel, but that his purpose was to notify them to make out and serve their case on appeal and have plaintiff to file his exceptions, if he disagreed to defendants' case, if this had not already been done, so that the appeal might be settled on the day specified and the case made out and sent up before the case of *Cloud v. Wilson,* was heard in the Supreme Court.

VII. That plaintiff with two of his counsel attended at Judge Wilson's on the day specified. Messrs. Graves and Watson, two of defendants' counsel, were also present. The Judge stated that no case

on appeal had been filed with him and he had no notice of such. So nothing was done in the matter. That the Judge settled all the cases of appeals on the circuit, when the parties disagreed, on that day. That after the Judge had adjourned his court, Mr. Graves left for Greensboro, and after his return to Winston from that place, he with Mr. Watson did make out and serve a case on appeal for defendants on Col. Masten, who upon examining it, stated that he
(113) could not agree to it and that they certainly did not expect him to do so, and also stated that he had not taken a single note of the evidence on the trial, but that his associates had taken full notes and he wished to confer with them and have the benefits of their notes, etc., in filing his exceptions. That owing to the serious illness of the Colonel's wife and the dangerous illness of one of his children, he was confined in the sick room for a week or more, so that he could not make out any exceptions before the 25th or 26th of January, 1875, and his exceptions or case was handed to Mr. Watson on Monday or Tuesday, the 25th of January. That at the time of serving the case on appeal upon Col. Masten by defendant's counsel, they must have known that it would be impossible for Col. Masten to confer with his associate counsel and get their assistance, or the benefit of their notes in filing his exceptions, and have the case settled by Judge Wilson, before his case, *Cloud v. Wilson,* was heard, and in all probability decided. And that this could not be done even if the Colonel took the responsibility of filing the exceptions without the aid of his associates or their notes. That plaintiff's counsel resided, Mr. J. M. Clement in Mocksville, J. M. McCorkle in Salisbury, Wilson, ———— and ———— in Lexington, L. M. Scott in Greensboro, and J. Masten in Winston. That defendants' counsel, or some of them, knew that Col. Masten was one of Judge Wilson's counsel and that the Judge, with the Colonel, intended to leave Winston on the 18th of January, 1875, for the Supreme Court at Raleigh and be present at the hearing of the case, *Cloud v. Wilson.* And at the time Mr. Watson presented the case of appeal with the exceptions to Judge Wilson, the Judge either knew or had good reason to believe the decision of the Supreme Court was against him, and that these papers were not presented to the Judge until after he returned from Raleigh and his case had been heard.

VIII. That plaintiff is informed that so far as his counsel are
(114) concerned, that there was no agreement as to how, when, or where the case of appeal was to be made out by defendants, or settled. That in fact, no agreement was necessary, for the reason, as he is informed, that the law prescribes how the whole matter shall be done.

IX. That plaintiff is informed and believes that in the latter part of May, or the first part of June, 1875, being the Spring Term of Stokes Superior Court, some of defendant's counsel did ask one of plaintiff's counsel if he would agree that Judge *Wilson* should make out the case, who, in reply, proposed that the counsel should take the case and exceptions and make out the case, saying that all he should ask or insist upon, was a fair statement of the case, and that if they were willing to that, the case could be settled at once. The reply was, "But if we cannot agree, what will you do?" The answer was, "I will not answer now, but if you will try I believe we can agree, all I ask is a fair case," and declined to make any offer. Thus the matter ended.

X. "That plaintiff insist, that if the defendants really intended to appeal and failed to get it up, such failure was owing solely to their own neglect, and on no account owing the default of plaintiff or his counsel, or of Judge *Wilson*. That defendants had ample time and opportunity to get their appeal up, but neglected to do so. So that plaintiff insists that defendants are not entitled to the relief prayed for, nor to any relief whatever in the premises; and prays to be hence dismissed without day, and with his reasonable cost."

The affidavit of Joseph Masten, Esq., of counsel for the plaintiff, was also filed, but the same is not set out, as the material parts thereof are stated in the opinion of the Court.

Shipp & Bailey, Watson & Glenn, and Dillard & Gilmer in favor of the motion.

Fowle, Clement, Masten, Scott & Caldwell, and Gray & Stamps, contra.

READE, J. As we said in *Wade v. City of Newbern*, 72 N. C., (115) 498, it is of prime importance that the rules prescribed in C. C. P. for preparing and sending up cases to this Court should be strictly complied with. And wherever there has been a departure from them, and objection taken, we will sustain the objection, and dismiss the appeal. Nor can we hear testimony in excuse for the departure. The profession will recognize the propriety of this rule, when it is remembered how often counsel on opposing sides, make conflicting statements. In such cases we cannot undertake to decide between them. Equal forces operating in different directions leave the thing at rest.

But still there must be innumerable cases where the courtesies of the profession will allow of departures. And where that appears of record, or is *not denied*, when we will support them.

Circumstances which we could not consider upon a motion to dismiss the appeal, might nevertheless be considered on a motion for a *certiorari.*

In the case before us, the appellant did not serve "the case" upon the appellee within the prescribed time. And afterwards when he did serve it, it would have been competent for the appellee to take no notice of it, or to reject it. And if he had done so we would dismiss it. But then it was competent for the appellee to waive the lapse of time; and in that case we would entertain the appeal. The *record* shows no such waiver. And, as upon the motion to dismiss the appeal, we can hear no contradictory evidence, the motion must be allowed, if the waiver is denied and the counsel left to settle *courtesies* out of Court.

The appellant files an affidavit that there was such waiver. The appellee and his counsel file counter-affidavits. We can consider only the counter-affidavits: and unless it appears from them that the lapse of time was waived, the appeal must be dismissed.

(116) Mr. Masten, the appellee's counsel, states that the appellant's counsel served "the case" on him; "upon examining the case, I remarked, I cannot agree to this." * * * "I then stated that they knew that I was one of Judge Wilson's counsel, and intended to leave with him on the 18th for Raleigh," etc. "That I could not file my exceptions before I returned." "And that I wanted the aid of my associate counsel and their notes; that there were 100 witnesses examined, and I had taken no notes; but my associates had; and that the time was too short for me to do it. And finally I did not say whether I would make out any exceptions or not. My final remark was, well, I will see about it." * * * "On 25th or 26th, and it may have been as late as 27th or 28th January, 1875, I made out our exceptions, or case, and handed the paper to Mr. Watson," the appellant's attorney, "stating that my family had been so sick that I could not do any thing before. That I would like to re-write a part of it, as I had no time to even correct it."

It is true that Mr. Masten stated to the appellant upon other occasions that he was not authorized to waive any thing, and that "no quarters was his motto;" but still it is clear that in this particular, he did by his conduct, waive the lapse of time. And having done so, we will hold him to it.

Now, here was not only no objection to the lapse of time, but he actually accepted the paper, and as soon as he could, filed exceptions to it. Where then is the difficulty? It happens in this way: The parties not being able to agree upon a statement of the case, it became necessary for the judge to settle it. And before he could do so, he was ousted of his office.

So, the appeal is lost. And a *certiorari* will do no good, because there is no judge who can settle the case. The only remedy is, to remand the case for a new trial. *Isler v. Haddock,* 72 N. C., 119.

The motion to dismiss the appeal, is not allowed. The motion (117) for *certiorari* is not allowed. The case is remanded and a new trial ordered. Each party will pay his own cost in this Court.

PER CURIAM. Judgment accordingly.

Cited: Rouse v. Quinn, 75 N.C. 355; *Simonton v. Simonton,* 80 N.C. 7; *Walton v. Pearson,* 82 N.C. 466; *Hutchison v. Rumfelt,* 83 N.C. 443; *Scroggs v. Alexander,* 88 N.C. 67; *Royster v. Burwell,* 90 N.C. 25; *Office v. Bland,* 91 N.C. 3; *Comrs. v. Steamship Co.,* 98 N.C. 167; *S. v. Price,* 110 N.C. 602; *Glanton v. Jacobs,* 117 N.C. 428.

D. M. BUIE AND WIFE v. THE MECHANICS' BUILDING AND LOAN ASSOCIATION, AND W. H. CUMMINGS.

Where, in an action against B, it appeared upon the face of the complaint that A had been formally joined as a party for the purpose of explaining a transaction between himself and the plaintiff, and no demand was made, and no decree asked against him: *It was held,* that this was not such a misjoinder of parties as to be a ground of demurrer; nor could a demurrer to the complaint be sustained on the ground of a misjoinder of causes of action.

This was a CIVIL ACTION for an account tried before *Henry, J.,* at Fall Term, 1875, of NEW HANOVER Superior Court.

The complaint alleged:

That on the 11th day of June, 1870, the plaintiffs borrowed of the defendant company the sum of eight hundred and sixty-five dollars; and on the 16th day of July, 1870, the further sum of sixteen hundred and eighty-five dollars, to secure the payment of which sums, the plaintiffs executed two several mortgages on real estate in the city of Wilmington.

On the — day of July, 1870, the plaintiffs borrowed of the defendant company the further sum of thirteen hundred and seventy dollars, and executed a mortgage to secure the payment of the same. That said mortgages contained a power of sale, in case of default made by the plaintiffs in paying regularly, the dues and interest due the defendant company, or in default thereof to pay the defendant (118) company the several sums secured by said mortgages, with interest thereon from the dates thereof.

That the plaintiffs having made default, the defendants through its agents offered for sale, and sold two of the several parcels of land.

That the plaintiffs paid to the defendant company, large sums of money in satisfaction of said mortgages, how much or when paid, the plaintiffs are unable to state, because the book in which the account of said payments was kept is in the hands the defendant company, and the said company refuses to surrender the same to the plaintiffs.

That the sum for which said property was sold greatly exceeds the amount due upon said mortgages.

That the plaintiff, Mary J. Buie, the party entitled to the surplus, after satisfying said debts with the interest thereon, has demanded in writing an account of the said indebtedness and sales, and the payment of the surplus arising therefrom, which the defendant has failed and refuses to make.

The plaintiffs were permitted to amend their complaint by adding thereto:

That the defendant company by virtue of the power of sale contained in said mortgage deeds, advertised and offered for sale the said real estate and the plaintiffs fearing that by such sale and foreclosure they would be forever foreclosed from redeeming the same, executed to the defendant, W. A. Cummings, a deed in fee simple for a part of the said real estate, upon an express understanding and agreement that the defendant Cummings should hold the same as security for the amount which he should pay for said property at the sale for foreclosure.

The complaint prayed judgment:

1. For an account of all the payments made by the plaintiffs
(119) or either of them is satisfaction of said mortgages, and of the proceeds arising from said sales.

2. For such balance as may be found to be due the plaintiffs, upon the said account, together with the cost of this action.

The defendant, W. A. Cummings, filed an answer admitting the conveyance of the property to him, as a security.

The defendant company demurred to the complaint upon the following grounds:

1. That two separate and distinct causes of action are joined therein and are not separately stated.

2. For that two separate and distinct causes of action, having no connection with each other, are joined in the said amended complaint, to-wit: a cause of action against the defendant for an account of the trust fund arising from the sale under mortgage, and a cause of action against the defendant, William A. Cummings, to have an absolute deed, declared to be only a security for money.

3. For that this defendant, and the defendant William A. Cummings, are improperly joined therein as parties defendants.

Upon the hearing the demurrer was sustained and the action dismissed by the court, and thereupon the defendants appealed.

A. T. & J. London, for the appellants.

No counsel *contra* in this Court.

READE J. The plaintiffs allege that they borrowed money of the defendants; gave a mortgage upon certain lands as a security; and subsequently paid back a part of the sum borrowed at different times and in different amounts; how much they do not know, and cannot ascertain, as the book in which the entries were made, is in the hands of the defendants; and that the defendants have sold the lands under the mortgage, and received the price, and that the amount of sales added to the prior payments is more than the debt due the defendants. And so the plaintiffs demand an account of the (120) trust fund.

The right of a mortgagor, or any other *cestui que trust* to an account of the trust fund is so well settled, that either discussion or authority to sustain it would be out of place.

In an amendment to the original complaint the plaintiffs say, that when the lands were sold they were unable to buy them, and yet they were anxious for one of the tracts, and made an arrangement with the defendant Cummings, to buy it, and to make his title perfect, they made him a deed to the same, as well as the mortgagee did, with the understanding that Cummings should hold the land in trust, to be conveyed to plaintiffs whenever they should reimburse Cummings the amount which he bid for it. And Cummings is made party defendant, but no decree is asked against him. He comes in however, and files an answer, admitting the plaintiff's allegations.

To this the principal defendants demur, because they say, the claim for an account against them, and the claim against Cummings to have an absolute deed declared to be only a security, are two separate and distinct causes of action against separate and distinct persons.

The answer to this is, that no demand is made against Cummings, and no judgment or decree asked for against him. His rights are not litigated, or asked to be adjudicated. There is a mere explanation of a transaction between the plaintiffs and Cummings about the land which the plaintiffs supposed might embarrass them in the taking the account asked for, as without the explanation it might be said, well, if there is any thing due you on account, you have sold it to Cummings and we must account to Cummings. And so the plaintiffs by their

amendment, and Cummings by his admissions, show and thereby bind themselves that the conveyance of the land by the plaintiffs to Cummings, had nothing to do with the balance which might be (121) due plaintiffs upon account with the principal defendants. So there are not two causes of action at all.

As for joining Cummings with the principal defendants, it is useful to them that it should be done, because the decree will bind him and prevent him hereafter from claiming any balance due the plaintiffs upon taking the account.

And besides, making one a defendant who need not be, is generally immaterial. The increased cost is the only hurt, and that can be adjusted. But to leave out one who ought to be in, is generally fatal, unless amended. *Rowland, et al., v. Gardner,* 69 N. C., 53.

There is error in sustaining the demurrer. This will be certified.

PER CURIAM. Judgment reversed.

STATE v. ROBERT P. LOWRY.

Where, upon the trial of an indictment in the court below, the jury return a special verdict, which is so defective that no judgment can be pronounced thereupon, this court will order a new trial.

Therefore where A indicted for retailing spirituous liquors by measures less than a quart without a license, and the jury returned a special verdict finding "that the defendant was not a regular dealer in spirituous liquors, but that he made wine of blackberries, in the usual way, without adding brandy or whisky thereto, and being of the opinion that wine so made was not a spirituous liquor, retailed the same in quantity less than a quart without a license, etc. If the court should be of the opinion that wine so made was a spirituous liquor, then the jury find the defendant guilty; otherwise, not guilty:" *Held*, that whether the particular wine was a spirituous liquor, was a question of fact, for the decision of the jury, and that the jury had no right to refer the same to the court for decision.

INDICTMENT for retailing spirituous liquors in quantity less than a quart, without license, tried before his Honor Judge *Watts*, (122) at Fall Term, 1875, of the Superior Court of WARREN County.

The jury returned the following special verdict:

That the defendant was not a regular dealer in spirituous liquors, but that he made wine from blackberries, in the usual way, without adding brandy or whisky to the wine in the making; that the defendant was a shoemaker, and used a house on the side of the public road as his place of business; that he kept a barrel of blackberry wine in this

shop, from which he retailed to one Charles Fisher, without license to retail spirituous liquors by the measure less than a quart, and from which he retailed in the same way to various persons, being of the opinion that blackberry wine was not spirituous liquor. The jury not knowing whether blackberry wine made in this way is spirituous liquor or not, submitted that question for the decision of the court. If the court be of opinion that blackberry wine is spirituous liquor, then we find the defendant guilty. If the court be of the opinion that blackberry wine is not spirituous liquor, then we find the defendant not guilty.

Upon this special verdict the court rendered judgment of not guilty, and thereupon the State appealed.

Attorney General Hargrove, for the State.

No counsel in this court, for the defendant.

RODMAN, J. If the question presented by the case was the general one, whether, what is called blackberry wine always or usually contains alcohol, and so would come under the head of spirituous liquors, it would be a question of fact on which we could give no decision. We may be allowed to assume as matter of common knowledge, that when first pressed from the berries it contains no alcohol. After it has remained a certain time, the length of which depends on the temperature and perhaps on other causes, it will, especially if the berries were fully ripe, or if sugar has been added, undergo a fermentation by which alcohol is generated, and after a certain longer time it (123) may undergo another fermentation in which the alcohol will be converted into vinegar. So that whether at any given time alcohol is present is a question of fact to be determined by some of the tests known to scientific men or by evidence of its effects in producing intoxication and the like. But the question which the jury had to decide and which they referred to the Judge, and which he decided as one of law, was not the general one, but whether the particular liquid which the defendant retailed contained a sufficient amount of alcohol to be perceptible to the taste or smell or to manifest itself by its effects, in which case it would be properly called a spirituous liquor. This clearly is a question of fact and not law. We do not think the Legislature intended to include under "spirituous liquors," every liquor which contains the least alcohol, for that would include cider which has begun to get hard; and many extracts usually sold by druggists as perfumes or medicines, which have not been usually considered as spirituous liquors so as to require the druggist to take out a retailer's license before selling them. The phrase "spirituous liquors" is not a

technical term. It must receive the meaning usually given to it among people in general. Its meaning should not be sought to be extended to embrace more cases than the Legislature probably had in view, upon any notion of benefiting the public revenue by taxing the innocent beverages of the people, the trifling accessories of ladies' toilets, or the medicines of the sick. When the Legislature designs to tax the sale of these things, it will have no difficulty in finding clear words to include them.

The verdict is imperfect, and we can give no judgment on it. There must be a *venire de nova*. Let this opinion be certified.

PER CURIAM. *Venire de nova.*

Cited: S. v. Blue, 84 N.C. 809; *S. v. McIver,* 88 N.C. 688; *S. v. Bray,* 89 N.C. 481; *S. v. Bloodworth,* 94 N.C. 121; *S. v. Giersch,* 98 N.C. 728, 729; *S. v. Gadberry,* 117 N.C. 820; *S. v. Hanner,* 143 N.C. 635.

(124)

STATE v. DECATUR BRYANT.

If A borrow of B a horse, with the felonious intent to deprive B of it, and to appropriate it to his own use, and does so, he is guilty of larceny. If A borrow of B twenty dollars with the same intent, it is not larceny, but fraud. But where, upon an indictment for the larceny of money, the defence relied upon was, that the prosecutor had voluntarily loaned the money to the defendant, and the transaction alleged to be a loan was left to the jury under the charge of the court: "that if the jury found that the borrowing was in good faith, and the money was voluntarily loaned, they should acquit the prisoner; but if the act of the defendant was but a trick or contrivance to get possession of the prosecutor's money, and the defendant borrowed the same with the intent at the time to steal it, it would be larceny," and the jury returned a verdict of guilty: *Held*, that there was no error.

INDICTMENT for LARCENY, tried before *Schenck, J.*, and a jury at Fall Term, 1875, of MECKLENBURG Superior Court.

The evidence in the case was substantially as follows:

One John M. Rankin, the prosecutor, came from the county of Lincoln to the city of Charlotte, and sold his cotton, for which he received two hundred dollars in legal tender notes of the United States. One hundred and eighty dollars of this amount, consisting of nine twenty dollar bills he rolled up in a close package and put in his pocket book. He started home about twelve o'clock, in his wagon, and the defendant, a colored man, overtook him about a half mile from town, and upon

his representation that he was just from Monroe, was tired, and had to be at Yates' Factory that night, which was about eighteen miles off, he was permitted to ride. The defendant soon presented some cards, and endeavored to get the prosecutor, who was a feeble old man, and very nervous, to bet on the cards, and draw one, which he refused to do. The wagon then came to the edge of a thicket, when one Aiken, another colored man, and a co-defendant in this indictment came up and addressing the prosecutor, asked him for some tobacco, (125) which the prosecutor refused to give him.

Bryant then said to Aiken, "Stranger, won't you draw a card?" Aiken then drew twice, but did not draw the prize card. Bryant then said, "Stranger, I'll bet you this old man in the wagon, can draw the prize card," and desired the prosecutor to bet, which he refused to do. Bryant then said he would bet, and the prosecutor must lend him twenty dollars and draw for him. The prosecutor then took out his pocket book and the defendant then put his arms around him and drew him around to the other side of the wagon, from where the prosecutor's son and Aiken were. At this time, Segrave, a white man, and also a defendant, came up on the other side of the wagon, and Bryant, addressing him said, "Hello! stranger, I want you to hold stakes." Then turning to the prosecutor, he said, "Old gentleman, you are very feeble, I will help you," and slipped one of his hands under the pocket book and unrolled the money, a part which the prosecutor felt go out of his hand. When Bryant got the money he gave one twenty dollar bill to Segrave, to hold and asked the prosecutor to draw a card for him, which the prosecutor did. Bryant then said, that was not the right card, and Segrave gave Aiken the money. Segrave, Aiken and Bryant then made off. There were five twenty dollar bills taken, instead of one twenty dollar bill. The prosecutor did not discover this until the next day. The prosecutor swore that he never consented to lend the twenty dollar bill to Bryant, but that he did not resist his taking it. It was in evidence that Aiken and Bryant fled to Rock Hill, S. C., and were arrested and brought back to Charlotte. It was also in evidence that Bryant, Aiken and Segrave lived in Charlotte and knew each other. That Bryant and Segrave lived in one hundred and fifty yards of each other, and that Aiken lived very near to Segrave, in that part of the city known as "Five Points." That on the morning of the day on which the occurence took place, all the defendants were seen lying down together, near a spring about three hundred yards from where the alleged larceny was com- (126) mitted. That the defendants Bryant and Aiken were seen passing backwards and forwards on the road that morning, and that Aiken and Segrave had been seen together, often on the road.

The defendants's counsel asked the court to charge the jury:

1. That if the jury believed that the prosecutor, Rankin, loaned the twenty dollars to Bryant, to put up as stakes in the bet with Aiken, this would not be larceny.

2. If the prosecutor permitted Bryant to take the money without objection; that this amounted to consent on the part of the prosecutor, that he could take the money.

The court, after summing up the testimony and defining what larceny was, and what constituted a felonious intent, to which there was no objection, stated that larceny might be committed by taking property directly from another's possession, or if one gets possession of another's goods by trick or contrivance, and if the act be done in such a way as to show a felonious intent to evade the law, he would be guilty of larceny. That it was true, if one voluntarily lends money to another, or permits him, knowingly, to take it without objection, it would not be larceny. If the borrowing was in good faith, and if you believe this money was so borrowed, the defendant would not be guilty. But if the getting on the wagon, exhibition of the cards, meeting of the parties, and the other acts of the defendants was a trick or contrivance between the parties, to get possession of the prosecutor's money, and Bryant borrowed the money in this way, with the intent at the time to steal it, it would be larceny; and if the other defendants were present aiding and abetting, they are guilty.

The court also used the following language: "This is not an ordinary case of larceny, with which the defendants are charged. The State alleges that it was committed by a trick or contrivance." The
(127) court further instructed the jury, that it was the duty of the State fully to satisfy their minds of the allegations contained in the bill of indictment, before they could convict.

The jury rendered a verdict of guilty as to all of the defendants. Whereupon the defendant, Bryant, moved for a new trial, on the ground that the court erred in refusing the special instruction prayed for, and on the further ground that the court, in its charge to the jury, intimated an opinion that a larceny had been committed.

The motion was overruled. Judgment and appeal.

Jones & Johnston, for the prisoner.

Attorney General Hargrove, for the State.

READE J. Larceny is so subtle that it is difficult to say; it is this, and nothing else; or this is it, and nothing else. It is liable to be confounded with fraud and trespass.

If A borrow a horse from B with the felonious intent to deprive B of it, and to appropriate it to his own use, and does so, A is guilty of larceny. But if A borrow of B twenty dollars with the same intent, it is not larceny, but it is fraud.

This distinction is settled by the authorities. It is satisfactorily treated in *Welsh v. People*, 17 Ill., 339, and the cases there cited.

The reason for the distinction is, that in lending the horse, the owner expected the return of the same horse and did not part with the *title;* the property remained in him. And therefore, when the borrower, subsequently, feloniously converted the horse, it related back, and was a theft from the beginning. But when B loaned the *money* he parted with the *title*, and did not expect the return of the same money, (unless loaned with that express understanding) but made it a *debt*, which the borrower might pay with any other money. And therefore, this was fraud and not larceny. That distinction is the defence (128) relied on in this case.

It is insisted that the prosecutor loaned the defendant the twenty dollar bill, and thereby *voluntarily* parted with the *possession* expecting it to be returned in kind; but with the *title*, and that the defendant having by contract acquired the *title* to the bill, as well as the possession, did not by what subsequently passed, steal, take and carry away the *property* of the *prosecutor.*

It must be conceded that if the prosecutor *loaned* the defendant the bill, then the defendant is not guilty of *larceny*, of whatever else he may be guilty. But put the most liberal construction upon the whole transaction for the defendant, and there is not a single feature in it that looks like a contract, nor a particle of testimony that tends to show it, and but for the fact that juries are very safe judges of such matters, it would seem to be trifling with the administration of justice to have left the question to the jury. His Honor might very well have told the jury that there was *no* evidence of any contract of lending.

The prosecutor was a feeble, nervous old man, going home from market in his wagon with a considerable amount of money. It is natural that that fact should have made him timid. The defendant, a colored man, overtakes him, and is permitted to get into his wagon and ride, pulls out cards and proposes to gamble, which the old man refused to do. That was calculated to alarm him. They get to a thicket, when another colored man, Aiken, comes up and asks the old man for tobacco, which he refuses to give him. The defendant addresses Aiken as "stranger," and proposes to gamble with him, and they do gamble. Defendant then says, "stranger, I will bet you this old man in the wagon can draw the prize card." And he proposes for the old man to bet, which he refuses to do. The defendant then says to the

old man, "you must lend me twenty dollars and draw for me." The old man takes out his pocket book, but does not show his money.
(129) The defendant put his arms around him and draws him around to the other side of the wagon. At this time a third man, white, comes up and defendant says, "Hallo, stranger, I want you to hold stakes." He then takes hold of the old man's pocket book, which the old man holds on to, unrolls the money, the old man feels some of it go out of his hands; he does not know how much; (it turns out to be five twenty dollar bills;) the defendant hands one twenty dollar bill to the third man to hold; tells the old man to draw a card for him, which he does; defendant pretends to have lost the bet; directs the stake holder to hand over the money to Aiken, and they all three make off together and leave the old man in the road. The old man was examined as a witness and swore that he did not lend the money, but he did not resist the taking.

That was the transaction; those were the facts. Now when the facts are ascertained, whether they amount to a contract is usually a question for the court. And yet in the greatest liberality to the defendant, it was left to the jury to say whether the old man did not *voluntarily lend* his money to those three highwaymen, all of whom were strangers, who had stopped him on the highway in a thicket, and by unmistakable conduct showed that they meant to have his money. When he refused to bet or play, and the defendant said to him, "Well, if you won't bet you must lend me the money," if he had handed him the money it could not be tortured into a *voluntary* loan. But he did not do that. He took out his pocket book, but held on to it, showing his unwillingness to part with it as long as it was safe to keep it. But the defendant took him in his arms and carried him to the other side of the wagon, (Showing him completely the old man was at his mercy,) took hold of the pocket book and took out the money, the old man feeling it pass out of his hand. And because the old man did not resist him, putting his life in peril, it is left to the jury to say whether it
(130) was not a *voluntary loan.* And that too, when the uncontradicted testimony of the old man is, that it was not a loan but a taking. It is not pretended that there was any conflicting testimony to be reconciled; but it is insisted that from the undisputed facts a loan is implied by the law or might be found by the jury. But we are of the opinion that the undisputed facts make a plain case of larceny.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Lyerly, 169 N.C. 378.

JOHN HALL v. THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY.

Since the adoption of the C. C. P., evidence is admissible in an action on a bond, to prove mistake or fraud in the consideration thereof, for the purpose of reforming the bond in order to show the amount justly due.

Therefore, where a settlement was made between a creditor and debtor, the debtor giving several bonds for the balance due, some at one time and some at another, in an action on the bonds, mistake in the consideration having been alleged by the defendant: *It was held*, that the court below erred in ruling that unless the defendant could show, not only the mistake, but in which particular bond the mistake was embraced, the mistake would not be allowed: *It was further held*, that fraud in the bonds would not render them altogether void.

This was a CIVIL ACTION, tried before *Kerr, J.*, at December Term, 1875, at GUILFORD Superior Court.

The suit was brought to recover the value of certain coupons on bonds of the county of Guilford, issued in pursuance of Legislative authority, which the defendant had refused to pay upon the ground, "that the bonds were issued by mistake, on account of misrepresentation and fraud practiced upon the Board of Commissioners of Guilford County, by the plaintiff, and that such fraud and (131) mistake were not known to the defendant until after the bonds were issued and the interest paid.

The defendant denied that the county of Guilford is indebted to the plaintiff in any sum whatever, except such claims as have been audited by the defendant since the 1st day of September, 1870, the amount of which falls far short of the amount of the bonds held by the plaintiff against the county."

The bonds are of different denominations, ranging from $20 to $500, but all bearing date of July 1st, 1871, drawing interest from that day, but were after that date executed and delivered to the plaintiff at different times, some at one time and some at another.

It was in evidence, that the plaintiff was Treasurer of Guilford County from August, 1868, to September, 1870, and in his settlement with the old Board of Commissioners, received credit for having paid to J. M. Mebane the sum of $193.92, which was allowed in his settlement. It was also in evidence from the records of the Commissioners, that on the 14th day of July, 1870, an order was issued by the Board, on the Treasurer of Guilford County, (the plaintiff being then Treasurer,) to pay W. M. Mebane the sum of $193.82. There was no other order issued in favor of Mebane, except an order for about $3,000 at or near that time. That there was no order of the Board

to pay Mebane any other sum similar in amount to the order for $193.82.

The minutes of the Board show that on the 4th of July, 1870, there was an order to pay Mebane $194.32, and that several other small claims had been audited and allowed in favor of Mebane before that day. The Treasurer's settlement does not show any such amount paid Mebane, only the $93.92. It was further in evidence, that the plaintiff's vouchers were in possession of the defendant.

(132) The defendant insisted that the jury should find as a fact, whether or not the $193.92 allowed the plaintiff, in his settlement as Treasurer, was not the amount for which he had received credit in his said settlement as having been paid to Mebane.

The $192.83 claimed by the plaintiff, and which was payable to Mebane, had been bonded to the plaintiff to the defendant, and constituted a part of the bonds on which the plaintiff claimed interest.

The court refused to allow the jury to consider the question unless the defendant could show in which of the bonds this particular sum was included. It being admitted by the defendant, that they could not show at what time or in what bond said sum of $193.82 was included. His Honor charged the jury that there was no evidence before them going to show in which one of the bonds this amount was included, and unless the defendant could show that they were not entitled to it as a credit.

The defendant requested the court to charge the jury: That if the bonds sued on, or any part thereof, were based on fraudulent claims against the county, known to be so to the plaintiff, but not known to the defendant at the time the defendant issued the bonds and coupons, they are void, and it is not the duty of the jury to separate the good from the bad, but to declare the whole transaction as fraudulent and void.

His Honor declined the instruction prayed for.

To support this prayer for special instructions, it was in evidence that the defendant did not know at the time the bonds were issued, that any part thereof were based upon fraudulent claims, but that the bonds were issued upon claims previously audited by their predecessors, of which board W. M. Mebane was chairman, and that the defendant issued the bonds to the plaintiff from time to time, without examining the books, vouchers and papers in their office.

It was further in evidence that the bonds were issued to the (133) plaintiff by the defendant at different times after July 18th, nor did it appear how many at any one time. That at the time plaintiff went into office he did not have property exceeding a homestead, and personal property exemption, and that his commissions as Treasurer

were paid him by the present Board after his term of office had expired, and to the amount of about $900.00 were invested in the bonds. That he was in comfortable circumstances, and good credit, and could borrow money. That the claims bonded to the plaintiff were some of them for money advanced out of his own means, when in office, to persons holding orders on the Treasurer, and some were for excess of orders so paid and taken up by him beyond the annual county fund levied and not counted in the annual settlement, and some were upon orders bought by him after he had gone out of office.

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

Mendenhall & Staples, for the appellant.
Scott & Cadwell, contra.

READE, J. Before C. C. P., if parties accounted with each other, and the debtor gave the creditor his bond for the balance due, every thing was merged in the bond; and, *at law,* the debtor was not allowed to set up any defence of mistake or fraud in the *settlement* or in the *consideration* of the bond: but if such mistake or fraud were alleged and proved, he could have relief *in equity.* Now, we administer both law and equity in the same civil action. If, therefore, there was mistake or fraud in the consideration of the bonds sued on, the defendants may show it in this action, and have the benefit of it as a consideration, or by way of having the bonds reformed so as to show the amount justly due.

His Honor seems to have recognized this principle; and yet he refused to allow the defendants to prove the alleged mistake. (134)

For the balance found to be due the plaintiff on the settlement, the defendants gave him, not *one bond* for the whole amount, but *several bonds* making up the whole amount; and his Honor held, that unless the defendants could show, not only the mistake, but in which particular bond the mistake was embraced, it could not be allowed. In this we think there was error. The amount of the mistake having been divided up and embraced in several bonds, may involve some calculations to see how much is to be deducted from each. That would seem to be the only difficulty. And probably there need not be that difficulty; as, if the principal and interest now due and claimed by the plaintiff are equal in amount to the alleged mistake and interest thereon, the one may be deducted from the other. And this would approximate if it would not be exact justice between the parties. The interests of the parties to end litigation, may induce the liberality which will secure the result.

This is said upon the supposition there was a mistake, and not as intimating any opinion that there was. That is a question of fact for the jury.

The defendant also made the point, that if there was mistake or fraud, it would avoid the bonds altogether. That is not so. Fraud in the *factum*, which is not here alleged, might have that effect; but not fraud in the *consideration*.

There is error.

PER CURIAM. *Venire de novo.*

Cited: Garrett v. Love, 89 N.C. 208.

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(135)

SAMUEL P. FORSYTHE v. HENRY A. BULLOCK.

In a summary proceeding, under the provisions of the Landlord and Tenant Act, the tenant may set up in his answer any equitable defence which he may have to his landlord's claim; and if such defence involve the title to real estate, a Justice of the Peace has no jurisdiction thereof, and should dismiss the proceedings.

Therefore, where A instituted summary proceedings under said Act against B, who offered to prove that the deed under which the plaintiff claimed title, although executed by himself, and absolute upon its face, was in fact intended as a mortgage, and delivered as such: *It was held,* that upon appeal from the court of a Justice of the Peace, the court below *erred* in excluding evidence tending to show that said deed was intended and delivered to operate as a mortgage, and that the proceeding should have been dismissed for want of jurisdiction in the Justice of the Peace.

This was a SUMMARY PROCEEDING before a Justice of the Peace under the "Landlord and Tenant Act" to get the defendant from the premises claimed by the plaintiff, heard upon appeal before his Honor Judge *Moore,* at July, (Special) Term, 1875, of the Superior Court of GRANVILLE County.

The defendant denied that he rented the premises; and as a further defence alleged that he had executed a deed in fee simple to the plaintiff for the same; that said deed was delivered as a mortgage, and that he had made large payments thereon. Upon this allegation the defendant moved to dismiss the proceeding, on the ground that a Justice of the Peace had not jurisdiction, because the title to the real estate was in controversy.

The motion was overruled and judgment rendered for the plaintiff, whereupon the defendant appealed to the Superior Court.

Upon the trial of the cause in the Superior Court the motion was again made, upon the same ground and was overruled by his Honor.

The defendant offered to prove that the said deed, although (136) upon its face purporting to be an unconditional conveyance, was in fact intended as a mortgage for money borrowed. The evidence was conflicting as to whether or not the defendant had rented the premises from the plaintiff.

His Honor being of the opinion, that if the deed was in fact intended as a mortgage, the defendant's remedy was by summons for relief, to reform the deed, rejected the evidence upon that point and the defendant excepted.

The jury returned a verdict in favor of the plaintiff, whereupon the defendant moved for a *venire de novo.* Motion overruled, and judgment in favor of the plaintiff. The defendant appealed.

Hargrove, with whom was *Venable* for the appellant cited: *McCombs v. Wallace,* 66 N.C., 481; *McMillan v. Love,* 72 N.C., 18; *Green v. Wildar, Ibid.,* 592; *Turner v. Lowe,* 66 N. C., 413; and *Credle v. Gibbs,* 65 N.C., 192.

Edwards, Batchelor & Son, Peace and *Young, contra* argued:

A Justice of the Peace has no jurisdiction of action by purchaser at execution sale against defendant in the execution. *Credle v. Gibbs,* 65 N. C., 192, *Doolin v. Howard,* ..... N. C., 433.

Nor of an action by the purchaser at a sale under a deed in trust against the trustor. *McCombs v. Wallace,* 66 N.C., 481.

Froelick v. So. Ex. Co., 67 N.C., 1, shows jurisdiction of Justices of the Peace in matters of contract:

Has no jurisdiction upon action for deceit in sale of a mule.

Bullinger v. Marshall, 70 N.C., 520; *Lutham v. Rollins,* 72 N.C., 455. But if one takes my horse and sells it, and *receives the money,* I may waive the tort and sue for money had and received to my use, and if the sum does not exceed two hundred ($200) dollars, the jurisdiction belongs to a Justice of the Peace. *Bullinger v. Marshall supra; Winslow v. Weith,* 66 N. C., 432. (137)

No jurisdiction of proceedings of forcible entry and detainer. *Perry v. Tupper,* 70 N.C., 538; *Railroad v. Johnson, Ibid.,* 509; *State v. Yarborough, Ibid.,* 250.

Contract to convey land, plaintiff pays thirty ($30) dollars for outstanding incumbrance to perfect his title. Justice of the Peace has jurisdiction of action to recover this sum. *Templeton v. Summers,* 71 N.C., 269.

Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession, etc. *Greer v. Wilbar,* 72 N.C., 592;

McMillan v. Son, Ibid. 18; Battle's Revisal chap. 64, Sec. 19; Chapter 63, Secs. 16 and 17; Constitution, Article IV, Sec. 33.

Tenant can never dispute his landlord's title until he yields possession. *Abbott v. Cromartie,* 72 N.C., 294; *Turner v. Lowe,* 66 N.C., 413.

A Justice of the Peace having jurisdiction to try the principal question, has jurisdiction to try every incidental question which may arise in the progress of the action. *Haines v. Dalton.* 14 N.C., 91; *Garrett v. Shaw,* 25 N.C., 395.

SETTLE, J. A Justice of the Peace is prohibited by the Constitution from entertaining jurisdiction of any action wherein the title to real estate shall be in controversy.

This does not conflict with any of the decisions, where it has been held, that a lessor may take summary proceedings before a Justice of the Peace, to recover possession from a lessee who holds over after the expiration of his term, where there is no other relation than that of lessor and lessee to complicate the question, for in such cases the tenant is estopped to deny the landlord's title.

But, as is said in *Turner v. Love,* 66 N.C., 413, a tenant might always show an equitable title in himself against the legal title of his landlord, or any facts which made it inequitable in the land-
(138) lord to use his legal estate to turn him out of possession.

In the case at bar, the defendant offered to prove that the deed for the premises, made by him to the plaintiff, although on its face purporting to be a conveyance in fee simple, was in fact intended as a mortgage, to secure the payment of borrowed money, and was delivered as such, and that he, the defendant, had made large payments thereon. His Honor, being of opinion that, if this defence was true, the proper remedy for the defendant was by summons for relief to reform the deed, rejected the evidence.

In *Turner v. Love, supra,* it is said when law and equity were administered by distinct tribunals, the tenant was obliged to go into a Court of Equity for that purpose. But now, that they are administered by the same court, and without any distinction of form, the tenant can set up in his answer any equitable defence he may have to his landlord's claim. If such a defence cannot be set up in the Superior Court, it cannot anywhere, for we have no separate Court of Equity. Our conclusion is:

1. That his Honor should have dismissed the proceedings for want of jurisdiction in the Justice of the Peace, before whom they were instituted.

2. That the evidence offered by the defendant was competent to show that it was not the simple case of lessor and lessee, which is embraced by the landlord and tenant act.

There must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: Heyer v. Beatty, 76 N.C. 32; *Foster v. Penry,* 77 N.C. 161; *Davis v. Davis,* 83 N.C. 74; *Nesbitt v. Turrentine,* 83 N.C. 537; *Hughes v. Mason,* 84 N.C. 474; *Shew v. Call,* 119 N.C. 453; *Houser v. Morrison,* 146 N.C. 250; *Lawrence v. Eller,* 169 N.C. 214; *Timber Co. v. Yarbrough,* 179 N.C. 340; *Hargrove v. Cox,* 180 N.C. 362, 363; *Realty Co. v. Logan,* 216 N.C. 27; *Simons v. Lebrun,* 219 N.C. 46.

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(139)

WILLIAM J. EXUM v. DANIEL COGDELL AND OTHERS.

One who has title to land is not estopped from asserting the same against a purchaser from a third party for a valuable consideration, but with notice of the defect in the title of the vendor, although the vendor claim title under the real owner.

CIVIL ACTION, in the nature of ejectment, tried before *Seymour, J.,* and a jury, at Fall Term, 1875, of WAYNE Superior Court.

The action was commenced May 19th, 1872, by the plaintiff against Z. L. Thompson, to recover possession of thirteen acres of land. At Fall Term, 1872, Daniel Cogdell, assignee in bankruptcy of Z. L. Thompson, was made a party defendant. (The Register's deed in bankruptcy bears date February 25th, 1869, and was registered in Wayne County January 20th, 1873.)

The *locus in quo* was, at the commencement of the action and still is, in the possession of the defendant Thompson. The plaintiff produced in evidence a judgment and execution against the defendant Thompson, returnable to May Term, 1868, of Wayne County Superior Court, under which the sheriff sold the "George Thompson old place," May 20th, 1868, to the said R. T. Fulghum, and a sheriff's deed, duly registered to the said R. T. Fulghum, which included the *locus in quo,* and also a deed, including the same, dated October 17th, 1868, from Fulghum to the plaintiff.

It was in evidence for the defendant, and admitted by the plaintiff, that the sheriff did not levy upon and sell the *locus in quo,* and that the deed as originally made to Fulghum did not cover it, but that subsequent to the registration of the same, at the request of both Fulghum

and the defendant Thompson, a description of the *locus in quo* was interlined by the sheriff in the deed and by the register of deeds (140) in his record of the conveyance.

The defendant Thompson was insolvent at the time of the sheriff's sale.

The plaintiff bought of Fulghum after the interlineation, for a valuable consideration, at the instance and request of the defendant Thompson, and has subsequently with the assent of Thompson, by contract dated January 12th, 1870, contracted to convey fifty acres of the land conveyed by the sheriff's deed, including the *locus in quo,* to one Dr. Exum. It was a part of this contract that Dr. Exum should convey the fifty acres to the defendant Thompson upon being repaid the purchase money.

The above stated facts being conceded, there was a conflict in the evidence as to whether the plaintiff purchased of Fulghum with notice of the interlineation, and upon that question the following issues were submitted to the jury:

1. Did the plaintiff, W. J. Exum, at the time of purchasing the thirteen acres now in controversy, have notice of the interlineation in the sheriff's deed?

2. Did he have notice that the sheriff did not offer and sell said land at his sale?

To both of these issues the jury responded in the affirmative.

The plaintiff introduced in evidence the record of a former action, in which the plaintiff in this action was defendant, and the defendant was plaintiff, and insisted that, that action was conclusive against the defendant in this action, by way of estoppel. This action is reported in 69 N. C., 464, under the title of *Cogdell, Assignee. v. Exum.* The defendant in that action contended that the complaint did not cover the *locus in quo* and the plaintiff contended that it did. Both parties agreeing upon what was the land covered by the description in the complaint, and the difference being one of construction merely, the court passed upon it as a matter of law, and decided that the (141) *locus in quo* in this action was in controversy in the former action, but held that the defendant in this action was not estopped by the record, for the reason that, as appears by the opinion of the Supreme Court the case went off upon a defect which precluded an inquiry into the merits.

Upon these facts the plaintiff insisted that the defendant was estopped from denying his title.

The court held that the sheriff's deed did not convey the *locus in quo* to plaintiff's assignee:

1. Because the sheriff never sold it; and 2, Because the sheriff's power was exhausted when he gave the first deed; and that the defendant was examined as a witness for the defence, and testified that of any misrepresentation of the defendant, but upon his own judgment, with a full knowledge of all the facts.

The following question of evidence arose upon the trial: The defendant was examined as a witness for the defence, and testified that he told the plaintiff before his purchase from Fulghum, of the interlineation. Upon the cross-examination the plaintiff's counsel asked the witness, if he had put his interest in the *locus in quo* in his schedule in bankruptcy. This question was objected to on the ground that the schedule must be produced. The plaintiff contended that it was admissible as a collateral impeaching question.

The court sustained the objection, ruling that, before the witness could be examined as to the contents of a writing signed by himself, the writing must be shown to him, and because the question was not as to the existence, but as to the contents of the schedule.

Judgment was rendered in favor of the defendant, and thereupon the plaintiff appealed.

Smith & Strong, for the appellant.
Faircloth & Grainger, contra.

SETTLE, J. The plaintiff contends that the defendants are (142) estopped to deny his title.

1. By a judgment in a former action, in which the present plaintiff was defendant and the present defendants were plaintiffs; reported in 69 N. C., 464.

2. That the defendants are estopped by matter *in pais;* towit: the procuring of the Sheriff and the Register of Deeds, by the defendant Thompson and the purchaser, Fulghum, to so alter his deed as to embrace the land now in controversy, although the same had not been levied upon, nor sold by the Sheriff; and the conduct of the defendant, Thompson, in inducing the plaintiff to buy of Fulghum and sell to Dr. Exum.

A judgment to constitute an estoppel must be final, and upon the merits. It is not the recovery, but the *matter alleged* by the party, and *upon which the recovery proceeds* which creates the estoppel. Bigelow on Estoppel.

By reference to 69 N. C., 464, it will be seen that, that action, in the language of his Honor in the Superior Court, "went off upon a defect which precluded an inquiry into the merits."

In *Holmes v. Crowell,* 73 N. C., 613, it is said, "in order to create an estoppel *in pais,* it must appear:

1. That the defendant knew of his title.

2. That plaintiff did not know and relied upon the defendants' representations.

3. That the plaintiff was deceived."

In the case it appears, either by admission or the findings of the jury, that the plaintiff knew all the material facts in regard to the title, and could not have been deceived by misrepresentations of the defendant. In fact, he knew that he was purchasing under a deed which did not originally embrace the *locus in quo,* and which had been vitiated by alteration.

As to the question of evidence: If the purpose of the plaintiff, in asking the defendant, Thompson, upon his cross-examination, "if he had put his interest in the *locus in quo* into his schedule in (143) bankruptcy," was to impeach him on a collateral point, he had not laid the proper foundation for doing so, and it was immaterial; for how could his answer, one way or the other, affect the rights of the defendant, Cogdell, who, as assignee in bankruptcy, represented all creditors.

Indeed, if the defendant, Thompson, had been estopped by matter *in pais,* it would not necessarily have followed that Cogdell, who represents creditors, would have also been estopped.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Johnson v. Woody, 76 N.C. 399; *Melvin v. Bullard,* 82 N.C. 40; *Loftin v. Crossland,* 94 N.C. 83; *R. R. v. McCaskill,* 94 N.C. 754; *Bank v. Winder,* 198 N.C. 21.

STATE v. WILMINGTON & WELDON RAILROAD COMPANY.

The provisions of the act of 1837, Bat. Rev., chap. 104, sec 36, do not apply to Railroads, etc., constructed before the time of its passage.

The proviso to the 27th section of the charter of the Wilmington and Weldon Railroad Company does not require that company to make and repair bridges, made necessary by roads laid out subsequent to the construction of said railroad.

INDICTMENT, for a nuisance in not keeping up a proper bridge over a highway, tried before his Honor, *Judge Kerr,* at February Term, 1875, of NEW HANOVER Superior Court.

The jury returned a special verdict, which responding to many issues not discussed upon the appeal, is not wholly inserted in this statement. Those facts pertinent to the issues decided, are fully set out in the opinion of the Court.

His Honor, in the court below, from the finding of the jury, ruled that the defendant was not guilty. From this ruling the State appealed.

Attorney General Hargrove, for the State. (144)
Wright & Steadman, for the defendant.

BYNUM, J. The facts of the case, as found by the special verdict, are, that the defendant company, was incorporated by the Legislature of the State, at its session of 1833-4, and constructed its road and made a cut at the point in question, in the year 1835. This cut was outside of the corporate limits of the city of Wilmington, as it then existed; it is 47 feet wide, 18 feet deep, and 400 yards long. In 1835, when the railroad was first constructed, there was no public road or highway, at said point, to be intersected by the railroad, and the defendant Company then built a bridge at this point, over the cut, and kept it up until 1860, since which time the bridge has been used by the public.

In the year 1849, the corporate limits of the city were enlarged by an act of the Legislature, and Fourth Street was extended to and across the railroad, at the point in question, and has been, since that time, a public way, established by law.

The bridge in question was rebuilt by the defendants in 1860, and at that time it was sufficient to accommodate the public and afford them a free passage; but since that time the population of the city has greatly increased, and at the finding of the indictment, it was and still is insufficient, as constructed to accommodate the public, by reason of its *narrowness*, and the free passage of travellers over said bridge and along said public highway was, and still is thereby impeded. The bridge is 18 feet and 9 inches wide between the hand-rails.

The indictment charges the defendant company with the commission of a nuisance, in omitting to build a wider and sufficient bridge across their railroad, where it is intersected by the public highway. It is found and not disputed, that the highway was laid out and opened *after* the railroad was constructed; but it is insisted by the State that the defendants are guilty upon two grounds, to-wit: First by the general law; and second, by the charter of the Company. (145)

1. The right of laying out the street and highway across the railroad is conceded, and the enquiry is, whether the city corporation,

or the defendant Company is bound to construct and maintain the the wider bridge. By the common law as well as by our statute, Bat. Rev. chap. 104, Sec. 1, the duty of making and repairing public bridges devolved upon the counties, unless some other persons or bodies were made liable by some special obligation. 2 Inst. 701; 2 East, 342: But the State insists that this special obligation to make and repair this bridge as required, devolves upon the defendants by virtue of the 36th Sec. of chap. 104 of Bat. Rev. which provides that "railroad companies, plank road and turnpike companies, each shall keep up at their own expense, all bridges on or over county or incorporated roads, which they have severally made necessary to be built in establishing their respective roads." To this the defendants reply, true, but this act was passed in 1838, three years after the construction of the railroad, and therefore cannot make that criminal which was innocent when done. But by the rule for construing statutes, especially penal statutes, the act applies only to railroads *thereafter* to be built, in the building of which it may become necessary to intersect or interfere with a public highway then existing. If the act in direct terms, had applied to railroads previously constructed and in operation, an interesting question as to the extent of the police power of the State, as affecting railroad charters would have been presented.

2. The State next insists that the obligation to build and maintain the bridge in question is devolved upon the defendant Company by virtue of the 27th section of their charter. That section enacts: "That it shall be lawful for the said Company in the construction of said road to intersect or cross any public or private way established by law, and it shall be lawful for them to run their road along the route of any of said roads; *Provided,* That whenever they intersect (146) or cross said public or private roads, the President and Directors shall cause the railroad to be so constructed as not to impede the passage of travellers on the public road, or private way aforesaid; and whenever the railroad runs over and along with such common road or way, the president and directors shall cause the new common road, (which shall be laid out by order of the County Court upon the petition of said president and directors) to be opened at their expense."

It is unnecessary to consider whether this *proviso* includes the building of bridges or not, for without the *proviso* at common law, the obligation would be imperative upon the company to build bridges over highways intersected by them, whenever such bridges are necessary; and the omission to build them, would obstruct the highway. The true question, whether this *proviso,* superadds to the duties imposed by the common law, the obligation to make and repair bridges, made

necessary by roads laid out, subsequent to the construction of the *railroad*. We do not think it does.

The language of the 27th section of the chapter, is not stronger than, or as strong as that used in Bat. Rev. chap. 104, Sec. 36, before cited, which we hold to be clearly insufficient to charge the defendants, The obvious purpose, both of the general law and the proviso, was that these railroad companies in regard to highways, should as far as possible, leave them as they found them: when they obstructed a passage along them, they had to furnish a new one. In our case, the highway was laid out in 1849, or fourteen years after the construction of the railroad. No public road was in existence at that place, when the railroad was built, and therefore no highway was obstructed by the act of the defendants. To give the 27th section of the chapter, the construction insisted upon by the State, would be to extend the meaning of the language used, beyond its fair and natural import, without any adequate reason; for the contrary construction does not deprive the public of the right to have the road or bridge, whenever the necessity requires, but at most, the question is, who shall (147) incur the expense of altering the bridge, the company which built its road long anterior and in pursuance of law, or the city corporation whose growing prosperity demands an enlargement of its boundaries, and new and larger avenues of travel and trade. The burden, we think, should fall on the latter.

The very question raised here, was made and decided in *The Morris Canal & Banking Co. v. The State*, 4 Zabriskie, 62. The indictment was for not keeping in repair a certain bridge over the canal of the defendants, where the same crossed a public highway, in the county of Passaic, and was founded on the 12th section of their charter, which enacts, "that when the canal shall cross any public road or farm, it shall be the duty of said company, at their proper expense, to make good and sufficient bridges, across said canal, and to keep the same in repair," etc. The facts were agreed upon, of which the only one material to the question upon which the decision is given was, that the public highway in question was laid out after the canal was constructed. The court held, that neither by the principles of the common law, or by their charter, was the company compelled to make and maintain such bridges.

3. Our case states that in 1860, after the street had been established by law across the railroad, at the bridge, the defendants rebuilt the bridge, and that it has been ever since used by the public. Without any explanation, this is a clear dedication of the bridge to the public use. Where the intention of the owners to dedicate the bridge to the public is evident, no former or official acceptance is necessary to con-

stitute it a public bridge by dedication. *Buchanan v. Curtis,* 25 Wis., 99. But it is the dedication of the bridge as constructed, towit, 18 feet, 9 inches wide. The defendants have made no dedication of a bridge of a different character or dimensions, and are under no obligations to vary and enlarge their bounty to suit the subsequent varying (148) wants of the public. Whether the defendants are bound to repair and keep up the bridge as now constructed, is a question not raised in the case, and which we do not decide. The bridge appears to have been built, originally, as well for the benefit of the defendants as the public. Certainly the deep cut made by the defendants, became a serious public inconvenience, and in consideration thereof, it may perhaps be assumed, that the defendants undertook to and did dedicate the bridge to the public, coupled with the obligation to keep it in repair. The fact that they have rebuilt the bridge and kept it in repair, to the present time, supports this view, but we do not decide the point. The defendants are indicted for not *widening* the bridge so as to afford a free and convenient passage for the increased public travel, and our decision is that they are not bound to do so.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. JERRE RORIE AND PATSY RUSHING.

A prisoner under arrest, on his preliminary examination, was told by the committing magistrate that "he was charged with selling stolen corn, and that if he wanted to tell anything, he could do so, but it was just as he chose:" *Held,* that the statement then made by the prisoner, and reduced to writing by the magistrate, was not admissible in evidence on the trial in the Superior Court; for the reason that the prisoner had not been cautioned as provided for in sec. 23, chap. 33, Bat. Rev., and had not been sufficiently put on his guard.

That the statement of the prisoner was in the nature of a denial, and not a confession, made no difference, and it was not for the State to say that such declaration did not prejudice the prisoner's case.

This was an INDICTMENT for *Larceny,* and receiving stolen property, knowing it to be stolen, tried before *Buxton, J.,* at Fall Term, 1875, of RICHMOND Superior Court.

(149) The bill of indictment was found at Fall Term, 1875, of Anson Superior Court, and, upon the affidavit of the prisoner, removed to Richmond County.

There were several exceptions taken to the rulings of his Honor in the court below, but as the case, as decided in this court, turns upon a single point they are omitted.

During the progress of the trial, one Redfearn, the prosecutor, testified, among other things, that after the witnesses were examined before the committing Magistrate, the defendant then made a statement which was taken down in writing by the Magistrate. The Solicitor here proposed to read in evidence the statement made by the defendant and certified by the Magistrate. The counsel for the prisoner objected on ground that the statement was in the nature of a confession, and that the prisoner had not been warned by the committing Magistrate as to his rights, and especially because the prisoner had not been informed that his failure to make any statement should not be used to his prejudice. The Solicitor insisted that the prisoner had been sufficiently put upon his guard, and that the statement was rather in the nature of a denial, than a confession.

The evidence as to the caution given by the Magistrate, was as follows: "When Jesse was arrested he was carried before J. T. Redfearn, J. P., who told him that he was charged with selling stolen corn, and that if he wanted to tell anything he could do so, but it was just as he chose."

The statement, offered in evidence, was as follows: "Jesse Rorie states that he sent one-half bushel of corn to Hornsboro,' and sold corn only one time at Hornsboro,' that being one bushel out of carts which he got from Jesse Duren. He says he might have said he did not send the corn to Redfearn's "by the boys."

His Honor overruled the objection, and the prisoners excepted.

There was a verdict of guilty as to both of the defendants. Whereupon the defendants moved the court for a new trial. (150) Motion overruled. Judgment and appeal.

Walker, for the prisoners.

Attorney General Hargrove, for the State.

SETTLE, J. "At the commencement of the examination, the prisoner shall be informed by the Magistrate that he is at liberty to refuse to answer any question that may be put to him and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings." Bat. Rev., Chap. 33, Sec. 23.

In the case at bar, when the prisoner was brought before the Magistrate, he was told by that official that "he was charged with selling stolen corn, and that if he wanted to tell anything he could do so, but it was just as he chose."

Was this a compliance with the statute? We think it was not. It is essential that judicial confessions be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession; and if the prisoner does not feel at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary. I Greenleaf, Ev., Sec. 225.

It was the duty of the Magistrate to inform the prisoner that his refusal to answer should not be used to his prejudice in any stage of the proceedings.

This caution is not a mere matter of form, it is a substantial right, necessary for the protection of prisoners who are too poor to employ counsel, and too ignorant to conduct their own defence.

In the language of this Court in the *State v. Matthews*, 66 N.C., 106, "this caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence."

But the State says this was a denial of guilt, and not a con-
(151) fession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution?

The use which was made of the prisoner's statement precludes the State from saying that it was not used to his prejudice.

There must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: S. v. Spier, 86 N.C. 601; *S. v. Conrad,* 95 N.C. 669.

STATE v. P. H. HODSON AND OTHERS.

Where one, against whom an offence is alleged to have been committed, had not been endorsed as prosecutor upon the bill of indictment, the court has no authority, after indictment found and a *nol. pros.* entered, to endorse such person as prosecutor, without his consent, and thus subject him to the cost of the prosecution, notwithstanding the Solicitor had admitted that such prosecution was frivolous and malicious.

This was a MOTION in the cause heard before *Kerr J.*, at Fall Term, 1875, of GUILFORD Superior Court.

The defendants were indicted for a forcible trespass upon the lands of James Lowe and Daniel Lowe.

At December Term, 1874, on motion of the counsel for the defendants, upon the admission of the Solicitor that the indictment was frivolous and malicious it was ordered by the court that James Lowe and Daniel Lowe be endorsed as prosecutors upon the bill of indictment. After this order was made, and when the case was called for trial, the Solicitor entered a *nol pros.* (152)

The counsel for the defendants thereupon moved the court to tax the prosecutors with the cost of the action, and at the request of the court filed a certificate as to the materiality of certain witnesses summoned and in attendance, in behalf of the defendants. Upon the hearing the motion was allowed by the court.

At a subsequent day, during the same term of the court, the prosecutors came into court, and by their counsel moved that the order taxing them with cost be re-considered until they were further heard.

The motion was allowed by the court, and at Fall Term, 1875, the motion was again heard, when it was insisted on the part of the prosecutors that his Honor was not authorized to make the order upon the following grounds:

1. That the witnesses certified by counsel to be material and necessary for the defence were not examined, and therefore the court could not know that the prosecution was malicious or frivolous.

2. That the court had no authority in law to adjudge the witnesses of the defendants, material and necessary, upon the certificate of counsel merely, the witnesses never having been sworn or tendered.

His Honor permitted the prosecutors to introduce evidence touching the facts connected with the alleged trespass, which evidence was replied to by evidence on the part of the State.

The court declined to vacate the order theretofore made and confirmed the same, whereupon the prosecutors appealed.

Dilliard & Gilmer and Tourgee, for the appellants.
Attorney General with whom was Morehead, for the State.

READE J. Before the adoption of our present Constitution a defendant in a criminal prosecution was obliged to pay his costs whether convicted or acquitted. That was thought to be hard, (153) and so our Constitution is careful to provide that no one shall be compelled to pay costs in a criminal prosecution against him "unless he be convicted." Art. 1, Sec. 11. This was much relied on by defendant's counsel. After thus guarding the rights of *defendants*, it would be strange to carelessly inflict the costs upon *someone else*, without conviction. We must avoid Scylla as well as Charybdis. And yet in this case the defendants were indicted, a true bill found, *nol pros*

entered, and the prosecution admitted to be frivolous and malicious by the Solicitor for the State, whereupon the court ordered the persons against whom the offence was alleged to have been committed, to be endorsed as prosecutors, and on motion of the defendants ordered the prosecutors, so endorsed to pay the costs of the defendants. They had not been endorsed as prosecutors on the bill of indictment; it does not appear that they were witnesses; or that they had notice of the motion to endorse them as prosecutors, or to make them pay costs. There was no trial from which the court could see from the part they took, whether they were prosecutors, but the action of the court was based upon the admissions of the Solicitor and the motion of the defendants. At least so it appears from the record before us. It is true that at a subsequent day of the term the prosecutors came into court and asked that the proceedings against them might be reconsidered and the order vacated. The court did reconsider but refused to vacate. And so, these persons were made prosecutors without their knowledge or consent, and fixed with the stigma of a malicious prosecution and a bill of cost upon the "admissions" of the Solicitor.

There is no doubt that the court may, in a proper case, make the prosecutor pay the costs. But it has first to be determined who is the prosecutor? The Solicitor says that A is the prosecutor; A denies it—how is it to be determined? Examine the bill. If he is "marked on the bill," then he is prosecutor; otherwise not. C. C. P., Sec. (154) 560; Acts 1874-'75, Chap. 247. Just as we determine who is plaintiff in a civil action. Not only is that the plain letter of the statute, but it has been decided in two cases in this court. *State v. Lupton,* 63 N. C., 483; *State v. Darr,* 63 N. C., 516.

It would seem that no person ought to be endorsed as prosecutor, with a view to his liability for costs, without his consent. No harm can grow out of this, because the Solicitor may refuse to send a bill unless he will consent to be endorsed, and may abandon the prosecution at any time. And whether he is endorsed or not, he is liable to a civil action if the prosecution be malicious, when, of course, he can put in issue the fact whether he did prosecute or not. If, however, one may be made prosecutor without his consent, an innocent man may be put in jeopardy, not, of course, by the wilful wrong of the Solicitor, but by his mistake.

This will be certified, to the end that the order may be vacated and the appellants discharged.

PER CURIAM. Judgment accordingly.

Cited: S. v. Crosset, 81 N.C. 582; *S. v. Adams,* 85 N.C. 561.

(155)

OWEN M. ALLEN AND WIFE v. WILLIAM J. BOWEN AND OTHERS.

A limitation by deed of "a tract or parcel of land lying and being in the upper part of the C. L. tract, which we have drawn agreeable to the division that has been made, and if said division shall not stand, the understanding is that we sell all the right, title and claim that we have in the lands of L. R., deceased, unto the said W. B. of the second part, and by these presents hath bargained and sold and conveyed our land or right aforesaid, which we do warrant and forever defend. And we, T. P. and E. P. his wife, doth for themselves, their heirs and assigns forever, clear of all encumbrances whatsoever," is clearly intended to convey, and does convey an estate in fee simple to the bargainee.

CIVIL ACTION in the nature of *Ejectment*, tried before his Honor *Judge Moore*, at Fall Term, 1875, of the Superior Court of WASHINGTON County.

The following are the facts, as agreed upon and sent up as a part of the record, upon appeal to this court:

The only question involved arose upon the construction of a deed dated the 16th day of October, 1846, between Thomas A. Pritchett and Elizabeth Pritchett, his wife, of the first part, and William Bowen, Sr., of the second part.

By said deed Pritchett and his wife, in consideration of the sum of one hundred and twenty five dollars paid by Bowen, sold and conveyed "a tract or parcel of land lying and being in the upper end of the Charles Latham tract which we have drawn, agreeable to the division that has been made, and if said division shall not stand, the understanding is that we sell all the right, title and claim that we have in the lands of Langley Respass, Sr., deceased, unto the said William Bowen, Sr., of the second part, and by these presents hath bargained and sold and conveyed our land or right aforesaid, which we do warrant and forever defend. And we, Thomas A. Pritchett and Elizabeth, his wife, doth for themselves, their heirs, executors, (156) administrators and assigns, forever the land to the said William Bowen, his heirs, executors, administrators and assigns, forever clear of all incumbrances whatever."

William Bowen, Sr., is dead.

It is agreed by counsel, that if the court should be of the opinion that the said deed does not convey the land in fee simple to William Bowen, Sr., then the plaintiffs are entitled to a verdict and judgment for possession, sixpence damages and costs. If the court should be of opinion that the said deed passes an estate in fee simple to the said William Bowen, Sr., then a verdict and judgment is to be entered for the defendants.

The court being of opinion that the deed did not pass a fee simple to Bowen, rendered judgment for the plaintiffs according to the case agreed, from which judgment the defendants appealed.

Walter Clark, for the appellants.
Smith & Strong, contra.

BYNUM, J. The intent to convey the fee simple is clearly expressed and is not denied, and the only question submitted for our decision is, whether the deed conveys a fee simple, as was intended, or only a life estate. It is the duty of the court to give the deed such a construction as will carry out the intent of the parties to it, if it can be done according to the rules of construction which have been adopted by the court. The facts of the case are so like *Phillips* and wife *v. Thompson* and wife, 73 N. C., 543, that it is only necessary to refer to that case as governing our decision in this. The confusion here, as in that case, is produced by the attempt to incorporate a clause of warranty with the *habendum*. By excluding from the deed, or putting in a parenthesis, that portion of the instrument purporting to make a warranty, the deed becomes intelligible, and though very in-
(157) artificially drawn, it conveys a fee simple estate to the bargainee. See also *Armfield v. Walker*, 27 N.C., 580, and *Phillips v. Davis*, 69 N. C., 117.

There is error. Judgment reversed and judgment for the defendant according to the case agreed.

PER CURIAM. Judgment accordingly.

Cited: Stell v. Barham, 87 N.C. 67; *Staton v. Mullis*, 92 N.C. 626; *Bunn v. Wells*, 94 N.C. 69; *Hodges v. Fleetwood*, 102 N.C. 125; *Anderson v. Logan*, 105 N.C. 271; *Saunders v. Saunders*, 108 N.C. 332; *Condor v. Secrest*, 149 N.C. 206; *Real Estate Co. v. Bland*, 152 N.C. 227, 228, 229, *Lee v. Barefoot*, 196 N.C. 115.

STATE AND EMMA HIATT v. W. W. PATTERSON.

It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him, if he should deny it, thereby to discredit his testimony; and if a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted, but is conclusive against the party asking such question.

Therefore, where upon the trial of a proceeding in bastardy, upon the cross examination, the defendant asked the prosecutrix if she had ever had sexual intercourse with A, to which she replied that she had not: *It was held*, That the question was collateral and irrelevant, and the answer of the prosecutrix was conclusive upon the defendant; and that there was *no error* in the ruling of the court below, in excluding the testimony of A, in contradiction thereof.

This was PROCEEDING IN BASTARDY, tried before *Kerr, J.* at December Term, 1875, of the Superior Court of GUILFORD County.

The facts of the case are stated in the opinion of the court.

There was a verdict of guilty, and the defendant appealed.

Mendenhall & Staples, for the defendant.

Attorney General Hargrove and J. T. Morehead, for the State.

BYNUM, J. Upon her cross examination by the defendant, (158) the prosecutrix denied that she ever had sexual intercourse with Madison Hiatt. Madison was afterwards introduced and testified that about four years before the child was begotten, and when he was a lad of eleven years of age, he had such intercourse with the prosecutrix. The issue was whether Patterson was the father of the child, and it was wholly collateral to this issue, what had transpired four years before between the prosecutrix and the witness. The rule of evidence is thus stated in 1 Greenleaf, Sec. 449: "But it is a well settled rule, that a witness cannot be cross examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted, but is conclusive against him."

So in the *State v. Patterson*, 24 N. C., 346, where a witness on his cross examination was asked whether the prosecutor had not paid him for coming from another State to be a witness, and he answered that he had not, it was held to be incompetent for the defendant to introduce witnesses to prove his declarations, that he had been so paid. *Clark v. Clark*, 65 N. C., 155.

It was, therefore conclusive upon the defendant, when the prosecutrix denied having had sexual intercourse with the witness, and the the court should not have allowed the testimony of Madison Hiatt. If the prosecutrix had sworn falsely in answer to this collateral matter, it would not have been perjury. 1 Greenleaf, Sec. 448.

Had the testimony of Madison Hiatt been competent, the remarks upon it by his Honor, would have constituted error, for however

improbable or unreasonable the story, its credibility was for the jury alone. Bue as it was incompetent, the defendant has received no prejudice thereby.

(159) The other exceptions of the defendant were not much pressed, and are untenable.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: S. v. Johnston, 82 N.C. 591; *S. v. Parish,* 83 N.C. 614; *Kramer v. Electric Light Co.,* 95 N.C. 279; *S. v. Hawn,* 107 N.C. 811; *S. v. Perkins,* 117 N.C. 701; *Burnett v. R. R.,* 120 N.C. 519; *S. v. Warren,* 124 N.C. 808; *Carr v. Smith,* 129 N.C. 234.

THE FLAT SWAMP, LOCK'S CREEK AND EVAN'S CREEK CANAL COMPANY v. D. A. MCALISTER.

The appointment of appraisers to assess damages, etc., by the County Commissioners, upon the petition of the Flat Swamp, Lock Creek and Evan's Creek Canal Company, under the provisions of the act of 1871-72, (in which incorporated the first eleven sections of the act of 1869-70, Battle's Revisal, chap. 39,) is not a judicial act. In order to have that character, an act must determine a case in controversy between parties, or be a judgment affecting the title to property.

Therefore, the act is not unconstitutional.

The plaintiff in such proceeding can only enforce the lien acquired by the return of the appraisers, by carrying the whole proceeding by writ of *certiorari* into the Superior Court, and obtaining a judgment thereon. The county commissioners cannot render judgment thereupon.

A Justice of the Peace has no jurisdiction to enforce such lien, where the amount is less than two hundred dollar; his judgments are necessarily personal, and enforceable on all the property of the debtor, and not *in rem.* Such a lien is not a personal debt, but a lien upon the land benefited, which is the only security therefor.

CIVIL ACTION, heard before his Honor *Judge Buxton,* at Chamber, in CUMBERLAND County, Dec. 27th, 1875.

"The plaintiff is a corporation duly created by an act of the General Assembly entitled 'An act to amend and re-enact an act to incorporate the Flat Swamp, Lock Creek and Evans Creek Canal Company of Cumberland County." Ratified 13th of Dec. 1871, (Act of 1871-'72, Chap. 129, p. 171.)

(160) The plaintiff on the 6th of October, 1873, made application in writing to the Board of Commissioners of Cumberland

County, specifying the charter of a certain canal desired in said petition, which the plaintiff proposed to cut: its general course, extent, height, depth, width; the amount of fall per mile, the point of beginning and terminus, with a description of lands to be affected thereby, together with the names of the owners of such lands; praying the said Board of Commissioners to appoint three disinterested freeholders of said county, not of kin to any of the parties interested, appraisers to assess the benefits and damages to any of such lands incident to said contemplated work. Thereupon the Board of Commissioners appointed David Murphy, J. C. Blocker and W. B. Draugh, to act as appraisers.

On or about the 24th of October, 1873, the plaintiff served upon the defendant a notice of the time and place of meeting of the appraisers, with a description of the said proposed canal. The appraisers met at the time and place named in the notice, and after an examination of all the land in any way liable to be affected by the proposed canal, assessed the benefit to a certain tract of land, containing sixty-five acres and adjoining the land of Devane and others, the property of the defendant, at $195, and returned their assessment with their appraisement thereto appended; that the same was in all respects a true assessment to the best of their judgment and belief, with a description of the lands of the defendant, to the Register's office of said county, which return was thereupon recorded.

On or about the 8th day of May, 1874, the plaintiff finished the canal according to specifications. The plaintiff demanded of the defendant the amount of the assessment levied upon his land more than ten days prior to the institution of this proceeding. No part of the assessment has been paid.

The plaintiff claims that it has a lien on the land of the defendant for the amount of the assessment, by virtue of its charter of incorporation.

The defendant claims: (161)

1. That the land has not been benefited by cutting the canal;

2. That the amount of assessment is too high;

3. That the said lands are a part of his homestead and are not subject to the lien of the plaintiff;

4. That the provisions of the act of incorporation are unconstitutional.

The following questions are submitted to the court for decision:

1. Whether the defendant can now be allowed to contest the question of benefit or no benefit, not having appealed from said assessment?

2. Whether the assessment constitutes a lien upon the land of the defendant?

3. Whether the defendant can claim his homestead exemption in said land paramount to the lien of said assessment?

4. Whether the Superior Court has jurisdiction of the subject matter of this controversy?

5. Whether the act of incorporation of said company is Constitutional?

It is agreed that if the court shall decide the foregoing questions in favor of the plaintiff, then judgment shall be rendered against the defendant for the amount of said assessment, and said judgment shall be declared a lien on the land of the defendant, and for cost. If the court shall decide in favor of the defendant, then judgment shall be rendered against the plaintiff for cost.

Upon the hearing, his Honor gave judgment in favor of the plaintiff, and thereupon the defendant appealed.

G. M. Rose, for appellant.

McRae and Broadfoot, contra.

(162) RODMAN, J. The defendant contends that the Act of 1871-'72 Chap. 129, which refers to and incorporates in itself the first eleven sections of the Act of 1869-'70, Chap. 137, (found in Battle's Revisal, Chap. 39,) is unconstitutional, because it attempts to give judicial powers to the County Commissioners. The argument, we may suppose, would be this: The Constitution requires that the judicial, executive and legislative powers shall be kept separate. It vests the judicial power in the Supreme and Superior Courts, and in Justices of the Peace. The power to act on a petition from persons wishing to drain their flat lands through the lands of other person; to appoint appraisers to assess the damages and benefits which all persons affected by a proposed canal will receive; and to give judgment in favor of the applicant against the owners of land affected, for the amount of the benefits they are considered to have received, which shall be a lien on the land, is in its nature a judicial power which can be exercised only by the courts. The only part of this argument which can be disputed, is that which asserts the power to appoint appraisers, etc., to be exclusively and necessarily a judicial one. The question is new. Probably the constitutions of all the States contain in some shape the principle that the judicial and other powers of the government shall be kept separate. It is certain, that in many cases, such powers as are given to County Commissioners by the acts cited, have been given to bodies not judicial. Yet I have not seen any case in which objection is taken upon the ground taken here. Judge Cooley in his work on Constitutional Limitations, at page 98 *et seq.*,

attempts to define legislative from judicial power. Neither his opinions nor his authorities touch the special question before us.

In *Rice v. Barkman,* 16 Mass. 326, the court held that an act of the Legislature authorizing the father of certain infants to sell their lands and hold it as their guardian, was not an exercise of judicial power.

The court said in substance, that because a power was usually delegated to courts, it was not thereby necessarily and ex- (163) clusively judicial. An act to have that character must determine a case in controversy between parties, or be a judgment affecting the title to property. In none but the exact sciences do words have a perfectly precise and unchangeable meaning.

In construing written laws, the words unless they are clearly technical and thus have a definite meaning, must be considered as somewhat elastic, or else the different parts of the law are liable to clash and its working will be found impracticable, like all machines whose parts are so closely adjusted as to permit no play or lubrication. We are of opinion that a power to appoint appraisers to assess the benefits to lands affected by a canal is not exclusively judicial, and that the act in question is not unconstitutional upon that account. A similar power in numerous instances is exercised by bodies not judicial, though in all cases their proceedings may be brought before the courts for review by proper proceedings for that purpose.

For instance: The county commissioners may issue an order to a Sheriff to summon a jury to lay off a public road and assess damages to persons injured thereby. It is true the Constitution gives to the County Commissioners a general supervision over roads, Art. VII, Sec. 2, so that the instance is not strictly analogous. In the charter of the town of Asheville, considered in the case of *Johnson v. Rankin,* 70 N. C., 550, authority is given to the Mayor of the town to issue his warrant to the sheriff requiring him to summon commissioners to assess damages by reason of extending the streets. The objection to the act as unconstitutional for this reason did not occur to the learned counsel for the defendant or to the court. Probably there are many charters with similar provisions both before and since the adoption of the Constitution of 1868. The valuation of land for taxation has never been considered a judicial act, although if the valuers proceed on wrong principles, their proceedings may be reversed in the courts. (164)

We cannot readily conceive the policy of the Legislature in thus, in a single and special class of cases, taking away from the courts the jurisdiction of the initiatory proceedings which they have always heretofore had, and giving it to a body which we may suppose to be less fit for it, and which cannot have power to give an ultimate

judgment and enforce it by execution; especially when there were two statutes, viz: chap. 40 of the Revised Code, and chap. 164 of the acts of 1868-'69, upon the same subject, which were not repealed, but left in force, under which all the objects apparently contemplated by the act of 1868-'70, except that of giving jurisdiction of the initiatory proceedings to the county commissioners, could have been effected. These acts cannot be considered as repealed because they were overlooked and are not included in Battle's Revisal. Nevertheless, whatever the legislative policy may have been, it is our duty to give effect to every act of 1869-'70, except that of giving jurisdiction of the initiatory pro-

2. We are next called on to consider the force and effect of the appraiser's return in fixing the defendant with liability for the sum assessed against him.

It follows from the conclusion, that the county commissioners had jurisdiction to appoint the appraisers and to receive their return; that if the proceedings were in all respects legal and regular, the assessment is conclusive, unless the defendant in due time, by appeal or *certiorari*, shall bring the proceeding into the Superior Court for revision. It does not follow, however, that the county commissioners could give a judgment against the defendant for the sum assessed against him, or enforce it by execution. The giving of a judgment to affect property or rights is as we have seen, a judicial act, and it is therefore beyond the power of the county commissioners. The plaintiff can only enforce his demand by bringing the whole proceeding into the Superior
(165) Court by a *certiorari* and obtaining judgment there.

It is said for the defendant that as the principal sum demanded is less than $200, a recovery can be had before a Justice of the Peace, and in his court only. But a Justice has jurisdiction of actions founded on contract only. His judgments are necessarily personal, and enforceable on all the property of the debtor, and not *in rem*. Now although the assessment may, in some sense and for some purposes, be regarded as creating a debt, and even a debt by contract, yet it is not a personal debt to be enforced out of the general property of the debtor, but merely a lien upon the land benefited, which is the only security for its payment. Hence a Justice has not jurisdiction of such a claim as this.

The act of March 26, 1870, by referring to Sec. 11, of Chap. 39, Bat. Rev., gives an appeal to the Superior Court to any person aggrieved by the proceedings of appraisers, "upon giving bond and within the time, as in cases of appeal from Justices of the Peace." It is of course true that if a person aggrieved has lost his appeal without default on his part, he is entitled to a *certiorari*. In this case the defendant did not appeal, nor has he asked for a *certiorari*. The present case

is made under C. C. P., Sec. 213, the parties having agreed to certain facts, upon which they ask the judgment of the court. We take it to be, by agreement, a proceeding intended as a substitute for an appeal or *certiorari,* by which the whole proceedings of the County Commissioners and of the appraisers would be brought into the Superior Court for review upon errors assigned. In the present case, however, those proceedings are not set forth in full, or with such particularity as will enable us to say whether there was error in them, or not. We are not informed on what rule the appraisers acted; whether they assessed the benefits which the defendant would or did receive, or whether they assessed upon him his proportion of the cost of the work according to the benefits he received, as compared with the benefits received by others, which seems to be the rule contemplated by the act, (166) Sec. 11. It seems to have been the intention of the parties to present these questions, but they cannot be presented unless all the proceedings, under which the liability is alleged to have arisen, are set forth.

The question whether the defendant can claim his homestead against the assessment, does not at present arise.

Any question which the defendant may be disposed to make upon the constitutionality of the act of 1871-'72, other than the one we have considered, may be made of the return of the *certiorari.* Any consideration of it, by anticipation, would be premature.

We think we will best promote the intention of the parties, and enable them to present the points in controversy, so that they may be fairly adjusted by a decree to the following effect:

The case is remanded to the end that the proceedings may be amended as the parties may be advised, and either party shall have liberty to move for a *certiorari* to the County Commissioners of Cumberland requiring them to certify to the Superior Court of that county all the proceedings in the matter of the Flat Swamp, etc., Co. against McAlister and others, and, on the return thereof, the parties may move as they may be advised.

Each party will pay his own costs in this court.

Let this opinion and decree be certified, etc.

PER CURIAM. Judgment accordingly.

Cited: Gamble v. McCrady, 75 N.C. 513.

(167)

JOHN W. HINSDALE v. A. G. THORNTON AND OTHERS.

When a purchaser of land takes from the bargainor a paper writing purporting to be a deed, but which, on account of defects therein, can only be allowed the effect of an agreement to make title; or as furnishing a ground to have the instrument converted into a deed on the ground of mistake, he acquires no interest that is subject to execution.

This was a CIVIL ACTION, heard upon the complaint and demurrer thereto, before his Honor *Judge Buxton,* at Spring Term, 1875, of the Superior Court of CUMBERLAND County.

The complaint alleged: That before the commencement of the action, A. G. Thornton, one of the defendants, was the owner, and in possession of certain lands therein fully described; that on or about Feb. 20th, 1866, said Thornton bargained and sold, and attempted in good faith to convey, by two paper writings purporting to be deeds, the fee simple for the said lands executed by himself to James W. Lancashire, William H. Morehead and Melvin Lowery, composing the firm of Lancashire, Morehead & Lowery. The consideration of the said pretended deeds was $1,000 in cash then paid to A. G. Thornton, and the promissory note of the co-partnership unsecured, for the sum of $2,500, payable to the order of said Thornton twelve months after date. The lands were not worth more than one thousand dollars, but that the firm was induced to purchase them at the price of thirty-five hundred dollars by material misrepresentation of facts by A. G. Thornton.

Said paper writings were delivered and received in good faith as valid deeds and said firm was put in possession of the premises under the same, but they have never been registered according to law. The lands were purchased for partnership purposes and were occupied and used as such.

Said paper writings, as was afterwards discovered, were defective, for want of a seal, which was left off either through fraud or
(168) through mistake and inadvertence, contrary to the wishes and intention of all the parties thereto.

On the 10th of March, 1868, the interest of A. G. Thornton in said lands was levied on, and sold on the 1st of June, 1868, by the Sheriff of Cumberland County under a *fi. fa,* issuing upon a judgment recovered in the Court of Pleas and Quarter sessions of Cumberland County at March Term, 1868, in favor of John W. Hinsdale, administrator of Mrs. Maria Johnson and against A. G. Thornton, F. W. Thornton, R. W. Thornton and J. W. Lett, the execution being tested of March Term, and returnable to June Term, 1868. F. W. Thornton and W. D.

Rayner became the purchasers at the price of four hundred and fifteen dollars; with full notice of the possession and claim of the firm of Lancashire, Morehead & Lowery.

F. W. Thornton and J. W. Lett were abundantly responsible for the judgment in favor of J. W. Hinsdale, administrator, and that the execution was levied at the special request of Lett, upon the interest of A. G. Thornton in the lands aforesaid as well as all other lands claimed by said Thornton in the county of Cumberland.

Since the said sale the sheriff has made and executed to the purchasers a proper deed for said lands.

On the 5th of May, 1868, A. G. Thornton was duly adjudged a bankrupt in the District Court of the United States for the Cape Fear District of North Carolina, and that he scheduled the said promissory note for $2,500 as held by him in his own right and that said note has since come into the hands of his assignee in bankruptcy who now holds the same.

On the 8th of January, 1870, A. G. Thornton received his final discharge in bankruptcy. About the 1st of July, 1870, F. W. Thornton and W. D. Raynor by deed or deeds in fee simple conveyed to the said A. G. Thornton their interest in the said premises.

On the 17th day of May, 1869, the interest of James W. Lancashire in said premises was sold by the sheriff of Cumberland (169) County under a writ of *Ven, Ex.,* returnable to May Term, 1869, of the Superior Court, execution having been levied upon the same August 5th, 1867, when John W. Hinsdale became the purchaser at the sum of $39.26 which he has paid to the Sheriff, and has received a deed from said sheriff for the land.

On the 14th day on November, 1870, R. & J. McCaskell recovered a judgment in the Superior Court of Cumberland County against J. W. Lancashire, as surviving partner of the firm of Lancashire, Morehead & Lowery; (Morehead and Lowery were then dead) upon a partnership debt. Execution was issued thereupon returnable to Spring Term, 1871, and was levied upon the lands aforesaid. On the 3rd of April, 1872, the premises were sold under said execution, when John W. Hinsdale became the purchaser for the sum of five dollars and received the Sheriff's deed therefor.

Before the commencement of this action the plaintiff demanded of the defendants, F. W. Thornton and W. D. Raynor that they should convey the legal title to said premises to him, with which demand the said defendants refused to comply.

That the plaintiff demanded of A. G. Thornton, before the commencement of this action, that he convey the legal title in said premises to the plaintiff, with which demand he also refused to comply.

The complaint demanded judgment:

1. Setting up and declaring the trust in respect to said premises, in such of the said defendants, as may now hold the legal title thereto to the use of the said plaintiff, and adjudging that the plaintiff is the beneficial and equitable owner thereof, and entitled to call for a conveyance to him of the legal estate in the same, free and discharged from any claim of said defendants or any of them.

2. That the defendants or such of them as may have control
(170) thereof shall produce and deliver up to this plaintiff the Sheriff's deed aforesaid conveying A. G. Thornton's interest in said premises to W. D. Raynor and F. W. Thornton, and the said deeds for the same from W. D. Raynor and F. W. Thornton to A. G. Thornton.

3. That the said A. G. Thornton shall perfect the paper writing which he executed to Lancashire, Morehead & Lowery, if the same shall be produced, and if not that he shall execute to this plaintiff a deed in fee simple for said premises.

4. For such other and further relief as may be proper, together with the cost and disbursements of this suit.

The defendant, J. W. Lancashire, demurred to the complaint, and for cause of demurrer alleged:

1. That it appears upon the face of the complaint, that the plaintiff has no right to maintain the action, because under the deeds which are set forth and specified in the complaint, the plaintiff acquired no title to the land, the interest of the defendant in the execution upon which the said deeds are founded not being subject to sale under execution.

2. And because it is shown by the complaint that the interest of the parties who were dead at the time of the commencement of the original actions under which plaintiff claims were sold and conveyed by the sheriff's deeds which are the foundation of the plaintiff's claim upon the land.

Upon the hearing his Honor sustained the demurrer and the plaintiff appealed.

The case was argued in this court at the last (June) Term, 1875, when an *advisari* was taken. The opinion was filed at this term.

Hinsdale, with whom was *J. C. McRae,* argued:

I. The case of *Tally v. Reid,* 72 N. C., 336, has no application to this case, for the reason that there the *title was to be retained until the whole of the purchase money should be paid,* while in our
(171) case it appears that the $1,000 in cash and the note for $3,500, payable in six months after date, were *received in payment.* Thornton *taking the risk of the collection of the note upon himself,* and

giving, what he and the guarantees intended to be and thought was a good deed for the land. Thornton cannot now be permitted to take advantage of his own wrong, by holding the legal title for security of the note of $3,500. If it was a simple mistake on his part at *first* that he left off the seal, it is *now* a fraud for him to set it up as a defence, thus ratifying his mistake. But this question is set at rest by the able decision in *Phillips v. Thompson* (73 N. C., 543) decided at the present term. There it is held distinctly, that where one takes a note *in payment* for a tract of land and gives what he thinks and intends to be a valid deed for the same, it afterwards appearing that a mistake was committed in the execution of the deed that requires reformation, the grantor cannot set up in defence to the bill for reformation, that the purchase money has not been paid. So, in the present case Lancashire, Morehead and Lowry, the grantees, had the right to have the deed perfected at any time, without tendering the amount of the $3,500 note. Thornton held the bare legal title, coupled with *no* interest, but subject to the call of the grantees at any moment. This is so, whether the contract be regarded as executed under the rule that equity will regard as done that which ought to be done, or whether it be regarded as the same as a contract to convey land, *The whole of the purchase money being paid.* Thornton then held the legal estate in trust for Lancashire, Morehead and Lowry. It being an unmixed trust, (as where a bond for title has been given and all the purchase money paid,) the grantees or bargainees owned such an interest as could be sold under execution against them.

II. The land being held for partnership purposes, went to Lancashire as *personal* property in his hands as surviving partner could be sold under execution on a judgment on a firm debt, just (172) as *personal* property in his hands as surviving partner could be so sold. See *Baird v. Baird,* 21 N. C., 524; with which *Summey v. Patton,* 60 N. C., 601; does not conflict. Under the old practice, personal property of the intestate in the hands of the administrator was subject to levy and sale under execution.

III. If the land was properly sold in the hands of the surviving partner upon a partnership debt, the title is now in the purchaser, and the heirs of the deceased partners are now proper parties.

IV. The case of *Stith v. Lookabill* decides expressly that the bare legal estate of a trustee can be sold under execution at law, and this was in accordance with all the authorities. Hence Thornton's legal title passed to F. W. Thornton and W. D. Raynor *before the bankruptcy of A. G. Thornton.* After the discharge of A. G. Thornton, this same title is reconveyed to him for value. The good faith of this shifting is not called in question *here.* It must be apparent that the fact that

Thornton went through bankruptcy while the title was out of him does not make it necessary to bring in his assignee in bankruptcy as a party. We are in no sense asking for relief against a bankrupt's estate. We do not claim through the assignee. The case of *Blum v. Ellis,* 73 N. C., 293, decided at June Term, 1875, has no application. This is the case where it is held that the Bankrupt Court alone has jurisdiction over cases affecting a bankrupt's estate.

V. Defect of parties is not *specified* in the demurrer as a ground of demurrer. The point is made here for the first time. This is not the usual practice. Should, however the court hold that there is a defect of parties, which is fatal, it is asked that the cause may be remanded for the proper parties to be made. We think that if this course is adopted, it should be without costs, as the plaintiff is taken by surprise at a *new* ground of demurrer being urged.

(173) VI. If it should be held that the legal estate passed to the purchaser at execution sale of Lancashire's interest at the sale under judgment on firm debt, and therefore that there is no need for Thornton to complete the deed, it will still be observed that *other* relief is asked; and this bill will not be dismissed as unnecessary, for it may be regarded as a bill *quitimet,* or to *remove cloud from title.* We have a right to have the deeds which make up our chain of title, registered. This is one of the reliefs demanded.

Merrimon, Fuller & Ashe, with whom were *W. McL. McKay,* and *W. A. Guthrie, contra:*

Lancashire, Morehead & Lowery had *no estate* in the land, and *no interest subject to execution.*

They had a contract for the purchase of the land. *Blacknall v. Parish,* 59 N. C., 72; *Lane v. Patrick,* 7 N. C., 473.

A right under a contract to purchase is not such an equitable estate as may be sold under execution. See *Halford v. Tetherow,* 47 N. C., 396; *Sprinkle v. Martin,* 66 N. C., 55; *McKeithan v. Walker,* 66 N. C., 97; *Hutchison v. Symons,* 67 N. C., 160-161; *Ledbetter v. Anderson,* 62 N. C., 323.

A purchaser with only bond for title, not having paid the whole price, has no such interest as is the subject of execution. But *secus* if all the money is paid. *Phillips v. Davis,* 69 N. C., 119.

PEARSON, C. J. The plaintiff acquired nothing by the two deeds of the Sheriff, for the plain reason that the defendants, in the execution, had no estate or interest that could be sold under a *scire facias.* It is the general rule; nothing but a legal estate can be sold under a *fi. fa.* See the matter discussed; *Tally v. Reid,* 72 N.C., 336, affirmed at this term on petition to rehear. That the sheriff, under his writ, can sell

nothing but a legal estate, is shown by its works, "of the goods and chattels, land and tenements," etc. "Land an tenements" (174) imply the ownership at law. Such has been the meaning of these words ever since the statutes of *mortmain*, and the time of the conflict between the houses of York and Lancaster. The law takes no notice of uses and trusts nor of equities of any kind, except as is otherwise provided for by statute. An exception is made to the general rule by the act of 1812, which subjects equities of redemption and trusts to sale under a *fi. fa.* Under this statute it is settled, that when a vendee pays a part of the price, and takes bond for title when the balance is paid, his interest or trust cannot be sold under *fi. fa.* When a purchaser takes a bond for title, it would seem to be as strong a case as when he takes a paper writing, purporting to be a deed, but which can only be allowed the effect of an agreement to make title, or as furnishing the ground to have the instrument converted into a deed on the ground of mistake, which could hardly be allowed except on payment of the balance of the price; but however this may be, the vendee did not acquire the legal estate, and at most, had only an equity, which certainly does not come within the operation of the act of 1812.

No error.

PER CURIAM. Judgment affirmed.

Cited: Hinsdale v. Thornton, 75 N.C. 381.

STATE v. W. H. H. HOUSTON AND OTHERS.

A recognizance, conditioned that the defendant appear at the Court House in C, on the 8th Monday after the 4th Monday in March, 1875, is not forfeited by the defendant's failure to appear on the 22d of February, 1875.

Scire Facias, upon a recognizance alleged to have been forfeited, tried before his Honor *Judge Schenck.* at August Term, 1875, of the Superior Court of MECKLENBURG County.

The defendant, W. H. H. Houston, was arrested to answer (175) a bill of indictment found against him at Fall Term, 1874, of Mecklenburg Superior Court, and he with the other defendants entered into the following recognizance:

STATE OF NORTH CAROLINA, }
Mecklenburg County. } Superior Court.

Whereas W. H. H. Houston has been arrested on a charge of the State upon a bill of indictment for forgery; Now therefore, we the said W. H. H. Houston, as principal, and W. A. Trott, E. A. Armfield, C. A. Armfield, C. Austin, John D. Stewart, J. R. Winchester and C. B. Curlee as his sureties, acknowledge ourselves jointly and severally indebted to the State of North Carolina in the sum of twenty-five hundred dollars each, to be levied of our several goods and chattels, lands and tenements, to be void on condition that the said W. H. H. Houston shall personally appear at the next term of the Superior Court to be held for said county at the court house in Charlotte, on the 8th Monday after the 4th Monday in March, 1875, then and there to answer said charge and not depart the same without leave.

Signed and sealed this 14th day of Dec., 1874, before S. H. Walkup. C. S. C., of Union County, State aforesaid.

W. H. H. HOUSTON, [SEAL.]
W. H. TROTT, [SEAL.]
E. A. ARMFIELD, [SEAL.]
C. AUSTIN, [SEAL.]
JOHN D. STEWART, [SEAL.]
J. R. WINCHESTER, [SEAL.]
C. B. CURLEE, [SEAL.]

At February Term, 1875, the defendant Houston was called and failed to answer, and thereupon judgment *nisi* was entered upon his recognizance.

A *sci. fa.* was issued to Union county for the defendants to ap-
(176) pear at Spring Term, 1875, and show cause why the said judgment should not be made absolute. The defendants appeared in accordance to the *sci. fa.* and pleaded *"nul tiel record,"* and the cause was continued until August Term, when judgment was rendered for the defendants and the State appealed.

Attorney General Hargrove, for the State.
No counsel for defendants.

READE, J. 1. That the bond taken in this case is good as a *recognizance* for the appearance of the principal defendant. See case between the same parties at this term; and *State v. Edney,* 60 N. C., 463.

2. A recognizance for the appearance of the defendant at the next term of the court to be held for a given county is valid, and binds the

defendant to appear at the next term, and at the court house; although neither time nor place be specifically named; because every one knows, or is presumed to know the time and place of holding the court. But if the recognizance *specify* time and place, the defendant cannot be held to be in default for not appearing at some other time or place.

Here the defendant was recognized to appear at the next court to be held on the 8th Monday after the 4th Monday in March; and he was called out on 22d February. An additional term of the court having been provided for by statute to be held at that time, after the recognizance was taken to appear on 8th Monday after 4th Monday of March was not forfeited by his failure to appear on 22d February. *State v. Melton,* 44 N. C., 426.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Jones, 100 N.C. 440; *S. v. Horton,* 123 N.C. 697.

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(177)

STATE v. A. M. KING.

In order to constitute a Forcible Trespass there must be some demonstration of force as distinguished from mere words: as by a display of weapons, or other outward signs of violence, or by numbers, which supply the place of violence, and are equally calculated to put in fear.

This was an INDICTMENT tried before *Cloud J.,* at Fall Term, 1875, of STOKES Superior Court.

The indictment contained two counts: one for obtaining goods by false pretense, and the other for forcible trespass. Upon the trial the defendant moved the court to direct the Solicitor for the State to elect as to the count upon which the defendant should be tried. The motion was overruled by the court and the prisoner excepted.

The State introduced one Wilson, the prosecutor, as a witness, who testified that some time during the year 1875, the defendant came into his store, in the county of Stokes, and desired to purchase of him a bolt of domestic. That he at first declined to sell, telling the defendant that his wife desired the cloth for her own use. The defendant insisted on buying it, promising the witness that he would pay him the money and he could buy other goods of the kind by the time his wife would need it. The witness then measured off the cloth and laid it on the counter telling the defendant that it came to $3.55. The defendant picked it up, carried it to his horse, which was hitched in the road

about five paces from the store and laid it across the saddle. He then returned to the store, walked up to the counter, felt in his pocket and taking out some money, (witness could not say how much) told the witness that he had an order on him for the cloth from one Wm. Edwards which he must take. The witness replied, "you prom-
(178) ised me the cash, I can't take an order from Edwards; that the order was just but he could not accept it, that he must have the money." The defendant then turned and walked out toward his horse. The witness followed, and as the defendant was about mounting, told him not to carry off his goods until he had paid for them. The defendant then started to ride off, the witness being present, and throwing down the order looked back at the witness and said with an oath, "I have got the goods, help yourself if you can." No other person was present. The defendant made no other demonstration of force.

His Honor instructed the jury that the evidence did not sustain the allegation contained in the first count and the Solicitor abandoned the same.

The counsel for the defendant then asked the court to charge the jury that the proof did not sustain the allegation of forcible trespass. The court declined to charge as requested, but charged the jury that if they believed the witness the defendant was guilty of forcible trespass as charged in the second count of the bill of indictment. The defendant excepted.

The jury rendered a verdict of guilty, and thereupon the defendant moved for a new trial. Motion overruled and defendant appealed.

No counsel in this court for the defendant.
Attorney General Hargrove, for the State.

BYNUM, J. This case is governed by the decisions in the *State v. Ray,* 32 N. C., 39, and the *State v. Covington,* 70 N. C., 71, where it is held, that to constitute a forcible trespass, there must be some demonstration of force, as distinguished from mere words, as by a display of weapons, or other outward signs of violence, or by numbers, which supply the place of force, and are equally calculated to intimidate or put in fear, as was the case of the *State v. Armfield,* 27 N. C., 307, and *State v. Pearman,* 61 N. C., 371, cited by
(179) the Attorney General. There was no such parade of force or numbers in our case, but bare words only. There is error.

The other count, for cheating by false pretenses, on the intimation of the court that it could not be sustained, was abandoned by the

Solicitor. Perhaps, as framed, it is insufficient, but the attention of prosecuting officers is called to the case of the *State v. Phifer*, 65 N. C., 321, and the law of this State, as there announced, as affording an indictable remedy in most cases of fraud and meanness like this. It is there laid down that where there is a false representation of a subsisting fact, calculated to deceive, whether the representation be in writing or in words or in acts, by which the defendant obtains something of value from another without compensation to him, it is indictable as a cheat by false pretenses. The defendant here, in substance, represented to the merchant, that he had the money in his pocket, and would pay down the cash as soon as the cloth was measured, and, by this false represention, obtained the goods. I incline to think that Phifer's case covers this, but the question is not now presented, and we do not decide it. Certain it is, that unless such offences can be thus reached, it is incumbent upon the Legislature, in these times of homesteads and exemptions, where a civil action affords no redress, to protect society and trade against such dishonesty, by some adequate legislation.

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

Cited: S. v. Holmes, 82 N.C. 608; *S. v. Dixon,* 101 N.C. 744; *S. v. Gray,* 109 N.C. 793; *Anthony v. Protective Union,* 206 N.C. 11.

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(180)

STATE v. ROBERT CHILDERS.

Upon the trial of an indictment for larceny: *It was held*, that it was not error in the court below to charge the jury, "That all the evidence introduced (the defendant having introduced no evidence) was intended by the State's attorney to prove to them that the defendant feloniously stole, took and carried away, the money of A. R. & Son, charged in the bill of indictment, and that was the question for them to determine; that if the evidence satisfied them that he did, then their verdict should be 'guilty;' but if the evidence did not so satisfy them, then their verdict should be 'not guilty.'"

INDICTMENT for LARCENY, tried before *Furches, J.*, at Fall Term, 1875, of WILKES Superior Court.

It was in evidence that there was a firm engaged in merchandizing in the town of Wilkesboro, under the name and style of "A. Rosseau & Son." The store house was on a corner and a door opened on each street.

J. O. Rosseau testified, that he, one Woodruff, the defendant and another person were in the store, when he, the witness went out at the west door to buy some wheat, and directly Woodruff, who was his clerk, and the other person came out of the store and went to the lumber room, and left no one in the store except the defendant. He saw several persons on the porch beyond the door on the south side of the store house. He remained in front of the door on the west side, where he could see the south door, and that no one was in the store after Woodruff left, except the defendant, until he returned. He remained out about six or eight minutes after Woodruff left, when he stepped in at the west door and defendant was either standing in or in the act of stepping out at the south door. Soon after going in he went to the money draw and found that several dollars of fractional currency were missing. After making inquiry he suspected that the defendant took the money, and he thereupon called the defendant from off the porch back into the counting room, and at the same time called in one McLean and stated to the defendant that
(181) he had missed some money and had reason to think that he took it, and would not be satisfied until he searched him. The defendant said he did not have the money. Rosseau insisted on his being searched. The defendant at first refused, and said after being asked, that he had but one dollar, and that he too, did not know how much he had. That he left home with $2.50, and had been spending some that day.

Rosseau then called in the sheriff and others and stated what was the matter, and sat down on the head of the bed, the defendant sat near the foot of the bed. While sitting there several persons were standing around, near the defendant, and the Sheriff told him that he was under arrest and must be searched. The defendant at first refused, but not long after got up, pulled his knife and some strings out of one pocket and threw them on the bed, and told them to search him. In the bunch of strings there was four ten-cent pieces. They searched him and found no money except these ten-cent pieces. Rosseau stated that he did not see him take the money, nor did he see him have it at any time. That he could not see the defendant from where he was, at the west door.

McLean was examined and stated that he heard defendant deny having the money. That while the defendant was sitting on the bed, he saw his right arm hanging down on his right side, his hand under his coat; at the same time he saw the bed cover move up as if the defendant was putting something under it. Four or five persons were standing around near the defendant. That he did not see the defendant take the money, nor did he see him have it at any time. Soon after

the defendant got up, the witness lifted up the bed cover, where the defendant was sitting, and one Hunt exclaimed, "there is the money under the cover." Rosseau examined it and said, "there is a quarter, that is mine; I know it because of its torn and ragged condition; that he first refused to take it." When the money was taken out from under the cover, the defendant said it was not his money, nor did he know any thing about it. He counted the money, (182) found under the bed cover, and that it amounted to $6.50. That it resembled the money he had lost in amount and size of bills. There was one twenty-five cent bill that he had taken from a customer not more than fifteen minutes before; that it was torn and ragged, and he at first refused to take it, and by this circumstance could, and did swear positively that that twenty-five cent bill was his.

Woodruff, who was clerking for Rosseau, testified: That he and the other person left the store and went to the lumber room. At the time they left, the defendant started and walked toward the passage. That it was impossible for any one to have taken the money out of the drawer without either getting behind the counter or getting on top of the counter. He did not see the defendant take the money or have it at any time. He was not present at the time the defendant was searched. He heard him deny having the money.

Hunt testified as follows: That he saw McLean raise the bed cover, at which time he saw the money under the cover in a wad, Rosseau counted it, and there was $6.50. He did not see the defendant take or have the money at any time, but saw him have his hand under his coat and pull up the cover.

The Sheriff being examined, also testified: He got into the counting room after a considerable crowd had assembled, and told the defendant he must be searched. The defendant at first refused, and then consented, pulling out his knife and strings from his pocket and throwing them down on the bed. They searched but found no money upon the person of the defendant. He did not see the defendant take the money or have it at any time. There were four ten cent pieces among the strings, and the defendant had a pocket book in another pocket, but had no money in it.

The State's Attorney did not ask any one of the witnesses whether he took or put the money under the cover.

The counsel for the prisoner asked the court to charge the (183) jury:

1. That if they believed the evidence deposed to by the witnesses, the defendant would not be guilty of larceny.

2. That if they found that the prosecutor, Rosseau, identified the twenty-five cent bill simply because it resembled the twenty-five cent

bill he had at first refused to take that day, the money would not be sufficiently identified, there not being any private mark upon it, the the defendant still would not be guilty.

The court declined to give the special instruction prayed for, and charged the jury:

That all the evidence introduced (the defendant having introduced no evidence,) was intended by the State's attorney to prove to them that the defendant feloniously stole, took and carried away the money of "A. Rosseau & Son," charged in the bill, and that was the question for them to determine. That if the evidence satisfied them that he did, then their verdict should be "guilty." But if the evidence did not so satisfy them, then their verdict should be "not guilty."

The jury rendered a verdict of quilty, and thereupon the defendant moved for a new trial. The motion was overruled by the court and judgment pronounced, whereupon the prisoner appealed.

M. L. McCorkle, for the prisoner.
Attorney General Hargrove, for the State.

PEARSON, C. J. This is a clear case of larceny. There is no error in the charge of his Honor. We find no error in the record.

This will be certified to the end, etc.

PER CURIAM. Judgment affirmed.

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(184)

STATE v. PETER DOWNING.

Where, upon the trial of an indictment against A and B for an affray, it was in evidence: That A had gone to the front gate of B's premises and an altercation having arisen between them. B had ordered A to leave, and upon his refusal to do so had gone to his house, some forty yards distant and procured his pistol, and come back to the gate with it in his hand. A in the mean time having left the gate and walked off some thirty yards. Upon seeing B with the pistol in his hand, A returned, defying at the same time B to shoot, and B did shoot him in the leg: *It was held*, that it was not error to charge the jury, that in any view of the case the defendants were both guilty.

INDICTMENT for an affray, tried before *Moore, J.*, at Spring Term, 1875, WASHINGTON Superior Court.

The defendant was jointly indicted with one Levi Arnold. The facts in the case are substantially as follows:

During the month of August, Arnold came to the front gate of Downing's premises, and having called out Downing's wife, began to curse and abuse her husband, because, as Arnold alleged, Downing had committed adultery with his (Arnold's) wife. Downing came from his house to the gate, remaining on the inside. At that time Arnold was in a road leading from one public road to another. The portion of the road on which Arnold was standing was upon the land of Downing. When Downing came to the gate, Arnold charged him with being too intimate with his wife. They then had some words, and Downing ordered Arnold to leave, which he refused to do, saying he came to kill or be killed. Downing then said, "I will make you leave," and went to his house, (distant about forty yards,) got his pistol, and returned to the gate with it in his hands.

When Downing reached the gate, Arnold had started off, and was about forty yards distant. He turned, and seeing Downing's pistol, opened his breast, and with an oath, told Downing to shoot, and immediately started toward the gate in a violent manner. When he was near the gate, Downing shot him in the leg. The gate (185) was shut. Arnold had no weapon. Downing had only one arm.

His Honor charged the jury that in any view of the case, the defendants were both guilty. The defendant excepted.

The counsel for the defendant asked his Honor to charge the jury, that considering the relative strength of the parties, and the threats of Arnold, if the defendant had reasonable ground to believe that Arnold was about to inflict upon him great bodily harm, he had a right to use such force as was necessary to protect himself, and if they should find that he used no more force than was necessary for his protection, the defendant Downing was not guilty.

His Honor declined so to charge, and repeated his first instruction. The defendant excepted.

The jury rendered a verdict of guilty, whereupon the defendant moved for a new trial. Motion overruled.

The court rendered judgment against the defendants; from which judgment the defendant Downing appealed.

Walter Clark, counsel for defendant:

The jury are the sole judges of the weight of the evidence. *State v. Davis,* 23 N. C., 125; *State v. Crow. Ibid,* 375. Wharton's American Criminal Law, 1250. Bishop's Criminal Law, Vol. 2, Secs. 384, 627, 628, 634, 643. *State v. Harris,* 46 N. C., 190; *Wittkowsky v. Wasson,* 71 N. C., 471.

Hence, whether the defendant, from the declarations and actions of the prosecutor, had reasonable fear of bodily harm, should have been left to the jury.

Attorney General Hargrove, for the State.

SETTLE, J. We concur with his Honor in the opinion, that in any view of the case, the defendants were both guilty.

The evidence furnishes no ground for the defence relied upon (186) by the defendant, to-wit, that one having reasonable ground to believe that great bodily harm is about to be inflicted upon him, has a right to use such force as is necessary to protect himself.

It was not necessary for Downing, after he had left the gate at the road and gone some thirty or forty yards to his house, to return to the gate, with his pistol in his hand, in order to protect himself from great bodily harm. If indeed he feared such harm, it would seem that the house, some distance from his antagonist, was a much safer place than the side of the road, where he had just left him.

But having armed himself, he returned to the road, evidently for the purpose of asserting his manhood, and attesting his willingness to engage in combat.

Why go to the gate with his pistol, for self-defence, when Arnold had already left it some thirty or forty yards? What was there in the manner of Arnold's return to excite his fears of great bodily harm?

Arnold opening his breast, advanced towards the gate, which was closed, without any weapon, defying Downing to shoot, thereby clearly giving his assent to a breach of the peace, but by no means giving Downing any reasonable ground to apprehend great bodily harm.

The big talk of Arnold, that he came to kill or be killed, amounted to nothing in connection with the other circumstances, and evidently did not put Downing in fear.

Indeed, there is nothing in the evidence which would have justified his Honor in presenting the view of the case contended for by Downing to the consideration of the jury.

PER CURIAM. Judgment affirmed.

Cited: S. v. Harrell, 107 N.C. 946; *S. v. Kimbrell,* 151 N.C. 708; *S. v. Lancaster,* 169 N.C. 285.

(187)

STATE v. SOL. RICKETTS.

The rule that a prisoner on trial for perjury can be convicted only upon the testimony of two witnesses, or of one witness supported by corroborating circumstances, does not affect the *competency* of a witness to the alleged perjury. But if at the close of the case for the prosecution, there be no other witness to the alleged perjury, and no corroborating circumstances, the court will direct a verdict of acquittal.

The court below does not err in refusing to rule out the admissions of the defendant on the ground that they were obtained by undue influence, where it appears by the examination, preliminary to the admission of such evidence, that no such influence was used.

The declarations of the defendant made after the commission of the alleged offence are not competent evidence in his favor, unless they become a part of the *res gestæ*.

In this State, in general, every act may be lawfully done on Sunday, which may lawfully be done on any other day, unless there be some statute to the contrary. Receiving the verdict of a jury on Sunday is not forbidden by any statute of this State, and is therefore a lawful and valid act:

BYNUM, J. and SETTLE, J., *dissenting*.

INDICTMENT for *Perjury*, tried before *Buxton J.* at Fall Term, 1875 of RICHMOND Superior Court.

The indictment was found at Spring Term, 1875 of Anson Superior Court, and upon affidavit removed to Richmond County.

The perjury was alleged to have been committed by the prisoner while testifying as a witness upon the trial of the issues in a divorce suit, tried at Anson Superior Court at Fall Term, 1874, to-wit: *Martin V. Horne v. Mary E. Horne.* The petitioner in that case alleged adultery against his wife as ground for the application, and the defendant in her answer alleged adultery against the petitioner, charging him with having committed adultery with one Fanny Horne, a colored woman. (188)

The defendant, a colored person, with a witness for the defendant in the suit. The perjury assigned is that the defendant swore that he saw the said Martin V. Horne at the house where Fanny Horne was; that he went in and saw Martin V. Horne in bed with Fanny Horne, with his clothes off.

Upon the trial John C. McLaughlin testified on the part of the state: "I am Clerk of Anson Superior Court and administered the oath to Sol Ricketts in the usual form, as a witness at Fall Term, 1874, on the trial of the case *Martin V. Horne v. Mary E. Horne.* I suppose I heard the whole of Sol's evidence. The substance was that about the time the Federal troops passed through the county of Anson he was flying around Fanny Horne, and on one occasion he went to

Fanny's house and saw Martin V. Horne there, in bed with Fannie Horne, with his clothes off. That there was no one else in the house except some little children of Fanny's."

As the prisoner's counsel were about to examine the witness, the Solicitor moved the court that all the witnesses on both sides except the witness on the stand be separated and required to leave the court room. The motion was allowed by the court after objection by the prisoner that the motion ought to have been made before any part of the evidence was received by the court, and came too late after a State's witness was partially examined. The witnesses were all sworn and sent out of the court room. The prisoner excepted.

The Solicitor proposed to examine Martin V. Horne who is the prosecutor and also the husband of Mary E. Horne. The competency of this witness was objected to by the prisoner. The objection was overruled and the witness testified:

"I was present at the trial of the divorce suit in which I was plaintiff and heard Sol. Ricketts testify that he saw me stripped off
(189) in bed with Fanny Horne in 1865. This was not so. I never was in bed with Fanny in my life."

To the ruling of his Honor admitting the testimony of Martin V. Horne the prisoner excepted.

The Solicitor purposed to prove by one William C. Threadgill, that two or three weeks after the trial of the divorce suit he heard the prisoner say "that he never saw what he had said in court he had seen, that he had said so to please some folks." The prisoner objected on the ground that the confession was obtained by improper influence exerted by Threadgill. The preliminary evidence was as follows: Sol. Ricketts was my hired servant, he had been staying with me two years about the jail. I am the jailor of Anson County. I had given him a coat that morning, also a drink. I gave him a drink every morning. It was one half of his rations. I furnished him with clothing. I had it to do: That morning Sol. said to me, "Mars William, Mars Martin is mad with me about that court house business." I replied "Sol., that was pretty heavy, wasn't it." This was two or three weeks after the trial of the divorce suit. Sol. was not then under arrest. I am not positive whether he had been threatened with prosecution or not. I and Martin V. Horne are intimate and Sol. knew it. I don't think I held out any inducement.

The Solicitor contended that the evidence was admissible. The counsel for the prisoner again objected. The court overruled the objection and the prisoner excepted. The witness then testified as follows: "Sol. then said he never saw what he had said in the court house he had seen. That he had said so to please some folks or

the old folks. I forget which expression he used, 'some folks' or 'old folks.' He used to belong to the Ricketts, the parents of Mary E. Horne. The morning he told me this I gave him a coat. My doing so had nothing to do with what he told me. He said he was afraid to go up town, that Martin was mad with him."

The defendant introduced as a witness one Enniss Edwards, (190) who testified as follows:

"About two weeks after the trial of the divorce suit, I and Sol. Ricketts were sitting on the store steps of Mr. Huntley, in Wadesboro, talking together of going off to work. Martin V. Horne and William C. Threadgill came along and called Sol. off, and spoke to him. I was out of hearing and did not hear what was said. Another man, named Theadgill, came along and he and William C. Theadgill and Martin V. Horne went into a grocery, and I called Sol. back to me."

Here the prisoner's counsel proposed to prove that Sol. Ricketts, when he came back to the witness, informed him that he had told William C. Theadgill and Martin V. Horne what he had testified to on the trial was true. The counsel of the prisoner contended that this was competent as corroboratory of the truth of the prisoner's evidence.

The court excluded the evidence because the statement was not made by the prisoner to the witness in the hearing of the prosecutor, and because it was made after the trial upon which the perjury was alleged to have been committed, and so came within the general rule excluding declarations of the accused after the fact.

The defendant again excepted.

The trial occurred on Saturday of the first week of the term, and was protracted into the night. The jury retired about 10 o'clock. Before leaving the bench, his Honor inquired of the counsel on both sides if they were content that the Clerk should take the verdict. They both replied "yes." His Honor then left the courthouse. The jury remained all night and rendered a verdict of "guilty," at 8 o'clock on Sunday morning. The Clerk recorded the verdict and discharged the jury. On Monday the verdict was read to the Judge as a part of the minutes.

The prisoner excepts, because the verdict was rendered to the court on the Sabbath day.

The prisoner moved the court for a new trial on account of (191) error as alleged in the foregoing exceptions. The motion was overruled by the court. The prisoner then moved in arrest of judgment for error in receiving the verdict.

The motion was overruled. Judgment and appeal by the prisoner.

Walker, for the prisoner.

Attorney General Hargrove, with whom was Smith & Strong, for the State.

RODMAN, J. We will examine the exceptions of the defendant in their order.

1. This was properly abandoned.

2. Martin Horne was a party to the divorce suit in which the alleged perjury was committed. He was allowed to testify to what the defendant had sworn on the trial of that action in respect to an occurrence between him (Martin) and one Fanny Horne, and that the defendant therein swore falsely. The defendant contends that the witness (Martin) was incompetent because of the rule that a prisoner on trial for perjury can be convicted only on the testimony of two witnesses, or of one witness supported by corroborating circumstances. The rule is admitted, but it does not affect the competency of the witness in question. He was one witness to the alleged perjury, and if at the close of the case for the prosecution there had been no other witness to the same effect and no competent evidence of corroborating circumstances, the court would have directed a verdict of acquittal.

3. The corroborating circumstances relied on were the admissions of the defendant to Threadgill, that he had sworn falsely on the trial of the divorce suit. The defendant objected to the admission of this evidence, on the ground that the admissions were procured by undue influence. The Judge held that the evidence did not show that
(192) they were so procured or made. We concur with the Judge.

4. The Judge excluded the evidence of one Edwards, by whom the defendant proposed to prove that about two weeks after the trial of the divorce suit the defendant told him that what he had sworn to on the trial was true. Defendant excepted.

The case of *Bullinger v. Marshall*, 70 N. C., 520, cited by defendant's counsel, does not sustain his exception. That a person who has sworn to a fact, in court, afterwards re-asserts it, has no tendency to prove that what he swore to was true. He would be just as likely to do so if it were consciously false, as if it were true.

5. The defendant contends that the judgment is void because the verdict was rendered on Sunday, the case having been tried and given to the jury on the preceding day. He mainly relies on this exception. What religion or morality permit or forbid to be done on Sunday, is not within our province to inquire. In different christian countries, and in different ages in the same country, very differing opinions have prevailed upon this question. In this State in general every act may lawfully be done on Sunday, which may lawfully be done on any other

day, unless there be some act of the Legislature forbidding it to be done on that day. This is the principle on which the cases of *Bland v. Whitfield,* 46 N. C., 122; *State v. Williams,* 26 N. C., 400, were decided. In the first case, a levy on personal property made on Sunday was held void, not because it was void at common law, or upon the idea that the day ought, upon religious or moral doctrines, to be kept holy, but because a statute made the execution of process on that day unlawful. In the latter case, the court, while condemning the conduct of the defendant in requiring his slaves to work on Sunday as immoral and reprehensible, held that no indictment could be sustained against him, because the act was not an offence at common law, and had not been made so by statute. Sunday is (193) frequently called *"dies non juridicus." McNally's case,* 9 Co. Rep., 66, b, 3 Thomas Coke, 354 and note 3. But this means only that process cannot ordinarily issue or be executed or returned, and that courts do not usually sit on that day. It does not mean that *no* judical action can be had on that day. On the contrary, it is laid down in books of authority, that warrants for treason, felony and breach of the peace, may be issued and executed on that day. I do not doubt that if the circumstances made it proper, a coroner and his jury might lawfully hold an inquest of homicide on that day, although I have no authority for the opinion. So I think that a magistrate might, upon that day, hear the case of a prisoner brought before him on a criminal charge, and admit him to bail or refuse it. "The Sabbath was made for man." All religious and moral codes permit works of necessity and charity on their sacred days. The instances mentioned come as fully within that description as many acts which are habitually done on Sunday, without offending public sensibility, although in a more ascetic age they were thought sinful. The receiving the verdict of a jury, who have perhaps been long confined, and may be mentally and physically exhausted, in order that they may be discharged, is a work of necessity within the common and the legal meaning of the word, and may be justified on religious and moral grounds. But whether this be so or not, it is not forbidden by any statute of this State, and is therefore a lawful and valid act. I think that probably it has repeatedly occurred.

We do not say how it would be, (if we may suppose such an improbable case,) if a court should undertake to sit on Sunday for the trial of actions, civil or criminal, or for giving judgments, when no extreme necessity for it existed. As long practice makes the law of a court, probably its proceedings in such cases would be doomed irregular, as was held in the instance of taking a deposition on Sunday, in *Sloan v. Williford,* 25 N. C., 307. (194)

PER CURIAM. There is no error in the judgment, which is affirmed Let this opinion be certified.

Cited: S. v. McGimsey, 80 N.C. 383; *S. v. Howard,* 82 N.C. 626; *S. v. Moore,* 104 N.C. 749; *White v. Morris,* 107 N.C. 99; *S. v. Penley,* 107 N.C. 810; *Taylor v. Ervin,* 119 N.C. 276; *Rodman v. Robinson,* 134 N.C. 507; *S. v. Medlin,* 170 N.C. 684; *McCollum v. Stack,* 188 N.C. 463.

A. M. LEWIS, JR. v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY.

There is no provision of law for the payment of witnesses summoned to appear and testify generally before the grand jury "in certain matters then and there to be enquired of," and there is no authority of law to issue such summons.

Witnesses are entitled to compensation, where a bill is prepared and sent to the grand jury, with the names of those summoned endorsed thereon as sworn and sent.

This was a controversy submitted without action, upon a case agreed, and heard before his Honor *Judge Watts,* at June Term, 1875, of the Superior Court of WAKE County.

All the facts in the case are stated in the opinion of the court.

There was judgment in favor of the plaintiff; thereupon the defendant appealed.

Busbee & Busbee, and G. H. Snow, for the appellant.
Badger & Devereux, Batchelor & Son, and A. M. Lewis, contra.

BYNUM, J. This is a controversy submitted without action, under section 315 of the Code of Civil Procedure, upon the following case agreed: A. M. Lewis, a citizen and resident of Franklin County,
(195) on the 8th day of April, 1875, was served with a subpoena, in the following words and figures, to-wit:

"WAKE COUNTY—IN THE SUPERIOR COURT.

To A. M. Lewis, Jr., Greeting:

You are hereby commanded to appear before his Honor S. W. Watts, at Raleigh, *instanter,* to give evidence in a certain matter then and there to be enquired of by the grand jury. Herein fail not.

Issued the 8th day of April, 1875.

JNO. N. BUNTING,
Clerk Superior Court of Wake County."

The plaintiff attended and gave evidence to the grand jury, as required. Thereupon a witness ticket was proved by him and certified by the Clerk as follows:

"SUPERIOR COURT, } SPRING TERM, 1875.
Wake County. } *Before the Grand Jury.*

A M. Lewis, Jr., charges the State for six days attendance as witness, at $1.50 per day, $9.00. Mileage at 5 cents, $3.20.

This ticket sworn to before me, 10 cents. Total $12.30.

JNO. N. BUNTING, Clerk."

The above case agreed was submitted to the Judge of the Superior Court of Wake, and it was by him adjudged that the said witness ticket be allowed, and that the defendants pay the same. From this judgment the defendants appealed to this court.

At common law, no costs were recoverable by the plaintiff or defendant, in civil actions or in criminal prosecutions. 2 Inst., 288. No fees need have been tendered or paid by the State, to compel the attendance of witnesses in criminal cases, because it was the duty of every citizen to obey a call of that description, and because it was a case also in which he was in some sense a party as a member of the (196) commonwealth, supposed to be injured. I Greenl. Ev., Sec. 311.

Costs are now given by statute, both in England and this country, but they are recoverable by law, only in those cases, State and civil, where they are allowed, and only in the manner and to the extent allowed by law. After a diligent search through the body of our statue law, we have been unable to find any provision for the payment of witnesses summoned to appear and testify generally, before the grand jury, "in certain matters then and there to be enquired of." The summons in this case, does not command the attendance of the witness at a term of the court, nor purport to be issued by, or under the authority of the court, nor to have been issued in behalf of the State, nor to testify for the State. But waiving these irregularities, and assuming the summons to be regular in these respects, the important inquiry remains, whether witnesses before the grand jury are entitled to pay for attendance there, and if so, with what limitations. The result of the inquiry is, that there is no provision of law for their pay, where they are summoned merely to testify in matters of enquiry before the grand jury: but that they are entitled to compensation where a bill is prepared and sent to the grand jury with the names of the witnesses summoned, sworn and sent, endorsed thereon.

Witnesses are not entitled in the first case, because there is no authority of law to summon and send them before the grand jury,

upon mere matters of inquiry, a power which, if allowed, is capable of the grossest and most oppressive abuse, coupled with great temptations to abuse it.

The object sought, in sending the witness in this case, before the grand jury, was to enable that body to ascertain whether the witness knew of any violation of the criminal law, and if he did, to make a presentment of it to the court. Properly, a presentment
(197) is the notice taken by a grand jury of any offence, from *their own knowledge or observation*, without any bill of indictment before them. 2 Inst., 739. 1 Chit. Cr. Law, 162. 1 Bish, Cr. Pro., 731.

In England, almost every offender brought before the court for trial, has in the first instance, been examined and committed or bailed, by a magistrate, in the ordinary way, having been brought before him by a police officer, on his own judgment, or on the complaint of some private individual; though cases do occur where an offence is presented by the grand jury, without preliminary notice, against an absent party, "a mode of proceeding," however, says Brown, "which is not commonly resorted to, nor expedient." Com. Law, 991. 4 Bl., 301. Cooly, 311.

The English practice, which thus requires a preliminary investigation, where the accused can confront the accusers and witnesses with testimony, and have counsel, is more consonant to justice and the principles of personal liberty.

The powers of the grand jury, therefore, should not be extended farther beyond these conservative and salutary principles, than is clearly warranted by public necessity and the most approved precedents. A prosecuting officer has no right, of his own motion, or upon that of an officious, if not an intermeddling and malicious prosecutor, to send witnesses to the grand jury room, merely to be interrogated whether there has been any violation of the criminal law, within their knowledge. The law denounces such inquisitorial powers, which may be carried to the extent of penetrating every household, and exposing the domestic privacy of every family. The repose of society as well as the nature of our free institutions, forbid such a dangerous mode of inquisition. While the grand jury may thus proceed in prosecutions instituted by themselves, upon their own knowledge and observation, private individuals who may desire to prosecute offenders, have the right to inform the solicitor and have him to frame a bill of
(198) indictment against the accused, endorsing upon it the name of the prosecutor, as such, with such other witnesses as he may desire, and send the bill with the witnesses to the grand jury. The real prosecutor thus becomes responsible for the costs of a criminal action which he has instituted. As a general proposition, it is

not advisable for the prosecuting officer to send a bill to the grand jury, without endorsing upon it the name of a prosecutor, except upon presentments, or when the parties have been bound over by committing magistrates, or where the solicitor is directed by statute to send bills for particular offences. In these latter cases the prosecutions must be assumed to have been instituted on good cause and from proper motives, as well as upon due deliberation.

The course of procedure hereinbefore indicated as the proper one, will have the effect of bringing to justice all notorious offenders and all others that society may deem worthy of prosecution, and at the same time protect the public against frivolous or malicious prosecutions, and the attendant costs.

It was stated on the argument that a serious accumulation of costs had accrued to some of the counties from the compensation allowed to witnesses summoned and sent before the grand jury upon matters of enquiry. The practice is unwarranted by law, and such witnesses are not entitled to pay for their attendance. So far as this and other practices equally objectionable are followed by solicitors, it will not be amiss to say this much. A solicitor is not a judicial officer. He cannot administer an oath. He cannot declare the law. He cannot instruct the grand jury in the law. That function belongs to the Judge alone. If the grand jury desire to be informed of the law or other of their duties, they must go into court and ask instructions from the bench.

So the solicitor has no business in the grand jury-room. He is not a component part of that body. It is true, the grand jury is a component part of the court, but it is an independent and self-acting body, clothed with the very highest functions, and, (199) as such, is responsible to the law and to society. None but witnesses have any business before them. No one can counsel them but the court. They do not communicate with the solicitor, but with the court, either directly or through an officer sworn for that purpose. They act upon their own knowledge or observation, in making presentments. They act upon bills sent from the court, with the witnesses. The examination of witnesses is conducted by them, without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or suggestions of others, *or the opportunity thereof*. We know there have been wide departures from the principles here announced, in this and, perhaps, in other judicial districts. It has become necessary, therefore, to review the ground, and recur to the earlier and more correct practice as it was established by those who have gone before us, and has been handed

down by tradition and the recollection of the oldest members of the court.

Having decided who are not entitled to pay as witnesses, it only remains to ascertain who are entitled to pay. The right is derived from Bat. Rev., Chap. 105, Secs. 30, 34 and Chap. 17, sub. Secs. 343, which is but in affirmance of Rev. Code, Chap. 28, Sec. 9, and Chap. 35, Secs. 36 and 37. Bat. Rev., Chap. 105, Sec. 30, provides that "the fees of witnesses, whether attending a term of the Superior Court or before a referee or clerk, shall be one dollar per day." Section 31 provides that "no witness summoned in a State case shall be allowed to prove attendance for more than one case for any one day," etc; and Section 33 for proving attendance provides that "the certificate shall state the *case* in which, and the *party* by whom, the witness was summoned." The law to be extracted from these statutes seems to be this: Whenever the parties occupy the adversary relation of prosecutor and defendant, where a judgment for costs can be rendered against a defendant, as well as for him, there, in a court of record, the witness is entitled to compensation. We think a
(200) just and liberal construction of the statutes will embrace both a "case" constitued by bill, before the grand jury, and a "case" constituted in court, upon indictment found.

There is error. The judgment is reversed, and upon the case agreed the action is dismissed.

PER CURIAM. Action dismissed

Cited: Overman v. Sims, 96 N.C. 454; *Stern v. Herren,* 101 N.C. 518; *S. v. Lewis,* 142 N.C. 638; *S. v. Means,* 175 N.C. 822; *S. v. McAfee,* 189 N.C. 321; *S. v. Crowder,* 193 N.C. 132; *S. v. Carden,* 209 N.C. 410; *S. v. Thomas,* 236 N.C. 457.

JAMES CALLOWAY AND OTHERS v. THE ORE KNOB COPPER COMPANY AND OTHERS.

In a joint action against several defendants some of whom are residents of the State in whose court the action is brought, where such resident defendants are unnecessary or merely formal parties: *It is not error,* upon proper affidavit and bond filed by the non resident defendants, to remove the cause to the Circuit Court of the United States.

The fact that such resident defendants were made parties to the action upon motion of the non-resident defendants, is immaterial and constitutes no waiver of the right of the latter to a removal.

This was a MOTION in the cause heard before his Honor, *Furches, J.*, at Fall Term, 1875, of the Superior Court of ASHE County.

The defendants moved the court upon affidavit and bond filed, to allow the action to be removed to the Circuit Court of the United States. Upon the hearing, the motion was allowed.

All other facts relating to the points raised and decided in this court, are fully stated in the opinion of Justice RODMAN.

From the ruling of the court, allowing the motion, the plaintiffs appealed.

M. L. McCorkle, for the appellants. (201)

Armfield & Folk and Johnstone Jones, contra.

RODMAN, J. The plaintiffs brought their action to recover certain lands lying in Ashe County, of which the Ore Knob Company is in possession, and for an account of profits, etc. The plaintiffs claim title under a deed to them from George E. Miller and John L. Miller, made on November 6th, 1854. The defendant company claims the land under a deed from the said George E. Miller (who had previously purchased the estate of the said John L. Miller) dated March 31st, 1873, to Clayton, and by him conveyed to the company. The defendants allege that the deed to plaintiffs was obtained by fraud, and that the grantors therein being very ignorant men, were informed and made to believe that it was merely a lease to search for minerals, etc.

The action was brought against the company alone. But at Spring Term, 1875, of Ashe Superior Court, on motion of the company, the said George and John Miller were added as defendants, and filed answers stating substantially the same matters in defence as those contained in the answer of the company.

The cause being at issue at Fall Term, 1875, Clayton, for the defendant company, made affidavit in due form that the property in dispute was worth over $500; that plaintiffs were citizens of North Carolina; that the company was incorporated in Maryland, and that the president, directors and all the stockholders resided in that State; and that by reason of prejudice and local influence, the defendants in his belief would not be able to obtain justice in the court in which the action was pending. The defendants also gave bond, as required by the act of Congress. They thereupon moved that the action be transferred to the Circuit Court of the United States for trial, which motion the Judge allowed, and from his order to that effect the plaintiffs appealed to this court.

The act of Congress, under which the right to remove the (202) case is claimed, is in the following words:

"Third. When a suit is between a citizen of the State in which it is brought, and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before, or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reason to believe and does believe that from prejudice or local influence, he will not be able to obtain justice in such State court." Rev. Stat. of U. S., 639.

It is not denied that if the Ore Knob Company was the sole defendant, it would be a proper case for removal. But it is contended that when there is a joint action against several defendants, and some of them are citizens of the State, in whose court this action is brought, no such right to remove exists. *Case of the Sewing Machine Companies,* 18 Wall. This may be true where all of the defendants have a common interest. But surely it cannot apply where the defendants, who are citizens of the State, disclaim any interest in the controversy, and are unnecessary, or, at best, merely formal parties.

The pleadings in this case show that such is the case in respect to the Millers. It is not material that they were made defendants upon the motion of the company. That act being done *"diverso intuitu,"* was not a waiver by the company of its right to remove. The Millers are, nevertheless, unnecessary parties. No judgment is prayed for or against them, and they disclaim all interest in the controversy, admitting that they had assigned all their estate to the company.

Judgment below affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: Smoke Mount Industries v. Ins. Co., 224 N.C. 95.

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(203)

BENJAMIN FLEMING v. T. A. STATON.

A was indebted to B by account in 1866; B transferred the same to C. Afterwards, and within three years before action brought, A verbally promised C to pay the account. This promise was made subsequent to the adoption of C. C. P. In an action brought by C upon the account: *It was held,* that the assignee could only declare upon the promise made to him; and that as no promise had been made in writing within three years before action brought, the action could not be maintained.

CIVIL ACTION, heard upon appeal from a judgment of a Justice of the Peace, before his Honor *Judge Moore,* at Spring Term, 1875, of the Superior Court of PITT County.

The complaint was in the following words and figures:

"T. A. STATTON,

To ROBERT GREEN, Dr.

1866. To Lumber, $25.00
Int. for two years, 3.00

$28.00"

The account was endorsed:
"Pay the within account to B. Fleming.

R. GREENE."

Upon the trial it was alleged that it was transferred to the plaintiff for a valuable consideration, and that the plaintiff was the present owner of the cause of action; that within three years next preceding the commencement of this action, the plaintiff presented the account to the defendant, and that he promised to pay the same.

The facts alleged were admitted and the defendant relied upon (204) the statute of limitations.

Upon the hearing his Honor rendered judgment in favor of the defendant, and thereupon the plaintiff appealed.

Carter, for the appellant.
Walter Clark and Mullen & Moore, contra.

BYNUM, J. In *Finn v. Fitts,* 19 N. C., 236, it is decided that in an action begun by warrant, there is no other declaration than the statement, how the debt became due. And whether the plaintiff's case was made out by the original promise implied by law from the delivery of the articles, or the subsequent express promise to pay for the articles so delivered, such case was embraced by the statement in the warrant. It is then further held, that had the action been commenced by writ, where a formal declaration is required, a count for goods sold and delivered, would equally have embraced the first and second promise, but that the promise must be *identical* and by the *same man to the same man,* else a recovery can be had only on the count on the new promise. Where the old and new promises have been made to the same individual in the same right, the action on the old promise will lie, and is the well settled form in this State, following the English courts, where this form of declaration is adopted. When the defendant pleads the statute of limitations as a bar to the action, the plaintiff replies the new promise, which when shown, is evidence of the renewal or continuance of the old promise. So far have the

courts gone in sustaining the declaration upon the original promise that in *Falls v. Sherrill,* 19 N. C., 371, it was held that where an action is begun on a contract barred by the statute, a promise made *after* the action is commenced, is sufficient and will take the case out of the statute, because it is evidence of a *continuing* promise. In *McCurry v. McKesson,* 49 N. C., 510, the same line of decisions is affirmed,
(205) and *it is held,* that where the old promise is barred and the new one relied on to repel the statute, the declaration must be upon the first assumpsit, and the second revives the first, provided it is made between the same parties to do the same thing.

But while the decisions are uniform that it is proper to declare upon the original contract, they are equally uniform that the declaration must be upon the new promise, where the contract is made with one and the new promise to another. In *Thompson v. Gilreath,* 48 N. C., 493, *it is held,* that where a note without seal, payable to bearer, is transferred by delivery to several holders successively, and after three years from its maturity, a suit is brought on it, a new promise made to a previous holder, cannot avail a subsequent holder, to repel the statute of limitations. "If the new promise is to deliver a horse or other specified thing, in consideration of the old debt, of course the action must be on the new promise. So if the debt was due to the testator and the new promise is to the executor." So also, in an action by an assignee of an insolvent debtor, for money due him before his insolvency, stating the new promise to have been made to the plaintiff, the action must be on the new promise.

To allow the operation of the statute as a bar to the action, to be defeated at all by a new promise, has been by the courts regretted as an unwise departure from the strict letter of the statute, and the direction of the decisions now is to adhere to the letter of the statute, except where a departure from it is settled by authority. But "there is no higher evidence of the law, than the forms of pleading, settled and adopted by universal usage, through a long course of time." The doctrine that the statute of limitations can be removed by proof of a new promise, has been restricted, first, to actions on promises; second, the new promise, to repel the statute, must be made to the same person and to do the same thing, in order to support an action on the old promise; and third, when the original contract is made with
(206) one and the promise relied on to repel the statute is made to another, who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on. *Thompson v. Gilreath,* 48 N. C., 493, and the authorities there cited and commented on. We have only to apply these principles to our case. The account sued on, was made by the defendant with, and was due to, one Greene,

in 1866, who sold and transferred it to the plaintiff. The defendant afterwards, and within three years before this action was begun, promised, without writing, to pay the account to the plaintiff. The assignee can declare only upon the promise made to him, but that promise was made after the adoption of the Code of Civil Procedure, the 51st section of which provides: "No acknowledge or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest."

No promise *in writing* having been made within three years, the limitation prescribed in the statute, the action cannot be maintained.

How it would have been, had the old and new promise been made to the same person in the same right, is an important question, not now presented, and upon which no opinion is given.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Pool v. Bledsoe, 85 N.C. 2.

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(207)

STATE v. J. B. BRYANT.

Upon the trial of an indictment under chap. 32. sec. 72, Battle's Revisal, (betting on a game of chance,) the jury returned a special verdict, finding: At the time specified in the indictment, there was kept a place on Wilmington street, in Raleigh, where there were sold, small oval shaped cards, with certain numbers on them; that there were also in a box a certain number of envelopes, containing each one card with a number on it. The party bought one of the cards, and was permitted to draw from the box an envelope; if the number on the card corresponded with any one of the numbers on the oval card, the purchaser got ten times the amount invested. The envelopes and the oval cards were kept on a table at which the proprietor stood. The defendant bought and drew a card at the time specified in the bill of indictment. It was called a gift enterprise, and so licensed. *Held:* That the enterprise was a lottery, and the parties who sold the tickets were not indictable under said section, and the purchaser thereof was not indictable at all, for the reason that the statute did not make it an indictable offence to purchase lottery tickets.

INDICTMENT, tried before *Watts, J.*, and a jury at January Term, 1875, of the Superior Court of WAKE County.

The defendant was indicted under Chap. 32, Sec. 72, Battle's Revisal, for playing at a game of chance. The jury rendered the following special verdict:

1. At the time specified in the indictment, there was kept a place, on Wilmington street, in Raleigh, where there were sold small oval shaped cards with certain numbers on them; that there were also in a box a certain number of envelopes, containing each one card with a number on it. The party bought one of the cards and was permitted to draw from the box an envelope; if the number on the card corresponded to any one of the numbers on the oval card, the purchaser got ten times the amount invested. The envelopes and the oval cards were kept on a table at which the proprietor stood.

2. The defendant bought and drew at the time specified in the bill of indictment.

(208) 3. It was called a gift enterprise and so licensed.

4. If, upon this state of facts, the court be of the opinion that the defendant is guilty, the jury so find, otherwise they say for their verdict that he is not guilty.

It was adjudged by the court that the defendant was not guilty, and thereupon the State appealed.

Busbee & Busbee, for the defendant, argued:

Defendant is indicted in two counts, (amounting practically to one—the only variation being between a charge of playing and betting money,) for a violation of Battle's Revisal, Chap. 32, Sec. 72, for betting money or playing at a gaming table.

The defendant is not indicted for a violation of section 69.

The proceeding described is clearly a lottery. Bishop on Stat. Crimes, Secs. 952, 953, 954, 955, 956. *Bell v. the State,* 5 Sneed (Tenn.) 507, 509.

It is not now indictable to construct *a place* at which games of chance are played, etc., as it was in 1848, as in *State v. Gupton,* 30 N. C., 273. Rev. Stat., Chap. 34, Sec. 68, is not now in force.

It is only indictable "to erect," etc., and to play, etc., at a gaming table (other than a faro bank,) by whatever name called, at which games of chance shall be played.

By admitted law of construction, "a gaming table, other than a faro bank," means a table of like kind. It is not intended that a buyer of a lottery ticket should be indicted, because there was a table in the room in which the tickets were sold, upon which they were placed. Rev. Stat., Chap. 34, Sec. 68; Rev. Code. Chap. 34, Sec. 72; Bat. Rev., Chap. 32, Sec. 72.

As to what gaming tables were meant, see Bish. on Stat. Crimes, Sec. 866; *Ritte v. Commonwealth,* 18, B. Monroe (Ky.) 35, 39, 40.

In a game there must be a winner and a loser, but in a lottery as the prizes are to be distributed in any event, the manager does not win, because the ticket purchaser loses. Bishop, 857, 858. (209)

SETTLE, J. The enterprise described in the special verdict is a lottery; and a lottery is a species of gambling; and gambling is immoral and is denounced by statute. But all gaiming is not immoral, and it may be that all immoral games are not prohibited by statute. And however immoral this or that game may be, we cannot go outside of the statute law of this State to punish those who play at them. The managers of a lottery and also their agents for selling tickets, are indictable under Chap. 32, sections 69 and 90 of Battle's Revisal; but these sections do not embrace persons who buy their tickets.

The object of these two sections is to punish the chief offenders, who inaugurate and carry on the schemes specified therein, but they were not framed to catch small and occasional transgressors of morals and propriety.

This is not so however with sections 71 and 72 of the same chapter, which denounce faro banks and gaming tables (other than a faro bank,) by whatever name such table may be called; for in these sections the meshes are so adjusted as to catch both large and small; in fact all who participate in such games.

The indictment in the case before us is framed upon section 72, but the facts do not support it.

The State lays stress upon the fact that the lottery, or game, if you choose, was carried on at a table. The classes of offenders specified in sections 69 and 70 cannot be enlarged, nor can those specified in sections 71 and 72 be diminished by the mere circumstance of the presence or absence of a table in the room or place where they carry on lotteries and games.

In other words while the seller of a lottery ticket is indictable, the purchaser is not, and simply for the reason that the statute makes it so.

Can the fact that the purchaser of a lottery ticket, obtained it at a *table,* instead of on the street, effect his guilt under the (210) statute? We think not.

We have examined Bishop on Statutory Crimes, and all the cases cited by counsel for the prosecution and defense, and as far as they are applicable to our statute they support the conclusion at which we have arrived.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Lumsden,* 89 N.C. 574; *S. v. DeBoy,* 117 N.C. 705; *S. v. Lowe,* 178 N.C. 778; *S. v. Powell,* 219 N.C. 222.

J. F. G. SPEARS AND WIFE v. R. L. SNELL.

Battle's Revisal, chap. 5, sec. 3 provides: "The Judges of Probate in their respective counties shall bind out as apprentices," all orphans whose estates are of so small value, that no person will educate and maintain them for the profits thereof.

Therefore, where the uncle of an orphan was, upon petition, without notice to his mother, appointed guardian, and subsequently the mother, who had again married, filed a petition praying that the order of appointment be revoked and that she be appointed guardian; and upon the hearing it appeared that the orphan's estate was very small, and neither of the parties offered to maintain and educate him for the profits thereof: *It was held,* that the court below erred in revoking said order and appointing the petitioner guardian, upon her filing bond as required by the court; and that the orphan should have been bound out as an apprentice.

The Probate Court of the county in which such orphan has acquired a settlement has jurisdiction of the proceeding, which should be entitled *In re* A. B. etc.

The Probate Judge had authority and ought, in the exercise of a legal discretion, upon the application of the step-father, acting in the name of his wife, made within a reasonable time, to have revoked the order appointing the uncle guardian, without notice to the mother, and heard the same *de novo.*

The boy was a competent witness, and ought to have been examined in that character, and his feelings and wishes ought to be allowed serious consideration by the court, in the exercise of its discretion as to the person to whose control he was to be subjected.

This case was an APPEAL from the decision of his Honor, *Schenck, J.,* affirming his judgment of the Probate Court of CABARRUS (211) County, appointing the plaintiff guardian of one C. A. Snell, an orphan. The case was heard at Chambers, June 19th, 1875.

The following are the facts, as found by the Probate Judge:

"J. F. G. Spears and his wife, Margaret, applied to the court, upon affidavit, to revoke the letters of guardianship heretofore issued to R. L. Snell, over the person and estate of Cyrus A. Snell, a minor, and to appoint the applicant, Margaret Spears, guardian of said minor. The said Spears and wife are persons of good character. The said Margaret is the mother of Cyrus A. Snell, by a former marriage. Cyrus is in his thirteenth year. He was born at his grandfather's

(Elias Snell,) now deceased, and has lived with and been raised by him. That his grandfather died during the year 1874.

Margaret Spears lived with her father-in-law some three years after the birth of her said child, when she went to live with her father, leaving the child with his grandfather at the request of the grandfather, who begged that he might keep him.

J. F. G. Spears intermarried with Margaret Spears about seven years since, and after her marriage she applied for her son, but the old man persuaded her to let him keep him. The said Spears and his wife own very little personal property, and no real estate. They have three children. Spears is in debt.

The defendant, Robert L. Snell, is a man of good character, is the owner of about $1,200 worth of real estate, and is in comfortable circumstances, is a resident of this county. He resided with his father up to the time of his death, and managed his affairs. Said Robert Snell sent the said Cyrus to school for six months, and is much devoted to him. That said Robert has been married for ten years, and has no children.

After the death of his father, Spears and his wife went to the defendant for the minor, and the defendant asked the child if he desired to go with them, when he cried and said he did not. The defendant thereupon refused to allow the plaintiffs to take him without his consent. The defendant applied to this court for the (212) guardianship of said child, without giving notice to his mother.

Since the commencement of this proceeding, the plaintiff, Spears, stated that he wanted the boy to work for him, but that he was angry at the time. He said the plaintiff, Margaret, stated that she thought it best for the child if he were to remain with his uncle Robert.

The plaintiffs live in the county of Mecklenburg, having moved there two years since.

The following is the affidavit upon which the letters were granted to the defendant, and the court finds that the facts therein alleged, are true:

Applicant R. L. Snell makes oath that he is the uncle of said minor; that said minor is in his thirteenth year; that said minor has been living with applicant all his life; that said minor's father is dead and his mother is married again, and is living in another county; that said minor has an estate of about two hundred dollars.

The defendant proposed to examine the minor, Cyrus, as a witness, when the plaintiff objected on the ground that it was against the policy of the law. The court sustained the objection, and the defendant excepted.

Upon the forgoing facts, it is the opinion of the court that the mother is entitled to the guardianship, and that as the letters were granted without notice to her, it is ordered that the said letters of guardianship granted to R. L. Snell on the 4th day of August, 1874, be revoked, and that letters of guardianship of the person and property of the said Cyrus A. Snell, a minor, be granted to Margaret Spears upon her entering into bond, in the sum of $500, with justified sureties.

From the judgment of the court, the defendant appealed to the Superior Court.

The case was heard on appeal by his Honor, *Judge Schenck*, at Chambers, in Charlotte, on January 3d, at 1876, when the fol-
(213) lowing judgment was rendered; that the judgment of the Probate Court revoking the letters of guardianship heretofore issued to the defendant as guardian of the person and estate of Cyrus A. Snell, be affirmed.

And adjudged further: That Margaret Spears, the mother of said Cyrus A. Snell, is primarily entitled to the guardianship of the person and estate of said Cyrus, and the Probate Court of the proper county will appoint her accordingly, on her giving bond and security required by law.

From the judgment of the Superior Court, the defendant appealed.

Montgomery, for the appellant.
Burringer, contra.

PEARSON, C. J. This is a proceeding concerning the appointment of a guardian for Cyrus A. Snell, an infant of the age of thirteen years.

We think there is error in the conclusion of his Honor upon the facts found, (which the reporter will set out,) and feel confident that he would have given the *uncle* of the boy a right to the custody and control of his person rather that the *step-father*, which is the effect of the order giving it to the mother, had not his Honor felt cramped by his opinion that in law the mother had a *primary right*. Herein he erred, and by this he was misled. In fact, he and the Judge of Probate and the counsel of both parties, altogether misconceived the case.

The boy had no *estate* to be committed with his person to the charge of a guardian; he had nothing but his *body* to be put, by indentures of apprenticeship, into the keeping of some fit person who would undertake to educate him and give him a freedom suit and such other more favorable terms as the Judge of Probate, acting in his behalf, could induce the master to agree to.

In this contest between the step-father and the uncle, the in- (214) terest of the boy seems to have been altogether overlooked. Neither of the contesting parties offered "to educate and maintain the boy for the profits of his estate." Battle's Revisal, Chap. 5, Sec. 3. (1.) So the boy ought to have been bound as an apprentice. We would then have had the indentures which secure to him maintenance and an education; true, to a very limited extent; but "half a loaf is better than no bread." *Our boy,* (I emphasize this, for the courts are the general guardians of all orphans,) is delivered to his step-father. The poor fellow, after serving until he arrives at the age of twenty-one, will have nothing to look to except a bond, in the penalty of $300, with condition properly to manage and account for his estate as guardian. See order of Probate Judge, which is affirmed by his Honor, leaving it indefinite as to the *proper county* in which the bond should be given.

We have said enough to dispose of the matter; but as it will go back for final action, it is proper to give our opinion upon the several questions made on the argument before us.

1. We think the Probate Judge of the county of Cabarrus has jurisdiction of the matter, which should be entitled "*In re* Cyrus A. Snell," so as to make him the prominent figure, and let his step-father, acting in the name of his mother and his uncle, intervene as secondary characters. Cyrus A. Snell was born in the county of Cabarrus, and has lived there ever since. His mother, supposing her to have any claim to the custody of his person after the age of nineteen, (three years,) had surrendered her claim to the boy's grand-father, who lived in the county of Cabarrus, and in this manner the boy had acquired *a settlement* in that county of which it was not in the power of the mother to deprive him, and fix his settlement in the county of Mecklenburg, simply by the fact of her moving into the latter county, especially after she had subjected herself to the control of a second husband. Suppose, by accident or disease, the boy had become decrepid and a county charge, could it be supposed, for a moment, that the accident of her going with her second husband to live in the (215) county of Mecklenburg, when her husband had no homestead or other fixed estate, would charge that county with his maintenance, to the relief of the county of Cabarrus, where he was born and raised and in which he had acquired a settlement?

2. We think it clear, that the Judge of Probate, finding he had upon the application of the uncle, improvidently granted to him "letters of guardianship," as styled in the record, without notice to the mother, of whose existence and residence the application informed him, had power and ought, in the exercise of a legal discretion, upon the

application of the step-father, acting in the name of his wife, made within reasonable time, to have called in the letters of guardianship, and heard the matter *de novo,* when all sides could have a showing.

3. We think the boy was a competent witness, and ought to have been examined in that character. Indeed, we think, being the party mainly concerned, he had a right to make a statement to the court as to his feelings and wishes upon the matter, and that this ought to have been allowed serious consideration by the court, in the exercise of its discretion, as to the person to whose control he was to be subjected.

4. It is not necessary to decide whether a mother upon the death of her husband is under a legal obligation to support her child after the age of nineteen, and is entitled to his services, for in this case, admitting that the mother is *primarily entitled,* there are special circumstances to induce the court in the exercise of a legal discretion, to decide that the boy shall remain with his uncle, with an undertaking for maintenance and education.

1. The boy during a long residence in the family of his grandfather and uncle, has formed attachments and associations which he is unwilling to sever. At the age of 13, a minor has a right to have his wishes and feelings taken into consideration, whether in the choice of a master as an apprentice, or of a guardian to whom *his* (216) *estate* and person are to be committed, or of a friend who, without respect to the want of an estate, will undertake to provide for his maintenance and education, to prevent his being put out as an apprentice, as in our case.

2. The mother had separated from the child and subjected herself to the control of a second husband, thus putting it out of her power to support the child without subjecting him to the control of a step-father, which she had no right to do. Consequently she was no longer entitled to the services of the child, and she agrees that it is better for the child to remain with his uncle.

3. The uncle is a man of substance, and offers to provide for the maintenance and education of the boy.

4. "The step-father" is under no legal obligation to support the boy, and consequently is not entitled to his services, to say nothing of the fact that the step-father is a man of small estate, has no land or fixed residence, and moves from place to place as a tenant or cropper.

These and the other facts of the case, show beyond all question, that it is for the interest of the boy to remain with his uncle, and in the absence of any positive right, either in the mother or step-father, the court below, in the exercise of its legal discretion, should so order.

This opinion will be certified, to the end that proceedings may be had in the court below in conformity thereto.

PER CURIAM. Judgment accordingly.

Cited: James v. Pretlow, 242 N.C. 105.

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(217)

STATE v. JOEL DISHMAN.

Where, upon the trial of an indictment for larceny, the only evidence against the defendant was: That when the witness for the State entered a still house where the stolen property (a hog) was found, between eleven and twelve o'clock at night, "the defendant was lying on a pallet, apparently asleep, and it was not shown that he awoke during the time the witness engaged in a conversation with his codefendants, each of whom charged the other with the larceny; and there was no evidence *aliunde* connecting the defendant with the larceny: *It was held,* That the court below erred in refusing to charge the jury that the evidence was not sufficient to warrant the conviction of the defendant.

INDICTMENT for *Larceny,* tried before *Furches, J.,* at Fall Term, 1875, of the Superior Court of WILKES County.

The defendant was jointly indicted with Daniel Dishman, Noah Hardin and W. G. Cheatham, for the larceny of a hog, the property of one Bartlett Mullis.

Mullis was examined as a witness, and testified: That about the first of June, 1872, he lost a sandy or sorrel-colored hog, weighing about forty or fifty pounds, marked with a hole in his left, and an underbit in his right ear.

On the trial, J. W. Redman testified: That he was an officer and had a warrant for the arrest of Noah Hardin and Daniel Dishman, and had been for some days trying to arrest them. On the night of the 4th June, 1872, about 11 or 12 o'clock, he and one Osborne Anderson went to the still house of the defendant, Cheatham, in search of said Dishman and Hardin. Upon arriving at the still-house, he demanded to know who was in the house, and the defendant, Cheatham, said he would tell him if he would not shoot. He told him he would not, and witness and Anderson went in. In the still house they found the defendant Cheatham and his brother and Daniel Dishman, Joel Dishman and Noah Hardin.

Joel Dishman was lying on a pallet, apparently asleep.

Witness found the head and liver of a hog cooked and hot, (218) in a pot, with a sheep skin thrown over it. He asked what

that was? The defendant (Cheatham) replied that it was his, and his brother's "edibles." Upon examination, he found the fresh pork of a small hog in two other places in the still-house. He then charged them with stealing it. The Cheathams charged the defendants Hardin and Daniel Dishman with killing the hog and bringing it there, and the Dishmans and Hardin charged the Cheathams with killing it.

Osborne Anderson was examined as a witness, and testified substantially to the same effect as Redman, except that he said that the Dishmans and Hardin accused the Cheathams of killing the hog *and bringing it to the still-house.*

The counsel for the defendant requested the court to charge the jury, that there was no evidence against the defendant, Joel Dishman.

The instruction prayed for was refused by the court, and the defendant excepted.

The court, after summoning up the evidence, charged the jury: That it was for them to determine the weight and effect of the testimony; that they must be satisfied of the defendants' guilt, before they could find him guilty; that is, that he took the hog, or assisted in taking the hog of Bartlett Mullis, for the purpose of appropriating it to his own use, and without letting Mullis know that he had done so; that if the testimony satisfied them that the defendant did so take the hog, they should return a verdict of guilty; but if it did not so satisfy them, then they should return a verdict of not guilty.

The jury rendered a verdict of guilty, and the defendant moved for a new trial. The motion was overruled and judgment pronounced, and thereupon the defendant appealed.

M. L. McCorkle, for the prisoner.
Attorney General Hargrove, for the State.

(219) SETTLE, J. We think his Honor should have charged the jury, in compliance with the prayer of the defendant, that there was no evidence to warrant his conviction.

We are to take it that all of the evidence has been sent to this court. From this, it appears that when the witnesses for the State entered the still-house, between eleven and twelve o'clock at night, "the defendant Joel Dishman was lying on a pallet apparently asleep," and it is not shown that he said anything or heard anything, or even woke up and remained silent, during the time the State witnesses were in the still-house talking with the other defendants about the missing hog and the fresh meat. Why set forth the fact prominently, in the record of the evidence, that the defendant was apparently asleep, unless that fact be of importance, and is to have its proper weight

in determining the guilt or innocence of the accused? And of what possible consequence could it be in determining that question, if it be true as contended by the State, that the defendant woke up and participated in the conversation about the lost hog?

The only foundation for the suggestion that the defendant did awake and join in the conversation, is the very unsatisfactory statement that "when the Cheathams charged the Dishmans and Hardin with killing the hog and bringing it to their still-house, the Dishmans charged the Cheathams with killing the hog," etc.

Let it be remembered, there was no charge in the warrant against Joel Dishman, and in view of the fact, already commented upon, the circumstance that, in making up the case for this court, the Cheathams and Dishmans are spoken of in the plural number, affords no sufficient ground to infer that there was any evidence against Joel Dishman.

Let it be certified that there must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

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(220)

RALEIGH & AUGUSTA AIR LINE R. R. CO. v. J. J. WICKER AND OTHERS.

The rule for the assessment of damages to lands taken for railroad purposes, with regard to the benefit to the land arising from the construction of the road, as settled in this State, is: The jury shall not deduct from, or set off against, the damages special to the land, a part of which is taken, any benefits arising from the railroad under construction, which are common to the owner and all other persons in the vicinity; but may deduct or set off any benefit peculiar to the land.

The owner is entitled to recover, for the expense of any additional fencing of cultivated lands, made necessary by reason of the construction of the road; but as he is not required by law to fence uncleared or uncultivated land, and the expense of fencing such, should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated, the same should not be taken into consideration.

If by the construction of the road, water be ponded upon the land, the owner may recover damages, if the ponding be the result of the obstruction of a natural or artificial drain way; otherwise, if the ponding be the result of an alteration of the previous grade of the land, caused by the construction of the road bed.

The danger that the cars of the railroad company may injure the cattle of the land owner without negligence, is not peculiar to the land owner, a part of whose land is taken, but common to all who own cattle near the line of the road; and as the owner is not required to abate the damages to his land, on account of any benefit he may derive from the road in common

with adjacent land owners, he is not entitled to be compensated for any damages which are in like manner common.

This was a SPECIAL PROCEEDING tried upon appeal from the award of commissioners appointed to assess the damages arising from the construction of the road of the plaintiff through the lands of the defendant, before *Buxton J.*, at Spring Term, 1875, of the Superior Court of MOORE County.

Commissioners were appointed upon the petition of the plain-
(221) tiff to assess the damages arising from the construction of the plaintiff's road bed through the lands of the defendant. The damages were assessed at the sum of four hundred dollars, and the plaintiff objected to the finding of the Commissioners on the ground that the damages assessed were excessive; the objection being overruled the plaintiff appealed.

When the case was called for trial, all irregularities were waived and the only question submitted to the jury was as to the amount of damages.

The plaintiff is a corporation originally chartered under the name of "The Chatham Railroad Company." By a subsequent statue, Chap. 11, acts of 1871-'72, the name was changed to "The Raleigh and Augusta Air Line Railroad Company."

By an act amending the charter of the Chatham Railroad Company (Private Acts 1862-'63, Chap. 26, Sec. 7) it is provided that in making the valuation, the said commissioners shall take into consideration the loss or damage which may accrue to the owner or owners in consequence of the land or right of way being surrendered, and the benefit or advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the value and amount of each, and the excess of loss or damage over and above the advantage and benefit shall form the measure of the valuation of said land or right of way.

In Bat. Rev. Chap. 99, Sec. 15, entitled "Railroad Companies" the rule of compensation is stated differently, it being provided "in determining the amount of such compensation, they (the commissioners) shall not make any allowance or deduction on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed railroad."

Preliminary to the introduction of evidence, the question was raised which rule of damages shall be adopted in this case?
(222) The court held that the rule laid down in the charter should be adopted.

It was in evidence that the plantation of the defendant consisted of two hundred and seventy-five acres of land, valued by the several

witnesses at prices ranging from $5 to $8 per acre. The bed of the road upon the defendant's land is two-thirds of a mile in length, and the land condemned for the use of the road covers about sixteen acres. The track runs within about a quarter of a mile of the defendant's house. About two-thirds of the road runs through old fields and gullies, not fit for cultivation, and a small part thereof through valuable meadow lands worth ten dollars per acre.

Owing to the gullies and ravines and also to the excavations and embankments of the road, there are three crossing places, one of these is the public county road, which by reason of an excavation has been changed from a direct line, requiring a detour of fifty yards down the track and fifty yards back instead of crossing directly over the road in its original course. Owing to insufficient culverts, water is sometimes ponded on two or three acres of the defendants' land. The crossing near the dwelling used to be good. It is interrupted now. In running through the orchard a row containing twelve apple trees was buried to the height of two or three feet. Waste dirt from one to two feet in depth, and piles of rock from one to nine feet high are scattered along the line of the road, off the condemned land, and upon the plantation of the defendant.

There was a great diversity of opinion among the witnesses as to the amount of damage sustained by the defendant. There was much evidence as to the advantages and disadvantages arising from the construction of the road.

His Honor charged the jury:

That the enquiry for them to make was: how much more was the land of the defendant damaged than benefited by this railroad crossing it. In considering this question the jury are to remember that railroads were useful enterprises, promotive of public good, (223) sanctioned by law, and authorized to enter upon the land of the citizens: so that there was nothing wrong or in the nature of trespass in the act of entry by this company. The object of this proceeding was to compensate the owner for the damage necessarily sustained. In making their estimate the jury should not take into consideration any mere fancied injury or benefit, or remote probability of advantage or disadvantage; they were to consider the direct consequences necessarily resulting from the railroad passing through the farm, not the remote speculative or contingent damage. For instance, they might take in consideration the circumstances mentioned in evidence, that about sixteen acres were appropriated for the tract—the increased fencing required—the ponding of water on the land, the space occupied by waste dirt and rock, the inconvenience occasioned by obstructing the passage from one part of the farm to another, and

the liability to injury to which the stock on the farm would be exposed. These were consequences flowing directly from the passage of the road through the farm and tended to render it less valuable. On the other hand the jury would reject from their consideration such circumstances as the worry of mind, or possible pillage of fruit, or other depredations apprehended by counsel in their argument, from railroad hands.

To the charge of his Honor the plaintiff excepted.

The jury rendered a verdict in favor of the defendant, assessing the damages at $450.

Thereupon the plaintiff moved the court for a new trial, on account of error in the charge of his Honor, in including among the circumstances which the jury might properly consider, as depreciating the value of the land, "the liability to injury to which the stock on the farm would be exposed."

The motion was overruled and the plaintiff appealed.

(224) *Manning, for the appellant.*
Neill McKay, contra.

RODMAN, J. I. The Judge below was of opinion that the rule for the measure of damages to an owner of land condemned for the use of the railroad, prescribed in the charter of the company, (Private Acts 1862-'63, Chap 26, Sec. 7,) was different from, and controlled, that prescribed by the general law, (Bat. Rev., Chap. 99, Sec. 16,) and he directed the jury in assessing the damages, to consider and deduct therefrom the benefits of the road to the defendant's land. This opinion of the Judge was adverse to the defendant, and as he has not appealed, no question upon it comes to us for decision.

As the question, however, is of general importance and will necessarily arise upon a new trial, it may be useful to make some observations upon the opinion of the Judge on this point, although they are not necessary to a decision of the case.

It is an admitted rule that all special grants of special benefits and privileges, whether to corporations or to individuals, contrary to the general law, are to be strictly construed, and will not be enlarged against the public by intendment. All such grants must be interpreted with and in subordination to the general law, unless it clearly appears that the Legislature intended to depart from the general law and to repeal it as respects the particular grantee, and to confer on him peculiar privileges. An illustration of this rule of interpretation is found in *State v. Krebbs*, 64 N. C., 604.

The rule with respect to the assessment of damages to land taken for railroads upon the point under consideration, is settled in this State, *Freedle v. N. C. R. R. Co.*, 49 N. C., 89, and has been recognized in so many States that it may now be taken as the general law of the United States. Cooley Con. Lim., 565; *Swaze v. N. J. Midland R. W. Co.*, N. J., 297; *Walker v. Old Colony, etc., R. W. Co.*, 103 Mass., 10; *Elizabeth Town, etc., R. R. Co., v. Helm*, 8 Bush. 681, (Ky.); *Lee v. Tebo, etc., R. R. Co.*, 63 Mo. 178. (225)

The rule, as gathered from the cases cited, is this: The jury shall not deduct from, or set off against, the damages special to the land, a part of which is taken, any benefits arising from the railroad under construction which are common to the owner and to all other persons in the vicinity, but may deduct or set off any benefits peculiar to the land. The charter may, without violence, be interpreted as meaning to express this rule, and if it does, it is in conformity to the general law.

II. It is difficult to reconcile all the cases in which it is attempted to declare more particular rules for estimating damages in cases like the present. The following are consistent with the current of authority, and seem just and reasonable. The land owner is entitled to the market value of the land taken by the company. In addition to this, he is entitled to any damage accruing to the part not taken, by reason of its being separated into two sections by the road, under which will be considered the difficulty of getting to one from the other by reason of the elevation or depression of the road bed, and of the piles of earth and stone along the line of the road; the inconvenience, if any, of having a tract cut up into small or irregular sections; that arising from the deflection of the public road crossing the railroad from its accustomed crossing place to another one, and all other injuries incidental to the taking of the land. That these were properly to be considered in the estimation, does not seem to have been a dispute on the trial. The jury were at liberty to consider them under the instructions given by the Judge, and they seem to have done so.

There are three sources or grounds of damage which the Judge instructed the jury that they might consider, in respect to which his instructions are excepted to:

1. The expense of the additional fencing made necessary by (226) the road.

Every planter of cultivated land is required to keep it enclosed by a sufficient fence, and if the road makes necessary additional fencing to enclose the cleared land of the defendant, it is to be considered in estimating the damages to him from the road. *Freedle v. N. C. R. R. Co., ub. sup.* If by reason of the steepness of the railroad cut or em-

bankment, prohibiting the access of cattle from the land occupied by the company, no additional fencing is made necessary, of course nothing will be allowed on that account.

As to the expense of fencing uncleared or uncultivated land, that should not be taken into consideration. The owner is not required by law to enclose such land, and it is not usually done. No damage in this respect is done to the land in its present condition, and any damage by reason of the necessity of fencing, in case the land shall at any future time be cleared, it too remote and uncertain to be capable of estimation. Moreover, the Legislature has thought proper not to impose on railroads in this State, the duty of fencing their lines of road. If, however, it should be held that every owner of wild land through which the road passes could recover as damages the cost of such fencing, a heavier burden would be imposed on the companies than if they were required to make the fences themselves. And as the fences would rarely be built, neither the company nor the public would receive the benefit which their erection is intended to secure. With this qualification we concur with his Honor as to this element of the damages.

III. The Judge instructed the jury that they might consider the ponding of water on the land of the defendant. In *Walker v. Old Colony, etc., R. W. Co.*, 103 Mass., 10, a distinction is taken between cases in which the ponding is caused by the obstruction of a natural or artificial drain way; and where it is caused by the alteration
(227) of the previous grade or slope of the land, by which the surface water on defendant's land is prevented from running off as it was accustomed to do. In the first of these cases, it is held that the resulting damage should not be estimated in measuring the compensation to the land owner; but that in the second it should be. The distinction at first sight may seem over refined and unreal. But on reflection, it will be found to be a substantial one. In the first of these cases, it is the duty of the company in constructing its road bed to leave a space sufficient for the discharge of the water through its accustomed drain way, whether natural or artificial. If it fails to do so, any owner whose land is injured, whether he be one a part of whose land is taken for the road or not, may compel the company to discharge its duty by opening the drain to its previous capacity. And so if the obstruction causes a nuisance, the corporation may be compelled to abate it. If the damage to the land of the defendant from this cause should be assessed to him, the corporation would acquire against him a right to pond his land perpetually, but not against any adjoining or other person injured, or against the public if it creates a nuisance. These might deprive the corporation of its use of the defend-

ant's lands by reason of their right to compel it to open the drain. Under a rule which should subject the corporation to damages in cases of this sort, it would pay for a right which it could never get. And even if the ponding were entirely on the land of the defendant, so that this result would not follow, and the corporation would obtain a perpetual right to flood the land, yet it is contrary to public policy to give to one not the owner of the soil, a right to reduce any land to perpetual uselessness, without necessity and without a corresponding benefit to any one.

The case of surface water is different. Every one has a right to build on or otherwise improve his own land, subject to certain equitable limitations which it is not necessary now to state. If, as an incidental consequence of this lawful use, the flow of the (228) surface water from adjoining land is obstructed, the owner of such land cannot recover damages as for a tort. Wood on Nuisances, Sec. 383; *Waffle v. N. Y. Central R. R. Co.*, (N. Y. S. C.) 421; *Rawstron v. Taylor*, 11 Exch. 369.

As the defendant could not hereafter compel the corporation to remove the surface water thus ponded on his land by the lawful construction of the road, he is entitled to have any incidental damage from that cause, assessed to him in measuring his compensation for the land taken.

The case does not show the nature of the ponding on defendant's land. The instructions of his Honor on this point were too general and not therefore strictly correct. But as they were not excepted to on that special ground, we should not be disposed to sustain the exception and to grant a new trial on that ground alone.

3. His Honor instructed the jury that they might allow to the defendant damages on account of the possibility that his cattle might be killed by the trains on the road. He had previously instructed them that they might allow damages from the necessity for additional fencing, and we have said how far in our opinion his instructions on that point were correct. It is clear that if the defendant is allowed as damages the expense of additional fencing on his cultivated land for preventing his cattle from straying on the road, he ought not to be also allowed damages for the danger which his cattle may incur by doing so. That is a risk which he has received an indemnity for. And it might be a question, whether if after having the expense of fencing allowed him, he should fail to maintain a fence, by reason of which failure his cattle strayed from his cleared land upon the tract of the road and were there run over, and the cars thrown from the track and the corporation thereby damaged, it could not recover damages from him for the neglect. It is said however, that ad-

mitting that the defendant has been allowed compensation
(229) for the additional fencing of his cultivated land, he has been allowed none for fencing his wild land; that he has a right to graze his stock upon that, and that they may stray from there upon the road and be injured, and therefore he is entitled to be compensated for this risk which has not been allowed for, and that although it is true that if the cattle straying upon the road are injured by the negligence of the corporation their owner can recover damages, yet some cattle may be killed without negligence in the corporation, and for the increased danger of this sort the land owner is entitled to compensation. The answer to this is, that the danger that the cars may injure cattle without negligence and consequently without liability to an action, is not peculiar to the land owner a part of whose land is taken. It is common to all who own cattle near the line of the road, whether a part of their land is taken for the road or not. It is clear that those persons, no part of whose land is taken, cannot recover anything for this danger of possible loss, and as the defendant is not required to abate the damage proper to him by reason of any benefits which he may derive from the road in common with the whole neighborhood, so he is not entitled to be compensated for any damages which are in like manner common, such as this we are considering, or such as may arise from smoke, noise, etc. In *Presbery v. Old Colony, etc., N. C. W. Co.*, 103 Mass., 1, and *Elizabethtown, etc., R. R. Co. v. Helm*, 8 Bush. (Ky.) 681, the court says, "such depreciation is not occasioned directly by any effect upon the land of which the construction or the maintenance of the railroad is the cause. It belongs to that class of results which necessarily arise from the exercise of the franchise granted to such corporations in consideration of the general advantage which the whole community are expected to derive from it. The annoyances to the land owner are the same in kind, with those which are suffered by the whole community."

(230) We think the Judge substantially erred in holding that the danger of injury to cattle was an element in the damages to which the defendant is entitled.

PER CURIAM. *Venire de novo.*

Cited: R. R. v. Phillips, 78 N.C. 51; *Brown v. R. R.*, 83 N.C. 129; *Jones v. R. R.*, 95 N.C. 330; *Bridgers v. Dill*, 97 N.C. 226; *Bell v. R. R.*, 101 N.C. 23; *Fore v. R. R.*, 101 N.C. 531; *R. R. v. Church*, 104 N.C. 529; *R. R. v. Parker*, 105 N.C. 250; *S. v. Wilson*, 107 N.C. 872; *Adams v. R. R.*, 110 N.C. 330; *Knight v. R. R.*, 111 N.C. 83; *Mullen v. Canal Co.*, 130 N.C. 501, 502, 503; *R. R. v. Platt Land*, 133 N.C. 270; *R. R. v. Land Co.*, 137 N.C. 335; *Parks v. R. R.*, 143

N.C. 295; *Davenport v. R. R.,* 148 N.C. 293; *R. R. v. McLean,* 158 N.C. 501; *R. R. v. Mfg. Co.,* 166 N.C. 174; *R. R. v. Mfg. Co.,* 169 N.C. 160; *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; *S. v. Lumber Co.,* 199 N.C. 202; *Highway Com. v. Black,* 239 N.C. 203; *Gallimore v. Highway Com.,* 241 N.C. 355.

STATE v. NANCY CARPENTER.

The plea of "not guilty" by a defendant charged with an assault, makes it incumbent upon the State to prove everything necessary to establish his guilt: *Hence,* when on the trial below, the State failed to prove that the offence had been committed within two years before the finding of the indictment, the defendant was entitled to a new trial.

INDICTMENT for Assault and Battery, tried at Fall Term, 1875, of GRAHAM Superior Court, his Honor *Judge Cannon* presiding.

The defendant pleaded "not guilty," and her counsel asked the court to charge the jury that "as the State did not show, or offer to show, that the offence was committed within two years before the finding of the indictment, the jury must acquit."

The court refused to charge as requested, and held that if the defendant relied on the statute of limitations, he must show it or give the State notice of such defence.

The jury returned a verdict of guilty and thereupon the defendant moved for a new trial. Motion overruled. Judgment and appeal.

No counsel for defendant in this court.

Attorney General Hargrove, for the State.

SETTLE, J. To an indictment for an assault and battery the (231) defendant plead "not guilty," and requested the court to charge the jury that as the State did not show, or offer to show, that the offence was committed within two years before the prosecution was instituted, they must return a verdict of not guilty. The court refused so to charge, and held "that if the defendant relied upon the statute of limitations, he must show it or give the State notice of it." This was error.

The general issue "not guilty" made it incumbent upon the State to prove every thing necessary to establish the guilt of the defendant.

We believe a practice has grown up, under which the State does not usually, in the trial of misdemeanors, prove, in the first instance, venue, time, etc., unless some point be made thereon by the defendant, but this practice is permitted merely for convenience and the dispatch of business, and ought never to prejudice a defendant who, as in this case, relies upon such defences.

The court might have permitted the prosecution to recall a witness and prove time, place, etc., when the defendant asked for instructions to the jury, but instead of so doing a ruling was made to the prejudice of the defendant, for which there must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: S. v. Tucker, 127 N.C. 540; *S. v. Holder,* 133 N.C. 712; *S. v. Brinkley,* 193 N.C. 748.

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(232)

STATE v. MARION ALEXANDER.

It is not sufficient, to constitute the crime of larceny, that the defendant *have the power* to remove the property alleged to have been stolen, there must be *some* asportation thereof.

INDICTMENT for *Larceny,* tried before his Honor, *Cannon, J.,* at Fall Term, 1875, of the Superior Court of HAYWOOD County.

The defendant, with one James Alexander, was indicted for the larceny of a hog.

All the facts necessary to an understanding of the case, as decided in this court, are stated in the opinion of Justice BYNUM.

There was a verdict of guilty, and judgment, whereupon the defendant appealed.

No counsel in this court, for the defendant.
Attorney General Hargrove, for the State.

BYNUM, J. The defendant was indicted for stealing a hog running at large in the "range." The hog was found dead having been shot. Its ears had been cut off, and one of its hams skinned, but the skin had not been severed from the animal, no part being cut off except the ears. There was no evidence that the hog had been killed elsewhere than where found, or had been removed from the spot where it had been killed. There was evidence that the defendant shot the hog and

did the skinning. His Honor charged the jury, that if the defendant shot and skinned the hog, as alleged, and had it under his control, with the intent to steal, there was in law a sufficient asportation and he was guilty. There is error.

To complete the crime of larceny, it is not sufficient that (233) the defendant had the control of the article, that is, had the power to remove it, but there must be an asportation of the thing alleged to have been stolen. It is true, a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offence. The case here shows that there was no removal of the hog, but that it remained *in situ*, as it had been shot down. In the *State v. Jones*, 65 N. C., 395, it was held that the turning of a barrel of turpentine, which was standing upon its head, over upon its side, with a felonious intent, was not such an asportation as constituted larceny. So in the *State v. Butler*, 65 N. C., 309, which is a case almost identical with this, it was held, that an indictment at common law, for stealing a cow, is not supported by proof that the cow was shot down and her ears cut off by the defendant with a felonious intent, because there was no asportation of the *cow*, the thing charged to have been stolen. These cases and others of our own, as well as English, are decisive. *State v. Jackson*, 65 N. C., 305; Roscoe, 570, 2 Bish. Cr. Law, 804; 2 East, P. C., 556.

PER CURIAM. Judgment reversed.

Cited: S. v. Fulford, 124 N.C. 800.

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(234)

JOHN B. GREEN v. ROBERT H. HOBGOOD.

It is not sufficient for a defendant, for the purpose of perfecting an appeal from the judgment of a Justice of the Peace, to the Superior Court, to show that when the case was called for trial on the 3d of October, 1874, it was continued at the instance of his co-defendant until the 16th day of the same month; that on the said 3d of October, another case, in which he was also defendant, and which involved the same merits, was tried, and judgment rendered against him, from which judgment his attorney appealed; and that then and there, in the presence of the plaintiff, his attorney gave notice to the Justice, that if neither his client nor himself could be present at the trial on the 16th, and if judgment should be rendered in favor of the plaintiff, he requested the Justice to make this entry, "an appeal prayed by the defendant H. alone, and granted as to him;" that he did not know whether the plaintiff heard this notice or not. The requirements of the State regulating appeals are plain and simple, the neglect of which should no longer receive the indulgence of the courts.

GREEN *v.* HOBGOOD.

This was a MOTION by the plaintiff to dismiss an appeal from the court of a Justice of the Peace to the Superior Court of GRANVILLE County. The motion was heard at July (special) Term, 1875, his Honor *Judge Moore* presiding.

The grounds upon which the motion to dismiss was based were, that no appeal was prayed by the defendant at the time the judgment was rendered against him in the Justice's court; that the plaintiff was not present, either in person or by attorney, at any time when an appeal was prayed, nor was any notice ever given to the plaintiff of an appeal by the defendant, as required by law.

In support of the motion the plaintiff filed several affidavits which it is unnecessary to set out.

The defendant resisted the motion, and offered in evidence the affidavit of A. S. Peace, Esq., his attorney, which was substantially as follows: He was of counsel for the defendant, Hobgood,
(235) at the time of the rendition of judgment in the case by the Justice of the Peace. He was at Dutchville on the 3d of October, 1874, on which day the case was set for trial. The case was called by the Justice, and continued at the instance of the defendant, Chappel, to the 16th day of October. On the 3d day of October, the Justice tried the case of John B. Green against Willis Rogers, R. O. Weathers and R. H. Hobgood, and that he appeared as counsel for Hobgood. In that case the Justice rendered judgment against the defendants, from which judgment, as council for Hobgood, he appealed. Believing the merits of this case were the same as those of the case aforesaid, he had no hope of preventing judgment being rendered against his client in this action when it should be heard on the 16th of October, and remembering the distance (eighteen miles) which he and his client resided from Dutchville, the place of trial, he then and there gave notice to the Justice that if neither his client nor himself should be present at the trial, and if the court should render judgment in favor of the plaintiff, to make this entry: An appeal prayed by the defendant, R. H. Hobgood, alone, and granted as to him. He did not know that the plaintiff heard the notice to the Justice, but he was present and might have heard it if he desired. Before this case was called for trial he had a conversation with the plaintiff, in which each party declared it to be his fixed purpose to appeal, should judgment be rendered against him.

Upon the hearing his Honor allowed the motion, and dismissed the appeal, whereupon the defendant appealed.

No counsel for plaintiffs.

A. S. Peace, Busbee & Busbee, and J. W. Hays, for defendant.

SETTLE J. This is an appeal from an order of his Honor, *Judge Moore,* dismissing an appeal from a judgment of a Justice of the Peace, upon the ground that no appeal was prayed by (236) the defendant at the time of the rendition of the judgment, nor was the plaintiff present in person or by attorney at any time when an appeal was prayed, nor was any notice of appeal from said judgment ever given to the plaintiff as required by law.

The statute regulating appeals from Justices of the Peace to the Superior Court, Bat. Rev. Chap. 63, Sec. 53, *et seq* prescribed certain plain and simple requirements for perfecting appeals, the neglect of which so long since the Code went into operation, should not receive the indulgence of the courts. The matters of excuse presented by the defendant are not sufficient.

His counsel referred as to the case of *Marsh v. Cohen,* 68 N. C., 283, but that is an authority directly in point against the defendant.

It is there said, "if an appeal of which no notice had been given to the opposite party, (the word *no,* before notice is omitted in the report of the case, but this is evidently a mistake) should be docketed in the Superior Court, while the Judge would certainly refuse to try the case until reasonable notice was given *and might dismiss the appeal,* he might also in his *discretion* retain the case and allow a reasonable time in which to give notice."

In the case before us his Honor dismissed the appeal, as we think properly.

His judgment is therefore affirmed. Let this certified, etc.

PER CURIAM. Judgment affirmed.

Cited: Richardson v. Debnam, 75 N.C. 392; *S. v. Johnson,* 109 N.C. 854.

(237)

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

When an executor converts his real and personal estate into notes and money, so as to lead to a reasonable apprehension that the assets are not sufficiently secure in his hands, it becomes the duty of the court, pending an action for an account and payment of the assets, to provide by an order in the cause, that the executor give bond for the protection of the assets, and for the performance of the final decree, and upon his failure so to do, to appoint a receiver. It is error to appoint a receiver in the first instance.

MOTION in the cause, heard before *Cloud J.* at Fall Term, 1875, of the Superior Court of DAVIE County.

The action was commenced at Spring Term, 1874, for an account and settlement. The facts in the case as disclosed by the record sent to this court upon the appeal are substantially as follows:

James Gray died in the county of Davie in the year 1873, leaving a last will in writing in which he appointed the defendant his executor. On the 20th day of September, A. D. 1873, this will was admitted to probate, and the defendant duly qualified as executor.

At Spring Term, 1874, of Davie Superior Court, the plaintiffs after due notice upon affidavit, moved the court to appoint a receiver of the assets of the testator in the hands of the defendant. The motion was allowed, and one William Anderson was appointed receiver by the court. Anderson failed to give bond as required in the order of appointment and did not accept, and at Fall Term, 1874, after due notice upon the affidavit of the defendant, the order appointing Anderson as receiver was vacated by the court.

After due notice, the plaintiff upon the affidavit of L. Q. C. Butler, again moved the court to appoint a receiver. The affidavit of Butler is to the following effect: "That James A. Gaither, the defendant has sold his homestead tract of land to Robert Albea, and has de-
(238) livered possession in part of said land, and of a house on said land. That he owns no other lands, That he has publicly sold to the highest bidder his personal property over a week ago, including his household and kitchen furniture, and that he now owns no real or personal estate except money or debts for his property sold.

That it is reported that James A. Gaither has made these sales of his property with the purpose of removing from the State of North Carolina to Texas. That it is understood that sales, both of his real and personal property, were for cash, and affiant knows that some of the personal property has been delivered to the persons who are said to be the purchasers. That the removal of James A. Gaither from the State of North Carolina with the proceeds of the sale of his real and personal property would prevent the plaintiffs from collecting any judgment they may recover in the cause, except at the will and pleasure of J. A. Gaither. That said Gaither has sold the rents of the lands for the year 1875 recently, with which the plaintiffs seek to charge him in this suit, and has given no bond to secure any part of the assets in his hands as executor.

The defendant resisted the motion, filing an affidavit to the following effect: That he is worth three thousand dollars. That he is not indebted exceeding fifty dollars. That he is worth as much now as he was on the day the testator appointed him as executor of his will. That at the time, and before the testator (who was an uncle of affiant,) made his will, affiant resided but two miles from him. That the

testator well knew all about affiant, the value of his property, etc., and in view thereof committed the execution of said will to affiant, who accepted the same in good faith, has committed no breach of his duty and does not intend to do so.

That while it is true that affiant did speak of removing to the West, and for some time intended to do so, at no time did he intend to leave the State without first coming to a settlement of his executorship and turning over to those entitled thereto the (239) estate in his hands. That he spurns the idea insinuated in the application for a receiver, that he ever for a moment had any idea of carrying from the State one cent of his testator's estate. That it was expectation of affiant and the plaintiffs that this action would have been tried at the last term of Davie Court, and if it had been, affiant intended to settle up the estate and remove to Oregon, but when he ascertained that it would not be, and was not tried, on consultation with his counsel and those claiming interest in his testator's estate adversely to the plaintiffs, he gave up and abandoned the idea of removing from the State. That defendant has sold his lands for $2,200.00 and has also sold such of his personal property, (some $400 or $500 worth,) as he would not need in the business in which he was about to engage, to wit: the manufacture of tobacco.

That having entirely given up his intention of removing from the State, he has entered into a contract of partnership with J. M. & A. Turner, who are experienced and successful tobacco manufacturers near Cool Springs, in the county of Iredell. That affiant expects to remove to their said factory in a few days, which is only four miles from his present residence. That affiant does not intend to remove from Iredell County, nor does he expect to remove any of his funds from that county, but honestly, and *bona fide*, intends using them in manufacturing tobacco, and expects to make much larger profits therefrom than from farming. It is true (as it was his duty) that he has sold the rents of his testator's lands for this year, but will keep the same and use the proceeds in a due course of administration of his testator's estate. That affiant, in testator's lifetime, and to his knowledge, advertised his said lands for sale."

Upon the hearing, his Honor allowed the motion of the plaintiffs, and one Martin R. Chaffin was, by the court appointed receiver.

From the ruling of his Honor the defendant appealed, upon (240) the ground that the facts in the case are not, in law, sufficient to warrant the ruling of the court.

Wilson, for the appellant.

Bailey and Clement, contra.

PEARSON, C. J. When an executor is guilty of a *devastavit* by applying the funds of the estate to his own use, it is the duty of the court to appoint a receiver and take the estate out of his control.

In our case there is no allegation that the executor has misapplied the funds of the estate to his own use; but the motion for a receiver is put on the ground that the estate is insecure in the hands of the executor by reason of the fact that he has sold his land and personal property and now has no estate except what consists of money and notes, which can be easily removed out of the jurisdiction of the court. When an executor becomes insolvent after his appointment, or his insolvency was not known to the testator, it is the duty of the court to require him to secure the fund by a sufficient bond. Otherwise when his insolvency is known to the testator—for it may be that he would rather confide in an insolvent man in whose honesty he has full confidence—than in one whose solvency is not doubted.

So, when an executor is a non-resident, so that the court can take no personal control over him, he is required to give security. So when an executor converts his real and personal estate into money and notes, so as to lead to a reasonable apprehension that the assets are not sufficiently secured, as is found to be the fact in this case, it becomes the duty of the court, pending an action for an account, and payment of the assets, by an order in the action, to provide for the security of the fund. Thus far, we agree with his Honor, but the doctrine of the court only justifies an order for the protection of the
(241) assets against this apprehended danger in the first instance, and does not justify an order for the appointment of a receiver, as in case of a dereliction of duty on the part of the executor in direct reference to his management of the estate.

There is error. This opinion will be certified to the end that an interlocutory order may be made in the court below, requiring the executor to give bond, etc., for the protection of the assets, and to perform the final decree in the cause, and in case he fails to give such bond, that a receiver may be appointed.

PER CURIAM. Judgment accordingly.

Cited: Strayhorn v. Green, 92 N.C. 121.

LEONIDAS C. EDWARDS v. ARCHIBALD KEARSEY.

No levy of execution upon property or sale under the same, made subsequent to the ratification of the present Constitution of this State, and the Act of 1868, Battle's Revisal, chap. 55, (known as the "Homestead Law,") will divest the right of the defendant in execution to a homestead; and it is immaterial whether the debt upon which judgment has been recovered was contracted prior or subsequent to the adoption of the Constitution and said Act.

CIVIL ACTION, in the nature of *Ejectment*, tried before his Honor, *Judge Albertson*, at Spring Term, 1873, of GRANVILLE Superior Court.

The plaintiff offered in evidence various judgments rendered against the defendant for debt, interest and cost, and docketed in Granville County, as follows:

One on the 16th day of December, 1868, and one on the 16th day of October, 1868, and one on the 7th day of January, 1869. (242)

The plaintiff further offered in evidence writs of *fieri facias* issued upon these judgments respectively, and levied upon the *locus in quo*, and also writs of *venditioni exponas*. It was in evidence, that by virtue of the writs of *venditioni exponas*, the sheriff, after due advertisement, offered the *locus in quo* for sale, as the property of the defendant, to the highest bidder, at public auction, on the 6th day of March, 1869, when the plaintiff became the purchaser and took the sheriff's deed therefor, dated March 6th, which deed was duly registered and offered in evidence by the plaintiff.

It was further in evidence that the debts for which the said judgments were rendered were contracted prior to the adoption of the present Constitution of North Carolina.

On behalf of the defendant, it was in evidence that at the time of said levies and sales, the *locus in quo* was the only real estate owned by him, and did not exceed the value of one thousand dollars, and that the defendant and his family resided thereon. That the whole of said land was sold absolutely by the sheriff, no homestead ever having been allotted to the defendant.

The defendant further offered to prove by competent evidence that on the 22d day of January, 1869, he applied to a Justice of the Peace, for the county of Granville, for an allotment of his homestead in the *locus in quo*. That in accordance with his application, three disinterested freeholders were appointed by the said Justice to allot to the defendant his homestead. That the commissioners so appointed did assign to the defendant the whole of the *locus in quo*, as a homestead, and duly made a report thereof according to law. That this report was returned to the office of the Register of Deeds, for registra-

tion, but the report having been lost or mislaid after it came to the hands of said officer, was never registered. That diligent search had been made for the report, but the same could not be found. The
(243) defendant then introduced in evidence a correct copy of said report. The plaintiff objected, and the evidence was ruled out by the court. To this ruling of the court the defendant excepted.

The court instructed the jury, that if they believed the evidence they should find for the plaintiff. To this the defendant again excepted.

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

Attorney General Hargrove, for the appellant.
Haywood and Batchelor & Son, contra.

BYNUM J. As the case states particularly the dates of docketing the several judgments, and that writs of *fieri facias* were issued on the judgments and levied upon the lands, which were afterwards sold under writs of *venditioni exponas*, and no reference whatever is made to the time of the levy, we think it is sufficiently clear that no levy was made upon the land until after the judgments were docketed. As the judgments were not docketed until after the adoption of the Constitution and the Act of 1868, Bat. Rev. Chap. 55, known as the homestead law, any levy subsequent to that time would not divest the defendant of his right of homestead. *McKeethan v. Terry,* 64 N. C., 25. In the light of our decisions, it is immaterial whether the judgment debts were contracted prior or subsequent to the homestead law, the defendant was entitled to the benefit of its provisions, and his title to the land and right of possession are not divested by the sale and sheriff's deed. *Hill v. Kessler,* 63 N. C., 437. *Crummen v. Bennett,* 68 N. C., 494. *Wilson v. Sparks,* 72 N. C., 208. *Abbott v. Cromartie,* 72 N. C., 292.

There is error. Judgment reversed.

PER CURIAM. *Venire de novo.*

Cited: Mebane v. Layton, 89 N.C. 399; *Lowdermilk v. Corpening,* 92 N.C. 335.

(244)

STATE v. WARREN YANCEY.

A threat to use a deadly weapon, with a present power to do so, is justifiable in the protection of the property of the defendant, where it appears that no battery was committed and the defendant did not use the weapon for any other purpose than the actual protection of his property.

INDICTMENT for assault, tried before his Honor *Moore J.*, at July Special Term, 1875, of the Superior Court of GRANVILLE County.

Trial by jury having been waived his Honor found the following facts: On 9th day of January, 1875, about 12 o'clock, the prosecutor, William D. Royster, was in the public highway near Nutbush Bridge in the county of Granville, and the defendant was in an adjacent field. The defendant rode up to the fence which separated the field from the highway and asked the prosecutor if he had seen any hogs. The prosecutor said he had not. The defendant, who was riding on a mule, turned to ride off when the prosecutor hailed him and asked if he had paid a debt, for which the prosecutor was a surety. The defendant stopped and answered no. The prosecutor then said "Warren, you have got my saddle?" The defendant said "no, I brought this saddle of a horse-drover and paid him $8.00 for it." The defendant then got off his mule. During the conversation the prosecutor took hold of the stirrup leather of the defendant's saddle, and while holding it he called to one Thomas Parham, who was some distance off and said, "Oh! Tom come here." The defendant twice requested the prosecutor to "turn loose" his saddle, with which request the prosecutor refused to comply. When the defendant saw Parham approaching, putting his hand into his pocket and taking his knife therefrom he said to the prosecutor, "If you don't turn my saddle loose I'll cut you loose." The defendant at that time was distant five or six feet from the prosecutor and started towards him. The prosecutor did turn loose the saddle and stepped back from the mule.

Upon this state of facts the court adjudged that the defendant (245) was guilty and sentence was pronounced. Thereupon the defendant appealed.

Young, for the defendant.
Attorney General Hargrove, for the State.

READE, J. When the defendant drew his knife and threatened the prosecutor and started towards him, being already within five or six feet of him, this was undoubtedly an assault, and the defendant is guilty, unless the conduct of the prosecutor made the assault justifiable.

The prosecutor, at that time was committing a trespass upon the property of the defendant in his presence, by holding on to the defendant's saddle and claiming it as his own, and calling to another for help with the purpose of taking it by force, as the defendant had reasonable ground to believe. This conduct of the prosecutor was not such as to justify an actual battery with the knife in the first instance; but the defendant had the right to do what was necessary to make the prosecutor let go his saddle, beginning with moderate force, and increasing in the ratio of the resistance, without measuring it in golden scales. We are not left to any speculation as to whether he used too much or too little force; for the result shows that he used just enough to accomplish his purpose. If he had used more he would have injured the prosecutor. If he had used less, and allowed the prosecutor's help to come up he would have lost his property, or engaged in an unequal contest, with probably serious consequences.

A threat to use a deadly weapon, with the power to do it, may often be justifiable, when a *battery* with the same would not be. And this is one of those cases.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

Cited: S. v. Dixon, 75 N.C. 281; *S. v. Auston,* 123 N.C. 751; *Curlee v. Scales,* 200 N.C. 614.

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(246)

STATE v. CEPHUS HUDSON.

Where the jury return a verdict of "guilty of shooting," upon an indictment for an assault and battery, drawn in the usual form, judgment will be arrested.

Whether, if the bill had charged that the assault was made, by shooting at the prosecutor, the verdict could be sustained, *Quere?*

INDICTMENT for *Assault* and *Battery,* tried before his Honor *Watts, J.,* at Fall Term, 1875, of the Superior Court of GRANVILLE County.

The indictment was drawn for an assault and battery in the usual form.

The jury returned a verdict of "guilty of shooting" and thereupon the counsel for the prisoner moved the court in arrest of judgment.

The motion was overruled and the defendant appealed.

No counsel in this court for the defendant.
Attorney General Hargrove, for the State.

BYNUM, J. The defendant was indicted for an assault and battery, in a bill drawn in the ordinary form. The jury for their verdict returned "that the said Cephus Hudson is guilty of shooting." Shooting at what? In what direction? If at any human object, was that object within the carrying distance of the gun, so as to constitute an assault? If the indictment had charged that the assault was made by shooting at the prosecutor, possibly the verdict could be sustained by the reasonable certainly of its meaning, to be obtained by construing the bill and verdict together. But the instrument contains no such charge, and the verdict standing by itself is therefore senseless, certainly it is not responsive to the indictment. The courts should never allow such absurd and irresponsive verdicts to be recorded. They should have the jury to correct them, so as to be in conformity (247) to law and to present an intelligent record. *State v. Arrington,* 7 N. C., 571.

There is error.

PER CURIAM. Judgment arrested.

Cited: S. v. Whitaker, 89 N.C. 474; *S. v. Whitson,* 111 N.C. 697; *S. v. Parker,* 152 N.C. 791; *S. v. Brame,* 185 N.C. 633; *S. v. Potter,* 185 N.C. 743; *S. v. Snipes,* 185 N.C. 746; *Allen v. Yarborough,* 201 N.C. 569; *S. v. Noland,* 204 N.C. 334; *S. v. Perry,* 225 N.C. 177.

STATE v. WILLIAM E. NORWOOD.

Where, upon the trial of an indictment for larceny, the court charged the jury: "To decide the case by the evidence alone; that on account of the color of the defendant, (who was a white man,) they should require no other or stronger proof to convict him, than they would if the prosecutor (who was a colored man) were on trial and the defendant were his prosecutor. That the proposition, "that before the jury can convict on circumstantial evidence, they must be as well satisfied of the guilt of the accused, as if one creditable eye witness had testified to the fact," was not a rule of law, but only an illustration—all that was intended by the comparison, was to inform the jury that they must be fully satisfied, beyond a reasonable doubt, of the guilt of the accused. When a single eye witness swears to the fact of guilt, if the jury believe him, there is an end of the matter; while in many cases of circumstantial evidence, the mental operations are much more complex, and then the comparison might mislead instead of assisting the jury. In either case the jury must

be fully satisfied. The expression, "testimony of an eye witness," is no more a fixed phrase in the law, than "reasonable doubt." And after the case had been submitted to the jury and they were about leaving the box, the court further charged: Gentlemen, you will find whether the defendant is guilty on the first or second count—that is, whether he is guilty of larceny, or of receiving the stolen goods, knowing them to be stolen, if you find him guilty at all:" *It was held*, that there was no error in the matter of the charge, nor in the manner of submitting it to the jury.

INDICTMENT for larceny and receiving goods knowing them to be stolen, tried before his Honor *Judge Moore*, and a jury, at
(248) July (Special) Term, 1875, of the Superior Court of GRANVILLE County.

The defendant, a white man, was indicted for stealing tobacco, the property of a colored man. In his argument to the jury the solicitor alluded to this fact and urged them to guard against the prejudice of race.

His Honor in his charge urged the jury "to decide the case by the evidence alone; that on account of the color of the defendant they should require no other or stronger proof to convict him than they would if the prosecutor were on trial and the defendant were his prosecutor."

To the charge of his Honor the defendant excepted.

The defendant's counsel upon the argument stated as a rule of law, "before the jury can convict on circumstantial evidence, they must be as well satisfied of the guilt of the accused as if one credible eye witness had testified to the fact," and requested his Honor so to charge.

His Honor declined to give the special instruction prayed for, and charged the jury, "Such was not a rule of law, but only an illustration —all that was intended by the comparison was to inform the jury that they must be fully satisfied beyond a reasonable doubt of the guilt of the accused. When a single eye witness swears to the fact of guilt, if the jury believe him, that is an end of the matter, while in many cases of circumstantial evidence the mental operations are much more complex, and then the comparison might mislead instead of assisting the jury. In either case the jury must be fully satisfied. The expression, "testimony of an eye witness" is no more a fixed phrase in the law than "reasonable doubt."

The defendant again excepted.

After the case was submitted to the jury and when they were about leaving the box, his Honor said to them, "Gentlemen, you will find whether the defendant is guilty on the first or second count—that is,

whether he is guilty of larceny or of receiving the stolen goods, knowing them to be stolen, if you find him guilty at all." (249)

The jury returned a verdict of guilty of receiving the goods knowing them to have been stolen. The defendant thereupon moved the court for a *venire de novo.* The motion was overruled and the defendant appealed.

Young, for the defendant.
Attorney General Hargrove, for the State.

PEARSON, C. J. We have given to the elaborate argument of the counsel for the defendant full consideration, and do not, by the aid of it, see in the charge, or in the manner of submitting the case to the jury, any error of which the defendant has a right to complain.

The propriety of the allusion by the Solicitor to the fact, that the prosecutor was a colored man and the defendant a white man, depends on the incidents and surroundings of the trial, which are not set out in the statement of the case. But the defendant has no ground on which to complain of the charge, for his Honor holds the scales of justice even.

Indeed, it may be thought that his Honor leaned to the side of the defendant in order to meet a prejudice against a white man who would steal from a negro. Although the crime of stealing admits of no degrees of comparison as "mean, meaner, meanest," it may be that by reason of prejudice, in the county of Granville, a white man who steals from a negro is *mean* in an extra superlative degree. But of this, we are not informed by the record.

No error. Certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Carson, 115 N.C. 744; *S. v. Adams,* 138 N.C. 695; *S. v. Charles,* 161 N.C. 289; *S. v. Jones,* 182 N. C. 786; *S. v. Shook,* 224 N.C. 732.

(250)

P. N. HEILIG AND OTHERS, ADMINISTRATORS v. H. A. LEMLEY AND EDWARD SHAVER, ADM'RS, ETC.

Where a sheriff, who by negligent delay in collecting an execution, had rendered himself liable to the plaintiff, paid off the debt in his own exoneration, and took an assignment from the plaintiff to a third person in trust for himself; *Held,* that the judgment was not thereby extinguished, and nothing else appearing, the assignee was entitled to an *alias* execution thereupon.

This was a MOTION in the cause, heard before his Honor, *Cloud, J.*, at Fall Term, 1875, of the Superior Court of ROWAN County.

It was admitted that the plaintiffs obtained judgment against the defendants' intestate and others at Fall Term, 1869, of Rowan Superior Court, for the sum of one thousand dollars, and interest thereon from the 20th day of September, 1869, and also for costs. That an execution issued to the sheriff of said county, returnable to Spring Term, 1871; that after the said execution was spent, and while the same was in the hands of W. A. Walton, the then sheriff of Rowan County, who was sheriff at the time the execution issued, said Walton paid to the plaintiffs the amount of said execution, before the same had been returned to court, and the plaintiffs endorsed the execution, as follows:

"I assign the within execution to L. W. Walton, without recourse, August 28th, 1871," the same being signed by all of the plaintiffs.

It was further admitted that L. W. Walton was the son of W. A. Walton, the then sheriff of Roway County; that the said sheriff paid the value of the execution with his own funds and had the same assigned as aforesaid.

The plaintiffs moved the court for leave to issue execution
(251) against the defendants for the collection of the judgment for the benefit of L. W. Walton.

The defendants' counsel resisted the motion upon the grounds:

1. That there had been no legal assignment of the judgment to L. W. Walton.

2. If there was an assignment, it was made with the money of the sheriff of Rowan County, and that an assignment made under such circumstances was contrary to public policy, and therefore void.

Upon the hearing, the motion was allowed by the court, and the defendants appealed.

McCorkle & Bailey, for the appellants.

Battle, Battle & Mordecai, and J. S. Henderson, contra.

RODMAN. J. The question is whether a Sheriff who has made himself liable to a plaintiff by his negligent delay in collecting an execution, and who pays off the debt in his own exoneration and takes an assignment from the plaintiff to a third person in trust for himself, has thereby extinguished the judgment, so that he cannot have an *alias* execution issued to another officer upon it?

The cases cited by the learned counsel for the defendants from New York do certainly establish that, in that State, upon grounds of public policy, the judgment is absolutely extinguished. *Reed v. Pruyn*, 7 Johns., 426; *Sherman v. Boyce*, 15 Johns., 443; *Bigelow v. Provost*,

5 Hill, 566, and others which may be found cited in a note to Herman on Execution, 205. Nor is this doctrine confined to New York. It is so held in Alabama: *Rountree v. Weaver,* 8 Ala., 314; *Boren v. McGehee,* 6 Porter, 432; *Crutchfield v. Haynes,* 14 Ala., 49; in Tennessee, *Smith v. Herman,* 1 Cold., 141; *but see Lintry v. Thompson,* 1 Head, 456; in Missouri, *Garth v. Campbell,* 10 Mo., 154; in Maine and Massachusetts, unless the Sheriff takes an assignment from the plaintiff, the judgment is extinguished, but if he does, it is not. *Whittier v. Heimingway,* 22 Me., 238; *Allen v. Holden,* 2 Mass., (252) 133; *Dunn v. Snell,* 15 Mass., 481. So in Georgia, *Arnett v. Cloud,* 2 Ga., 53; and perhaps in some other States.

The foundation of all these cases seems to be that of *Reed v. Pruyn.* In that case the Sheriff having a *ca. sa.,* against Staats, under which Staats was arrested, procured him and Pruyn to confess a judgment in favor of the plaintiff for a larger sum, and the Sheriff paid the amount of the execution to the plaintiff. In a few days he took out a *ca. sa.* on the judgment confessed by Staats and Pruyn, and took their note for a still larger sum, and gave them a receipt for the amount of the first judgment. Afterwards the Sheriff advertised the property of Pruyn and Staats for sale under an execution upon the judgment confessed, and they moved to set aside the execution, and for an entry of satisfaction on the judgment confessed. The court granted the motion, and there can be no doubt was right in doing so.

A sheriff who has an execution against a defendant and as the price of indulgence takes from him a judgment confessed, or a note, for a larger sum, is guilty of oppression and of a breach of official duty, and on grounds of public policy such judgment confessed, or note, must be held void, notwithstanding the sheriff has paid the plaintiff in the original judgment the amount of his claim. And *a fortiori* any acts of the sheriff after he had acquired his interest, under an execution whether issued upon the original judgment confessed, were in like manner void as to the defendant in the execution. This last proposition has long been settled. Bat. Rev. Chap. 25, Coroner; Chap. 106, Sheriff; *Bowen v. Jones,* 35 N. C., 25; *McLeod v. McCall,* 48 N. C., 87; *Stewart v. Rutherford,* 49 N. C., 483. And the first we conceive to be equally clear upon general principles. See also Bat. Rev. Chap. 106, Sec. 17.

KENT, J., in delivering the opinion of the court (after citing the cases of *Wallace v. Weedale,* Noy. 107: *Langdon v. Wallis,* Lutw. 587; *Speake v. Richards,* Hob. 206, and *Ward v. Hauchel,* (253) 1 Keb. 551,) says, "The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion

is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court should not use its process as the means of making unequal bargains, and taking undue advantage. The facts in this case have the appearance of an instance of gross abuse."

He concludes by saying, "I am happy therefore that the sheriff will be driven to seek his remedy upon the note, when the legality of the increase of the original debt will be open to further investigation."

We think that in the subsequent cases in New York, and in the others elsewhere that have followed this case, the opinion of the eminent Judge has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case, has been converted into a general and arbitrary rule.

In the present case, the sheriff having an execution against the defendant paid it to the plaintiff in his own exoneration and took an assignment on the execution to his son, whether as a trustee for himself, or as a gift to the son, is not material. He now moves that an *alias* execution may issue to his successor in office, for his benefit. There has been no oppression as there clearly was in the case of *Reed v. Pruyn,* 7 Johns. 426, and the debt has not been increased.

We are at a loss to conceive what public policy will be violated if the motion is allowed.

It is said that if a sheriff can escape amercement by paying an execution which it was his duty to collect, he will be induced to delay enforcing executions, and creditors may be injured. The creditor cannot be injured if the debt is paid. And it cannot be a (254) wrong to the debtor if a sheriff who, relying perhaps on his promise to pay the money by the return day, has made himself liable by his indulgence, is allowed after payment to stand in the position of the creditor. If public policy forbids such payments by sheriffs, and for that reason the judgment is extinguished, it would seem that the same principle would forbid any recovery by the sheriff of the money so paid by him. But the principal case we have commented on, holds that the sheriff might sue upon the note which he had taken, and recover what might be just.

It is also said in *Roundtree v. Weaver,* 8 Ala., 314, that the sheriff in an action against the defendant can recover the money paid for his benefit. And in *Lintz v. Thompson,* 1 Head 456, it is said that if the sheriff is compelled to pay the debt by a judgment of a court, there is an implied transfer of the plaintiff's debt to him. These cases thus acknowledge that it would be inequitable for a defendant to

receive the benefit of the sheriff's payment, and refuse to re-imburse him. It is true that the defendant did not previously request the sheriff to pay the debt, and that in general no one can make himself the creditor of another by officious service, or by officiously paying a debt for him. But where a sheriff, at the express or presumed request of a defendant in execution, indulges him so that the sheriff is compelled to pay the debt, there is a clear equity for re-imbursement. The acceptance of the discharge of the original debt by the defendant in execution, may be considered as a ratification of the sheriff's act, and as equivalent to a prior request. It is somewhat like a case where one accepts a draft about to be protested for non-acceptance, for the honor of the drawer. If this equity for re-imbursement be admitted as a foundation for an action, why is it illegal and against public policy for the sheriff to take an assignment of the execution, which gives him no more than he would have a right to recover? The form of the recovery is not an essential part of the equity, and there is no reason why the sheriff should be put to the circuity of (255) an action.

It has been seen that in Main and Massachusetts it is held that where the sheriff takes an assignment of the judgment from the plaintiff in execution, the judgment is not extinguished. The decisions in those States support our decision in the present case. We think also that they imply that it is not against public policy for a sheriff to pay off a debt in his own exoneration; for if it were, an assignment would not be sustained.

We concur with the Judge below, that the motion should be allowed.

Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

JORDAN WOMBLE v. GEORGE LITTLE AND HENRY MORDECAI.

Where A confessed judgment in a court of a Justice of the Peace, in favor of B, upon a note, upon its face bearing interest at the rate of eight per cent., and the Justice gave judgment for the principal of the note, "with interest from date," and the judgment being sent to the Superior Court to be docketed, execution was thereon issued for the principal sum "with interest at 8 per cent:" *Held*, that there was no material variance between the judgment as rendered and the transcript upon which the execution issued.

This was a MOTION in the cause heard before his Honor *Judge Watts*, at Fall Term, 1875, of the Superior Court of WAKE County.

The motion was "to reform the judgment entered, and for an order to issue to the Sheriff of Wake County to suspend the sale of property, upon which he had levied, until the motion was heard."

(256) His Honor granted an order to the Sheriff to suspend the sale from day to day until the hearing, when the following facts were found:

1. That the defendant, George Little, made to the plaintiff his promissory note on the 10th day of April, 1874, for the principal sum of two hundred dollars, with interest at eight per cent, payable one day after date.

2. That a summons was issued by a Justice of the Peace, against the defendant on the 13th day of April, 1874, who accepted service and confessed judgment on the same day, according to specialty filed. That said judgment was stayed by giving the defendant, Henry Mordecai as surety.

3. That a transcript of said judgment was sent up to the Superior Court and docketed on the 19th of June, 1875. Said docket shows that the judgment was for two hundred dollars, and interest from the 10th day of April, 1874, at 8 per cent. The transcript is for two hundred dollars, and interest from the 10th of April, 1874.

4. The execution issued by the Superior Court Clerk on the 19th day of June, 1875, was for the principal sum of two hundred dollars, with interest from the 10th day of April, 1874, at 8 per cent.

Upon these facts his Honor refused the motion, and thereupon the defendants appealed.

Jones & Jones, for the appellants.

A. M. Lewis, contra.

SETTLE, J. The defendant's appeal rests upon the idea that there is a variance between the judgment rendered by the magistrate and the one docketed in the office of the Superior Court Clerk, when, in fact, though expressed in words somewhat different, they mean precisely the same thing. The defendant contends that the Justice's judgment implies interest at six per cent. only. But of course his judgment, giving "interest from 10th day of April, 1874," upon a note

(257) which specified on its face that it should bear interest at eight per cent. *per annum*, could mean nothing else than interest at eight per cent; and when the Clerk, in docketing the Justice's judgment, which was taken by confession, according to specialty filed, added the words "at eight per cent." he did not, in the least degree, change the sense of the legal effect of the Justice's judgment

The judgment of the Superior Court is affirmed.

There are four other cases between the same parties, and involving the same point, before us at this term. Let judgment be entered in all in conformity to this opinion.

PER CURIAM. Judgment affirmed.

Cited: Cotton Mills v. Burns, 114 N.C. 356.

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(258)

FLORA McFARLAND *v.* JOHN W. McKAY, ADM'R, ETC.

A bequest to the following effect, "I leave in the hands of my executor to be hereinafter named, eight hundred dollars, to be by him applied, according to his discretion and as necessity may require, to the use and benefit of my daughter (the plaintiff); and should he, my executor, deem it advisable so to do, he may invest the whole or any part of this amount in the purchase of land for the use of my said daughter, which land, if thus purchased, shall vest at her death in the heirs of her body, if any then living; but if not, in the next of kin, share and share alike" etc., vests no discretion in the executor, except to pay over the money as the legatee might need it, or to invest it in land for her benefit.

The Superior Court in term, has original jurisdiction of an action to recover a legacy, where the same has been assented to, or is sought to be enforced as a trust.

In an action against an administrator of an executor to have him declare a trustee of the plaintiff as to certain funds held by his intestate as a legacy to the plaintiff, the fact that he is only an administrator of the executor, and not the executor of the will, cannot avail the defendant as a defence against an account of the fund, where it is admitted that the same is in his hands.

This was a CIVIL ACTION for the recovery of a legacy, tried before his Honor, *Judge Buxton,* at Fall Term, 1874, of RICHMOND Superior Court.

The plaintiff in her complaint alleged that her father, Daniel Blue, died in 1844, leaving a large estate; that he made his last will and testament, and appointed his son, Malcolm Blue, executor to his said will, which was duly admitted to probate in the proper court, and the said Malcom Blue qualified as executor thereto. That said executor settled up the estate and paid off the legacies, except the one given to Flora McFarland, to which he assented and promised to pay, but failed so to do, and died without paying any portion thereof. That Daniel Blue, her father, left a legacy in the hands of Malcom Blue, his executor, of eight hundred dollars to the use and benefit of the plaintiff, in the following words, to wit: (259)

"Item 10th. I leave in the hands of my executor, to be hereafter named, eight hundred dollars, to be by him applied according to his discretion and as necessity may require, to the use and benefit of my daughter, (the plaintiff;) and should he, my executor, deem it advisable so to do, he may invest the whole or any part of this amount in the purchase of land for the use of my said daughter, which land, if thus purchased, shall vest at her death in the heirs of her body if any then living; but if not, that said land belonged to the next of kin, share and share alike, and my executor to take title to the land accordingly."

That the plaintiff requested the administrator to invest a portion of said fund in the purchase of land for the use of herself and family, to which he assented, but failed to make the purchase. The plaintiff after the death of her father, at different times called upon the executor to pay over her legacy, to which he would agree and promise to pay, but in every instance failed to pay anything. Wherefore the plaintiff demands judgment.

To this complaint the defendant John McKay, administrator of Malcom Blue, deceased, executor as aforesaid, demurs upon the ground that it appears upon the face of the complaint:

1st. The court has no original jurisdiction of the subject of the action.

2d. That the plaintiff has no right under the provision of the will of Daniel Blue to call this defendant to account to her for the legacy which she claims in her complaint.

That the complaint does not state facts sufficient to constitute a cause of action, in that the fund claimed by the plaintiff is a trust under the will of Daniel Blue, to be applied at the discretion of the trustee according to the provisions of the will.

(260) Demurrer overruled and the defendant required to answer. From this judgment the defendant appealed.

Leitch and Walker, for the appellant.

Neill McKay and Hinsdale, contra.

READE, J. The plaintiff claims a legacy. The defendant demurs:

1. Because the Superior Court in *term* has not original jurisdiction. The court has such jurisdiction where the legacy has been assented to; or when it is sought to declare and enforce a trust.

2. The second cause for demurrer is, that the plaintiff has no right to call this defendant to account. It is not stated why this right does not exist. It was however stated at the bar, that it is because the defendant is not the executor of the will; but is only the administrator of the deceased executor, and has not assumed the trust of the legacy. This

cannot avail the defendant, inasmuch as it is not denied that the funds are in his hands.

3. The third cause of demurrer is, that the disposition of the legacy was discretionary with the executor and not with the defendant.

The only discretion was to deal out the money to the plaintiff as she might need it, or to invest it in land for her benefit, neither of which has been done.

There is no error. The cause will be remanded to the end that the defendant may answer. The attention of the plaintiff is called to the imperfect statement of her case in the complaint. There is no allegation that the defendant is administrator of the deceased executor, or that any fund has come to his hands. If the plaintiff have leave she can amend.

PER CURIAM. Judgment affirmed.

(261)

IVY KING AND OTHERS v. JESSE W. KINSEY, EX'R., AND OTHERS.

It is not necessary to the valid execution of the will of an illiterate person that the same shall be read over to him in the presence of the attesting witnesses. Upon proof of the actual execution, the law presumes knowledge of the contents, and the *onus* of proving to the contrary falls upon the party alleging ignorance thereof.

DEVISAVIT VEL NON tried before his Honor *Judge Seymour,* and a jury, at Spring Term, 1875, of the Superior Court of JONES County.

A *caveat* having been entered to the probate of a paper writing, purporting to be the last will and testament of Ivy King, deceased, the cause was transferred to the Superior Court for trial, where the following issue was submitted to the jury:

Is the paper writing offered as the last will and testament of Ivy King, the last will and testament of the said Ivy King?

The evidence submitted to the jury was as follows:

Stephen W. Noble testified, that the signature as a subscribing witness to the will, was his. He saw Ivy King sign, and heard him say it was his last will and testament. He signed it at his request. That Nunn, the other subscribing witness and King were present. Ivy King was of sound and disposing memory, but he could not read or write. He did not recollect that the will was read over in the presence of the testator.

Henry S. Nunn, the other subscribing witness testified that the signature as witness was his. He signed it in the presence and at the

request of the testator. The testator was of sound and disposing memory. He was also a witness to the first codicil, and the signature thereto was his.

(262) Stephen W. Nodles having been recalled, testified that he was a witness to the first codicil. He signed in the presence of other witnesses and at the request of the testator. He saw the testator sign it. He wrote the codicil himself, according to the instructions of the testator, and thinks at his direction. The testator was at the time, of sound memory.

J. J. Whitehead testified, that he wrote the second codicil, at the request, and according to the instructions of the testator, and signed it as a witness.

The propoundants then asked the witness: Was the will read over to the testator by you? The *caveators* objected to the question. The objection was overruled by the court and the witness answered: I did not read the will, I read the codicil. I think I am certain the testator told me the contents of the will. He got the will and gave it to me. He said he wanted the property insured so that his illegitimate child (the devisee) would get the benefit of it if he were burned. He said he had given the property to the child in question. The testator was of sound mind.

William Irwin proved his signature to the second codicil as a witness.

Henry L. Nunn having been recalled, stated: That the will was not read over to the testator at the time of the signature.

The defendants introduced no evidence.

His Honor charged the jury: "That the will need not have been read over to the testator at the time of its execution. It is sufficient if the jury believe from the evidence that the contents were known to him. That the evidence that he had the will in his possession and requested witnesses to sign it, and the testimony of Whitehead, that the testator stated to him that he devised his property to his illegitimate child, and that he had a codicil drawn by his own instructions or direction relating intelligibly to the will, are all circumstances tending to show that he knew the contents of the will. There is no opposing evidence."

(263) The counsel for the defendants then requested the court to charge the jury:

1. That there is no evidence that Ivy knew of the contents of the will.

2. That if the jury believe that the testator knew of the contents of the codicil, and not of the will they should find for the plaintiff.

3. That the republication of the codicil was no evidence that the testator intended to publish the will.

4. That republication of the codicil was only evidence that the testator knew of the contents of the will.

5. That there is no evidence that the will was ever read over to the testator, and that if he could not read, it is not his will unless it was read over to him.

The special instructions were refused by the court.

The jury returned a verdict in favor of the propoundants and judgment was rendered in accordance therewith, whereupon the *caveators* appealed.

Isler, for the appellants.

Green and Haughton, contra.

SETTLE, J. The execution of the paper writing, purporting to be the last will and testament of Ivy King, and also of the two codicils, was duly proved by the subscribing witnesses thereto. The objection to the validity of this paper, as a will, is that no one proves that it was ever read over to the testator, who could neither read nor write. Was this necessary? This is not an open question, having been fully discussed and decided by this court adversely to the views of the caveators, in the cases of *Downey v. Murphey,* 18 N. C., 82, and *Hemphill v. Hemphill,* 13 N. C., 291. In the one it is held, "where the capacity of a testator is perfect, his knowledge of the contents of his will is presumed from the fact of execution."

In the other; "It is not necessary to the valid execution of the (264) will of a blind or illiterate person, that it should be read over to him in the presence of the attesting witnesses. The fact that a will was not read over to the testator, is evidence to be left to the jury of his incapacity or of undue influence, or of fraud. But upon proof of the due execution of a will, the law presumes the testator to have been aware of its contents, and the *onus* of proving the contrary is thrown upon him who alleges it." Not only is this true of wills, but the general proposition is said to be correct, that the execution of every written instrument, by every man having competent intellectual capacity, is evidence in law that he knew its contents, and binds him.

In this instance there is nothing in the evidence to rebut this presumption of law. On the contrary there is much to support it.

The conversations of the testator, with some of the subscribing witnesses, at the time of executing the two codicils, go far to show that he had a full and perfect knowledge of the contents of the paper, which he published as his will.

PER CURIAM. Let this opinion be certified. The judgment of the Superior Court is affirmed.

(265)

JESSE SUMNER v. THOMAS J. CANDLER.

Either a Clerk or Judge of the Superior Court may, in proper cases, within the jurisdiction of said court, authorize a person to sue *in forma pauperis.*

A party to an action or special proceeding in any and all courts, and before any and all persons acting judicially may be examined as a witness on his own behalf, or in behalf of any other party thereto:

Therefore, where a party is authorized by a competent tribunal, to sue *in forma pauperis; it is error,* to dismiss the action upon the ground that the application so to sue is based upon the evidence of the plaintiff himself.

This was a MOTION in the cause, heard before his Honor *Judge Henry,* at Fall Term, 1875, of the Superior Court of BUNCOMBE County.

The plaintiff, upon petition, was allowed by the Clerk of the Superior Court to sue *in forma pauperis.* The petition was verified by the plaintiff.

The defendant moved the court to dismiss the action, upon the ground that the plaintiff had not complied with the requirements of the statute in his petition for leave to sue *in forma pauperis,* but the record does not show in what particular.

The motion was allowed by the court, and thereupon the plaintiff appealed.

J. H. Merrimon, for the appellant.

No counsel contra, in this court.

SETTLE, J. This is an appeal from an order of the Superior Court, dismissing the action for the reason that the plaintiff had not complied with the provisions of the law, regulating suits *in forma pauperis.*

(266) As the defendant was not represented by counsel in this court, no particulars were specified in which the plaintiff had failed to comply with the law.

If the objection be that the Clerk could not authorize the plaintiff to sue, as a pauper, in the Superior Court, it is answered by the decision of this court in *Rowark v. Gaston,* 67 N.C., 291, where it is held that either a Judge or *Clerk* of the Superior Court may, in proper cases, within the jurisdiction of said court, authorize a person to sue *in forma pauperis.* But if the objection be that the plaintiff cannot, by his own oath, prove that he has a good cause of action; the reply is, since "a party to an action or special proceeding in any and all courts and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other

party," etc., no reason is perceived why he may not prove, by his own oath, a fact, in order to get into court, which, it is admitted, he may prove when once there; or, in other words, why he may not prove that he has a good cause of action at different stages of the proceeding.

The judgment of the Superior Court is reversed.

Let this be certified, etc.

PER CURIAM. Judgment reversed.

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(267)

JOHN A. LONG v. A. T. COLE AND OTHERS.

It is always in order, so long as a case is pending, upon motion to set aside any irregular order therein, independent of the provisions the Code of Civil Procedure.

Under the provisions of the C. C. P., a judgment, etc, may be set aside, on account of mistake, surprise or excusable neglect at any time within twelve months; and the fact that an order in the cause which in effect deprived the plaintiff of the right of appeal, was made at midnight when the plaintiff was absent and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the trial, constitutes a case of "excusable neglect."

This was a MOTION in the cause heard before his Honor *Buxton, J.*, at Chambers, in RICHMOND County, November 9th, 1875.

The following statement accompanies the record sent upon appeal to this court:

This was a motion made in lieu of a Bill of Review which was before the Supreme Court between the parties at January Term, 1875. 72 N. C. Rep.

Upon the return of the Certificate in that case, that a Bill of Review was not the proper remedy, and sustaining the demurrer, the plaintiff asked leave to use his summons issued 16th of May, 1871, and complaint and affidavit, as ground for a motion in the original cause to set aside the decree rendered at Fall Term, 1870, of this court, and correct the same for errors alleged in the complaint and affidavit.

The motion was allowed to be entered as of Fall Term, 1871, upon payment of cost incurred in the prosecution of the action in the nature of a Bill of Review. The costs have been paid.

On the 22d day of April, 1875, plaintiffs served a notice on the defendant's counsel, notifying them that at the next term of the Superior Court he would move to set aside the judgment ren- (268) dered in this cause at Fall Term, 1870. Previous to Spring Term 1871, he also served a notice of motion to re-open the account taken

in the case, but the motion was not made, he having concluded to seek his relief in answer to a rule served upon him as Clerk of the Superior Court, wherein the defendants A. D. Cole and E. D. Covington sought to require him to apply the money in his hands as Clerk, in satisfaction of the decree made at Fall Term, 1870, which answer the Supreme Court held was not responsive to the rule.

The motion of the plaintiff was not formally drawn out and entered of record of this term. The defendants moved to dismiss the motion of the plaintiff.

The plaintiff was Clerk of the Superior Court of Richmond County at the commencement of this action, and continued as such until September, 1871. The report of the Commissioner was filed at Spring Term, 1870, and exceptions thereto were filed at the same term. No exception was taken by the plaintiff to the *pro rata* distribution of the fund among the co-partners, nor to the fact that the Commissioner distributed the net balance of the fund among the partners without making provision for the payment of the cost; or reference to the profit and loss account between the partners.

Upon the hearing of the cause at Fall Term, 1870, a part of the plaintiff's exceptions were sustained and a part overruled, and judgment was rendered.

After the filing of an affidavit at Fall Term, 1875, in support of their motion to dismiss the plaintiff's motion to set aside the judgment, the plaintiff was allowed after objection by the defendants, to file an affidavit additional to the proceedings in the Bill of Review which was also considered in support of the plaintiff's motion to set aside the judgment.

His Honor being of the opinion that the case made by the
(269) plaintiff was one of excusable neglect, allowed the motion to set aside, and overruled the motion to dismiss.

From the ruling of his Honor the defendants Cole and Covington appealed.

Leitch, for the appellants.
Shaw and Hinsdale, contra.

READE, J. The order at Fall Term, 1870, re-referring the report to be re-formed in certain particulars, and when so reformed, to be the judgment of the court, is irregular and contrary to the course and practice of the court, in that it deprives the parties of the right to except to the report as reformed, and puts the referee in the place of the court to render judgment.

It was proper for his Honor, at a subsequent term, to set aside this irregular judgment, independent of the C. C. P., Sec. 133. It is always in order as long as a case is pending, to set aside an irregular order. But if that were not so, still it might be considered under that section of C. C. P., Sec. 133, which allows a judgment, etc., to be vacated at any time within twelve months on account of "mistake, surprise or excusable neglect;" for the motion being entered *as of* Fall Term, 1871, it is an apt time, and the order being made at midnight, when the plaintiff was absent, and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the case, make a case of "excusable neglect."

It is not intended to reflect upon his Honor for holding his court at midnight. On the contrary, he is commended for his industry in endeavoring to dispose of all the business before adjournment. And it has always been the custom to do a considerable portion of the business upon the equity docket in the night, and often late at night in the Judge's room, with only the lawyers present. (270)

There is no error in the order appealed from. Let this be certified.

PER CURIAM. Judgment accordingly.

Cited: Sircey v. Rees, 155 N.C. 299.

STATE v. ELIAS POWELL.

Where, upon an appeal to this court from the judgment of the court below, upon an indictment for murder, no error is assigned, and the court, after a careful examination of the record, is unable to discover any error, the judgment of the court below must be affirmed.

INDICTMENT for murder, tried before his Honor, *Judge Watts,* at June Term, 1875, of the Superior Court of HALIFAX County.

The prisoner was indicted at Spring Term, 1875, of the Superior Court of Edgecombe County, and by consent was removed to the Superior Court of Halifax, where it was tried at June Term, 1875. The prisoner was found guilty of the murder of one Esadore Cohen as charged in the bill of indictment.

No statement of the case accompanies the record sent to this court upon appeal.

After the jury had returned their verdict, the prisoner moved the court for a new trial. The motion was overruled, and judgment of death pronounced.

At the last term of this court a *certiorari* was issued, upon motion of the defendant's counsel, in response to which his Honor, Judge Watts, filed the following statement: "No objection was taken by either counsel for the State or the prisoner, to the charge of the court;
(271) but after the conviction of the prisoner by the jury, his counsel moved the court for a new trial, and stated that he had discovered some new evidence that would explain one of the circumstances relied upon by the State to convict the prisoner with the homicide. It appeared in evidence that a piece of small trace chain was found in the yard of the prisoner near his door, after the homicide, which was identified as the property of the deceased, or the property of his little child.

The court overruled the motion, as the evidence was only corroborative of the testimony of two accomplices, and if their testimony was to be believed at all, the circumstance of the chain would in no way effect or alter the main isue.

Moore & Gatling, for the prisoner.
Attorney General Hargrove, for the State.

RODMAN, J. We have carefully examined the record in the case, and find no error therein. The counsel who represented the prisoner in this court assigned none.

There is no error. The judgment below is affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: Paschall v. Bullock, 80 N.C. 8; *S. v. Hooks,* 82 N.C. 696; *S. v. Thompson,* 83 N.C. 597; *S. v. Coy,* 119 N.C. 903.

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(272)

STATE v. SAMUEL BURGESS.

Upon the trial of an indictment charging the defendant with the larceny of goods, the property of A, proof that the defendant was guilty of the larceny of goods, the joint property of A and B, is a fatal variance between the *allegata* and the *probata.*

It is not strictly regular to take the objection to such evidence, after verdict, upon a motion in arrest of judgment; but where this court can see from the record that there was a fatal variance between the charge and the proof, a *venire de novo will be awarded.*

STATE *v.* BURGESS.

INDICTMENT for larceny, tried before his Honor *Judge Cannon,* at Fall Term, 1875, of the Superior Court of CLAY County.

The defendant was charged with the larceny of a pair of shoes, the property of Joshua Brooks.

Henry Brooks, a witness for the State, testified that a pair of ladies' shoes, the property in question, were taken from the shop of William Brooks & Sons, by some person, to him unknown; that the firm of William Brooks & Sons was composed of William Brooks, Joshua Brooks and himself. On cross-examination, the witness stated that the shoes belonged to one Hagler; that Hagler had furnished the leather and William Brooks & Son had made the shoes for him; the firm had no property or claim upon them except that they were in the possession of the firm when taken, and a lien upon the shoes for making them.

The counsel for the defendant requested the court to charge the jury: That if they believed the testimony of Brooks, the shoes were the property of Hagler and the defendant must be acquitted.

The court declined to give the instruction, and charged the jury: That if they believed Henry Brooks, the property was properly laid in Joshua Brooks as a bailee.

To the refusal of his Honor to charge as requested, and to the charge of his Honor as above set forth, the defendant ex- (273) cepted.

The jury returned a verdict of guilty, and the defendant moved for a new trial. The motion was overruled; the defendant then moved in arrest of judgment, alleging a variance between the *allegata* and the *probata.* Motion overruled by the court, and defendant appealed.

No counsel in this court for the defendant.
Attorney General Hargrove, for the State.

READE, J. The *probata* does not correspond with the *allegata,* and that is always fatal. If one is charged with stealing the property of A, it will not do to prove that he stole the joint property of A and B.

It was not strictly regular to take the objection after verdict on a motion in arrest of judgment; it ought to have been taken on the trial; but still we see from the record that there was a fatal variance between the charge and the proof, and that the defendant ought not to have been convicted. And therefore there was error.

There is error.

PER CURIAM. *Venire de novo.*

Cited: S. v. Allen, 103 N.C. 435.

(274)

W. AUSTIN *v.* R. E. MILLER.

Where A hired a horse to B, upon an express contract that B should return the same at a specified time in as good condition as she then was, and should he fail to do so, B was to pay A a specified sum as the price of the horse, and B, after the time specified returned the horse, which had been greatly injured; in an action brought by A against B to recover the price: *It was held*, that the acceptance of the horse by the plaintiff did not necessarily constitute a rescission of the contract or a waiver of the right to recover thereunder:

It was further held, that the plaintiff having subsequently sold the horse, that the price received should be credited upon the judgment recovered of the defendant in this action.

CIVIL ACTION, tried before his Honor, *Judge Furches*, at Fall Term, 1875, of the Superior Court of CALDWELL County.

The plaintiff alleged: That on November 3d, 1873, the defendant came to him in Lenoir, and wanted a horse, buggy and driver to go to Boone, in Watauga County. He agreed, in consideration of a reasonable hire, to furnish the same, as desired, and had them ready, and so told defendant. The defendant then said that he did not wish a driver; that he would take another young man with him, and one of them could drive. The plaintiff refused to allow the horse to go upon such conditions, stating that if two of them wished to go, he would send his hack, with a double team and driver; that his mare was a spirited and valuable animal, then with foal, and that he was unwilling that any one but a person acquainted with her should drive her. The defendant then said, "Price your mare, and if I do not bring her back tomorrow night as good as she is, I will pay you your price for the mare." Plaintiff then said, "I will take two hundred and fifty dollars for the mare, and if she is not hurt I will take her back; if she is, you (275) must pay me for her, and I shall expect you to do it."

The mare was not returned to the plaintiff until November 8th, and when returned, showed the effects of hard and reckless driving, and has not since recovered from the effects of the trip. She was damaged to the amount of one hundred dollars, and the defendant has never paid the price of said mare as he contracted to do.

The defendant denied in his answer that he ever said to the plaintiff, "Price your mare," etc., as above stated, and averred that it was expressly agreed and stipulated between the parties that if the mare was injured or became sick from colic, the defendant was not to be responsible therefor. The only injury to the mare arose from an attack of colic, from which she speedily recovered, and from which she suffered no material injury. That the mare when returned, was

sound and well; was received by the plaintiff, and shortly thereafter sold by him for one hundred and fifty dollars, which was her full value.

The defendant denied that he drove the mare recklessly, or in any way used her improperly or negligently. He admitted that he had not paid the sum of two hundred and fifty dollars, but avers that he paid the hire for the horse and the buggy, and that the same was received by the plaintiff.

Upon the issues submitted by the plaintiff and the defendant respectively, the jury found:

That the defendant agreed with the plaintiff either to pay him two hundred and fifty dollars, the price of his mare, or to bring her back the next night in as good condition as when he hired her. That the defendant did not bring the mare back the next night in as good condition as when he hired her. That the defendant has never paid the plaintiff the price of the mare as agreed. That after the commencement of this action the plaintiff received the mare and sold her for one hundred and fifty dollars, which was a fair price for her at the time of the sale. The plaintiff has not received from the defend- (276) ant the hire for the mare. The mare was injured by the immoderate driving of the defendant to the amount of one hundred dollars.

The plaintiff thereupon moved the court for judgment for two hundred and fifty dollars, the price of the mare, offering to credit the judgment with one hundred and fifty dollars, the price for which the mare was sold. The motion was overruled and judgment rendered against the plaintiff for costs, and thereupon the plaintiff appealed.

Folk & Armfield, and Johnstone Jones, for the appellant.

No counsel contra in this court.

READE, J. It is not controverted that if the defendant had not returned the mare at all, he would have been liable for the price agreed on, $250. And the same is true if he had offered to return her *injured,* and the plaintiff had refused to receive her. So the question is, whether the fact that he did, after the time agreed on, return the mare in a damaged condition, when she was received by the plaintiff and sold, make any difference? Can we say, as a matter of law, that the taking of the mare back was a recission of the contract, or a waiver of the plaintiff's right to recover for a breach of the contract? It is evident, as a matter of fact, that the plaintiff did not intend it as a recission or waiver, for he had already instituted his suit for damages, and continued to prosecute it. The reasonable implication is, that when the plain-

tiff received the mare back, he had no purpose to release the defendant, but fearing that if he refused to take her, he might lose the mare and the price too, he determined to take her as a *security* for the claim which he had against the defendant, and to do the best he could with her. If this was not so, then it would have been easy for defendant to submit an issue to the jury embracing the enquiry
(277) as to the *intent* of the plaintiff. This he chose not to do.

If A agrees to deliver to B an article of a certain quality for which B is to pay a certain price, and an article of an inferior quality is offered, B may refuse to receive it. And, generally, this is the better way, the contract being executory. But if B has paid for the article, and by rejecting it he may lose the money and the article, both, then the better way is for him to receive the article and make the most of it, and sue A for a breach of the contract. That is substantially what the plaintiff did in this case. It is like the shingle case, *Cox v. Long*, 69 N. C., 8. There Long had agreed to furnish Cox shingles of a certain quality, at a certain price, and Cox had paid for them. Shingles of an inferior quality were delivered, and Cox, under stress of circumstances, and to keep his house from injury, received and used them, and sued Long for a breach of his contract, and recovered. So here, the defendant promised to deliver the mare in a certain condition; he delivered her in an inferior condition. The plaintiff, under stress of circumstances, to keep from losing his mare, took her and used her, and sued for breach of the contract. *Spiers v. Halstead*, post, 620.

There is error. Judgment reversed, and judgment here for plaintiff upon the finding of the jury, upon the basis of $250 for the breach of the contract, less $150, which plaintiff waived on the sale of the mare, with interest from the time of the verdict.

PER CURIAM. Judgment accordingly.

Cited: Parker v. Fenwick, 138 N.C. 216; *State's Prison V. Hoffman*, 159 N.C. 571; *Lacy v. Indemnity Co.*, 193 N.C. 182.

(278)

J. J. RICHARDSON AND ANOTHER v. JORDAN WICKER AND OTHERS.

A purchaser at execution sale is affected with notice of all defects of title. If one purchase land at such sale as the agent of another, and the land be subsequently sold under execution for his individual debt, the purchaser having no actual notice of the agency, he acquires only the interest of the agent, and is to be deemed to have had notice.

Therefore, where A purchased a tract of land at execution sale, as the agent of B, and subsequently the land was sold under execution against A: *It was held*, in an action brought against A to recover the land, that the court below did *not err* in refusing to charge the jury, that although they should find that A purchased as agent of B, yet if the plaintiffs bought without notice, and for value, they were entitled to recover.

CIVIL ACTION, in the nature of *Ejectment*, brought to this court upon appeal from the judgment of the Superior Court of MOORE County, at Spring Term. 1875, his Honor, *Buxton, J.*, presiding.

The *locus in quo* containing ninety-eight acres, was a part of a larger tract, containing one thousand acres, originally owned by Daniel McIver, and which, at his death, descended to his heirs-at-law, one of whom was David W. McIver.

The plaintiffs introduced in evidence a judgment, rendered at —— term of the County Court of Moore County, in a cause wherein one Eliza Ann McIver was plaintiff, and David W. McIver was defendant, upon which judgment execution issued for $24.90 cost, returnable to July Term, 1844. This execution was levied by Alexander Kelly, sheriff of Moore County, upon the one thousand acres, aforesaid. Upon this execution (a *fi. fa.*) is endorsed a sale of the interest of David W. McIver, signed by "Alexander Kelly, sheriff of Moore County," purporting to have been made July 23d, 1844, to Winship Bryant for William McIntosh." The words, "for William McIntosh" appear to have been written in fresh ink and different from the balance of the sheriff's return.

The plaintiffs further introduced in evidence the record of (279) a petition for partition among the tenants in common of the one thousand acre tract, filed at October Term, 1857, of Moore County Court, wherein William McIntosh claims two shares in said land, the one in right of his wife, one of the heirs-at-law of Daniel McIver, and the other as purchaser and assignee of the interest of David W. McIver. The final report of the commissioners was confirmed at January Term, 1858, allotting to him two shares, claimed as aforesaid. Lot No. 6 was allotted to him as assignee of David W. McIver, which lot contained ninety-eight acres, and is the *locus in quo*. The plaintiffs insist that the *locus in quo* became the property of Winship Bryant, by virtue of his purchase of the interest of David W. McIver, under the execution aforesaid, and that the words "for William McIntosh" were added to the return of the sheriff after the return was made, and without authority of law. That although Bryant obtained no deed from the sheriff, yet by virtue of his purchase, he acquired the right to a deed and an interest in the property, which could be levied on and sold under execution against himself.

The plaintiffs further introduced in evidence the record of an action in the County Court of Moore, wherein John R. Ritter was plaintiff, and Winship Bryant and others were defendants, in which action judgment was rendered against the defendants at October Term, 1857, and execution was issued returnable to January Term, 1858. This execution was levied upon the *locus in quo* as the property of Winship Bryant, and the land was sold at execution sale, the plaintiffs becoming the purchasers, and taking a deed from the sheriff of Moore county, dated May 9th, 1859.

It was in evidence, that when the execution was issued in 1857, against Winship Bryant, the words, "for William McIntosh" were not then endorsed upon the execution, returned by sheriff Kelly to July Term, 1844. The possession of the defendants was admitted.

(280) In behalf of the defendants there was evidence tending to show, that directly after the execution sale in 1844, both Bryant and McIntosh had said that Bryant bought the land for McIntosh. That after the partition of the land in 1857, McIntosh took possession of the two shares allotted to him.

The defendants introduced in evidence a sheriff's deed containing the usual recitals, dated October 30th, 1857, made by Alexander Kelly, sheriff, to William McIntosh, which recited a sale to McIntosh and a receipt of the money $26.50 from Winship Bryant for William McIntosh, and conveyed the interest of David W. McIver in the one thousand acres, levied on under the execution which issued in 1844, in the suit, *Eliza Ann McIver v. David W. McIver.*

It was admitted, that prior to the commencement of this action, William McIntosh executed a deed to the defendants for the *locus in quo.*

His Honor instructed the jury, that if the words "for William McIntosh" were not in the original return of Sheriff Kelly upon the execution, but were added by him afterwards, then these additional words were to be disregarded. That the return after being once made could not be altered without leave of the court, of which there was no evidence of it having been obtained, and that in that event the return of sale would be a sale to Winship Bryant.

Reading the return in this way it would be *prima facie* evidence of a sale to Winship Bryant, but the jury might still inquire, who in fact was the purchaser, and for this, might consider the evidence on that point; also the admitted fact that Winship Bryant never took possession, or so far as is known ever claimed the sheriff's deed, while it was in evidence that William McIntosh, although years afterward did obtain a deed from the sheriff.

That if they found that the words "for William McIntosh" should be discarded from the return of Sheriff Alexander Kelly, as made without authority, and that the *prima facie* evidence thus established of a sale by the sheriff to Winship Bryant was not (281) rebutted by the evidence of the defendants, then they should find a verdict in favor of the plaintiffs. If however, the rebutting evidence satisfied them that William McIntosh was the real purchaser, and that Bryant was merely acting as his agent then their verdict should be in favor of the defendants.

The counsel for the plaintiffs, requested the court to charge the jury in the latter view of the case:

That if the plaintiffs purchased without notice of the agency of Bryant and for value, relying upon the return of Sheriff Alexander Kelly as seen and testified to by the witness T. W. Ritter, sheriff, the verdict ought to be in favor of the plaintiffs.

The court refused the instruction prayed for and the plaintiffs excepted.

The jury rendered a verdict in favor of the defendants. Thereupon the plaintiffs moved for a *venire de novo* upon the grounds:

1. That the court erred in refusing the special instruction prayed for.

2. Because of a misapprehension of his Honor's charge by a portion of the jury, as evidenced by an affidavit of one of the jurors.

The motions were overruled by the court, and the plaintiffs appealed.

Busbee & Busbee, Manning, J. D. McIver, and Battle & Son, for the appellants.

Neill McKay, Merrimon, Fuller & Ashe, contra.

BYNUM, J. The material question between the parties was, whether Winship Bryant purchased the land in controversy for himself, or as the agent and for William McIntosh. This issue was submitted to the jury fairly, by his Honor, upon the whole evidence, and no exceptions were taken to the charge. The plaintiffs, how- (282) ever, asked the court to instruct the jury, that although they should find that Bryant purchased as the agent of McIntosh, yet if the plaintiffs bought without notice and for value, they were entitled to recover. His Honor refused this instruction, and in that he committed no error.

The plaintiffs purchased at execution sale, and therefore with notice of all defects in the title. They could acquire the interest of the defendant in the execution only. The jury finding that Bryant purchased as the agent of McIntosh, it followed that he had nothing in

the land which could be sold under execution, and that the plaintiffs were not entitled to the instructions asked for.

The second exception of the plaintiffs, was not insisted upon here. It was for the refusal of the court to grant a new trial, upon a motion to that effect, grounded upon the affidavit of one of the persons, that a portion of the jury had misapprehended the charge of the judge. Such an application ought never to be entertained. On a motion for a new trial, the evidence of a juror as to the motives and influences which affected their deliberations, is inadmissible.

There is no error.

PER CURIAM. Judgment affirmed.

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(283)

NATHAN LEWIS v. DAVID LATHAM AND ANOTHER.

One who sold a horse to another, taking his note, therefor, knowing at the time of the sale that the purchaser intended to use the horse in the Confederate army, or to swap him for one to use in the army, is not entitled to recovery in an action upon the note, because the illegal consideration vitiates the same.

A tender of Confederate money in 1864, in payment of a note, payable "in good current money," is not a discharge, where it appears that it was expressly understood at the time of the execution of the note, that Confederate money would not be accepted in payment of the same.

Every presumption is made against a wrong doer:

Therefore, where in an action upon a note, the defendant relied upon the Statute of Limitations, and it was in evidence that he had obtained possession of the note by means of threats, and he failed to produce it upon the trial, and introduced no evidence to show that it was not under seal: *It was held*, that the court below committed no error in ruling that the plaintiff was entitled to recover.

This was an APPEAL from a judgment of a Justice of the Peace, tried before his Honor, *Judge Furches*, and a jury, at Fall Term, 1875, of the Superior Court of ASHE County.

The action was commenced on the 16th December, 1874, to recover the sum of one hundred and fifty dollars, alleged to be due by bond for that amount, dated March —, 1863. The bond was alleged to have been given as the price of a horse sold the defendant Latham at that time, with the other defendant as security.

The purchase of the horse at the time the alleged note bore date, and at the alleged price, was admitted, but the defendant denied the execution of the bond. They also as matter of defence alleged that

the bond was given for an illegal consideration, and the cause of action was barred by the statute of limitations, and further that the debt had been paid and satisfied.

The plaintiff as a witness in his own behalf, testified that some time during the late war, the defendant Latham, then a (284) volunteer in the army, came to his house and desired to purchase his horse, then three years old, if he could swap him to one Brown. The witness told Latham he would take one hundred and fifty dollars in good money for the horse, but that he would not take Confederate money in payment. Latham then left but returned the next morning in company with Brown, and he and Brown agreed to swap. Latham thereupon agreed to purchase the horse upon the terms proposed, upon a credit of nine months, with the defendant Worth as security. The parties then went to Worth's house for the purpose of having the note drawn, Latham taking the horse and carrying him away. It was well understood by all the parties, that the plaintiff would not take Confederate money for the horse. Worth wrote the note, payable to the plaintiff nine months after date, for one hundred and fifty dollars, payable in good current money, such as the defendant Worth would sell his stock for. Both the defendants signed the note and after reading it, delivered it to the plaintiff. He was anxious for Worth to write the note because he knew how to write a good one. The defendant and one Maxwell came to the witness and insisted on paying off the note in Confederate money and offered him some cotton yarn, but he declined to receive such payment and demanded good money. Some time thereafter, Maxwell and Latham came to the plaintiff's house, and Latham told the plaintiff that his money was left at Worth's house, and he must take the note over there and give it up and get the money, or he, Latham would sue him and make him give it up. The money left at Worth's was Confederate money. He thought that Latham could make him give the note up and he therefore carried the note to Worth's and left it and has never seen it since. He has never received any thing for the horse. The defendant Worth offered to pay him Confederate money for the note at the time he surrendered it, but he declined to receive it. He did not know what use the defendant Latham had for the horse. He did (285) not know whether or not the note was under seal, but he thought it was a good note. He depended on Worth to write the note and supposed it was all right.

Jacob Lewis, a son of the plaintiff, testified that the horse was worth one hundred dollars. He saw the note. It was a good note, but he did not remember whether or not it was under seal.

One Telly testified that he had a talk with Latham last winter, before the commencement of this action, and requested him to pay the money due the plaintiff. He refused to pay anything and said "that note was in other fingers" than the plaintiff's, and that he had paid all on it he ever expected to pay.

The defendant Latham testified that at the time of the purchase, he was in the Confederate army, a member of the 1st N. C. Cavalry, and was at home on detail, for the purpose of obtaining a horse. That he went to the plaintiff to buy a horse to ride in the army, and found that his horse would not do. After he and Brown had agreed to swap, he went to the plaintiff's house in company with Brown, and the plaintiff agreed to accept his note with Worth as security, for $150, in old State money; the plaintiff refusing to take Confederate money. That about the time they arrived at Worth's, the plaintiff changed his mind and directed Worth to write the note payable "in good current money such as Worth would sell his stock for." That he and Worth executed the note and delivered it to the plaintiff. When the note fell due he sent Confederate money to Maxwell to pay it off. He afterwards heard that the plaintiff would not accept the Confederate money, and he and Maxwell went to the plaintiff's house, and the plaintiff declined to accept it and demanded specie. The defendant Latham then told the plaintiff that his money was at Worth's, and if he did not go and get it and leave the note with Worth, he, Latham, would sue him, and try it out at law. In a few days the plaintiff carried the note to Worth's and left it, but did not accept the Confederate money. Soon
(286) afterwards Worth gave the note to the witness. He stuck it in his pocket and lost it, and has never seen it since. Did not know whether or not the note was under seal. He could not read. This was in the year 1864.

There was other evidence introduced, which being irrelevant is not necessary to be stated.

His Honor instructed the jury, that there was no evidence of a payment of the note. Upon the question of illegal consideration, that if the defendant Latham purchased this horse for the purpose of riding or using him in the army, or for the purpose of swapping him to use in the army, and if the plaintiff knew of such purpose at the time of the trade, then the consideration would be illegal and vicious, and the plaintiff could not recover.

The court reserved the question as to the statute of limitations.

The jury rendered a verdict in favor of the plaintiff for sixty dollars principal, with interest.

Upon the question reserved, the court being of the opinion that the plaintiff's cause of action was not barred by the statute of limitations gave judgment upon the verdict, and the defendants appealed.

Folk, for the appellants.
M. L. McCorkle, contra.

SETTLE, J. We see no objection to the charge of his Honor, either on the question of payment, or of the illegal consideration of the note, which is the subject of this action. We also concur in his ruling, on the plea of the statute of limitations. "Every presumption is made against a wrong doer." Broome's Legal Maxims.

This is sound doctrine, and had it been carried to its legitimate results in this case, it would seem that the recovery should have been for the full amount of the note, $150 and interest. But as (287) the plaintiff does not complain, we will not do so for him.

The evidence, which is sent up with the record, left no room for doubt that the sole purpose of the plaintiff, in selling his horse, was to get a good price, and also *good money* for him, and that he took a note for the price, which has never been paid.

It further appears that the plaintiff, an old man, after repeated refusals to receive Confederate money, in discharge of his debt, was induced by the threats of the defendant, Latham, to leave the note with Worth, the surety thereto, and that the note went into the hands of Latham, who, after notice, failed to produce it on the trial. He says he lost it. Let that be conceded, but still be obtained it tortiously; and although the note may have been without a seal, it was upon him to show it; and having failed to do so, he must be content to take the measure which the law gives to a spoliator.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

STATE v. THE RICHMOND & DANVILLE RAILROAD COMPANY AND OTHERS.

Where, upon an appeal to this court, it appears that the subject matter of the action has been disposed of, and the only matter involved is a question as to costs, the appeal will be dismissed.

This was an APPEAL from the ruling of his Honor, *Albertson, J.*, requiring the defendant to give bond in the sum of $50,000, to con-

(288) tinue an injunction, theretofore granted upon motion in the cause. The case was heard by his Honor, at Chambers, in WAKE County, June 19th, 1873.

A motion was then made by the defendants to vacate the injunction. Upon the hearing, among other things, it was adjudged by the court:

"Should the plaintiff appeal, he shall first give bond in the sum of fifty thousand dollars to continue the injunction, and also in the sum of five hundred dollars for costs of appeal."

From so much of the judgment of the court, as required the plaintiff to give bond in the said sum for the continuance of the injunction, the plaintiff appealed.

The case was before the court upon an appeal by the defendants, at June Term, 1875, and is reported in 73 N. C. Rep.

Attorney General Hargrove, Smith, Batchelor & Son, and Clark, for the State.

Strong, Badger, Merrimon, Fuller & Ashe, and Fowle, for the defendant.

READE, J. The action was brought to enjoin the defendants, who were the lessees of the North Carolina Railroad, from changing the gauge of that road. A restraining order was granted without notice, and then, upon notice, an injuction was granted until the final hearing. From that order the defendants appealed to this court. And this court directed the injunction to be dissolved. That, of course, carried the costs against the plaintiff; for the statute provides, "that in all civil actions, prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases, and to the same extent as private parties." Bat. Rev., Chap. 17, Sec. 288, C. C. P.

But the injunction was continued until the hearing, *upon condition* that the plaintiff give bond with surety, in the sum of $50,000 to indemnify the defendants, the bond to be given by a day
(289) named, or else the injunction to be dissolved. From so much of the order as required the plaintiff to give the $50,000 bond, the plaintiff appealed. We assume that on the day named, the plaintiff gave the $50,000 bond, notwithstanding the appeal, although it is not so stated in the record, and no such bond appears among the papers.

We are now asked to decide:

(1) First, whether it was lawful to require the plaintiff to give the bond.

(2) Secondly, are the sureties upon said bond liable.

We decline to decide the first point, because it is of no practical importance. The plaintiff gave the bond, or if she did not, there is no need that she should, or should not give it now; because the subject matter of the action was decided upon the defendant's appeal. In cases where slaves were the subjects of actions pending at their emancipation, we declined to decide the cases, as the subject matters were gone, and nothing involved but the costs. *Kidd v. Morrison,* 62 N. C., 31. And we have lately said, that we would not try a case when nothing but the costs is involved. *Martin v. Sloan,* 69 N. C., 128.

In such cases we dismiss the appeal.

We decline to decide the second point, as to the liability of the sureties, because it is not presented by the record.

The liability of the sureties does not *necessarily* depend upon the liability of the principal. *Davis v. Commissioners of Stokes Co.,* 72 N. C., 441.

Appeal dismissed.

PER CURIAM. Judgment affirmed.

Cited: May v. Darden, 83 N.C. 239; *Hasty v. Funderburk,* 89 N.C. 94; *Russell v. Campbell,* 112 N.C. 405; *Futrell v. Deanes,* 116 N.C. 40; *Herring v. Pugh,* 125 N.C. 438; *In re Burnett,* 225 N.C. 647; *Swink v. Horn,* 226 N.C. 719.

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(290)

JAMES HARRISON v. JESSE STYRES AND OTHERS.

The Act of the General Assembly, ratified the 11th day of May, 1861, (the first *Stay law,*) making void all mortgages and deeds of trust, for the benefit of creditors thereafter executed, whether registered or not, does not apply to a mortgage executed prior to the passage of that act, but registered after its passage.

This was a CIVIL ACTION, brought to recover $577.00 alleged to be due the plaintiff by the defendant, on a bond executed on the 15th day of October, A. D. 1860, in which the defendant Styres was principal, and the co-defendants, sureties, and also for the purpose of foreclosing a mortgage executed by the defendant Styres to the other defendants to indemnify them as sureties, tried before his Honor, *Judge Cloud,* at Spring Term, 1874, of the Superior Court of DAVIDSON County.

The plaintiff offered in evidence a mortgage duly registered on the 14th day of May, 1861.

The defendants objected to the admission of the evidence on the ground, that no mortgage, professing to secure a surety, was valid, unless all the debts due by the mortgagor were also secured.

The defendant Styres was sworn, and testified: That on the 14th day of May, 1861, he owed sundry other debts, besides that specified in the mortgage. The court overruled the objection, and the defendant further objected to the admission of the evidence, on the ground that no privity was shown between the mortgagees and the plaintiff. The court again overruled the objection, and the defendants excepted.

The following is a copy of the mortgage:

"This indenture, made on the 15th day of October, A. D. one (291) thousand eight hundred and sixty, between Jesse S. Styres of the County of Davidson and State of North Carolina on the one part, and Henry Harrison and Levi Hill, (the co-defendants) of the County and State aforesaid of the other part, witnesseth: That the said Jesse S. Styres for and in consideration of one dollar, to him in hand paid by the said Henry Harrison and Levi Hill, at the time of executing these presents, the receipt is hereby acknowledged, hath granted, bargained, sold, aliened and confirmed and by these presents doth grant, bargain, alien, sell and confirm unto the said Henry Harrison and Levi Hill, their heirs and assigns, a certain tract or parcel of land in the County of Davidson and State of North Carolina, situated on the waters of Caben's Creek, adjoining the lands of D. Styres, Henry Newsom and others, bounded as follows, viz: Beginning at a stone on D. Styres line, thence in a Southwest direction with the public road to a post-oak, thence south to a black-jack, Henry Newsom's corner, thence east to a maple, thence east to a stake, thence south to a maple, Joseph Harrison's corner, thence east to a hickory, Andrew Thompson's corner, thence north to a dogwood, D. Styres corner, thence with his line N. W. to the beginning, containing 167 acres more or less.

To have and to hold the said lands and premises, all and singular the tenements, hereditaments, woods, ways, waters, mines, minerals and appurtenances thereunto belonging to their proper use and behoof in fee simple.

The condition of this indenture is such, that whereas the said Henry Harrison and Levi Hill are standing security for the said Jesse S. Styres to James Harrison in the sum of five hundred and seventy-seven dollars, due by bond, with interest from the 15th day of October, 1860, as by reference to the bond will more fully appear; and whereas the said Jesse S. Styres is honestly desirous of securing the payment thereof: Now thereof if the said Jesse S. Styres, shall on or before the 15th of March, 1861, fully pay and discharge the said debt, then

this indenture and every part and clause thereof shall be void, (292) otherwise to remain in full force and effect."

This mortgage was executed by all the parties thereto, *and was registered May 14th, 1861.*

It was in evidence that the defendant Styres had occupied the mortgaged premises ever since the execution of the mortgage, and that the land upon which the mortgage was given, was bought by Styres from the plaintiff and the bond in suit was given as the price of the land. That the plaintiff had proposed to the defendant Hill, who had the mortgage in his possession that if he would surrender it to him, he would see the defendant Styres, and if he could compromise with him and get back the land he would release the sureties, and that if he failed to effect a compromise he would return the mortgage. That having failed, he shortly thereafter delivered it to the defendant Harrison.

The plaintiff here rested his case, whereupon the defendants moved for judgment of non-suit. The court overruled the motion.

On the part of the defendants there was evidence tending to show that the plaintiff had told Hill that if he would give him the mortgage he would release Harrison and Hill from the debt. That the defendants had no property liable to execution.

There was also further evidence tending to show that the interest of Styres in the mortgaged premises, had been sold under the Internal Revenue law of the United States, for the payment of taxes due the government.

The plaintiff had a verdict and judgment, and the defendants appealed. All other facts pertinent to the case, are stated in the opinion of the court.

Shipp & Bailey, for the appellants.
Dillard & Gilmer and T. J. Wilson, contra.

BYNUM, J. On the 15th of October, 1860, the plaintiff sold (293) and conveyed a tract of land to the defendant, Styres, for the sum of $570, taking his bond for the purchase money with the defendants, Harrison and Hill, as the sureties thereon. At the same time, and as a part of the transaction, Styres, the principal, executed to the sureties a mortgage of the land, reciting therein the suretyship and expressly stipulating that Styres should pay the debt on or before the 15th of March, 1861, or the deed should become absolute. The mortgage was not registered until the 14th of May, 1861. The principal and sureties in the bond are now insolvent, and the land embraced in the mortgage is the only property available for the payment of the debt.

The prayer of the complaint is for judgment on the bond and a foreclosure and sale of the mortgaged premises for the satisfaction of the debt.

The defense mainly relied on is, that the mortgage is void under the seventh section of an act of the Legislature, ratified the 11th of May, 1861, and known as the first stay law of the war. That section is as follows: "That all mortgages and deeds of trust for the benefit of creditors hereafter executed, whether registered or not, and all judgments confessed during the continuance of this act, shall be utterly void and of no effect."

It will be observed that the mortgage was executed on the 15th of October, 1860, the stay law was passed on the 11th of May, 1861, and the deed was registered on the 14th of May, 1861. The mortgage was executed prior to the act of the Legislature, which, in express terms, makes void those mortgages and trusts only, which should be executed after the passage of the act. This deed, then, does not fall within the prohibition of the act. It is true, the mortgage was not registered until after the act was ratified, but the act clearly refers to the time of the execution of the deed, and not the time of its registration, for the terms used in the act are *"hereafter executed,* whether registered or
(294) not," that is, whether those mortgages and trusts, which shall hereafter be executed, shall be registered or not. Prior to the act, mortgages were good *inter partes,* without registration, and the purpose of the act seems to have been to make such deeds void as well as registered ones, when they were executed after the passage of the act. Certainly, when this mortgage was executed on the 15th of October, 1860, there was no law in existence which forbid it; it was then valid between the parties, and the subsequent act does not, in terms or by implication, forbid its registration. Valuable rights were acquired by the plaintiff, by virtue of the mortgage, even prior to registration; rights which could not be divested without impairing the obligation of contracts. If the contract of mortgage was valid when entered into, it was not competent to the Legislature, afterwards to make it invalid. If the act of May 11th is fairly capable of it, it must receive such a construction as will not conflict with the Constitution.

But this court in *Barnes v. Barnes,* 53 N. C., 366, has declared so much of this act, as was brought in question in that case, to be unconstitutional and void. That part of the 7th section of the act, which attempts to make void all judgments confessed, was held to be an invasion of the judicial power, as well as a violation of contract. The whole section is an integral part of the act, the design and purpose of which, as a whole, was to stay the proceedings of all courts, indefinitely, and to prohibit creditors from either collecting or securing their debts. The

reasoning of the court in *Barnes v. Barnes,* is, therefore, as applicable to the whole act, as to the part there brought in question, and must be considered as conclusive against the constitutionality of the act. This is upon the supposition, that the act was intended to include mortgages executed before and registered after the act, which is the extremest view which can be taken in behalf of the defendants. But we believe the first view taken of the act is a correct one, and by it, the validity of the act need not be drawn in question.

The mortgage being established as valid, the defendants Hill (295) and Harrison, by the very terms of the mortgage, hold the land in trust for the payment of this debt. Even if it were a deed in trust to indemnify the sureties, as was argued by the defendants' counsel, the debt of the creditor supplies the consideration to support the deed, and the creditor's interest, therefore, is the primary object to be protected in equity, and the sureties' indemnity is only secondary. *Wiswall v. Potts,* 58 N. C., 184; *Bank v. Jenkins,* 64 N. C., 719. It is unnecessary to consider the rights of the defendant Harris, who claims to have lately purchased the interest of Styres, under a sale for a violation of the revenue law.

This claim seems to have been trumped up to complicate the rights of the plaintiff, and for the benefit of Styres. It cannot affect the rights acquired by the plaintiff under the mortgage.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Lyon v. Akin, 78 N.C. 261; *Mast v. Raper,* 81 N.C. 335; *Matthews v. Joyce,* 85 N.C. 266; *Sherrod v. Dixon,* 120 N.C. 67; *Blanton v. Bostic,* 126 N.C. 421.

(296)

CHANEY CALDWELL AND OTHERS v. WILLIAM J. WATSON AND OTHERS.

Whenever it shall judicially appear that any person while held as a slave, purchased and paid for any property, real or personal, and that conveyance thereof was made to him, or to any one for his use, such purchaser, or those lawfully representing him, shall be entitled to such property, anything in the former laws of this State forbidding slaves to acquire and hold property, to the contrary notwithstanding.

A, a slave, purchased in 1858, a lot of B, paying therefor, which was conveyed to C, to have and to hold so long as the said A shall live, with remainder to the children of D, A's owner—this being done in fraud of the law—and in 1869, after A had become a free man, B executes and delivers another deed to A himself, in fee simple, being in possession and continuing in

possession until his death in 1872. Before his death, A devised the lot to the plaintiff, his wife, with remainder to his grandchildren. In an action by the plaintiff, demanding that the first deed from B to C shall be delivered up to be cancelled and declared void, and the cloud upon her title removed: *It was held*, that the plaintiff was clearly entitled to the relief sought, A, the grantee in the second deed, being owner in fee, with the right to devise the same.

This was a CIVIL ACTION tried before his Honor, *Judge Kerr*, at Fall Term, 1875, of ORANGE Superior Court.

The parties having waived a trial by jury; the court found the following facts:

That November Caldwell was in the year 1858, a slave, the property of Dr. William Hooper, and upon the removal of Dr. Hooper from Chapel Hill, wishing to remain there, he made arrangements with James Y. Watson, by which the latter was to purchase him at the price of three hundred dollars, and he, November, was to pay the purchase money; which he accordingly did.

That about the same time, November being the slave of Jas. Y. Watson, bought of one Green Caudle a lot of land, which is the
(297) subject of this controversy, at the price of one hundred dollars, and himself paid the whole of the purchase money.

That November Caldwell took a deed dated the 10th day of September, 1858, whereby the said lot was conveyed by Green Caudle to one Jones Watson "to have and to hold to the said Jones Watson, so long as November, a slave formerly the property of Joseph Caldwell and now belonging to James Y. Watson, of Chapel Hill, shall live, with remainder upon his death to William J. Watson and Mary V. Watson, and their heirs, the said William and Mary being children of James Y. Watson aforesaid," this being done by the parties in fraud of the law. Neither Jones Watson, James Y. Watson or the remaindermen paid any part of the purchase money.

November Caldwell occupied the said lot from the date of his purchase to the day of his death on the 24th day of Dec. 1872, paid the taxes and built improvements thereon. On the 29th day of March, 1869, Green Caudle executed another deed for the lot, whereby he conveyed the same to November Caldwell in fee simple.

That November Caldwell left a last will and testament duly executed to pass both real and personal estate, which has been admitted to probate in the Probate Court of Orange County, wherein he devised the lot in controversy to the plaintiff, Chaney Caldwell, his wife, remainder in fee to the other plaintiffs, his grandchildren.

Upon these facts the court rendered judgment to the effect, that the plaintiffs take nothing, and that the defendants are entitled to the real

estate mentioned in the complaint, and that a writ of possession issue to put them in possession thereof.

From this judgment the plaintiffs appealed and assigned the following as error:

1. That upon the finding of the court, the plaintiffs are entitled to have the deed from Caudle to Jones Watson cancelled by reason of the change of circumstances of the said November Caldwell and to have their title quieted by said cancellation. (298)

2. That by the proper construction of said deed the estate given to Jones Watson terminated upon the death of November Caldwell, and the remainder, to William J. and Mary V. Watson, fails both for want of consideration moving from them, and because they are not parties to the said deed.

3. That said deed having been executed by a slave, in favor of his master's children, the law presumes undue influence and nothing else appearing, it should be vacated and the plaintiffs' title quieted by a cancellation thereof.

4. That at most, the said remaindermen had but an estate during the life of Jones Watson, and the court should have so declared, and thereby quieted the title of the plaintiffs acquired under the later deed from Green Caudle to November Caldwell, and will of the said November.

5. That the plaintiffs are entitled to recover of the defendants the costs of this action.

All other facts pertinent to the points decided, are stated in the opinion of the court.

Graham & Ruffin, for the appellants.
No counsel contra, in this court.

SETTLE, J. The counsel for the plaintiffs suggests that if the court can find in the books no principle sufficiently large to give relief in cases like this, they ought to invent one to meet the new order of things necessarily arising upon the abolition of slavery and the establishment of freedom. I confess that I should feel much inclined to do, rather than burden the consciences of the defendants with a decree in their favor. But fortunately for their repose, we need not invent a new principle in order to induce the defendants to do equity. So far as this litigation is concerned, we may treat the defendants as plaintiffs seeking the active intervention of the court to enable them, not to hold, but to recover possession of land by virtue of a deed which (299) his Honor finds was made in fraud of the law.

His Honor also finds that neither Jones Watson, the trustee, nor James Y. Watson, the master, nor his children, the plaintiffs, ever paid

any part of the purchase money, but that the same was paid by November Caldwell, who occupied the said lot from the date of his purchase in 1858, to the day of his death in 1872, and paid the taxes on the same and built improvements thereon; and that he devised the same to his wife and grandchildren, who now have possession of the premises. So in order to support the decree which his Honor felt bound to render, we must give force to a deed made in fraud of the law, when equity would at least say to the parties, we leave you as we find you; the devisees of November Caldwell in possession, and the aid of the court to eject them therefrom will not be granted.

But we must not stop here. Putting aside the fraudulent deed as something which the court will not enforce in aid of either party, it appears that Green Caudle, the grantor in the deed, on the 23d day of March, 1869, after November Caldwell had become a free man, executed another deed untainted with fraud in law or fact, and in pursuance of the original intention of all the parties, whereby he conveyed the same lot to November Caldwell in fee simple. So that November Caldwell having acquired his freedom, and being relieved of the disability which enforced his participation in the fraudulent transaction, acquires a deed in fee simple, to land for which he had paid the full purchase money to the vendor.

And now his devisees only ask the aid of the court to remove from their title, under the deed of 1869 a cloud darkened by fraud, and bearing upon the plaintiffs in a manner revolting to good conscience. Why cannot this be done without resort to a new principle? But fur-
(300) ther, no one can believe for a moment, that when November Caldwell, a slave, purchased his *quasi* freedom, and then purchased half an acre of land and paid for both with his own money, that either he or any of those with whom he was dealing, did not intend by the first deed to create a trust for his benefit, and that the limitation over to his master's children was also intended to be upon the same trust, from which they were to derive no beneficial interest. Will they at this day, be heard to say ought to the contrary?

Whatever may have been the result, had the trustee or the master's children, in violation of all faith, taken the property to their own use, while November was a slave, and when such conveyances were against the policy of the law, yet as no such claim was asserted until that policy had ceased, and the Convention of 1868 had ordained, "that whenever it shall judicially appear that any person, while held as a slave, purchased and paid for any property, personal or real, and that conveyance thereof was made to him, or to any one for his use, such purchaser, or those lawfully representing him, shall be entitled to such property, anything in the former laws of the State forbidding slaves to

acquire or hold property to the contrary, notwithstanding," it is clear that the courts will not now give countenance to such an iniquitous claim. Nor shall they permit the plaintiffs to be harassed thereby. In support of this view, we may cite the act of 1869-70, Chap. 57, to show that the Legislature has adopted the policy indicated by the Convention of 1868, a policy in fact, which necessarily sprang into existence, full grown and vigorous, upon the abolition of slavery.

The judgment of the Superior Court is reversed.

Let a decree be drawn in conformity with the prayer of the complaint. *Lattimore v. Dixon,* 63 N. C., 356.

PER CURIAM. Judgment reversed.

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(301)

W. W. McCANLESS v. H. W. REYNOLDS.

Where one contracts to sell a well known tract of land described by metes and bounds for a specified sum, and in the deed therefor subsequently executed, adds a strip (the *locus in quo*) to the land sold, without further consideration, it is fraudulent to the grantor's creditors, and no title to such added strip passes to the grantee.

Any one who has acquired the rights of a deceased person, whether by his deed or the deed of the sheriff, who is authorized to make a deed for him, is an assignee within the meaning of section 343 of the Code of Civil Procedure, and no distinction is made between a voluntary and an involuntary assignee.

Neither of the parties, (plaintiff or defendant,) whether claiming as original parties or as assignees, either by deed of the party or deed of the sheriff, is a competent witness in regard to conversations and transactions between the party who offers himself as a witness and the assignees of the dead man.

CIVIL ACTION, in the nature of *Ejectment,* tried before *Cloud, J.,* at Spring Term, 1875, of the Superior Court of FORSYTH County.

The following is, substantially, the statement of the case sent up as a part of the record, upon appeal to this court:

The plaintiff claimed the *locus in quo* as a purchaser at an execution sale, the execution having been issued in his own behalf.

The defendant claimed the same under a deed from one Richard Cox, the defendant in said execution, dated prior to the sheriff's deed to the plaintiff.

The plaintiff alleged, that the *locus in quo* was conveyed to the defendant by the said Cox in fraud of his creditors. In suppport of this allegation, evidence was adduced tending to show that the plaintiff

held a bond for the sum of $1,395.75, against the said Cox, dated the 31st day of March, 1866, and that on the 2d day of April, 1866,
(302) he commenced an action on said bond. That at Fall Term, 1866, the defendant pleaded to the said action, and issues joined therein. The action was pending until Spring Term, 1867, when the plaintiff recovered judgment against the defendant; and that execution issued upon the judgment, and the plaintiff became the purchaser of the *locus in quo*, at the execution sale.

Two other actions were commenced against Cox, each on the 22d day of March, 1866, one by W. A. King, and the other by Presley George, together amounting to about $800. That in October following, other creditors instituted actions against Cox, to recover about the sum of $1,060, to wit, M. L. Smith and J. L. Peatress, the former of whom was a brother-in-law of Cox and the defendant. In the four last mentioned suits, judgments were confessed at Fall Term, 1866.

It was further in evidence for the plaintiff, that on the 23d day of April, 1866, Cox executed a deed in trust conveying the "Nancy Cox" tract of land to secure Charles E. Moore, M. L. Smith and Powell Simmons, his sureties, for a debt of $1,203, due the Bank of Salem, contracted in 1861. That a short time before Cox made the deed to the defendant, he declared that he owed the plaintiff a large debt, and that he did not intend to pay it. That he intended to give Mary Reynolds, a daughter of the defendant, five hundred dollars in the "Molly Cox" land (the *locus in quo*), and the defendant was to have the balance. That a few days before he executed the bond to defendant to make title to the land, which was dated April 11th, 1866, Cox declared that he was about to be sold out, and that "while they were selling, he was going to sell too." A few days after this, Cox went to Virginia to the home of the defendant, when and where the contract between Cox and the defendant was made, and the title bond given. That on the day before the execution of the deed, Cox stated to a neighbor that he was about to sell his "Molly Cox" land to the defendant for $1,500, that he asked $2,000 for it, but the defendant talked like not giving it. That he would not take that from anybody else
(303) in the world. That in the fall of 1866, after the conveyance of the land to the defendant, the defendant was at said neighbor's house, and a colored girl told him that she had heard that the defendant's son Dick was to come to live with Richard Cox at his home place, and his daughter Mary was to come to the "Molly Cox" place. That in reply to this, the defendant said that he had never heard of such a thing; that he had thought of giving the "Molly Cox" place to his son Abram.

There was also evidence, tending to show that on the 15th of April, the defendant and Cox came to the house of one Powell Simmons, in Stokes County, and on their arrival the defendant remarked to Gideon E. Moore, who was present at that time, that he was glad to find him there, as he wrote a good hand; that he had bought of Cox his "Molly Cox" tract of land at $1,500, and he wanted a settlement made and a deed drawn. Moore and Simmons remarked that he paid enough for it. Moore excused himself from doing the writing, saying that Simmons was the best draughtsman.

Moore testified that the defendant produced his papers, sitting near to him, and he knew that he had in his hands a bond on Cox to Moody, and by him transferred to the defendant; another for $900, or thereabout; and beside these, there was a small account, upon all of which Simmons computed the interest, Cox admitting each one to be justly due Simmons, announced the result of the calculation as $1,450, or about that sum. The defendant thereupon remarked to Cox, that it was very near what they had made it, the only difference being that Simmons had counted the fractions. It was further in evidence, that the deed was not drawn on that occasion, owing to the fact that Cox did not know the courses of the lines to the "Molly Cox" tract, and Cox left Simmons to go to his house, a few miles off, to get his deed, and was to come back that evening, but did not. The defendant stayed all night at Simmons', and the next morning he and Simmons (304) went off together, saying they were going to Cox's to draw the deed.

It was further in evidence, that on arriving at Cox's house, they found him with a trunk open, looking for an old deed, which he did not find; and the question arose as to how the "Molly Cox" land should be described so as to distinguish it from other lands belonging to Cox, adjacent thereto. Cox wanted the line to run across the creek, near the ford, and the defendant insisted that it should run below the ford. This disagreement arising, Cox, the defendant, and the witnesses went from the house to the ford, still disagreeing. They then went down to the creek, about a hundred yards to a bend, where there was a large rock in the creek, and a cleared ridge makes a near approach to the creek. The defendant then said to Cox, "I want to see you," and they went off into the woods, out of sight of the witnesses, and were gone sometime. When they returned, the defendant remarked that Cox had agreed for the line to commence at the bend, and run due north and south through Cox's land to his outside lines. The deed was thus drawn, a copy of which the plaintiff offered in evidence. The quantity of land, between the road, as it runs through the land, and the line

crossing at the bend, was variously estimated by the witnesses, ranging from twenty-seven to one hundred acres.

It was further in evidence that Cox had been a man of large property up to the time the slaves were emancipated, and afterward owned the following property, to-wit: The "Molly Cox" place, containing four hundred and seventy-five acres, the *locus in quo* sold to the defendant for the sum of $1,500; the "Nancy Cox" place, containing three hundred and twenty-seven acres, said to be worth more than the "Molly Cox" place by some of the witnesses, and by some less, which after the execution of the deed to the defendant, was conveyed in trust and sold at auction for five hundred dollars; the "House place," containing six hundred and thirty-five acres, worth $3,000, and sold at a sher-
(305) iff's sale for $1.00 per acre; the "Turkey Branch place," worth from $150 to $400; the "Mountain place," worth $100, and a lot in Danbury, worth $50, besides personal property which brought $275. There was no evidence that Cox was reputed as insolvent at the time of the execution of the deed to the defendant; but some of the witnesses, testified that it was thought that he would break. It was in evidence that before the end of the year 1866, Cox was entirely sold out, leaving a considerable part of his debts unpaid, his property selling for a low price, owing to the scarcity of money, the then prevalent fear of confiscation in that section, and the consequent scarcity of purchasers of real estate.

The evidence as to the value of the "Molly Cox place" was conflicting, some of the witnesses testifying that it was worth more than $1,500, and others that it was worth less. It was further in evidence that the lands retained by Cox after the execution of the deed to the defendant, if sold at the same proportional price, would have paid off all his debts and left a considerable surplus. That before the execution of the deed to the defendant, the defendant asked one Wm. S. Lawson, "if any one had made a break on Cox," stating that he was expecting it, and that on the day after the execution of the deed, defendant came to Lawson's house and told him that he had bought the "Molly Cox place" for $1,500, and asked the witness what he thought of it, and if he had not paid too much. To which the witness replied that it was worth more money. The defendant remarked, "If it was so, it was all in the family; that Cox was old, and would have to be taken care of; that McCanless and others had debts (naming the debt due the Bank of Salem), and if those debts came against him it would break him up. He said McCanless had sued Cox, and asked the witness if he knew anything about the justice of the debt; to which the witness replied, that he knew some portions of it to be just.

It was further in evidence that Lawson was at the sale of the (306) "Nancy Cox place." That some six or eight persons were present, of whom three or four were bidders. One M. L. Smith, a brother-in-law of Cox, became the purchaser, at the price of $510. That, in the opinion of the witness, the land was worth five dollars per acre. (The tract contained three hundred and twenty-seven acres.) That the defendant had told the witness to attend the sale of Cox's personal property and buy some articles for Cox, which he did. Afterward the defendant complained that he bought more than he was instructed to buy, and proposed that the witness should take and pay for a part, and he would pay for the balance for Cox. At this proposition some unpleasantness and irritation was shown, and the witness refused to do so, saying if he took a part he would take all. There was no hard feeling between them that witness knew of. After this disagreement the witness went after the articles purchased, when Cox alleged that the defendant had promised to give him a home on the "Molly Cox place" for life, and to buy these articles for him. The next time the witness saw the defendant he communicated to him these declarations of Cox. This was in the Spring of 1867. The defendant replied that M. L. Smith had as much right to take care of Cox as he had, that he had a large family of his own to attend to.

On cross-examination the defendant asked the witness if he was not a bidder at the sale of the "Nancy Cox place;" and if he was not bidding for McCanless with authority from him to run it to five hundred dollars? The witness replied that he was a bidder, but that he had no authority from McCanless and was not bidding for him, but that McCanless had agreed to lend him $500 to help pay for the land. He was also asked if he did not on the day of sale, tell M. L. Smith that McCanless had authorized him to bid for the land and limited him to $500? To which the witness replied, that he had not.

During the progress of the case M. L. Smith was called as a (307) witness for the defense and asked, "what, if anything, W. S. Lawson had said on the day of sale as to his bidding for McCanless. To this question the plaintiff objected on the ground that it was collateral. The court overruled the objection and the plaintiff excepted. The witness thereupon stated that Lawson told him at the sale that he was a bidder for McCanless, and that he had limited him to five hundred dollars.

There was evidence tending to show that the line contended for by Cox had been the reputed line of the "Molly Cox place," on the east, for thirty or forty years; that the tenants on that tract, and on the tract east of it, had before and since Cox become the owner of both, worked to the road on each side and claimed that as the line. That

the defendant himself had at a former trial declared on oath, that the road was the reputed line, and that he had only purchased to the road and that he had paid no consideration for the land below the road and only went there to get a permanent object to start from.

The defendant contradicted the evidence as to his testimony on the former trial.

It was further in evidence on the part of the plaintiff, that he recovered judgment in his suit at Spring Term, 1867, and that execution issued thereupon, under which the *locus in quo* was levied upon and sold, the plaintiff becoming the purchaser at sheriff's sale and taking the sheriff's deed therefor, under which he claims title. The plaintiff also read in evidence the deed from Cox to the defendant conveying the *locus in quo*, dated April 16, 1866.

The defendant was introduced as a witness in his own behalf, and produced a title from Cox to himself. He also testified to the effect that Cox was dead; Hopkins an attesting witness was also dead, and that the other attesting witness, a son of the defendant, resided in the
(308) State of Tennessee, that he had endeavored to have him present; that he had promised to be present, and was absent without his consent or procurement. Evidence having been introduced tending to prove the hand-writing of Cox and also of the subscribing witnesses to the title bond, which the defendant also offered as evidence. To this evidence the plaintiff objected, the objection was overruled, and the plaintiff excepted.

The defendant then offered to show by his own testimony, all the transactions that took place between himself and Cox concerning the *locus in quo*. To this evidence the plaintiff objected on the ground that Cox was dead. The objection was overruled by the Court and the plaintiff excepted.

The witness then stated that Cox came to his house, in Virginia, to buy corn. He declined to sell him any unless he was paid for the same. He told Cox that he already owed him about $1,500, and that he could not afford to make the debt any larger, and that he would sell him some corn if he could pay him for it, and pay or secure the old debt. Cox told him he had no money but only land. The witness then told him he would buy land. After some chaffering about the trade he bought the "Molly Cox place," and took the title bond. Cox asked $2,000 for the land, and he offered $1,500 for it in the old debt, and at this price they agreed. Cox was his brother-in-law, and though a man of means, was very improvident, and for a long time got provisions from the plantation of the witness in Stokes County, and in this way became indebted to him. About 1857, he had a settlement with Cox and took his bond for $830, the sum due him for provisions previously furnished.

Besides this he paid off a bond due by Cox, to one Nut Moody, for about two hundred dollars. He also held a small account against Cox, and these three claims with the interest, amounted to $1,450, lacking a few cents. This with five dollars in cash and nine barrels of corn at $45, was the consideration for the land. That the $1,500 in old debts was recited in the title bond from a conjecture as to what the debts would foot up, the interest not having been calculated until a (309) few days afterwards. The title bond was given from an expectation that the plaintiff would not go to Stokes for some time. That finding it convenient sooner than he expected, he went over with Cox and concluded that he would have the matter closed and the deed executed. He came to North Carolina to have the deed executed, because he thought the law required it. He expected that Cox owed McCanless but did not certainly know it when the contract was made, and he did not then know of McCanless having sued Cox, but on the way over to North Carolina Cox told him that he had been sued. He knew of no purpose on the part of Cox to defeat the plaintiff, and heard from him no declaration of any such purpose. On his part, he purchased the land with no purpose, other than to obtain payment of his debt. He suspected no purpose to defraud any one. He then thought Cox able to pay all his debts, and in fact he was able to pay them all if he could have sold all his other property then under no lien, as well in proportion as he had sold the "Molly Cox place" to the witness, which he said he was going to do. The witness further testified as to the execution of the deed and the disagreement as to where the line on the east side of the tract should run. His evidence did not materially differ as to these facts, from the evidence for the plaintiff, except that he stated that he might have gone off with Cox, when they reached the bend of the creek; that he did not recollect doing so, but that if he did, it was for the purpose of hunting for the line, which some one had informed witness ran across the creek about that point. That Cox agreed for the deed to be drawn crossing at the bend instead of foard, while they were on the ground, and he did this from no promise or inducement on the part of the witness to cover the same from his creditors, or for his care or benefit in any wise; and there was no promise of compensation or reward in any way whatever, but it was insisted upon because the witness had heard that the line was at or near the ridge next below the foard. There was a remark made at the time of the (310) execution of the title bond, by Cox, to Mary Reynolds that he had always intended to give her the "Molly Cox place," but he was in debt and he was forced to sell it, and now her papa could let her have it. But no such term or stipulation was made in the contract, and nothing of that kind was spoken of in the course of the trade, or had any con-

nection therewith. He allowed Cox to go into a house on the "Molly Cox place" during the winter of 1866-67. After he was entirely sold out, he removed him thence to his house in Virginia, where he kept him over a year and sought to keep him longer. He told W. S. Lawson to attend the sale of the personal property of Cox, and to buy some things for Cox, but neither of these things were done as an inducement or part consideration for the land, and from no motive except charity and regard for him, as the brother of his wife. There was never any understanding that Cox had given to Mary Reynolds $500 in the price of the land and fixed on $1,500 as the price on that account. No such thing was ever spoken of, or known to the witness.

There was evidence corroboratory of the testimony of the defendant as to the bond for $930, which the defendant claimed as a part of the consideration paid to Cox for the land; also as to Cox obtaining provisions from the defendant's farm in Stokes County.

The defendant also introduced one Gideon George, a surveyor, who testified that the line, if run at the bend due north and south, would include exactly the quantity of land specified in the bond for title, but if the road be the line, then the quantity will be about one hundred acres less.

The defendant also offered in evidence, a deed from Joshua Cox to Jesse Cox, dated in 1819, and another from Salathiel Stone, sheriff, to Richard Cox, the grantor of the defendant, describing the eastern line of the "Molly Cox" tract of land as to be run on the highest part
(311) of the first cleared ridge below the road, commencing near the middle of the cleared ground. There was other evidence tending to show that the line as established between the defendant and Cox on the day of the execution of the deed was at or near this line. There was no evidence that such line was ever marked, until the sale to Reynolds, the defendant.

It was admitted that Richard Cox had been the owner of the "Molly Cox" tract and the lands adjoining on the east, since 1835; and that owning on both sides of the Quaker Gap road, his tenants on both tracts had since that time worked to the road. It was in evidence that Richard Cox and Jesse Cox, under whom he claimed had been heard to speak of the road as the line.

The bond for title describes the land as being a tract in Stokes County, "on both sides of the waters of South Double Creek, containing 475 acres more or less, known as the "Molly Cox" tract of land.

Among other things, the court charged the jury: That Cox, owning the land on both sides of the road, had a right to make the dividing line wherever it was agreed upon in his sale to the defendant; and if from the evidence, they could collect that the contract was for lands west

of the road, with the road as the line, at the price of $1,500, and that the defendant and Cox afterwards added in a strip between the road and the line crossing at the bend of the creek, and this was without further consideration, it would be fraud, and the plaintiff would be entitled to their verdict. But, if from the evidence, they should find that the contract of sale was of the "Molly Cox" tract of land, by its true lines, at fifteen hundred dollars, and not by the road, as the line, and that the defendant got no more than he bought; and should they further find that the defendant paid therefor in old debts and corn and money, fifteen hundred dollars, and that that was a fair price; then they should find for the defendant; and if the jury should find that the sale was by the true lines, that then in locating and determining where that was, and whether at or near the bend of the creek, and (312) thence due north and south, they were at liberty to consider the title bond and all the deeds offered in evidence in the cause, and that as to that matter, the written evidence was of more weight than the oral.

The jury rendered a verdict in favor of the defendant, and thereupon the plaintiff moved for a new trial upon the following grounds:

1. Error in the ruling of the court in the admission of the title bond in evidence.

2. Overruling the objection, and admitting the testimony of M. L. Smith in contradiction of W. S. Lawson.

3. The admission of the testimony of the defendant as to the transaction between Cox, deceased, and himself.

There was no exception to the charge of his Honor, and no instruction prayed for was refused. But it was urged upon the hearing of the motion that the charge, as given, was calculated to mislead the jury.

The motion was overruled, and the plaintiff appealed.

Clement, T. J. Wilson and Joyce, for appellant.

Dillard & Gilmer, Watson and Glen, contra.

PEARSON, C. J. There is no error in the charge. It was not calculated to mislead, but, on the contrary, directed the minds of the jury to the very point on which the case turned, to-wit: Did the deed of Cox convey to the defendant more land than was embraced by the original contract of purchase at the price of $1,500, with an intent thereby to benefit said Cox, at the expense of his other creditors? This was fairly left to the jury, and the verdict is in favor of the defendant.

We think there is error in permitting the defendant to testify as to conversations and transactions with Cox, who was dead at the time of the trial.

(313) 1. Is the plaintiff, who is a purchaser at sheriff's sale, "an assignee" of Cox, within the meaning of Sec. 343, C. C. P.? Any one who has acquired the rights of the dead man, whether by his deed or by the deed of the sheriff, who is authorized to make a deed for him, is an assignee within the meaning of Sec. 343. This is the general meaning of the word, and on the face of the statute no distinction is made between a voluntary and an involuntary assignee.

2. The position is taken: The object of the proviso is to protect dead men, and not to allow conversations and transactions with them to be proved by a party to the action, inasmuch as he is not here to explain the transaction or to justify his conduct in the transaction.

In this case the conduct of the dead man had been called in question by the plaintiff, and he is charged with fraud. So this opens the door, and lets in the defendant, although a party to the action, to explain the transaction, and explain and justify the conduct of the dead man in regard to the transaction. This is a new point upon the construction of Sec. 343, and has much plausibility.

After consideration, we are of opinion his Honor erred in allowing the defendant to testify as to conversations and the transactions between himself and Cox. True, this testimony tended to exculpate Cox from the charge of fraud imputed to him by the plaintiff. The plaintiff does not become a witness in his own behalf, but relies on the testimony of third persons. The plaintiff does not assume to represent Cox, except as assignee of his right to the land, treating the deed to defendant as fraudulent; but takes the ground, suppose Cox was living, I could then put him upon *his oath,* whereas now, you let the defendant swear as to the transaction without fear of contradiction, *because the man is dead.*

We are satisfied by the true construction of Sec. 343, neither of the parties, whether claiming as original parties or as assignees either by deed of the party or deed of the sheriff, is a competent witness, in (314) regard to conversations and transactions between the party who offers himself as a witness and the assignee of the dead man.

Allowing a party to an action to give evidence in his own behalf is a wide departure from the rules of evidence at common law, and the proviso in Sec. 343, which fixes a limit to this departure should be construed liberally. The effect of it is to exclude one of the parties to a transaction, who is afterwards a party to an action, concerning the right or property involved in the transaction from the enabling clause of the statute, in the event of the death of the other party to the transaction. The proviso rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground, that the other party to the action has no chance, even by the oath of a relevant witness to reply to the oath of the party to the action, if he be allowed to testify.

The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction.

There is error. *Murphy v. Ray,* 73 N. C., 588, is not well reported. The original papers show that the depositions of Buchanan and of his wife, *who were the real parties in interest* were read in evidence. This explains the opinion, and brings the case within the exception to the proviso of a very complicated statute, and distinguishes it from our case.

PER CURIAM. *Venire de novo.*

Cited: Ballard v. Ballard, 75 N.C. 193, 346; *Pepper v. Broughton,* 80 N.C. 253; *Gregg v. Hill,* 80 N.C. 256; *Thompson v. Humphrey,* 83 N.C. 419; *Perry v. Jackson,* 84 N.C. 234; *McLeary v. Norment,* 84 N.C. 237; *Morgan v. Bunting,* 86 N.C. 70; *Hampton v. Hardin,* 88 N.C. 596; *Peacock v. Stott,* 90 N.C. 520; *Halliburton v. Carson,* 100 N.C. 105; *Armfield v. Colvert,* 103 N.C. 156; *Hall v. Holloman,* 136 N.C. 36; *Bonner v. Stotesbury,* 139 N.C. 6; *Smith v. Moore,* 142 N.C. 283; *Brown v. Adams,* 174 N.C. 494, 495; *Sutton v. Wells,* 175 N.C. 4; *Pope v. Pope,* 176 N.C. 287; *In re Mann,* 192 N.C. 250; *In re Will of Brown,* 203 N.C. 349.

(315)

H. S. EDWARDS v. THOMAS JARIS.

In an action to recover the possession of land, and involving the title thereto, and to which the Statute of Limitations is pleaded, the time from the 20th day of May, 1861, to the last day of January, 1870, is not to be counted.

This was a CIVIL ACTION, for the recovery of the possession of land, tried before *Furches, J.,* at Fall Term, 1875, of ALLEGHANY Superior Court.

The case was heard upon facts agreed, which are fully set out in the opinion of Justice SETTLE.

The defendant relied upon the statute of limitations. The court rendered judgment in favor of the plaintiff, and thereupon the defendant appealed.

McCorkle, for the appellant.
No counsel in this court, contra.

SETTLE, J. The record presents the following facts:

1. The plaintiff has the older chain of title, and it covers the land in dispute.

2. The defendant took a deed for the land on the 23d day of September, 1865, and went into possession on that day, and has held possession thereof ever since, under his said deed.

3. This suit was commenced on the 11th day of April, 1873.

Is the action barred by the lapse of time?

The general proposition, that the time elapsed from the 20th day of May, 1861, until 1st day of January, 1870, shall not be counted so as to bar actions or suits, or to presume satisfaction or abandonment of rights, we may assume to be true.

This general proposition, however, is subject to the exception that actions of debt, covenant, assumpsit or account, upon any contract, demand or penalty incurred since the first day of May, 1865, and the remedies thereon, shall be in all respects the same as they were (316) in the year 1860. This exception opened the door for suits and causes of action founded on *contract* or obligation entered into since the first day of May, 1865, but did not affect the general rule already stated in respect to *torts*, or other causes of action, save those, in contract, embraced in the exception just mentioned. The ordinances and acts establishing these propositions have been so frequently the subject of review, we are inclined to think, that perhaps every other question that can arise out of the suspension of the statute of limitations from 1861 to 1870, has been decided by this court.

We are therefore not disposed to further discuss the subject.

The judgment of the Superior Court is affirmed.

Let this be certified, etc.

PER CURIAM. Judgment affirmed.

Cited: Hawkins v. Savage, 75 N.C. 133; *Pearsall v. Kenan,* 79 N.C. 474; *Bruner v. Threadgill,* 88 N.C. 366; *Price v. Jackson,* 91 N.C. 15.

STATE v. AKUM GRIFFICE.

Matters which go to the incompetency of a grand jury, may be excepted to after bill found, if it is done at the earliest opportunity afterwards, which clearly is upon the arraignment, when the defendant is first called upon to answer.

Where it appears that nine of the grand jury, who found the bill, had paid no taxes for the previous year, as required by Chap. 17, Sec. 229, Bat.

Rev., and that another was under twenty one years of age, if it is objected to in apt time, the bill will be quashed.

When an indictment is quashed, it is competent and proper for the court to require the defendant to give bail to answer the charge. Those against whom there is a well grounded suspicion of crime, should not be allowed to escape without an investigation.

CRIMINAL ACTION, charging an assault, with intent to commit rape, tried before his Honor, *Judge Eure,* at the Fall Term, 1875, of PASQUOTANK Superior Court.

All the facts pertinent to the points raised and decided in this (317) court, are fully set out in the opinion of Justice BYNUM.

For certain reasons assigned, the defendant moved to quash the indictment. The court allowed the motion, and the Solicitor for the State appealed.

The counsel for the defendant then moved, that the defendant be discharged from custody. His Honor refused to allow this motion, whereupon the defendant appealed.

Attorney-General Hargrove and Smith, for the State.
Bledsoe, for defendant.

BYNUM, J. When the prisoner was being arraigned, and it was demanded of him whether he was guilty or not guilty of the crime charged, his counsel objected that he ought not to be called upon to answer, for that the indictment was not found by a legally constituted grand jury. The case states that "this objection was waived for the moment, and the prisoner was arraigned and plead not guilty." A motion was then made by the prisoner's counsel to quash the indictment for the reason before alleged, and the following facts were found, and do not appear to have been disputed, to-wit: That the first Monday in September, 1874, was the last time the jury list was revised, and that then many names were put into the box which were not upon the tax list; that the names of others who had not paid taxes for the year preceding the first Monday in September, 1874, were put in the box; and that the names of others were put in, who were not twenty-one, and of others who did not reside in the county. It was also shown that when the jury list was last revised on said first Monday of September, 1874, the Commissioners exercised no discretion in the application of any moral or intellectual test of fitness, but that all the names were put in the box without any regard to moral character, intelligence or the payment of taxes the preceding year. It was further found that upon the grand jury which found this bill of indictment, there were nine persons who (318) had not paid taxes for the year preceding the first Monday of

September, 1874, and there was one who was under twenty-one years of age, when the bill was found, which was at the August Term, 1875.

1. Was the objection by the prisoner taken in apt time and manner?

When the case of one charged with an offence, is to come before a particular grand jury, it is the general doctrine, with many exceptions, however, that he may be present at its organization and makes challenges either to the array or to the polls, for cause. But this practice has never obtained in North Carolina, and would be attended with such inconveniences that to allow it would be of doubtful policy. Obviously, however, it would be a great wrong to deny to defendants all opportunity of objecting to the incompetency of the accusing tribunal. If lawful, it would not be practicable, in general, for the defendant to make objection prior to the finding of the bill, inasmuch as the charge is usually preferred by the grand jury without his knowledge or presence, and the alleged offence might even have been committed after the organization of the grand jury.

While, therefore, much difference of opinion has existed, and the decisions in the American courts have been conflicting on the question, whether, after bill found, the defendant can take advantage of the incompetency of the grand jury, who found it, the better opinion seems to be, that matters which go to the incompetency of the grand jury, may be excepted to after bill found, if it is done at the earliest opportunity afterwards, which clearly is, upon the arraignment, when the defendant is first called upon to answer. Such was the holding of this court at the last term in the *State v. Haywood,* 73 N. C., 437, following the *State v. McEntire,* 4 N. C., 267, and *State v. Seaborn,* 15 N. C., 305.

(319) As the objection in this case was upon the arraignment, and before pleading over to the felony, and the facts relied upon as affecting the competency of the grand jury, are set forth agreed upon, we think the objection was taken in apt time and manner, though, as we said in *Haywood's case,* the more regular way of raising the questions here made, would have been by a formal plea in abatement.

2. Great and inexcusable irregularities were committed by the County Commissioners in making up the jury list, but this court can notice only such as affected the composition of the grand jury, which was drawn from that list. Battle's Revisal, Chap. 17, Sec. 229, provides that "the Commissioners of the several counties, at their regular meeting on the first Monday of each year, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of such persons *only* as have paid tax for the preceding year, and are of good moral character and of sufficient intelligence." The list of names thus selected constitutes the jury list, and from it the grand and petit jury are drawn. If

the list thus made up happens to contain the names of some, disqualified by the statute from being jurors, this fact does not vitiate the jury list, so as to render incompetent a grand jury drawn from it. For it may well be that none of the disqualified persons would be drawn upon the jury, in which event no objection could be raised to its competency. To hold that a jury list which contains the names of some who are disqualified, so poisons and corrupts the whole list that a lawful grand jury cannot be made from it, would greatly embarrass, if not defeat, the due administration of justice. These statutory regulations for making up the list from which the several juries are to be taken have ever been held in this State not to be mandatory but merely directory, and so the statute itself (Sec. 229) in effect declares. But the question in this case is, not as to mere irregularities in constituting and impaneling the grand jury, which, in general, cannot be objected to after an indictment has been found and received. It is as to the com- (320) petency of individual grand jurors, of the number of those finding this bill. Nine of these had not paid tax for the year preceding the first Monday of September, 1874, when their names were put upon the jury list. One other was under twenty-one years of age when the bill was found.

Hawkins says, that if one of a grand jury who find an indictment, be within any of the exceptions of the statute, he vitiates the whole, though ever so many unexceptionable persons join in the finding, and the prisoner may plead such matter in avoidance of the indictment and plead over to the felony. B. 2, Chap. 25, Secs. 26, 28. To the same effect is Chitty, Cr. Law 307. The language of our statute is strong; "from which (tax list) they shall proceed to select the names of such persons *only* as have paid tax, etc., and are of good moral character and of sufficient intelligence." The restrictions fall fully within the rule as laid down by Hawkins and Chitty, and followed by the weight of authority in this country. *State v. Vanhook*, 12 Texas, 252, where the question is fully and ably discussed. Yet in the light of our statute, the question is not without difficulties, for it is equally prescribed that the jurors shall be of "good moral character and sufficient intelligence." Can the defendant upon arraignment plead in abatement, the want of good moral character or sufficient intelligence in one or more of the grand jury? If so, on the one hand such challenges would raise questions of fact calculated to embarrass the course of justice, in all trials where the delay or defeat of justice is sought. On the other hand, undoubtedly an idiot or lunatic, or felon, should not be a part of the accusing body. Between these conflicting difficulties, the safer and more humane choice is to risk the inconveniences or even delays which may be incurred in receiving the plea and deciding the questions of fact raised

preliminary to the trial, rather than adopt the alternative stern and harsh rule, which must often work great injustice and wrong. (321) The defendant must have the right to have the accusation against him performed by men unexceptionable in respect of qualification. In no other way can this right be secured than by entertaining the plea upon the arraignment. But little inconvenience or delay in the trial can be apprehended, as the court would, upon the spot, try the questions raised, and if not well founded, proceed with the trial, otherwise the bill would be abated and a new bill sent immediately. The nine non-tax paying jurors were therefore incompetent, and upon the exception taken, vitiated the bill found.

One other juror was under the age of twenty-one at the finding of the bill, and this is made another exception to the indictment.

There is no statute in this State prescribing at what age persons become competent jurors, but it is a universal principle of the common law, that a person under twenty-one, is an incompetent juror. He must be *liber et legalis homo,* exempt from legal servitude to master or parent. It never was the law that an infant, one declared to be unfit to manage his own affairs, could be invested with power to dispose of the lives and property of others. This objection also is fatal to the indictment.

3. When the court quashed the indictment, the prisoner's counsel moved for his discharge. The court refused the motion and required bail for his appearance at the next term of the court. It was both competent and highly proper in the court to do so. Those against whom there is a well grounded suspicion of crime, should not be allowed to escape without an investigation.

There is no error, and the judgment is affirmed.

Cited: S. v. Liles, 77 N.C. 497; *S. v. Baldwin,* 80 N.C. 392; *S. v. Smith,* 80 N.C. 410; *S. v. Davis,* 80 N.C. 413; *S. v. Martin,* 82 N.C. 674; *S. v. Watson,* 86 N.C. 625; *S. v. Carland,* 90 N.C. 673; *S. v. Haywood,* 94 N.C. 850; *S. v. Gardner,* 104 N.C. 740; *S. v. Fertilizer Co.,* 111 N.C. 660; *S. v. Smarr,* 121 N.C. 670; *S. v. Perry,* 122 N.C. 1021; *S. v. Hewlin,* 128 N.C. 572; *S. v. Harwell,* 129 N.C. 552; *S. v. Paramore,* 146 N.C. 607; *Wilson v. Batchelor,* 182 N.C. 96; *S. v. Oliver,* 186 N.C. 330; *S. v. Levy,* 187 N.C. 586; *S. v. Barkley,* 198 N.C. 352; *S. v. Emery,* 224 N.C. 584, 589; *S. v. Speller,* 229 N.C. 71.

(322)

STATE v. CHARLES TALLY.

An indictment for Fornication and adultery, charging that the defendants "did unlawfully and adulterously bed and co-habit together, and then and there did unlawfully commit fornication and adultery," is amply sufficient, and ought not to be quashed.

INDICTMENT for Fornication and Adultery, tried before his Honor, *Judge Watts,* at Fall Term, 1875, of the Superior Court of GRANVILLE County.

The defendant was held to answer upon the following bill of indictment:

"The jurors for the State upon their oath present, that Chas. Tally, yeoman, and Winney Bass, spinster, both late of the county of Granville, being lewd and vicious persons, and not united together in marriage, on the 28th day of July, one thousand eight hundred and seventy-five, and on divers other days and times, both before and after that day, at and in the county aforesaid, did unlawfully and adulterously bed and cohabit together, and then and there did unlawfully commit fornication and adultery, in contempt of the holy rites of matrimony, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The defendants moved the court to quash the bill "for that the offence therein charged is not sufficiently stated to constitute the crime of fornication and adultery."

The motion was allowed and the Solicitor for the State appealed.

Attorney General Hargrove, for the State.

Busbee & Busbee, for defendants.

SETTLE, J. The defendant insists that the indictment is insufficient:

1. "For that it does not contain the material words of the (323) statute, against fornication and adultery."

2. "There are no words used in the indictment, sufficient to charge every ingredient of the offence as defined by statute."

As a general rule it is safe, in pleading, to follow the words of a statute, but this is not necessary, nor indeed always proper.

This bill charges that Charles Tally, yeoman, and Winney Bass, spinster, both late of, etc., being lewd and vicious persons, and not united together in marriage, on the 28th day of July, A.D., 1875, and on divers other days and times, both before and after that day, at and in the county, etc., did unlawfully and adulterously bed and cohabit

together, and then and there did unlawfully commit fornication and adultery, etc.

The bill is amply sufficient. I believe it is a copy of an old and well approved form, long in use by the Solicitors of this State, since the adoption of our present statute. However that may be, an examination of the cases collected in 1 Battle's Digest, page 519, title Fornication and Adultery, will abundantly show that bills much less accurate and formal than this have been sustained by this court. We are not disposed to be hypercritical about words, when the substance sufficiently appears in the pleading.

The judgment of the Superior Court quashing the indictment is reversed.

Let this be certified, etc.

PER CURIAM. Judgment reversed.

Cited: S. v. Guest, 100 N.C. 413; *S. v. Britt,* 150 N.C. 812.

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(324)

STATE v. GEORGE EVANS.

Where, upon a mistrial, the defendant moves for his discharge, which motion is refused, and he is required to give bail for his appearance at the next term, the Judge presiding at such next term, has no right to entertain the motion and discharge the defendant. It is *res adjudicata.*

CRIMINAL ACTION, tried before *Moore, J.,* at December (Special) Term, 1875, of the Superior Court of HALIFAX County.

The defendant was indicted for larceny and pleaded not guilty. A jury was impaneled and after hearing the evidence, argument of counsel and the charge of his Honor, Judge Watts, announced in open court that they could not agree upon a verdict. The counsel for the State and for the prisoner were both present. The prisoner was absent, being then in jail.

His Honor, without having consulted the counsel for the prisoner, ordered a juror to be withdrawn and a mistrial entered. Prisoner's counsel said nothing either for or against the order.

After the order was made and the jury discharged, his counsel moved the court, upon affidavit, to discharge the prisoner upon the ground:

1. That having once been put in jeopardy, he could not again be tried for the same offence.

2. That the defendant was not in court when the order was made.

The motion was overruled and the defendant appealed.

At December (Special) Term, Moore, J., presiding, his counsel again moved the court to discharge the prisoner upon the same ground. The motion was allowed and the State appealed.

Attorney General Hargrove, for the State. (325)
Buxton & Burton and Busbee & Busbee, for the prisoner.

PEARSON, C. J. On a trial for larceny, the jury, after deliberation for some eighteen hours, announces to the court that they cannot agree, whereupon his Honor, Judge Watts, in the absence of the prisoner, who was confined in the jail of the county, but in the presence of his counsel, who neither assented to nor objected to his action, directed a juror to be withdrawn, and the jury was discharged. The prisoner's counsel then moved for his discharge on the ground that he could not be again put on trial. This motion was overruled by Judge Watts. At the next term, the same motion on the same ground was made and was allowed by his Honor, Judge Moore. So we have the conflicting rulings of two of the Judges of the Superior Courts in the very same case—in fact, one Judge reverses the decision of the other Judge. How is this unseemly conflict of decision to be prevented? It can only be done by enforcing the rule, *res adjudicata.*

Without entering into the question, was the decision of Judge Watts right or wrong, it is sufficient to say he had jurisdiction and decided the motion against the defendant. That decision until reversed on appeal, or by writ of *certiorari* to this court, must stand as a thing settled.

It follows that Judge Moore erred in entering the motion. His ruling, by which the defendant was discharged, being a final determination of the case, the Solicitor had a right to appeal.

This will be certified, to the end that the defendant may be again put on trial.

PER CURIAM. Judgment accordingly.

Cited: Wilson v. Lineberger, 82 N.C. 413; *Mabry v. Henry,* 83 N.C. 302; *Roulhac v. Brown,* 87 N.C. 4; *Scroggs v. Stevenson,* 100 N.C. 358; *Dockery v. Fairbanks,* 172 N.C. 530; *Revis v. Ramsey,* 202 N.C. 816; *S. v. Lea,* 203 N.C. 322; *Fertilizer Co. v. Hardee,* 211 N.C. 58.

(326)
MERCANTILE BANK OF NORFOLK, VA. v. CAROLINA PETTIGREW AND OTHERS.

A, holds a promissory note for the payment of money on B; B pays off the note to A, but does not take it up, nor does he take a receipt or other acquittance: *Held*, that B cannot maintain an action against A to have the note delivered up to be cancelled.

In a suit on such note against B and others, endorsers, by A, the endorsee, to which B pleaded payment and demanded in his answer that the note should be delivered up to be cancelled: *Held*, that notwithstanding such demand, the plaintiff, A, had a right to take a judgment of non-suit, if he so elected, as to B.

CIVIL ACTION, tried before his Honor, *Judge Moore*, at December (Special) Term, 1875, of the Superior Court of HALIFAX County.

The following are the facts agreed and sent to this court as a part of the record:

"This was an action upon a promissory note, for the recovery of money. The summons was issued April 3d, 1875, returnable to Spring Term, 1875, of Halifax Superior Court. The complaint was duly filed at the return term; in which complaint the plaintiffs alleged, among other things, that the defendant, Caroline Pettigrew, on the 14th of April, 1874, made her promissory note payable to the order of Baker, Neale & Sheperd, the other defendants, for $2,399.88, seven months after date, at the Mercantile Bank of Norfolk, and that thereafter, and before the same fell due, the firm of Baker, Neale & Sheperd, by endorsement for value, transferred the same to the plaintiff; that no part of said note has been paid, and that the same was negotiable under the laws of Virginia.

At the return term, it was agreed, in writing, that the plaintiffs should take judgment against all of the defendants except Caroline Pettigrew, without prejudice to any cause of action which the plaintiffs have against the said Caroline Pettigrew." In accordance with this
(327) agreement, judgment was rendered against the defendants Baker, Neale & Sheperd for the principal sum of the note with interest.

The defendant, Caroline Pettigrew, filed an answer in which she admitted the execution of the note, but denied that the same was transferred to the plaintiff, as alleged in the complaint, and alleged further, that the same had been paid, and demanded judgment "that the said note be surrendered to her for cancellation, and for costs of this suit."

The plaintiff filed a reply, in which the allegations of the complaint were re-affirmed, and in which it was denied that the said note had been paid.

After the case had been called, and a jury impaneled, and evidence introduced by both parties, the plaintiff moved the court to be allowed to enter judgment of non-suit. The defendant resisted the motion on the ground that she demanded in her answer that the note be delivered up to be cancelled.

The court being of the opinion that the relief demanded was not such affirmative relief as to preclude the right of the plaintiff to elect to enter judgment of non-suit, allowed the motion. Thereupon the defendant appealed.

Clark, for appellant.
Hill, contra.

READE, J. A holds a promissory note for the payment of money, on B. And B pays off the note to A, but does not take it up; nor does he take a receipt or other acquittance. Can B maintain an action against A, to have the note delivered up and cancelled?

The fact that no precedent can be found for such an action, is strongly against it; for there must have been innumerable instances of such transactions.

A note, which has been paid off, is of no value. It is not like (328) a title deed for land, which may be recovered. Nor is it like an unsatisfied bond, or other instrument, which has been obtained by fraud, and which may be decreed to be delivered up and cancelled. It is simply a worthless piece of paper, which was evidence of a promise which has been performed. It could be worth nothing to B, if he were to recover it. It is worth nothing to A who keeps it, for if he attempt to recover upon it of B, B can defeat the recovery by the very evidence upon which he would rely in his action to have it delivered up and cancelled, that is, by proof of payment.

And besides, when B paid off the note, it was gross negligence not to take it up, or take a receipt against it. And his negligence will not be aided by a Court of Equity.

Furthermore, the plaintiff is entitled to hold the note as against the endorsers, as to whom it is not pretended that they have paid it to the plaintiffs. And as the plaintiffs have taken judgment against the endorsers, the note is, or ought to be, filed as a paper in the cause. So that, as the defendant could not have recovered in a direct action, his counter-claim to have the note delivered up to be cancelled, is no reason why the plaintiff should not take a non-suit.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Bank v. Stewart, 93 N.C. 404.

(329)

E. R. BRINK v. A. R. BLACK.

The decision of a Judge, presiding on a trial in the Superior Court, that a verdict of the jury is or is not against the weight of evidence, cannot be reviewed by the Supreme Court.

CIVIL ACTION for damages, tried at December (Special) Term, 1875, of the Superior Court of NEW HANOVER County, his Honor, *Judge Henry* presiding.

As the case is decided in this court upon a single point of law, it is deemed unnecessary to state all the facts as disclosed by the record.

There was a verdict in favor of the defendant; whereupon the plaintiff moved the court for a new trial, upon the ground that the verdict was contrary to the weight of the evidence.

Upon the hearing, the motion was allowed, and thereupon the defendant appealed.

A. T. & J. London, for appellant.
W. S. & D. J. Devane, contra.

READE, J. The defendant had a verdict, and the Judge set it aside and granted a new trial; because in his opinion, it was against the weight of the evidence. The defendant appealed, and the only question is, can we review his Honor's order. We have so often said that we cannot, that it is a matter of some surprise that we should have the question presented again.

When a Judge presiding at a trial below, grants, or refuses to grant, a new trial because of some question of "law or legal inference" which he decides, and either party is dissatisfied with his decision of that matter of law or legal inference, his decision may be appealed
(330) from, and we may review it. But when he is of the opinion that, considering the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable that we can review it, unless we had the same advantages? And even if we had, we cannot try facts. *Vest v. Cooper,* 68 N. C., 132; *Watts v. Bell,* 71 N. C., 405. And see, also, other cases cited in briefs of counsel on both sides, in which, when well considered, there is no conflict.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: Edwards v. Phifer, 120 N.C. 407; *Abernethy v. Yount,* 138 N.C. 342; *Trust Co. v. Ellen,* 163 N.C. 47; *Goodman v. Goodman,* 201

N.C. 810; *In re Will of Hargrove,* 207 N.C. 281; *Roberts v. Hill,* 240 N.C. 381.

STATE v. WILLIAM B. SURLES AND OTHERS.

Where one rented land for the year 1875, the landlord cannot avail himself of the Act, ratified the 19th day of March 1875, as a defence against a charge of Forcible Trespass, in that he entered on said land before the prosecutor's term had expired, and with a strong hand caused to be removed certain fodder, before the same had been divided.

The Act of the 19th March, 1875, provides in terms, how a landlord shall proceed to enforce his demands, and take the benefit of its provisions before the courts, which negatives the idea that he can take redress in his own hands.

INDICTMENT for *Forcible Trespass,* tried before *Buxton, J.,* at Fall Term, 1875, of the Superior Court of CUMBERLAND County.

The defendants were charged with forcibly taking and carrying away from the actual possession of the prosecutor, one Thomas Norwood, a stack of fodder, the prosecutor being present and forbidding it.

It was in evidence that on Saturday afternoon of the 6th of (331) November, 1875, the prosecutor having received a message from the defendant Surles, went to his house, when Surles told him that he wanted to haul the fodder out of the field. The prosecutor inquired how much he was going to take, to which he replied "all." The prosecutor asked him how much he was going to allow him, for his part of the fodder. To this he replied seventy-five cents. The prosecutor replied that he asked $1.00 per hundred weight. The defendant said he would not give it. The prosecutor then told him not to haul it. Defendant said he would haul it, and directed James Hobbs, Isaac Byrd and Bill Cade, the co-defendants, who were in his employment, to take the wagon and haul the fodder out of the field. The prosecutor went with them to the fence and forbid them taking the fodder. They went in and carried off seven stacks, which was all there was.

It was further in evidence that the prosecutor rented the field from the defendant Surles. That one-third of the fodder belonged to Surles as rent, and that the fodder had not been divided. Surles did not go into the field. Two of the defendants, Byrd and Cade are colored men. The prosecutor did not live inside of the field but on another place which he had also rented from Surles.

All of the defendants were present at the house, when the conversation took place between the prosecutor and the defendant, Surles. The

wagon was ready, hitched up. A man named Crewington was also present. Hobbs and Byrd were then, and had been previously in the employment of Surles.

There was other evidence tending to corroborate the testimony of the prosecutor.

The defendants requested the court to charge the jury:

1. That so far as the defendant Surles was concerned, the offence of forcible trespass could not be committed by him, as he was the landlord of Norris, and the crop being vested in his possession as the
(332) owner of the land, in accordance with the act of 1874-75, Chap. 209, Sec. 1, ratified 19th of March, 1875.

2. That none of the defendants could be convicted, because the forbidding was not of the character necessary and required, in that the prosecutor expressed no forbidding of Surles getting his own share of the fodder, being one-third part.

3. That there was a variance against the allegation and the proof—the offense charged is a forcible trespass to personal property while the evidence merely tended to prove a trespass on real property.

4. According to the proof, the prosecutor was not near enough to be present in the sense required by law,—he was standing off, outside the field at a considerable distance and merely saw them taking the fodder.

His Honor declined to charge as requested, and instructed the jury: That the forbidding up at the house was insufficient and would go for nothing, unless it was repeated by Norris down at the fence; whether it was so repeated was for the jury to say, as it was a matter contradicted. If the defendants Hobbs, Byrd and Cade were so forbidden and yet entered the field and carried off the fodder under the circumstances testified to by Norris, and he was deterred by their number from maintaining his rights, then the jury should convict them; and if the jury should further find that they committed the offense in pursuance of orders given to them for that purpose by the defendant Surles, then the jury should find him guilty too, although he was not present at the commission of the offense, there being no accessories in misdemeanors, all guilty participants are regarded as principals. If A whips B at the command of C, who is not present when it is done, A and C are both guilty of the assault and battery. A is guilty because he committed it, and C is guilty because he commanded it.

(333) The jury rendered a verdict of guilty as to all the defendants. There was a motion for a new trial; motion was overruled. Judgment and appeal by defendants.

Guthrie, for the defendants.

Attorney General Hargrove, Smith & Strong and Ray, for the State.

SETTLE, J. The indictment charges the defendants with a forcible trespass, in taking and carrying away from the actual possession of the prosecutor, a certain stack of fodder, he, the prosecutor, being personally present forbidding the defendants so to do.

The defendant Surles says he cannot be convicted of this offense, because he was the landlord of Norris, the prosecutor, and the whole crop, raised by the prosecutor, was vested in him, Surles, by force of the Act of 1874-75, Chap. 209, ratified the 19th day of March, A.D., 1875.

His Honor mentions the fact, that, at the request of the defendants, the whole evidence given on the trial, is sent up with the record.

From this it will be seen that Norris rented the land from Surles for the year 1875; that one-third of the fodder belonged to Surles; that it had not been divided; and the agreement between them was to settle on the first day of January, 1876.

These facts are not controverted. Then, whatever rights had accrued to either party, under the contract, could not be effected by the act ratified on the 19th day of March, A.D. 1875. To give it the effect contended for, would clearly violate the contract already made between the parties.

But even if this contract was embraced by the act, it provides, in terms, how a party claiming this constructive possession, shall proceed to enforce his demand before the courts, which would seem to negative the idea that he could take redress in his own hands. (334)

But the defendants further say they were not forbidden to take one-third of the fodder. We do not see how that helps them. It certainly did not amount to a license to take the other two-thirds. And the only bearing it would seem to have upon the case, is to aggravate the offence of the defendants. We need not notice the other points made in behalf of the defendants, further than to say that the charge of his Honor was a clear and concise statement of the law applicable to the case before him. We could not add to its force by repeating it.

The judgment of the Superior Court is affirmed.

Let this be certified, etc.

PER CURIAM. Judgment affirmed.

(335)

LUNSFORD A. PASCHAL, ADM'R., v. BENJAMIN T. HARRIS AND WIFE AND OTHERS.

Where a mortgagor has an equity of redemption, subject to a power of sale, and the land mortgaged is actually sold after forfeiture, the right of the mortgagor is entirely extinguished.

Hence, where A executed and delivered a mortgage to B to secure the repayment of a sum of money borrowed by him of B, the mortgage containing a power of sale upon forfeiture, and the land was sold upon the failure of A to repay the money at the time specified: *It was held,* that the administrator of A could not sustain a petition to sell the interest of A in the mortgaged premises, to create assets for the payment of debts due by his intestate upon judgments docketed prior to the execution of the mortgage, because the sale divested the intestate of all interest.

Held further, that the liens of the judgment creditors, if enforced at all, must be enforced by some direct proceeding on their part for that purpose.

SPECIAL PROCEEDING, heard upon appeal from the Probate Court, before his Honor, *Judge Watts,* at Spring Term, 1875, of the Superior Court of WARREN County.

The plaintiff, who is the administrator of Andrew J. Rogers, deceased, filed a petition in the Probate Court, praying that he be allowed to sell certain lands, the property of his intestate, in order to raise funds to pay off the intestate's debts.

The case was heard before his Honor upon the following facts:

There were seven judgments against the plaintiff's intestate, duly docketed in the Superior Court of Warren County, of the following dates, to-wit: one on the 22d of February, 1869, four on the 15th day of March, 1869, one on the 16th day of March, 1869, and one on the 17th day of March, 1869, amounting to over ten thousand dollars.

No execution or any process whatever had ever issued against the plaintiff's intestate for the enforcement of any of the said judg-
(336) ments after the docketing of the same. The plaintiff's intestate died during the month of January, 1875.

On the 6th day of May, 1871, the intestate, having procured a loan of seventeen hundred and twenty-four dollars and thirty-two cents from the defendant, Thomas Connell, executed to him a mortgage, duly registered, May 7th, 1872, whereby he conveyed to said Connell the land now sought to be sold by the plaintiff to make assets. As a security for the repayment of said sum, the mortgage contained a power of sale on default of such repayment.

The intestate, on the 5th day of May, 1872, informed the defendant, Connell, that the judgment had been satisfied, by reason of which information, and by failure of the judgment creditors to have their judgment liens enforced by execution or otherwise, the defendant was satisfied, and being so informed by counsel that said judgments no longer created a lien upon said land, thereupon loaned to the intestate the sum aforesaid. On the 24th day of April, 1875, the defendant, Connell, sold the land under the provisions of the mortgage deed, and one Martin Connell became the purchaser, and received a proper conveyance and possession thereof.

Upon these facts his Honor rendered the following judgment:

This action coming on to be heard upon the petition, and the answer and exhibits of the defendant Connell, and the argument of counsel for both parties, and it appearing to the court that the land described in the petition was bound for the payment of intestate's debts, which are set forth in the said petition, prior to the execution and registration of the intestate's mortgage of said land to the defendant Connell; and it further appearing that intestate's personal estate is sufficient to pay his debts, as set forth in said petition and the charge of administration, it is now, on motion of plaintiff's counsel, ordered and adjudged that said Paschal, as administrator as aforesaid, have a license to sell the land described in said petition, after due advertisement, at public auction for cash, in order to pay so much of said intestate's debts (337) as are stated in said petition, as his personal estate may be insufficient to discharge.

From this judgment the defendants appealed.

Moore & Gatling and Cook, for the appellants.
Edwards and Batchelor & Son, contra.

PEARSON, C. J. The plaintiff's intestate had an *equity of redemption,* but it was subject to a power of sale. An equity of redemption is a valuable interest which may be sold by the mortgagor and at sheriff's sale; and it is such an interest as may be devised and will descend to heirs. Chap. 45, Sec. 71, Battle's Revisal, embraces an equity of redemption; but in our case the equity of redemption was subject to a power of sale, and when the power was executed, it took from the plaintiff all pretext in support of the petition and he had no foundation to stand on. The right of the intestate and of his heirs and of the administrator, was divested by the sale. Whether the mortgagee and the purchaser under the power of sale are subject to the lien of the docketed judgments, or whether they can get rid of the lien of the judgments, as purchasers for value without notice by reason of the *laches* of the judgment creditors in delaying to sue out executions for more than three years, are questions with which the plaintiff has no concern.

If the creditors who have docketed judgments wish to make the question, it must be done by some proceeding on their part; for instance, let them issue executions and sell the land; then the purchaser under the execution and the purchaser under the power of sale in the mortgage can have a "fair fight," and the question be put on its merits. In this action, the plaintiff is interfering officiously in regard to a matter which does not concern him one way or the other.

We listened with pleasure to the argument of Mr. Gatling,
(338) because it was able and well considered; because he discussed the point on which his Honor put his decision, and because the argument suggested a new doctrine so far as the decisions of our court extend, to wit: can a lien, *valid at law,* be defeated on the plea of "a *bona fide* purchase for full value without notice;" and in the second place, can the failure of a judgment creditor to issue execution for three years after judgment docketed excuse, a purchaser of negligence in not making inquiry of him, and in lending his money upon the bare word of the debtor in the execution, that the judgment has been satisfied? Upon these questions we, at this time, say nothing. His Honor put the decision upon the wrong point; it should have been on the point that the plaintiff had nothing to operate on and his petition was *functus officio* by a sale under the power in the mortgage.

Error. Reversed. The petition must be dismissed. This will be certified.

PER CURIAM. Judgment reversed and petition dismissed.

Cited: Joyner v. Farmer, 78 N.C. 198; *Heck v. Williams,* 79 N.C. 439; *McCaskill v. Graham,* 121 N.C. 191; *Harrington v. Hatton,* 129 N.C. 147; *Dunn v. Oettinger,* 148 N.C. 282; *Hobbs v. Cashwell,* 152 N.C. 189.

WOOD & HATHAWAY v. T. J. HARRELL.

An affidavit in an action upon a contract for the recovery of money, alleging "that the said T. J. is about to remove from the State of North Carolina, to become a resident of the State of Virginia," is not sufficient to warrant an order of arrest of the defendant.

The affidavit must show the grounds upon which the belief of the plaintiff is based, in order that the court may judge the reasonableness thereof.

This was a CIVIL ACTION, tried before his Honor, *Eure, J.,* at Spring Term, 1875, of the Superior Court of CHOWAN County.

(339) The action was originally commenced in a Court of Justice of the Peace, to recover the sum of $85.00, alleged to be due the plaintiff by contract. At the time of issuing the summons, the plaintiff filed the following affidavit:

"J. R. B. Hathaway makes oath:

"1. That he is a member of the firm of Wood & Hathaway, composed, as above stated, and doing business in Edenton, county aforesaid.

"2. That Thos. J. Harrell is indebted to the said firm by contract, with interest to this date, in the sum of $85.54.

"3. That the said Thomas J. Harrell is about to remove from the State of North Carolina to become a resident of the State of Virginia."

Upon the filing of this affidavit, a capias was issued for the arrest of the defendant.

On the____day of_____, 1874, judgment was rendered in the Justice's Court in favor of the plaintiff, from which judgment the defendant appealed to the Superior Court.

When the case was called in the Superior Court, the defendant moved the court to vacate the order of arrest, because of the insufficiency of the affidavit.

After argument, the motion was overruled, and it was submitted to the jury to decide whether the facts, stated in the affidavit of the plaintiff, were true. The jury found by their verdict that the defendant was about to remove from the State, whereupon the court rendered judgment in favor of the plaintiff. From which judgment the defendant appealed.

No counsel in this court for the appellant.

Gilliam & Pruden, contra.

BYNUM, J. The affidavit filed did not warrant the order of arrest. The distinction was taken in *Hughes v. Person,* 63 N. C., 548, between things *done* and things which the party believes *are about to be done,* and this distinction was reaffirmed in *Clark v. Clark,* 64 (340) N. C., 150. It was therefore necessary for the plaintiffs, in their affidavit, to have set forth the *grounds* of their belief that the defendant was "about to remove from the State," in order that the court might judge the reasonableness thereof. *Wilson v. Barnhill,* 64 N. C., 121. The court refused to vacate the order of arrest; why, then, afterwards submit the same matter to the revision of a jury? The question of the sufficiency of the affidavit was one of law addressed to the court alone.

There is error.

PER CURIAM. Judgment reversed and order of arrest vacated.

Cited: Adrian v. Jackson, 75 N.C. 539; *Peebles v. Foote,* 83 N.C. 104; *Hanna v. Hanna,* 89 N.C. 72; *Judd v. Mining Co.,* 120 N.C. 399; *Bank v. Cotton Factory,* 179 N.C. 204.

JOHN G. CHAMBERS v. G. F. PENLAND.

A defendant in execution, whose homestead has been allotted to him by appraisers appointed by the sheriff. and who had appealed to the township trustees from such allotment, and afterwards withdrew his appeal, expressing himself satisfied, will not be permitted, after the sheriff's levy on the excess has been returned to court, by a motion in the cause, to set aside the levy and call in the execution, because one of the sheriff's appraisers married a cousin of the plaintiff's wife.

Such objection, to avail the defendant, must be made in apt time to the sheriff; and if not allowed by the sheriff, it ought to have been taken advantage of in an application to the township trustees; and if not allowed by them, it ought to have been taken advantage of by a petition, as in other special proceedings.

MOTION in the cause heard before his Honor, *Henry, J.*, at Spring Term, 1875, of BUNCOMBE Superior Court.

The following are substantially the facts agreed:

At Fall Term, 1874, a motion was made in the cause, to call
(341) in an execution and set aside a levy. The motion was continued until Spring Term, 1875, when it was heard upon the following state of facts, as appeared from the proofs and affidavits:

The plaintiff had caused the defendant's homestead to be laid off and a levy to be made upon the excess. Soon after the homestead was laid off, the defendant applied to the township trustees to have it re-allotted, but subsequently withdrew the application and declared himself satisfied with the allotment. He then sold his homestead and recited in the deed that it was the homestead set apart to him by the appraisers.

He now makes the motion. It appears and the facts are, that one of the appraisers was related by marriage to the plaintiff, having married a cousin of the plaintiff's wife. This was known by the defendant at the time his homestead was allotted.

The appraisers did not set apart any personal property exemption. The defendant did not claim any, nor did he exhibit any personal property to the appraisers.

The motion was overruled by the court, and the defendant appealed.

No counsel in this court, for appellant.
J. H. Merrimon, contra.

READE, J. It is the declared policy of the State to secure every debtor a homestead who has one, although its effect should be to inflict upon the creditor the hardship of losing his debt. And therefore, the sheriff before levying, shall have a homestead valued and laid off; and if the debtor is dissatisfied he may apply to the township trustees, and have a

re-valuation and allotment. And the allotment of the trustees may be set aside upon petition as in other special proceedings "for fraud, complicity or other irregularity. Bat. Rev., Chap. 55, Secs. 2, 20, 24.

But after the debtor has had his rights passed upon and se- (342) cured by these liberal provisions, there is no policy which encourages captious or trifling objections, thrown in the way of the creditor's pursuing his remedies against the excess, over and above the homestead. Such seems to be the character of the objections in this case, and they place the defendant in the position of appearing to be ungrateful for the favors shown *him;* insensible to the resulting hardship upon the *plaintiff,* and disposed to add to it by expensive and vexatious delays.

The defendant's homestead was laid off by the sheriff. He applied to the trustees for a re-allotment. He withdrew that application. Expressed himself satisfied with the first allotment, and sold his homestead so allotted. He now seeks to stop the creditor's execution against the excess and have a re-allotment upon the ground that one of the sheriff's appraisers was the husband of a cousin of the plaintiff's wife, a fact which was known to defendant at the time, and not objected to; nor is it alleged that there was any "fraud or complicity or other irregularity."

This objection cannot avail the defendant for three reasons: (1) first, it was not made in apt time to the sheriff; (2) secondly, if not allowed by the sheriff it ought to have been taken advantage of in an application to the township trustees, as provided for in section 20; (3) thirdly, if not allowed by the trustees, then it ought to have been taken advantage of by a "petition, as in other special proceedings," under section 24.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

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(343)

JAMES J. MOORE v. LEWIS C. RAGLAND AND OTHERS.

A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so, is not *of itself* proof of a fraudulent intent. The mortgagee in such case, is deemed a purchaser for value, and his rights are not affected by a prior *unregistered* mortgage.

That a man owes debts, does not disable him from making a mortgage to secure a present loan, or to secure some of his debts to the exclusion of others. The mortgage is not void as to the creditors excluded. A creditor can only assert his rights as such, by obtaining a judgment, which will be a lien on the property which the debtor then has, and also on all which he has, before that time, fraudulently conveyed.

CIVIL ACTION, to vacate and declare void a certain mortgage, and for other relief, tried at the Spring Term, 1875, of GRANVILLE Superior Court, before his Honor, *Judge Watts.*

The facts, as disclosed by the complaint and answer, are substantially the following:

The defendant, Ragland, for the purpose of paying for a house and lot he had purchased from one Cheatham, on the 9th of August, 1873, borrowed of the plaintiff three hundred and fifty dollars. He bought and paid for the house and lot, and, to secure the plaintiff, mortgaged the same to him, the same day he obtained a deed therefor. This mortgage was at once acknowledged before the Probate Judge, and ordered to be registered; the same, on the day it was acknowledged, was deposited in the Register's office, but was not registered until the 15th day of April, 1874.

Ragland being indebted to the other defendants, J. B. Crews and Alexander Crews, on the 6th of December, 1873, conveyed said
(344) house and lot to J. B. Crews in trust, to pay the debts due to him and to Alexander Crews and to A. Crews & Bro., (the same persons composing said firm,) and also to secure such "further accounts as may hereafter be agreed upon from this date up to the 25th of December, 1874." This deed was proved and registered the day it was executed.

The plaintiff demanded that the deed to Crews should be declared null and void; that Crews should deliver it up to be cancelled; that he should have judgment against Ragland; and that the said house and lot should be sold to satisfy his debt.

On the trial in the court below, it was submitted to his Honor, trial by jury being, by both parties, waived:

1. Did the plaintiff, on the 9th of August, 1873, loan to the defendant, Ragland, three hundred and fifty dollars, to enable him to buy the house and lot described in the pleadings?

2. Did said Ragland execute the mortgage to secure the plaintiff, as charged in the complaint?

3. Has Ragland paid plaintiff's debt, or any part thereof?

The allegations of the complaint in regard to the foregoing questions being admitted by the defendant, the following single issue of law was referred to the court for decision:

Is the mortgage from Ragland to Crews, upon its face, fraudulent and void as to the plaintiff, who was, at the time of its execution, and still is, a creditor of the said Ragland?

His Honor gave, substantially, the following judgment: *First.* That the mortgage from Ragland to Crews is fraudulent and void, so far as the plaintiff in this action is concerned. *Second.* That the said James

R. Crews bring the same into court to be cancelled. *Third.* That the plaintiff recover of defendant, Ragland, the sum of two hundred and seventy-seven dollars and eighty cents, with interest, etc. *Fourth.* That the house and lot described in the pleadings, be sold at public sale, after due notice, and that so much of the proceeds as may be necessary to satisfy the plaintiff's judgment, shall be paid to him and the (345) excess delivered to said Ragland.

From this judgment the defendants appealed.

Hays & Peace, Busbee & Busbee, for appellants.
Batchelor & Son, Edwards, Haywood, contra.

RODMAN, J. On the 9th August, 1873, one Cheatham owned a certain lot in Oxford. The defendant Ragland wished to buy the same, and borrowed of plaintiff $350, with which he did buy it. The defendant on the same day mortgaged the lot to plaintiff to secure the said debt. The mortgage was immediately acknowledged and left with the Register with directions however, not to register the same until he should be thereafter required by the plaintiff to do so, and the mortgage was not in fact registered until 15 April, 1874. The complaint alleges that the delay to register the mortgage was caused by the neglect of the Register, and we have nowhere found on the record any statement to the contrary. But the counsel in this court said that the delay was for the reason stated. While the deed to plaintiff was thus lying in the Register's office, viz.: on 6th December, 1873, Ragland conveyed the lot to James B. Crews "on trust," viz.: "that whereas said Ragland is now indebted to said Crews in an open account, and to Alexander Crews in an open account, and also to A. Crews & Bro., merchants, in an open account amounting in the aggregate to $175, and more, etc., and whereas it is agreed that said Ragland may make other and further accounts as may hereafter be agreed upon from this date up to 25th December, 1874, and the said Ragland being honestly desirous of paying the same. Now therefore, if said Ragland shall on 25th December, 1874, faithful payment make of all his indebtedness which now exists, and all of which may arise out of contracts from this date up to said 25th December with said James B. Crews, Alexander Crews and A. Crews & Bro., this deed shall be void;" but on failure, the (346) grantee may sell, etc. This mortgage was proved and registered on the day of its date.

His Honor, the Judge below, held that the mortgage to Crews was fraudulent on its face, and void, and ordered it to be cancelled, and adjudged the possession of the land to the plaintiff.

We are told that the reason for which the Judge declared the mortgage to Crews fraudulent was, that it undertook to secure not only debts which Ragland then owed, but also such as he might contract up to 25th December, 1874. We do not concur with his Honor on that point. It is clear that a man may lawfully mortgage his property to secure future and contingent debts, and that he does so is not *of itself* proof of a fraudulent intent. *Dewey v. Littlejohn,* 37 N. C., 495.

In this court, the argument goes on a different ground, Chap. 35, Sec. 12, of Battle's Revisal. Revised Code, Chap. 37, Sec. 23, enacts that no mortgage for real estate shall be valid to pass any property against creditors or purchasers for a valuable consideration from the mortgagor, but from the registration of such deed, etc. It is agreed that the deed to the plaintiff was valid between the parties before and without registration; but it is contended that until registration, it was void as to Crews.

1. Because he was a creditor; and

2. Because he was a subsequent purchaser for value, within the meaning of the statute.

The first ground may be shortly disposed of. That a man owes debts does not disable him from making a mortgage to secure a present loan, or to secure some of his debts to the exclusion of others. The mortgage is not void as to the creditors excluded. A creditor can only assert his rights as such, by obtaining a judgment which will be a lien on the property which the debtor then has, and also on all which he has before that time fraudulently conveyed. The principle is well expressed
(347) in Bump. on Fraud, Conveyances, 453, which we quote, omitting a few superfluous words: "The expression that a fraudulent transfer is void against creditors, simply means that their rights as such are not affected by such transfer, but that they may, notwithstanding, avail themselves of all the remedies for collecting their debts which the law has provided, and in pursuing those remedies, may treat the property as if the transfer had not been made, that is, as the property of the debtor." *Williford v. Conner,* 12 N. C., 379; *Green v. Kornegay,* 49 N. C., 66; *Hafner v. Irwin,* 26 N. C., 529; *Grimsley v. Hooker,* 56 N. C., 4.

The other question is one which has been much contested. It is admitted that a mortgagee by mortgage to secure a present loan is a purchaser for value, under 27 Elizabeth. *Freeman v. Lewis,* 27 N. C., 91. And it must be held to be settled in this State, by the case of *Potts v. Blackwell,* 57 N. C., 58, that there is no difference between such a mortgagee and one who takes a mortgage to secure a pre-existing debt.

BATTLE, J., delivering the opinion of the court in that case, says: "Whatever distinctions there may have formerly been supposed to exist

between conveyances either in trust or by way of mortgage to secure these different classes of debt, it must, we think, be regarded as now exploded." In another part of the opinion he says, "But we have seen that whether the debts secured were new or old, is now considered, at least in this State, as immaterial." And the case was decided on that principle.

The same rule must apply to our act respecting mortgages above cited. Crews must be deemed a purchaser for value, and the unregistered mortgage of the plaintiff was void as to him.

This conclusion is strengthened by what is said in *Leggett v. Bullock*, 44 N. C., 283, to-wit: That Sec. 7, of the act of 1715, (the original of our own act above cited,) declared that prior mortgages not registered within fifty days, should be postponed to subsequent mortgages first registered. Finding this provision insufficient to compel the (348) immediate registration of mortgages the present act was passed, by which they were made void as to creditors and purchasers, except from the time of registration.

PER CURIAM. Judgment reversed, and judgment for defendant Crews in this court.

Cited: Bank v. Harris, 84 N.C. 210; *Brem v. Lockhart*, 93 N.C. 193; *Davis v. Whitaker*, 114 N.C. 280; *Fowle v. McLean*, 168 N.C. 541.

DANIEL H. LAMBERT v. N. R. KINNERY.

The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution.

The title to a homestead can be divested from the owner only in the mode prescribed by law, to wit, by deed, with the consent of the wife evidenced by her privy examination.

Where, in an action for the recovery of land, the defendant upon affidavit is allowed to defend the action without giving security for cost, he is neither exempted from paying cost, if judgment be rendered against him, nor prevented from recovering cost.

CIVIL ACTION, in the nature of Ejectment, tried before his Honor, *Judge Kerr*, at Spring Term, 1875, of the Superior Court of RANDOLPH County.

The defendant, upon certificate of counsel and affidavit, was allowed by the court to defend the action without bond.

The plaintiff claimed title to the *locus in quo* as a purchaser at sheriff's sale.

(349) To this the defendant replied, that he was a resident of this State; that the *locus in quo* was the only real estate that he owned, and that no homestead had been allotted to him prior to the levy and sale thereof by the sheriff.

The plaintiff demurred to the answer, insisting as ground of demurrer, that the defendant is estopped from denying the title of the plaintiff by the levy, deed and sale of the sheriff; that the plaintiff was entitled to recover, notwithstanding the failure of the sheriff to allot a homestead to the defendant, and that the defendant's remedy is against the sheriff and not against the plaintiff.

His Honor, upon the hearing, overruled the demurrer and the plaintiff excepted.

The plaintiff was then allowed by the court to file a reply, whereupon the following issue was submitted to the jury:

Did the defendant waive all right to a homestead in the land, the subject of this action?

In behalf of the plaintiff, there was evidence tending to show, that after the land was levied upon and advertised for sale, and before the sale, in a conversation with the sheriff, the defendant said the land did not belong to him and he had no interest in it, and he, the sheriff, might sell it. The sheriff had no conversation with the defendant with regard to the land until after the day of the levy.

The plaintiff was introduced in his own behalf and testified that on the day of sale, at the court house, when the land was about to be sold, the defendant said to the sheriff, in the presence of the bystanders, "that the land did not belong to him; that he had sold it to his cousin William Kinnery; to put it up and sell it for the plaintiff to buy it, and he would buy a long law suit," etc. The land was then claimed by William Kinnery and the sale forbid by him.

The defendant was introduced in his own behalf and testified, that at the time of the levy and sale he was a citizen of this State,

(350) and that he still is. He has a family consisting of a wife and two children.

His Honor charged the jury, that the evidence, if believed, did not oust the defendant of his right to a homestead in the land, and did not amount to a waiver of his right. That the defendant could not waive his right to a homestead by parol, but it must be done in writing and his wife must join him in such waiver. The plaintiff excepted.

There was a verdict for the defendant, and, upon motion, judgment was entered against the plaintiff for costs. From this judgment the plaintiff appealed, assigning as error, the exceptions before stated, and also that the court erred in rendering judgment against the plaintiff for cost.

Battle & Son, for the appellant.
Scott & Caldwell, contra.

BYNUM, J. 1. We had supposed that it was well settled, in this State, that the homestead of a resident was exempted from sale under execution, and that only the excess after laying off the homestead, was the subject of such sale. Const., Art. X, Sec. 2; and that it was the duty of the officer having the execution, first, to lay it off, and then levy upon the excess, if any. This allotment of a homestead by the sheriff, was not required in order to vest the title to it in the owner, for that is done by the Constitution, but for the purpose of ascertaining if there was any excess, which only was the subject of levy and sale. Bat. Rev., Chap. 55, Secs. 1, 5, 17, 26; *Abbott v. Cromartie,* 72 N. C., 292; *Lute v. Reilly,* 65 N. C., 20; *Crummen v. Bennett,* 68 N. C., 494; *Duvall v. Rollins,* 71 N. C., 218.

2. As to waiver and estoppel: The defendant, having a vested estate in the homestead, conferred by the Constitution, can lose or part with it only in the mode prescribed by law, to-wit: by deed, with the consent of the wife, evidenced by her privy examination. Const., (351) Art. X, Sec. 8.

His Honor, therefore, was correct, both in overruling the demurrer and in his charge to the jury on the trial.

3. Costs: The defendant, by the order of the proper court, was allowed to defend without giving security for costs. This does not exempt him from paying his own costs, nor prevent him from recovering them from the plaintiff on the prosecution bond. His only privilege is, that being unable to give a bond for costs and damages, he is allowed to defend the action without filing the bond. Bat. Rev., Chap. 17, Sec. 382.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Curlee v. Thomas, 74 N.C. 54; *Comrs. v. Riley,* 75 N.C. 146; *Pemberton v. McRae,* 75 N.C. 501; *Gheen v. Summey,* 80 N.C. 191; *Murphy v. McNeill,* 82 N.C. 224; *Adrian v. Shaw,* 82 N.C. 476; *Simpson v. Wallace,* 83 N.C. 481; *Mebane v. Layton,* 89 N.C. 399; *Dempsey v. Rhodes,* 93 N.C. 128; *Jones v. Britton,* 102 N.C. 185; *Hughes v. Hodges,* 102 N.C. 241, 258, 260; *Bailey v. Brown,* 105 N.C. 219; *Thurber v.*

LaRoque, 105 N.C. 311, 314; *Vanstory v. Thornton,* 112 N.C. 219; *Thomas v. Fulford,* 117 N.C. 684; *Loan Asso. v. Black,* 119 N.C. 327; *Weathers v. Borders,* 124 N.C. 614; *Fulp v. Brown,* 153 N.C. 533; *Dalrymple v. Cole,* 156 N.C. 357; *Cameron v. McDonald,* 216 N.C. 715; *Williams v. Johnson,* 230 N.C. 342.

STATE v. J. Q. BRYAN.

Upon the trial of an indictment for robbery, declarations made in the absence of the prisoner charging him with the offence, were given in evidence by the prosecuting witness without objection. The State also offered to prove the declarations by the person to whom they were made, and upon objection the evidence was ruled out. It was in evidence that the prosecutor was under the influence of liquor at the time of the alleged robbery: *Held,* That it was not error in the court below to charge the jury that although the declarations of the prosecutor, that the prisoner had taken his watch, being made in his absence was no evidence that the prisoner had taken the watch, yet they might consider it as a circumstance to show, that the witness was not so much under the influence of liquor as not to be conscious of all that took place.

INDICTMENT for robbery, tried before *Watts, J.,* and a jury, at January Term, 1876, of the Superior Court of WAKE County.

(352) The case was determined in this court upon a single exception, and it is therefore unnecessary to set out in detail all of the facts.

The jury returned a verdict of "guilty of larceny," and the defendant moved in arrest of judgment, upon the ground, that the bill of indictment only charged a robbery, and that under it, the defendant could not be convicted of larceny.

All other facts necessary to an understanding of the points raised and decided in this court, are fully stated in the opinion of Justice RODMAN.

The motion was overruled by the court, and the defendant appealed.

Busbee & Busbee, Smith & Strong, Fowle and Badger & Devereux, for the prisoner.

Attorney-General Hargrove and Argo, for the State.

RODMAN, J. Wilcox, the person upon whom the robbery is charged to have been committed, testified to the effect that he was walking with the prisoner, that he felt the prisoner's hand in his pocket, and charged the prisoner with robbing him. Syme then came up and told the pris-

oner to give Wilcox his money, to which the prisoner replied "I have not got his money," and walked off leaving Wilcox and Syme together. A short time thereafter, Wilcox said to Syme, "the damned scoundrel has got my watch." The witness said he had been drinking, but was not so drunk as not to be conscious of what occurred.

No objection was made to the evidence of this witness as to what he said about the watch after the prisoner had left.

Syme was then examined as a witness for the State, and after stating other matters not material to be stated here, testified that after the prisoner had left them, Wilcox said that prisoner had taken his watch. This was objected to as incompetent to prove the taking (353) of the watch by the prisoner, and it was ruled out by the Judge.

Afterwards in charging the jury the Judge said that although Wilcox's declaration that the prisoner had taken his watch, being made in the absence of the prisoner, was no evidence to prove that the prisoner did take the watch, yet they might consider it as a circumstance to show that Wilcox was not so much under the influence of liquor, as not to be conscious of all that took place.

It is clear that the declaration of Wilcox about the watch was incompetent evidence of the fact that the prisoner had taken it. It is equally clear that it was competent for the purpose for which the Judge told the jury they might consider it, and if that purpose had been stated by the Solicitor when the objection was made, the Judge would have admitted it for that purpose.

It is argued here for the prisoner, that the Judge erred in calling the attention of the jury to the declaration in any way, after he had rejected it, and that the prisoner was prejudiced, in that, if it had been offered for the purpose for which it was competent, and had been received for that purpose, the prisoner could have cross-examined Syme about it, which privilege under the circumstances he had lost.

The counsel in making this argument have apparently overlooked what nevertheless appears in the case, that Willcox had been allowed to testify to his declaration about the watch without objection, and that consequently the declaration was in evidence. The Judge was justified in referring to it, and in instructing the jury in what point of view they should consider it.

But if this part of Wilcox's testimony were stricken out, we do not see how the prisoner was prejudiced by the Judge's course. The declaration had been testified to by Syme, the jury had heard it, and although the judge rightly rejected it for the purpose for which it was apparently offered, yet he might then, or at any time afterwards during the trial, have received it for the purpose for which it (354) was competent. The prisoner had opportunity to cross-examine

Syme as to the whole occurrence, including the degree of intoxication under which Wilcox was laboring, and no doubt he did so. If the counsel for the prisoner was taken by surprise at the Judge's allusion to the declaration, and thought the prisoner injured thereby, they might not improperly at the end of the charge, have called the Judge's attention to his supposed error. But that does not appear to have been taken at the time.

In criminal, as well as in civil cases, it is for the public interest that the verdict of a jury shall be final. If an injurious error has been committed, it is of course that there shall be a new trial. But it is established doctrine, and the cases are very numerous to that effect, that if it appears that an error of the Judge in instructing the jury could not have injured the prisoner, he is not entitled to a new trial.

In the present case, we are of opinion that the Judge did not commit an error in the part of his charge, which is excepted to. And we also think that if it was an error, it could not have injured the prisoner.

PER CURIAM. Judgment affirmed. Let this opinion be certified.

Cited: S. v. Isom, 243 N.C. 166.

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(355)

BIZZELL JOHNSON AND OTHERS v. WALTER R. BELL.

The Supreme Court has jurisdiction to review, upon appeal, the decision of the court below, granting, or refusing to grant, a new trial, where a matter of law of legal inference is involved; and where it appears from the record, that the court has committed no error in charging the jury, but has laid down the law of the case plainly, fairly and correctly, this court will reverse the judgment of the court below, granting a new trial, upon the ground that the judge thereof conceived that he had misdirected the jury.

It is not error for a Judge of the Superior Court to refuse to instruct the jury as asked by one of the parties in the cause, when such instruction is based upon a hypothetical state of facts, not alleged in the pleadings, or even appearing in the evidence.

CIVIL ACTION for the recovery of money only, tried before *Kerr, J.*, at Spring Term, 1875, of the Superior Court of DUPLIN County.

There was a verdict in favor of the plaintiff, and the defendant moved for a new trial. Motion allowed and the plaintiffs appealed.

The other facts necessary to an understanding of the points raised and as decided, are sufficiently stated in the opinion of the court.

Stallings, Battle, Battle & Mordecai, for the appellants.
Smith & Strong and W. S. & D. J. Devane, contra.

BYNUM, J. The plaintiffs alleged in their complaint and testified on the trial, that the defendant held a judgment on Eli Hines, which the defendant transferred to one Woodward with his, the defendant's guaranty thereon to make such judgment good to him, in case he, Woodward failed to collect it; and that he assigned, for value, the said judgment, guaranty and undertaking to the plaintiffs.

The defendant in his answer alleged that he only guaranteed (356) the legal liability of the Hines' and not their solvency, and he testified to that effect. Upon this evidence his Honor charged the jury "that the matter for their determination was whether the defendant agreed with Woodward, to make good the said judgment and guaranty, when he transferred them to Woodward, and that if they found that in fact the defendant did so agree, they would find for the plaintiffs."

The defendant's counsel asked the court to instruct the jury, "that the plaintiffs took the said judgment and guaranty, with the defendant's undertaking to make them good, (in case they found such undertaking,) subject to the counter-claim of defendant against Woodward, and that they should give the defendant the benefit of such counter-claim against the plaintiffs in this action." His Honor refused this instruction, and said that the defendant could not take advantage of such counter-claim in this action. There was a verdict for the plaintiffs, and a rule was taken by the defendant for a new trial, on the ground of misdirection of the jury by the court. The rule was made absolute, and the plaintiffs appealed.

The pleadings show that no counter-claim was alleged or set up in the answer, either against Woodward or the plaintiffs, nor does the evidence set out in the case, disclose any such defense. But to avail himself of it, the new matter constituting a defense or counter-claim, must be set up in the answer. Bat. Rev., Chap. 17, Secs. 100 and 101. The Judge, therefore, was not in error in refusing the instruction asked for, as it was based upon a hypothetical and not an actual state of facts alleged in the answer, or even appearing in the evidence. So also, his instruction to the jury was correct; to-wit, that the matter for their determination was whether the defendant agreed with Woodward to make good the said judgment and guaranty, when he transferred them to Woodward; and that if they found that the defendant did so agree, they should find for the plaintiffs. That was the very matter in issue, and upon which conflicting evidence had been given. The (357) charge was clear, concise and to the very point. It not only does not appear that his Honor erred, but it appears affirmatively that the

instruction was in all things correct upon the issue which was being tried.

The question, therefore is, whether, when the Judge has committed no error in his instructions to the jury, but has laid down the law of the case plainly, fairly and correctly, he can afterwards set aside the verdict and grant a new trial upon the ground, that he conceived that he had misdirected them upon the law, and thus deprive the plaintiffs of an advantage they had gained in the regular and due administration of justice. This involves a construction of Bat. Rev., Chap. 17, Sec. 299. The whole section is as follows:

"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; or which, in effect, determines the action and presents a judgment from which an appeal might be taken, or discontinues the action, or *grants or refuses a new trial.*"

The right of appeal is thus expressly given whenever a matter of law or legal inference is involved in the grant or refusal of a new trial. It is error to misdirect the jury in the law, and the misdirection entitles the injured party to a new trial in the appellate court. So the statute was intended to, and does equally protect the party, where he has gained a verdict by the right application of the law, but is afterwards deprived of it by the action of the court in undoing, through a misconception of the law, that which has been thus rightfully done. In *Moore v. Edmiston,* 20 N. C., 471, where this court sustained the Judge in setting aside the verdict and granting a new trial, because, in that case, it was a matter of discretion, from the exercise of which no appeal lay, it
(358) is said: "To give the parties the full benefit of this section of the Code, the courts should, and no doubt will, on exceptions taken by the parties aggrieved, put upon the record the matters inducing the order granting as well as refusing a new trial. The appellate court can thus see whether the order presents a matter of law, which is the subject of review, or matter of discretion, which is not. In this way only can the full benefit of that provision of the Code be secured to suitors." No difficulty of that sort arises here. The pleadings and evidence, the instructions refused and those given, are set forth. From these, it sufficiently appears that the court set aside the verdict because of error in refusing the instructions asked for by the defendant. We have seen that the Judge was correct, both in the instructions given and as to those refused. It was error in law to set aside the verdict for misdirection.

By the appeal, the whole case is before this court, and it is our duty to render here such judgment upon the verdict as should have been given in the court below.

Judgment reversed, and judgment here according to the verdict of the jury.

PER CURIAM. Judgment reversed.

Cited: Trotter v. Comrs., 90 N.C. 457; *Bird v. Bradburn*, 131 N.C. 490; *Roberson v. Stokes*, 181 N.C. 64.

(359)

STATE ON THE RELATION OF M. E. ADAMS AND WIFE AND OTHERS *v.* JAMES QUINN AND OTHERS.

Whenever the relation of guardian and ward is proved or admitted, either party has a right to an account, unless the action can be barred by the plea of *insimul computassent*, or a release, or the statute of limitations.

Where the guardian is charged with fraud by his wards, the plaintiffs, in that, he sold certain lands whilst acting as guardian and never accounted for the proceeds, the plaintiffs are entitled to an answer to their complaint, and to a reference for an account.

CIVIL ACTION, heard upon demurrer to the complaint, before his Honor, *Judge Schenck*, at Spring Term, 1875, of the Superior Court of GASTON County.

The complaint alleged: That the plaintiffs, Sarah Adams, Mary Torrence, Eliza Lineberger, an infant under twenty-one years of age, and without guardian, and J. H. Holland, are the distributees and heirs at law of Jasper N. Holland, and the wards of the defendant Quinn.

Jasper N. Holland died in the county of Yell, State of Arkansas, about the year 1860, leaving a will and testament, wherein he bequeathed and devised his real and personal estate to the plaintiffs; which will was admitted to probate in Gaston County, N. C., in August, 1860. The defendant Quinn was appointed executor thereof, and qualified and entered upon the discharge of his trust at that time.

In the month of April, 1861, the defendant Quinn was appointed guardian of the plaintiffs above named, giving bond as required by law, which position be held until April, 1863, when he procured his removal from said office by voluntary petition.

The plaintiffs are informed and believe that Jasper N. Holland, at the time of his death, was seized and possessed of considerable real and personal estate, which was under the control, and subject to sale

(360) by the defendant Quinn, under a power vested in him by said will. The value of said estate was some eight thousand dollars, and the indebtedness very small.

The real estate of said Holland, which the plaintiffs charge as being sold by the defendant Quinn, or which he fraudulently suffered to pass out of his possession and control, consisted of five town lots in the town of Dardanelle, Arkansas, of the value of three thousand dollars, and a tract of land containing one hundred and sixty acres, in the county of Yell, said State, of the value of one thousand dollars, besides other property of the value of four thousand dollars, of which the defendant has made no account whatever; and that said real estate is now in the possession of strangers who hold the same adversely to the plaintiffs, under *bona fide* deeds.

Said sales or transfers fraudulently suffered on the part of the defendant, Quinn, occurred between the time he assumed the office of guardian and the date at which he procured his removal as guardian. Plaintiffs are informed, and believe, that they have been fraudulently deprived of said property by an iniquitous combination between said Quinn and one Falls, his son-in-law, who resides in the State of Arkansas.

The destruction of the records of Yell County, Ark., which occurred during the late war, renders them unable to state definitely the means by which they have been defrauded of their rights, and this fact is well known to the defendant, Quinn, and one which they believe he expects to enable him to consummate said fraud upon them.

This fraudulent conduct on the part of the defendant, Quinn, in depriving his wards of their rights, was practiced when they were infants of tender age and unable either to know or protect themselves in their rights.

The defendant, Quinn, has made no return of the estate of Jasper N. Holland, or accounted for the same, either as executor or guard-
(361) ian, except a small part of the personal estate which was brought to this State.

The other defendants, J. B. Falls and Z. S. Hill, are sureties on the guardian bond of said Quinn, in the sum of eight thousand dollars.

Plaintiffs demand judgment against the defendants for eight thousand dollars, to be discharged upon the payment of the sum found to be due on an account taken in this action.

The defendants demurred to the complaint, and assign the following grounds of demurrer:

1. The complaint is ambiguous, uncertain, redundant and multifarious, in that no certain, specific charge is made by the plaintiff, and in that the general charges made are against the defendant, Quinn, as

executor of Jasper N. Holland, deceased, and as guardian of the plaintiffs.

2. That the complaint does not show that the former wards of James Quinn have become of age, but does show that one of them, Eliza Lineberger, is not of age, and that therefore the plaintiffs cannot sustain this action.

3. The complaint does not show that a demand has been made upon the defendants for a settlement of the guardianship, or any claim made upon them.

4. That the complaint shows that the defendant, James Quinn, has settled the whole estate of the plaintiffs that came into his hands as guardian.

5. That the complaint only charges that the testator, Jasper N. Holland, left a large estate in Arkansas, and therefore the defendant, Quinn, as guardian, or in any capacity whatever, cannot be charged with an estate in Arkansas, with which he was not concerned and over which he had no control.

6. The complaint does not charge the defendant or any one of them with having received any property or estate that has not been accounted for.

7. That no breach of the guardian bond is alleged in the complaint.

8. The complaint charges a fraudulent conspiracy between (362) the defendant Quinn and his son-in-law Falls, who lives in Arkansas, to cheat and deprive the plaintiffs of their property in Arkansas, and seeks to charge the defendant therewith upon his guardian bond, all of which the defendants respectfully submit is beyond the jurisdiction of any court in North Carolina.

9. That the complaint joins an action for fraud and conspiracy and an action upon a guardian bond.

10. That the whole statement of facts in the complaint do not constitute a sufficient cause of action.

11. That allegation No. 3 of the complaint shows that the defendant Quinn, as guardian, was removed from his guardianship in 1863, and therefore the plaintiffs cannot sustain an action against him because of the lapse of time and the bar of limitations prescribed by law.

Upon the hearing the demurrer was sustained by the court and thereupon the plaintiffs appealed.

W. A. Moore, Battle and Battle & Mordecai, for appellants.
Smith & Strong and Cobb, contra.

PEARSON, C. J.' Whenever the relation of guardian and ward is proved or admitted, either party has a right to an account, unless the action be barred by the plea, "*insimul computassent*," that is a full settlement, or a release of the cause of action, or the statute of limitations. In our case, no settlement or release is alleged, and the statute of limitations is only relied on as to the sureties; so the defendant Quinn has no ground on which to object to a reference for an account of his "actings and doings" as guardian, and his Honor erred in sustaining the demurrer. The complaint makes a direct charge of fraud committed by the defendant while acting as the guardian of the
(363) plaintiffs, in that he sold land and other property of his wards in the State of Arkansas and failed to make any return of the moneys received except a small sum. This charge of fraud is admitted by the demurrer to be true, and the defendant is thus put in a very unenviable light before the court, for the object of a demurrer is to avoid an answer. Without more saying, the plaintiffs are entitled to have an answer and to an account, when upon exceptions, the matter in controversy will be brought squarely before the court.

His Honor was of opinion that the sureties on the guardian bond were discharged by the statute of limitations, as "the breach complained of" occurred since the adoption of the C. C. P. This point is not now presented and must be made by answer.

The other exceptions are on "the skirmishing line" and need not be noticed, as all can be cured by amendments.

Error. This will be certified.

PER CURIAM. Judgment accordingly.

Cited: Solomon v. Bates, 118 N.C. 316; *Moses v. Moses,* 204 N.C. 658.

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(364)

JOHN M. KING AND OTHERS v. E. M. LYNCH, EX'R., AND OTHERS.

A testator bequeathed as follows: "2. All my property not otherwise disposed of, to be sold at my death and all my children made equal, taking into consideration what I have already advanced or given them, as will appear by reference to a book where I have kept their accounts thus far," etc. Before the date of this will, the testator had given to each of two sons, a valuable tract of land: *Held,* that the land so given not appearing in the testator's book, was not to be accounted an advancement, in distributing the surplus so as to make his children equal.

KING *v.* LYNCH.

SPECIAL PROCEEDING, originally commenced in the Probate Court of RUTHERFORD County and removed thence to the Superior Court, where it was heard before *Schenck, J.*, at Fall Term, 1875.

The plaintiffs filed a petition for an account and settlement of the estate of Elias Lynch, deceased, according to the terms of the will. The defendant E. M. Lynch, is the executor, and the other defendants John Lynch and Jonathan Lynch are heirs at law and legatees, under the will of the testator.

The only point decided in this court, is as to the proper construction of the will, which is as follows:

"In the name of God, Amen.

"I, Elias Lynch, calling to mind the uncertainty of life and certainty of death, do make and ordain this my last will and testament revoking all others, to-wit:

"First. I will and bequeath to my beloved wife Frances, six negroes, two men, two women and a boy and a girl, all her choice during her natural life, all the household and kitchen furniture, three horses or mules, her choice, one wagon and gear, three plows with all necessary tools for carrying on her farm, forty head of hogs, six cows and calves, two other cattle for beef, fifteen head of sheep if on hand, (365) one set of blacksmith tools, five hundred dollars in money with a sufficiency of grain and rufness of all kind to do her and family one year, together with all necessaries to make her comfortable for the same time. The money and stock she may dispose of to suit herself; at her death the negroes to be sold by my executor and the proceeds equally divided among my legal heirs.

"Second. All my property not otherwise disposed of to be sold at my death and all my children made equal, taking into consideration what I have already advanced or given them, as will appear by reference to a book where I have kept their accounts thus far. My daughter, Rebecca Minerva King, being dead, the balance that may be due her I give to her children she had by her husband, Noah King, as my account will show what they have already received. My son, Toliver L. Lynch, being dead and left four children, two sons and two daughters, what may be coming to my two grand daughters, children of Toliver L. Lynch, I place in the hands of my son, E. M. Lynch, in trust for them and by him to be vested in real estate for their sole benefit and their heirs. I mean their estate that may be due them on a final settlement of my estate.

"I appoint my son, Elias M. Lynch, sole exector to this my last will and testament. In witness whereof I have hereunto set my hand and seal this 2d day of July, 1858.

(Signed) ELIAS LYNCH, [SEAL.]

"Witness:

ROBT. G. TWITTY,
WILLIAM L. TWITTY."

"A codicil to my last will and testament bearing date the 2d day of July, 1858.

"Being desirous of making a small change in the same to-wit: All the property or estate that would be due my daughter, Malinda Whiteside, at my death shall be paid to her six children, Martha, Elliot, Wm. Joseph, Pasey, Richard and Noah Whiteside, that is, they (366) are to have their mother's share of my estate taking into consideration what she has already received.

"In witness whereof I have hereunto set my hand and seal this 19th day of October, 1860.

ELIAS LYNCH, [SEAL.]

"Witness:

ROBT. G. TWITTY."

On the 6th day of February, 1854, the testator conveyed to the defendant, John Lynch, by deed, a tract of land worth $8,000, at the time of conveyance; and on the 1st day of July, 1854, he conveyed to Jonathan Lynch a tract of land worth $4,000, at the date of conveyance.

The defendants were not charged with the value of this land in the book referred to in the will, and the same was not mentioned therein.

The will was submitted by consent to the construction of the court, as to whether in stating the account, the defendants John and Jonathan, should be charged with the value of the land aforesaid, and upon consideration the court held that they should be so charged.

All other facts necessary to an understanding of the case, are stated in the opinion of the court. The defendants appealed.

Smith & Strong, for the appellants.
Battle, Battle & Mordecai, contra.

PEARSON, C. J. When the primary purpose and a secondary purpose of a testator conflict, or when from unforeseen events, the secondary purpose cannot be carried into effect without defeating the primary purpose, the secondary purpose must give way—for illustration, see *Lassiter v. Wood*, 63 N. C., 360.

We refer to this case for illustration, because in the application (367) of the general rule, every case must, like tubs, stand on its own bottom.

While agreeing with his Honor as to the general rule of construction, we differ from him in regard to its application to our case. The only purpose of the testator was to make an equal division of his estate among his children and grand children, considering each to have received *advancements, as set down in his book.* So the equality is made to depend upon his books, in which he made entries and which is referred to in his will.

Thus it is seen that the testator had no primary and secondary purpose, or "general and particular intent." He had only one intent, to divide what he owned at his death among his children, and grand children taking the place of parents deceased *equally, according to the amount he had put down in his book.* Upon the face of the will, the land deeded to Jonathan and John, not being entered in *"the book"* cannot be taken into the account.

Going outside of the will, and putting ourselves as near as may be in the position of the testator when he made the will, we are not able to account for the fact that the testator does not charge Jonathan and John with the lands for which he had given them deeds in 1854, upon "his book of account," except on the ground, that in consequence of one and then the other living with him, and acting as his general agent and overseer for many years, up to the time of his death, he intended the land as compensation, and not as an advancement, or he intended to make a gift and not an advance to his favorite sons. It was his estate, why should he not dispose of it as he pleased? "His book of accounts of advancements" dates back to 1850, itemizes and dates each advancement, charges John and Jonathan with certain advancements at dates prior and subsequent to the date of the deeds, but does not charge them with land, one $8,000 the other $4,000.

This cannot be taken as an omission—an act of forgetfulness. (368) The value is too large to have been overlooked.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

Cited: Balsley v. Balsley, 116 N.C. 477; *Coppedge v. Coppedge,* 234 N.C. 176.

JAMES FREEMAN AND WIFE AND OTHERS v. JOHN WILSON, GUARDIAN, AND OTHERS.

A guardian has power to exchange property of his wards, which he thinks hazardous, for other property; and if his discretion has been honestly exercised in the transaction, the courts will not hold him liable for the results.

Where a guardian received from an administrator a note on a certain person without surety, it was his duty, at once to collect the same, or require the maker of the note, although a wealthy man, to secure it. If, instead of this, he exchanges said note for one payable to himself as guardian, also unsecured, he becomes liable for the amount thereof.

In the exercise of a sound and honest discretion, a guardian was empowered, during the late war, to receive Confederate money for the rent of his wards' land and the hires of their slaves, and disbursing the same for their support and education. He might also receive payment of apparently solvent bonds and notes, in the same currency, if the amounts were similarly disbursed, or expended in the payment of taxes, and such like, without being liable to be charged therewith.

A guardian should be charged with what he receives, and credited with what he paid out, it not appearing that he collected anything prematurely, or kept on hand any unreasonable sum.

CIVIL ACTION, tried before *Moore, J.*, at Spring Term, 1875, of BERTIE Superior Court, upon exceptions to the report of the referee, to whom the cause was referred to state an account of the defendant as guardian of the *feme* plaintiff, and the intestate of the plaintiff, Freeman.

(369) The facts pertinent to the case as decided, are stated in the opinion of the court.

The exceptions were overruled, and judgment rendered in favor of the plaintiffs; and thereupon the defendants appealed.

Gilliam & Pruden, for appellants.
Smith & Strong, contra.

RODMAN, J. *First exception.* The defendant was appointed guardian of the plaintiff in 1857. The referee does not state at what time he came to a settlement with the administrator of her father, and received from him the notes mentioned under the heads of the several exceptions. We assume that he did so soon after his appointment.

In December, 1862, the defendant assigned or delivered to one Isaac Freeman a note made by Floyd, Pugh and Cotton, and also one made by Walston, Pugh and Cotton, which he held as guardian, and which together amounted to $3,425.30. In exchange he took the note of said Freeman for that amount, payable to him as guardian, to which James

Freeman, the son of Isaac, afterwards became a surety. Isaac Freeman was a man of wealth, and in good credit; his son James had but little means. The makers of the notes which the defendant assigned to Isaac were men apparently of large means. Their property, however, consisted mostly of slaves, and they owed more than the value of their lands. The referee finds that "this exchange of notes was enjoined by a prudent regard for the interests of his wards," and that the notes which the defendant assigned would have been a total loss if he had retained them until the end of the war, whereas, it is probable that a considerable sum will be recovered from the note of Freeman. The referee nevertheless has charged the defendant with the full amount of the notes which he assigned, and the Judge confirmed his report. Defendant excepted.

According to the familiar principles which govern the liability (370) of guardians, we think the plaintiff has no right to complain in this matter. No fraud is imputed to the defendant, and he seems to have acted with a prudence and foresight unusual at that time. It is true he did not take a *good* surety from Isaac Freeman, when it appears that Isaac might have given one, if he had been inclined to. But it does not appear, but that if any other surety than James had been insisted on, Isaac might have refused the exchange. It is unnecessary to repeat what has been so often said. If it be a case in which a guardian has a discretion, and it has been honestly exercised, the courts will not hold him liable for the results. In this case he had the power to exchange property of his wards which he thought hazardous, for other property, and the exchange was not only honest, but seems to have been fortunate.

We do not concur with the Judge. This exception is sustained. The plaintiffs are entitled to have assigned to them the note of Isaac Freeman, and to have all that has been, or that may be, collected on it.

Second exception. The defendant, as guardian, received from the administrator a note of Askew, which was without surety. He surrendered this note on taking from Askew one payable to himself as guardian, but without surety. Askew was in independent circumstances. It was the statutory duty of the defendant either to have collected the money or to have required Askew to give a surety. That Askew was in good credit, or, in fact, rich, did not exempt the defendant from the performance of a duty required by statute. It was not a case in which he had a discretion. He is liable for the amount of this debt. This exception is overruled.

Third exception. For the same reasons the defendant is properly charged with the unpaid residue of the Holly debt. This exception is overruled.

Fourth exception. The property of the wards consisted of
(371) lands, slaves and notes. The guardian rented out the lands and hired out the slaves each year, upon the terms that he did not oblige himself to take payment of the rents and hires in Confederate money, and would not do so, except so far as money might be needed for the support of his wards. He did receive Confederate money for these rents and hires. He also, during the war, received payment of sundry notes due to his wards which were then apparently good, in Confederate currency. All these sums were expended in the support and education of the wards. In some years he expended for that purpose more than the income of the year. But it does not appear that during the whole term of his guardianship, he expended more than the whole income of the wards' estate. Whether the terms of renting and hiring damaged the interests of the wards, does not appear. It is not material to inquire whether they were the wisest that could have been adopted. It was a case in which the guardian was obliged to use a discretion, and as he did it honestly, he is not liable for the results, whether good or ill. We think, also, he was justified in receiving payment of old debts in Confederate money, if the money was needed for paying taxes, or for the support and education of his wards. He could obtain payment in no other money, and of course nobody would give more for a note than its face value. We think, as to these transactions, the guardian should be charged with what he received, and credited with what he paid out, it not appearing that he collected anything prematurely, or kept on hand any unreasonable sum.

With regard to the loss from exchanging the old issue of Confederate currency for new, we are of opinion that it should not fall on the guardian. The sum he had on hand ($2,500) was not more than it was prudent to have, in view of the needs of his wards, and the exchange at a discount of one-third was a loss which everybody suffered, and which he could not help.

(372) Judgment below reversed, and case remanded to be proceeded in, in conformity with this opinion.

Let this opinion be certified. The defendant will recover costs in this court.

PER CURIAM. Judgment accordingly.

Cited: Luton v. Wilcox, 83 N.C. 26; *Coggins v. Flythe,* 113 N.C. 111.

JAMES WALLINGTON v. A. D. MONTGOMERY, EX'R.

An appeal does not lie from the Superior to the Supreme Court, upon the refusal of the Judge below to pass upon the competency of evidence and its materiality, especially before the trial.

CIVIL ACTION, on a bond, heard before *Kerr, J.*, at Fall Term, 1875, of the Superior Court of ROCKINGHAM County.

The action was brought to recover $12,000, alleged to be due the plaintiff as assignee of one E. M. Powell. After issue joined, the defendant took the deposition of a non-resident witness, under a commission, returnable to Fall Term, 1875, and during the term the deposition came, directed to the Clerk, in a sealed envelope. Notice was served upon plaintiff's counsel to be present at the opening thereof. The plaintiff's counsel did not attend, but having examined the witness, he wrote as follows: "The plaintiff, notified of the opening and passing on depositions of John W. Montgomery, taken in behalf of the defendant, has no objection to the regularity of the taking, but he excepts to the propriety and legal sufficiency of the questions propounded to the witness, each and every one of them, and to the answers thereto. If his exceptions were overruled, the Clerk will enter an appeal to the Judge of the court."

The Clerk overruled the exceptions and entered the appeal. (373) In the calling of the docket the case was not called for trial, but the defendant directed the attention of the court to the exceptions, and moved the court to pass upon the same. The plaintiff stated that the exceptions and appeal was only intended as a reservation of the right of objection as to the competency of the evidence. The defendant insisted that the court should pass upon the exceptions, and the court refusing to do so, until the deposition should be offered in evidence upon the trial of the cause, the defendant appealed.

Scales & Scales, for appellant.
Dillard & Gilmer, and Gray & Stamps, contra.

BYNUM, J. The refusal of his Honor to pass upon the competency of the evidence and its materiality before the trial, was not the subject of appeal, any more than from his refusal to try or continue a cause, or from his order to allow or disallow an amendment. If in the course of a trial a question is objected to and ruled out by the court as irrelevant, or a witness is rejected as incompetent, an appeal cannot then be taken and the trial arrested, but exceptions are made and the trial progresses.

In the case before us, the appeal was taken on a ruling from which no appeal lay, even had it been made on the trial and in proper time, instead of in anticipation of a trial, when the court had no jurisdiction whatever to pass upon the objections. The court was right in refusing to decide at that time, but in error in allowing the appeal.

An appeal can only be taken from "a judicial order or determination of a Judge upon or involving a matter of law or legal inference, which affects a substantial right claimed in any action or proceeding, or which, in effect, determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action or grants or (374) refuses a new trial." C. C. P., Sec. 299. This was not such "judicial order or determination" as is embraced in the statute. *Childs v. Martin,* 68 N. C., 307; *Gray v. Gaither,* 71 N. C., 55. The appeal having been improvidently allowed, must be dismissed.

PER CURIAM. Appeal dismissed.

Cited: Sutton v. Schonwald, 80 N.C. 23; *Lutz v. Cline,* 89 N.C. 188.

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(1)

WM. DAVIS v. THE BOARD OF COMMISSIONERS OF STOKES COUNTY AND JOHN F. POINDEXTER.

(2)

WILLIAM DAVIS v. THE BOARD OF COMMISSIONERS OF STOKES COUNTY

A County Court borrowed money of a bank, to aid the rebellion: *Held,* that it was not the duty of the County Court to pay the debt; nor could the bank have made the county pay it. Subsequenty the County Court borrowed the money to pay this bank debt: *Held,* that the county was not bound, either on the bond given, or on any implied contract, to pay the same, as it might have been, if the money had been applied to some legitimate object, as to support the poor and such like.

The surety on the bond of the county, acting for himself, and not as agent for the county, becomes liable to the party who loaned the money for no illegal purpose.

PETITION to rehear the two cases, decided in this court at January Term, 1875, and which are reported in 72 N. C., 441.

The plaintiff moved the court to re-hear upon the ground in the first named case, that there was error in the judgment and decision aforesaid in this, that although the county of Stokes is not liable on

the note, yet it is liable on the implied contract to repay the (375) money borrowed by Poindexter, to whose rights, on payment of the $500, the plaintiff, Davis, was subrogated *pro tanto,* which it received and appropriated to its own use, and that use held not to be an unlawful one."

That in the second case, "there was error in the judgment and decision aforesaid in this, that although the county of Stokes is not liable on the note, yet it is liable on the implied contract to repay the plaintiff's money which it received and appropriated to its own use, and that use held not to be an unlawful one.

For a further statement of the facts, see the report of the cases in 72 N. C., 241, and the opinion of the court therein.

Shipp & Baily, for the petition.
J. F. Graves, Watson & Glen, contra.

READE, J. We have with care considered what we said, and examined the authorities cited upon the rehearing. (See same case reported in 72 N. C., 441.) And we do not see the alleged error.

In *Poindexter v. Davis,* 67 N. C., 112, cited by the plaintiff, the liability of the *county* was not involved; but the liability of the present plaintiff, who was then defendant as *surety* of the county.

And when it is remembered that a county may be liable when the principal is not, it will be seen that that case has nothing to do with this, which involves the liability of the *county* alone. In the opinion delivered in this case upon the first hearing, it is illustrated how a surety may be liable when the principal is not: surety of infant, *feme covert,* a county undertaking to build a church, etc.

But now it is insisted, that although the county was not liable upon the *bond* to Poindexter, because it was *ultra vires,* yet, inasmuch as the county actually received the money and applied it to (376) county purposes; and inasmuch as the plaintiff, as surety, has paid the debt for the county, there is a *moral* obligation upon the county to pay, and an *implied* promise that it will pay.

It is the duty of a county to support its poor and to *levy taxes* for that purpose; but it has no power to *borrow money and give its bonds* for that purpose, (as we will suppose for the sake of the argument,) and a suit upon *such bond* would fail. But if the county received the money and used it for the support of the poor, the plaintiff has cited very respectable authority that the county would be liable upon an implied contract. Let it be admitted that it would be liable. But it is not the duty of a county to build churches, and if the county board were

to borrow money, with or without a bond, for such purpose, the county would not be liable in any form.

The want of attention to that distinction has led the plaintiff into error. The board is the agent of the county to support the poor, but is not its agent to build churches, although the building of churches is not infected with any turpitude. But if the board borrows money, either to support the poor or to build a church, and gives its bond, with A B as surety, then the *surety* is liable whether the board is or not.

Apply these principles to our case. The County Court of Stokes borrowed money of the bank to aid the rebellion—was it the duty of the county to pay that debt? Of course not. Could the bank have made the county pay it? Of course not. When therefore the County Court subsequently borrowed money and gave its bond to pay that debt, it simply did what it had no power to do, and therefore the county was not bound upon an implied contract, as it might have been if the money had been applied to something that the county was obliged to do—as to support the poor. But still, the plaintiff by becoming surety on the bond, acting for himself and not as agent for a county, became liable to Poindexter, who loaned his money for no *illegal* purpose.

(377) And now, as we said in the former opinion, "when the plaintiff calls upon the people of Stokes County to reimburse or indemnify him, they have the right to answer that he was not *their* surety, that the County Court was not *their* agent to contract *that* debt, and therefore they are not liable.

And so we have to repeat what we said in our former opinion, that notwithstanding the hardship upon the plaintiff and the shame upon the defendants, the decision must stand.

PER CURIAM. Petition to re-hear dismissed.

Cited: Womble v. Comrs., 74 N.C. 422; *Daniel v. Comrs.*, 74 N.C. 500.

GEORGE R. TROXLER v. THE RICHMOND & DANVILLE RAILROAD COMPANY

It is negligence in a Railroad Company to place near its track and suffer to remain there, a pile of old, dry, combustible sills, which, being set on fire by one of the company's engines, communicated the fire to the fence of the plaintiff which was thus burned.

And although there was an intervening fence between the pile of sills and the plaintiff's fence, to which it was joined, which intervening fence caught and was burned, and from which the plaintiff's fence was directly

fired, still, if the burning of the sills was the cause of the intervening fence catching fire and the same was directly set on fire by the engine itself, the plaintiff is entitled to recover.

It is no good cause to set aside the verdict of a jury, on the ground, such verdict did not specifically respond to the issues, when the issues (in writing) were handed to the Judge by the defendant's counsel, after the charge of his Honor was concluded, and the jury had risen to retire; and especially when his Honor, after reading aloud the issues, handed the paper to the jury, who did not return it, but whose verdict substantially covered such issues.

CIVIL ACTION, to recover damages for the burning plaintiff's fence, tried at December Term, 1875, of GUILFORD Superior Court, before his Honor, *Judge Kerr*.

On the trial in the court below, the plaintiff, examined as a (378) witness, testified: That on the 9th of April, 1873, about one hundred panels of his fence was destroyed by fire; that the fence was joined to another fence at nearly a right angle, which latter began about a rail's length from a cattle guard on defendant's road, thence running west for a short distance, when an angle was made, and thence north, bearing away from the line of said road, which at that point ran northeast and southwest, until it reached the junction with plaintiff's fence, distance about one hundred panels. As to this last one hundred panels, it was stated that the same was on the land of one Chilcut, who said that the fence belonged to the plaintiff; for this reason the plaintiff claimed it; but his Honor held that he had shown no title to this part of the fence, and could not recover damages for its loss. In the opinion of the plaintiff the damage caused by the destruction of the other portion of his fence, amounted to twenty-five dollars.

One Vanstory, in behalf of the plaintiff, stated that he was at work in a field on the south side of the railroad, on the morning of the said 9th of April, 1873, and that about 10 or 11 o'clock, A.M., the freight train of the defendant passed going to Greensboro; that after it passed and before it was out of sight, he observed fire blaze up at or near the cattle guard; that he at once went to the spot, and found the grass, which had grown up in great quantities around a pile of old sills near the track, and between that track and the fence, as also the sills, all on fire, and the fire making out towards the fence; and that both the sills and fence were consumed.

On his cross-examination, the witness stated, that the fence was an old fence opposite the pile of sills; that he could step over it in places, and that it was grown up with briers and bushes, and that a quantity of what is known as "tickle grass" had accumulated against the fence, as well as around and against the said pile of sills. The witness denied that he had ever stated that there were no sills there.

(379) Other witnesses were examined for the plaintiff, who testified, that on the morning aforesaid, other fires at different points were caused by the same freight train; that they saw the fire at the cattle guard, and that they had noticed the pile of old sills spoken of, and that they were rotten, dry, very combustible and easily ignited by a spark; and that they were burned on the occasion spoken of.

On behalf of the defendant, one Gibbs testified, that he was an employee of defendant in the shop near Richmond, and examined all engines which were going out on a trip, and on their return; that, hearing of this fire, he examined this engine particularly when it returned to Richmond, and found it in complete order, including smoke stack, spark arrester, etc. Witness described the spark arrester and its use. Stated on his cross-examination, that spark arresters from long, continued use, would wear out. (The engine was purchased from the United States in 1865.)

Mark Adams for defendant testified, that he was an engineer in defendant's employ at the time mentioned and still is; that he did not think he ran the freight train on the occasion of the fire alluded to, still if he was running that train, the engine was in good order; he always examined his engines before starting on a trip. On his cross-examination, he stated that he considered spark arresters a sure preventive against the escape of sparks, though sparks could sometimes be thrown out from ash pans, but they could not get outside the rails.

The section master on that part of the road, stated in his evidence for defendant, that there was no pile of sills at the place spoken of by the witness, Vanstory and others; that there was a pile about seventy-five yards south of the place, and another about one hundred yards north; that he knows the place described by Vanstory, but he has never seen any charred ends of sills or ashes there; that he goes over his section nearly every day, never permitting more than two days to pass without inspecting it. This witness further testified, that he had
(380) heard Vanstory make a statement contrary to his testimony on this trial, as to where the fire originated. On his cross-examination, the witness stated, that he did select one William Pritchett, on the part of the road, to act with one Rankin, in assessing plaintiff's damage for the burning of his fence, and to report the same to the authorities; that he stated in that report, that the burning was caused by defendant's engine; that he is accustomed to report all losses, whether of stock killed or anything else.

It was also in evidence, that it was a very dry time, and that the said 9th of April, 1873, was a very windy day, and that the wind blew from south-east to north-west.

The plaintiff insisted that the defendant was guilty of negligence; in the first place, because from the large number of fires kindled by the engine in its wake on that day, it was evident that the engine was not in a proper condition to prevent the emission of sparks; and in the second place, that the placing by defendant, near the track, of a pile of old, dry, combustible sills, in which the fire first ignited, or around which much dry and combustible grass and other material had accumulated and ignited from the sparks, was negligence.

The defendant in reply contended:

1. That the fire did not catch from the engine.
2. That the Railroad Company was guilty of no negligence.
3. That the plaintiff was guilty of contributory negligence.

His Honor instructed the jury, that if from all the evidence they believed that on the 9th day of April, 1873, the engine of the defendant was supplied with a proper spark arrester, and that the same was in good order, the defendant was not guilty of negligence so far as the engine was concerned; and further, if they believed that the fire from the defendant's engine first ignited the fence, connecting with the fence of the plaintiff as stated, and was communicated to plaintiff's fence, the defendant was guilty of no negligence. But if they believed that the defendant had placed near its track a pile of old, dry, combustible sills, and that the fire from the engine first ignited the (381) sills, and was communicated thence to the fence near by, and thence to the plaintiff's fence, the defendant was guilty of negligence.

At the conclusion of his Honor's charge, and while the jury had risen to retire, the defendant's counsel asked the court to submit two other issues to the jury, at the same time handing his Honor a paper containing said issues, which his Honor read aloud and handed to the jury. This paper was not returned by the jury with their verdict. The verdict was returned to the Clerk in the following form: "We find the fire was caused by sparks from defendant's engine; that the defendant was guilty of negligence; and we assess the plaintiff's damage at fifteen dollars."

The case states that at the re-opening of the court on Monday morning—the jury who rendered the foregoing verdict having been discharged—the counsel for the defendant presented to the court the following paper:

"Was there a pile of sills between defendant's track and the fence, at the place of the fire? Answer:"

"Did the fire ignite in the sills (if there was such pile,) or in the fence? Answer:"

Which paper his Honor stated was substantially a copy of that handed to the jury.

Defendant's counsel then moved to set aside the verdict, or to adjudge that it was no verdict, because the jury had failed to respond to the written issues submitted to them. Motion refused, and defendant excepted.

Defendant's counsel then moved to set aside the verdict as being contrary to the weight of the evidence as to negligence; motion again refused.

Said counsel then moved for judgment in favor of defendant, *non obstante veredictu*, on the ground that the plaintiff was guilty of contributory negligence, and therefore could not recover. Motion
(382) refused by the court, and defendant again excepted.

The plaintiff had judgment in accordance with the verdict, and the defendant appealed.

Morehead, for appellant.

Dillard & Gilmer, contra.

READE, J. I. His Honor charged the jury that "if the defendant had placed near its track a pile of old, dry, combustible sills, and that fire from the defendant's engine first ignited the sills and thence the plaintiff's fence was burned, then the defendant was guilty of negligence."

The correctness of this charge is too plain for controversy.

II. Admitting that to be so, still the defendant insists that plaintiff was guilty of contributory negligence, and therefore was not entitled to recover.

It is not stated in what the alleged contributory negligence consisted, but there was evidence that the pile of old sills caught fire and communicated fire to a fence, near by, which was connected with it, a good distance off; and that the intermediate fence was old and was grown up with grass, and was highly combustible. And we suppose that the alleged contributory negligence consisted in the plaintiff's joining his fence to that. But the defendant has no right to complain; for his Honor charged that if the fire caught that fence from the engine, then the plaintiff could not recover. So that the amount of the finding of the jury is that the burning resulted solely from the old sills.

III. After the testimony and the arguments of counsel and the charge of the Judge were all closed, and the jury had risen to retire, the defendant's counsel handed up to his Honor two issues in writing, and requested him to submit them to the jury. His Honor read the issues aloud and handed them to the jury; and the jury did not return
(383) the paper and did not *specifically* respond to the issues. And for this the defendant insisted that the verdict should be set aside. His Honor knew better than we, what consideration to give to such

irregular practice. The defendant certainly had no right to complain that he did not give enough. If the issues were embraced in what had been already submitted to the jury, he had no right to have them repeated. And if they were new issues, he had no right to have them made then. It appears, however, that said issues were, as to whether the pile of sills were there, and whether there was contributory negligence. Both of which had been fairly submitted to the jury, and although they did not return the paper, yet their verdict covered the issues.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Aycock v. R. R., 89 N.C. 330; *Knott v. R. R.*, 142 N.C. 243; *Deligny v. Furniture Co.*, 170 N.C. 200; *Matthis v. Johnson*, 180 N.C. 132.

WILLIAM PUGH v. LEANDER YORK.

APT time sometimes depends upon *lapse* of time, as where a thing is required to be done at the first term, or within a given time, it *cannot* be done afterwards. But it more usually refers to the *order* of proceeding, as *fit* or *suitable.*

Hence, where a defendant filed a petition for a *recordari*, to remove a case from a Justice's to the Superior Court, and during the pendency thereof, and before motion in the Superior Court to place the case upon the trial docket, the defendant obtained his discharge in bankruptcy: *Held*, that the defendant had not been guilty of laches because two years had elapsed since his discharge, before making said motion and praying to be allowed to plead such discharge.

No time is prescribed within which a discharge in bankruptcy is to be pleaded. If it is done in proper *order*, it makes no difference whether the time be long or short.

This was a CIVIL ACTION, originally commenced in a Court of Justice of the Peace, and brought by writ of *recordari*, to the Superior Court of RANDOLPH County, where it was heard at Spring Term, (384) 1875, before his Honor, *Kerr, J.*

The facts pertinent to the points raised and decided in this court, are fully stated in the opinion of Justice READE.

From the refusal of his Honor to place the case on the trial docket, the defendant appealed.

Mendenhall & Staples, Tourgee & Gregory, for appellant.

Scott & Caldwell, contra.

READE, J. The plaintiff had obtained judgment against the defendant before a Justice of the Peace. The defendant had filed a petition for a writ of *recordari* to take the case up to the Superior Court. While that petition was pending, and before the Superior Court had determined whether it should be put upon the trial docket, the defendant was declared a bankrupt, and received his discharge.

At Spring Term of the Superior Court, 1875, the defendant moved to have the case put upon the trial docket, and offered to plead his discharge in bankruptcy. His Honor refused to put it upon the trial docket, upon the ground that the defendant had been guilty of laches in not appealing, and refused to allow the defendant to plead his discharge in bankruptcy, because it was not offered in apt time. And in this we think his Honor was mistaken.

Apt time sometimes depends upon *lapse* of time, as when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards. But it more usually refers to the *order* of proceeding, as *fit* or *suitable* time.

No time is prescribed within which a discharge in bankruptcy is to be pleaded.

When anything is done in the proper *order*, then whether the time is long or short, makes no difference. Now, in this case, the very first step taken after the defendant was discharged, was a motion to
(385) docket, and to be allowed to plead the discharge. That was in apt time, although it was a long time—some two years—after the discharge. Why no steps had been taken during these two years, by either of the parties—by the plaintiff to dismiss, or by the defendant to have put upon the trial docket—does not appear; nor is it important. There the case stood upon the docket, continued from term to term, until Spring Term, 1875, when the defendant moved to docket and to plead his discharge. At an earlier *time* he might have moved, but at no earlier *stage* of the proceedings. No step backwards was taken.

There is error. This will be certified.

PER CURIAM. Judgment accordingly.

Cited: Dawson v. Hartsfield, 79 N.C. 340; *Electric Co. v. Light Co.*, 197 N.C. 770.

THE BANK OF GREENSBORO v. THE COMMISSIONERS OF THE CITY OF GREENSBORO.

Under the charter of the city of Greensboro, the Commissioners thereof have the power to tax the stock of the Bank of Greensboro.

This was a "CONTROVERSY submitted without action," and decided by his Honor, *Judge Kerr,* at Chambers, in the county of GUILFORD, — day of January, 1876, upon the following

CASE AGREED:

"Of the ordinances passed by the Commissioners of the city of Greensboro, there is one for defraying the current expenses of the corporation, for the years 1875 and '76, to-wit:

" 'On all personal property, taxed at this time by the State, within the corporate limits of the city, included under the name (386) of personal property, money, credits, bonds, stocks, etc., on each one hundred dollars value, seventy-five cents (75 cts.).'

"The Bank of Greensboro returned to the Township Trustees for assessment, the capital stock of said bank, for which certificates had been issued to the different shareholders, to the amount of forty seven thousand dollars ($47,000), upon which a tax had been levied for county and State purposes. The Commissioners of the city of Greensboro, in pursuance of their charter, made out a list of taxes for collection, and included therein the said stock of the bank, to the amount of forty-seven thousand dollars ($47,000), and directed the city collector to collect the tax on the same.

"The Bank of Greensboro contends that under the charter of the city of Greensboro, the Commissioners have not the power to collect taxes on bank stock, investments, etc.

"On the other hand, the Commissioners contend that they have the power to tax bank stock, as well as all other investments, under their charter.

"It is conceded, that the taxes have been demanded by the city tax collector, and payment thereof refused by the said Bank of Greensboro. And it is agreed by and between the parties to this suit, to submit the matter in controversy between them for the decision of the court; and should the court be of opinion with the defendant, then judgment shall be entered up against the plaintiff for the taxes due upon the said sum of forty-seven thousand dollars ($47,000).

"Should the opinion of the court be otherwise, then judgment to be given in favor of the plaintiff."

His Honor being of opinion with the plaintiff, gave judgment accordingly, whereupon the defendant appealed.

Staples, for the appellants, submitted:

Does Section 45, of the charter of the city of Greensboro con-
(387) fer upon the defendants authority to tax the capital stock of banks, solvent credits, etc.?

The court will carry out the intention of the Legislature, if, by a *reasonable* and *fair* construction of the language used, they can consistently do so. To ascertain fully what the meaning of the clause, "On all real and personal property whatever, which may at the same time be subject to taxation by the State," etc., used in the charter, reference should be had to the subjects of taxation specifically set out in the act of the Legislature to "Raise Revenue," and also the act to provide for collection of taxes. See Public Laws, 1874-75, Chapters 184 and 185.

Money, solvent credits, bonds, and the capital stock of National, State and *private* banks are "subjects of taxation" under the State law. See Sub-divisions 4, 5, 6, Sec. 9, Chap. 184, Pub. Laws, 1874-75, p. 216.

If the charter authorizes the defendants to collect taxes upon stocks, bonds, solvent credits, etc., the act is constitutional. *Pullen v. Commissioners of Raleigh,* 68 N. C., 451.

The power depends upon the charter. *Ibid.*

It is admitted that a reasonable and fair construction of the charter, taking in consideration therewith the reference made to the specific description contained in the State law, would warrant the court in declaring that the language used in the charter was intended to confer, and does confer upon the defendants the authority claimed.

Dillard & Gilmer, contra.

RODMAN, J. Section 43 of the charter of the city of Greensboro authorizes the city government to annually levy and collect the following taxes: "On all real and personal property whatever which may at the same time be subject to taxation by the State, an *ad valorem* tax

not exceeding 25 cents on the $100 valuation." This limit was
(388) afterwards extended by the act of 1874-75, Chap. 184. The charter of the bank requires it to give in its stock for taxation. So that if the stock but for this provision would be taxable against the owners, it is taxable against the bank. The opinion delivered at this term in *Wilson v. City of Charlotte, post,* 748, declares that stock in a bank is taxable as property. This being the only question made in the

case, our opinion is that the judgment be reversed and judgment be given that defendant recover of plaintiff according to the case agreed.

PER CURIAM. Judgment reversed, and judgment that defendant recover of plaintiff according to case agreed.

JOHN H. GARRETT AND WIFE v. THE BOARD OF COMMISSIONERS OF THE TOWN OF EDENTON.

In an action to recover damages to land, caused by the defendants' ponding water thereon in the Fall of 1873, it is competent for the plaintiff, for the purpose of fixing the amount of damages, to show the diminished products of the land in the Spring of 1874, as compared with the products of previous years from the same land.

This was a CIVIL ACTION, to recover damages for injury to land, tried before *Eure, J.*, at Spring Term, 1875, of the Superior Court of CHOWAN County.

The plaintiffs were the owners, before and since to the present time, of certain lots in the town of Edenton, which they regularly cultivated.

The defendants were the Board of Commissioners of the town of Edenton.

Upon the trial in the court below, the plaintiffs introduced evidence tending to show that the defendants caused to be (389) opened a ditch upon the back of the town in September, 1873, by reason of which water was ponded upon the plaintiffs' lots during the Fall of 1873, and the winter of 1873-74.

The summons in this action was issued on the 4th day of April, 1874. In their complaint the plaintiffs demand damages from the defendants, for ponding water on their lands.

The plaintiffs introduced further evidence, and offered to show the diminished products of the land in the vegetable crops of the Spring of 1874, and that this diminished product was in part caused by the ponding of the water on the land by the defendants' ditch, before the action commenced. To this evidence the defendants objected. Objection overruled by the court, and the defendants excepted.

The jury returned a verdict for the plaintiffs. Judgment in accordance therewith, from which judgment defendants appealed.

A. M. Moore and Badger & Devereux, for appellants.

Gilliam & Pruden, contra.

READE, J. The lands of the plaintiffs were used for cultivation and the production of crops; and they were flooded with water by the defendants in the Fall of 1873, and in the Winter of 1873-74. The action was commenced on the 4th of April, 1874. The injury complained of is, the flooding the land. Damages are demanded,

(1) First, for injury to the crops;

(2) Secondly, for injury to the plaintiff's health;

(3) For injury to the land itself.

We suppose there was no crop raised in the Fall or Winter. It is not alleged that there was. No point seems to have been made about health. So, as we understand it, the only matter at issue was the injury to the land itself.

Was the land injured? If so, how much, seem to have been
(390) the issues. In order to show how much the land was injured, the plaintiff was permitted to show how much the crop of 1874, made after the action was commenced, was less than the crops of former seasons. To this the defendants objected. And that is the only point before us.

What is the standard of value of lands used for cultivation? Their productive capacity. How is that best ascertained? By actual experiment. If they have usually yielded a given quantity, and are then flooded so that they cannot be cultivated at all, may not their former productiveness be proved to show the amount of damage? Unquestionably. If they are not flooded so as altogether to prevent cultivation, but are flooded so as to reduce their production one half, may not that be proved to show the amount of damage? Unquestionably. And this is the best possible evidence of the amount of damage. If the trial had been *before* the crop was made, the witnesses would have been asked: How much do you think the land is injured? And the answers would, of necessity, have been conjectural. But *after* the crop was made, the answers were from observation.

The doctrine of "remote damages," "good bargains" and "speculative profits" does not come in; because the only injury complained of was that done to the land in the Fall and Winter, and the diminution of the crop was the evidence of the amount of the damage. See *Spilman v. Roanoke Navigation Company, post,* 675.

There is no error. Judgment here for plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Spilman v. Navigation Co., 74 N.C. 678; *Oates v. Mfg. Co.,* 217 N.C. 489.

(391)

STATE v. NANCY HONEYCUTT.

Where, on a trial for a capital felony, the jury has had the case for six days, and on Saturday of the second week of the term, they come into court, and being polled by his Honor, he finds as a fact that they cannot agree; *Held*, that the Judge below did not err in withdrawing a juror and directing a mistrial to be entered; and further, that the prisoner, on that account, was not entitled to be discharged.

INDICTMENT against the mother for killing her bastard child, tried at the Fall Term, 1875, of the Superior Court of YANCEY County, before his Honor, *Judge Henry*.

The case, after argument and the charge of his Honor, was given to the jury on Monday of the second week of the term. His Honor on Saturday, (six days,) polls the jury, and finds as a fact, that they are unable to agree, he directs a juror to be withdrawn and a mistrial entered.

The defendant thereupon moves to be discharged, as being once put in jeopardy; motion refused, whereupon defendant appeals.

Busbee & Busbee, for defendant.
Attorney General Hargrove, for the State.

PEARSON, C. J. In *"Jefferson's case,"* 66 N. C., 309, it is declared to be the opinion of the court "by the cases *State v. Price,* 63 N. C., 529; *State v. Alman,* 64 N. C., 364; *State v. Baker,* 65 N. C., 332, it is settled, that in a trial for a capital felony, for sufficient cause the Judge may discharge the jury and hold the prisoner for another trial."

That principle being settled, no further discussion of the subject is called for.

In *Jefferson's case, supra,* it is said, "as the case was given to (392) the jury on Tuesday of the second week of the term, we are inclined to the opinion that had his Honor *remained at the court,* until Saturday night (ready to instruct the jury) and then discharged them, the fact that the case had been with the jury four days, and that from declarations of jurors in the presence of the others in open court, before him, he was satisfied the jury would not agree, and that it was useless, and 'not necessary for the purposes of the case' to continue the term longer, and had thereupon discharged the jury, there would have been no error."

In the case now before us, these conditions are all strictly complied with. The Judge is present during the entire term. The case had been with the jury for six days, and not four, as in the case supposed, and his Honor not content "with the declarations of some of the jurors in

the presence of each other in open court before him," *polls* the jury on that question, and on this evidence finds, as a fact, that the jury could not agree, and orders a discharge of the jury, and that the prisoner be held for trial at the next term.

The supposed state of facts in *Jefferson's case* was fully considered by the members of the court, and although that is *dictum,* or rather matter used for illustration, after full consultation, we now hold it to be the law of the land.

It follows the prisoner is not entitled to a discharge, and must stand another trial.

This will be certified.

PER CURIAM. *Venire de novo.*

Cited: S. v. McGimsey, 80 N.C. 379; *S. v. Bass,* 82 N.C. 571; *S. v. Locke,* 86 N.C. 649; *S. v. Washington,* 89 N.C. 538; *S. v. Carland,* 90 N.C. 672; *S. v. Twiggs,* 90 N.C. 687; *S. v. Whitson,* 111 N.C. 697; *S. v. Tyson,* 138 N.C. 628; *S. v. Cain,* 175 N.C. 829.

(393)

STATE v. OLIN JAMES.

A hand, who has been regularly assigned to work a certain road, and who has been properly summoned by the overseer thereof to work said road, cannot excuse himself from aiding to repair a bridge over a ditch across the road, upon the ground that it is the duty of the person who cut the ditch to make a bridge over it, and keep the same in repair.

This was a proceeding in the nature of a CRIMINAL ACTION, commenced by warrant before a Justice of the Peace, and carried by appeal to the Superior Court of DUPLIN, and there tried at Spring Term, 1875, before his Honor, *Judge McKay,* and a jury.

On the trial in the court below, the jury returned the following verdict:

"The defendant is a hand properly assigned to work on a public road in Duplin County, from Concord Church to the Sampson County line. Stephen E. Hall is the overseer of said road and regularly appointed. The defendant was properly summoned by said overseer to attend and work said road. The defendant attended according to said summons and willingly worked said road as required, until they reached a point on said road, at which it is crossed by a ditch or canal, which was cut by one Alfred Hall about sixteen years ago. The said ditch was cut

by said Hall for the purposes of benefiting the road, as well as draining or benefiting his (said Hall's) land, lying below said road.

"After the said ditch was cut across the road, Hall put a sufficient bridge across the same, which stood for several years; but in June, 1871, the bridge was swept away by a freshet, and one Boone, who was the overseer, (the bridge having been repaired all along by the overseers of the road, from the time it was built,) summoned the hands, and with the road-hands, aided by Hall who originally built it, and who furnished a team for the occasion and five dollars in money to (394) purchase plank to cover the bridge, rebuilt the same. That subsequently, the overseer with the hands, finding the bridge too high, took it down; and then seeing that it was rotten, he applied to said Hall for help to rebuild it. Hall informed the overseer that he could not help him then, but he would loan him his ox. The overseer returned and informed his hands of what Hall had said, and left it to a vote of the hands whether they would fill up the ditch, and a majority decided in favor of filling it up, which was done with logs and dirt dug from each side of the same. Afterwards the hands dug it out and built the present bridge, upon which the defendant, being required to work by the overseer, refused, alleging that Hall, who dug the ditch and erected the first bridge, was liable for the repairs thereof, and not the road hands.

"Upon these facts, if the court should be of opinion that the defendant is guilty, then the jury find him guilty; if the court should be of opinion that the defendant is not guilty, then the jury find him not guilty."

Upon the foregoing facts, as found by the jury, the court was of opinion that the defendant was guilty, and so declared and gave judgment accordingly. From which judgment the defendant appealed.

No counsel in this court, for defendant.

Attorney General Hargrove and Stallings and Battle & Mordecai, for the State.

SETTLE, J. This is a proceeding in the nature of a criminal action, commenced before a Justice of the Peace, under Sec. 10, Chap. 104 of Battle's Revisal, and it presents this question: Can a hand who has been regularly assigned to work a certain road, and has been regularly summoned by the overseer thereof to work said road, excuse himself from aiding to repair a bridge over a ditch across said road, upon the ground that it is the duty of the person who cut the ditch to (395) make a bridge over it and keep the same in repair? One who cuts a ditch across the road, or wilfully throws a tree across it, or erects a fence or other obstacle therein is indictable; but it does not follow that the overseer of the road, who neglects for an unreasonable time to

remove such obstruction, may not also be indicted. And in order that the overseer may properly perform his duty, the law gives the remedy pursued in this case against such hands as refuse to obey his legitimate orders in relation to the road.

It may be that upon proper proceedings, the overseer and road hands could be relieved of the duty of repairing the bridge over the ditch which obstructs the road in question, and that, that duty could be placed where it properly belongs; but it is not for the hands assigned by law to work a road to say, that because A obstructed the road, it is his duty to remove the obstruction, and we will not do so.

Were this so, it would of course put an end to the present system of road laws, which I am inclined to think would be well enough, since under it, our public roads are sadly neglected; but this is a matter for the consideration of the legislature, and not for the courts.

The judgment of the Superior Court is affirmed. Let this be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Witherspoon, 75 N.C. 224.

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(396)

STATE v. JIMMY GRAVES.

Rails, when made up into a fence upon the land, becomes a part of the realty; and an indictment for Forcible Trespass to personal property, in carrying them away, cannot be supported.

INDICTMENT, for Forcible Trespass in removing rails, tried at the Spring Term, 1875, of DUPLIN Superior Court, before his Honor, *Judge Kerr.*

The case made out and signed by counsel, states that the defendant and a boy moved a division fence between the field the defendant rented, and the prosecutrix, who was tenant by dower on the other side, she being present and forbidding it. Under the charge of his Honor, the defendant was found guilty, whereupon he appealed.

Stallings and Battle & Mordecai, for defendant.
Attorney General Hargrove, for the State.

BYNUM, J. The indictment is good, but the evidence does not support it. The charge is a forcible trespass to personal property, and the evidence goes to establish a forcible trespass upon the realty. Rails when made into a fence upon the land, become a part of the land, and

as much so as a tree or a house. The act of taking the rails from the fence is not the subject of larceny at common law, nor is it a trespass to personalty. To cut down and carry away a tree by one continuous act, is not a trespass to personal property. So to remove rails from a fence and carry them away by the same continuous act is not such a trespass. The evidence here is that the defendant, with a boy and cart, took the rails from the fence and hauled them away, until all the fence was removed. While he was in the field thus loading his (397) cart with rails taken from the fence, he was forbidden to remove them by the prosecutrix. Certainly at that time the rails were not in her actual possession as personal property. At no time were they in her actual possession after they were removed from the fence. Yet it is necessary to allege in the indictment and prove on the trial, this actual as distinguished from constructive possession, in order to make out this criminal offence.

But the case turns upon the question whether the rails thus taken from the fence and removed, by one continuous act, became personal property thereby, so as to support this indictment. In the *State v. Burt*, 64 N. C., 619, the defendants found a nugget of gold on the land of another, on the top of a rock pile and separated from the view. After consultation among themselves, they appropriated it to their own use. It was held to be a part of the realty, and the taking and carrying away, being one continuous act, it did not become personalty so as to be the subject of larceny. 2 Russ. on Cr., 62.

So, a tree severed and taken away by a continuous act. But if the tree has been some time felled, and is then taken away by the one who felled it, it has become personalty, and is the subject of larceny. Whar. Am. Cr. Law, Sec. 1733.

If the rails had been taken from the fence and piled up upon the land of the prosecutrix, for example, and after some time, had been removed by the defendant, the prosecutrix being present and forbidding it, an indictment for forcible trespass to personal property would lie. It is unnecessary to decide whether an indictment for a trespass to realty, can be supported upon the evidence, as the case goes off upon the other point. It seems that the fence was a division fence; at least the prosecutrix claimed upon one side, and the defendant upon the other.

Perhaps both claimed the land upon which the fence was (398) situated, though the defective statement of the case does not disclose how that was.

There is error.

PER CURIAM. Judgment arrested.

Cited: *S. v. Hovis*, 76 N.C. 117; *S. v. Beck*, 141 N.C. 831; *S. v. Baker*, 231 N.C. 141.

GWATHMEY & DOBIE AND OTHERS v. EDW. PEARCE, ADM'R. OF AUG. R. CREECY.

A widow, who joined her husband before his death, in executing a deed of trust, to secure a certain debt of his, and conveying her right of dower in the only land held by them at the husband's death, becomes a creditor of her husband's estate to the amount of the value of her dower in the land.

EXCEPTIONS to the account of an administrator, heard before the Probate Court of CHOWAN County, and thence carried by appeal to the Superior Court and again heard by *Eure, J.*, at Fall Term, 1875.

His Honor, presiding in the court below sends to this court, substantially, the following facts:

Augustus R. Creecy died in November, 1872, and administration on his estate was granted to the defendant, Edward Pearce.

On the 21st of August, 1871, the intestate, Creecy, bought certain lands, and on the same day he conveyed the same by trust deed, in which his wife, Mary E., joined to convey her right of dower, to John Roberts to secure certain debts due him. Creecy nor his wife owned any other real estate whatever. No part was paid to Roberts during the life of Creecy, but was still due at his death.

(399) After Creecy's death, his widow, Mary E., filed her petition against the administrator and heirs at law, praying that the administrator be directed to sell the personal estate of his intestate, the two-thirds of the said land not encumbered by dower, and the reversion in the dower, (which had already been assigned to her,) and to apply the proceeds to the debt due Roberts, in exoneration of her dower.

Upon appeal to the Supreme Court, reported in 69 N. C., 67, the prayer as to the personal estate was refused, and the following order made: That a sale be made of the two-thirds of the land not embraced by the dower, and the reversion in the dower, and the proceeds thereof be applied to the Roberts debt, and that the residue of the Roberts debt be paid rateably out of the personal estate in the course of administration; and if any part remain yet unpaid of the Roberts debt, that the dower be sold and pay the same.

The administrator filed his petition in obedience to said order to sell the lands to make assets, and obtained license to do so on the usual terms.

The trustee, Roberts, claimed his right to sell under the trust, and according to its terms, and refused to permit the administrator to do so; but at the request of the administrator and the widow, sold according to the order of the Supreme Court: First, two-thirds of the land; then the reversion in the dower; and finally, the dower right, which

brought the sum of eight hundred dollars. The total sales of the said land was just sufficient to pay the debt to Roberts.

The estate of the intestate paid about forty per cent of its indebtedness. The widow demanded of the administrator three hundred and twenty dollars as her rateable share, being forty per cent of the value of her dower. This the administrator paid, and filed her receipt therefor, as a voucher for his disbursements, which was allowed by the Clerk. To this the plaintiffs, who were creditors of the intestate, excepted. The Clerk overruling the exception, the plaintiffs appealed to the Superior Court. In that court the judgment of the Clerk was (400) affirmed, and the plaintiffs again appealed.

No counsel in this court for the appellants.

Gilliam & Pruden, contra, submitted: That Mrs. Creecy, the widow's receipt is a proper voucher for that:

1. Since the act of 1866, she has a *vested right* of dower in the lands of her husband, acquired after the marriage, of which *his alienation* could not divest her. *Sutton v. Askew,* 66 N. C., 172.

She conveyed that right to secure *his* debt to Roberts, and is his surety to that extent, and is entitled to be subrogated to the rights of the principal, Roberts, against her husband's personal estate to the amount of the payment made by her as surety, *i.e.,* to 40 per cent of $800. 69 N. C., 67; *Towe v. Newbold,* 57 N. C., 212; *Brinson v. Thomas,* 55 N. C., 416 (bottom); Adams' Eq., 269; 1st Eq. Leading Cases, 144 and 153; 2nd do. 226, 577 and 591 (3d American edition).

2. Roberts having *two funds,* out of which to make his claim, exhausted the widow's *only one,* her equity of substitution to Roberts' rights against the second fund, the personal estate, is complete. *Jones v. Zollicoffer,* 9 N. C., 625; *Greenlee v. McDowell,* 56 N. C., 325; Story's Eq. Juris., 625, and cases cited there.

3. Had Roberts looked to the personal assets first after selling two-thirds and reversion in land, he would have diminished that fund for the general creditor $320, and relieved the dower to the same extent. How are the general creditors damaged by the widow's claim then? "They lose not a cent." Roberts "gets but his due." "The widow gets back her dower diminished by her own charge." "The parties all have what they ought." *Jones v. Zollicoffer, supra,* specially Judge RUFFIN'S brief.

4. The widow is considered in equity assignee of Roberts' claim. *Myrover v. French,* 73 N. C., 609; *Carter v. Jones,* 40 (401) N. C., 196; 1st Leading Cases, 154 *et seq.*

5. The personal estate is the primary fund out of which to pay the trust debt in the absence of equities changing the rule. Story's Equity Jurisprudence, 532; Coke Littleton, Buller's Note, 2 Vol. 208 b; *Packly v. Packly,* 1st Vernon, 36.

READE, J. Where a wife conveys her separate property to secure a debt of her husband's, the relation which she sustains to the transaction is that of surety. *Purvis and Wife v. Carstarphen,* 73 N. C., 575.

Here the wife joined her husband in the conveyance of his land in trust to pay his debt; in which land she had, under our dower statute, a vested right to dower, to be allotted after her husband's death; and she joined in the deed for the purpose of binding her dower. After her husband's death the whole land, her dower included, was sold under the trust deed to pay the debt. This made the wife a creditor of her husband's estate, to the amount of the value of her dower in the land. That is the only point in this case. And it was rightly decided by his Honor.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: Gore v. Townsend, 105 N.C. 231; *Trust Co. v. Benbow,* 135 N.C. 312; *Chemical Co. v. Walston,* 187 N.C. 824, 825; *Griffin v. Griffin,* 191 N.C. 229; *Blower Co. v. MacKenzie,* 197 N.C. 155, 158; *Barnes v. Crawford,* 201 N.C. 438; *Trust Co. v. White,* 215 N.C. 566; *Brown v. McLean,* 217 N.C. 557; *Smith v. Smith,* 223 N.C. 437.

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(402)

STATE v. JOHN W. POOL.

Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the court:

Hence, in Section 153, Chap. 32, of Battle's Revisal, which reads, "If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purpose of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage in lessened or retarded, or whereby the navigation of such course by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty," etc., the disjunctive conjunction, *or,* in the latter portion thereof, between the words "retarded" and "whereby," should be read as *and,* thus making such section read, "If any person shall wilfully fell any tree," etc., "whereby the natural flow of the water," etc., "is retarded, *and* whereby the navigation of such course by any raft or flat may be impeded," etc.

Such a change of words is consistent with the rules of construction, and divests the said section of all constitutional objections, and it becomes consistent with law, reason and public policy.

Justices READE and RODMAN *dissenting.*

INDICTMENT for obstructing a creek by the erection of a dam across the same, tried before his Honor, *Judge Watts,* at the Fall Term, 1875, of the Superior Court of JOHNSTON County.

The defendant was held to answer for a misdemeanor, under act of 1872-73, Bat. Rev., Chap. 32, Sec. 154. On his trial in the court below, the jury returned a special verdict, finding certain facts, upon which the presiding Judge pronounced him guilty.

From this judgment, the defendant appealed.

The verdict of the jury and all other facts, necessary to an understanding of the case, are fully stated in the opinion of (403) the court.

No counsel in this court, for defendant.

Pou, for the prosecution, filed the following brief:

It is found by the verdict in this case, that the obstruction was placed in the stream *after* the passage of the act.

The prohibition to the owners of running streams, is not the taking of private property for public use; but is a proper general police regulation prescribing the mode or manner of using their property. "The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens." See 2 Kent's Com. (top) p. 415, (edition in this library).

By the act under consideration, the Legislature wisely forbids the wanton obstruction of running streams, and regulates the use of them for fishing, leaving their utilization for motive power free, but subject to the common law of nuisance. For Act, see Bat. Rev., p. 323, Secs. 154, 155.

Whether the Legislature used its powers wisely or otherwise, the court will not consider.

Attorney General Hargrove, for the State, cited and relied on the following authorities: *State v. Glen,* 52 N. C., 321; *Cornelius v. Glen, Ibid.,* 512; and *Pugh v. Wheeler,* 19 N. C., 50.

BYNUM, J. The defendant is indicted for constructing a dam across Swift Creek, in the county of Johnston, whereby the natural flow of the

water through the same is retarded and lessened, the said dam and obstruction not being for the purpose of utilizing the water as a motive power.

The jury found the following facts as a special verdict:

1. That the bed of the creek at the point named, and the waters of the creek, and the land upon each side of the stream were duly
(404) granted by the State in 1749 to one Nathaniel Giles, and that from him the title has regularly descended to the defendant.

2. That the said creek is not navigable, and has never been so declared by the Legislature.

3. That the dam was built within two years prior to the finding of the indictment, and that by reason of its construction the natural flow of the water is retarded.

4. That the stream is forty-five feet wide at the point where the dam and trap are erected.

Upon these facts found by the jury, the court below, as a matter of law, declared that the defendant is guilty.

The indictment is founded upon an act incorporated in Battle's Revisal, Chap. 32, Section 154, which was enacted in 1872-73, and is as follows: "If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purpose of utilizing water as a motive power, in any branch, creek or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, or whereby the navigation of such course by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days."

It will be observed that the indictment charges the offence to be in "retarding the natural flow of the water through Swift Creek" by the obstruction of the dam, and therefore no question arises under Section 155, which relates to fish dams. The construction of Section 154 then will determine the case.

The prosecution insisted that by the use of the disjunctive conjunction, "or," in the section just cited, every wilful obstruction of a creek or branch, in any part of the State, which may retard the natural flow of the water, is indictable. And so it is, with that construction.
(405) But it cannot be supposed that an intelligent Legislature, meant, that every obstruction of a stream, no matter how insignificant, private, or removed from public access or use, shall be indictable and subject the offender to fine and imprisonment. The statute has no degrees, and but the single exception, to-wit: where the water is utilized as a motive power. So that it is equally a crime to build a dam, to wash the extensive gold deposits and other minerals of the State, or to

pond water to save ice for domestic or commercial use. A man may not construct a pond for raising fish, but he may, to run an illicit distillery, for that is utilizing water as a "motive power." Many of the streams, in the western part of the State, are hardly accessible to man, are remote from habitations, and of such rapid fall, that no obstruction can create a nuisance or affect the public. In that region, dams are often built and water diverted to dwellings and lots for domestic uses, and sometimes for the irrigation of meadows and gardens. In many portions of the mountain district, large volumes of water are thus conducted from dams, for many miles, in canals and trunks, to the surface mines, where the water is used for working away the dirt, preparatory to collecting the gold or other metals.

Certainly the act does not intend to make such obstructions and the like, unlawful, and if it does, the least that can be said of it, is, that it is of questionable constitutionality, apart from its impolicy. *State v. Glen*, 52 N. C., 321.

Whenever an act of the Legislature can be so construed and applied, as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts. Cooley, 185; *Newland v. Marsh*, 19 Ill., 384. This can be done, in our case, consistently with the rules of construction, by reading the word "or" as "and," which was most probably intended by the draftsman. The section will then read: "If any person shall wilfully fell any tree, etc., whereby the natural flow of the water, etc., is retarded, *and* whereby the navi- (406) gation of such course by any raft or flat, may be impeded," etc.

Such a change of "or" into "and," is often resorted to in order to effect the intent of the parties, and prevent the entire avoidance of the instrument. *Parker v. Carrow*, 64 N. C., 563, and similar constructions, are allowed and encouraged by our statutes. Bat. Rev., Chap. 108. This construction divests the act of all constitutional objections, and it becomes consistent with law, reason and public policy. To the extent that the streams and waters of the State, are used for navigation, or are fairly capable of such use, even for "rafts and flats," they fall under the control of the State, so far that the private citizen, though the owner of the land and the bed of the stream, may not exclude the public from their navigation, when the State forbids it. Such only is the declared purpose of Section 154; and it remains to be seen whether the special verdict, finds facts which bring the defendant under the penalties of the act. It is found that the bed of the creek, and the lands upon both sides of it, belong to the defendant, by the grant of the State; and that the creek is not navigable, and has never been so declared by the Legislature. These findings would seem to end the case; for if the creek is not navigable, the alleged obstruction cannot "impede, delay or

prevent" the navigation, and so there is no violation of the statute. If the indictment is framed upon the idea that the obstruction is a public nuisance, no facts are found which constitute it such. It is not found that the public health is affected thereby, or that the lands of others are injured, or that it either occasions, or is calculated to occasion, any public or private inconvenience or deprivation of right. The owner is allowed by the act, to construct a dam of any height, upon the spot where this one is erected, provided he uses the water as a motive power to drive machinery, although he thereby retards the flow of the water, impedes navigation and stops the passage of fish. Such retarda-
(407) tion is no public nuisance. How the same act, for a different purpose, though with the same physical results, can be a nuisance to the public, is, by no means clear.

By the finding of the jury, the creek at the dam, was unnavigable for any purpose, and was strictly private property. The only right possessed by others, was to the use of the running water, above and below the lands of the defendant, *ad potandum et lavandum.* The verdict establishes that no such right of others was disturbed.

Take the case in the strongest possible aspect for the State: Suppose the Legislature had enacted that Swift Creek should be considered to be a public highway and a navigable stream. If, in *fact,* it was neither, the Legislature cannot *by a simple declaration,* make it so. Because if it is private property, the Legislature cannot appropriate it to public use without compensation. Cooley, Const. Lim., 590; *Morgan v. King,* 33 Pa. Stat., 301. If the use or enjoyment of a thing, not in itself immoral, or injurious to others or their rights, is prohibited, it is unconstitutional, and opposed to the genius and spirit of our institutions.

In the *State v. Glen,* 52 N. C., 321, after an exhaustive examination of the question and the authorities, this court announces as the law of North Carolina, in relation to the water courses of the State, three resolutions, embracing the three classes of streams into which the subject is divided. The third resolution only, applies to this case, and is thus stated:

3. "All the rivulets, brooks and other streams, which from any cause, cannot be used for intercommunication by inland navigation, are entirely the subjects of private ownership, are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling or other lawful trade or business. The only restriction upon this right of ownership arises, *ex necessitate,* from the nature of running water; and it is, that the owner shall so use the water as not to interfere with the similar
(408) rights of other proprietors, above or below him, on the same stream. *Pugh v. Wheeler,* 19 N. C., 50. Rights acquired in

streams of this class, by grants from the State, for the bed of the stream, cannot be taken from the owners by the Government, except in the exercise of the power of eminent domain, and then only for public use, with a provision for just compensation. 2 Dev. & Bat., 460."

In the subsequent case of *Cornelius v. Glen,* 52 N. C., 512, it was that the Yadkin River, not being a navigable stream, a grant from the State of the bed of the river, passes it as does any other grant of land, and the Legislature has no power to take it away, either for public or private uses, without making compensation to the owner. And in that case, attention is called to a distinction, the non-observance of which has led to some confusion; that is the distinction between the *absolute* ownership which is acquired to the bed of the river, when it has been actually granted and paid for, and the *limited* ownership, which is acquired where a grant calls for "a corner on the bank of a river, and then with the meanders of the river to another corner," etc.; in which case, although by implication of law, the grant extends to the middle of the river, and confers ownership for certain purposes, as appurtenant to the land granted, yet as it has not been actually granted and paid for, certain rights, by like implication, are still in the State.

The court then observes that "this will seem to account for the many acts of the Legislature, that have been passed in former years, in regard to the passage of fish, extending at first down to small streams, such as Haw River, Deep River, Uharrie, South Yadkin and the like; which was well enough until the beds of these streams were entered and grants taken out; after which those streams were left out of the fish acts," and parties were content with the rights of riparian ownership, the privilege of going to the middle of the stream, as contra-distinguished from the ownership of those where grants actually cover the bed of the stream. PEARSON, C. J., in delivering the opinion of the court, thus sums up the law: "Not being navigable, the defendant, by (409) virtue of the grant to Phillips, is the owner of the bed of the river, and the Legislature had no more power to impair his right of ownership, either for public or private purposes, without making compensation, than it had to take away any other piece of land, which he had bought and paid for, and for which the State had been paid." See also *Pugh v. Wheeler,* 19 N. C., 50. Whether the State can enforce against the owner of the land and bed of an unnavigable creek, an act of the Legislature forbidding its obstruction to the passage of fish, is a question not raised upon this indictment and verdict, and need not be discussed. The point upon which the decision rests is, that where the indictment is for a public nuisance in obstructing the flow of water in an unnavigable stream, and the special verdict of the jury negatives the

idea of a nuisance, or any injury or circonvenience, public or private, the defendant cannot be declared guilty.

There is error. Judgment reversed.

PER CURIAM. *Venire de novo.*

Cited: S. v. Pool, 75 N.C. 597; *S. v. Sutton,* 139 N.C. 578.

RICHARD TEN BROECK v. WILLIAM H. ORCHARD.

In an action for the recovery of land under the Code of Civil Procedure, the defendant may set up an equitable defence to the claim of the plaintiff who has the legal title; and all persons interested in such equitable defence, should be made parties, and not driven to assert their rights by a separate action.

CIVIL ACTION in the nature of ejectment, tried before his Honor, *Judge Schenck,* at Fall Term, 1875, of CABARRUS Superior Court.

(410) The plaintiff moved the court to strike out a portion of the defendant's answer, setting up a counter-claim as a bondholder of the Phoenix Gold Mining Company.

The motion was allowed and the defendant excepted. The defendant then moved the court to make all the other bondholders parties. The motion was overruled and the defendant appealed.

All other facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

Shipp & Bailey and Montgomery, for appellant.

Barringer and Wilson & Son, contra.

RODMAN, J. The plaintiff claims title to certain mineral lands, and that the defendant is in possession, and unlawfully withholds it from the plaintiff after a demand. Defendant admits that plaintiff has the legal title, and that he went into possession under plaintiff as his agent or tenant. On this answer, the plaintiff would be entitled to judgment in a court of law, and under our former system the defendant would have been driven to assert his equitable rights in a court of equity. Under our present system he can have the benefit of any equitable defence in the first action. The defendant alleges as an equitable defence, that a company called the Phoenix Gold Mine Company, owned the lands. The Company issued bonds to enable them to work the mines, and conveyed all its real estate to Jacobson in trust, to

secure the bonds and other debts of the Company. That defendant became the holder for value of certain bonds of the Company and also otherwise its creditor. It is not distinctly stated that these debts were secured by the deed to Jacobson. Jacobson died, Stagg was appointed trustee in his place, and he sold to the plaintiff to hold, as we understand the answer, for all the creditors of the Company, but certainly in trust to secure debts to the defendant. In part performance of this trust, and under an agreement with the plaintiff which it is not (411) material to state fully, the defendant took possession of the lands. The plaintiff denies the particular agreement alleged by the defendant, and that the debts to defendant are secured upon the land, and does not claim to hold on any trust whatever.

Taking the defendant's answer as true for the present, no doubt a trustee, in trust to sell and pay creditors, is entitled to the possession of the property against any or all of the creditors, and to its management and the receipt of the rents and profits; because they are necessary to carry out the purposes of the trust, and the creditors have no equitable estate in the land, but only a right to the proceeds. That is the case when he admits the trust and seeks the aid of the court in executing it. The case, however, is different when he denies the trust and claims the equitable as well as the legal estate for himself. In that case the mere possession of the legal estate will not be conclusive. The action will be considered as between rival claimants to the equitable estate, and the defendant in possession will not in general be ejected, (although he be but one of several equitable claimants,) until the rights of the parties can be determined. This is in analogy to the proceedings in the action of ejectment at law. It is true that defendant does not claim any equitable title to the land in himself, but he denies any title to the plaintiff except upon a trust which the plaintiff denies. In such case, "*melior est conditio possidentis.*" If a case exists for the appointment of a receiver, such as is provided for in Sec. 215 of C. C. P., the court in which the action is pending may appoint one.

To refuse to the defendant the benefit of his equity in this action, and thereupon adjudge the possession to the plaintiff upon his legal title only, would compel the defendant to assert his equity by a separate action, and would be an unnecessary circuity.

If the defendant can assert his equity in this action, it is clear that the other secured creditors are at least proper parties in (412) order that there may be a complete adjustment of the matters in controversy, and that they may have an opportunity to protect their interests. To this end the case will be remanded.

Properly, by analogy to a plea in abatement for want of parties which must give the plaintiff a better writ, the defendants should have

named the creditors whom he desired to be made parties, or given such a description of them as to have enabled the plaintiff to cause service of a summons on them personally, or otherwise as required when the parties are very numerous, or unknown, or non-resident.

If the Judge had refused the defendant's motion on this ground, we should have been disposed to concur with him. But in his absolute refusal we think he erred.

Let this opinion be certified.

PER CURIAM. Judgment reversed. Case remanded.

Cited: Kerchner v. Fairley, 80 N.C. 26; *Farmer v. Daniel,* 82 N.C. 158; *Emry v. Parker,* 111 N.C. 264; *Moore v. Moore,* 151 N.C. 557.

SIMON W. KITTRELL v. ALEXANDER B. HAWKINS.

The condition of a bond to pay the amount sued for, "whenever an issue now pending in the Superior Court of Law for Granville County, between J. H. L., plaintiff, and A. D., defendant, is decided in favor of said plaintiff in said issue," is literally fulfilled, when the said suit is compromised and the plaintiff, upon the payment of a certain sum, was to have judgment entered in his favor; and upon such compromise the obligee in said bond is entitled to recover.

CIVIL ACTION originally commenced in a court of a Justice of the Peace, and heard upon appeal before his Honor, *Judge Moore,* at July (Special) Term, 1875, of GRANVILLE Superior Court.

(413) The suit was brought upon the following instrument:

"Due Simon W. Kittrell, one hundred and sixty-seven dollars and fifty cents, which I hereby promise and bind myself to pay whenever an issue now pending in the Superior Court of Law for Granville County between James H. Lassiter, plaintiff, and Archibald Davis, defendant, is decided in favor of said James H. Lassiter, plaintiff in said issue. Value received by me of said Simon W. Kittrell. This October 21, 1867.

ALEX. B. HAWKINS."

Upon the trial in the Justice's Court, the plaintiff recovered judgment for the principal, with interest, and thereupon the defendant appealed to the Superior Court.

Upon the hearing in the Superior Court, trial by jury was waived and the facts disputed, were decided by his Honor.

It was agreed that the defendant executed the obligation sued on; and that at the time of its execution, there was pending in the Superior Court of Granville County an action of ejectment wherein one James H. Lassiter was plaintiff and Archibald Davis, defendant. That said action was compromised between the parties thereto, by the terms of which compromise the plaintiff was to pay the defendant $750, and the defendant in consideration of the payment thereof, agreed to allow a verdict and judgment to be entered in the action, in favor of the plaintiff, which was done at February Term, 1871.

The defendant in this action appeared and resisted the compromise, and the same was made after having been opposed and resisted by him.

It was found as a fact by his Honor, that the consideration of the obligation sued upon, was the conveyance by the plaintiff to the defendant of all his interest in and to the *locus in quo,* the subject of said action of ejectment.

Upon the facts agreed, and the facts found by his Honor, the court rendered judgment in favor of the plaintiff; from which (414) judgment the defendant appealed.

Batchelor & Son and Edwards, for appellant.
Smith & Strong, contra.

BYNUM, J. The condition of the bond sued on, is to pay "whenever an issue now pending in the Superior Court of law, for Granville County, between James H. Lassiter, plaintiff, and Archibald Davis, defendant, is decided in favor of the said James H. Lassiter, plaintiff in said issue." It is agreed that before the bringing of this suit, the action between the parties above named, was compromised, whereby the said Lassiter agreed to pay Davis $750, and Davis, in consideration thereof, agreed to let a verdict and judgment be entered up against him in favor of Lassiter. Was this such a compliance with the condition of the bond, as enabled the plaintiff to maintain this action?

The condition of the bond was literally fulfilled, and nothing appears in the case to show that it was not performed according to the spirit and intent also, of the parties to the bond. How the parties to this action were to be affected by the result of the suit between Lassiter and Davis, nowhere appears. For ought we see, neither of them had any interest in that action, or was to be affected by it, one way or another. The condition of the bond was that the issue in the action should be found for the plaintiff. That was done, and, as far as we see, it was immaterial whether the result, stipulated for, was brought about by a compromise or other ways. The case states that the action of *Lassiter v. Davis,* was ejectment for land, and that the bond in suit

in this action, was for the purchase of the plaintiff's interest in that land. Be it so, and that the verdict and judgment in favor of Lassiter inures to make good the title of the defendant, Hawkins, which probably was the purpose of the action. The defendant has no right
(415) to complain of that. Suppose, improperly and against the will of the defendant, Lassiter paid the sum of $750 for his verdict, and intends to seek to make the defendant, Hawkins, liable for the whole or a part of that sum. That suggestion has been made. When the defendant is so sought to be charged, he has his remedy, and can make his defence, if he has any. That is a matter wholly outside of this case, and one that we have no right to anticipate. The condition of the bond was saved by the verdict and judgment rendered in favor of Lassiter, and thereby the bond declared on, became due and payable, expressly. *Candler v. Trammell,* 29 N. C., 125.

This view of the case renders unnecessary any discussion of the cases cited as to the nature of conditions precedent and their performance.

There is no error.

Per Curiam. Judgment affirmed.

JOHN McRAE and WILLIAM FRENCH in Behalf of Themselves and Others v. THE BOARD OF COMMISSIONERS OF NEW HANOVER COUNTY.

When an appeal from the Superior Court is perfected, the Judge below has no further jurisdiction of the matter.

This was a motion in the cause heard before *Henry, J.,* at Chambers in New Hanover County, on the____day of December, 1875.

The defendants moved the court to increase the amount of a bond for an injunction theretofore granted.

The motion was allowed, and the plaintiffs appealed.

(416) All the facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

M. London and A. T. & J. London, for the appellants.

Russell and W. S. & D. J. Devane, contra.

Bynum, J. There is error. *Judge Seymour* granted the restraining order, requiring a bond of $5,000 for the indemnity of the defendants. The restraining order was afterwards vacated by *Judge McKay,* and the plaintiffs appealed to the Supreme Court, from the vacating order,

gave the appeal bond, and the case was stated and signed by the counsel of both parties. Some two weeks after this, an affidavit was filed by one of the commissioners, stating no new facts, and not alleging the insufficiency of the bond. Upon a motion founded on that affidavit, *Judge Henry* then holding court in *Judge McKay's* district, required the plaintiffs to file an additional bond for $10,000. When the appeal was perfected, the Judge below had no further jurisdiction. Certainly the plaintiffs could not thus be deprived of the benefit of an appeal perfected, and an injunction obtained.

PER CURIAM. Judgment reversed.

Cited: Wilson v. Seagle, 84 N.C. 112; *Pasour v. Lineberger,* 90 N.C. 161; *Green v. Griffin,* 95 N.C. 52; *Pruett v. Power Co.,* 167 N.C. 599; *Bohannon v. Trust Co.,* 198 N.C. 703.

M. C. THOMAS v. ABNER KELLY.

It is competent for a plaintiff, as witness for himself, to testify to a conversation had with a certain person deceased, whose representative is not a party to the suit.

CIVIL ACTION to recover the amount due on a bond, tried before *Buxton, J.,* at Spring Term, 1874, of MOORE Superior Court.

The bond, (or note under seal), was executed by the defendant (417) and others, was payable jointly and severally to H. B. Judd or order, on the 25th December, 1861, in the sum of three hundred dollars. There were several credits entered on the note, and it was not endorsed by the payer.

The defense relied on was that the plaintiff was not the owner of the note.

The plaintiff, for himself testified, that the note was his property; and explained his possession of the same on his cross-examination, thus: That his uncle, Henderson Judd, now dead, was the owner of the note. In 1871, the year he died, he handed the note to the plaintiff and told him to take the note to pay a debt out of it, for which he was liable as surety for Dr. Judd, to a daughter of the defendant, in the sum of sixty dollars, and the note should be mine. He took the note and saw the defendant in order to effect the arrangement through him. This was done by the defendant's executing his individual note to his daughter for sixty dollars and receiving from her the note upon which his uncle was liable as surety. The defendant surrendered the same to him and

he gave him credit for the amount upon the note now in suit. This credit is endorsed $60.00, 4th February, 1871. Plaintiff further stated, that he was not to have the credit put on, and then to return the note; it was to be his.

For the defendant Col. A. A. F. Seawell was called, who stated that Henderson Judd died in July, 1871; that he was unmarried, but there were some colored people about him, whom he recognized as his children. On the 29th of March, 1871, at his request, the witness wrote for him a deed of trust, which he executed, and in which he appointed the witness and another person, trustees of the property therein conveyed, for the benefit of these colored children. The property conveyed in trust is thus described after naming and including his lands: "Also all the stock of horses and mules, cattle and hogs, and all the personal property of every description, which I, the said Henderson Judd,
(418) now own or may hereafter become the owner of, up to the day and time of my death."

This witness further stated, that while he was engaged in writing the deed, Judd told him, that he wanted him, the witness, to get from Thomas, the plaintiff, this note and collect it, and if he was living to pay it over to himself, and if he was not living, to these colored children of his. Witness told Judd, that he thought that he, Judd had better get the note from Thomas. Judd said he would. Witness did not apply for the note until after the death of Judd.

The plaintiff being re-called by his counsel, was asked if he still persisted in his assertion notwithstanding the evidence offered by the defendant that the note belonged to him. He replied that he did, and that the note was his property.

Upon his cross-examination, the plaintiff stated that he had never given a cent for the note; and upon being asked whether he had any other reason to give for claiming the note, besides what he had stated on his first examination, said that he had: and was proceeding to state another conversation, which he had with his uncle in the month of April, 1871, and which was after the deed of trust was executed. To this conversation as evidence, the defendant objected, for the reason, because it was between the plaintiff and himself and a person deceased.

His Honor, upon consideration, admitted the evidence, partly because he was of opinion, that the case did not strictly come within the prohibition of Sec. 343, C. C. P., as the representative of the dead man was not a party to this suit; and it was not sought in any way to hold his estate liable on the note; and secondly, because Col. Seawell, the trustee, who claimed the note, had been examined by defendant, touching a communication between himself and the dead man in regard to the note in controversy; and again, because the defendant's counsel had

opened the way by the question he had himself propounded to the witness.

The plaintiff thereupon testified, that after he had seen the (419) defendant and received from him the $60.00 note on which his uncle was liable as surety, and entered the credit on the note in suit, he went back to his uncle and told him he had satisfied the debt. His uncle said, "All right, keep the note." He offered to surrender the note he had taken up; but his uncle said, "Keep it; it will show, some day, what you have done." To this the defendant excepted.

It was admitted on the trial, that one H. B. Thomas was the administrator of Henderson Judd, deceased.

The jury returned a verdict in favor of the plaintiff. Rule for a new trial; rule discharged. Judgment and appeal by defendant.

Merrimon, Fuller & Ashe and Neill McKay, for appellant.
Busbee & Busbee and McIver, contra.

READE, J. The plaintiff testified as a witness in his own behalf, of a conversation between himself and a person then deceased.

The evidence was competent, because the representative of the deceased person was not a party to the suit. C. C. P., Sec. 343.

This would entitle the plaintiff to his judgment here; but then, it is apparent that "a complete determination of the controversy cannot be had without the presence of other parties;" for, if the plaintiff recover, the representative of the deceased payee of the note may sue either the plaintiff or defendant. To prevent that, C. C. P., Sec. 65, makes it the duty of the court to have such party brought in. And yet, that would be hard upon the plaintiffs in this case, because as soon as the representative of the deceased payee is made a party it makes the plaintiff an incompetent witness, and defeats his recovery. This would be right if the representative desires to be a party, and to claim the (420) debt; but it may be that he does not desire to do so. It may be that he desires that the plaintiff shall recover. And then it would seem that he ought not to be made a party against his wish, for the benefit of the defendant. It is clear, however, that if he desires to be a party he ought to be allowed to be.

The defendant offered no evidence that he had paid the debt, and the jury found that he had not paid it. So that he owes it, either to the plaintiff or to the representative of the deceased. And if his object is to protect himself against a double liability, the same section of C. C. P., 65, provides that *he* may have any other claimant brought in and made a party in his place, upon his paying the money into court. And this is what he ought to have done.

The case will be remanded, to the end that the representative may have notice of the suit and be made a party plaintiff or defendant as he may be advised.

Affirmed and remanded. Plaintiff will have judgment in this court for his costs only.

PER CURIAM. Judgment accordingly.

Cited: Molyneux v. Huey, 81 N.C. 110; *Roberts v. R. R.,* 109 N.C. 671.

(421)

JORDON WOMBLE v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY

Money loaned to the Wardens of the Poor, under an order of the County Court in 1864, authorizing them to borrow money to purchase provisions for the support of the poor, and which was used for that purpose, may be recovered back by the creditor, as for money paid to the use of the county, or, as upon substitution of the creditor to the rights of the person furnishing the provisions.

CIVIL ACTION tried before *Henry, J.,* at January (Special) Term, 1875, of the Superior Court of WAKE County.

The plaintiff claimed the scaled value of $19,597.67, as the balance of an amount loaned by him, while Treasurer of the Wardens of the Poor of the county, to the Wardens of the Poor, in December, 1864, under an order of the County Court of Wake County, made about the 10th of December, 1864, there being more than twenty Justices of the Peace present and acting, when the order was made. Under this order, the money was loaned for the purpose of buying meat for the paupers in the poor house, and was so used.

The defendants denied that any such court was held, or such order made and insisted that if the money was loaned as alleged the court had not power to authorize the borrowing of the same.

By consent the action was tried upon affidavits filed by the plaintiff and the facts found to be as above set out.

Thereupon his Honor ordered the records of the County Court of Wake County to be amended as follows:

It is ordered by the court, more than twenty magistrates being present, that the Wardens of the Poor for Wake County be authorized and empowered to borrow so much money as may be necessary for the purpose of purchasing meat for the support of the poor at the poor house in Wake County.

It is further ordered, that the debt so contracted shall be (422) binding upon Wake County.

The court rendered judgment in favor of the plaintiff and the defendants appealed.

Snow, Busbee & Busbee and Battle & Son, for the appellants.
Lewis and Fowle, contra.

READE, J. Wake County was obliged to support its paupers at the poor house. Under stress of circumstances, it ordered the Wardens to borrow money to buy meat. The plaintiff loaned the money with which the meat was bought. The meat was received and used at the poor house.

We pass by the question whether the county had the power to "borrow money." It certainly had the power and was bound to purchase meat for the poor house. It did purchase meat, and the plaintiff paid for it. He is therefore entitled to recover as for money paid to the use of the county; or as being substituted to the rights of the person who furnished the meat.

The question has been considered more at large at this term in *Davis v. Commissioners of Stokes County, ante,* 374, and in *Daniel v. The Commissioners of Edgecombe County, post,* 494.

There is no error.

PER CURIAM. Judgment affirmed.

(423)

J. R. MOORE AND WIFE v. G. DICKSON.

Granting or refusing a continuance in the court below, is in the discretion of the presiding Judge; and it would require circumstances, proving beyond doubt, hardship and injustice to induce this court to review the exercise of such discretion, if in any case it had the power to do so.

Hence, where a case has been continued several terms, and a motion is made to continue it again, in the absence of the affidavit showing merits, this court will not review the decision of the court below, refusing a continuance.

CIVIL ACTION, tried before *Schenck, J.,* at Fall Term, 1875, of GASTON Superior Court.

There was a verdict for the plaintiffs and the defendant moved for a new trial; motion overruled. Judgment for the plaintiffs and appeal by defendant.

All the facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

W. W. Fleming, for the appellant.
Battle, Battle & Mordecai, contra.

RODMAN, J. We see no error in the proceedings below. The first error alleged by the defendant is, that the Judge refused to continue the case.

We will not say that there may not be a case in which the refusal of a continuance would not be a ground for granting a new trial by this court, under its general power to supervise and control the proceedings of the inferior courts. But undoubtedly the granting or refusing a continuance is in the discretion of the Judge below, and it would require circumstances proving beyond doubt hardship and injustice to induce this court to review his exercise of it, if in any case it has the power to do so.

(424) In the present case the only ground presented to the Judge for a continuance, was the recent death of one of the counsel for the defendant, perhaps his leading, and substantially, we will suppose, his only counsel until a few hours before the trial. We may think that under such circumstances the Judge might well have deferred the trial until the next day if such request had been made to him. But the action had been continued several times before, *and there was no affidavit of merits.* We cannot see but that the Judge acted properly and discreetly, and certainly we cannot say that he acted unjustly or oppressively.

The other exception was not insisted on, and clearly could not be maintained.

PER CURIAM. Judgment affirmed.

Cited: Kendall v. Briley, 86 N.C. 58; *Long v. Gooch,* 86 N.C. 710; *Carson v. Dellinger,* 90 N.C. 232; *Allison v. Whittier,* 101 N.C. 495; *Edwards v. Phifer,* 120 N.C. 407; *S. v. Dewey,* 139 N.C. 560; *S. v. Sauls,* 190 N.C. 813; *Abernethy v. Trust Co.,* 202 N.C. 48; *Tomlins v. Cranford,* 227 N.C. 325.

(425)

STATE v. ALEXANDER NEELY.

In an indictment for "Assault and Battery with *intent* to commit a Rape," the evidence of such intent being substantially the following: That very soon after the prosecutrix left the railroad, (and her companion,) she heard the prisoner, a colored man, "holler" to her "to stop," and saw

him running after her, distant about seventy yards. The prosecutrix then began to run "as hard as she could," and was pursued rapidly by the prisoner, who "hollered" three times to her "to stop." The prisoner, who approaching her, until the road emerged from the woods into a lane; when he reached the mouth of the lane, and saw the dwelling house of her brother-in-law, he fled in the direction of the road and into the woods, etc,: *Held*, (by a majority of the court,) that this was evidence of the intent charged, proper to be left to the jury, and that the prisoner was not entitled to a new trial, because the same had been submitted to the jury under the charge of the court.

RODMAN and BYNUM, JJ., dissenting.

INDICTMENT, for an assault with intent to commit a rape, tried before *Schenck, J.*, and a jury, at Fall Term, 1875, of the Superior Court of CABARRUS County.

It was in evidence that on the 10th July, 1875, the prosecutrix, a woman over ten years of age, and a young girl were returning home, along the track of the North Carolina Railroad, a few miles from Concord. When they reached a point on the railroad at which a country road crossed the same, the prosecutrix and the girl separated. The road taken by the prosecutrix led through a woods about a quarter of a mile, to the house of her brother-in-law, with whom she then resided. Very soon after she left the railroad, she heard the prisoner, a colored man, "holler" to her "to stop," and saw him running after her, distant about seventy yards. The prosecutrix then began to run "as hard as she could," and was pursued rapidly by the prisoner, who "hollered" three times to her to "stop." The prisoner was approach- (426) ing her, until the road emerged from the woods into a lane. When the prisoner reached the "mouth of the lane," and saw the dwelling house of the brother-in-law of the prosecutrix nearby, he fled in the direction of the railroad and into the woods. He was pursued and taken shortly afterwards at a section house. The prosecutrix was put in great fear by the chase.

The record sent to this court upon appeal says: "There was other evidence bearing on the intent with which he pursued the prosecutrix, which it is not necessary to set forth in detail."

The court charged the jury: "That this was a very serious charge against the prisoner, and it was the duty of the State to prove all the essential facts constituting it, beyond a reasonable doubt, and that if they had reasonable doubt, they must acquit." As to the assault, the court charged: "That if the prisoner pursued the prosecutrix against her will, with the intent violently to take hold of her person, and caused her to flee, and then continued to pursue her, that this would be an assault, and that if they found that the prisoner committed such an

assault with the intent carnally to know the person of the prosecutrix violently and against her will, he would be guilty, and they must so find; otherwise they would acquit."

To this charge the prisoner excepted.

The jury rendered a verdict of guilty, whereupon the prisoner moved the court for a new trial. Motion overruled. Sentence pronounced, and the prisoner appealed.

Shipp & Bailey, for the prisoner.

Attorney General Hargrove, for the State.

PEARSON, C. J. That the prisoner upon the facts set out in the statement of the case, committed an assault is not an open question. *State v. Davis,* 23 N. C., 125; *State v. Rawls,* 65 N. C., 334; *State v. Vannoy, Ibid.,* 532.

(427) This it would seem was the only point relied on by the counsel of the prisoner in the court below. We are led to the inference, that the points as to there being no evidence of the intent to commit a rape, was not taken in the court below, by the fact that in stating the case his Honor assumes that the intent charged was fully proved and given up on the trial, and contents himself with setting out "there was other testimony bearing on the intent with which he pursued the prosecutrix, which it is not necessary to set forth in detail." Clearly had the point been made, that there was *no evidence* fit to be left to the jury as to the intent charged in the indictment, his Honor would have seen that it was necessary to set forth in detail the other testimony, "bearing on the intent with which he pursued the prosecutrix." However this may be, giving the prisoner the benefit of the rule "what does not appear does not exist," and relieving him from the rule "the appellant must show error and intendments are to be taken against him," we will consider the case as presenting the question: Do the facts and circumstances set out amount to any evidence fit to be left to the jury as to the intent charged? Or was the matter of intent left so much in the dark as to make it the duty of the Judge to have instructed the jury to have acquitted the prisoner of the criminal intent charged?

A majority of the court are of the opinion that there was evidence to be left to the jury as to the intent charged. For my own part I think the evidence plenary, and had I been on the jury would not have hesitated one moment.

I see a chicken cock drop his wings and take after a hen; my experience and observation assure me that this purpose is sexual intercourse, no other evidence is needed.

Whether the cock supposes that the hen is running by female instinct to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt, as for instance if she is a setting hen and "makes fight" not merely amorous resist- (428) ance. There may be evidence from experience and observation of the nature of the animals and of male and female instincts, fit to be left to the jury, upon all of the circumstances and surroundings of the case, was the pursuit made with the expectation that he would be gratified voluntarily, or was it made with the intent to have his will against her will and by force? Upon this case of the cock and the hen, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female *instincts*.

Again; I see a dog in hot pursuit of a rabbit; my experience and observation assure me the intent of the dog is to kill the rabbit; no doubt about it, and yet according to the argument of the prisoner's counsel, there is no evidence of the intent.

In our case, when the woman leaves the railroad and starts for her home and is unaccompanied, to pass through woodland for one-fourth of a mile, a negro man calls to her stop; he is at the distance of seventy-five yards; she with female instinct, from the tone of his voice, looks, etc., sees his purpose and runs as fast as she can through the woodland and makes the head of the lane, in sight of the house before he is able to catch her; he pursues to the head of the lane, and then flees and attempts to escape in the woods.

It is said in the ingenious argument of the counsel of the prisoner, his intent may have been to kill the woman, or to rob her of her shawl or of her money, and if the jury cannot decide for which of these intents he pursued her, they ought to find a verdict for the defendant. The fallacy of this argument is, I conceive, in this: it excludes all of the knowledge which we acquire from experience and observation as to the nature of man. This is the corner stone on which the institution of trial by jury rests. To say that a jury are not at liberty to refer to their observation and experience, when a negro man under the circumstances of this case pursues a white woman, starting at, (429) say seventy-five yards and gaining on her and being near when she gets in sight of the house, when he stops and flees into the woods, is, as it seems to me, to take from a trial by jury all of its recommendations.

Our case particularly called for the observation and experience of the jurors as practical men. The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was

to kill her or to rob her, so the intent must have been to have sexual intercourse, and the jury considering that he was a negro, and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house, and the instinct of nature as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to find that the intent was to commit a rape.

RODMAN, J., *dissenting.* I cannot concur in the opinion of the majority of the court, and will state the reasons for my dissent with as much brevity as is consistent with clearness.

Upon the authority of *State v. Rawles,* 65 N. C., 334, I admit there was evidence on which the jury might convict the prisoner of a simple assault.

But in my opinion the record sets forth no evidence fit to go to the jury, or upon which they could reasonably find the prisoner guilty with the intent charged. The intent was an essential ingredient of the offence charged and there was no evidence of it.

In the opinion of the court as delivered by the Chief Justice, the argument is, that because from certain actions of certain brute animals, a certain intent would be inferred, a like intent must be inferred against the prisoner from like acts.

It seems to me that the illustrations are not in point, even if that method of reasoning be allowable at all. The chicken cock in
(430) the case supposed has no intent of violence. He expects acquiescence and knows he could not succeed without it, and besides, he is dealing with his lawful wife.

But the method of reasoning is misleading and objectionable on principle. It assumes that the prisoner is a brute, or so like a brute that it is safe to reason from the one to the other; that he is governed by brutish, and in his case, vicious passions unrestrained by reason or a moral sense. This assumption is unreasonable and unjust. The prisoner is a man, and until conviction at least, he must be presumed to have the passions of a man, and also the reason and moral sense of a man, to act as a restraint on their unlawful gratification. Otherwise he would be *non compos mentis,* and not amenable to law. He is entitled to be tried as a man, and to have his acts and intents inquired into and decided upon, by the principles which govern human conduct, and not brutish conduct. Assume as the opinion of the court does, that the inquiry as to his intent is to be conducted upon an analogy from the intents of brutes, you treat him worse than a brute, because what would not be vicious or criminal in a brute, is vicious and criminal in him, being a man. When you assume him to be a brute, you assume

him to be one of vicious properties. If that be true, what need of court and jury? The prisoner is not only *ferae naturae* but *caput lupinam* whom any one may destroy without legal ceremony.

The evidence of the prisoner's intent is circumstantial; the circumstances being the pursuit, and its abandonment when he got in sight of White's house. It is the admitted rule in such cases that if there be any reasonable hypothesis upon which the circumstances are consistent with the prisoner's innocence the Judge should direct an acquittal, for in such cases there is no positive proof of guilt. The particular criminal intent charged must be proved. It will not do to prove that the prisoner had that intent or some other although the other may have been criminal; and especially if the other, although immoral was not criminal. In *Rex v. Loyd*, 7 Car. P. 318, (32 E. C. L. R.) it (431) was held by *Patterson, J.*, that in order to convict of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the prosecutrix, but that he intended to do so at all events and notwithstanding any resistance on her part. Roscoe Cr. Ev., 811. It is not proof of guilt, merely, that the facts are consistent with guilt, they must be inconsistent with innocence. It is neither charity, nor common sense, nor law, to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent.

In the present case, may not the intent of the prisoner have been merely to solicit the woman, and to desist, if she resisted, his solicitations? Or may it not be that he had not anticipated resistance, and would desist in case it occurred? Either hypothesis will do, and either is consistent with every fact in evidence; with the pursuit, and with its abandonment, when the prisoner apprehended discovery. There is absolutely no evidence that the prisoner had formed the intent charged, viz.: to know the woman in spite of resistance, and at all hazards.

We are told in the Sacred Book that "who so looketh on a woman to lust after her hath committed adultery in his heart" *adultery*, not *rape*. In the minds of men there is a wide space between the immoral intent to seduce a woman, and the criminal intent to ravish her. It is at this point that the inference drawn from the assumed identity of civilized men, with brutes, is most misleading and unfair. A man may perhaps be easily led by his passions to form the immoral intent to solicit a woman, and to attempt to execute it. But, as a reasoning being, he will pause before he forms the intent, and attempts to execute it, to commit so hideous and penal a crime as rape; one so certain of detection and punishment. The moral sense which every man has, in a greater

(432) or less degree, and the terrors of the law, come in to hold him back from the determination to commit the crime, and to make him take a period for deliberation, which, in the absence of evidence to the contrary, it must be presumed, he availed himself of. Whereas, on the brute, there are no such restraints, as the gratification of his passions is neither a sin or crime. Surely the same rules of evidence cannot apply to beings so different and acting under different moral and legal responsibilities.

The difference in color between the prosecutrix and the prisoner, although it would aggravate the guilt upon the prisoner upon conviction, cannot justly affect the rule of evidence, by which his guilt is to be inquired into. These must be the same for all classes and conditions of men.

It seems to me that the decision of the court is a departure from what I had supposed to be a firmly established rule of evidence for the protection of innocence.

BYNUM, J., concurs in the dissenting opinion of Justice RODMAN.

PER CURIAM. There is no error.

Cited: S. v. Massey, 86 N.C. 660, 662; *S. v. Mitchell,* 89 N.C. 523; *S. v. Powell,* 94 N.C. 970; *S. v. Jeffreys,* 117 N.C. 747; *S. v. Garner,* 129 N.C. 539, 541; *S. v. Adams,* 133 N.C. 671; *S. v. West,* 152 N.C. 834; *S. v. Rogers,* 166 N.C. 390; *S. v. Kincaid,* 183 N.C. 717; *S. v. Jones,* 222 N.C. 38.

WILSON & SHOBER v. HUTCHINSON AND OTHERS.

Where, upon an appeal to this court, the appellant fails to prepare a case and serve it upon the adverse party, as required by the provisions of the Code of Civil Procedure, "*the liberal practice among the members of the bar in this district,*" in such cases, is not sufficient ground to warrant a writ of *certiorari.*

PETITION by defendants for a *certiorari,* filed at this term.

The plaintiffs brought an action against the defendants on a promissory note and obtained judgment thereupon at Fall Term, 1875,
(433) of GUILFORD Superior Court. From that judgment the defendants appealed and duly filed an appeal bond. More than ten days after the notice of appeal the defendants' counsel served upon the counsel for the plaintiffs a statement of the case upon appeal. The

counsel for the plaintiffs declined to accept the same or to take any notice thereof.

The other facts necessary to an understanding of the case as decided, are sufficiently stated in the opinion of the court.

Scott & Caldwell, for petitioners.
Dillard & Gilmer and Gray & Stamps, contra.

PEARSON, C. J. The writ of *certiorari* in the place of an appeal, is prayed for on the ground that the petitioners ought not to be prejudiced by the delay of their counsel in making up the statement of a case for the Supreme Court. This delay is attributed in the petition to the "liberal practice among the members of the bar in that district," etc.

With all of this we have nothing to do. The C. C. P. specifies the time in which the appellant must have a case made up. For a failure to do so, the attorney is liable for damages. This seems to be a fit case in which that right of a client against his lawyer can be enforced, and perhaps an example may serve a good purpose, and hereafter lawyers will not depend upon an indefinite, general understanding "among counsel," but will make up the case in the time required by law, unless there be a specific arrangement in regard to it.

PER CURIAM. Motion refused.

Cited: Smith v. Smith, 119 N.C. 313; *Willis v. R. R.,* 119 N.C. 719; *Cozart v. Assurance Co.,* 142 N.C. 523.

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(434)

HENRY WILLIAMS v. C. B. HASSELL, ADM'R. AND OTHERS.

Under a devise of land to A, B, and C for life only, with remainder to *such of their children as should be living at their death,* the land can not be sold for partition,—those taking in remainder not being ascertained. One of the life tenants dies, leaving two children: *Held,* that although they are known, yet their interest is so mixed up with the interests of others in reminder, who are not yet ascertained, and cannot be during the lives of the life tenants, that the same cannot be sold now in any way, or by any person.

PETITION filed at this term of the court in behalf of all the parties to the action.

This case was decided at the last term of the court and is reported in 73 N. C., 174. The petition states: That the principal object of the action, after ascertaining the interest of the legatees in the estate of the

testator, was to ascertain whether the defendant, as administrator *de bonis non,* had the right to sell the lands of the testator, and to ascertain how the interest of the defendants, Jessie Stubbs and Harry Stubbs, grand children of the testator, (whose interest in the land had become vested by the death of their mother,) should be sold.

The opinion of the court settles the interest of the respective legatees in the estate of the testator, but does not state how the interest of the Stubbs children should be sold, nor whether the administrator *de bonis non* could convey the lands of the testator.

Therefore in order to save cost to the parties to the cause, the petitioners pray that the court render judgment:

1. Whether under the will of the testator, the defendant has the power as administrator *de bonis non* to sell the real estate of the testator, and particularly the Woodlawn plantation.

(435) 2. How the interest of the said Jesse Stubbs and Harry Stubbs may be sold.

3. Whether it is not the duty of the defendant, Hassell, under the direction of the said will, to sell the lands in the pleadings mentioned, and to pay over the proceeds to the devisees under said will.

4. For a general construction of the will.

Mullen & Moore and Clark, for the petitioners.

Venable and Attorney General Hargrove, contra.

READE, J. This proceeding was originated to obtain the advice of the court as to the construction of the will of Henry Williams, and for a sale of the land devised.

His Honor below declared the rights of the parties and ordered a sale of the land. From which there was an appeal to this court.

At the last term we reviewed the ruling of his Honor as to all the points presented. See same case, 73 N. C., 174.

At this term a petition is filed in the cause, setting forth "that the principal object, after ascertaining the rights of the devisees, was to ascertain whether Hassell, as administrator *de bonis non,* had the right to sell the land." And that the decision at last term does not cover that inquiry.

The opinion filed at last term declares, that inasmuch as the lands are devised to the first takers for life only, with remainder to *such* of their children as should be living *at their death,* it cannot be ascertained *now* who are to take the remainder, and not being ascertained they cannot be represented or bound by any proceeding, and, therefore, the lands cannot be sold at all. A reasonable inference from this is, that Hassell cannot sell them.

A second inquiry now made is, "How is the interest of Mrs. Stubbs' children to be sold?"

Mrs. Stubbs, one of the first takers, is dead, leaving two children, so that here, the remaindermen are ascertained. True; (436) but then their interest is mixed with the interests of persons not ascertained; and therefore they cannot be severed. The lands cannot be sold *now,* in any way by any body. And this was substantially declared in the opinion filed at last term.

In *Grissom v. Parish,* 62 N. C., 330, the devise was the same as here; and it was held that the children of the first taker had, during the life of the first taker, no interest which could be sold. So in *Watson v. Watson,* 56 N. C., 400, there was the same devise and the same decision. That is the leading case in North Carolina. And it is put upon the ground stated at last term, that during the life of the first taker, it was impossible to know who would be the remaindermen; and, therefore, they could not be represented or bound. In that case the first taker was unmarried, and, of course, had no children; and he represented, that he could not cultivate the land, and that it would go to waste, if not sold; but still the court refused to order a sale, upon the ground that it had not the power to do so.

We have taken pains to elaborate what we said at last term, and to refer to the precedents, for the satisfaction of the parties.

In *Watson v. Watson, supra,* there is a *dictum* which may mislead. In that case there were no children born; and the *dictum* is, that in a case where there are children born, and the devise is to the children as a class, the born children may represent the unborn, the class; and the land may be sold. There is no illustration to show the meaning of the *dictum,* but probably it may be thus illustrated: Suppose in the case before us the devise had been to the first takers for life, remainder to their children; that would take in all the children, as well those born after the death of the testator as those born before, and in such case it may be that the born children might be allowed to represent the class; but this is not that case. Here the devise is not to all the children as a class, but to *such* as should *survive* the first taker. Will (437) these born children be of that class? Who can tell? How then can they, as a part of a class, represent the whole, when it may turn out that they are not of the class and have no interest whatever?

PER CURIAM. Judgment accordingly.

Cited: Justice v. Guion, 76 N.C. 444; *Simpson v. Wallace,* 83 N.C. 479; *Miller Ex Parte,* 90 N.C. 628; *Overman v. Sims,* 96 N.C. 455; *Irvin v. Clark,* 98 N.C. 445; *Aydlett v. Pendleton,* 111 N.C. 31; *Whitesides v. Cooper,* 115 N.C. 575; *Silliman v. Whitaker,* 119 N.C. 94;

Ex parte Yancey, 124 N.C. 153; *Hutchinson v. Hutchinson,* 126 N.C. 673; *Hodges v. Lipscomb,* 128 N.C. 62; *Springs v. Scott,* 132 N.C. 553; *Bowen v. Hackney,* 136 N.C. 192; *Dawson v. Wood,* 177 N.C. 162; *Thompson v. Humphrey,* 179 N.C. 52, 58; *Ray v. Poole,* 187 N.C. 752; *Stepp v. Stepp,* 200 N.C. 239; *Beam v. Gilkey,* 225 N.C. 524.

WILLIAM M. PIPPEN v. CHAS. M. WESSON AND CAROLINE M. WESSON.

One who contracts by virtue of a power, statutory or otherwise, and who, except by such power, is incapable of contracting, must pursue the power, or such contract will be void; and it must appear in some lawful way, that such one meant to act under the power.

A married woman has no power to contract a personal debt, or to enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication arising out of the nature or consideration of the contract, showing that it was for her benefit.

This was a CIVIL ACTION, to recover the amount of a bond, tried at August Term, 1875, of the Superior Court of EDGECOMBE County, before his Honor, *Judge Moore.*

In his complaint, the plaintiff alleged, that the defendants are indebted to him in the sum of twenty-nine hundred and eighty-six dollars and seventy-seven cents, as is evidenced by their bond, executed and delivered on the 24th day of July, 1874, and payable on the 1st day of February, 1875, which said bond is in the following words and figures, to-wit:

(438) "TARBORO, N. C.,
"July 24th, 1874.

"$2,986.77:—On the first day of February next, (1875,) we promise "to pay W. M. Pippin, or his order, two thousand nine hundred and "eighty-six, 77-100 dollars, for value received.

(Signed) "CHAS. M. WESSON, (SEAL.)
" "CARRIE M. WESSON, (SEAL.)

"Credit $154.62 and $45.10."

2. That said bond was executed by Caroline M. Wesson, with the consent of her husband, Chas. M. Wesson, as testified by his signature to said bond, both assenting thereto at the same time; and the said Caroline, signing the same, at the same time with her husband and at his request, without the procurement of the plaintiff, or any other person.

Wherefore plaintiff demanded judgment for two thousand nine hundred and eighty-seven dollars.

The defendants, at the same term, demurred to the complaint of the plaintiff, assigning as grounds for such demurrer, that the complaint does not state facts sufficient to constitute a cause of action against the said Carolina M. Wesson, in that: It does not appear on the face of the complaint, that the contract specified as being entered into by her, was made with the written consent of her husband, or for her necessary, personal expenses, or for the support of her family, or in order to pay her debts existing before marriage, or that it was made by her as a free trader, or that the debt, secured by the note, was specifically charged on her separate estate and property, at or before the execution thereof.

Upon consideration, the court sustained the demurrer, and gave judgment against the plaintiff for costs. From this judgment, plaintiff appealed.

Phillips, for appellant.

1. Before the adoption of the present Constitution, it was (439) recognized as settled law in this State that a wife may, when not restricted by the deed of settlement, with the consent of the trustee, specifically charge her separate estate with her contracts and engagements. *Knox v. Jordan,* 58 N. C., 175; *Frazier v. Brownlow,* 38 N. C., 237. "But the court in that case seemed unwilling to sanction the doctrine that as to the separate estate of the wife she was to be regarded as a *feme sole* in all respects, as held in England, and also in the State of New York. But however proper this unwillingness of the court to recognize that doctrine might have been at the time of that decision, there can be no reason, since the adoption of our present Constitution, why the English and New York doctrine should not now be followed in our State." *Withers v. Sparrow,* 66 N. C., 138. If the construction of Art. X, Sec. 6, of the Const., is, that as to the separate estate of the wife she is to be regarded as a *feme sole,* the effect of such a construction is to make her personally liable at law and to give a remedy at law against her upon such contract as would have formerly been enforced in equity against her separate estate. If, therefore, there is no restriction of her power to make contracts except as to *conveyances with the written* consent of husband, then the marriage act is unconstitutional. The court must reverse *Withers v. Sparrow,* or overrule the demurrer.

2. If the effect of Art. X, Sec. 6, is not to treat a married woman as a *feme sole* in all respects, with the exception of the restriction of conveyances which requires the written consent of her husband, then, and in that case, the marriage act is an enabling act, and authorizes a *feme*

covert to contract in certain cases. Sec. 17, Bat. Rev., 590. And the written consent of the husband is given as testified by his signature to the bond, both assenting thereto at the same time. Here is a joint contract. It is as much the contract of the wife as of the husband, and the presumption is that the written consent of the husband was
(440) given at the time, or at least before the delivery of the bond. It is not inconsistent with the face of the instrument. If the husband was principal and the wife surety, it would be consistent with the face of the paper that the written consent of the husband was not given, for the wife may have signed afterwards as husband's surety. Reverse the case: Suppose the wife is principal and the husband surety, the rule must be different. For by his signing as surety for his wife, he thereby gives his consent, which is in the strongest possible form. But if the court should be of the opinion that it is consistent with the face of the instrument in this case, that Mrs. Wesson signed after that of her husband, then plaintiff insist that in analogy to those cases under the statute of frauds, parol evidence is admissible to show that it was executed at the same time. That the assent of herself and husband to their contract co-existed. The case of *Miller v. Irvine,* 18 N. C., 103, was the first case under our law which changed the old doctrine laid down in *Wain v. Warlters,* Smith's Leading Cases, in our State. In this case it was held that under the act of 1809, "to make valid parol contracts for the sale of land and slaves, it was not required that the consideration of the contract should be set forth in the written memorrandum of it. And this case has been acquiesced in as settling the construction of the act, that the consideration of a contract for the sale of land or slaves need not be set forth in the written memorandum of it. *Rice v. Carter,* 33 N. C., 298; *Green v. Thornton,* 49 N.C. 231. The consideration is no part of a contract, but is an inducement to it. And the same doctrine is laid down in 2 Kent, 613, 614, 12 Ed., and numerous cases cited. The authority to the agent who contracts for the sale of goods, need not be in writing. *Ibid.* The statute of frauds does not require that the authority of the agent contracting, even for the sale of land, should be in writing. *Ibid.*

(441) *Johnstone, contra.*

Married woman secured in all her estate real and personal. Constitution, Article X, Sec. 6.

No woman capable of making a contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage without the written consent of her husband. Battle's Revisal, Chap. 69, Sec. 17; *Harris v. Jenkins,* 72 N. C., 183.

The separate estate of a married woman is not liable to her personal engagements generally, but only where the debt is charged specifically upon her separate estate with the concurrence of the trustee if there be one. *Draper v. Jordan,* 58 N. C., 175; *Johnston v. Malcom,* 59 N. C., 120.

Case of *Wethers, Ex'r., v. Sparrow and wife,* 66 N. C., 129, does not conflict with above. The jury found that the credit was given to the wife, that the trustee assented to the contract, and that the wife expressly contracted on the credit of her separate property.

See case of, *The Cora Exchange Insurance Company v. Babcock,* 42 N. Y., 613, 1 Amer., 601. *Kemen v. Kuffat,* 64 Missouri, 532, (11 Amer., 541;) *Philips v. Graves,* 22 Ohio, p. 371, (V. Amer., 675.) *Willard v. Earthan,* 15 Gray, (Mass.), 328. *Machatton Brass and Manufacturing Company v. Thompson,* 58 N. Y., 80.

RODMAN, J. The common law, by which the contract of a married woman was void, continued to be the law in courts of law in this State until the adoption of the Constitution of 1868. In Courts of Equity it was settled that a married woman might have an estate settled to her separate use, and that although she had no power to bind herself personally by a contract, she might specifically charge her separate estate, and Courts of Equity would enforce the charge against the property. But in order that her contract should have the effect of creating a charge it must refer expressly, and not by implication to the (442) separate estate as the means of payment. *Knox v. Jordan,* 58 N. C., 177; *Frazier v. Brownlow,* 38 N. C., 237. The words "not by implication," though found in the decisions, are not to be understood in the strictest sense as excluding necessary implications. *Withers v. Sparrow,* 66 N. C., 129.

The Constitution and subsequent legislation have greatly changed the rights of married women in respect to their property; but they remain as they were, except so far as they have been changed by such legislation expressly or by reasonable implication. The inquiry therefore is, has the Constitution, or the Act of 1871-72, Chap. 193, (Bat. Rev., Chap. 69), given to married women the power to make a contract like the one sued on? The contract sued on is a bond for the payment of money, executed by the defendant Wesson and his wife Caroline, the other defendant. It contains no reference to the separate property of the wife. It says "for value received," but of what the value consisted, or by which of the obligors it was received, is not said. It does not appear that the contract was for the benefit of the wife.

In the case of obligors *pleni juris* this would be immaterial. But where one of them has only a limited capacity to contract, the contract must be shown to be within her capacity. One who contracts by virtue

of a power, statutory or otherwise, and who, except by such power, is incapable of contracting, must pursue the power, or her contract will be void. And it must appear, in some lawful way, that she meant to act under the power; and that is the reason why there must be a reference to the separate estate and an apparent intent to charge it. It will be seen upon an examination of the legislation referred to, that it by no means converts a married woman into a *feme sole* in respect to her separate property, but that it gives special powers which are carefully limited and defined, and that outside of such powers her dis-
(443) ability remains as at common law. She has no power to enter into a contract, upon which a personal judgment might be given against her, or by which she might be subjected to arrest.

It is true that when the decisions to which I have referred were made, the separate estate of the wife was a mere equity, the legal estate being vested in a trustee, and that since the constitution of 1864, she has the legal estate to her separate use. But that change has not removed her legal disabilities to contract, or extend her ability in equity. Her contract by bond is still void at law, and the courts under their equitable powers will not enforce it against her separate estate, unless the creditor has an equity to have it so enforced; that is to say, unless it was for her benefit. This is the doctrine of *Yale v. Dederer,* 18 N. Y., 265; *S. c.,* 22 N. Y., 450, in which it is held that the contract of a wife as surety for her husband is void at law, and as not being for her benefit, is not supported by any equity and will not be enforced. This view of the subject was taken in *Owens v. Dickerson,* 1 Craig. & Phil., 48. (Cond. Eng. Ch. Reps.) It has the advantage of avoiding some difficulties which might arise upon the theory that a wife binds her separate estate under a power. It would follow from this view, that even if the contract did expressly refer to the separate estate and attempt to charge it, the attempt would be ineffectual, unless supported by the equity that it was for the wife's benefit. The wife could not charge her separate estate by a contract not for her benefit, except by a direct conveyance to which under our law, her private examination would be necessary. In the present case it is immaterial which of these two views may be taken. They lead to the same conclusion. The contract does not refer to the estate to be charged as it must do, to operate as the execution of a statutory power, nor was it for the wife's benefit, so as to give the creditor an equity.

In addition to the case cited, the following take the same views as we do, as to the effect of statutes giving to married women sepa-
(444) rate estates in their property with a limited or general *jus disponandi. Jones v. Crostwaite,* 17 Iowa 393; *Rhodes v. Gibbs,* 39 Texas 432; *Bibb v. Pope,* 43 Ala. 190; *Maclay v. Love,* 25 Cal. 367;

Smith v. Greer, 31 Cal. 476; *Montgomery v. Sprankle,* 31 Ind. 113; *Carpenter v. Mitchell,* 50 Ill. 470; *Whitworth v. Carter,* 43 Miss. 61; *DeFries v. Conklin,* 22 Mich. 255.

Sec. 6 of Art. X, of the Constitution reads as follows: "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, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised or bequeathed, and with the written assent of her husband conveyed by her as if she were unmarried."

It is contended that when the Constitution gave married women separate estates in their property, it gave them by a necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden; and an unrestricted right to contract, such as a *feme sole* or a man has. We think there is no such grant implied.

The terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and it must be taken that they were used in that instrument in the sense which had been affixed to them by prior decisions of this court. Such an estate had never been held to confer on the married woman an absolute power of disposition over the estate as if she were a *feme sole,* and it was never supposed that by force of having a separate estate, she had a general capacity to contract. The law was that she had such special powers only as were conferred by the deed of settlement, either expressly or by necessary implication. If the intent of the Constitution had been such as is contended for, it would have been superfluous and (445) unnecessary to proceed, as the section does, to give the separate estate special qualities, as that of exemption from the debts of the husband, and to the wife the power to devise and bequeath the property, and to convey it with the written consent of her husband, inasmuch as upon the doctrine contended for, the exemption and the wife's power of disposition would have followed as a necessary incident to the separate estate. That it was thought necessary expressly to give a limited power of disposition, shows clearly that the separate estate given was such as it had previously been defined to be, to which neither an absolute power of disposition, nor the general power to contract, were necessary incidents. The statute was intended to take the place of a deed of settlement, and must be construed as such deeds had been, as conferring on married women no powers beyond those expressly given or implied.

It is contended, however, that a general power to contract, with the written consent of their husbands, is given to married women by Section 17, of the marriage act above cited.

We conceive that while it would be beyond the power of the Legislature to destroy or alter the essential qualities of the separate estate given by the Constitution, as by giving the personal property to the husband, making the property liable for his debts or by destroying the wife's power of disposition; yet it is within its power to regulate the manner in which the separate estate shall be held, to prescribe what contracts and what dispositions of their estates, other than those specifically authorized by the Constitution married women may make, and by what forms and ceremonies all their contracts shall be made and authenticated, and their free consent thereto ascertained. The Legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. The question is, has it done so?

The section referred to reads as follows: "No woman during her coverture shall be capable of making any contract to affect her
(446) real or personal estate, except, etc., without the written consent of her husband, unless she be a free trader as hereinafter allowed." By no fair construction can this section be read as enacting that "every married woman shall be capable of making any contract to affect directly or indirectly her estate (which would include every contract whatever) by the written consent of her husband." By using the words "contract to affect her real or personal estate," the draughtsman evidently had in mind the existing law as above stated, that no married woman could make any personal contract, but only one to affect or charge separate estate, and the object was to require the consent of the husband in lieu of the consent of the trustee, which the law required when the separate estate was created by a deed of settlement. The meaning was not that a married woman may make contracts which, by existing law, she had no power to make, but that she shall not make such contracts as by existing law she had power to make, without the consent of her husband. The intent was not to enlarge her special power of contracting into a general power, but to abridge the special power by requiring the husband's consent. This is clearly shown by the negative frame of the section. The meaning contended for would have been expressed naturally by affirmative words, directly granting the power, and it would be a most unnatural construction to hold that the mere omission to deny the power to make general personal contracts, which there was no necessity for denying, as it was denied by existing law which was not repealed, was a grant of that power.

By section 26 of the act cited, it is enacted that no conveyance of her real estate by a married woman not a free trader, shall be valid

unless it be proved or acknowledged and her private examination taken as to her free consent. If a married woman can bind her real estate by an executory contract to pay money, as to which she is not privately examined, the safeguards against conveyances by the undue influence of her husband provided by this section, would be easily (447) defeated. Her real estate would be liable to sale under execution, and she would thus indirectly convey when she could not directly do so.

As it does not distinctly appear that Mrs. Wesson executed the bond as surety for her husband, we put that out of view. We put our decision on the ground that a married woman has no power to contract a personal debt or to enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication arising out of the nature or consideration of the contract, showing that it was for her benefit. Whether the contract would be good if it did expressly charge the separate estate, but was not for the wife's benefit, it is unnecessary to say.

PER CURIAM. Judgment affirmed.

Cited: Rountree v. Gay, 74 N.C. 454; *Atkinson v. Richardson,* 74 N.C. 457; *Jeffrees v. Green,* 79 N.C. 331; *Hall v. Short,* 81 N.C. 278; *Dougherty v. Sprinkle,* 88 N.C. 303; *Burns v. McGregor,* 90 N.C. 226; *Arrington v. Bell,* 94 N.C. 249; *Flaum v. Wallace,* 103 N.C. 304, 307; *Thurber v. LaRoque,* 105 N.C. 310; *Farthing v. Shields,* 106 N.C. 295; *Baker v. Garris,* 108 N.C. 222, 230; *Armstrong v. Best,* 112 N.C. 60; *Dixon v. Robbins,* 114 N.C. 104; *Green v. Ballard,* 116 N.C. 146; *Wilcox v. Arnold,* 116 N.C. 711; *Bank v. Howell,* 118 N.C. 273; *Sherrod v. Dixon,* 120 N.C. 67; *Barrett v. Barrett,* 120 N.C. 130; *Brown v. Brown,* 121 N.C. 11; *Sanderlin v. Sanderlin,* 122 N.C. 3; *McLeod v. Williams,* 122 N.C. 455; *Moore v. Wolfe,* 122 N.C. 713, 716; *Finger v. Hunter,* 130 N.C. 530, 532; *Harvey v. Johnson,* 133 N.C. 357; *Vann v. Edwards,* 135 N.C. 673; *Ball v. Paquin,* 140 N.C. 89; *Cameron v. Hicks,* 141 N.C. 29; *Bank v. Benbow,* 150 N.C. 783; *Thompson v. Power Co.,* 154 N.C. 19; *Robinson v. Jarrett,* 159 N.C. 167; *Warren v. Dail,* 170 N.C. 409.

WEBB & ROUNDTREE v. W. M. GAY AND OTHERS.

A feme covert, whose estate was created by deed in 1865, signs a bond for the payment of money, as surety, in 1872, which bond, or contract, does not in any manner refer to her separate estate, as to be charged there-

with, nor was it made either with the consent of her husband or of the trustee in the deed; *Held*, that the bond is invalid as to her.

This was a CIVIL ACTION tried before his Honor, *Judge Seymour*, at Fall Term, 1875, of the Superior Court of WILSON County.

Accompanying the record sent upon appeal to this court, is the following:

(448) CASE AGREED

"On the 10th day of February, 1872, the defendants executed to the plaintiff the following sealed instrument:

"$2,000.00.

"On the first day of February, 1873, we or either of us promise to pay to the order of Webb & Roundtree, the sum of two thousand dollars with interest.

"Wilson, N. C. Feb. 10th, 1872.

(Signed) "B. H. TYSON, [SEAL.]
W. M. RAY, [SEAL.]
MRS. S. V. WHITEHEAD, [SEAL.]"

At the same time the defendants executed to the plaintiff two other sealed instruments in exactly the same terms as the one above mentioned, except that they were each for the payment of fifteen hundred dollars and expressed to be for value received. These bonds have not been paid.

At the time of executing said instruments the defendant Mrs. Whitehead was, and still is a *feme covert* living separate and apart from her husband; but without any divorce or deed of separation. She was married to her present husband, Sept. 17th, 1875, and on the day previous to her said marriage she and her intended husband entered into a contract under seal a copy of which is hereto appended.

At the time of said marriage, the defendant was and she still is the owner of considerable real estate. Her husband at the time of the execution by her of said sealed instruments, and making of this contract with the plaintiff, did not assent thereto and the *feme* defendant executed said instruments as surety for the defendant Tyson at his request and the request of the defendant Gay, and was not personally benefited thereby and did not expect any personal benefit.

The defendants Gay and Tyson were greatly embarrassed at the time and the plaintiff would not have credited them but for the name
(449) of the *feme* defendant; but she was not aware that her name was all that gave value to the paper in the estimation of the plaintiff. The defendants Gay and Tyson are now insolvent.

There is and always has been an acting trustee under the provisions of the aforesaid marriage contract.

Subsequent to the execution of the bonds in suit, the defendant Gay made the following mortgages and trust deeds to secure the payment of the same: One mortgage recorded in the Register's office of Wilson County conveying the interest of Gay and his wife to certain trustees therein named, in one house and lot in the town of Wilson; one gin house and lot; one steam engine; two cotton gins; one cotton press and fixtures; one still lot near said town; turpentine and still fixtures. A mortgage made to B. H. Connor trustee, recorded in the Register's office, of Wilson County, executed by the defendant Gay, and his partner J. D. Gay, conveying all their interest in all the notes, accounts and mortgages, and other choses in action, in the firm of Gay, Tyson & Co. These securities are not sufficient to discharge in full the claims of the plaintiff.

The case is to be tried, as if the husband of the *feme* defendant had been made a party defendant.

At the time of the execution of said bonds, the *feme* defendant resided upon her said real estate, and exercised as much control over the same for farming purposes as if she had been a *feme sole;* employing laborers to cultivate the same, in her own name; selling the produce and receiving the proceeds; and applying the same to her own use.

If, upon the foregoing statement of facts, the court should be of the opinion with the plaintiff, then the plaintiff is to have judgment for the full amount of said bonds, and interest, and the *feme* defendant is to be subrogated to all the securities given by her co-defendants to the plaintiff.

If the court shall be of opinion that the *feme* defendant is not (450) liable, then judgment is to be rendered accordingly, and the action dismissed as to her.

The following is a copy of the marriage contract hereinbefore referred to:

"NORTH CAROLINA,
Pitt County.

"This indenture, made and entered into, this 16th day of September, A.D. 1865, by and between William Whitehead, of the first part, S. Virginia Atkinson, of the second, and Edward C. Yellowley, of the third part, all of the said parties being of the county of Pitt, and State of North Carolina, witnesseth: That whereas a marriage is soon to be solemnized between the said William Whitehead and the said S. Virginia Atkinson, and the said S. Virginia Atkinson is possessed of and entitled to a large estate of personalty which she is desirous of having

settled upon herself, so as to be free and clear from all control of said William Whitehead, or from all liability for his debts or contracts, and so as to have the ultimate disposition of said property, as well as such real estate as she may be seized of, she, the said S. Virginia Atkinson, by will, or paper writing in the nature of a will, by deed, bill of sale or otherwise:

"Now therefore, for and in consideration of the premises, and for the sum of one dollar to her the said S. Virginia Atkinson in hand paid by the said Edward C. Yellowley, she the said S. Virginia Atkinson, by and with the full knowledge and consent of the said William Whitehead, testified to by his being a party to these presents, does bargain and sell unto the said Edward C. Yellowley, all of the personal estate of which she the said S. Virginia Atkinson is either possessed or entitled to; consisting in part of railroad stock, bank stock, county bonds, household and kitchen furniture, farming implements, horses, mules, cattle, and buggies, and all other riding vehicles, etc., etc., to
(451) have and to hold unto him the said Edward C. Yellowley, his executors and assigns forever.

"*In trust nevertheless,* that he the said Edward C. Yellowley shall hold the same for the sole and special use and benefit and behoof of the said S. Virginia Atkinson, free and clear from all control of the said William Whitehead or liability for his debts or contracts during her coverture with said Whitehead and for the use of such person or persons as she the said S. Virginia Atkinson may bequeath the same to, by any paper writing in the nature of a will, in the event of the death of the said S. Virginia Atkinson, the said William Whitehead her surviving. And the said William Whitehead doth hereby consent, to the foregoing disposition of the estate aforesaid and doth covenant and agree that the said S. Virginia Atkinson shall have full power and authority at any time during the coverture to make, sign and seal any and all paper writings in the nature of a will for the disposition of the estate after her death, provided the same shall be attested by two credible witnesses; and that she shall have the further power to sell, exchange or otherwise dispose of the same or any part thereof during coverture without hindrance or interference on his part. And it is expressly agreed and stipulated by and between the parties hereto that the said Edward C. Yellowley shall in no manner or case be held responsible for the estate hereby conveyed to him or for any part thereof, until the same shall have been specially delivered into his possession by the said S. Virginia Atkinson; and it is further agreed that the said William Whitehead and S. Virginia Atkinson may at any time hereafter substitute by their deed the appointment of any other trustee in the place of the said Edward C. Yellowley; and it is further stipulated and agreed by and

between the parties hereto, that any and all estate to which the said S. Virginia Atkinson may at any future time become entitled by the death of any relation shall be governed by the settlement herein made.

"In testimony whereof the parties have hereunto set their (452) hands and seals the day and date above written.

(Signed) "WILLIAM WHITEHEAD, [SEAL.]
S. V. ATKINSON. [SEAL.]

"Signed, sealed and delivered in the presence of

JAS. MURRAY,
B. S. ATKINSON."

Upon the hearing of the case agreed, the court rendered judgment in favor of the defendant, and upon motion, the action as to her, was dismissed with cost. From this judgment the plaintiff appealed.

Green and Woodard, for the appellant.
Fowle and Kenan & Murray, contra.

1. At common law a wife could not contract, and the question is whether the Constitution, Article X, Sec. 6, has changed the rule. The common law disability was for her protection, as she was in contemplation of law, *sub potestate viri.* 1st Bish. Mar. Wom., Sec. 39; *Draper v. Jordan,* 58 N. C., at bottom of page 177; GIBSON, C. J., in *Thomas v. Folwell,* 2 Wharf., 11 (*S. c.* in Am. Notes to *Hulme v. Tenant,* 1st White and T. Leading Cases, Eq., at page 537); and consequently the rule, that statutes in derogation of the common law, are to be construed strictly, here applies with all its force. *Draper v. Jordan,* 58 N. C., at pages 176-77. HOAR, J., in *Edwards v. Stevens,* 3 Allen, 315; *Brookings v. White,* 49 Maine, 479 (*S. c.,* 2 Bish. Mar. Wom., note 2 to Sec. 175); *Brown v. Fifield,* 4 Mich., 322; *Hartley v. Ferrell,* 9 Fla., 374, 179 (*S. c.,* 2 Bish. Mar. Wom., Sec. 198, note); LOWRIE, C. J., in *Walker v. Reamy,* 12 cases, 410-414; *S. c.,* 2 Bish. Mar. Wom., Sec. 24.

2. The local position of the constitutional provision shows that it was intended to be a disabling, and not an enabling, statute, an exemption from debt; not a power to contract it. It occurs mid- (453) way a chapter of "exemptions." And, in this connection, see remark of PEARSON, C. J., in *Harris v. Harris,* 42 N. C., at pages 122-23. We know from the history of the times that the object of these exemption laws was to *save something* from the wreck of fortunes at the close of the war, an object which would have been little advanced by increasing facilities for the wife to denude herself of her estate.

3. The supposed power of the wife to contract can only be the outgrowth of her right to hold and dispose of property, and can never rise above its source, the *jus disponendi,* either in extent or mode of exercise, and here, as the Constitution requires her *direct* conveyance *inter vivos* to have the sanction of her husband, her *indirect conveyance* by way of charge, must have the same sanction. As tending to confirm this view, see RODMAN, J., in *Harris v. Jenkins,* 72 N. C., at middle of page 185; the part in italics.

And as her contract can only be effectual as "an appointment *pro tanto* out of her separate estate," 2 Story Eq., Jur. Secs. 1399, 1400, 1401, no contract is binding which is not executed with all the formalities requisite to such an appointment, *i.e., conveyance.* When realty is the separate estate, not even in England could it be charged merely by the wife's general engagements. The husband here has to join in the conveyance of the wife's separate estate in realty, and she must be privily examined. Bat. Rev., Chap. 35, Sec. 14; *Newlin v. Freeman,* 39 N. C., 312.

4. But the wife can only, by express words, charge even her own personalty. *Draper v. Jordan,* 58 N. C., 175, and this rule has been affirmed under the new Constitution. *Harris v. Jenkins,* 72 N. C., at page 185.

5. As Whitehead and wife were married before 1868, their property rights are not changed by the statute, which must have only a prospective operation.

(454) 6. The profits of realty are personalty, (RUFFIN, C. J., at page 113 of 7 Ired. Eq.,) and so go to the trustee under the marriage contract.

7. The wife's living separate from her husband, makes no difference in our case. Chitty on Contracts, 177.

8. The dictum in *Withers v. Sparrow,* 66 N. C., 129, does not conflict, for

a. It applied to a South Carolina estate, and is governed by S. C. law.

b. The trustee there concurred.

c. The contract was for the benefit of the married woman's estate.

d. The New York law, which is the basis of the dictum, does not recognize as binding the general engagements of the wife, but only such as were charged specifically on the separate estate. *Tate v. Dederer,* 18 N. Y., 265, 22 N. Y., 250, Am. notes to *Hulme v. Tenant,* 1 Ld. Cas. Eq., from page 531 to bottom of 533.

e. In England the object of the separate estate is the maintenance of the wife, (PEARSON, J., in *Harris v. Harris,* 42 N. C., at first of page 121 and last of 124,) and of course the power to change cannot be extended beyond the objects of its creation and made the means of impoverishing the wife.

RODMAN, J. For the reasons given in *Pippin v. Wesson, ante,* 437, the note sued on is invalid as to Mrs. Whitehead. And for the additional reason, that her separate estate was not created by legislation, but by a deed of settlement, executed in 1865, and the contract does not refer to or charge the debt upon her separate estate, and it was not made with the consent either of her husband, or of the trustee in the deed of settlement.

The case states that she is living separate from her husband, and is in the exclusive management of her separate estate, but it states no facts to bring her within either Section 23 or 24, of the mar- (455) riage act. (Bat. Rev., Chap. 69.) It does not appear that her husband has abandoned her, and there is no deed of separation.

PER CURIAM. Judgment affirmed.

Cited: Hall v. Short, 81 N.C. 278; *Flaum v. Wallace,* 103 N.C. 307; *Sanderlin v. Sanderlin,* 122 N.C. 3.

W. F. ATKINSON v. MARY E. RICHARDSON AND WILLIAM E. RICHARDSON.

In August, 1868, A sold to B, a *feme covert,* having a large separate estate, a tract of land, taking for the purchase money two notes with her husband as surety. Subsequently A surrenders these two notes to B, who executes instead thereof three notes, two of which are made to A, and the third to one C, upon which latter B's husband and A are sureties. After this, the land sale itself was concelled, and A gave up the two notes he held, and agreed to pay $1,000 on that held by C, B agreeing to pay the balance. C sued on the note he held, and recovered the amount thereof from A. In this action by A against B to recover the amount he had to pay to C over and above what he had promised: *It was held,* that the separate estate of B, the *feme sole,* other than that which was the consideration of the note, (now given back to A,) is not chargeable with its payment, and that therefore A cannot recover.

CIVIL ACTION for the recovery of money only, heard before his Honor, *Judge Seymour,* at Fall Term, 1875, of the Superior Court of WAYNE County.

The plaintiff on the 1st day of August, 1868, sold to the defendant, Mary E. Richardson, a tract of land in Orange County, for thirteen thousand dollars, and took three notes under seal for that amount, signed by Mary E. Richardson as principal, and her (456) husband, the co-defendant, with whom she inetrmarried in 1866.

On the 21st of July, 1869, by consent these bonds were surrendered and cancelled and three other bonds were given for the same amount, two payable to the plaintiff and one for $4,509.69 payable to S. P. Cox, the last being signed by Mary E. Richardson as principal and her husband and T. H. Atkinson as sureties. At her request, the last mentioned note was made and accepted in discharge of plaintiff's indebtedness to Cox, *pro tanto.*

On February 7th, 1870, the plaintiff and defendants, at the request of the defendant, Mary E. Richardson, cancelled the contract as to the land, the defendant reconveying the land to the plaintiff and the plaintiff surrendered the two notes held by him and agreed to pay $1,000 on the note held by Cox, and the defendants agreed to pay the balance of said note.

Subsequently Cox brought suit upon the note and on October 2d, 1871, recovered under execution against the plaintiff the sum of $3,200, none of which has been paid the plaintiff by the defendants.

The cause having been referred, the referee found that there is due the plaintiff $2,180.65, which is admitted to be correct. The referee held that the separate estate of the defendant, Mary E. Richardson, was liable for the plaintiff's debt and rendered judgment accordingly, and the defendant excepted. The cause coming on to be heard upon the report and exceptions thereto, the court sustained the exception and rendered judgment in favor of the defendant Mary E. Richardson, and against the plaintiff for cost. Thereupon the plaintiff appealed.

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

(457) RODMAN, J. It was held in *Pippin v. Wesson, ante,* 437, that the Constitution, in giving married women separate estates in their property, did not give to them a general power to contract. In order to charge the separate estate, the contract must either expressly, or by necessary implication from the consideration or nature of it, manifest an intent to do so. But if such an intent so appeared, and the contract was for the benefit of the married woman, the courts would enforce the charge by selling the separate estate for the payment of the debt. The question in the present case is, whether, from the contract, there is a necessary implication of an intent to charge the separate estate of Mrs. Richardson?

In August, 1868, after the adoption of the Constitution, but before the act of 1871-72, (Bat. Rev., Chap. 69,) which, therefore, has no bearing on this case, the plaintiff sold and conveyed to Mrs. Richardson a tract of land at the price of $13,000, and took her notes, with her

husband as her surety for that sum. Afterwards these notes were given up to Mrs. Richardson, and in exchange for them she, as principal, and her husband as her surety, executed to the plaintiff two notes, and a third for $4,503.69, payable to one Cox, which the plaintiff signed as surety for Mrs. Richardson and her husband, and delivered to Cox in payment of a debt which the plaintiff owed him. The plaintiff was afterwards compelled to pay a part of this note, and the purpose of the present action is, to be indemnified from that payment.

We think that it is a necessary implication from the contract, that Mrs. Richardson charged her separate estate in the land which she purchased from the plaintiff with the payment of that note. She received as her separate estate the consideration for the note, and it would be against equity that she should hold the land and refuse to pay the price. But in February, 1870, the plaintiff and Mrs. Richardson and her husband made another agreement by which she re-conveyed the land to the plaintiff, or cancelled the deed which he had made to her, and also cancelled the two notes which she had executed (458) payable to him, amounting to about $9,000, but the note for $4,503.69, it was agreed should stand, subject to a payment of $1,000, which the plaintiff agreed to make on it. If Mrs. Richardson is liable to the plaintiff in the present action, she will have lost by her dealings with the plaintiff about $4,000.

If the plaintiff's relief is confined to a charge on the land which was the consideration of the note, of course he has no relief at all, as that land has been re-conveyed to him. The question, therefore, is reduced to this: Did Mrs. Richardson, by her contract of July 21st, 1869, charge all the separate estate which she had at that time with its payment, or only the estate which was the consideration of the note?

Mrs. Richardson is not liable at law, by reason of her disability of coverture, and we are of opinion that the plaintiff has no equity upon which the contract will be enforced against any separate estate which she may have had, other than that which was the consideration of the note. There is no express reference to her separate estate, and as there was no benefit to it, there is no implication of an agreement to charge it. The law by giving to married women separate estates in their property did not convert them into free traders with power to speculate and trade in real estate. If it be said that this rule will enable married women who buy land to keep it, if the bargain shall be a good one, and abandon it if it shall be a bad one: the answer is, that all persons who deal with married women must be taken to do so with a knowledge of their disabilities. A married woman may purchase property for ready money, but not on credit, and she may contract debts for the benefit of separate property which she already owns, as for building a house on

it, etc. The gift of separate estates with this limited power of contracting in reference to them, was intended for the benefit of married women. A wider construction would in most cases lead to their (459) ruin. This is the view taken in other States. *Jones v. Crostwaite,* 17 Iowa, 393; *Carpenter v. Mitchell,* 50 Ill., 470; *Whitworth v. Carter,* 43 Miss., 61; *De Fries v. Conklin,* 22 Mich., 251; *Keinen v. Wisper,* 40 Mo.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

Cited: Jeffrees v. Green, 79 N.C. 331; *Burns v. McGregor,* 90 N.C. 225; *Draper v. Allen,* 114 N.C. 52; *In re Freeman,* 116 N.C. 202; *Gann v. Spencer,* 167 N.C. 431.

R. B. CHAPPELL AND WIFE v. EDWARD G. BUTLER.

In an action by a distributee against an administrator, seeking to cancel a deed releasing the plaintiff's interest in the estate of the intestate to said administrator, on the ground that the deed was obtained under false and fraudulent misrepresentation, etc., evidence is admissible, to show that the administrator (the defendant) on the day preceding the execution of said deed by the plaintiff, obtained a similar deed from another distributee of the intestate by like false and fraudulent misrepresentations and concealment.

Where the jury, in response to issues submitted to them, found: That the defendant did make false and fraudulent misrepresentations, and did fraudulently conceal facts and circumstances from the plaintiffs, and did exercise undue influence to secure the execution of such deed; and that the plaintiffs executed the same by reason thereof: *Held,* that there was no error in the judgment of the court below, directing said deed to be delivered up to be cancelled, and declaring the defendant to be a trustee of the plaintiffs, as to their interest in the estate of the intestate; and that the judgment must be affirmed.

CIVIL ACTION, tried before *Moore, J.,* and a jury, at July (Special) Term, 1875, of GRANVILLE Superior Court.

The action was brought to cancel a deed of assignment and release executed and delivered by the plaintiffs to the defendant on the ground that the same was obtained by false and fraudulent misrepre- (460) sentations made by the defendants.

The complaint alleged: That Elizabeth Marable died intestate in the county of Granville in the year 1871, leaving a large real and

personal estate, and the defendant on the 3rd day of March, 1871, qualified as administrator of her estate.

The plaintiff, Julia Chappell, is a near relative of the intestate, and as such entitled to a large interest in said estate, and the plaintiff R. B. Chappell is her husband.

The plaintiffs reside in the State of Virginia and knew but little of the business of the intestate, and the defendant resided near the intestate and was fully cognizant of the situation and value of her estate. Shortly after the death of the intestate the defendant came to the house of the plaintiff in the State of Virginia and stated that the estate of the intestate was greatly indebted and that but little if anything at all would be coming to her distributees. That he had lived with the intestate during her life, and that she had always promised him to give him her estate when she died, but that she had died without having done so and he thought the distributees ought to release him. The plaintiffs believing these representations and the defendant being a relation of the *feme* plaintiff, the plaintiffs during that visit executed a release of their interest in said estate for the nominal sum of ten dollars.

The real estate of the intestate was worth about twenty thousand dollars, and was free from debt, and the plaintiff was aware of these facts at the time said representations were made.

The defendant has had the said deed recorded and now claims the interest of the plaintiffs in the estate of the intestate in his own right, under the deed.

The defendant in his answer denied that the said deed was obtained by false and fraudulent statements made to the plaintiffs. He also denied that he made his representations as alleged in the complaint.

The answer contained other allegations denying the facts (461) alleged in the complaint and explaining the representations made to the plaintiffs, but it is unnecessary to state the same as they in no way affect the decision of the case in this court.

The following issues were submitted to the jury:

1. Did the defendant make to the plaintiffs any false or fraudulent misrepresentations or fraudulent concealments or exercise any undue influence to secure the execution of the deed in the complaint mentioned?

2. Did the plaintiffs execute the said deed by reason of the false or fraudulent misrepresentations or fraudulent concealments or undue influence on the part of the defendant?

During the progress of the trial the plaintiffs introduced one Mrs. Jefferson, also a distributee of the defendant's intestate, and proposed to prove by her, that on the day before the deed in controversy was executed, the defendant and one Richard H. Hammie procured from

her a deed, releasing her interest in the estate of the intestate, by false and fraudulent misrepresentations and concealment and undue influence. The defendant objected; the objection was overruled and the defendant excepted.

The record sent up on appeal to this court is voluminous. The foregoing are all the facts necessary to an understanding of the points raised and decided in this court.

The jury found all the issues in favor of the plaintiff, and the court rendered judgment, that the said deed be cancelled, and declaring the defendant a trustee of the plaintiffs as to their interest in the estate of the intestate.

From this judgment the defendant appealed.

Edwards and Batchelor & Son, for the appellant.

Hargrove, Venable, Peace and Young, contra.

SETTLE, J. The plaintiffs seek to have the deed executed by them to the defendant declared null and void, and that the same be deliv-
(462) ered up to be cancelled. The jury have found:

1. "That the defendant did make to the plaintiffs false and fraudulent misrepresentations, and did fraudulently conceal facts and circumstances from the plaintiffs, and that the defendant did exercise undue influence to secure the execution of the deed in complaint mentioned."

2. "That the plaintiffs did execute the said deed by reason of the false and fraudulent misrepresentations and concealment of the defendant, and by reason of undue influence on the part of the defendant."

A perusal of the record, which is ten times more voluminous than necessary to present the points which arise upon it, satisfies us that his Honor submitted the matter fairly to the jury, and that their verdict was fully warranted by the evidence, which is sent up with the record.

The exceptions of the defendant to the admission of evidence cannot be sustained. The whole matter is too plain for argument.

The judgment of the Superior Court is affirmed. Let this be certified, etc.

PER CURIAM. Judgment affirmed.

(463)

W. M. TALLY v. WASH. REED AND J. C. SOSSAMER.

A purchaser at a sheriff's sale, acquires only the naked legal title, and does not get the debt due to the defendant in the execution, or the trust by which it is secured. A sheriff has no power to sell the debt or the trust, although the defendant in the execution has such power.

A trust, in favor of a vendee of land who has paid the purchase money, may be sold under the Act of 1812; but a trust in favor of the vendor, cannot be sold.

PETITION to re-hear the case as decided at January Term, 1875, of this court, and which will be found fully reported in 72 N. C., 336.

The ground upon which the present petition is based, is that the decision of the court rendered at January Term, 1875, conflicted with prior decisions of the court in cases where the same principles of law were involved. The cases referred to are mentioned and commented upon in the opinion of the court at this term.

Bailey, for the petitioner.
Wilson & Son, Montgomery and Barringer, contra.

PEARSON, C. J. When this case was before us, January Term, 1875, it was decided that Tally, a purchaser of the land at sheriff's sale under a *fi. fa.* against Sossamer, did not acquire a right to the unpaid part of the purchase money. In other words, when a vendor of land retains the title to secure payment of the purchase money, a sale of the land under a *fi. fa.* against the vendor passes to the purchaser at sheriff's sale only the naked legal title, and does not vest in him (464) the right to the purchase money.

This principle seemed to us so clear that we decided the case "upon the reason of the thing" and did not consider it necessary to go into an examination of the authorities. Justice READE, who delivered the opinion, refers to the authorities in a general way, and cites only *Moore v. Byers,* 65 N. C., 240, where it is held that if the land be sold under *fi. fa.* against the vendor, the purchaser does not acquire title to the sale notes, but get only the naked legal estate, and *Sprinkle v. Martin,* 66 N. C., 55, where it is held that a mixed trust is not liable to sale under a *fi. fa.* by the act of 1812.

In the petition to rehear, and upon the argument, Mr. Bailey calls our attention to two old cases which had not been before adverted to, to-wit: *Linch v. Gibson,* 4 N. C., 676, and *Tomlinson v. Blackburn,* 37 N. C., 509. These two cases bear upon the question and conflict with our decision; so there is sufficient ground to support the application to rehear.

We have given to the question a reconsideration, both upon the principle and upon the cases, and are satisfied there is no error in the decision.

1. *Upon principle.* Under a *fi. fa.* the sheriff sells the land of the defendant in the execution. The sheriff has no power to sell notes due to him or a trust estate to which he is entitled. To this an exception is made by the act of 1812, which authorizes a sale under *fi. fa.* of the trust estate of a vendee who has paid the purchase money in full, but this statute has no application to vendors who have a trust estate in the land to secure the purchase money.

For illustration: A conveys land to B, in trust, to sell and pay certain debts, among others a debt to B. A creditor of B has the land sold under a *fi. fa.* Upon a judgment against B, the purchaser, at sheriff's sale, gets the legal title by the sheriff's deed; but does he get the
(465) debt due to B, which is secured by the deed of trust? No, for the debt was not sold, and the sheriff had no power to sell it. So upon proceedings in equity, the land will be sold, the debt of B will be paid to him, and not to the purchaser at sheriff's sale, and he will not be entitled to receive out of the fund the amount of his bid, for it was his folly to buy a naked legal title, and the residue after the payment of the debts secured by the deed of trust, will be paid to A, the maker of the deed, on his resulting trust.

Again: A lends money to B, and takes his note and a mortgage on land to secure the debt. A creditor of A has the land sold under a *fi. fa.* The purchaser, by the sheriff's deed gets the land, but does he get the debt secured by the mortgage? No, for the debt was not sold. The sheriff had no power to sell it, and the purchaser gets only the naked legal title. Upon proceedings in equity, B will get back the land, upon payment of the mortgage money, which will be decreed to A, and the purchaser at sheriff's sale gets nothing—not even the amount of his bid. It was his folly to buy a naked legal title.

Again: A sells land to B on credit, say one, two and three years, takes his notes, retains the title, and gives bond to make title when the purchase money is paid. A holds the land in trust for himself, to secure the payment of the three notes, and then in trust to convey to B.

Suppose after B pays up the three notes, but before A has conveyed the land to him, a creditor of A, has the land sold under a *fi. fa.* and the sheriff makes a deed to the purchaser, what passes by the deed? Only a naked legal title; and B can in equity compel the purchaser to convey without paying him the amount of his bid, or allowing him any compensation for his trouble, in buying a naked legal title. Note, in this case under the Act of 1812, a creditor of B could have the trust sold by *fi. fa.* and the purchaser of the trust gets the legal title by

parliamentary magic, as Blackstone terms it. We are satisfied that much of the confusion that has crept into the case is at- (466) tributable to the fact that the distinction—a trust in favor of a vendee who has paid the purchase money, may be sold under this Act of 1812, but a trust in favor of the vendor cannot be sold—has not been allowed its full significance.

Suppose after B pays one of his notes, a creditor of A has the land sold under *fi. fa.*, what passes by the sheriff's deed? A naked legal title, which in the adjustment of the equity will be considered *as nothing;* so the decree is for title to the vendee, on payment of the two notes, to be made to A and not to the purchaser at sheriff's sale.

Suppose before B makes any payment, the land is sold as above—the result is the same. The purchaser gets only the naked legal title, and the vendee on payment of the purchase money, not to the purchaser, but to the *vendor,* is entitled in equity to a conveyance of the land.

These five instances illustrate the principle that a purchaser at sheriff's sale acquires only the naked legal title, and does not get the debt due to the defendant in the execution or the trust by which it is secured —it all rests on the ground that the sheriff has no power to sell the debt or the trust.

Here note a diversity; *the defendant in the execution has power to sell the debt, and the trust, whereas the sheriff has no such power.* A want of attention to *this diversity* explains the confusion in the cases.

For illustration—in the first instance stated above, the trustee has power to convey the land and also his debt; if the purchaser has notice, the other *cestui que trust* may compel him, in equity, to give up the land; but he is allowed in the adjustment of equities to retain the debt due to the trustee, on the assumption of the express assignment of the debt, or an assignment implied, in order to prevent fraud, as some compensation for the loss of the land. If the purchaser bought without notice, he keeps the land and the other *cestui que trust* are left to their remedy against the trustee for the breach of trust. (467)

In the instance of the mortgage, if the mortgagee sells the land, the mortgagor has an equity to follow the land, as his equity of redemption is in the nature of a condition annexed to the land; but to prevent fraud the mortgagee is taken to have assigned to the purchaser the debt secured by the mortgage, hence he is entitled to the money on the redemption of the mortgage. In the case of a vendor, after the payment of all the purchase money, if the vendor sells the purchaser gets the legal title, if he buys with notice he has to give up the land to the vendee—if without notice, he keeps the land and the vendee must look to his vendor, and charge it to his own folly to have allowed the legal title to remain in the hands and under the control of the vendor.

If the vendor sells after payment of one of the notes, the purchaser without notice keeps the land, and the vendee must look to the vendor on the bond for title, but a purchaser with notice must give up the land to the vendee, and has a right to receive the money upon the other notes, on the ground that the vendor, had power to assign the notes and will be taken to have done so in order to prevent fraud, and in part compensation for the loss of the land.

The like result follows in a case where the vendor holds all of the notes, one to whom he conveys the land either keeps the land or else if the land is taken from him, in the adjustment of equities, is entitled to the money due on the notes, because the vendor had power to assign the notes and to prevent fraud, is taken to do so when he conveyed the land. *Obiter* when the land is sold under *fi. fa.* for the sheriff had no power to assign the notes, hence the purchaser gets only a naked legal title, and the right to the notes, and to receive, the money due thereon, remains in the defendant in the execution. For further illustration in the case first supposed.

1. The trustee dies; the land devolves upon his heirs, but the
(468) debt upon his personal representative, and in the adjustment of equities, the heir is decreed to make title and gets nothing.

2. The mortgagee dies; the land devolves upon his heirs the debt upon his personal representative who, on redemption, receives the mortgage money and the heir makes title to the mortgagor. (This is one of the reasons why in England mortgages are usually made upon long terms of years; on the death of the mortgagee, the term passes to the personal representative and the person to receive the money is the same person who is to re-convey.) See this matter fully discussed by Hargrave in his notes to Coke.

3. The vendor dies; the land devolves upon his heir, but the vendor can compel him to make title.

4. The land devolves upon the heir, but the right to the debt passes to the personal representative, he receives the unpaid purchase money and the heir will be decreed to make title to the vendee; so when neither of these notes are paid at the death of the vendor.

These illustrations, in our opinion, establish the position that the debt is not an *"incident"* of the land, but on the contrary, that the land is, in equity, considered as servient and attendant on the debt, and as a security thereto. It follows; one who at sheriff's sale, or by descent, acquires title to the land, gets legal title to the land, but does not get the debt, the payment of which is secured by the land, and takes the title, subject to all equities. On the contrary, one who is entitled to the debt, has a right to subject the land as security in the hands of any one who is not a purchaser for valuable consideration without notice.

Suppose in the instances above; the bankruptcy not the death of the party; the assignee takes the debt, and the land servient to the debt, by force of the act of Congress, in as full a manner as if the bankrupt had assigned the debt and conveyed the land, so there is no analogy between the assignee and a purchaser of the land at sheriff's sale. There is an analogy after *the debt* is subjected under "supplemental proceedings."

Our conclusion on the reason of the thing is, there is no error in the judgment.

2. Upon the authorities there is confusion and a conflict which may be accounted for in what is said above.

Linch v. Gibson, 4 N. C., 676, was decided without argument, and Judge DANIEL, who delivers the opinion, gives no reason and cites no authority but declares the opinion that the effect of the deed of the sheriff was to pass to the purchaser "all right, title and interest in the land which the vendor had," and thereupon decrees title to be made to the vendee on payment by him, to the purchaser at sheriff's sale of the unpaid part of the price of the land, giving to the deed of the sheriff the same effect to pass the debt due to the defendant in the execution as the deed of the defendant would have had;" and not adverting to the fact that the sheriff had no power to sell the debt due for the land. *Tomlinson v. Blackburn,* 37 N. C., 509, without discussion of the principle, rests on *Linch v. Gibson,* and is complicated by the fact that the vendor executes a deed to the purchaser at sheriff's sale. This of course, passed his rights to the unpaid part of the purchase money. The opinion goes on to say, "in addition to this, which we deem the substance of the bill, there are statements of conversations between the plaintiff and the defendants jointly and severally and conferences," etc.

The decision in *Linch v. Gibson,* was without argument, Judge DANIEL does not discuss the question, or give any reason for his conclusion; and *Tomlinson v. Blackburn,* follows in the same track, no discussion or reason for a conclusion, which, as we have seen has no ground to support it.

In regard to authority, *per contra* as the merchants say. *Giles v. Palmer,* 49 N. C., 386; *Moore v. Byers,* 65 N. C., 240; *Blackmer v. Phillips,* 67 N. C., 340; where the question is discussed at large. *Stith v. Lookabill,* 71 N. C., 25; in that case it is assumed to be settled that a purchaser of land at sheriff's sale under an execution (470) against a trustee, acquires merely the legal title, and may be enjoined by the *cestui que trust* from taking possession. The decision is in favor of the plaintiff on the ground that the defendant being a *wrongdoer* not at all connected with the *cestui que trusts* could not defend against one having the legal title, although it be a naked one. To

this we will add the only case on the point that we have been able to find outside of our reports. *Money v. Dorsey,* 7 Smiles and Marshall Rep. (Miss. 15,) in which the principle set out above is declared to be law.

There is no error.

PER CURIAM. Judgment re-affirmed, and petition dismissed.

Cited: Isler v. Koonce, 81 N.C. 381; *Black v. Justice,* 86 N.C. 512; *Rollins v. Henry,* 86 N.C. 716; *Threadgill v. Redwine,* 97 N.C. 244.

WM. R. GORDON AND OTHERS v. ENOCH F. BAXTER.

A plaintiff has no right to recover damages from a party, committing or suffering a public nuisance, unless he has in some way received extraordinary and particular damage, not common to the rest of the public.

CIVIL ACTION, for the recovery of damages, tried in the Superior Court of CURRITUCK County, at Fall Term, 1875, before his Honor, *Judge Eure,* and a jury.

The plaintiff alleges in his complaint, that the defendant has obstructed the free use of a wharf, which has been dedicated to the public for over fifty years, and that on account of such obstruction he and others have been greatly endamaged in not being allowed to ship or receive freight thereat.

The defendant denies that the wharf was ever dedicated to the
(471) public or that it is public property, and claims it as belonging to his wife.

Upon the trial, the following issues were submitted to the jury. Their response is annexed to each:

1. Has there been a dedication of the landing to the public use by any one who owned the fee in the land? Answer: "No."

2. Had there been previous to the 21st of May, 1861, a continuous adverse use of the wharf by the public, upon a claim of right, for more than twenty years? Answer: "Yes."

3. Did the defendant obstruct the free use of the public to this landing? Answer: "Yes."

4. What damage, if any, has the plaintiff sustained by the obstructing its use? "None."

Upon the foregoing finding, the court gave the plaintiff judgment for costs, and further ordered the defendant to remove the obstructions within ninety days.

From this judgment defendant appealed.

Gilliam & Pruden, for appellant.
Smith & Strong and Pool, contra.

PEARSON, C. J. According to the issues found, the wharf in question was public property, to be enjoyed in its use by the citizens of the county of Currituck, and by all of the citizens of the State as well, who may choose to resort to it. So its obstruction by the defendant is a public nuisance.

In response to the issue, "what damage, if any, has the plaintiff sustained by the obstruction of its use?" the jury say *"none."*

This finding defeated the action and his Honor erred in not rendering judgment for the defendant. "For any of those acts which are in the nature of a public nuisance, no individual is entitled to an action unless he has received extraordinary and particular damage not common to the rest of the citizens." *Dunn v. Stone,* 4 N. C., 241. (472) This decision, made in 1818, settled the law in North Carolina and has been ever since adhered to. It rests on the distinction between public wrong, to be redressed by indictment, and private wrongs, to be redressed by civil action, which is clearly explained by Blackstone in his Commentaries. This distinction would be utterly confounded if a citizen who has sustained no particular damage, was allowed to make himself the avenger of an injury to the public, even although he brings the action "in behalf of himself and the other citizens of the county of Currituck," or even if he had added the other citizens of the State of North Carolina.

From the complaint and answer, we think it probable that the jury were under a misapprehension of the meaning of "particular damages;" for instance, if one digs a hole in a public highway, it is a public nuisance, for which he is liable to indictment; should an individual travelling on this highway fall into the hole, he sustains particular damage and may maintain a civil action, although it might have happened that other citizens, if travelling on the road, would have met with a like injury.

However this may be, there is no exception to the charge, no motion for a new trial, and we cannot inquire into it.

Treating the case as before us on a special verdict, we are to render the judgment that ought to have been rendered in the court below.

The judgment in the court below is reversed, and judgment in this court that defendant go without day and recover his costs.

PER CURIAM. Judgment reversed.

Cited: Durham v. Cotton Mills, 144 N.C. 711.

(473)

R. B. PEEBLES v. JAMES W. NEWSON, SHERIFF, ETC.

A sheriff who, on the 6th of January, 1873, returns on an execution that he has collected and paid over the amount thereof, when in fact the money was not collected, etc., until some ten days thereafter, is liable for the penalty of $500, as for making a false return.

CIVIL ACTION to recover the penalty against a sheriff under the statute, for making a false return, tried before *Watts, J.*, at January Term, 1876, of NORTHAMPTON Superior Court.

The complaint alleged: That at June Term, 1872, of the Supreme Court, judgment was rendered in an action in said court in favor of the State of North Carolina on the relation of W. R. Cox, Solicitor, to the use of M. F. Peebles against N. Peebles and others, for the sum of $15,337.28.

On the 12th of October, 1872, execution issued upon said judgment against the property of said defendant, which execution was directed and delivered to the defendant, as sheriff of Northampton County.

The defendant afterwards returned upon the execution to the Clerk of the Supreme Court at Raleigh as follows:

January 6th, 1873: I have collected the sum of nine thousand three hundred and sixty dollars and eighty-five cents, it being the amount found to be due according to the decree, this execution being subject to the credits as per statement. The amount paid over to R. B. Peebles, guardian.

(Signed) JOS. W. NEWSON, Sheriff.

That said return was false, in that the said sum was not collected until about ten days after the 8th day of January, 1873.

That said false return damages M. F. Peebles by loss of interest to about the sum of fifteen dollars.

The defendant demurred to the complaint, and as cause of demurrer alleged:

(474) I. That it appears upon the face of the complaint that the action cannot be maintained by the plaintiff in his own name for any of the matters therein alleged.

II. That the action can only be maintained for any matters in the complaint alleged in the name of the State of North Carolina.

III. That the complaint fails to allege that the return was false within the knowledge or belief of the defendant, and was not honestly and in good faith made under belief of its truth.

IV. That it does not appear that any false return was made.

V. That the complaint does not state a cause of action against the defendant.

VI. That the complaint does not show any cause of action accruing to the plaintiff.

Upon the hearing the court rendered judgment sustaining the demurrer, and thereupon the plaintiff appealed.

R. B. Peebles, for appellant.

Barnes and Smith & Strong, contra.

READE, J. We decide the case against the defendant with reluctance, because he is only charged with "false return" in endorsing the date when money was collected under execution as 6th January, when in fact it was not collected until some ten days after. This, although untrue in fact, is consistent with mistake or inadvertence. And, coupled with the fact that no fraud is charged, and especially with the fact that the amount collected was the amount returned, so that he was in no way benefited; it seems to be a hardship to put upon him a penalty of $500. If it had been charged that he did it deceitfully or fraudulently, or that he derived any benefit from it from which a corrupt purpose might be inferred, it would be very different. And our first impression was that it was necessary to charge that he did it *deceitfully*, and if it were an open question, we would probably so hold; but the (475) contrary has been expressly decided in *Ledbetter v. Arledge*, 53 N. C., 475, and several other cases therein cited, that a criminal intent is not necessary; it is only necessary that the return should be *untrue*.

Any hardship resulting from this rule may be relieved, and will be relieved by our law of amendments. If a return is false by mistake or inadvertence, the court will allow the sheriff to amend his return, so as to speak the truth. If the return is false of purpose, then no amendment will be allowed, and the penalty will be recovered. It is of great importance that judicial proceedings and all executions and returns of process should be absolutely truthful.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

Cited: Finley v. Hayes, 81 N.C. 370; *Harrell v. Warren*, 100 N.C. 263, 264, 266; *Williams v. Weaver*, 101 N.C. 2; *Stealman v. Greenwood*, 113 N.C. 358.

L. D. TRIPLETT AND WIFE v. W. P. WITHERSPOON AND OTHERS.

A deed cannot be used to support a title until the same is proved and registered; and if a deed be lost, which has never been proved and registered, no legal title vests in the grantee.

Equity will not interfere to enforce a contract founded in fraud; certainly not against a purchaser for value, but will leave the parties to their legal rights.

CIVIL ACTION, in the nature of *Ejectment,* tried before *Furches, J.,* at Fall Term, 1875, of the Superior Court of CALDWELL County.

The case was before this court at January, 1874, and the facts are fully reported in 70 N. C., 589.

(476) There was a verdict and judgment in favor of the plaintiffs, and the defendants appealed.

G. N. Folk, for the appellants.

R. F. Armfield and Johnstone Jones, contra.

READE, J. If the plaintiffs' deed had not been lost, and had been registered, their title would have been perfect; for although their deed was fraudulent, as against creditors, and although Witherspoon, the defendants' intestate, was a purchaser for value, yet, as he purchased *with knowledge* of the fraudulent conveyance to the plaintiffs, he is bound by it. And this is under our statute of 1840, altering 27th Elizabeth. *Hiatt v. Wade,* 30 N. C., 340; *Triplett v. Witherspoon,* 70 N. C., 589.

But as the plaintiffs' deed is lost, and has not been registered, the legal title has not vested in them. Bat. Rev., Chap. 35, Sec. 1. *Wilson v. Sparks,* 72 N. C., 208; *Hogan v. Strayhorn,* 65 N. C., 279.

One of two things is necessary to be done before the legal title can vest in the plaintiffs: set up the lost deed and register a copy, or declare the defendants trustees for them, and compel a conveyance of the legal title. This involves the aid of a Court of Equity. Equity will not interfere to set up any transaction founded in fraud; certainly not against a purchaser for value, but will leave the parties to their *legal* rights.

There is error. This will be certified.

PER CURIAM. Judgment accordingly.

Cited: McMillan v. Edwards, 75 N.C. 82; *Beaman v. Wimmons,* 76 N.C. 44; *Hare v. Jernigan,* 76 N.C. 474; *Ryan v. McGehee,* 83 N.C. 503; *Davis v. Inscoe,* 84 N.C. 403; *Southerland v. Hunter,* 93 N.C. 312;

Anderson v. Logan, 99 N.C. 475; *Jennings v. Reeves,* 101 N.C. 450; *Respass v. Jones,* 102 N.C. 11; *Bank v. Adrian,* 116 N.C. 539, 549; *Wilson v. Wilson,* 117 N.C. 352.

(477)

JAMES M. MULLEN, ADM'R v. W. E. WHITMORE AND OTHERS.

A bond given by a deputy sheriff to the sheriff, to secure the faithful performance of his duties, is a private bond for which no form is prescribed by statute, and in which any condition may be inserted which will carry out the intent of the parties; nor is such bond subject to the rules which govern the construction of the sheriff's official bond.

Where the condition of the bond of the deputy sheriff was, that he "shall due return make of all moneys received by him, and in all respects execute faithfully, and fully discharge the duties of said office and pay over all moneys that may come into his hands as deputy sheriff, when and to whom it properly belongs": *Held,* that a failure to pay over to the sheriff the public taxes collected by such deputy, was a breach of the conditions of his bond, for which he and his sureties were liable.

CIVIL ACTION upon a bond, tried before *Watts, J.,* at Fall Term, 1875, of the Superior Court of HALIFAX County.

The complaint alleged substantially the following facts:

On the 1st January, 1871, and from that date to the time of filing the complaint, the plaintiff has been sheriff of the county of Halifax.

In the month of March, 1871, the plaintiff appointed the defendant W. E. Whitmore a deputy sheriff of the said county, and said defendant accepted the appointment and executed a bond with the other defendants as sureties, in the penal sum of fifteen hundred dollars. The condition of the bond was as follows:

"The conditions of the above obligation is such that whereas the said John A. Reid, on the ___ day of March, 1871, appointed William E. Whitmore of said county, a deputy sheriff for said county, with authority in said county to execute all such processes appertaining to his office of sheriff or constable as the said sheriff himself can execute; Now therefore, if the said William E. Whitmore, deputy sheriff as aforesaid, shall truly execute all the duties of deputy sheriff and constable and in every respect execute all mandates and orders issuing from the courts of any Justice of the Peace for said county of (478) Halifax, and due return make thereof of all moneys received by him and in all respects execute faithfully, and fully discharge the duties of said office and pay over all moneys that may come into his hands as

deputy sheriff when and to whom it properly belongs, then this bond shall be void, otherwise to remain in full force and virtue."

That after the appointment of the defendant as deputy sheriff and after the execution of said bond and after the defendant W. E. Whitmore had entered upon the discharge of his duties as deputy sheriff, the plaintiff placed in his hands for collection a list of taxable property for the townships of Caledonia and Palmyra, which taxes were levied by lawful authority and due the State of North Carolina, and Halifax County, for the years 1871-72.

The said defendant collected a large amount of the taxes specified in said lists and failed to pay over and account for to the plaintiff divers of said taxes by him collected, although the same has been frequently demanded by the plaintiff.

At December Special Term, 1874, the death of the plaintiff was suggested, and upon motion Jas. M. Mullen, administrator of the deceased, was made a party plaintiff.

The defendants demurred to the complaint and as ground of demurrer alleged:

That the complaint does not state facts sufficient to constitute a cause of action because:

1. The nature of said taxes does not appear.

2. The plaintiff cannot recover on the bond for the cause of action alleged in the complaint.

Upon the hearing the demurrer was overruled by the court, and leave granted the defendants to file and answer. From the judgment overruling the demurrer, the defendants appealed.

(479) *Hill, for the appellants.*

Mullen & Moore and Walter Clark, contra.

SETTLE, J. The defendants insist that their bond shall be interpreted by the rules which govern the construction of the official bonds of a high sheriff, drawn in pursuance of the statute, specifying what bonds shall be given and the conditions of the same.

But there is a wide difference between them in almost every respect. The one is an official bond of a public officer, the form and conditions of which are fixed by law; the other is the private bond of an individual, for which no form is prescribed and in which any conditions may be inserted which will carry out the intents of the parties. No one can doubt that the intention of the parties, in inserting, among others, the condition that the defendant "shall due return make thereof of all moneys received by him, and in all respects execute faithfully, and fully discharge the duties of said office and pay over all moneys that

may come into his hands as deputy sheriff, when and to whom it properly belongs," etc., was to make the defendant liable for all such breaches as are assigned in the plaintiff's complaint.

The collection of taxes is the common and ordinary work of a deputy sheriff. The high sheriff appoints his deputies and is responsible for their action. He appoints them generally or specially, with or without bond, as he sees fit, and if he takes a bond it is a matter between him and his deputy, with which the public has no concern.

We are of opinion that the breaches assigned are embraced in the conditions of the bond.

The judgment of the Superior Court is affirmed.

Let this be certified.

PER CURIAM. Judgment affirmed.

(480)

ELIJAH PEELE v. HENRY WHITE, EX'R OF JESSE JESSOP, AND OTHERS.

A agreed, in consideration of the use of his farm, to board B, his father-in-law; no time being fixed upon when such boarding was to cease, B continued to board with him until his, B's death. For several months preceding B's death, he was very ill, requiring constant nursing, day and night, so that A and his family were put to much trouble and expense. In an action by A against the administrator of B to recover for the extra trouble and expense consequent on B's helpless condition during his sickness, as upon a *quantum meruit: It was held*, 1. That the agreement must be taken to have been to board B from the date thereof, up to the time of his death:

2. That his Honor, on the trial in the court below, did not err in his charge to the jury, that if A did not intend, while the extra services were being rendered, to make a charge against B therefor, he could not afterwards do so.

CIVIL ACTION, tried before *Eure, J.*, at Fall Term, 1875, of PERQUIMANS Superior Court.

The suit was brought to recover the sum of $621.50, alleged to be due the plaintiff on account of services rendered the testator of the defendant White.

It was in evidence that the plaintiff married the testator's daughter, and that for nine years before the death of the testator, by agreement boarded him for the rent of his farm. The board was a fair price for the rent.

The testator devised his land to his daughter, the wife of the plaintiff. In November, 1873, the testator was attacked by paralysis, which ren-

dered him as helpless as a child. He was so afflicted for seven months; requiring the constant attention of the plaintiff and his wife and family. During the seven months, the testator required nursing day and night, by two persons.

During these seven months neither the plaintiff or his wife undressed and went to bed, but spent every night in his room. He required
(481) medicine at intervals of two hours during his entire illness. He had to be removed very often to change his position, which was always done or assisted in, by the plaintiff and his wife. To remove him required the aid of four persons.

It was shown by all the witnesses that the services rendered were worth the sum demanded.

During his illness the testator said to the plaintiff and his wife, that the gifts by his will would not pay him for their trouble in taking care of him in his sickness.

Visitors set up with the testator every night, for whom entertainment was provided by the plaintiff. A great many persons visited him during the day through his illness, and the plaintiff entertained them, and cared for their stock.

The plaintiff testified, that he had the purpose to charge for their services during the illness of the testator, but did not reduce it to writing until after his death.

The account does not include any charge for board during the illness of the testator.

The defendants requested the court to charge the jury: That the relationship between the parties repelled the implied obligation to pay, which would arise between strangers.

His Honor refused the instruction, and charged the jury that the relationship did not repel the presumption, but that near relationship was some evidence that such services were rendered gratuitously. That if the plaintiff did not intend to charge for the services while being rendered, he could not afterwards make the charge. The plaintiff excepted.

The jury returned the following verdict: "We believe from the relationship that the services rendered were presumptive gratuity; and the plaintiff not entitled to recover."

The court rendered judgment against the plaintiff for costs upon the verdict, and thereupon the plaintiff appealed.

Gilliam & Pruden, for the appellant.

No counsel contra, in this court.

PEARSON, C. J. The charge of his Honor is in conformity to (482) the doctrine announced in *Hauser v. Sain, post,* 552. If by reason of the relationship and the other circumstances, to wit: plaintiff and his wife, had the possession of the testator's farm on an agreement to furnish him with board for the use of the farm; the testator by his will gives the land to his daughter, the wife of plaintiff; no time is fixed during which the plaintiff was to board the testator for the use of the farm. So we must take it that the agreement covered the whole time up to the death of the testator. They agreed to board him for "better or for worse" up to his death, and although for the last seven months the plaintiffs were subjected to heavy charges, we can see no principle upon which they can get rid of the special contract and fall back upon a *quantum meruit.*

The verdict is not very intelligible, but on the whole, we are satisfied the jury, although they may not have exactly comprehended the charge, mean to say that the plaintiff, while the services were being rendered, had no intention of making a charge for extra services and expenses.

No error.

PER CURIAM. Judgment affirmed.

(483)

ALEXANDER MITCHELL AND OTHERS v. DAVID N. KILBURN, TREASURER, ETC.

It is error in the court below, to grant an appeal from the refusal of his Honor to grant a motion made by defendant, to dismiss the proceedings; an appeal thus improvidently granted will be dismissed in this court.

When a motion to dismiss the proceedings is overruled below, his Honor should proceed with the trial, leaving the parties to save their rights by exception; so that when final judgment is rendered, the appeal will present to this court, the questions raised upon the trial, as well as the motion to dismiss.

This was a SPECIAL PROCEEDING, under the act of March 3d, 1875, heard before *Seymour, J.,* at Chambers, in CRAVEN County, October 16th, 1875.

The proceeding was instituted upon the affidavit of the plaintiffs against the defendant, who is the treasurer of Craven County, on the ground that the surety on his official bond is insufficient. Upon the affidavit filed, the court ordered the defendant to appear at Chambers on the 9th day of October, 1875, and justify his said bond by evidence other than that of himself and his sureties.

The parties appeared on the return day of said order, and the case was adjourned to the 16th of October, at which time all the parties being present, the defendant moved to vacate the order and to dismiss the proceeding, on the ground that the act of March 3d, 1875, under which the proceeding was instituted, was unconstitutional and void. The motion was overruled, and the defendant appealed.

Green, Stevenson, and Lehman, for the appellants.
Hubbard, contra.

(484) BYNUM, J. The appeal was premature, and should not have been allowed, from a mere motion to dismiss the case. When his Honor denied the motion to dismiss, he should have proceeded with the trial, leaving the parties to save their rights by exception, as well to the refusal to dismiss, as to the admission or rejection of evidence, which might have been offered in the progress of the trial, in support of the petition. So that when the final judgment was rendered, the appeal would properly present to this court the grave questions raised below, both as to the constitutionality of the act of 1874-75, Chap. 120, and the construction to be placed upon its provisions.

The appeal, having been improvidently granted, must be dismissed. C. C. P., Sec. 299; *Childs v. Martin,* 68 N. C., 307; *Gray v. Gaither,* 71 N. C. 55.

PER CURIAM. Appeal dismissed.

Cited: Mitchell v. Hobbs, 74 N.C. 485; *Mitchell v. West,* 74 N.C. 486; *Crawley v. Woodfin,* 78 N.C. 6; *McBryde v. Patterson,* 78 N.C. 416; *Sutton v. Schonwald,* 80 N.C. 23; *R. R. v. Richardson,* 82 N.C. 344; *Gay v. Brookshire,* 82 N.C. 411; *McPeters v. Ray* 85 N.C. 465; *Scroggs v. Stevenson,* 100 N.C. 358; *Plemmons v. Improvement Co.,* 108 N.C. 616; *Cameron v. Bennett,* 110 N.C. 278; *Joyner v. Roberts,* 112 N.C. 114; *Williams v. Bailey,* 177 N.C. 40; *Pender v. Taylor,* 187 N.C. 251; *Gilliam v. Jones,* 191 N.C. 622; *Belk's Department Store v. Guilford County,* 222 N.C. 451.

ALEX. MITCHELL AND OTHERS v. ORLANDO HUBBS, SHERIFF, ETC.

(For the Syllabus, see the next preceding case of *Mitchell and others v. Kilburn, Treasurer,* etc.)

MITCHELL *v.* WEST.

This was a SPECIAL PROCEEDING, instituted under the provisions of the act of March 3, 1875, heard by *Seymour, J.*, at Chambers, in CRAVEN County, October 16th, 1875.

The plaintiffs filed an affidavit that they had made diligent inquiry as to the sufficiency of the official bond of the defendant, who is sheriff of the County of Craven, and that they verily believed said bond to be insufficient, in the ability of the sureties thereto.

Upon this affidavit the court issued an order to the defendant to appear on the 9th of October and justify said bond by evidence other than that of the defendant or his sureties.

The case was continued until October 16th, when all the (485) parties being present, the defendant moved the court to dismiss the proceeding, on the ground that the act of March 3d, 1875, was unconstitutional. The motion was overruled and the defendant appealed.

Green, Stevenson and Lehman, for the appellant.
Hubbard, contra.

BYNUM J. This is a proceeding under Chap. 120 of the Acts of 1874-75, to cause the defendant to justify his bonds as Sheriff of Craven County. The facts and the judgment of the court below, are the same as in the case of *Mitchell et al., v. Kilburn, ante,* 483. The opinion of the court in that case applies to this.

There is no error.

PER CURIAM. Appeal dismissed.

Cited: Mitchell v. West, 74 N.C. 486.

ALEX. MITCHELL AND OTHERS V. I. E. WEST, CLERK, ETC.

(For the Syllabus, see the preceding case of *Mitchell and others v. Kilburn, Treasurer,* etc., page 483.)

This was a SPECIAL PROCEEDING under the Act of March 3rd, 1875, heard before *Seymour J.* at Chambers in CRAVEN County, October 16th, 1875.

The plaintiffs filed an affidavit that they had made diligent enquiry as to the sufficiency of the official bond of the defendant who is Clerk

of the Superior Court of Craven County, and they believed the same is insufficient in the ability of the sureties thereto.

(486) Upon this affidavit the court issued an order to the defendant to appear at Chambers on the 9th of October, 1875 and justify said bond by evidence other than that of himself or his sureties.

The case was continued until October 16th, when all the parties being present the defendant moved to vacate the order and dismiss the proceeding on the ground that the Act of March 3, 1875, was unconstitutional. The motion was overruled and the defendant appealed.

Green, Stevenson and Lehman, for the appellants.
Hubbard, contra.

BYNUM J. This is a proceeding against the Clerk of the Superior Court of Craven County, to cause him to justify his bond as Clerk. The opinion and judgment of the court in the case of *Mitchell, et al., v. Kilburn, ante,* 483, and *Mitchell v. Hubbs,* ante, 484.

PER CURIAM. Appeal dismissed.

(487)

ALEXANDER MITCHELL AND OTHERS v. THE BOARD OF COMMISSIONERS OF CRAVEN COUNTY.

The plaintiffs, tax-payers in Township No. 8, obtained a temporary restraining order, restraining the defendants from collecting certain taxes to pay the accumulated debt of the township, and to defray the current expenses thereof; alleging in their complaint that the debt was fraudulent, had never been legally audited, and had been ordered by the defendants to be paid as a whole, "or in a batch," and not each claim separately. The answer of the defendants deny each and every material allegation in the complaint: *Held,* that his Honor, who heard the case after the answer was filed, did not err in vacating the temporary restraining order, and suffering the defendants to collect the tax already levied.

CIVIL ACTION, for an *Injunction,* heard before *McKay, J.,* at Fall Term, 1875, of CRAVEN Superior Court.

The complaint alleges: The plaintiffs are citizens of the County of Craven, and residents and tax-payers of township No. 8.

In the year 1873, the township trustees of said township levied taxes upon the property therein and upon the polls, to pay a large pretended, but unfounded debt, alleged to have been accumulating for several years. That no tax had been levied previously to pay the

actual current expense of each year, and the tax thus levied amounted to about the sum of $3,000.

To prevent the collection of said illegal tax, certain tax-payers, among them a portion of the plaintiffs, obtained an injunction restraining said trustees from collecting said tax, which is now pending on appeal in the Supreme Court, and still in force.

At a recent meeting of the Board of Commissioners of Craven County, held on the second Monday of May, 1875, the defendants levied a tax of 6⅓ cents on the $100 worth of property, (488) and 19 cents on the poll, in said township, to be applied to the payment of the aforesaid claims, the collection of the tax to pay which, had been enjoined as aforesaid.

The said pretended claims, the plaintiffs charge, have never been audited and examined, as prescribed by law—no account on oath having been rendered to said board, nor made out in items, nor is any affidavit attached to and filed with it, that the services therein charged for have been, in fact, made and rendered, and that no part thereof has been paid or satisfied; nor is the time necessarily devoted to the performance thereof stated. That a large number of accounts of various persons, and for different periods of time, have been allowed by the defendants, the originals of which have not been filed, but the whole thrown together in one general account, and all in the handwriting of the clerk of said township trustees, and so far as appears from the records of the defendants, have not been proved at all, and this entire batch of accounts have been allowed *en masse*. On the outside of said text of accounts is the following endorsement:

"May 17th, 1875.

"*Ordered:* That the within accounts of township No. 8 are hereby audited, and the whole amount of taxes to pay the same shall be 6⅓ cents on the $100, and 19 cents on the poll.

(Signed.) "JOHN PATTERSON, Chairman."

A large portion of said accounts were never due by said township, but were fraudulent and illegal.

Said levy is illegal and void for the further reason that it is to pay a new debt, pretended to be due, contracted since the adoption of the present Constitution of the State, and extending over periods of five or six years, and which has never been submitted to and approved by the qualified voters of said township, and which tax, (489) if collected, will exceed the sum of one thousand dollars.

That at the meeting of said Board, held in the month of June last, a part of the plaintiffs applied to the defendants to reconsider their

action, and proposed to show that said action was not authorized, but forbidden by law, and the said board refused so to do, and avowed their purpose to collect said tax unless restrained by law.

The plaintiffs demanded judgment: That the defendants be restrained and enjoined from collecting said tax or any part thereof, etc.

Upon the foregoing complaint his Honor, *Judge McKay*, upon motion at Chambers, granted a restraining order until the cause should be heard before *Seymour, J.*, within ten days; at a time to be designated by him.

The cause was heard before *Seymour, J.*, on July 15th, 1875, when the defendants filed an answer the material allegations of which are stated in the opinion of the court.

Upon the hearing the restraining order was vacated and the plaintiffs appealed.

Clarke & Roberts, for the appellants.

Lehman, contra.

READE, J. The defendant levied a tax in township No. 8, and the plaintiffs seek to enjoin the collection: first, because they say the debts to be paid are mostly fraudulent, and secondly, because they say the debts have never been audited by the defendants as the law requires. They say that no taxes have been levied in the township for several years, and that now false claims are presented and allowed; and that the defendants, instead of passing upon each claim separately according to its merits, allowed the claims in a "batch," and ordered them to be paid. They do not specify, however, a single claim which they allege to be fraudulent.

(490) The answer meets every charge fully, with a denial. No taxes have been collected for the township for several years and the "necessary expenses" remained unpaid, and certificates had issued from time to time to those entitled. And now they have all been presented amounting to about $1,900.00. For some reason, the defendants abated the whole amount of the claims to $900, and ordered them to be paid to that amount *pro rata*. The creditors may have had some right to complain at this disposition of their claims; but certainly the taxpayers had not. The defendants say, that they did fully consider and audit all the claims presented, and found them to be due for necessary expenses, which distinguishes this case from *Weinstein v. Commissioners of New Bern*, 71 N. C., 535.

To allow the necessary expenses of a township or county to accumulate for years instead of laying taxes yearly to pay the same, is unquestionably bad policy; but it is not a policy which this court can control.

The plaintiffs make complaint as to the formalities of auditing the accounts by the defendants, but there is nothing affecting the merits. The items of the account—list of the claims—accompany the answer, and no one of them is specifically assailed by the plaintiff.

The enjoining the collection of whole tax lists, thereby stopping the wheels of government, ought only to be allowed in plain and extreme cases.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

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(491)

STATE v. LEANDER CRUSE.

Upon the trial of an indictment for larceny, it appeared that the officer who arrested the prisoner, in order to restrain him from violence, tied him: that shortly thereafter, the prisoner said to the officer, "if you will untie me, I will tell you all about it;" and upon being untied, made certain confessions: *Held*, that in the absence of evidence tending to show that the tying was painful, and to be relieved of the pain, formed an inducement to his subsequent confession, the admissions made were competent evidence against the prisoner.

INDICTMENT, for *Larceny*, tried before *Furches, J.*, at Fall Term, 1875, of IREDELL Superior Court.

The State introduced one Sharpe to prove the declarations of the prisoner. The counsel for the prisoner objected to the admission of the evidence on the ground that they were improperly obtained. Sharpe testified: That he was deputized to arrest the prisoner, that he found him at Damascus church, on Sunday night; the prisoner was standing outside the church, and the services were then going on; he arrested him and, for the purpose of preventing a disturbance of the congregation, he carried the prisoner off some forty yards. Soon thereafter a deputy sheriff and several other persons came up. The sheriff asked the prisoner what was the matter, the prisoner replied "nothing," and commenced dancing and cutting up. Sharpe then said to the prisoner, "If you don't behave yourself I will tie you," to which the prisoner replied with an oath, that it would take a better man than he was to tie him. The prisoner was then tied. Soon after being tied, he said: "If you will untie me I will tell you all about it." He was then untied, and made a statement.

The counsel for the prisoner renewed the objection. Objection overruled by the court, and the prisoner excepted.

(492) The confessions of the prisoner were given in evidence. The jury rendered a verdict of guilty and the prisoner moved for a new trial. Motion overruled, judgment and appeal by the prisoner.

Scott & Caldwell, for the prisoner.
Attorney General Hargrove, for the State.

RODMAN, J. An officer who arrests a person charged with crime, has a right to tie him, if he thinks it necessary to do so, either to prevent his escape or to prevent violence to himself or others. *State v. Stalcup,* 24 N. C., 50. From the fact that the officer tied the prisoner under the circumstances set forth, no inference can be drawn of a purpose to frighten him so as to induce a confession. It is admitted law that the confessions of a prisoner cannot be received as evidence against him, unless it appears that they were made freely and without the inducement of hope or fear. If a person in authority (as the constable on this occasion was) presents even a very slight inducement to the prisoner to confess, his confessions thereafter made are inadmissible. The principle is discussed with much ability in *Regina v. Moore,* 12 E. L. & E. R., 583, and in *Regina v. Baldry, Id.,* 590. See also 1 Greenl. Ev., S. 219; *State v. Davis,* 63 N. C., 578; *State v. Moore,* 2 N. C., 482. It is held in many cases that the mere fact that the prisoner was under arrest when he made the confessions, does not render them incompetent, unless some inducement had been held out to him. *State v. Jefferson,* 28 N. C., 305; *State v. Parish,* 44 N. C., 239.

In the present case the prisoner not long after he had been tied, said: "If you will untie me, I will tell you all about it." The constable then untied the prisoner, and the prisoner then stated that he and another broke into the prosecutor's house and took the property mentioned in the indictment, and he led the officer to the place in which it had been concealed.

(493) If it appeared that the tying was so done as to produce pain, and that to be relieved of the pain formed an inducement to the subsequent confession, we should not hesitate to reject it. Nothing is more abhorrent to our law than confessions extorted by torture, or by the fear of it, or by the hope of being relieved from it. But it appears in the present case that the tying was resorted to, to restrain the violence of the prisoner. It does not appear that it was painful, or that it was continued longer than was necessary for the object in view. The confessions were made after the prisoner was released from his bonds. We think they were properly admitted in evidence to the jury, subject as to their credibility, to be affected by all the circumstances attending them. Of their credibility, under the circumstances, the jury was the proper judge.

As in our opinion all the confessions were admissible, it is unnecessary to consider separately that part of the prisoner's statements which relates to the goods having been deposited by him in the place where they were afterwards found.

Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Sanders, 84 N.C. 731; *S. v. Efler,* 85 N.C. 590; *S. v. Rogers,* 112 N.C. 876.

(494)

GEORGE T. DANIEL, EX'R., v. THE BOARD OF COMMISSIONERS OF EDGECOMBE COUNTY.

A contract for the loan of money made by the late County Courts for the support of the paupers in their respective counties, was *ultravires*, and therefore void.

The denial of the power of a municipal corporation to borrow money is not inconsistent with an admission of its power to contract debts for legitimate purposes:

Therefore, where a County Court in 1864, had purchased supplies for the support of the poor, and to pay therefor and purchase other necessary provisions, borrowed money of the plaintiff: *It was held*, that the plaintiff was entitled to be subrogated to the rights of the creditors whose debts he paid, and recover as their substitute the value of what he paid, as upon a *quantum meruit*, according to the legislative scale.

A defendant will not be permitted to plead the statute of limitations, when it appears that the plaintiff delayed bringing his action, under an agreement with the defendant that such action should abide the decision of another already instituted, and involving the same merits.

CIVIL ACTION, tried before *Seymour, J.*, at July Term, 1875, of EDGECOMBE Superior Court, upon the following

CASE AGREED:

At a regular term of the late County Court of Edgecombe County, held at Tarboro on the fourth Monday of February, 1864, a majority of all the justices being present, an order was made in the words and figures following:

"It appearing to the satisfaction of the court that it will require at least $25,000 for the support of the paupers of this county for the next twelve months, including the amount due for provisions now on hand and not paid for; and that there is nothing in the hands of the Treasurer of the Board of Wardens to meet the same, wherefore it being the duty

of the court to provide for said deficiency, and the matter being
(495) fully considered: *It is ordered,* by the court, a majority of the Justices being present, that Thomas Norfleet, Treasurer of the said Board of Wardens, be and is hereby fully authorized and requested to borrow as it shall be needed, upon the faith and credit of the county, not exceeding in the aggregate the sum of $25,000, to be returned to the lender or lenders two years after the termination of the present war, in currency, the interest to be payable annually in currency also; that the said Thomas be, and he is hereby fully authorized as Treasurer of said Board, and in behalf of the county, to sign certificates and deliver them to the persons from whom he may borrow the money, setting forth therein the sum borrowed and the particulars of the loan, and that it be his duty to report to the court at the next term a statement in writing showing the amount borrowed from each person and the date of each certificate issued by him. *It is further ordered,* That he borrow as much of the said sum as he can from the Wilson, and school funds of this county, receiving Confederate Treasury notes under $100, at par, but in borrowing from others that he do so upon as favorable terms as possible for the county by giving public notice and inviting competition; and the money when thus realized is hereby appropriated for the support of the paupers of this county in such matters as the Wardens shall direct."

The Wilson fund was a fund in the hands of the Chairman of the County Court, delivered to him and his successors by the late Louis D. Wilson for the benefit of the paupers of said county.

At the same term of the court an order was also made for borrowing money for the support of the families of indigent soldiers, but this fund had no connection with that borrowed under the order above written.

Thomas Norfleet, the Treasurer of the Wardens of the Poor, in pursuance of said order, after public advertisement and after complying with all the directions contained therein, borrowed from John H.
(496) Daniel, the testator of the plaintiff, for and on behalf of the county, the sum of two thousand three hundred and twenty-five dollars in Confederate Treasury notes, on the terms that the county should pay for every dollar thereof 43 1-93 cents, being the sum of one thousand dollars, and issued to said Daniel the following certificate:

"TARBORO, N. C., April 9th, 1864.

"This certifies that I, Thomas Norfleet, as Treasurer of the Board of Wardens for Edgecombe County, in behalf of said county, acting under authority conferred on me by the Court of Pleas and Quarter Session of said county, at February Term, 1864, have this day borrowed of John H. Daniel, the sum of two thousand, three hundred and twenty-

five dollars in Confederate Treasury notes, to be repaid by the county at the end of two years after the expiration of the present war with the United States, at the rate of forty-three 1-93 cents for every dollar so borrowed. Amounting to one thousand dollars which last mentioned sum is to carry interest from the date hereof, payable in currency on the 9th day of April in each and every year hereafter until the said sum of one thousand dollars shall be paid. In witness whereof I have hereunto subscribed my name the day and year above written.

(Signed) "THOMAS NORFLEET,
Treasurer Board of Wardens for Edgecombe County."

The whole amount borrowed from individuals was $11,167 for which certificates were issued for $4,840.00, the residue of the $25,000 was borrowed from the Wilson fund and the common school fund.

The price agreed to be paid for said Confederate Treasury notes was the common price for which they could be obtained at that time, and the money so borrowed was used by the Treasurer of the Board of Wardens for the support of the paupers.

John H. Daniel died in the year 1873, leaving a last will and (497) testament, in which the plaintiff was appointed his executor, and he has duly qualified as such.

At an adjourned meeting of the Board of County Commissioners for said county, held April 29th, 1873, William H. Johnston, Esq., an attorney at law, came before the Board and stated that he held, as attorney for the plaintiff's testator, the above certificate, and a similar one issued to Austin, Norfleet & Co.; that similar certificates were issued to and held by others; that the holders desired to test the liability of the county on the same, and suggested that the most economical way was to let the firm of Austin, Norfleet & Co. decide all claims. To this he understood them to assent and four of the members of the Board (there being a vacancy,) accepted service of the writ of summons issued against them by Austin, Norfleet & Co., by writing their names then and there on the back of said summons, and on account of this agreement no suit was brought on the certificate of the plaintiff. Capt. W. S. Duggan was Chairman of the Board, and spoke for the Board; no vote was taken.

The suit of Austin, Norfleet & Co., was heard before Judge Moore, at July Term, 1874, of said court, but before his Honor had announced his decision upon the liability of the defendants, and after the close of the argument, the plaintiffs proposed to the defendants to accept the scale value of the money loaned, and the proposition was accepted, and the suit compromised.

At the session of the Board of Commissioners held on the first Monday in January, 1875, the plaintiff applied to the defendants to pay the certificate above named, but the defendants refused to pay the same.

Upon the foregoing state of facts the court held:

1. The original certificate of April 9th, 1874, was invalid, not being under seal.

2. The defendants made no new promise in April, 1872, suffi-
(498) cient to repel the bar created by the statute of limitation.

3. The proposition of Mr. Johnston to make the case of Austin, Norfleet & Co. a test case, was not voted on by the Board.

4. The action of the Board, if any, on said proposition was not recorded in the minutes of said Board.

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

Howard & Perry, for the appellant.

Phillips, contra.

RODMAN, J. 1. The first question we have to consider is the authority of the County Court of Edgecombe to borrow money in 1864, for the support of the county poor, for the ensuing year. As the money was borrowed in 1864, the case is unaffected by the Constitution of 1868. Municipal corporations being the creatures of statute law, possess no powers but those which are given to them by statute; that is to say, by the Constitution or some Act of the Legislature.

The general question of the power of a municipal corporation to borrow money, is discussed in 1 Dillon Mun. Corp. Sec. 83, and among the cases to which the author refers, that of *Ketchum v. City of Buffalo*, 14 N. Y., 356, seems particularly deserving of attention for its reasoning; for the point was not decided. Without undertaking to lay down a rule of universal application, we think that there was nothing in the duties imposed upon the County Courts, or in the powers given to them, which required for their exercise, a power to borrow money, or from which such power could be fairly implied. By Chap. 86 of the Revised Code, the general care of the poor is given to Wardens, who are required to be annually elected by the County Courts. By Sec. 7, "On application of the Wardens, the Justices, when providing for other county revenue, may lay a tax sufficient for the maintenance of the poor,
(499) which shall be collected and paid to the Warden," etc. This was the whole power of the County Court which is material to the present question. We are of opinion that the contract of the County Court with the testator of the plaintiff was *ultra vires* and void. This opinion is supported by that of the Supreme Court of New Jersey in

the very recent case of *Hackettstown v. Swackhamer,* 37 N. J. Law, (8 Vroom) 191, and by the Supreme Court of the United States in *Mayor, etc., v. Ray,* 19 Wall., 468.

2. The denial of the power of a municipal corporation to borrow money, is not inconsistent with an admission of its power to contract debts for legitimate purposes. It is impossible to conceive how without this power, a County Court could perform the various duties imposed on it, for the welfare and good government of the county. Among these duties are included the building and repair of the necessary public buildings and bridges, the paying of the salaries of certain officers, of jurors, and of witnesses in certain cases, and sometimes of prosecuting and defending suits. There is no authority which denies the power, and its possession is directly decided, or necessarily implied, in many cases decided in this court, of which *Winslow v. Commissioners of Perquimans,* 64 N. C., 218, and *Yellowley v. Commissioners of Pitt,* 73 N. C., 164, may be taken as examples. The power to contract a debt is of necessity, but the power to borrow money is not, and though both are liable to abuse, the first is the less so.

3. In the present case the County Court had purchased certain provisions for the poor, whereby they had contracted a debt, and the case states that the money which was borrowed from the testator of the plaintiff, and from others at the same time, was actually applied to the payment of that debt, and to purchasing other like supplies. All fraud is thereby excluded, and we see no reason why the plaintiff should not be subrogated to the rights of the creditors whose debts he paid, and recover as their substitute the value of what he paid. (500)

This agrees with what is said in *Davis v. Commissioners of Stokes, ante,* 374.

The creditors of the county could certainly assign their claims, and their being paid in the manner stated, ought not in equity to be regarded as an extinguishment. Equity will consider the money lender as an assignee of the original debt.

Upon the principles here stated, every person who furnishes labor or materials upon a contract with county commissioners takes on himself the burden of showing that the debt was fairly contracted, and was for a purpose within the scope of their powers. And every one who lends money to county commissioners, is bound to show that it was faithfully applied to pay *such* debts, when he will be permitted to stand in the place of the creditors.

4. The rule for ascertaining the value of what the plaintiff paid would not be the value of the Confederate money loaned by him as fixed by the agreement in 1864, for that contract, as we have seen, was void.

There is, under the circumstances of this case, no practicable rule for ascertaining the value, except by the legislative scale.

We think the plaintiff is entitled to recover according to that scale, unless he is barred by the statute of limitations.

5. He is barred, unless what took place between his counsel and the defendants, makes it against equity and good conscience for them to plead the statute. We are of opinion that it does so make it. When the plaintiff, through his counsel, proposed to the county commissioners that his claim should abide the result of a trial in the suit of Austin against them upon a similar claim, there was no dissent expressed. The commissioners accepted service of a summons issued at the instance of Austin, which seems to have been a part of the plan for an economical determination of his claim, and that of the plaintiff, and left the
(501) plaintiff under the belief that his proposition had been accepted.

That no formal note was taken, and no record of the acceptance of the proposition made, was not decisive. The law that a record shall be kept, of all resolutions and acts of the commissioners is directory only. It ought always to be observed, and it is perhaps penal to neglect it, but it is not essential to the validity of their acts. Otherwise persons dealing with them who have no means of knowing whether a record is made or not, might be deceived and injured.

The assent of defendants to this proposition was equivalent to an agreement, that the time which should thereafter elapse, until the trial and determination of Austin's suit, should not be counted. Austin's suit was never tried, but was compromised by the parties to it.

The plaintiff was entitled to have until the next regular meeting of the commissioners after he was informed of the compromise, before he could be considered *in moro*, so that the statute could run. Deducting this time of permitted delay, the plaintiff's claim is not barred. Judgment for the plaintiff according to the legislative scale, for the value of Confederate money. The judment being partly affirmed, and partly reversed, each party will pay his own costs in this court.

PER CURIAM. Judgment accordingly.

Cited: Somble v. Comrs., 74 N.C. 422; *Haymore v. Comrs.*, 85 N.C. 270; *Whitehurst v. Dey*, 90 N.C. 543; *Barcroft v. Roberts*, 91 N.C. 369; *Joyner v. Massey*, 97 N.C. 151, 155; *Cecil v. Henderson*, 121 N.C. 247, 248; *Tomlinson v. Bennett*, 145 N.C. 281; *Oliver v. Fidelity Co.*, 176 N.C. 601; *Franklin v. Franks*, 205 N.C. 98; *Wilson v. Clement Co.*, 207 N.C. 543; *Jackson v. Parks*, 216 N.C. 333.

(502)

N. M. LONG v. B. F. FINGER.

A and B entered into a parol contract for the sale and purchase of a town lot, B agreeing to pay two hundred and fifty dollars for the same within two years; B took possession and put improvements thereon to the value of one hundred and fifty dollars. When the purchase money became due, A tendered a deed and demanded payment; B was insolvent and failed to pay. In a suit to recover the possession, A claimed the lot without any allowance to B for his improvements; B demanded pay for the same: *Held*, that the court below did not err in giving the possession of the said lot to A, without any payment to B for his improvements: *Held further*, that B might have sold his interest in the lot and retained of the sum the same sold for, all in excess of the just demands of A.

This was a CIVIL ACTION, in the nature of Ejectment, tried at June Term, 1875, of HALIFAX Superior Court, before his Honor *Judge Watts*.

The following are the facts agreed and signed by counsel:

In the month of November, 1870, the plaintiff and defendant entered into a *parol* contract for the purchase of a lot in the town of Weldon, for the sum of two hundred and fifty dollars, to be paid in two years; the title to be conveyed to the defendant when the purchase money was paid.

By virtue of this contract, the defendant entered into possession and erected improvements on said lot; which are admitted to be worth one hundred and fifty dollars.

After the purchase money became due, the plaintiff loaned the defendant one hundred dollars, upon the parol understanding that if the defendant failed to pay the sum so loaned within sixty days, the defendant would surrender the lot with the improvements thereon, and that the contract of sale should be cancelled. After the purchase money and the money loaned became due, both were demanded by the plaintiff, he, at the same time, tendering a deed to the defendant for the lot; the defendant did not comply with either demand, alleging (503) his inability to do so. The insolvency of the defendant, at the date of the denial, and now, is admitted.

The action was commenced on the 9th day of April, 1873. The amended replication, which first sets up the one hundred dollars loaned, was filed at June (Extra) Term, 1875.

The plaintiff claims:

1. The possession of the premises, without any allowance to the defendant for his improvements.

2. That if any allowance be made the defendant for his improvements, that he, the present plaintiff, is entitled to an offset of one hundred dollars, amount loaned the defendant, with interest, and for the

amount of the annual rental value of the premises, which is admitted to be twenty dollars *per annum*.

The defendant claims:

1. That he be allowed the value of his improvements, after deducting the annual rental value of the premises.

2. That no abatement of this sum shall be made on account of the one hundred dollars, because it is a distinct transaction, wholly disconnected with the original purchase, and that it is not within the jurisdiction of the Superior Court, being under the sum of two hundred dollars.

3. That the promise made by the defendant in respect to pledging the improvements for the one hundred dollars loaned, concerned the realty, and is void under the statute of frauds.

Upon this statement of facts, his Honor decided that the plaintiff was entitled to the possession of the premises; and that the defendant was entitled to no allowance for the value of his improvements.

Judgment in accordance with his Honor's decision, and appeal by defendant.

Busbee & Busbee, for appellant.

Day and Batchelor & Son, contra.

(504) RODMAN, J. The plaintiff has the legal title to the land in controversy, and is therefore admittedly entitled to recover unless the defendant has some equity to restrain him. The defendant alleges that the plaintiff by parol agreed to convey the lot to him on the payment of $150; that he thereupon entered into possession and put up improvements to the value of $150; he admits that he has never paid the plaintiff the purchase money and is unable to do so. He contends that he ought to be allowed the value of his improvements, or at least that the premises be sold and any excess they may bring over the purchase money, and damages for withholding the possession, and the costs of this action, may be paid to him.

It may be observed that although the contract was originally by parol and could not be enforced, yet as the plaintiff in his replication acknowledges the contract and offers to perform his part of it on performance by the defendant, the defendant does not need any decree of a court to give him that relief. It is competent for him to sell his estate in the premises, and if he can obtain for them a price in excess of the just demands of the plaintiff, the excess will be his, unless the plaintiff will have in that event a right to tack on his subsequent loan of $100. As no case is before us calling for any opinion as to the plaintiff's right in that respect, we express none.

If the defendant cannot sell his estate in the premises subject to the plaintiff's claim, for anything, the inference is clear that although his improvements have cost him something, they have added nothing to the value of the lot.

Beyond the remedy indicated, the defendant has no equity or title to relief. He relied in the argument on the case of *Albea v. Griffin*, 22 N. C., 9, and others, to the effect that if a vendee by parol paid part of the purchase money, or entered and made improvements, although he could not enforce a specific performance on the ground of part performance, yet the vendor would not be allowed to turn him out without repaying what of the purchase money had been paid and making compensation for the improvements. Obviously the present case (505) does not stand on the same footing. Here the vendor does not set up the statute of frauds, but waives it, and is both willing and able to comply. The defendant alone is in default.

There is no error, and the plaintiff is entitled to judgment for the possession of the premises on the pleadings. The pleadings are so irregular, that we are somewhat at a loss what judgment ought to be given here. The replication is a departure from the cause of action alleged in the complaint; it contains irrelevant matter and offers no material issue. The rule, however, is that no matter at what stage of the pleadings a demurrer is put in, the court will look at all the pleadings and give judgment in favor of the party entitled. The Judge was right, therefore, in giving judgment for the plaintiff for possession. He might, however, on the request of the plaintiff, have caused a jury to be impaneled to assess his damages. This he did not do, and it does not appear that the plaintiff requested it. In the absence of such a request, we do not feel called on to remand the case in order that damages may be assessed. We therefore merely affirm the judgment below, with costs in this court.

Let this opinion be certified.

PER CURIAM. Judgment affirmed, with costs to the plaintiff in this court.

(506)

THE RICHMOND & DANVILLE RAILROAD COMPANY v. THE BOARD OF COMMISSIONERS OF ORANGE COUNTY.

The real estate held by the N. C. Railroad Company, for right of way, station places, etc., is exempt from taxation until the dividend of profits of said company shall exceed six per cent, *per annum*. As the said dividends have not as yet reached that amount the authorities of a county through which the said road passes, have no power to tax the same.

This was a PETITION praying a remission of certain taxes levied by the defendants upon the real estate of the plaintiffs, originally filed before the Board of Commissioners of ORANGE County, and carried thence on appeal to the Superior Court, where it was heard before *Kerr, J.,* at Chambers.

Upon the hearing of the petition the Board of Commissioners found the following facts:

The Richmond & Danville Railroad Company has leased the road of the North Carolina Railroad Company for the term of thirty years from the 12th day of September, 1871, and by the terms of the lease agreed to pay taxes to the State of North Carolina, to a sum not exceeding $10,000 *per annum* during said term, if so much tax should be lawfully imposed on said railroad or any part thereof.

Chap. 32, Sec. 5 of the laws of 1954-55, entitled "An act for the completion of the North Carolina Railroad," which has been accepted as an amendment to the charter of the North Carolina Railroad Company, by the private stockholders thereof, and made a part thereof, provides that all real estate held by the N. C. R. R. Co., for right of way, station places of whatever kind and for work shop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum.

(507) The dividends of profits of said company have at no time exceeded six per centum per annum.

In pursuance of Chap. 184, Sec. 11, Acts 1874-75, the proper officer gave in to the Treasurer of the State the franchise of the N. C. R. R. Co., and the Treasurer together with the Governor and Auditor of the State assessed said franchise at $52,875; the entire length of said road as returned to said Treasurer being two hundred and thirty-five miles; thus giving the value of $225 per mile.

A return of the valuation was made by these officers to the defendants.

There are twenty-six miles of said railroad, lying in the county of Orange, giving to that county $5,850 as its proportion of the value of the franchise, upon which the State and county tax for the year 1875, at the rate of 88 cents per one hundred dollars would have been $51.48; which rate was adopted in said county for the year 1875.

In pursuance of instructions from the State Treasurer, the defendants caused the trustees of the several townships in the county, through which the said railroad runs, to assess the value of the real estate thereof, and upon the return made by the trustees the defendants fixed the value of said real estate at the sum of $40,054, which added to the value of the franchise amounts to $45,914, making the tax at the rate aforesaid amount to $404.04, being $51.48 upon the franchise and $352.56 upon the real estate of said company.

On the 1st day of April, 1874, the proper officer gave in to the Treasurer of the State the entire property of the N. C. R. R. Co. exclusive of the interest of the State therein, and the Treasurer together with the Governor and Auditor, in pursuance of the law as it was then understood, proceeded to assess the same, including not only the franchise but all the real estate and property belonging to the corporation, and fixed the value thereof at the sum of $415,000, and so returned to the defendants. They assessed the value of the road lying in said county at $45,914, making no distinction in their return to the (508) defendants between the amount assessed upon the franchise, and that assessed upon the real estate.

Upon this assessment the defendants imposed a tax for State and county purposes of ninety cents upon every one hundred dollars, that being the rate for the year 1874, making the sum of $413.23 upon the property of said corporation lying in the county; and the same has never been paid.

Upon this state of facts the defendants refused to remit the taxes upon the real estate of the N. C. R. R. Co. as prayed for in the petition, and the plaintiff appealed to the Superior Court.

Upon the hearing of the cause the court held that the real estate was not liable to the taxes assessed on the same for the years 1874-75, and ordered the defendants to remit the same.

From this judgment the defendants appealed.

Attorney General Hargrove, for the appellants.
Graham and Ruffin, contra.

SETTLE, J. This court has held that if County Commissioners proceed upon a correct principle to assess property for taxation, there can be no appeal from their finding of facts as to the value of such property; but if they proceed upon an erroneous principle, an appeal will lie, and the courts will afford relief.

In the charter of the North Carolina Railroad Company, we find this provision: "All real estate held by said Company for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividend of profits of said Company shall exceed six per centum per annum." It is alleged in the complaint and admitted in the answer that the dividend of profits of the said North Carolina Railroad Company have at no time exceeded six per centum per annum. And yet the authorities of Orange County admit that they have assessed for the year 1875, the real estate (509) belonging to said corporation in said county, and held for right of way and station places, at the sum of $40,064, in addition to the

assessment levied by the Governor, Treasurer and Auditor, on the franchise of said corporation within said county.

This is a palpable violation of the contract which the State, at the time she entered into it, had a right to make with the corporators.

By the Constitution adopted in 1868, all the real and personal property in the State, with certain limited exceptions, is required to be taxed uniformly according to value, and we may hope hereafter to be relieved from the evil effects of such unwise legislation, but there is no relief from such contracts as the Legislature sees proper to make, and has the power to make.

It also appears that for the year 1874, the Governor and his associates assessed for taxation, not only the franchise, but all the real and other property belonging to the corporation.

Of course they had no more power to violate the contract than the Commissioners of Orange County had; and besides, this court has said in the *Wilmington, Columbia and Augusta Railroad Company v. The Board of Commissioners of Brunswick County,* 72 N. C., 10: "We conceive that the General Assembly has no right to confer on such a board the power of valuing the tangible real and personal property of a Railroad Company. Such power is by the Constitution vested in the township trustees alone, and cannot be taken from them."

Citation of authority for the positions herein assumed is not required, but we refer to a few of the latest cases on the same subject, which have received the consideration of the Supreme Court of the United States, and which fully support our conclusions.

Wilmington Railroad Company v. Reid, 13 Wallace, 264;
(510) *Humphrey v. Piques,* 16 Wallace, 243; *Pacific Railroad Company v. Maguire,* 20 Wallace, 36.

The judgment of the Superior Court is affirmed. Let this be certified to the end, etc.

PER CURIAM. Judgment affirmed.

Cited: R. R. v. Governor, 74 N.C. 711; *R. R. v. Comrs.,* 77 N.C. 5; *R. R. v. Comrs.,* 82 N.C. 262.

Y. D. VINSON v. THE N. C. RAILROAD COMPANY

A petition filed by the plaintiff at November Term, 1857, of the late Court of Pleas and Quarter Sessions, to recover the assessed value of that portion of his land taken and used by the defendant for its road bed, etc., which road was finished in 1854, is barred by the statute of

limitations, as provided in the 29th section of the original charter of said road, which prescribes that such petitions for damages shall be brought within two years from the completion of the road.

That the defendants in 1855 instituted proceedings in the Superior Court to have the plaintiff's land condemned for the use of its road, which proceedings were subsequently discontinued by the defendant "without prejudice," and with the understanding that the plaintiff was to suffer no hurt or loss in consequence of such act of the defendant, did not prevent the plaintiff from pursuing his remedy under the said 29th section; nor did such action prevent the statute of limitations from running.

RODMAN, J., *dissenting.*

This was a PETITION, originally filed in the Court of Pleas and Quarter Sessions, of JOHNSTON County, and thence carried to the Superior Court, where it was tried before *Watts, J.*, at Spring Term, 1875, upon the following

CASE AGREED:

This is a petition filed by the plaintiff against the defendant at November Term, 1857, of the Court of Pleas and Quarter Ses- (511) sions of Johnston County, to recover of the defendant, damages, on account of the construction of its railroad across the land of the plaintiff. The railroad was finished in 1854. The amount claimed was the value of the land upon which the road bed lies, and one hundred feet on each side thereof. The petition was filed under an act of the General Assembly, entitled "An Act incorporating the North Carolina Railroad Company," ratified the 27th day of January, 1849. The defendant relies on the 29th section of said act as a bar to the plaintiff's claim.

At September Term, 1855, of the Superior Court of law of said county, the defendant filed a petition against the plaintiff, who was duly served with notice thereof, to have the value of said land assessed, and the land to vest in the plaintiff upon the payment of the assessed valuation thereof under and in pursuance of the said act of the General Assembly.

The plaintiff in this case upon the service of said notice, employed counsel to appear for him, and his counsel did appear, and an order was made by the Court for the valuation of said land and assessment of the damages which might accrue to the present plaintiff, in consequence of the construction of the railroad of the defendant, and commissioners were appointed for that purpose; but they never acted thereupon.

Said cause was continued from term to term until Spring Term, 1875, of said court, at the end of which term the counsel for the plaintiff

entered a dismissal of the cause without prejudice, and without consultation, or any agreement with the defendant or his counsel in that case, and without their knowledge. Some months afterward, when the counsel of the defendant complained that they were surprised by the said entry, and that they were then barred by the statute of limitations from filing their petition for damages, the attorney for the plaintiff in said action assured them that he would not allow them to suffer
(512) from his said act, but before this petition was filed, he had ceased to be the attorney for said company.

If the court shall be of opinion that the statute of limitations is a bar, or for other cause the plaintiff is not entitled to recover, then this petition is to be dismissed and judgment entered against the plaintiff for cost. If the court be of the opinion that the plaintiff is entitled to relief, then judgment shall be entered for the appointment of commissioners to assess damages as prayed, and either party may appeal from the judgment.

The court rendered judgment in favor of the plaintiff, according to the case agreed, and thereupon the defendant appealed.

Moore & Gatling, for the appellant.
Smith & Strong, and Lewis, contra.

SETTLE, J. The plaintiff seeks to recover damages of the defendant for constructing its road over his land. That portion of the road was finished in 1854.

This action was brought to the November Term, 1857, of the former Court of Pleas and Quarter Sessions, for the county of Johnston.

The 29th section of the Act incorporating the North Carolina Railroad Company, declares that in the absence of any contract, etc., it shall be presumed that the land upon which the road or any of its branches may be constructed, together with a space of one hundred feet on each side of the centre of the said road, has been granted to the said company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same, as long as the same be used for the purposes of said road, and no longer, unless the person or persons owning the said land at the time that part of the said road, which may be on the said land, was finished, or those claiming under him, her, or them, shall apply for an
(513) assessment of the value of the said lands, as hereinbefore directed, within two years next after that part of said road, which may be on the said land, was finished; and in case the said owner or owners, or those claiming under him, her, or them, shall not apply within two years next after the said part was finished, he, she, or they

shall be forever barred from recovering said land, or having any assessment or compensation therefor, etc., with a saving in favor of *feme coverts* and infants, until two years after the removal of their respective disabilities.

This is a positive statute of limitations, and it clearly bars the plaintiff's action, unless it be saved by the special circumstances relied upon by the plaintiff for that purpose, which are stated in the case agreed, and which the reporter will set forth in full. The plaintiff has not been vigilant, and if he has lost anything by sleeping on his rights, we can only say, the law is so written.

Although the defendants in this action had, in 1855, instituted proceedings in another and different court from that to which this action was brought, to-wit: in the Superior Court, to have the land of the then defendant, now plaintiff, condemned under the 27th section of its charter, that did not prevent the plaintiff from proceeding, under the 29th section, as he afterwards attempted to do in the County Court.

Whatever the entry, "dismissed without prejudice," and the subsequent conversations of the defendant's attorney, may amount to, they certainly cannot operate to defeat a plain, positive statute of limitations.

TAYLOR, C. J., in *Jones v. Brodie,* 7 N. C., 594, says: "To all statutes of limitation, the principle has been hitherto applied, that when they begin to run, nothing will stop their operation."

This may sometimes operate harshly, but not more so than in the numerous cases where it has been held that courts have no power to permit an amendment, when the proposed amendment will evade or defeat the provisions of a statute. *Cogdell v. Exum,* 69 N. C., (514) 464, and cases there cited.

Let the petition be dismissed, and judgment entered here against the plaintiff for costs, according to the case agreed.

PER CURIAM. Petition dismissed.

Cited: R. R. v. McCaskill, 94 N.C. 752; *Abernathy v. R. R.,* 159 N.C. 343; *R. R. v. Lissenbee,* 219 N.C. 322; *R. R. v. Mfg. Co.,* 229 N.C. 700.

THE MERCHANTS' & FARMERS' NATIONAL BANK OF CHARLOTTE v. W. R. MYERS.

National Banks are subject only to the penalties prescribed by the U. S. Banking Act, for taking usury.

CIVIL ACTION, to recover the amount of a promissory note, tried in the Superior Court of MECKLENBURG, at Spring Term, 1875, before his Honor, *Judge Schenck.*

The action is brought to recover payment of the following note:

"$300.00 CHARLOTTE, N. C., April 27th, 1875.

"Five days after date, I promise to pay to the Merchants and Farm-"ers National Bank of Charlotte, N. C., or order, three hundred dollars, "for value received; negotiable and payable at the Merchants and "Farmers National Bank of Charlotte, N. C., with interest after ma-"turity at the rate of eight per cent *per annum* until paid, for money "loaned.

(Signed) "W. R. MYERS."

The defendant, in his answer, alleged that said note was made and delivered to the plaintiff upon the usurious agreement that the plaintiff should receive interest at the rate of twelve per cent *per annum* for the said loan, which the plaintiff reserved, paying the defendant the balance.

(515) To this answer the plaintiff demurred. His Honor overruled the demurrer, and rendered the following judgment:

"This case presents the question, whether a National Bank, organized under the act of Congress, June 3d, 1864, is subject to the provisions of the statute, entitled 'An act to regulate the rate of interest and to prevent usury,' or not.

"The question is not a novel one; it has been discussed with much learning and ability in the Supreme Courts of three of our sister States: In the Supreme Court of Ohio, in the case of the *First National Bank of Columbus v. Garlinghouse,* 22 Ohio, 492; and in the Supreme Court of Massachusetts, in the *Central National Bank v. Pratt,* 115 Mass., *it was held,* 'That the laws in imposing penalties, (other than those provided by act of Congress,) for taking usury, do not apply to National Banks; while the Court of Appeals in the State of New York, in *Lamb v. The First National Bank of Whitehall,* held that they do apply to National Banks.' The ground on which the Supreme Courts of Ohio and Massachusetts base their opinion is, 'that a National Bank is a convenient, useful and essential instrument in the prosecution of the fiscal operations of the Federal Government; that they were created for *national purposes,* and endowed with such faculties and functions as were necessary to enable them to effect this object.' That being so created for this object, the State has no power to defeat it by the enactment of usury laws, or in their own words, 'That the power of creating such banks being vested in Congress, is inconsistent with a power in

any State or Territory, to affix penalties on the bank for taking unlawful interest.' *McCullough v. Maryland,* 4 Wheat., 316, is relied on to sustain this position. The Court of Appeals in New York assumes the opposite ground. 'That the Federal Government has no concern with the business of the bank. . . . That they are selected as depositories of the public money, or financial agents of the government, but, in so far as their *private business* and contracts are concerned, the act does not assume to place them on any different footing from (516) natural persons selected by the government, for the performance of some special function.' That National Banks do not bear the same relation to the Federal Government that the United States Bank did, and therefore that the principles decided in *McCullough v. Maryland, supra,* and *Osborne v. United States Bank,* 9 Wheat., 738, do not apply to them. So that so far as this question can be settled by the Supreme Court of North Carolina, it will most probably depend on the view it takes of the object and purposes for which National Banks were created; whether they were created to effect national purposes, or whether like other bank corporations, they were established directly for private profit and gain, and indirectly as vehicles for the issue and circulation of a currency, based on the credit of the Federal Government.

"This court being subordinate in its character, it is its duty, if possible, to ascertain the views of the Supreme Court of North Carolina on the question, and then to follow it. This question was directly involved in the opinion of the court in *Ruffin v. The Commissioners of Orange,* 69 N. C., 510, (1873.) It arose in the right of the State to tax National Bank bills. Justice READE in the opinion says: 'The power of the State to tax the circulation of National Banks depends upon whether they are *for the use of the United States Government, or for private profit.* It is true they are authorized by Congress, as a currency convenient and useful for circulation, just as State bank bills are authorized by the State. But in neither case have they necessarily any connection with the Government. The act of Congress authorizing National Banks imposed a tax on their circulation of two per cent, and surely that would not have been done if they had been regarded *as a part of the Government. The truth is, the United States Government has no interest in National Banks.* It authorizes them, in order to provide a currency, not for the Government, but for the people.' This decision is clear and unequivocal, and its conclusion (that (517) the State may tax National Bank bills) is, in my opinion, correct, and fully sustained by authority and reason.

"But it seems that even if the National Banks were created for the use of the United States Government, that our statute does not defeat

this object or obstruct the legitimate operations of the National Banks. 'It is only when the State law incapacitates the banks from discharging their duties *to the Government,* that it becomes unconstitutional.' *National Bank v. Commonwealth,* 9 Maine, 362.

"Now it cannot be assumed, that *taking more interest than the State allows,* is a duty that the National Banks owe to the Government; and by this rule the statute of our State cannot be unconstitutional. The State law is not in conflict with the act of Congress; it only imposes a greater penalty, or an additional penalty. Both laws prohibit the taking of usury. The policy of the General Government, as appears by the 30th section of the act of Congress, was to prevent the banks from receiving more interest than the State in which they were located allowed, sustained and enforced by State laws. Penalties are *punishments* for wrong, not *prices.* The Federal Government did not intend to say to the National Banks, if you pay the price of forfeiting interest when demanded, that you may take as much usury from others as you wish. If it had said so, then indeed might the banks complain that this understanding was violated by increasing the *price* for taking usury, and they might ask the General Government to enforce this understanding: but when the penalty is viewed as a punishment, the rule of law is settled. The State may make the same act punishable by State law that is punished by Federal law. For illustration: By act of Congress, the counterfeiting a United States note or National Bank bill is a crime; so it is a crime by our State law, and the counterfeiter may be punished twice for the same offence. *Marigold's case,* (518) 9 How., 261; *Foy v. Ohio,* 5 How., 410; *Moore v. Illinois,* 14 How., 13. So in this case, the taking of usury may be punished by a State penalty and a United States penalty, according to the court which has the case before it."

For the reasons above stated, his Honor was of opinion that the act of the Legislature is constitutional and applies to National Banks, and that defendant have judgment accordingly.

From this judgment the plaintiff appealed.

Wilson & Son, for appellant.

Jones & Johnston, contra.

READE, J. The only point in this case has been lately settled by the decision of the U. S. Supreme Court in the case of *Bank v. Dearing,* 91 U. S., 29, which holds that national banks are subject only to the penalties prescribed by the United States Banking Act for taking usury.

There is error.

PER CURIAM. Judgment reversed, and judgment here for plaintiff.

Cited: Credit Corp. v. Motors, 243 N.C. 331.

A. A. STEWART AND OTHERS v. T. K. SALMONDS, S. P. ALEXANDER, AND ANOTHER.*

Twenty-five acres of the north side of a tract of land, containing one hundred and twenty-nine acres, of an irregular figure, and bounded by eight lines, all straight, and with definite courses and distances, can be ascertained and cut off with mathematical precision.

This was a CIVIL ACTION in the nature of a Bill in Equity for (519) the specific performance of a contract, tried before *Schenck, J.,* at Fall Term, 1875, of the Superior Court of MECKLENBURG County.

A single question is involved in the decision of the case in this court, which is fully stated in the opinion of Chief Justice PEARSON. It is therefore deemed unnecessary to state the facts set out in the voluminous record sent to this court upon appeal.

A portion of the relief demanded in the complaint was the partition of a tract of land, in pursuance of the following award of certain arbitrators to whom the matter had been submitted for adjustment:

"NORTH CAROLINA, } August 23d, 1871.
MECKLENBURG COUNTY. }

"We the undersigned subscribers having been called upon to settle or arbitrate a matter in controversy between Thomas Salmond and Archy Stewart, relating to the division of the Reid lands, formerly belonging to the estate of Joseph Reid dec'd., and having examined all the evidence laid before us, have decided that said Archy Stewart is to have one hundred acres of land including the buildings in which he lives, in consideration of the money he has paid, provided he pays one-third of the bill of costs in the Clerk's office; and his lot of land is to stand bound for the costs, and Thomas Salmonds is to have the remainder of the land to pay the balance of the money due against the land, with two-thirds of the bill of costs, and make a good and sufficient title to the heirs of William Ross, dec'd., for fifty-five acres of land; the Deacons of Sharon Church, a title to five acres of said land, provided the said Archy Stewart holds his one hundred acres in the plat made by William Parks, and twenty-nine acres to be cut off the North end of it, to

*NOTE.—Justice BYNUM, having been of counsel in this case in the court below, did not sit, on the argument and decision thereof in this court.

be designated by Dr. Walkup and Barnett McKee. Given under
(520) our hands and seals, *Provided,* That this settlement is not to interfere with the present crop upon the land.

Signed, etc."

In response to the issues submitted to them the jury found:

I. That the referees did make the award as set out in the complaint.

II. That said award was not read over to the defendant Salmonds and the plaintiff Stewart.

III. That the said award was signed and approved by the defendant Salmonds in person.

IV. That said award was signed by J. B. Stewart acting for and in behalf of A. A. Stewart.

Upon the rendition of the verdict the plaintiff moved for a judgment of specific performance upon the award. The motion was resisted, among other grounds for the reason that the award, was uncertain and that the court could not compel the two arbitrators to perform the act required of them, to wit: to designate the tweny-nine acres of land mentioned in said award. The defendant then moved the court for an account to be taken between the parties and the land sold for partition.

The court overruled the motion for judgment of specific performance, and rendered judgment for an account and the cause was retained for further directions.

From this judgment the plaintiff appealed.

Wilson & Son, for the appellants.

Jones & Johnston, contra.

PEARSON, C. J. We have in this case, a tract of land containing 129 acres, of an irregular figure, bounded by eight lines, all straight, and with definite courses and distances. In order to make partition, it is referred to arbitrators, who awarded to the plaintiff "29 acres to be cut off of the north end of it."

(521) His Honor held that this award was void for uncertainty. In this there is error. The question is, can *the 29 acres* be identified by the rules of mathematics, so that the "cutting off of the 29 acres" will involve no discretion, but be a mere ministerial act? *"Id certum est, quod certum reddi potest."* We think the 29 acres can be identified by a mere ministerial act, and nothing is left by the award dependent on discretion. Awards are construed liberally, *"ut res magis valeat quam pereat."* It is certain, that in order to cut off 29 acres of the *north end of the tract,* it must be done by an "east and west line," for if the line dips to the north at one end, and to the south at the other, then so much

land south of an east and west line, as is included, is not a "part of the north end of the tract," and so much land north of an east and west line, as is excluded, is a part of the north end of the tract.

The next question is, can the 29 acres be identified by scientific principles, without resort to discretion?

Suppose a tract of land in form a parallelogram, lines north and south, east and west, containing one hundred acres. Can twenty-five acres be cut off at the north end without room for discretion? Certainly. All that is to be done—begin at the north corner, measure off one-fourth the length of the line running south, and then run an east and west line, and you have 25 acres cut off of the north end. It is done by a rule of arithmetic, in my school days called "the single rule of three," "as 100 acres is to 25, so is the whole length of the line to the line sought for," to-wit, one fourth. If 29 acres are to be cut off, apply "the single rule of three," as 100 acres is to 29, so is the whole length of the line to the line sought, and by an east and west line from that point, you have the 29 acres cut off from the north end.

In our case, the figure of the tract being irregular, the "single rule of three" will not serve the purpose, and you may have to resort to "the double rule of three," or differential calculus or fluxions, but although (having become rusty in my college condition), I can- (522) not state the rule, there can be no doubt that science gives a rule by which the 29 acres may be identified with mathematical certainty.

Any competent surveyor can do it by running an experimental line on the plat; strike a line East and West, calculate the number of acres North of the line—if over 29 acres move the line to the North, if less than 29 acres move the line to the South until you take in exactly 29 acres, then go into the field and with compass and chain, and by means of the experimental lines, find the east and west line, that will cut off 29 acres and make it. This would be a rude way of doing the thing, and men of science would smile at it, because they have a more certain rule, but still, by it the 29 acres may be identified with sufficient certainty for all practical purposes.

Judgment reversed, and judgment that plaintiff have a decree for specific performance.

PER CURIAM. Judgment accordingly.

Cited: Warren v. Makely, 85 N.C. 16; *Oxford v. White,* 95 N.C. 528; *Shaffer v. Hahn,* 111 N.C. 11; *Webb v. Cummings,* 127 N.C. 43; *Harris v. Woodard,* 130 N.C. 581; *Johnson v. Mfg. Co.,* 165 N.C. 107; *McSwain v. Washburn,* 170 N.C. 365.

(523)

R. S. ABRAMS, ASSIGNEE, v. THOS. K. CURETON, ADM'R. OF GOVAN MILLS, DECEASED.*

A voluntary assignment of a promissory note, without consideration and for the benefit of the assignor, has no legal effect except to consitute an agency to collect; and such assignee, not being the real party in interest, cannot bring a suit on such note in his own name.

A written contract as follows, to wit: "I do hereby agree to receive as agent or assignee the notes above described, upon the following condition and terms, viz: If I can collect the said notes or any part thereof, I am to pay over the same to John Bankston Davis, retaining to myself a reasonable compensation in these notes for my services," and the notes alluded to were also endorsed. "I assign the within note to R. S A.. (the plaintiff) for value received," is not such an assignment as will justify the assignee in bringing suit in his own name.

CIVIL ACTION to recover the amount of two promissory notes, tried in the Superior Court of POLK County at Fall Term, 1875, before his Honor, *Judge Schenck*, and a jury.

In his complaint, the plaintiff alleges that as assignee, he is the owner of two notes, made by the intestate of the defendant, one payable to John Bankston Davis, and by him endorsed to the plaintiff, and another payable to one R. H. Reid, also endorsed by said Davis as attorney for Reid. That these notes were made in South Carolina and draw interest at the rate of seven per cent, and are still due.

The defendant denies that the plaintiff is the owner of said notes, alleging that they were assigned without consideration, and that the plaintiff is only an agent to collect. There are other allegations in the answer as to assets, etc., not material to the point decided in this court, and therefore need not be stated.

(524) On the trial, the plaintiff in his own behalf testified, that the notes upon which the action is brought, were endorsed to him by J. B. Davis, and were in his possession when the action commenced. Upon his cross-examination he stated, that he considered himself the owner of said notes; that he paid no money for them, but that he agreed to collect the same, retaining a reasonable compensation for his trouble, and pay over the balance to Davis.

The following contract in writing was then offered in evidence. After a copy of the said notes, (set out in the complaint,) it read: "I do hereby agree to receive as agent or assignee, the notes above described, upon the following condition and terms, viz.: If I can collect the said notes or any part thereof, I am to pay over the same to John Bankston

*NOTE.—Justice BYRUM having been of counsel in this case in the court below, did not sit on the trial of the same in this court.

Davis, retaining to myself a reasonable compensation in these notes for my services. Witness my hand, seal, etc.," and signed by plaintiff.

The plaintiff also proved that the following endorsements on the notes were made at the same time of the signing of the foregoing contract: "I assign the within note to R. S. Abrams, for value received. Oct. 30th, 1869." Signed by said J. B. Davis.

The defendant offered in evidence a paper purporting to be a transcript of a suit in equity, pending in Spartanburg County, and State of South Carolina. To this the plaintiff objected; whereupon the defendant proposed to prove by parol testimony, that W. D. Johnston was Chancellor of Spartanburg County, S. C., on the 4th day of June, 1868, at the time the injunction purports to be signed by him. To this plaintiff again objected and the objection was sustained. To this ruling of the court the defendant excepted. His Honor allowed the bill and answer to be read, but refused to hear the injunction, for the reason that it was not signed officially, and there was no evidence that it was ever served on Davis and Reid. Defendant again excepted.

It was also in evidence that the courts of law and equity or (525) chancery, were consolidated in South Carolina, previous to the institution of this suit; and that the Clerk of the Superior Court is also the Clerk of the Equity or Chancery Court, and has control of the old chancery or equity papers and records.

The defendant asked his Honor to charge the jury, that upon the evidence offered, that the plaintiff was not entitled to their verdict on the first issue. Upon the second, that he was not the real party in interest in said notes, and that he has no such interest in said notes as would entitle him to bring an action in his own name.

The defendant asked his Honor to charge further, that as the notes upon which the action has been brought, were made in South Carolina and there was no evidence as to where the assignment was made, whether in North or South Carolina, the common law was presumed to prevail in South Carolina, in the absence of evidence to the contrary; and that according to the common law, said notes were not negotiable or assignable in that State, and that the plaintiff could not recover. The defendant further relied on Section 99, Code of Civil Procedure.

His Honor declined to give the instruction asked for by the defendant, and charged the jury that if they believed the evidence, they would find the issues in favor of the plaintiff. Defendant excepted.

The jury found for the plaintiff, who had judgment in accordance with their verdict.

From this judgment defendant appealed.

Battle, Battle & Mordecai and Montgomery, for appellant.
Smith & Strong, contra.

PEARSON, C. J. "Every action must be prosecuted in the name of the real party in interest." C. C. P., Sec. 55.

This provision is significant, and was necessary in order to let (526) in all defenses, as well equitable as legal, against the real party in interest, and save a resort to another action, so as to work in harmony with the provision of the Constitution. Art. II, Sec. 1. "The distinction between actions at law and suits in equity and the powers of all such actions and suits shall be abolished," etc. For instance, the holder of a note, without endorsement under the old system, sued in the name of the payee, and if the defendant had any defense, legal or equitable against the holder, who was the real party in interest, it could only be set up by a suit in equity.

In our case, Davis is the real party in interest, and to allow an action to be prosecuted in the name of Abrams, who is merely an agent or attorney for collection, would make this section of C. C. P. of no effect.

Not being able to stand the force of this battery, the counsel for the plaintiff yielded his first position and fell back upon Sec. 57: "An executor or administrator, a *trustee of an express trust,* or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted," and relied on *Willey v. Gatling,* 70 N. C., 410, to support his prosecution.

In that case Willey received the note as "a collateral" to secure a debt due to him. So the effect was to constitute him a trustee for himself to the amount of his debt, with a resulting trust to the grantor for the excess.

In this case there is no consideration whatever for the assignment of the note; it would seem the motive was to avoid the supposed bearing of certain proceedings of a court in the State of South Carolina.

Whether a Court of Equity in a "creditor's bill" has power to enjoin creditors, who are not parties, from suing an administrator, unless it be necessary for the protection of a fund which the court has taken into its keeping? Whether such an injunction, supposing it to be valid, would have the effect of preventing a creditor from suing in (527) another State? are questions into which we do not enter. We refer to them merely as tending to show that the assignment being voluntary, that is, without consideration, and for the benefit of the assignor, cannot be allowed any legal effect, save that of constituting an agency to collect.

Under C. C. P., as amended, see Battle's Rev., Sec. 68, Act of 1868-69, in transitory actions, the summons must be returnable either to the county in which the plaintiff or the defendant resides. If the party really interested in a note, can by a voluntary assignment for the purpose of collection, enable the assignee to sue in the county in which he

resides, this provision of the statute amounts to nothing, and the summons may be returnable to any county which the party really interested, may choose to select.

Thus it is clear, that to allow this action to be maintained in the name of Abrams, will nullify Sec. 57, C. C. P., as to the real party in interest, and also Sec. 68, Act of 1968-69, which, instead of requiring the action to be brought in the county where the defendant resides (as under C. C. P.,) allows the plaintiff to bring it in the county in which he or the defendant resides. This the court is not at liberty to do. True, in this particular case the action is localized by Sec. 68, C. C. P., Bat. Rev., that is, fixed in the county where administration is granted, but the principle is general, and would extend to transitory actions, and enable plaintiffs to select any county without reference to the residence of either the plaintiff or the defendant.

Judgment below reversed, and judgment that defendant go without day and recover his costs.

PER CURIAM. Judgment reversed.

Cited: Newsom v. Russell, 77 N.C. 278; *Williams v. Williams,* 79 N.C. 421; *Alexander v. Wriston,* 81 N.C. 194; *Jackson v. Love,* 82 N.C. 407; *Wilcoxon v. Logan,* 91 N.C. 452; *Wynne v. Heck,* 92 N.C. 416; *Egerton v. Carr,* 94 N.C. 653; *Hartness v. Wallace,* 106 N.C. 430; *Boykin v. Bank,* 118 N.C. 568; *Morefield v. Harris,* 126 N.C. 628; *Chapman v. McLawhorn,* 150 N.C. 167; *Martin v. Mask,* 158 N.C. 442; *Bank v. Exum,* 163 N.C. 202; *Bank v. Rochamora,* 193 N.C. 6.

(528)

W. P. MOORE v. THE NORTH CAROLINA RAILROAD COMPANY.

Where a cause of action survives, the action does not abate by the death of the plaintiff *ipso facto,* but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months, nor more than one year from the granting of the order.

Where a plaintiff, during the pendency of an action assigned his interest therein to a third party, and then died: *Held,* (the cause of action surviving,) that the court below did not err in permitting the record to be amended, so as to make the assignee a party plaintiff.

The statute prescribes no time in which such amendments shall be made; and the court may, in its discretion, allow it at any time before the action has abated.

CIVIL ACTION, tried before *Schenck, J.,* at Spring Term, 1875, of CABARRUS Superior Court.

The action was commenced in the name of W. P. Moore to recover the value of five bales of cotton, and was prosecuted in his name until Fall Term, 1875, when the death of the plaintiff was suggested upon the record. At July Term, 1873, on motion of the plaintiff's counsel, J. H. Carmer was made a party plaintiff. Afterward the defendant was upon motion allowed to file a supplemental answer denying that Carmer was the lawful administrator of the original plaintiff, and setting up a counter-claim against the deceased. At Fall Term, 1873, the case was placed upon the civil issue docket in the name of J. H. Carmer, assignee of W. P. Moore, but it did not appear how the change was made, nor did the record contain any order to that effect.

At July Term, 1875, the defendant moved the court that the action be abated, because of the death of W. P. Moore, and for want of an administrator. The counsel originally representing Moore claimed that Carmer was the assignee of Moore; but produced no written
(529) transfer; and suggested that the entry making Carmer a party plaintiff as the administrator of Moore was a mistake, and that the entry should have been "J. H. Carmer, Assignee, etc.," and moved the court to amend the record to that effect, *nunc pro tunc.*

In support of the motion to amend, the plaintiff filed the following affidavit:

"John E. Brown, one of the attorneys for the plaintiff, maketh oath that said suit was commenced in the name of W. P. Moore. That afterwards the said Moore assigned the cause of action to J. H. Carmer, and died. That the death of said Moore was suggested at Fall Term, 1872, and at Spring Term, 1874, J. H. Carmer was by mistake made party plaintiff, as administrator of W. P. Moore, which mistake was, on motion of counsel, corrected at Fall Term, 1873, as appears upon the trial docket; but said correction was not made by the Clerk upon the minute docket through inadvertence or mistake. That said J. H. Carmer, as affiant is informed and believes, is the real party in interest and entitled to prosecute said suit."

The motion was resisted by the defendant but allowed by the court.

It was admitted that at Fall Term, 1872, when the death of Moore was suggested, he was in fact dead; and that Carmer was never his administrator.

The docket does not show any motion to correct any alleged error until the one now made; nor did the defendant's counsel have any knowledge or notice of such motion. From the judgment of the court allowing the motion to amend, the defendant appealed.

Barringer and Shipp & Bailey, for the appellant.

No counsel contra, in this court.

BYNUM, J. The death of the plaintiff, Moore, was suggested at Fall Term, 1872, and at Spring Term, 1873, Carmer was made plaintiff, as the administrator of Moore, and the case so stood upon the docket until the Spring Term, 1875. The defendant, at that (530) Term, moved that the action be abated, because Carmer was not the administrator, and there was no party plaintiff. This motion was met by a counter motion of the counsel of Carmer, to amend the record *nunc pro tunc,* by making Carmer the plaintiff as assignee of Moore; instead of administrator. In support of this motion an affidavit of the counsel of Carmer, was read, to the effect that Moore, previous to his death, but after the institution of the action, assigned his claim to Carmer, and that the amendment of Spring Term, 1873, inadvertently made Carmer, plaintiff as administrator, instead of as assignee, as was intended.

When the cause of action survives the suit does not abate by the death of the plaintiff, but only on the application of the party aggrieved, and then only in the discretion of the court and in a time to be fixed, not less than six months nor more than one year from the granting of the order. C. C. P., Sec. 64 (3). So the action had not abated, but was still pending.

The power of the court to make the amendment requested, is unquestionable, for it is conferred by statute expressly. By Sec. 64 (1), C. C. P., it is provided: *First,* In case of death, 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 interest. And *Second,* "in case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action." The amendment was made under the second clause of this section. It prescribes no time within which the amendment shall be made, and it would seem clear that the court, in its discretion, may allow it any time before the action is abated, without reference to the life or death of the original plaintiff. But even if the motion of the plaintiff had been made under the first clause of the 64th (531) section, (which however, we think applies to parties who had not parted with their interest in their lifetime,) yet we would be disposed to treat the affidavit of Mr. Brown as a supplemental complaint, in order to support the amendment. So *quacunque via data,* the amendment was proper.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Lord v. Beard, 79 N.C. 12; *Murrill v. Humphrey,* 88 N.C. 140; *Coggins v. Flythe,* 114 N.C. 277.

STATE EX REL. JOHN BROWN AND OTHERS v. JOEL PIKE, ADM'R. OF MADISON BROWN AND JOAB NEESE.

A judgment against an Administrator on his official bond since the Act of 1844 Bat. Rev. Chap. 43, Sec. 10, is conclusive against the surety, both as to the debt and as to the assets sufficient to pay it, whether the surety was a party to the action or not.

The action is brought by the distributees of the intestate of the defendant Pike, against him as administrator on his official bond, to which the other defendant, Neese, is one of the suretics, (the other being insolvent,) to recover the amount of a judgment, heretofore obtained by the plaintiffs against said Pike, in the Court of Equity.

It appears that in 1868, the plaintiffs filed a bill in Equity against the administrator Pike for an account and settlement of the estate of his intestate, Madison Brown, who died in 1862; that in this suit a reference was had and the account stated, which being returned to court, the plaintiffs recovered judgment for the sum of $482.58, at the same
(532) time fixing the administrator with assets to that amount. The defendant Neese was not a party to this suit in Equity. No part of this judgment has ever been paid, and this action is brought to recover payment thereof.

The material allegations of the complaint were admitted in the answer. The defendants' grounds of defence are fully stated in the opinion of the court. Neese, the surety, contends that as he was not a party to the proceeding in Equity, he ought to be allowed to show in this suit, that Pike had fully administered the assets of his intestate, and that the judgment of the Equity Court was erroneous.

His Honor held, that Neese was concluded by the judgment against his principal, Pike, and that the plaintiffs were entitled to recover. Judgment accordingly. From this judgment the defendants appealed.

Scales & Scales, for appellants.

The question is, whether the decree against the administrator in a cause in which the security was no party, is conclusive against the security in a suit upon the administrator's bond.

Vanhook v. Barnett, 15 N. C., 268; *Justices of Cumberland v. Bowell and Campbell,* 11 N. C., 34; *Chairman of Mecklenburg County Court v. Clark & Springs,* 11 N. C., 43, all settle the question, that it was neither conclusive, *prima facie,* nor any evidence at all against the security, at least as to assets. This was settled law up to the enactment of the Legislature in 1844, to be found in Bat. Rev., Chap. 43, Sec. 10. The plaintiff's case rests on this statute, which is in derogation of the common law and must be strictly construed. There has been no adjudication of the question since. In *Bond v. Billups,* 53 N. C., 423, the court do not decide the question. The words of the statute are, that it "shall be admissible and competent for or towards proving;" but this is very different from saying it shall be conclusive, as was said in the court below. "The security made no agreement by the nature of his contract, to be concluded by a judgment or decree against his (533) principal. He ought, of course, to be bound only upon the assignment and proof of a breach of the condition in a suit against himself." *McKeller v. Bowell,* 15 N. C., 34.

Scott & Caldwell, contra:

I. The jury find by their verdict that there is a breach of the defendant's bond.

This is the only real issue raised by the answer, and it has been disposed of by the verdict of the jury.

II. The defendant Neese does not set up any defence in his answer which would entitle him to have the issue asked for submitted, or to offer proof upon it if submitted.

Rankin v. Allison, 64 N. C., 673, was a judgment at return term, notwithstanding the answer. The court say: "We do not see that the answer states any sufficient defence," etc. The court refused to disturb the judgment.

The answer admits the judgment and does not attack it by any direct allegation of fraud or mistake, but only by a general allegation of errors and oppression, which are not sufficient to falsify or surcharge.

The only evidence which could have been received from Neese to sustain his issue, would have been evidence to impeach the judgment; but none such was offered, nor could it have been received unless upon sufficient allegations in the answer—such as fraud, error or mistake, setting out the particulars therein.

III. The answer is insufficient as a bill to surcharge and falsify.

The admissions of the answer destroy every allegation attempted therein as a defence.

If it be true, as admitted, that plaintiffs have a judgment against the administrator, Joel Pike, that judgment fixes him with a surplus for

distribution, and such judgment while it stands unimpeached, is evidence against the security, Neese, and entitles the plaintiff to
(534) recover, and no issue is necessary. Bat. Rev., Chap. 44, Sec. 10.

BYNUM, J. The judgment must be affirmed. Prior to 1844, a judgment against the administrator was conclusive evidence both of the debt and of assets. But as to the surety upon the administration bond, who was not a party to the action, it was no evidence whatever of assets, but was conclusive of the debt only. As to him, the judgment was *res inter alios judicata. Armistead v. Harramond,* 11 N. C., 339; *McKellar v. Bowell,* 11 N. C., 34; *Strickland v. Murphy,* 52 N. C., 242; *Bond v. Billups,* 53 N. C., 423; *Chairman v. Clark,* 11 N. C., 43.

The act of 1844, Bat. Rev., Chap. 43, Sec. 10, introduced a change in the law of evidence. The act provides that in actions brought upon official bonds of administrators, and others there named, "when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing, which by law would be admissible and competent for or toward proving the same as against him, shall *in like manner* be admissible and competent against all or any of his sureties who may be defendants, with or without him in said action."

The only natural and reasonable construction of this act is, that when the evidence was conclusive against the principal, prior to the act, it became "in like manner" conclusive against the sureties, after the act. The judgment was therefore conclusive against the surety, both of the debt and of assets sufficient to pay it. Such was the law of evidence when the surety executed the bond, and he cannot complain.

PER CURIAM. Judgment affirmed.

Cited: Badger v. Daniel, 79 N.C. 379; *Moore v. Alexander,* 96 N.C. 36; *McNeill v. Currie,* 117 N.C. 346; *Miller v. Pitts,* 152 N.C. 632; *R. R. v. Lassiter,* 208 N.C. 212.

(535)

STATE ER REL. C. H. COFFIELD, COUNTY TREASURER, v. K. M. McNEILL, SHERIFF, AND OTHERS.

The condition of the bond securing the faithful collection of the public taxes, given by a sheriff in September, 1874, who was elected the preceding August, embraces the taxes to be collected for the fiscal year preceding the 1st of April, 1875, and not the taxes due and collected for the year ending April, 1874. The collection of the latter is secured by his former bond, if he was sheriff at that time.

COFFIELD *v.* MCNEILL.

CIVIL ACTION, tried on demurrer before *Buxton, J.*, at Spring Term, 1875, of the Superior Court of the county of HARNETT.

The following are the substantial facts as contained in the statement of the presiding Judge.

The action was instituted upon the official bond of K. M. McNeill, Sheriff of Harnett County, executed in September, 1874, to recover a balance of taxes due the county on the tax list of 1874.

McNeill was first elected in August, 1872; served one term of two years, and was re-elected in August, 1874. Upon his re-election he qualified by taking the oath of office and giving the bond in suit. The sureties upon this bond are not the same as those upon the bond of September, 1873.

A demurrer was filed by the defendants specifying some ten or twelve grounds of demurrer. His Honor allowed the plaintiff to amend *ad libitum*. The defendants were allowed to amend their demurrer by alleging that the action should have been instituted on the bond of 1873, for the taxes of 1874, and not upon the bond of 1874.

The counsel for the defendants insisted that the defendants were not liable on the bond in suit, for the tax lists of 1874, which had gone into the Sheriff's hands previous to his last election and previous to the execution of said bond. That if some one else had been (536) elected Sheriff in 1872, and McNeill had been elected for the first time in 1874, after the tax lists of 1874, had gone into the hands of his predecessor, they would not have been liable, and that consequently they ought not to be affected by the circumstance of his relation to a second term, which was entirely distinct from the first and ought not to be connected with it, so as to affect them.

It was insisted by the plaintiff that while it was true that if some one else had been elected Sheriff in 1872, neither McNeill nor his sureties would have been liable for the tax list of 1874, as it would not have been his duty to collect it; yet the fact was that McNeill was elected in 1872, and so it was his duty to collect the tax of 1874; that by his re-election he became his own successor and that the bond he gave in 1874, was cumulative and additional security, for any breach of duty which occurred subsequent to the execution thereof.

Upon the hearing the court sustained the demurrer and dismissed the action, and the plaintiff appealed.

A. D. McLean and Busbee & Busbee, for appellant.
Neil McKay, Guthrie and McKay, contra.

BYNUM, J. The taxable property in this State is required by law to be listed as of the first day of April in each year, and the taxes are due

thereon for the year preceding the said first day of April. The tax lists are to be made out, revised and delivered to the Sheriff on the first of July following, and the taxes are by him to be collected and paid over to the State for State dues, by the first of December, and to the County Treasurer, for county dues, by the eighth of January following. These taxes are all due for the year preceding the said first day of April. Bat. Rev., Chap. 102. These tax lists so delivered to the Sheriff, by express law, have the force and effect of judgments and executions against the taxpayers.

(537) In our own case, the tax lists were in fact delivered to the Sheriff in July, 1874, as prescribed by law, but they authorized him only to collect the taxes for the taxable year, beginning on the first of April, 1873, and ending on the first of April, 1874.

The sheriff was elected in August, 1874, and gave the bond sued on in September, 1874, as prescribed by law. The condition of this bond was, not to collect and pay over the taxes upon the lists placed in the hands of the sheriff in office in July, 1874, but the taxes due for the year preceding the first of April, 1875, and the lists of which would not come to his hands until July, 1875. The doctrine of cumulative bonds does not apply in this case, but only where successive bonds are required to be given for the same term of office. In such cases all the bonds are answerable for any default made during the term. The claim of the plaintiff here is based on the idea that, where the terms of office accumulate upon the same person by successive elections, a bond given is good for any default made during any one of the terms. That is confounding plain distinctions. The question is simplified by considering that the sheriff was elected for the first time in August, 1874. He then had nothing to do with the tax lists of the preceding year, which ended on the first of April, 1874, and before his election. The clerk, as required by law, had delivered these lists to his predecessor, who alone had authority to collect the taxes. The law has made no provision for transferring the tax lists to the new sheriff, as is provided for delivering prisoners and certain writs. If the new sheriff receives the lists and collects the taxes, it must be by some private arrangement between his predecessor and himself, which being unauthorized by law, cannot bind his sureties. For if it did bind them, they would be bound for three years instead of two, the term of office. *Fitts v. Hawkins*, 9 N. C., 394; *Poole v. Cox*, 31 N. C., 69.

(538) If the sheriff is re-elected, as it happened in this case, he is then bound to collect the taxes of the preceding year, but this is by virtue of his former election, and under the responsibility of his old bond. The duty of collecting taxes is not an incident to the office of sheriff, though ordinarily discharged by that officer. The duty,

therefore, does not terminate with the office, but he is bound to go on and collect the taxes after his term of office of sheriff has expired, and the sureties upon his bond are liable for the money by him collected, or that should have been collected, after that time. *Perry v. Campbell,* 63 N. C., 257. The plaintiff here had a plain remedy upon the bond of 1873.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Vann v. Pipkin, 77 N.C. 410; *Dixon v. Comrs.,* 80 N.C. 120; *Davis v. Moss,* 80 N.C. 144; *S. v. Alston,* 127 N.C. 520; *Comrs. v. Nichols,* 131 N.C. 502; *Comrs. v. Bain,* 173 N.C. 380.

M. C. DIXON v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

A shipped from Boston, Mass, in good order and condition a piano, to be delivered at Greensboro, N. C. The piano was in good order when it reached New York; and, nothing appearing to the contrary, it was also in like good condition when received by defendant's agent, but was delivered at Greensboro, to A, greatly damaged: *Held,* that the burden of proving that the piano was damaged on some other of the connecting lines of road, and not their own, rested with the defendants, who, failing so to prove, are responsible to the plaintiff for the injury to his piano.

CIVIL ACTION for damages, originally commenced before a Justice of the Peace, and carried on appeal to the Superior Court of GUILFORD County, where it was tried before *Kerr, J.,* and a jury, at December Term, 1875.

The plaintiff instituted the action to recover the sum of two hundred dollars damages, on account of injury to a piano forte, shipped by the plaintiff over the railroad of the defendant. (539)

The plaintiff testified: In September, 1873, he shipped from the city of Boston, *via* certain lines, including that of the defendant, to Greensboro, a valuable new piano, in good order, which cost $600 at the manufactory. The piano was boxed up and was shipped by him in person, and he took a receipt therefor without reading the same, or having any of the conditions or limitations, therein, called to his attention by the agent at Boston, but supposed he was taking a receipt for the shipment of his piano to Greensboro. He made no agreement whatever with the agent, but delivered the piano and took a receipt therefor in the regular course of his business. The receipt, through mistake, was made out to G. W. Morris, who was the manufacturer in the city

of Boston, and who sent the piano to the depot for the plaintiff. He did not consent to the limitations and conditions in the receipt.

The following is a copy of the receipt:

"Boston and Providence Railroad Corporation. New York, Providence and Boston Railroad Corporations, owners of steamboats running between New York and Stonington, in connection with New York, Providence and Boston Railroads.

"J. W. Richardson, Agent, 134 Washington Street; W. H. Morrell, Freight Agent, B. & P. Railroad.

"M. C. Dixon, Greensboro, N. C., via Old Dominion Line to Richmond, Va., via R. & D. R. R. to Greensboro.	Received from G. W. Morris, one Piano Forte boxed.

"Marked and numbered as above, to be transported by the Boston and Providence Railroad Company to Providence, and thence by the New York, Providence and Boston Railroad Company to Stonington, and thence to New York by the owners of steamboats running be-
(540) tween New York and Stonington, in connection with the New York, Providence and Boston Railroad Company.

"To be delivered to said companies in manner following, to-wit: By the said Boston and Providence Railroad Company at Boston to the agent of said New York, Providence and Boston Railroad Company; by the agents of said New York, Providence and Boston Railroad Company at Stonington, to the agents of said owners of steamboats running between New York and Stonington, in connection with the New York, Providence and Boston Railroad Company; and by the said owners of steamboats running between New York and Stonington, in connection with the New York, Providence and Boston Railroad Company at the city of New York to _____ on payment of freight therefor, in like good order and condition as when received by them, respectively, (dangers of the seas, of fire, water, breakage and leakage excepted,) and no package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars, unless specifically receipted for at a greater valuation.

"And in case of any loss, detriment or damage done to, or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that Company shall alone be held responsible therefor in whose actual custody the same may be at the time of happening of such loss, detriment or damage.

"It is understood and agreed that the property herein receipted for, or any part thereof may be carried on the decks of the steam-boats from Stonington to New York.

"W. H. MORRELL,

"Agent for the above named Companies and owners, severally and not jointly."

The plaintiff further testified that when the piano was opened upon its arrival at Greensboro, it was badly damaged.

There was other evidence on the part of the plaintiff tending (541) to show that the piano was damaged before it was delivered to him at Greensboro, and that the damage amounted to two hundred dollars.

Robert Vernon was introduced as a witness for the defendant: He is the agent of the defendant at the Greensboro depot. He collected the freight for the whole line of shipment from Boston to Greensboro. When the defendants received the piano at New York, they gave a receipt there, to be shipped at the owner's risk, and that the receipt given by the defendant to Ogburn (agent of the plaintiff) for the plaintiff set forth the fact that the piano had been shipped at the owner's risk. The words "O. R." were abbreviations for "owner's risk." The bill of lading and receipt given by the defendant to the New York agent showed that it had been received in New York by the defendant from a steamboat running between New York and Stonington, in connection with the New York, Providence and Boston Railroad Company.

One Kelly, an agent of the defendant, was introduced and testified: He delivered the piano to Ogburn, the agent of the plaintiff, at Greensboro. That it was apparently in good order. The box bore marks of rough usage.

The plaintiff was re-called and testified: That he did not ship the piano at his own risk. There was nothing said about it to him by the Boston agent. He had no understanding of that kind with any one connected with either of the lines over which it was to pass.

Ogburn was re-called and testified: He did not know what "O. R." meant, on the receipt given him by the defendant's agent at the depot. Nothing was said about the piano being shipped at the owner's risk, when he received it and paid the freight.

It does not appear from the plaintiff's receipt that the piano was shipped "O. R."

The plaintiff's counsel requested his Honor to charge the jury: (542)

1. That if they should find that the receipt for the piano was a special contract between the plaintiff and defendant, then the burden of proof was upon the defendant to show that the damage done the

piano, was within the exceptions contained in the receipt, and that the *onus* was upon the defendant to show that there was no negligence.

2. The defendants having shipped the piano over their road in consequence of the receipt given by the plaintiff in Boston, and having collected the freight for the whole line or route, was evidence to go to the jury that it was a connecting line from Boston to Greensboro for the transportation of freight, and that there was an arrangement between the said lines and the defendant for the shipment of freight, and if the jury should find that there was such an arrangement between the said companies, and the piano was delivered at Greensboro in a damaged condition, the plaintiff is not bound to ascertain upon which one of the lines the damage accrued, but can sustain his action against the defendant.

His Honor declined the instructions prayed for, but charged the jury:

1. That it was the duty of the plaintiff to show upon which one of the lines the damage to the piano accrued, and unless they were satisfied that it accrued on the defendant's road, the defendant is not liable.

2. That if the jury should be satisfied that the damage to the piano accrued on the defendant's road, they were restricted in their estimate of damages to the piano, to the proportionate amount of the same to two hundred dollars, the limited amount of liability, as expressed in the receipt, and that the jury could not go beyond two hundred dollars valuation of the piano, in assessment of damages.

3. That the receipt taken by the plaintiff for the piano, in Boston, was an express contract between him and the railroad company,
(543) and that he was bound by its provisions, limitations and exceptions.

The jury rendered a verdict in favor of the defendant. The plaintiff moved for a new trial. Motion overruled. Judgment and appeal by the plaintiff.

Mendenhall & Staples, for the appellant.

Morehead, contra.

READE, J. A continuous line, whether of one road, or of several, and connecting lines, are not one and the same thing. We have instances of both in this case. The receipt given at Boston for the piano, undertakes to transport it to New York City over two railroads and one steamboat line. This is an instance of a continuous line composed of several. Their liabilities as among themselves, depend upon their agreement, with which the plaintiff has nothing to do. Their liabilities to him are those of common carriers. But this is not important in this case; as, for aught that appears, all that was undertaken by that receipt

has been performed—the safe delivery of the piano at New York City. So, that receipt has but little to do with this action.

From New York to Greensboro there seems to be no continuous line in the sense just noticed; but only connecting lines in the sense, that where one ends another begins. They are separate and distinct from each other, except that, to save the shipper the necessity of having a receiving and forwarding agent at the end of each line, one line delivers to another; and the delivering line takes from the receiving line a receipt. The receipt specifies the condition of the article, as "in good order," "in bad order." If the contents and condition are unknown, liability may be guarded against by a stipulation, or by an examination. It is important that these precautions should be observed, because by them the shipper will be able to know and prove on which line an injury had accrued. And only in this way can the shipper know, (544) unless he accompany the article all the way. And it is negligence in a receiving line not to take these precautions. And, failing to take them, the receiving line is presumed to have received the article in good order. If this were not so, then shippers would be at the mercy of the carriers.

Apply these principles to this case: The piano was shipped in good order at Boston; passing over several lines, it came to the defendant's hands in good order, as is to be presumed, the burden being upon him, and he not having shown the contrary, and he delivered it in bad order. *Laughlin v. Chicago & N. W. R. R. Co.*, 28 Wisconsin, 204.

There is error.

PER CURIAM. *Venire de novo.*

Cited: Phillips v. R. R., 78 N.C. 299; *Lindley v. R. R.*, 88 N.C. 553; *Burwell v. R. R.*, 94 N.C. 456; *Mfg. Co. v. R. R.*, 121 N.C. 519; *Beville v. R. R.*, 159 N.C. 230.

SAMUEL BEAVAN & CO. v. R. A. SPEED.

The owner of a homestead can part with it only by the formalities prescribed by law. Such owner is not the only object of solicitude and care in our fundamental law; but the wife, if there be one, and children, if there be any have rights in the homestead fixed by the Constitution, which cannot be divested, save in the manner prescribed by that instrument.

Therefore, where a judgment was obtained on a promissory note, in which it was stipulated that "the maker and endorser each hereby waive the benefit of the homestead exemption as to the debt evidenced by this note," the maker of the note having at the time a wife and children: *It was held*, that no release of the right to the homestead was thereby effected,

and that the same could not be sold under an execution issuing on said judgment.

MOTION in the cause, heard before *Watts, J.*, at Fall Term, 1875, of the Superior Court of FRANKLIN County, upon the following:

(545) CASE AGREED:

The defendant R. A. Speed is seized and possessed of a tract of land lying in Franklin County, containing three hundred and seventy acres, and was so seized and possessed at the adoption of the present Constitution.

2. The defendant's wife is seized, and possessed in her own right, of a tract of land situated in Franklin County, containing six hundred acres, on which are the dwelling house and other houses occupied and used as a residence by the defendant and his family; (consisting of a wife and several infant children,) and was so seized and possessed at the time hereinafter mentioned.

3. The defendant, R. A. Speed, on the third day of November, 1870, executed to the plaintiffs his promissory note in words and figures as follows, to-wit:

"$457.15. HENDERSON, N. C., Nov. 15, 1870.

"Four months after date I promise to pay to the order of Samuel Beavan & Co., Four hundred and fifty-seven 15-100 dollars; payable and negotiable at the office of Dunn, Todd & Co., Baltimore, value received, without offset; the maker and endorser each hereby waive the benefit of the homestead exemption as to the debt evidenced by this note.

"Witness ___ hand this ___ day of ___, 187___.

[Signed] R. A. SPEED."

4. At Fall Term, 1872, of the Superior Court of Franklin County, the plaintiff obtained judgment for the amount of said note, against the defendant. Execution was issued on said judgment, returnable to Spring Term, 1873, of said court.

5. That James C. Wynne, sheriff of said county, after receiving the aforesaid execution and before levying the same, summoned appraisers to allot the defendant his homestead. The appraisers allotted (546) to the defendant the tract of land aforesaid, containing three hundred and seventy acres, valuing the same at the sum of one thousand dollars. The report of the appraisers was returned by the sheriff to Spring Term, 1873, of said court, and also the execution, upon which was the following endorsement: "Homestead allowed; no property in excess of the homestead, to satisfy the within execution."

6. At the next term of said court the plaintiffs after due notice to the defendant, entered a motion to set aside said allotment.

It is agreed that if upon the above state of facts, the court shall be of the opinion that the defendant is not entitled to the aforesaid tract of land as a homestead, as against the plaintiff in this action, then there shall be a judgment setting aside said allotment and directing the sheriff of said county to sell the same or so much thereof as is necessary to satisfy the aforesaid judgment. But if the court shall be of a different opinion, then this proceeding shall be dismissed at the cost of the plaintiff.

Upon the hearing of the case the court held that the defendant was entitled to a homestead, and rendered judgment against the plaintiff according to the case agreed. From this judgment the plaintiff appealed.

Davis and Cook, for the appellant.
Edwards and Batchelor & Son, contra.

SETTLE, J. On the third day of November, 1875, the defendant made and executed to the plaintiffs his promissory note, in words and figures following, to wit:

"$475.15. HENDERSON, N. C., Nov. 3d, 1875.

"Four months after date I promise to pay to the order of Samuel Beaven & Co., Four hundred and fifty-seven dollars and (547) fifteen cents, payable and negotiable at the office of Dunn, Todd & Co., Baltimore, value received, without offset, the maker and endorser each hereby waive the benefit of the homestead exemption as to the debt evidenced by this note.

"Witness __ hand this __ day _____, 187__.

"R. A. SPEED."

Can the benefit of the homestead exemption be waived in this manner? "Every homestead, etc., not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on *any debt*. Constitution, Art. X, Sec. 2.

"SEC. 3. The homestead after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them."

"SEC. 5. If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

"SEC. 8. Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

These provisions of the Constitution, adopted for the first time in 1868, effected a radical change in our former system of laws, and this court, in furtherance of the object in view, has given to them the most liberal construction.

Counsel cited authorities from other States, to the effect that the homestead could not be thus waived. While it is always satisfactory to find a position supported by authority, we do not feel the need of it in this instance. We have quoted the provisions of the Constitu-
(548) tion bearing upon the question at issue, and we are content to rest our conclusion upon the plain and obvious meaning of the words, which leave no room for construction.

It is clear that the owner of a homestead is not the only object of solicitude and care in our fundamental law, but the wife, if there be one, and children, if there be any, have rights in the homestead, fixed by the Constitution, which cannot be divested save in the manner prescribed by that instrument, to wit: by the deed of the owner, accompanied by the voluntary signature and assent of his wife, signified on her private examination, according to law. The case agreed states that the defendant has a wife and several infant children.

This is justly considered one of the most beneficent provisions of the Constitution. But the construction contended for by the plaintiff, if adopted, would entirely defeat it, and would enable a thriftless husband, by a dash of a pen, to turn his wife and children out of house and home.

It is stated in the case agreed that the wife has lands in her own right, and could not therefore claim a homestead in the lands of her husband. She *now* has lands; *non constat*, that she *will* have lands, in her own right, when she becomes a widow.

In *Abbott v. Cromartie*, 72 N. C., 292, this court has held that a defendant, entitled to a homestead in certain lands, which have been sold under an execution against him, is not estopped from claiming his homestead, by accepting a lease for the same land from the purchaser at execution sale. And it is said, "the defendant owned the legal estate in the land, and the Constitution confers no new estate upon him, but only confirms an existing one, to the extent therein expressed, *and restricts his powers of alienation and to charge it with his debts.* Hav-
ing then the estate in the land, exempt from execution, *he can*
(549) *part with it only by the formalities prescribed by law.*"

His Honor in the Superior Court held, that the defendant did not waive his homestead by the recital to that effect, in the note upon which this action is founded, and in this opinion we concur. Let judgment be entered here, dismissing the action at the cost of the plaintiff, according to the case agreed.

PER CURIAM. Judgment affirmed, and action dismissed.

Cited: Murphy v. McNeill, 82 N.C. 224; *Hughes v. Hodges,* 102 N.C. 258, 260; *Bank v. Land Co.,* 128 N.C. 195; *Dalrymple v. Cole,* 156 N.C. 357; *Simmons v. McCullin,* 163 N.C. 414.

STATE v. W. H. H. HOUSTON AND OTHERS.

It is competent for a Judge of the Superior Court to authorize the sheriff, or any other person, to take a recognizance from a defendant for his appearance at the next term, to answer, etc., his Honor having first fixed the amount of such recognizance.

Although the recognizance authorized to be taken is put in the form of a bond, with conditions, signed and sealed by the defendants, yet it is valid as a recognizance.

SCIRE FACIAS, on a forfeited recognizance, heard before *Judge Schenck,* at Fall Term, 1875, of the Superior Court of MECKLENBURG County.

The defendant Houston had been indicted for forgery, and was in custody when, upon his own affidavit, the case was continued. The court, after such continuance, made an order to discharge him from custody, upon his entering into recognizance with sureties, in the sum of twenty-five hundred dollars, for his appearance at the next term. This he did by executing a bond, with the other defendants as his sureties, in the sum specified and payable to the State of North Carolina, conditioned to be void should the defendant Houston (550) appear, etc.

At the ensuing term he was called and failed, and a judgment *nisi* entered against him. To the *scire facias* which issued, the defendants plead *nul tiel record.* His Honor found that there was such a record, and gave judgment accordingly. From this judgment the defendants appealed.

Shipp & Bailey, for defendants.

Attorney General Hargrove, for the State.

READE, J. It was competent for his Honor to authorize the sheriff or other person, to take the recognizance of the defendants for the appearance of the principal defendant at the next term, to answer the charge of the State against him, his Honor having fixed the amount of the recognizance. And although the recognizance authorized to be taken was put in the form of a bond with conditions, signed and sealed by the defendants, yet it is valid as a recognizance.

The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. *State v. Edney,* 60 N. C., 463.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Jones, 88 N.C. 685; *S. v. Jones,* 100 N.C. 440; *S. v. Morgan,* 136 N.C. 596; *S. v. Bradsher,* 189 N.C. 407.

(551)

GEORGE W. SWEPSON, TO THE USE OF G. W. CLAYTON, v. A. T. SUMMEY, ADM'R.

Where, upon an appeal to this court, no error is assigned, and there is no error apparent upon the record, the judgment of the court below will be affirmed.

This was a MOTION heard before *Henry, J.*, at Fall Term, 1875, of the Superior Court of BUNCOMBE County.

Notice was issued to the defendant as administrator of W. A. Patton, deceased, to show cause why execution *de bonis propriis* should not be issued against him, judgment absolute having been rendered at Fall Term, 1867, in favor of the plaintiff on specialty filed against A. B. Chunn & Co., the firm being composed of A. B. Chunn, E. Clayton and the intestate of the defendant.

After execution was issued, no plea being filed, G. W. Clayton paid off the judgment and took an assignment of the same to his own use. The notice to show cause was then issued and served. No answer to the rule was filed, and the case was continued from term to term for several years, always for the defendant, he desiring the evidence of G. W. Clayton, who resides in the county, was often there, and who has only been away from the county during the last year. The counsel alleged that a subpoena had been served upon him, but it did not appear

in the papers. He did appear once before the Court, at Chambers, but was not examined.

No plea or suggestion of a want of assets was ever made upon the original motion for notice to issue.

It was shown to the court that the defendant had been fixed with assets to the amount of the judgment, and that the sheriff had failed to find anything in his hands.

When the case was called at Fall Term, 1875, the defendant had G. W. Clayton called, and upon his failure to answer, the defendant moved the court again to continue the case on account (552) of his absence. The motion was refused.

Upon the intimation of the court that the plaintiff was entitled to execution, the defendant's counsel then demanded a jury, and said he had no other witness.

Counsel for the plaintiff stated that he had no objection to calling a jury. Clayton was again called, and upon his failure to answer, the court ordered execution to issue against the plaintiff as prayed for. The defendant appealed.

No counsel in this court, for appellant.

J. H. Merrimon, contra.

READE, J. No reason is assigned by the appellant, why execution should not issue against the defendant *de bonis propriis,* as ordered, and we see none in the record.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Hovis, 76 N.C. 118; *White v. Clark,* 82 N.C. 8; *Howell v. Ferguson,* 87 N.C. 115; *McDaniel v. Pollock,* 87 N.C. 505; *King v. Ellington,* 87 N.C. 574; *Neal v. Mace,* 89 N.C. 171; *Mott v. Ramsay,* 90 N.C. 30.

REBECCA HAUSER v. LEVI SAIN AND JACOB SAIN, ADM'RS.

When one person renders services to another, the law implies a promise to pay what the services are reasonably worth. The relation of granddaughter and grandfather existing between the plaintiff and the intestate of the defendants, does not rebut the presumption so as to throw upon the plaintiff the *onus* of proving a special contract.

This was a CIVIL ACTION, brought by the plaintiff to recover the value of certain services, alleged to have been rendered the intestate of the defendants; and was tried before *Schenck, J.*, and a jury, at Fall
(553) Term, 1875, of the Superior Court of LINCOLN County.

By consent, the following issue was submitted to the jury:

Is the plaintiff entitled to recover for services rendered to the deceased. If so, how much?

The plaintiff testified: That she was now thirty years of age. She was born in 1845. She was a granddaughter of the defendants' intestate.

Joseph A. Sain testified: The plaintiff went to John Hauser's, in March, 1864. He heard Hauser, the intestate of the defendant, say two or three times that he had got the plaintiff to come and stay with him; that he had nothing to give her now, but that she should be well paid for it. He heard the deceased say this in 1864, and in 1868. The plaintiff was not present during these conversations. The plaintiff remained at the house of the deceased from 1864, until the time of his death, in 1874. No one lived there except the plaintiff and her grandfather. For two years and a half before his death, the condition of the deceased was very bad; he was entirely out of his mind; he would have an axe and a pitchfork by his side to ward off apprehended danger. These weapons had to be taken from him. The plaintiff cooked and washed for, and attended the old man; and, for the last two and a half years, "cleaned him as a woman does her baby." He thought the plaintiff's services worth two hundred dollars a year.

On cross-examination, the witness testified: The old man worked some, before he became insane, but was very feeble. The plaintiff raised a cow there, which had a calf, which the plaintiff also raised. She also raised two sheep; she took one bed to Hauser's with her.

One Greenhill, a witness for the defendants, testified: In 1864, he lived with the deceased, who was his grandfather, but left on account of some land, which he desired to cultivate. He was eleven years of age when the plaintiff came there to live. He heard the plaintiff
(554) and the deceased say that the contract between them was, that the plaintiff was to do the cooking, washing and mending, and that she was to live there and have all the property she could make, over what was necessary for their support. The plaintiff had four or five cattle, and raised a little tobacco and sold it. Witness left Hauser's when he was eighteen years of age.

On cross-examination, the witness stated that he did not know what became of the money for the tobacco, and that the plaintiff generally bought one dress a year.

John Davis, a witness for the defendants, testified: On the 16th of November, 1874, he heard the plaintiff say in the presence of the de-

fendant, Levi Sain, that there was no contract between her and her grandfather as to her services. The defendants agreed that she should take her property or charge for her services, and that she might make her choice. The plaintiff promised to let them know on Saturday. On sale day, at the request of the defendants, he qualified her, as to her property. It consisted of three cattle, a bed or two, a spinning wheel and cards, and some other small articles. The witness said to her: "Now, if you take these things, it pays the debt," to which she replied, "Yes."

The evidence as to the conversation that the witness had with the plaintiff was received on the ground of corroborating Greenhill's testimony, and not as a proof of payment or release, as that defense was not alleged in the answer.

On cross-examination, the witness stated that the plaintiff claimed all the property as her own.

One Lingerfelt testified, that in his opinion the plaintiff's services were not worth much, as she kept all she made. They might be worth $100 a year, if she kept nothing. He is a grandson of the intestate.

The plaintiff was recalled, and testified: She did not tell Davis there was no contract; nor did she agree to take the property in place of her services. She did not tell him that she would give up her claim. She merely asserted her right to her own property. (555)

Martin Shultz, a witness for the plaintiff, testified: The plaintiff went to Hauser's during the deep snow in March, 1864, and that she did all the cooking, washing and mending. That at this time in 1864, Mr. Hauser's daughter, (who had been living with him,) died. The plaintiff remained until the old man died. He thought the services of the plaintiff were worth $50 a year, until the intestate lost his mind; that they were then worth $100.

The defendants' counsel resisted a verdict on the ground:

1. That the action was barred by the statute of limitations.

2. That there was no contract made between the plaintiff and defendants' intestate, except as stated by Greenhill.

3. That if no contract was made between them, (as Davis alleged the plaintiff had told him,) then as the plaintiff was the granddaughter of Hauser, and lived with him, the law raised no presumption of a promise to pay.

The court charged the jury:

1. That the statute of limitations barred the plaintiff's claim, except that part which accrued within three years before the action begun.

2. That if they believed Joseph Sain's testimony, and were satisfied from it, that there was a contract that the intestate was to pay the plaintiff, she would be entitled to recover whatever her services were worth within the three years.

3. That if they believed that the contract between them, was as stated by the witness Greenhill, the plaintiff was not entitled to recover.

4. That if there was no special contract as to the services, that as the plaintiff was some twenty-six or twenty-seven years old when the last services within the statute of limitations were rendered, the law raised a presumption of a promise to pay what the plaintiff's services
(556) were worth, and that this presumption was not rebutted by the relations of the parties or the circumstances of the case.

Under the charge of his Honor, the jury rendered a verdict for the plaintiff for $600, with interest.

The defendant moved for a new trial. Motion overruled. Judgment and appeal by the defendants.

Battle, Battle & Mordecai, for the appellants.
Cobb, and Shipp & Bailey, contra.

RODMAN, J. In regard to a special contract his Honor left the question to the jury upon the testimony of the witnesses.

In regard to an implied contract we see no error in the charge. When one person renders service to another, the law implies a promise to pay what the services are reasonably worth. This is admitted to be the general rule, but it is insisted for the defendant that the relation of granddaughter and grandfather, rebutted this implication and imposed on the plaintiff the burden of proving an express contract; otherwise it will be presumed that the services were rendered gratuitously. We can see no reason for this doctrine. The only authority cited in support of it, is *Williams v. Barnes,* 14 N. C., 348. That was the case of a son who upon arriving at age continued to live with his mother and attend to her business; it is put on its special circumstances. The mother had given the son two negroes and other property, etc. Apart from the sentiment and feeling excited in the heart of the Chief Justice, by the special circumstances of that case, which he expresses very forcibly, we think the weight of the argument is on the side of Judge DANIEL, who dissents. No authority is cited in either opinion, and the decision of the majority of the court admits the general rule to be as we have stated above. There is no error in the charge of his Honor, of which the defendant can complain. We are inclined to think his Honor erred in ruling that the plaintiff's right of action was barred by the
(557) statute of limitations, except as to the last three years. There was no reference to the number of years that the plaintiff was to render her services, nor was she to perform these services from year to year. So it was indefinite as to time, and her right of action did not accrue until her term of service terminated by the death of her grand-

father. See *Northcot v. Casper,* 41 N. C., 303, but upon this question we are not called on to express a decided opinion. It is alluded to merely to show that the defendant has not been as hardly dealt with by the jury as his counsel seemed on the argument to suppose.

No error.

PER CURIAM. Judgment affirmed.

Cited: Miller v. Lash, 85 N.C. 56; *Young v. Herman,* 97 N.C. 284; *Wood v. Wood,* 186 N.C. 560; *Keiger v. Sprinkle,* 207 N.C. 735; *Twiford v. Waterfield,* 240 N.C. 584.

JOHN G. WILLIAMS, TRUSTEE, v. JOSEPH B. BATCHELOR, ADMINISTRATOR, ETC., AND OTHERS.

A, after devising to his wife a life estate in all of his property, and appointing her his sole executrix, devised as follows: "The same, namely, all the said slaves, real and personal estate, at her death, I give, devise and bequeath to be equally divided among all my children then living, and the child or children of any deceased child of mine, to take the share of their deceased parent had he or she been living at the death of my wife . . . I hereby give and grant unto the executrix of this my last will and testament, full power and authority to sell and dispose of any part of my real and personal estate, etc., either for the purpose of partition or division among my legatees; or for any other purpose most advantageous for her or their interest, etc." The executrix, during her life, made certain advancements to the children of the testator. The son of the testator having been so advanced, died, during the lifetime of the executrix, leaving children, who survived the executrix: *Held,* that the share of the children of the deceased son were to be charged with the advancements made to their father.

This was a CIVIL ACTION, tried before *Watts, J.,* at Fall Term, 1875, of the Superior Court of WAKE County.

The plaintiff instituted an action at Spring Term, 1875, against (558) the defendants, Joseph B. Batchelor, admiinstrator of Lewis D. Henry, and also administrator of Margaret M. Henry, William S. Mason, Ed. G. Haywood, Margaret H. Haywood, D. K. McRae, Jane V. McRae, Sarah C. Manly, Thomas R. Waring, Robert P. Waring, Lewis D. Waring, Jane V. Waring, Lewis E. Henry, Margaret M. Henry, Douglas Bell, individually, and also as executor of Malvina D. Bell, individually, and also as executor of Malvina D. Bell, Douglas Bell, Jr., Matthew P. Taylor, and assignee in bankruptcy of Matthew P. Taylor, alleging in his complaint substantially the following facts:

That during the month of June, 1845, Louis D. Henry, being domiciled in the county of Wake, died, having first duly made and published his last will and testament in writing, which was properly executed to pass both real and personal estate, wherein he nominated and appointed his wife, Margaret M. Henry, his sole executrix, and among other things devised and bequeathed as follows:

"I give and devise to my beloved wife, for and during the term of her natural life, all the slaves now in my possession, or which are now hired out, or which shall be in my possession, or may be hired out, at my death, together with all their future increase, and also all my real and personal estate of every kind and description, so as aforesaid, for and during her natural life. The same, namely, all the said slaves, real and personal estate, at her death, I give, devise and bequeath, to be equally divided among all my children then living, and the child or children of any deceased child of mine, to take the share of their deceased parent, had he or she been living at the death of my wife. The share or shares of my said estate hereby given to my daughters shall be only to the sole and separate use of my daughters respectively, so as in no sense to be liable to the debts, liabilities, and contracts of their respective husbands, either of those married at my death, or who may marry thereafter, or of any husband they may ever at any time
(559) have in their lives. I enjoin it upon my dear wife to see that proper suitable settlements of the same be made upon my daughters, drawn up by some lawyer skillful in such matters. . . .

"Item 4th. I hereby give and grant unto the executrix of this my last will and testament, full power and authority to sell and dispose of any part of my real and personal estate for the best price, taking always good security, either for the purpose of partition or division among my legatees, or for any other purpose most advantageous for her or their interest, the securities or proceeds of such sales to be accounted for and settled in the way and manner the principal is, on each legatee, under this my will and subject to the same limitations and restrictions."

The following is a copy of the will, made a part of the complaint:

"In the name of God, Amen. I, Louis D. Henry, the of city of Raleigh, North Carolina, being in sound mind and memory, do ordain this, as my last will and testament, hereby revoking and annulling all manner of wills and testaments by me at any time heretofore made.

"Item 1st. I appoint my beloved wife Margaret, the executrix of this my will, and the guardian of all my minor or infant children; and of their estate.

"Item 2d. I charge my whole estate with the support and maintenance (which is to be of the most ample and sufficient and comfortable

kind,) of my dear mother-in-law, Mrs. Sally Haywood, during her life.

"Item 3d. I give and bequeath to my beloved wife, for and during the term of her natural life, all the slaves now in my possession, or which are now hired out, or which shall be in my possession, or may be hired out at my death, together with all their future increase, and also all my real and personal estate of every kind and description as aforesaid for and during her natural life, the same, viz.: all the (560) said real and personal estate, at her death, I give, devise and bequeath to be equally divided to and among all my children then living, and the child or children of any deceased child of mine to take the share of their parents, had he or she been living at the death of my wife. The share or shares of my said estate hereby given to my daughters, shall be only to the sole and separate use of my daughters respectively, so as in no wise to be liable to the debts, liabilities, and contracts of their respective husbands; either of those married at my death or who may marry thereafter, or any husbands they may have at any time in their lives. I enjoin it upon my dear wife, to see that proper, suitable, settlements of the same be made upon my daughters; drawn up by some skillful lawyer in such matters, and, in case the husband of either of my daughters (should my wife have died, without having allotted to the same,) shall neglect to have such marriage settlement executed for the space of four months after the death of my wife, and after her marriage, the share of my said estate, to which his wife may be so entitled, shall pay one thousand dollars, to be equally divided, to and among my other children then living, and the child or children of any deceased child; and the residue be subject to settlement as above.

"Item 4th. I hereby give and grant unto the executrix of this my last will and testament, full power and authority to sell and dispose of, any part of my real and personal estate for the best prices; taking always good security; either for the purpose of partition or division among my legatees, or for any other purpose most advantageous for her or their interest, the securities or proceeds of such sale, to be accounted for and settled, in the way and manner the principal is, on each legatee under this my will, and subject to the same limitations and restrictions.

"Item 5th. I hereby give and bequeath to the Episcopal, called 'Christ Church,' Raleigh, five hundred dollars.

"Item 6th. I hereby give and bequeath to the University of (561) North Carolina, at Chapel Hill, five hundred dollars.

"In witness whereof, I have hereunto set my hand and seal this 23d day of July, A.D. 1845. "LOUIS D. HENRY, [SEAL.]

"Signed, sealed and executed and published in presence of

"DAVID W. STONE,
C. L. HINTON.

"CODICIL.

"I hereby revoke and annul the above two legacies to the Episcopal Church, called 'Christ Church,' Raleigh, and to the University of North Carolina, at Chapel Hill. I also hereby direct, that all the property in my aforesaid will devised or bequeathed to my daughters, shall be so settled to their sole and separate use, as never to be liable to the control, or contracts, or debts, of any husband they may respectively have at any time, no matter how often they marry. I reiterate this, lest it might not have been clearly enough expressed in my said will. Done under my hand and seal, Raleigh, 3d December, A.D., 1845.

"LOUIS D. HENRY, [SEAL.]"

Said will was admitted to probate at the August Session, 1846, of the Court of Pleas and Quarter Sessions for the county of Wake, when the executrix therein named, duly qualified and entered upon the discharge of her duties.

That the testator left, him surviving, his wife Margaret M. Henry, and the following children, to-wit: Jane Virginia McRae, then intermarried with the defendant, Duncan K. McRae, Sarah C. Manly, then intermarried to one John H. Manly, now deceased, Augusta E. Henry, Louis E. Henry, Margaret H. Haywood, then Margaret H. Henry, Mary Henry and Malvina D. Henry.

After the death of the testator, and before the death of his said wife, Augusta E. Henry, intermarried with one Robert P. Waring and
(562) died, leaving the defendants, Thomas R. Waring, Louis D. Waring, Robert P. Waring and Jane V. Waring, her only children, her surviving, the last named child being now an infant under the age of twenty-one years.

After the death of the testator, and before the death of his said wife, Louis E. Henry intermarried with one Jane E. Massenburg and died, leaving him surviving Margaret M. Henry and Louis E. Henry, his only children, both of whom are infants under the age of twenty-one years.

After the death of the testator, and before the death of his said wife, Margaret H. Henry intermarried with the defendant, E. G. Haywood.

After the death of the testator, and before the death of his said wife, Mary Henry intermarried with the defendant, Matthew P. Taylor and died, leaving her surviving Henry Taylor, who also died in infancy and unmarried. The said Matthew P. Taylor was duly adjudicated a bankrupt before the death of the testator's said wife, and the defendant _____ was duly appointed the assignee in bankruptcy of all his estate, property and effects.

After the death of the testator, and before the death of his said wife, Malvina D. Henry intermarried with the defendant Douglas Bell and died, leaving her surviving, the defendant Douglas Bell, Jr., her only child, who is an infant under twenty-one years of age, and without guardian. The said Malvina D. Bell departed this life in November, 1871, having first published her last will and testimony in writing, wherein she named the defendant Douglas Bell, Sr., her sole executor, and whereby she devised and bequeathed to him all her estate and property of every description; which said will was duly admitted to probate in the Probate Court of Wake County, in the latter part of the year 1876.

The following is a copy of said will, made a part of the complaint:

"I, Malvina D. Bell, wife of Douglas Bell, of the city of (563) Raleigh, and State of North Carolina, being of sound and disposing mind and memory, although in feeble health, do make and publish this my last will and testament, as follows, that is to say:

"*First.* I desire and bequeath to my beloved husband, Douglas Bell, all my real and personal estate of every description, including that conveyed or held by John G. Williams, trustee, or to which I may be entitled in any other manner, to him, his heirs, executors, administrators and assignees forever.

"*Second.* I hereby appoint my husband, Douglas Bell, executor of my last will and testament. In witness whereof, I have hereunto subscribed my name and affixed my seal, this 24th day of October, A.D. 1871.

"MALVINA D. BELL, [SEAL.]

"Signed, sealed, published and declared by the testatrix to be her last will and testament in our presence, who signed the same at her request, in her presence, and in the presence of each other.

"WILLIAM SELDEN,
NORMAN BELL."

In the month of April, 1874, the said Margaret M. Henry, widow and executrix of Louis D. Henry, died intestate, and on the _____ day of _____, 1874, the defendant, Joseph B. Batchelor, was appointed and duly qualified as administrator of the said Margaret; and also as administrator *de bonis non, cum testamento annexo,* of the said Louis D. Henry.

The said Margaret, widow and executrix of Louis D. Henry, left her surviving, as her next of kin, and heirs-at-law, her children and grandchildren, the defendants, Jane V. McRae, Sarah C. Manly, Margaret H. Haywood, Thomas R. Waring, Louis D. Waring, Robert P. Waring,

Jane V. Waring, Margaret M. Henry, Louis E. Henry and Doug-
(564) las Bell, Jr. John H. Manly has died since the death of the said widow and executrix.

Malvina D. Henry intermarried with Douglas Bell on the 11th day of April, 1865, and after and during the lifetime of the said widow and executrix, on the 22d day of July, 1866, Margaret M. Henry joined in an indenture with one Alexander Bell and Malvina D. and Douglas Bell, wherein she assigned and conveyed to Alexander Bell, as trustee, a sealed note, bearing date January 1st, 1857, for four thousand dollars, payable to herself as executrix, and signed and sealed by Thomas C. Miller, J. T. Miller, Frederick J. Hill and Daniel B. Baker, on which the interest had been paid up to January 1st, 1861, which said note she then and there endorsed in blank; also, a second note under seal, bearing date January 1st, 1860, for one thousand dollars, payable to herself as executrix, and signed and sealed by Thomas C. Miller, A. S. Miller and Fred. J. Hill, on which the interest had been paid up to January 1st, 1861, which note she endorsed in blank, upon the express trust, the said Alexander Bell should collect the amount secured by said notes, or so much thereof as he could, by the exercise of due diligence, so as to raise thereout a fund of five thousand dollars and interest on the same from April 11th, 1865, and hold the said fund for the sole and separate use of the said Malvina D. Bell, as a *feme sole*, during the term of her natural life. And if she should die, leaving the said M. M. Henry her surviving, and also a child or children her surviving, then for the use and benefit of said child or children, provided he, she or they, should survive the said Margaret M. Henry.

To secure the said fund of $5,000 and interest in any and every event, and especially the case of Alexander Bell, should fail to collect so much out of the notes aforesaid, the said executrix in and by the same deed of indenture, also conveyed to Alexander Bell a house and lot in the
city of Raleigh, known as No. 18, lying on the east side of Fay-
(565) etteville Street, and on which she resided; by way of mortgage, conditional to be void in the event that the said $5,000 and interest from the 11th day of April, 1865, was realized out of the said notes, or otherwise paid into the hands of the said Alexander Bell by the executrix.

The following is a copy of said deed, which was made a part of the complaint:

"This indenture made and entered into this second day of July, A.D. 1860, by and between Margaret M. Henry, executrix of Louis D. Henry, deceased, of the first part, of the county and State above written, and Alexander Bell, of the county of Norfolk, in the State of Virginia, of the second part, and Douglas Bell and Malvina D. Bell, his wife, both of

the county and State last aforesaid, of the third part, witnesseth: That whereas Louis D. Henry, deceased, late of Wake County, did, by his last will and testament, which has been duly admitted to probate in the Court of Pleas and Quarter Sessions for the county of Wake, after giving to the said party of the first part a life estate in all his estate and property, real and personal, and giving likewise to the said party of the first part, whom he appointed his sole executrix, full power and authority to sell and dispose of any part of his real and personal estate for the best prices, taking always good security, either for the purpose of partition or division among his legatees, or for any other purpose most advantageous for her or their interest, devise and bequeath as follows: 'All my estate, at the said Margaret M. Henry's death, I give, devise and bequeath, to be equally divided among all of my children then living, and the child or children of any deceased child of mine to take the share of their parent, had he or she been living at the death of my wife. The share or shares of my said estate hereby given to my daughters, shall be only to the sole and separate use of my daughters respectively, so as in no wise to be liable to the debts, liabilities or contracts of their respective husbands, either of those married at my death or who may marry thereafter, or of any husband they (566) may, at any time, have in their lives. I enjoin it upon my dear wife to see that proper suitable settlements be made of the same, upon my daughters, drawn by some lawyer skillful in such matters;' and whereas, the said party of the first part is willing to give up her life estate in and to a certain portion of the estate and property of the said Louis D. Henry, hereinafter mentioned and described, and is desirous of settling the said portions according to the true intent and meaning of the last will and testament aforesaid: Now therefore, the said Margaret M. Henry, executrix of Louis D. Henry as aforesaid, party of the first part, for and in consideration of the premises and for the further consideration of five dollars, to her in hand paid by the said Alexander Bell, party of the second part, receipt whereof she doth hereby acknowledge, at or before the time of sealing and delivering of these presents, doth give, grant, bargain and sell, alien, transfer, convey, and assign over and deliver, unto the said Alexander Bell, party of the second part: *First:* A certain note under seal, bearing date the first day of January, one thousand eight hundred and fifty-one, (1851,) payable to the said party of the first part, for the sum of four thousand dollars, principal money, on which interest has been paid up to the first day of January, A.D. 1861, and signed by Thomas C. Miller, J. T. Miller, Frederick J. Hill and Daniel B. Baker, and which I, the party of the first part, have this day endorsed in blank.

"*Second:* A certain other note, under seal, bearing date for payment, one day after January the first, one thousand eight hundred and sixty, (1860,) payable to the said party of the first part, for the sum of one thousand dollars, principal money, on which interest has been paid up to the first day of January, A.D. 1861, and signed by Thomas C. Miller, A. S. Miller and Frederick J. Hill, and this day endorsed in blank by the said party of the first part, unto him, the said Alexander Bell,
(567) the said party of the second part, to have and to hold unto him, his heirs, executors, administrators and assigns forever, absolute and in fee simple; upon the express trust, nevertheless, that the said party of the second part shall proceed diligently to collect the sums of money secured by the notes under seal, hereinbefore referred to, mentioned and described, and when he has collected the same, shall hold five thousand dollars of the said sum, and interest on the said five thousand dollars, which has already accumulated, or which may hereafter accumulate, calculating from the 11th day of April, 1865, for the sole and separate use, benefit and behoof of the said Malvina D. Bell, one of the parties of the third part, as a *feme sole*, without being in any manner liable or subject to the debts, contracts, responsibilities or control of her husband, the said Douglas Bell, the other party of the third part, or any other husband the said Malvina Bell may hereafter at any time have, for and during the natural life of the said Malvina D. Bell; but if the said Margaret M. Henry shall hereafter die, leaving the aforesaid Malvina D. Bell her surviving, then, and in that event, for the sole and separate use of the aforesaid Malvina D. Bell, in like manner as aforesaid forever, and in fee simple absolutely; but if the aforesaid Malvina D. Bell, shall die before the aforesaid Margaret M. Henry, and shall leave a child or children surviving her, the said Malvina D. Bell, then, and in that event, for the use, benefit and behoof of such child or children her surviving, as she may hereafter have, absolutely and in fee simple, provided the said child or children, or any one of them, survives his, her, or their grand-mother, the said Margaret M. Henry; but if the aforesaid Malvina D. Bell shall die before the aforesaid Margaret M. Henry, leaving no child or children her surviving, or leaving a child or children, which survives her, the said Malvina D. Bell, but which die, each and every one of them, during the life of the said Margaret M. Henry, then, and in that event, in trust for such person or persons as shall, upon that contingency,
(568) be entitled to the same, under the limitations contained in the last will and testament of said Louis D. Henry, deceased, hereinbefore referred to, and made part of this instrument for greater certainty. And it is expressly covenanted and agreed, by the party of the first part, and the parties of the third part, to and with the party of the

second part, that the said party of the second part shall be held responsible for only as much, or such parts, of the property and estate hereinbefore conveyed and transferred, or intended to be conveyed and transferred, as shall come into his, the said party of the second part, actual, manual occupation and under his absolute control and possession, and that the said party of the second part shall and may pay over the income arising from the investment of the trust fund hereinbefore conveyed and transferred, or intended to be conveyed and transferred, to the said Malvina D. Bell, so long as she lives, and her written receipt shall be a full voucher and discharge to the said party of the second part for the disposition and expenditure of the income arising from the estate and property last aforesaid, and it is further covenanted, agreed and granted, that the said party of the second part is hereby and herein vested with full power to sell, convey, transfer, collect, invest and reinvest any and all property herein and hereby conveyed or intended to be conveyed, and in the same manner to deal with any property or estate which may arise from the investment of any part or portion of, or the whole of the aforesaid estate and property, or the proceeds arising therefrom as to him shall seem most for the advantage of his *cestuis que trusts*, and he is authorized to invest in realty or personalty, as to him shall seem best, upon the uses and trust hereinbefore declared. And as to the residue of the sum arising from the reducing to possession of the two notes under seal, hereinbefore described and specified, over and above the sum of five thousand dollars, and interest thereon from the eleventh day of April, A.D. 1865, intended by this instrument to be settled to the sole and separate use of the aforesaid (569) Malvina D. Bell, if any such residue there shall be, the said party of the second part shall pay over and deliver the same to the said party of the first part, after deducting the cost of collection and shall take her receipt therefor. And whereas it is the intention of the party of the first part to secure absolutely, and at all events, the sum of five thousand dollars, with interest thereon from the eleventh day of April, A.D. 1865, hereinbefore conveyed or intended to be conveyed to the said party of the second part, upon the uses and trusts hereinbefore set forth, and whereas, such is the uncertainty of property, and the remedies for the collection of debts, in the existing state of public affairs, that the said party of the second part may fail to collect and realize even by using the utmost diligence, the said sum of five thousand dollars, and the interest aforesaid, or some part thereof: Now, therefore, know all men by these presents that the said Margaret M. Henry, executrix as aforesaid, party of the first part, for and in consideration of the premises, and for the further consideration of ten dollars, to her in hand paid, by the aforesaid Alexander Bell, party of the second part,

at or before the time of sealing and delivering of these presents, the receipt whereof, the said party of the first part doth hereby acknowledge, doth give, grant, bargain and sell, alien, transfer and convey unto the said Alexander Bell, party of the second part and his heirs, a certain lot, or parcel of land, situate, lying and being in the city of Raleigh, in the county of Wake, and in the State of North Carolina, known in the plan of the said city of Raleigh, as lot number eighteen (No. 18) and bounded as follows: On the west by Fayetteville Street, on the north by lot number thirty-four (No. 34), on the east by Wilmington Street, and on the south by Lenoir Street, containing one acre or thereabouts, being the same lot on which the said party of the first part now resides, unto him the said Alexander Bell, the party of the second
(570) part, to have and to hold unto him and his heirs forever in fee simple.

"The condition upon which the above described lot of land is conveyed, is such that if the said Alexander Bell, using due diligence, shall collect and realize the sum of five thousand dollars and interest thereon from the eleventh day of April, A.D. 1865, by reason of the transfer of the notes, under seal, hereinbefore specified and described, or if the said Alexander Bell shall realize any part of said sum, by reason of the transfer of the notes, under seal, aforesaid, and the said Margaret M. Henry shall pay unto him, and make good the said sum of five thousand dollars, by paying unto him the residue thereof, and all interest thereon, from the eleventh day of April, A.D. 1865; or if the said Alexander Bell, using due diligence, shall fail to collect any part of the said five thousand dollars, and interest as aforesaid, an dthe said Margaret M. Henry shall pay over and deliver the whole of the aforesaid sum of five thousand dollars and interest thereon from the eleventh day of April, A.D. 1875, then, and in either in these events last aforesaid, the conveyance of the lot of ground aforesaid, is to be void and of no effect; otherwise the conveyance of the lot of land aforesaid, is to be in full force, validity and effect, and in any and every event, all and every other part of this indenture tripartite is to be and forever continue in full force and effect. In testimony of all which, the said party of the first part, the said party of the second part, and the said parties of the third part, have hereunto set their hands and affixed their seals the day and date first above written.

"M. M. HENRY, Ex'tx., [Seal.]
ALEXANDER BELL, [Seal.]
DOUGLAS BELL, [Seal.]
MALVINA D. BELL. [Seal.]"

During the lifetime of Alexander Bell, M. D. Bell and M. M. Henry, executrix, the two notes aforesaid, by the consent of all the parties

interested, were placed in the hands of the defendant, W. S. Mason, an attorney of this court, for collection, and the plaintiff is informed and believes that said defendant has collected a portion of said notes, and has still a part of the fund derived therefrom in his hands, for which he declares his readiness to account and to pay over such balance as may be found in his hands, as shall be directed by the judgment and decree of the court. The plaintiff is also informed by said Mason, that he expects to realize a still large ramount than he has as yet succeeded in collecting, but that in no event would a sufficient amount be realized therefrom to pay all the fund of five thousand dollars and interest thereupon as aforesaid. (571)

Alexander Bell died some time prior to the 15th of September, 1869, and after his death, under proceedings regularly instituted in the Superior Court of Wake County, returnable to Fall Term, 1869, the plaintiff was by the judgment and decree of said court substituted for the said Alexander Bell, deceased, as trustee in and under the aforesaid deed of the date of July 2nd, 1866.

After the plaintiff became such trustee and during the life of the said Malvina D. Bell, she on the 3d day of June, 1870, drew an order in favor of A. M. Lewis on the plaintiff, her trustee, for the sum of $500, with interest from the 3d day of June, 1871, which the plaintiff accepted, to be paid when he received, as her trustee, funds of hers which he had a right to apply to the satisfaction of said debt. The plaintiff insists that under these circumstances the said Malvina D. Bell had no power to appoint any portion of said sum for the benefit of her husband, Douglas Bell, by her last will and testament, until the plaintiff had received enough thereof to pay off said liability.

The complaint demands judgment:

1. That the defendant W. S. Mason, account with the plaintiff for such sums as he has collected on the two sealed notes mentioned in the complaint. (572)

2. That an account be taken to ascertain how much can be realized from said notes, and also to ascertain what balance of the fund of $5,000, and interest from the 11th of April, 1865, will remain unsatisfied, after applying all that can be realized from said notes to the satisfaction of said fund.

3. That the house and lot in the city of Raleigh, specified in the complaint, be sold, and so much of the proceeds of such sale as are necessary for that purpose, be applied to the satisfaction of said fund of five thousand dollars and interest, and the residue thereof be disposed of under the direction of the court.

The defendants Joseph B. Batchelor, as administrator *de bonis non, cum testamento annexo* of Louis D. Henry, and also as administrator

of M. M. Henry, deceased, Duncan K. McRae and Jane V. McRae his wife, Sarah C. Manly, Ed Graham Haywood and Margaret H. Haywood his wife, with the other defendants, jointly and severally, filed their answer, alleging, substantially the following facts:

They admit the truth of the facts alleged in the complaint and consent to a sale of the real estate specified and described therein, under an order of the court; the proceeds to be held under the control of the court, until the several and respective rights of the parties to this action have been decided, and then to a division of the same, in accordance with said decision.

In addition to the facts set out in the complaint, these defendants say, that during the life time of Malvina D. Bell, only six hundred dollars was paid her on account of the said fund of five thousand dollars, the same being the interest thereon between the 11th day of April, 1855, and the 11th day of April, 1867. The said Malvina D. Bell, died on the 8th day of November, 1871, at which date there was due her in her own right, and over which she had full power of disposition by will,

thirteen hundred and seventy-five dollars ($1,375) on account
(573) of the accumulated interest on said fund.

The defendant Douglas Bell was, at the date of the death of the said Malvina D. Bell, indebted to the intestate, Margaret M. Henry (then living, now deceased), as executrix of Louis D. Henry, deceased, in the sum of $1,050, with interest thereon from the 1st day of January, 1870, and that no part of said debt has been paid by the said Douglas Bell, either to Margaret M. Henry, executrix, during her life, or to the defendant Batchelor since her decease, except as hereinafter stated.

After the death of the said Malvina D. Bell, and the probate of her will and the qualification of her husband (Douglas Bell, as executor thereof, the said Douglas Bell being the sole legatee named therein, assigned to the intestate M. M. Henry (then living, now deceased), as executrix of Louis D. Henry, all his right, title and interest in and to the accumulated interest aforesaid; amounting to $1,375, to be applied when realized to the debt of $1,050, and interest thereon from the first day of January, 1870, which he owed to the said M. M. Henry, deceased.

At the time when said assignment was made, no part of said interest had been collected by the defendant Mason, but since the assignment was made, he has collected, and now has in his possession, twenty-five hundred dollars, or thereabout, raised upon the aforesaid sealed notes. The defendants insist that $1,375 of the said $2,500, ought to be paid to the defendant J. B. Batchelor as administrator, etc., of Louis D. Henry, deceased, as a part of the estate of said Henry, and that if the whole of said fund of $1,376 ought not to be so paid to the defendant Batch-

elor, then that all which remains of said $1,375, after paying off and discharging the draft for $500 mentioned in the complaint, ought to be paid to the defendant Batchelor as aforesaid.

The defendants answering further, say, that the assignee in bankruptcy of the defendant, Matthew P. Taylor, was one Willie R. Empie, who, after discharging all his duties as assignee, and winding up the affairs of said bankrupt, died in November, A.D. 1874, and (574) no assignee has since been appointed to succeed him, because there was no estate of the said bankrupt left unadministered, at the death of said Empie. The defendants insist, that the assignee of said bankrupt has not now, nor ever at any time, had any interest in the subject matter of this action, nor any right, title, or claim in the estate property and effects of Louis D. Henry, deceased. That if said assignee ever, at any time, had any such right, title, interest or claim, he has long since forfeited the same by his failure to prosecute the same within two years after he was so appointed.

That Louis D. Henry was not seized and possessed of the lot of ground mentioned in the pleadings at the time of his decease, but that after his decease, and during the lifetime of M. M. Henry, executrix, she, as executrix of Louis D. Henry, deceased, loaned to the defendant, Duncan K. McRae, certain moneys belonging to the estate of her testator, and took from the said defendant, to herself as executrix, a deed of mortgage conveying said lot to her, to secure the repayment of said moneys.

Afterwards the said executrix, with other moneys belonging to the estate of her testator, purchased from the said defendant the equity of redemption in said lot, and procured the same to be conveyed to her, as the executrix of Louis D. Henry, deceased.

The defendants insist that, by reason of such mortgage and purchase, made as aforesaid, the said lot became a part of the personal estate, in the hands of the executrix, and the proceeds arising from the sale thereof ought to be paid to the defendant, Batchelor, administrator *de bonis non,* etc., of Louis D. Henry, deceased, as a part of the assets of said estate, or that if the whole of the proceeds ought not to be so paid, then that so much as remains after paying off the plaintiff's demand ought to be paid to said Batchelor, administrator, *de* (575) *bonis non, etc.,* as a part of the assets of Louis D. Henry, deceased.

The defendant, Mason, filed an answer, admitting the truth of the allegations contained in the complaint, and alleging substantially as follows:

He brought suit to Spring Term, 1867, of Wake Superior Court, upon the two notes mentioned in the complaint, at which term the defendants

therein, to postpone judgment, under a statute of this State, paid ten per cent thereof and cost, to-wit, $750.

The defendant paid $650 of said amount to Alexander Bell, trustee of Malvina D. Bell, and the residue, after payment of cost and charges, to-wit, $49.82, was directed to be held to pay any further cost, etc.

At October Term, 1867, of said court, judgments were obtained upon said notes, which were duly docketed in Wake and New Hanover counties, and A. Empie, an attorney, residing in Wilmington, retained to forward collection in New Hanover County.

Thomas C. Miller and Fred. J. Hill, both of whom are now deceased, were the only parties to said notes, from whom, at any time since this defendant has had charge of the same, any portion thereof could be collected.

During the year 1874, there was collected $1,420.40 which after deducting $142 cost and charges, left in the hands of the defendant $1,278.44.

During the time said notes have been in the hands of defendant, he has also been the attorney of Mrs. M. M. Henry, and as such, took from Douglas Bell an assignment of all his interest in said two notes, to said M. M. Henry, to secure and pay a debt due her from him.

The defendant deeming the first payments to be properly applied to the payment of interest on said notes, paid $755.10 of said $1,218.44, towards said debt of Mrs. M. M. Henry, leaving $523.34, which (576) has been deposited in the State National Bank at Raleigh.

During the year 1875, there has been collected $1,348.45, which after deducting $134.80 for costs and charges, was also deposited in said Bank; and the total amount remaining in the hands of the defendant is $1,781.91, which he is ready to pay to the plaintiff when required by the court.

There will probably be collected early in next year, about $1,400, toward the satisfaction of said two notes.

The defendant Waring, filed an answer substantially the same as the answer of the defendants Batchelor and others, hereinbefore set out.

The defendants Margaret M. Henry and Louis E. Henry by their mother and guardian *ad litem*, filed an answer which after setting out the allegations contained in the answer of the defendants Batchelor and others, first herein stated, further alleged: That at the time of the death of the said Louis D. Henry, he was seized and possessed of a large estate and property, exceeding in value $120,000.00, all of which immediately after his decease went into the possession and under the control of his wife, as his executrix, and guardian by his will of his minor children. That she made large settlements out of said estate, upon several of the children of the said Louis D. Henry, and among

such settlements she advanced several thousand dollars to his son, Louis E. Henry, the father of these defendants; that she wasted and expended a portion of said estate; that she lost a considerable part thereof by the event of the recent war, and by other acts of mismanagement and unavoidable misfortune; that thereby the said estate and property was greatly reduced in amount and value and at the date of the death of the said M. M. Henry but little thereof remained for division among the ultimate legatees of the said M. M. Henry, consisting of some houses and lots in Fayetteville, almost valueless, and some three hundred dollars, or thereabout in money invested, and of the interest in lot No. 18, in the city of Raleigh, which remained (577) after satisfying the requirements of the mortgage to Alexander Bell, trustee.

The said M. M. Henry was entirely insolvent at the date of her death, and left no assets wherewith to replace that portion of the estate of her testator, which she had lost, wasted or eloigned during her lifetime.

For many years previous to her death, these defendants and their mother lived with the said M. M. Henry at her residence on said lot No. 18, and she assisted with such means as she had left, in their maintenance, support and education, and in the maintenance and support of their mother, but she did not leave any charges against these defendants on account thereof, nor so far as these defendants are informed and believe, expect them to repay her therefor; nor did the said M. M. Henry during her lifetime make any other advances to the defendants, or either of them, or any settlement upon them or either of them, out of the estate and property of their grandfather, Louis D. Henry.

Unless they are chargeable in their grandfather's estate, with such sums of money as were advanced by the said M. M. Henry, to their father, L. E. Henry, during her lifetime, all of which was expended by the said L. E. Henry before his death, and none of which have come to these defendants. They have received no part of the legacy limited to them by their said grandfather's will.

That if the whole of the plaintiff's claim is paid out of the proceeds of the sale of lot No. 18, after satisfying the same, there will not remain enough of said proceeds, when added to all the amount of the estate and property of their grandfather, now in the hands of the defendant, Joseph B. Batchelor, administrator, *de bonis non*, etc., to advance them equally with the defendant, Douglas Bell, the younger, and the other legatees of their said grandfather's estate.

The defendants insist that the whole of the proceeds arising from lot No. 18, ought to be paid into the hands of the defendant, Joseph B. Batchelor, administrator *de bonis non*, etc., of Louis D. Henry (578) deceased, to be held by him until it can be ascertained upon an

account taken among all the ultimate legatees of Louis D. Henry, dec'd, what portion of said proceeds these defendants are entitled to make them equal with the other legatees, and whether the claim of the plaintiff can be satisfied and paid out of the proceeds of said sale, in full, without disappointing the equitable claim and demand of these defendants on said proceeds of sale.

Douglas Bell, Jr., by J. H. Flemming, his guardian *ad litem* filed an answer admitting the facts alleged in the complaint, and consenting to a sale of the real estate mentioned therein, under an order of the court, the proceeds thereof to be held under the control of the court until the rights of the parties to the action might finally be adjudicated.

The defendant, M. P. Taylor, filed an answer, disclaiming any interest in the property or estate mentioned in the complaint.

At June Term, 1875, Joseph B. Batchelor was appointed a commissioner to sell the land specified in the pleadings, the same being known as lot No. 18, in the plan of the city of Raleigh, upon certain terms set out in the decree for sale; and the commissioner was ordered to report at the next term of the court.

It was further ordered, adjudged and decreed that E. G. Haywood, Jr., be appointed a commissioner, to inquire and report at the next term of the court:

1. What amounts have been collected by the defendant, W. S. Mason, on account of the sealed notes, specified and described in the pleadings?

2. When said amounts respectively were received by said Mason? What disposition he has made of the same, or any part thereof? And what amount thereof remains in his hands?

3. What amount remains yet charged upon lot No. 18, in the
(579) city of Raleigh, for the benefit of the plaintiff, after applying all credits, if any amounts have been paid by said Mason to the plaintiff or his predecessor in office, or on any other lawful account, and also the balance in the hands of said Mason, if any to be now applied as a credit?

At January Term, 1876, the marriage of the defendant, Margaret M. Henry, was suggested, and thereupon Joseph O. Wilcox, the husband of the said defendant, was, by consent of all the parties to the action, made a party defendant, and adopted for himself the answer filed in behalf of his wife.

At Fall Term, 1875, the said commissioner filed his report, which is substantially as follows:

1. The defendant, W. S. Mason, collected on said notes, between the 1st day of April, 1867, and the 1st day of May, 1875, various sums, in the aggregate amounting to $3,518.89, and the commissioner also charged him with $11.67, interest upon a small portion of said funds

which remained in his hands, belonging to the estate of Mrs. Malvina D. Bell.

2. Of said amount there yet remains in the hands of said Mason the sum of $1,776.83, and also the said $11.67 of interest.

3. The said Mason expended of the amounts received by him, and paid out on account of the parties entitled to the same, during the time this fund was in his hands, the aggregate sum of $1,742.06.

4. The principal fund charged upon the lot of land in the city of Raleigh, was $5,000, bearing interest from the 11th day of April, 1865. Mrs. M. D. Bell died on the 8th day of November, 1871. The interest on said principal up to the date of her death was $1,973.33, of which $600 was paid to her during her lifetime. The residue, amounting to $1,373.33, was not received by her, and the greater part thereof has been collected by the said Mason since her death.

5. The interest on said $5,000, from the 8th of November, 1871, to the 4th day of October, 1875, which belongs to the plaintiff as trustee for Douglas Bell, Jr., amounts to $1,171.66. (580)

6. The whole sum, principal and interest, before reducing it by deducting the amount collected by said Mason on the notes, and applicable thereto, is $8,144.99. The amounts received by Mason on said notes, after deducting the expenses of collection, aggregate $3,131.83, leaving a balance charged on said lot, at this date, of $5,013.16.

The commissioner further finds that the said Mason will probably collect hereafter on said notes about $1,350, which ought to be applied to reducing the balance yet due and charged upon the lot.

7. Of the balance in the hands of said Mason, $1,158.50 belongs to the plaintiff, as trustee for Douglas Bell, Jr., and ought to be paid by said Mason to him, and the residue of said balance in the hands of Mason and the $16.67 of interest, amounting to $630, belongs to the estate of Mrs. Malvina D. Bell, and ought to be applied to the satisfaction of an order drawn by the said M. D. Bell on John G. Williams, trustee, in favor of A. M. Lewis, dated June 3d, 1870, and now held by W. H. H. & R. S. Tucker & Co., and amounting at this date, principal and interest, to $630.

Upon the hearing there was no dispute about the facts, but the following rulings of the commissioner were excepted to:

1. The cost and expenses incurred and expended by W. S. Mason in collecting the several amounts upon said notes were $387.06. The commissioner deducted the same from the gross sum collected by Mason before applying it as a credit, to reduce the amount charged on lot No. 18, and so reduced that credit to $3,131.83; whereas if the credit had been applied before such deduction, the same would have amounted to $3,518.89. Mason acted as attorney for Alexander Bell, trustee, in said

collections. The defendant Batchelor, as administrator, claimed that the credit ought to be applied before said deduction was made. The commissioner held otherwise, and the said defendant excepted.

(581) 2. Mrs. M. D. Bell, on the 3d day of June, 1870, drew a draft on the plaintiff in the following words and figures:

"$500. RALEIGH, June 3d, 1870.

"Please pay to Mr. A. M. Lewis, five hundred dollars, and charge to my separate estate in your hands, without interest for one year.

"MALVINA D. BELL.

"To Jno. G. Williams, Esq., Trustee, Raleigh."

At the date when said draft was drawn, Mrs. M. Bell was a married woman, and her husband, Douglas Bell, Sr., contemporaneously endorsed the same.

When the draft was presented to the plaintiff he accepted the same in the following terms:

"Accepted, to be paid as soon as Mrs. Bell's funds come into my hands.

JOHN G. WILLIAMS, Trustee."

A. M. Lewis, who held said draft, assigned the same by endorsement to W. H. H. & R. S. Tucker & Co., who have held it ever since. At the date of this transaction, the plaintiff was substituted in the place of Alexander Bell, deceased, as trustee for Mrs. M. D. Bell, but had no ready money of hers in his hands, and W. S. Mason had only $39.82 of the fund in his hands, which was the remnant of the first collection made by him in 1867.

Mrs. M. D. Bell made a will before her death, whereby she gave her husband, Douglas Bell, Sr., "all my real and personal estate, of every description, including that conveyed or held by John G. Williams, trustee, or to which I may be entitled in any other manner," and made her husband the executor of said will. This will has been duly

(582) admitted to probate in the Probate Court of Wake County, and Douglas Bell qualified as executor thereof.

On the 26th day of September, 1873, being indebted in a large amount to Mrs. M. M. Henry, deceased, said Douglas Bell assigned to her all his interest, etc., in the notes and judgments thereon which Mason was then engaged in collecting.

On July 3d, 1874, said Mason collected $1,420.44, on account of said notes, from which he deducted $142, leaving in his hands, including the $39.82 aforesaid, $1,318.22. On the first day of May, 1875, Mason

made a further collection, which, together with the sum last aforesaid, the interest due Mrs. Bell at the date of her death, is made up.

On the 19th day of April, 1875, Mason paid the defendant, Batchelor, administrator, etc., out of the fund of $1,373.33, the sum of $755, in part satisfaction of his claim under the aforesaid assignment of Douglas Bell, Sr., and retained the residue thereof, which, with the interest thereon to date, amounts to $630, to pay off the said draft held by W. H. H. & R. S. Tucker & Co.

It was insisted by the plaintiff that he was entitled to receive the said sum of $755, for the benefit of the trust fund, and that Mason had made a misapplication of the same. The commissioner held otherwise, and the plaintiff excepted.

The defendant, Batchelor, administrator, etc., insisted that Mason ought not to apply the said sum of $630, remaining in his hands to the satisfaction of the draft of Mrs. Bell, held by W. H. H. & R. S. Tucker & Co., as aforesaid, but that the same should be paid to him as administrator, in part satisfaction and discharge of the assignment of Douglas Bell, as aforesaid.

The commissioner held that said sum of $630 ought to be applied to satisfy the said draft of Mrs. M. D. Bell and the defendant, Batchelor, administrator, etc., excepted.

Detailed accounts accompany the report of the commissioner, setting out specifically the date and amounts of receipts and disbursements, etc., but it is unnecessary to insert the same. (583)

Upon the hearing of the action, a jury and also any reference to ascertain the facts were waived by all the parties thereto, and it was agreed that all the matters of fact set out in the complaint of the plaintiff, and in the several answers of the defendants, were true, all the parties plaintiff and defendant assenting thereto.

Upon the state of facts set out in the pleadings, it was claimed by the plaintiff that he was entitled to receive the whole of his claim, out of the proceeds arising from the sale of lot No. 18, notwithstanding the alleged rights of the defendants, Margaret M. Wilcox and Lewis E. Henry, and Joseph B. Batchelor administrator *de bonis non*, etc.

It was claimed by the last named defendants, that the plaintiff was entitled to receive only so much of the said proceeds, as would make the share of his *cestui que trust*, Douglas Bell, Jr., of the estate of Louis D. Henry, deceased, equal to the share of the defendants, Margaret M. Wilcox and Louis E. Henry, of the same estate; and that the whole of the proceeds arising from the sale of said lot, ought to be paid into the hands of Joseph B. Batchelor, administrator *de bonis non*, etc., of Louis D. Henry, deceased, to be held by him, until it could be ascertained upon an account taken among all the ultimate legatees of Louis

D. Henry, deceased, what portion of said proceeds the defendants, Margaret M. Wilcox and Louis E. Henry, were entitled to, in order to make them equal with the other legatees, and whether the claim of the plaintiff could be paid in full out of the proceeds of said sale, without disappointing and denying the equal equitable claim and demand of the said last mentioned defendants.

Upon this point, the opinion of his Honor was with the plaintiff and against the defendants, to which ruling and the decree made in pursuance thereof, the defendants, Joseph B. Batchelor, administrator *de bonis non*, etc., and J. O. Wilcox and his wife Margaret M.
(584) Wilcox, and Louis E. Henry, excepted.

The defendant, Joseph B. Batchelor, administrator *de bonis non*, etc., also excepted to so much of the decretal order of the court, overruling his first and second exceptions to the report of the commissioner, E. G. Haywood, Jr.

At January Term, 1876, the following final decree was made:

In this action, the report of Joseph B. Batchelor, Esq., heretofore appointed commissioner to sell the lands specified and described in the pleadings, is filed; and there being no exception taken thereto, the same is in all respects confirmed; and it appearing therefrom, that L. Rosenthal has become the purchaser of said lands, at the price of seven thousand four hundred and fifty ($7,450) dollars, of which sum he has paid in cash to said commissioner ($1,862.50) eighteen hundred and sixty-two dollars and fifty cents, and has given his notes for the residue as required by the order of sale, *It is ordered, adjudged and decreed*, that the said Joseph B. Batchelor, as commissioner as aforesaid, proceed to collect the residue of said purchase money, as it falls due, and that upon the payment of the last installment thereof, and of all the other installments, and the interest that may accrue thereon, that he execute a deed in fee simple to the said L. Rosenthal and his heirs for said land. *It is further ordered, adjudged and decreed*, that the said Joseph B. Batchelor, as commissioner as aforesaid, after retaining out of said purchase money, five per cent thereof, which is hereby allowed him for his services in making sale, and collecting and disbursing the proceeds thereof, and executing title to the purchaser, applying the residue to the satisfaction of the sum of five thousand and thirteen ($5,013.16) dollars and sixteen cents, with the interest on five thousand dollars thereof from the 4th day of October, 1875, until paid, due and owing to the plaintiff as trustee of Douglas Bell, the younger;

but if the defendant Mason shall hereafter make further collec-
(585) tions, on account of the notes specified in the pleadings, the amount which the said Mason shall so collect, is to be first applied to the satisfaction of said debt, due said trustee, Williams, and the

said Batchelor is to satisfy the residue thereof after the application of the payment made by said Mason; and if said Batchelor shall have paid the whole of said debt, before said Mason shall have made any further collection and payment as aforesaid, then the said Mason is to apply such collection to replace *pro tanto*, the amount so paid by said Batchelor, and shall pay the amount so collected to said Batchelor as administrator *de bonis non, cum testamento annexo,* of Louis D. Henry, deceased. And any residue of said proceeds of sale which may remain in the hands of said Batchelor, he is to retain as administrator *de bonis non, cum testamento annexo,* of Louis D. Henry, deceased.

From so much of this decree as applies the proceeds of sale to the satisfaction of the debt claimed by the plaintiff, the defendants Joseph B. Batchelor, administrator, etc., and Joseph O. Wilcox and wife, and Louis E. Henry, appealed.

And the defendant, Joseph B. Batchelor, also appeals from so much of the order made at Fall Term, 1874, as overruled the first and second exceptions to the report of commissioner Haywood.

Haywood, for appellants.
Lewis, contra.

PEARSON, C. J. The main question depends upon the construction of the will. That is so plain, that it is difficult to discuss it, or to see any reason for having made it a subject of litigation.

The testator gives to each of his children an equal share of his estate, subject to the life estate of his wife in the whole—and he appoints her sole executrix of his will and guardian of his children, and he provides that in case of the death of any one of his children before the death of his wife, the child or children of such deceased child, (586) shall stand in the place of the parent and be entitled to such part of his estate as the deceased child would be entitled to at the death of his wife, had he been then living.

The will then confers upon the executrix power to allot the children in her lifetime, upon marriage or arrival of age, (this is a necessary implication) such part of the share of his estate, to which the child may be entitled, as she may in her discretion think proper, with an express injunction that the sum advanced to any of his daughters must be secured to their sole and special use; he makes no such provision in regard to his only son. This is the only discrimination made between his daughters and his son. The executrix so understood the will, and acted on her power. After the son arrived at age, she allotted to him an amount about the same as she had given to the daughters; he died in her lifetime. Suppose he had survived her, of course he would in the

final division have taken subject to the amount advanced. His children can only take what he would have been entitled to at his mother's death.

We concur with the view taken by the Commissioner in regard to the two matters excepted to, and see no error in the order confirming the report.

This opinion will be certified.

PER CURIAM. Judgment affirmed.

(587)

RICHMOND COLE v. THE CAROLINA CENTRAL RAILWAY COMPANY.

It is not error in the court below to refuse to dismiss an action against a railroad company, on the ground that the court had not jurisdiction thereof, because the charter of the defendant's company provides the manner, in which a party injured by the construction of its road, shall proceed to recover damages, where the complaint does not allege that the cause of action arose from the construction of said road.

This was a motion in the cause heard before *Buxton, J.*, at Fall Term, 1875, of RICHMOND Superior Court.

The complaint was filed at Fall Term, 1873, alleging that the defendant had changed the course of a certain stream, and claiming damages therefor.

At Fall Term, 1874, the case was, by consent, referred to two referees, with leave to choose an umpire in case of disagreement, the award to be made a rule of court. The referees chosen refused to act. No answer has ever been filed.

At Fall Term, 1875, the defendant moved the court to dismiss the action on the ground that the court had no jurisdiction thereof, because the plaintiff can only pursue the remedy prescribed by the charter of the defendant company. It was a fact, disputed by the counsel, whether the damages complained of, were incidental to the construction of the road, and necessarily occasioned thereby. The counsel for the plaintiff contending that it was, the counsel for the defendant contending that it was not.

His Honor refused to dismiss the action, because the complaint does not allege that the damages are caused by the location of the defendants' road upon the lands of the plaintiff.

From this ruling of his Honor, the defendant appealed.

Steele & Walker, Strange, and Busbee, for appellant.

Shaw and Hinsdale, contra.

PEARSON, C. J. For the reason by his Honor, we concur in (588) his opinion.

PER CURIAM. No error. Judgment affirmed.

HERRING & FARRELL v. HOTTENDORF & HASHAGAN.

The authority of an agent to collect debts, in the absence of evidence of the special employment of the agent, or the general usage of the business, or the habits of dealing between the parties, raising a presumption to the contrary, does not imply an authority to release a debt.

Evidence tending to show "that A was an agent for the plaintiff in selling safes, exchanging safes and collecting notes," is no evidence of authority to release a debt contracted in the course of such business.

CIVIL ACTION, tried before *Henry, J.*, at December (Special) Term, 1875, of NEW HANOVER Superior Court.

The plaintiff, in 1873, through their agent, one Spiro, sold to the defendant an iron safe, for two hundred and thirty dollars, payable by note at four months after the execution thereof. The defendants signed and delivered to Spiro, a written order for the safe. On the 26th of April, 1873, the plaintiffs delivered the safe to the Lorrillard Steamship Company in New York for shipment to Wilmington, and the safe was shipped by said company on the steamer Francis Wright, and the defendants notified of the shipment.

During the passage to Wilmington the steamer was lost at sea with all her cargo, including the safe.

The defendant, Hashagan, was introduced as a witness, and testified: That Spiro, the agent of the plaintiffs, through whom he purchased the safe, was frequently in Wilmington, acting as the agent of the plaintiffs, selling safes and collecting notes for the plaintiffs. In the month of August, 1873, Spiro came to Wilmington and visited the store (589) of the defendants, and had some conversation with them in regard to the safe. The counsel for the plaintiff objected to the admission in evidence of this conversation. The objection was overruled and the plaintiffs excepted.

The witness then testified: That Spiro asked him for the note that had been sent him by the plaintiffs to sign, and upon receiving the same, tore it in pieces, and stated that as the safe had been lost on the steamer Francis Wright, he would release the defendants from all liability on account thereof, and that he would send them another in place of it. The defendants have never received any safe.

The counsel for the plaintiff asked his Honor to charge the jury:

1. That there was no evidence that Spiro, as agent of the plaintiffs, had authority to release the defendants.

2. That the said release was without consideration, and not binding upon the plaintiffs.

The court declined the instructions prayed for, and charged the jury: That it was for them to say from the evidence, whether Spiro had the authority to constitute him a proper agent to release the defendants; that upon that point the evidence was conflicting; and that the facts deposed to by Hashagan constituted some evidence of such an authority, and if they believed that Spiro had the authority to make contracts for the sale and exchange of safes, and had charge of the business of the plaintiff in that line here, then he did have the authority to release the defendants and cancel the contract, and they would find a verdict for the defendants.

The jury found the issue in favor of the defendants. It was admitted that if the release by Spiro was not binding upon the plaintiffs, then they were entitled to judgment as prayed for in the complaint.

The plaintiffs moved for judgment *non obstante veredicto.*

(590) Motion overruled. Motion for a new trial. Motion overruled, and the plaintiffs appealed.

A. T. & J. London, for the appellants.

Russell, contra.

SETTLE, J. The question for determination is this: Did Spiro, the agent of the plaintiffs, have authority to *release* the debt due from the defendants to the plaintiffs?

The only evidence bearing upon this question is that of Hashagan, one of the defendants, who testifies that Spiro, through whom he purchased the safe, was frequently in Wilmington, acting as the agent of the plaintiffs, *selling safes, exchanging safes, and collecting notes for the plaintiffs.* That sometime in August, 1873, Spiro asked the witness for the note that had been sent by the plaintiffs to be signed, and on receiving the note tore it to pieces, and stated, that as the safe had been lost on the steamer Francis Wright, he would *release* them from all liability on account of the safe, and that he would send them another in the place of it, and that defendants have never received any safe.

Does this testimony furnish *any* evidence that Spiro had authority to release the debt due from the defendants?

Authority to collect, does not, by any means, imply an authority to release a debt.

Parsons, in his work on contracts, says, "one known to be an agent to settle claims, and with specific authority to this effect, cannot be supposed to have authority to commute them." And it is said in Story on Agency, Sec. 99, "An agent employed to receive payment, is not, unless some special authority beyond the ordinary reach is given to him, clothed with authority to commute the debt for another thing; or to release it upon a composition; or to pledge a note required for the debt, or the money when received; or to submit the debt or demand to arbitration; unless, indeed, the particular employment of the agent, or the general usage of the business, or the habits of (591) dealing between the parties should raise a presumption the other way."

In the case before us there is nothing to raise a presumption contrary to the general rule.

The agent, very generously attempted to *release* the debt due his principal without any consideration whatsoever, and actually promised to send another safe.

Our conclusion is that his Honor should have charged the jury that there was no evidence of such an agency as would authorize Spiro to release the debt.

Let the judgment prayed for in the complaint, be entered here, in accordance with the case agreed.

PER CURIAM. Judgment accordingly.

Cited: Bank v. Grimm, 109 N.C. 96.

STATE v. WARREN HARE.

Upon the trial of an indictment for an assault by poisoning: *Held*, that the court below erred in admitting evidence tending to show that "the defendant's house was a general resort for thieves." The State cannot put the defendant's character in issue.

Where, upon the trial of such indictment, the witnesses for the defendant were sworn and sent out of the court room: *Held*, that it was error to refuse to allow the defendant to examine a witness who was not present when the other witnesses were sworn and sent out, and came in during the trial, but did not hear the examination of the other witnesses.

INDICTMENT for an assault by poisoning, tried before *Watts, J.*, and a jury, at January Term, 1876, of the Superior Court of WAKE County.

When the case was called for trial, the counsel for the State moved the court that the witnesses for the defendant should (592)

leave the court room, and the motion was allowed. Accordingly, the witnesses were sworn and sent out of the court room. The counsel for the defendant informed the court that there were two witnesses for the defence who were not present, but were within the call of the court, and would be sent for and examined by the defendant. During the trial, Charles Lane, one of these witnesses, was called, and when put upon the stand, was asked by the court if he had not been standing in the court room. He replied that he had, and that he did not hear the testimony of the preceding witness, during whose examination he came in. The counsel for the defence insisted on examining the witness, but the court ordered him to stand aside. The defendant excepted.

Robert Crossan, the prosecutor, was asked by the prosecuting attorney if he had not been specially deputized as a policeman in the city of Raleigh, to watch defendant's neighborhood and house, as being a general resort for thieves and dissipated characters? The defendant objected to the question as an attack upon his character, and as not being competent evidence to prove a motive, unless it were shown that the defendant knew the prosecutor had been so specially deputized. There was no evidence that the defendant had any such knowledge, but the prosecuting attorney commented upon this evidence in his argument as evidence of a motive, and of a bad character. The question was allowed to be asked by the court, and the defendant excepted.

There was a verdict of guilty, and the defendant moved for a new trial. The motion was overruled and the defendant moved in arrest of judgment. Motion overruled and judgment pronounced. Defendant appealed.

Attorney General Hargrove, A. McLean and Busbee & Busbee, for the State.

Purnell and Pace, for the defendant.

(593) READE, J. It was error to allow the State to offer evidence tending to show that the "defendant's house was a general resort for thieves." The State cannot put the defendant's character in issue.

2. It was also error to refuse to allow the defendant to examine a witness who was not present when the other witnesses were sworn and sent out, and who came in during the trial, but had not heard the examination of the other witnesses.

There is error. This will be certified.

PER CURIAM. *Venire de novo.*

Cited: S. v. Hodge, 142 N.C. 691.

MARY A. REAVES AND OTHERS v. ORE KNOB COPPER COMPANY.

A deed as follows: "This deed witnesseth that I J. H., have this day *sold* and by these presents do convey unto G. R. one-sixteenth part of my half of all the mineral contained in a certain tract of land, etc. This deed therefore is, that I convey unto the said G. R. and his heirs and assigns forever, one-sixteenth part, etc.," shows upon its face that the grantor intended to convey the mines and minerals in and upon said land, and the word "sold" in the connection in which it is used, *ex vi termini*, imports a valuable consideration, and rebuts the presumption of a resulting use to the grantor, which would defeat the operation of the deed.

CASE AGREED, tried before *Mitchell, J.*, at Spring Term, 1872, of ASHE Superior Court.

The plaintiffs, all heirs-at-law, of one Jesse B. Reaves, claim that they are tenants in common with the defendant, and have title to one thirty-second part of certain lands, described in the complaint, and ask that their share may be declared, and the premises sold for the purpose of making partition.

The defendant denies the tenancy in common, and alleges sole (594) seizure in itself, and for the purpose of settling the right of the parties, all questions as to the jurisdiction of the court are waived.

It is admitted that the title to the lands and minerals in controversy, was originally in one Jesse B. Reaves, the ancestor of the plaintiffs, and that the defendant claims the same through *mesne* conveyances.

All these lands, land and minerals, by *mesne* conveyances, dating back to 1854, are owned by the defendant, except the one-thirty-second part thereof which is the subject-matter of this controversy.

On the 15th day of August, 1853, Jesse B. Reaves did assign and deliver to one George T. Reaves a paper writing, purporting to be a deed, and purporting to convey one thirty-second part of the minerals in said land to said Reaves, being that part now in controversy. Of which paper writing, the following is a copy:

"This deed witnesseth, that I, Jesse B. Reaves have this day sold, and by their presents, do convey unto George T. Reaves one-sixteenth part of my half of all the mineral that is in a certain tract of land, Peak's Creek, in the county of Ashe and State of North Carolina, and known as the Ore Knob, containing fifty acres; that John W. Martin has purchased the half of said mineral from me. This deed therefore is, that I convey unto the said George T. Reaves and his heirs and assigns forever, one-sixteenth part of my half of all the minerals of all kinds that said tract of land may contain, to him and his heirs forever. In

testimony whereof, I have hereunto set my hand and affixed my seal, this 16th day of August, 1853.

"Enterlined before assigned.

[Signed] "J. B. REAVES, [SEAL.]

"Attest:

A. B. MCMILLAN, Jurat."

(595) Jesse B. Reaves died intestate in the year 1863, and the plaintiffs are his heirs-at-law, and as such entitled to the one thirty-second part, as claimed, unless their title was divested by the foregoing deed, which was not registered until the year 1875. It is admitted that the land remained unoccupied from the year 1859, until 1872, when the defendant took deeds for all the shares in said land, the share in controversy being purchased from George T. Reaves.

His Honor, after argument, rendered judgment in favor of the defendant, and the plaintiff appealed.

Scott & Caldwell, for appellant.

Folk & Armfield, Smith & Strong and Jones, contra.

PEARSON, C. J. It is settled, that under the Act, 1715, a deed duly registered has the effect of a feoffment; and no consideration is necessary in order to pass the legal estate.

It was conceded on the argument, mines and minerals not severed from the land, are land, and may be conveyed in the same way, and will descend in the same way.

So the case turns upon the effect of the deed, Jesse H. Reaves to George T. Reaves, set out in the case.

The plaintiff takes the position, the deed was made without consideration, and there being no declaration of a use, there was a resulting use in the grantor which drew back the legal estate.

It is familiar learning, if a feoffment be made for consideration, the feoffee acquires title. If a feoffment be made without consideration, the feoffer may declare the uses, or he may reserve to himself a power to declare the uses at any future time, or he may give to another the power to declare uses, and so much of the use as is not thus disposed of, results to the feoffor. If there be no declaration of a use and no power of appointment, it follows that the entire use results to the feoffor. The statute brings to it the entire legal estate; the feoffment has no practical effect and was a vain thing.

(596) The plaintiffs' counsel, in a very learned argument, contends that such is the case in regard to the operation of the deed under consideration.

It is insisted for the defendant, the deed was made for a valuable consideration; and he relies upon the words, "This deed witnesseth that I, Jesse H. Reaves *have this day sold* and by these presents do convey unto George T. Reaves," etc.

So the case is narrowed down to this, does the import and meaning of the words "have this day sold" rebut the presumption of a resulting use in the feoffor which would draw back the legal title?

We have seen that a declaration of a use, or a power of appointment rebuts the presumption of a resulting use, except as to so much of the use as is not disposed of. It is learning equally familiar, if A buys and pays for a tract of land and directs title to be made to B without a declaration of the use, there is a resulting use to A; but if B is the son of A, the relation rebuts the presumption of a resulting use; so if a father makes a feoffment to a son, the relation rebuts the presumption of a resulting use.

The whole current of the authorities show that the court seizes upon any circumstance to rebut the presumption of a resulting use, when no part of the use is disposed of, under the maxim *"ut res magis valeat quam pereat,"* and will not readily come to the conclusion that the parties have done an idle act.

This deed shows upon its face that Jesse Reaves intended to convey the "mines and minerals" to George Reaves; and as we think the word "sold" in the connection in which it is used, imports, *ex vi termini*, that the deed was made for a valuable consideration, so as to rebut the presumption of a resulting use, which would defeat the operation of the deed and make the action of the parties a vain thing. There is no error. Judgment below affirmed.

PER CURIAM. Judgment affirmed.

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(597)

THOMAS D. WOLFE v. JOHN N. DAVIS, ADM'R., ETC.

An irregular judgment rendered at one term may be set aside at a subsequent term, independent of the provisions of the C. C. P.; but an erroneous judgment cannot be set aside at a subsequent term.

An *erroneous* judgment is one rendered according to the course and practice of the court, but contrary to law. An irregular judgment is one rendered contrary to the course and practice of the courts, as a judgment without service of process.

The power of amendment extends only so far as to make the record speak the truth; and the record cannot be so amended, as to show what *ought* to have been done, but only what *was* done.

MOTION in the cause, heard before *Buxton, J.*, at Spring Term, 1875, of UNION Superior Court.

The plaintiff held a note upon both of the testators of the defendant, given during the late war, and payable in Confederate money. Both of the testators died during the war, leaving each a last will and testament, which have been duly proved in Union County. The defendant Cureton qualified as the executor of W. J. Cureton, and the defendant Yarboro qualified as the executrix of G. W. Yarboro.

The plaintiff instituted an action against the defendant at Fall Term, 1867, of Union Superior Court.

The case came on for trial at Fall Term, 1869, being No. 32, of the civil issue docket of that term. The only plea relied on was "Fully administered." No jury was impaneled, but judgment was entered up as follows: "Judgment according to note, subject to scale, and subject to the same order as in No. 1." The case No. 1, referred to, was a case entitled, *D. A. Covington v. Hampton Huntley and Ellison Huntley, Executors of Thomas Huntley,* in which case at Fall Term, 1868, the following entries appear:

"General issue; specially, the executors of Thomas Huntley
(598) plead; Former judgment of debts of equal dignity before notice;
Retainer; Fully administered; Property sold by authority of Act of Assembly; and bonds and notes not yet collected.

Judgment according to note filed.

"It is ordered by the court that no execution issue against the defendants Ellison and John Huntley, Executors of Thos. Huntley, deceased, until further proceedings are had before the clerk to ascertain the state of the assets of their testator."

It is stated by way of explanation of the judgment and order in No. 1, that the plea of "general issue" was not relied on, but only the protecting pleas of the executors and the order was made by the court under the idea that the Act of 1868-69, relating to estates of deceased persons was applicable to administrations granted before its passage. The effect of the judgment was merely to ascertain the debt, leaving the question of assets to be determined thereafter before the clerk. The course adopted in No. 1, was followed as a precedent, hence the reference thereto.

In 1870, upon proceedings properly instituted, in the Probate Court of Union County Cureton was removed from his office as executor and John N. Davis, the largest creditor of the testator, was appointed administrator *de bonis non* with the will annexed of W. J. Cureton, deceased. And Davis, as administrator *de bonis non,* after notice to the plaintiff, Thomas D. Wolfe, moved the court to set aside the judgment

and order rendered at Fall Term, 1869, and reinstate the case so far as the estate of W. J. Cureton is concerned, upon the civil issue docket.

The plaintiff resisted the motion, and moved the court to reform the judgment *nunc pro tunc* as of Fall Term, 1869, into a judgment *quando*, as upon the admission of the plea, "fully administered."

His Honor upon the hearing directed the order made at Fall Term, 1869, to be stricken out, but refused the motion to set aside the judgment; and granted the motion of the plaintiff. (599)

From the ruling of the court, the defendant Davis appealed.

Battle, Battle & Mordecai, for the appellant.

Wilson & Son, contra.

READE, J. A judgment, however *erroneous*, rendered at one term, cannot be set aside at a subsequent term. But a judgment *irregular*, rendered at one term may be set aside at a subsequent term. (We are not speaking of the power under the Code of Civil Procedure to vacate a judgment within a year for mistake, etc., which is not applicable to our case.) An *erroneous* judgment is one rendered according to the course and practice of the courts, but contrary to law; as where it is for one party, when it ought to be for the other; or for too little, or too much. An irregular judgment is one contrary to the course and practice of the courts; as judgment without service of process.

In our case, the judgment against the defendant at Fall Term, 1869, was irregular, because there stood his plea of "fully administered" undisposed of. And therefore it may be set aside. *Cowles v. Hayes*, 69 N.C. 406. And his Honor erred in refusing to set it aside.

In granting the motion of the plaintiff to amend the record of Fall Term, 1869, by entering a judgment *quando, nunc pro tunc*, his Honor seems to have been of the opinion that the power to amend, embraces something more than simply making the record speak the truth—not only what *was* done, but what *ought to have been* done. But that is error. And as there was not in fact any judgment *quando* rendered at Fall Term, 1869, it would be improper to make the record say that there was.

There is error. This will be certified.

PER CURIAM. Judgment accordingly.

Cited: Moore v. Gidney, 75 N.C. 41; *Bank v. McArthur*, 82 N.C. 110; *Wall v. Covington*, 83 N.C. 145; *Koonce v. Butler*, 84 N.C. 223; *Weaver v. Roberts*, 84 N.C. 494; *Stradley v. King*, 84 N.C. 639; *Hinsdale v. Hawley*, 89 N.C. 88; *S. v. Horton*, 89 N.C. 583; *May v. Lumber Co.*, 119 N.C. 98; *Banking Co. v. Duke*, 121 N.C. 112; *Stafford v.*

Gallop, 123 N.C. 21; *Becton v. Dunn,* 137 N.C. 562, 564; *Flowers v. King,* 145 N.C. 235; *Calmes v. Lambert,* 153 N.C. 253; *Mann v. Hall,* 163 N.C. 60; *Estes v. Rash,* 170 N.C. 342; *Lee v. McCracken,* 170 N.C. 576; *Rawls v. Henries,* 172 N.C. 218; *Finger v. Smith,* 191 N.C. 819, 820; *Harnett County v. Reardon,* 203 N.C. 270; *Henderson v. Henderson,* 232 N.C. 12.

(600)

JOHN B. SHARPE v. HARDY PEARCE.

A executed and delivered to B a mortgage upon a sorrel horse, described in the mortgage as "one horse," etc. A, with the consent of B, exchanged the sorrel horse for a bay horse, with the understanding that the bay horse should stand in the place of the sorrel horse in the mortgage. Afterward A exchanged the bay horse for another horse. In an action brought to recover the bay horse: *Held,* that the mortgage was a lien upon the bay horse as between the mortgagor and mortgagee, but did not embrace the bay horse as against a third party without notice, and the plaintiff had no title against the defendant.

CIVIL ACTION, for the claim and delivery of personal property, tried on demurrer before his Honor, *Judge Moore,* at the Fall Term, 1875, of HERTFORD Superior Court.

The plaintiff filed the following affidavit, to-wit:

"John B. Sharpe, the plaintiff above named, being duly sworn, says:

1. That he is now the owner, and entitled to the immediate possession of the fellowing described property: one bay horse about twelve years old.

That said property is wrongfully detained by one Hardy Pearce. That the alleged cause of detention, according to this plaintiff's best knowledge, information and belief, is as follows:

That sometime during the early part of the current year, he sold to one W. E. Miller a certain sorrel horse, and that the said Miller executed to the plaintiff a lien or mortgage on the said sorrel horse, to secure the payment of the purchase money for the same. That since this first sale, the said Miller traded off the said sorrel horse for another,

(601) with the approval and understanding of and with the plaintiff, that his lien or mortgage was to be held by him on the same, or that the horse traded for was to stand in the place of the said sorrel horse. That notwithstanding this understanding, the said Miller, without the knowledge and consent of the plaintiff, has made another trade for a horse, almost worthless.

Wherefore the plaintiff demands that the said bay horse be taken from the defendant and returned to him.

That said property was not taken for tax, or fine, or assessment pursuant to a statute, or seized under attachment or execution against the property of deponent.

That the actual value of said property is about one hundred dollars. That the plaintiff is about to commence an action in this court for the recovery of the possession of said personal property, the summons in which action being hereunto annexed."

The Clerk ordered that the said bay horse be delivered to the plaintiff upon his filing the undertaking required by law.

To this affidavit, used as a complaint, the defendant demurred, assigning as the grounds thereof:

1. That it does not appear that the plaintiff had any mortgage, trust or lien of any kind upon the horse demanded in the complaint.

2. It does not appear that the defendant had notice of any mortgage, trust or other lien existing against the horse demanded in said complaint.

On the hearing, after argument, his Honor sustained the demurrer, giving judgment in favor of defendant and dismissing plaintiff's complaint with costs.

From this judgment the plaintiff appealed.

Smith & Strong, for appellant.

Gilliam & Pruden, contra.

BYNUM, J. The plaintiff sold and delivered to Miller a sorrel horse, at the same time taking a mortgage upon the same horse and other property to secure the purchase money and other debts. (602) Miller, the mortgagor, afterwards traded the horse for another—a bay horse about twelve years old, with the consent of the plaintiff and with the understanding that he should stand in the mortgage in the place of the sorrel. After this, the mortgagor traded off the bay horse to the defendant for another horse alleged to have been worthless; whereupon the plaintiff brought his action of claim and delivery against the defendant for the bay horse.

The only description of the horse given in the plaintiff's mortgage is, that Miller "does by these presents bargain, sell and convey to the said John B. Sharpe, and his heirs and assigns *one horse,*" etc. The demurrer admits these facts, and the question raised is, whether the plaintiff can maintain his action. The trade of the sorrel horse for the bay with the assent of the plaintiff, vested the title of the bay in the mortgagee, as against the mortgagor, but how did it affect third persons without notice? The defendant Pearce traded for a *bay* horse; the mortgage was of a *sorrel.* The very purpose of the registration laws was to

prevent frauds upon creditors and purchasers, by requiring that the deed must describe the subject matter of the conveyance, so as to denote upon the instrument itself, what it is in particular, or refer to something else to make it certain. *Kea v. Robeson,* 40 N. C., 373; *Jones v. Morris,* 29 N. C., 370; *Gregory v. Perkins,* 15 N. C., 50; *Holcombe v. Ray,* 23 N. C., 340; *Cannon v. Peebles,* 24 N. C., 449. Suppose the defendant had searched the Register's books to find out whether there was a lien upon the bay horse for which he was about to trade. He would have ascertained there, that Miller had mortgaged to the plaintiff "one horse" without further description. Had he then gone outside of the deed to learn what horse was meant, he would have found that it was a sorrel horse that was mortgaged, and not a bay.

To hold that such a mortgage is valid, and constructive notice to the defendant, would be to hold that the registration laws, which were
(603) designed to prevent fraud, were themselves a trap and a fraud upon honest purchasers. Against third persons without notice, the mortgage did not embrace the bay horse and the plaintiff had no title as against the defendant. We do not think *Hubbard v. Winborne,* 20 N. C., 271, cited by the plaintiff's counsel, conflicts with our decision in this case.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Spivey v. Grant, 96 N.C. 224; *White v. Carroll,* 146 N.C. 233; *Motor Co. v. Motor Co.,* 197 N.C. 374.

WILLIAM P. WETHERELL AND WIFE v. MAXWELL J. GORMAN AND OTHERS.

In stating an account of the rents and profits of real estate, the defendant should be credited with the enhanced value of the property on account of repairs, and not with the actual cost of such repairs.

It is not error to charge a defendant in such account with the actual rent received, after repairs made, where he has been credited with the value of such repairs, with interest thereupon.

This was a SPECIAL PROCEEDING, tried before *Watts, J.,* at January Term, 1876, of WAKE Superior Court.

The case was before this court upon appeal at June Term, 1875, and is fully reported in 73 N. C., 380.

In accordance with the judgment of this court, the case was referred to the Clerk of the Court below, to state an account between the plain-

tiffs and the defendant, Whitaker, "charging the said Whitaker with the rents and profits received by him, and allowing the said Whitaker the value of the purchase money paid by him, and also the enhanced value of the land, arising from any improvements made thereon with interest on these respective sums."

The case was heard in the court below, upon exceptions, to the (604) report of the referee.

The plaintiffs filed the following exceptions:

1. Because no rent is allowed from April, 1865, to October, 1867, whereas it is shown by the evidence and so found by the Clerk, that $20 per year might have been collected with repairs.

2. Because the value of repairs is allowed to defendant, without finding that the premises, when surrendered, had any enhanced value over that which they had when first occupied by defendant.

3. Because interest is allowed on the repairs, whereas the use and occupation is equivalent to interest.

4. Because interest is allowed on taxes, which are incident to the possession of realty, and not being a debt due to the person contesting, no interest is due thereupon.

5. Because the amount allowed for the back yard is based upon the increased value of the house instead of the actual value of the back yard.

The exceptions were overruled by the court, and judgment rendered. Whereupon the plaintiffs appealed.

Smith & Strong and Collins, for appellants.

Fowle and Haywood, contra.

READE, J. The amount in controversy is small, and another reference and report, and the delay and expense incident thereto make it important that there should be an end to the litigation, unless manifest injury would result to one party or the other. Both parties except to the report; both parties are dissatisfied, which probably amounts to about the same as if both parties were satisfied.

The plaintiffs have five exceptions to the report, only one of which, the second, has any force: "That the *cost* of the repairs, instead of their *value to the premises* was allowed the defendant." (605)

Their value to the premises is evidently the correct rule; for very expensive repairs might nevertheless injure the premises, as changing a dwelling into a store house or stable. But as the order of reference directed the Clerk to allow for the "enhanced value of the land, by reason of any improvements made thereon;" and he reports the cost of the repairs as "improvements," we must take it that he understood the

instructions, and that he meant that the value of the land was enhanced to the amount of the cost of the improvements. There was error therefore in sustaining any of the plaintiffs' exceptions.

Only one—the first—of the defendants' exceptions has any force: "That the defendant is charged with the *actual* rents received after his repairs, instead of such rents as the lot would have yielded without the repairs." The defendant says, that the improvements came out of his pocket, and the increased rents ought to go into his pockets, to reimburse him his outlays; else the profits of his money will go into the plaintiffs' pockets. That would be so, if it were not that the report reimburses him every dollar that he spent for improvements. Being reimbursed the cost of his improvements, with interest, it is the same as if he had never made any improvements. The plaintiffs having reimbursed the defendant the cost of his improvements, with interest, it is the same as if they, not he, had paid for them originally. So that there is really no substantial objection to the report in this particular in *this* case; although cases might arise in which the rule contended for by the defendant, would be the right one.

The judgment below ought to have overruled all the exceptions on both sides, and confirmed the report. And that will be the judgment of this court.

PER CURIAM. Judgment here for the plaintiff according to the report.

Cited: Daniel v. Crumpler, 75 N.C. 186; *Smith v. Stewart,* 83 N.C. 409; *Wharton v. Moore,* 84 N.C. 483; *White v. Jones,* 88 N.C. 181; *R. R. v. McCaskill,* 98 N.C. 537; *Vann v. Newsom,* 110 N.C. 126; *Jones v. Sandlin,* 160 N.C. 154.

(606)

WILLIAM P. WETHERELL AND WIFE v. MAXWELL J. GORMAN AND OTHERS.

(For the Syllabus, see the preceding case between the same parties.)

This was an APPEAL by the defendants and is a branch of *Wetherell and Wife v. Gorman and Others, ante,* 603.

The defendant Whitaker filed the following exceptions:

1. Because the actual rent, after the repairs, was charged, and not the amount for which the house would have rented without the repairs and before they were made.

2. Because the account was not taken upon the basis suggested in the first exception, and made to conform thereto in all other respects.

3. Because the expense of collecting rent was not allowed defendant, to wit: ten per cent.

His Honor overruled the exceptions and the defendant appealed.

Fowle and Haywood, for appellant.
Smith & Strong and Collins, contra.

READE, J. The facts in this case are the same as in a case between the same parties at this term. This being the defendant's, as that was the plaintiff's appeal.

There is error. There will be judgment here for the defendant for his costs.

PER CURIAM. Judgment accordingly.

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(607)

IN RE JOHN SCHENCK.

The power to issue the writ of *habeas corpus* is denied to the Supreme Court and any Judge thereof, or to the Superior Courts, by the express provision of Bat. Rev. Chap. 54, where the applicant is detained by virtue of a final judgment of a court of competent jurisdiction. The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous; and the applicant, in default of appeal, must be left to his remedy by writ of *certiorari.*

PETITION for a writ of *habeas corpus,* heard before this court at this term.

All the facts necessary to an understanding of the case are stated in the opinion of the court.

Attorney General Hargrove, for the State.
Battle, Battle & Mordecai, for the petitioner.

BYNUM, J. In the matter of Schenck. The petition in this case was filed before me, and as it is a case of much importance and public concern, I asked the assistance and advice of all the Justices of the Supreme Court. The case was accordingly argued before the whole court by the Attorney General on behalf of the State, and by MR. R. H. Battle for the petitioner. With the advice and concurrence of all the Judges, the motion was denied and the following opinion filed:

This is an application for a writ of *habeas corpus,* upon the following state of facts:

At the Fall Term, 1875, of the Superior Court of Lincoln County, the petitioner, John Schenck, was indicted for an assault and battery upon the body of one Alexander Schenck. At the same term of the court, the defendant appeared and submitted, and was by the court
(608) sentenced to two years imprisonment at hard labor in the penitentiary, where he now is, undergoing his punishment. The record shows that the penitentiary was substituted by the court, (instead of the common jail, I presume,) "by the consent and choice of the defendant."

The petitioner alleges that this judgment is illegal, in that the law confers upon the court no power to impose such a sentence for such an offence. That punishments in this State are regulated by statute; and that by a proper construction of Sections 29, 108 and 111, Chap. 32, of Bat. Rev. the punishment of misdemeanors of this class, is limited to fine and imprisonment in the county jail, one or both. And such would seem to be the law. It follows that no consent of the defendant can confer a jurisdiction which is denied to the court by the law, and that any punishment imposed, other than that prescribed for the offence is illegal.

But admitting that the petitioner is illegally confined, is he entitled to relief by this proceeding before me? I think he is not, and the application must be denied.

The power to issue the writ of *habeas corpus* is derived from the Constitution, Art. I, Sec. 18, and the Act of the Legislature for enforcing that provision, Bat. Rev., Chap. 54, Sec. 2 and Subsec. 4, which is as follows: "The application for the writ shall be in writing, signed by the applicant.

"1. To any one of the Judges of the Supreme Court.

"2. To any one of the Superior Court Judges, either at term time or in vacation."

It is thus plainly seen that a single Judge of the Supreme Court has the same and no other jurisdiction to issue the writ than a Judge of the Superior Court, and by reference to the same section of Bat. Rev., Chap. 54, Sec. 2, it becomes equally plain that the same limitation of power to issue the writ in certain cases, extends equally to the two classes of Judges, to-wit: "The application to prosecute the writ shall be denied in the following cases, . . . Where persons are committed or detained by the final order, judgment or decree of a compe-
(609) tent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." The Superior Court *is* a court of competent jurisdiction of the person and offence of the petitioner, and by the terms of the statute, no writ of *habeas corpus* lies against its final judgment. The petitioner had his

day in that court, and if he was aggrieved by the judgment he had the remedy and the opportunity of appeal to the court of last resort. This is the prescribed and regular course of procedure, from which there is and can be, from the very necessity of the case no departure.

So far as the law goes, to secure the citizen the full benefit of the right of appeal, even in cases of his own neglect to avail himself of this right, that upon his application to the Supreme Court, with a reasonable excuse for his neglect, that court will issue the writ of *certiorari* to the Superior Court, and thus bring up the case for review as on appeal. The petitioner here, has neither appealed from the final judgment, nor has he applied to the Supreme Court for the writ of *certiorari*. Should such an application be made to that court, and it clearly appeared that the court below had exceeded its jurisdiction, and sentenced a defendant to an illegal imprisonment, the Supreme Court would probably issue the remedial writ, that a wrong might be redressed in the only way open, upon an excuse slighter than is ordinarily required, for not having appealed from the judgment.

The question was raised, discussed, and has been considered, whether the Supreme Court, as such, has the power to issue the writ of *habeas corpus*, in this case. The jurisdiction of the Supreme Court is prescribed by the 10th section of Article IV of the Constitution: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the Court below, upon any matter of law or legal inference; . . . and the court shall have power to issue any remedial writs necessary to give it a general supervision and control of the infe- (610) rior courts." It is thus seen that the Supreme Court, as now constituted, is a court of appeals only, and has no jurisdiction to issue any original process, except to enforce its own judgments, and to issue such remedial writs as may be necessary to give it a general supervision and control of the inferior courts. For illustration, take the case now before us. If this case had come before the Supreme Court by appeal, or should hereafter come before it by *certiorari*, and upon the trial it should appear that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of Battle's Revisal, Chap. 54, Sec. 10, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of *habeas corpus*, even of its own motion, and discharge the prisoner. So if the Superior Court should refuse to allow an appeal in a proper case, or should refuse to carry into effect a decree of the Supreme Court, that court would have the power to issue the writ of *certiorari*, *mandamus* or appropriate writ, to enforce its supervisory power. Still, in these and the like cases, it is only a court of appeals,

clothed with these remedial powers, to secure the prompt and complete execution of its appellate and supervisory jurisdiction.

So it would seem from the constitution of the Supreme Court, as well as by the express provisions of the second section of the Habeas Corpus Act, Bat. Rev., Chap. 54, that the power to issue the writ in cases where the person is detained by virtue of a final judgment of a court of competent jurisdiction, is denied both to the Supreme Court and any Judge thereof or of the Superior Courts.

In cases where the writ is allowable, it has been seen that the power is conferred equally upon all the Judges to issue the writ. Without reference to the positive prohibition of the statute, it is otherwise clear that the power cannot extend to cases where the person is con-
(611) fined on final process. For if so, this unseemly and discordant result would follow, that Judge Schenck might try and sentence a person to death or the penitentiary, and Judge Cloud or Buxton might issue the writ of *habeas corpus* and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice, were never contemplated by the framers of our judicial system; on the contrary they were carefully guarded against, both by the Constitution and legislation. In *Childs v. Martin,* 69 N. C., 126, it is held that where two or more courts have equal and concurrent jurisdiction of a case, that court in which a suit is brought acquires jurisdiction of it, which excludes the jurisdiction of other courts. The same principal applies here.

PER CURIAM. Application denied.

Cited: S. v. McNeill, 75 N.C. 17; *S. v. Garrell,* 82 N.C. 583; *S. v. Jones,* 101 N.C. 723; *In re Holley,* 154 N.C. 169; *In re Croom,* 175 N.C. 457; *S. v. Hooker,* 183 N.C. 767; *McEachern v. McEachern,* 210 N.C. 102; *Allen v. Ins. Co.,* 213 N.C. 588; *In re Taylor,* 229 N.C. 303; *S. v. Parker,* 234 N.C. 241.

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(612)

VANDIVER TEAGUE v. WM. S. TEAGUE AND MOSES TEAGUE EXECUTORS, ETC., AND OTHERS.

A devised as follows: "(1) I will and bequeath to my beloved wife, M. B. T., forty acres of land, including the house and buildings, during her natural life, then to be equally divided between my three youngest daughters, to wit: . . . I also will and bequeath all the rest of my tract of land that I now live on, known as the Newland land to my three youngest daughters, . . . to be equally divided. (2) That all the rest of my land, with the exception of the land where my son W. S. T. lives, that land the said W. must pay for, what I paid without interest, then my executors to make

him a deed, to be sold, and my daughter N. A's heirs to have fifty dollars each, the balance to be divided *among my other heirs.* (3) I also will that my three sons, V., W., and M., account to my estate what money they owe me without interest, and have three hundred and fifty dollars each out of that money, and all the rest of my property to be sold and equally divided among my nine heirs;" *Held,* 1. It appearing that the testator owned several tracts of land adjoining the home place, and which had been used as one tract for thirty years, and was conveyed to him as one tract, known as the Newland land, the same constituted but one tract, and passed to the three youngest daughters, subject to the life estate of their mother.

2. That the words "my other heirs," excludes the three youngest daughters from all benefit under that clause of the will, and that N. A's heirs take nothing under said clause except the legacy of fifty dollars, to be paid out of the fund arising from the sale of the land. That the name of W. S. T. was only mentioned in order to direct that he should pay for the land on which he lived, and thereby increase the fund out of which he was to draw as one of "my other heirs;" meaning other than the three youngest daughters.

3. That although some of the debts due from his sons to the testator were barred by the statute of limitations, they must be paid before the sons owing them can claim any benefit under the will.

CIVIL ACTION, tried before *Furches, J.,* at Fall Term, 1875, of the Superior Court of ALEXANDER County.

The complaint alleged: That Vandiver Teague, Sr., died in the county of Alexander in the month of March, 1872, leaving a last will and testament in which he appointed the defendants, Wil- (613) liam S. Teague and Moses Teague, his executors.

The following is a copy of said will:

"In the name of God, Amen: I, Vandiver Teague, Sr., being of sound mind and disposing memory, blessed be God, do make and ordain this my last will and testament, to-wit:

"First: I will and bequeath to my beloved wife, Mary B. Teague, forty acres of land, including the house and buildings, during her natural life time, then to be equally divided between my three youngest daughters, to-wit: Sophronia J. Teague, Elizabeth Montgomery and Amanda L. Teague. I also will and bequeath to my beloved wife one years' plentiful provisions; also two choice cows and calves and four head of sheep, one sow and pigs and hogs enough for a killing, also all the household and kitchen furniture, with the exception of two desks and one bureau. And I will her one mare, all the farming tools and one wagon and gear. I also will and bequeath all the rest of my tract of land, that I now live on, known as the Newland land, to my three youngest daughters, Sophronia J. Teague, Elizabeth A. Montgomery and Amanda L. Teague, to be equally divided. I also will and

bequeath to my daughter, Sophronia J. Teague, a mule called Jim, which she is now in possession of, and I also will to my youngest daughter, Amanda L. Teague, a horse beast, to be worth one hundred dollars in gold, likewise three head of cattle apiece, and I will to Sophronia five head of sheep, and to Amanda nine head of sheep. I also will that all the rest of my land, with the exception of the land where my son, William S. Teague, now lives, that land the said William must pay for what I paid, without interest, then my executors to make him a deed, to be sold, and my daughter, Nancy Austin's heirs to have fifty dollars each, the balance to be divided among my other heirs. I will that my three sons, Vandiver, William and Moses, account to my estate for what money they owe me, without interest, and
(614) have three hundred and fifty dollars each out of that money, and all the rest of my property to be sold and equally divided among my nine heirs, my wife an equal heir. I also ordain and appoint my two sons, William and Moses, my executors in this, my last will and testament.

"N.B. I will that my wife, Mary B. Teague, and her four daughters have all the money accruing from the estate of Jas. H. Newland, deceased.

"In testimony whereof, I have hereunto set my hand and affixed my seal, March the 19th, 1866.

(Signed) "VANDIVER his × mark TEAGUE. [SEAL.]

"Witness:

JOSEPH his × mark DYSON,

A. B. OXFORD,

W. D. MARSHALL."

The said executors qualified and entered into the discharge of their duties on the 13th of April, 1872.

Two years have elapsed since the qualification of the executors, and they have wholly failed to settle with the legatees and heirs-at-law of the testator.

W. S. Teague is indebted to said estate in the sum of five hundred dollars, and the other executor, Moses Teague, is indebted to said estate, in about the sum of eight hundred dollars. The whole amount of property, money or other effects that have come into their hands besides the indebtedness of said executors, amounts to about twenty-one hundred dollars. The executors own no property over and above their homesteads, and they actually have less property than is exempted as a homestead.

The testator died seized and possessed in fee simple of several (615) tracts of land, to wit: one in the county of Alexander, on Middle Little river, one tract known as the "Home tract," containing about three hundred acres; one known as the "Sal Self" tract, containing about eighty acres; one known as the "Austin tract," containing about four hundred acres, and a tract on the waters of Glade creek, containing sixty acres.

The court was requested to construe the will with regard to the following points:

1. Did the testator devise that the remainder of the "Sal Self tract" and the "80 acre entry" should be sold and divided amongst his heirs other than Nancy Austin's heirs? What land does the testator intend to include by the clause, "I will and bequeath all the rest of my tract of land that I now live on, known as the Newland land, to my three youngest daughters, Sophronia J. Teague, Elizabeth Montgomery and Amanda L. Teague?"

2. What does the testator mean by "my other heirs" in the clause, "I also will that all the rest of my land, etc., be sold, etc., and the balance to be divided amongst my other heirs, etc.?"

3. What amount of provisions is the widow to receive by the clause, "I will and bequeath to my beloved wife one year's plentiful provisions?"

4. What is the meaning of the clause, "I will that my three sons, Vandiver, William and Moses, shall account to my estate what they owe me, without interest, and have three hundred and fifty dollars each out of the money," when a large amount of the notes are barred by the statute of limitations?

That the testator having been twice married had the following children by his first wife, to-wit: Nelly, wife of William Teague, Vandiver Teague, Elmira Teague, wife of J. J. Teague, W. S. Teague, Moses Teague, and Nancy Austin, who is now dead. By his second wife he had the following children, to-wit: Sophronia J. Teague, Elizabeth, wife of A. Montgomery and Amanda, wife of J. C. (616) Bell.

The complaint prayed judgment that said executors give bond and security for the faithful discharge of their duties, and that they account and settle with the devisees and legatees under said will, etc.

The defendants filed their several answers, which are not necessary to be stated.

A trial by jury was waived and the court found the following facts:

That the three tracts of land mentioned in the pleadings as the "Home tract," "Sal Self tract," and "80 acre entry" were at the time of the death of one Benjamin Newland, some thirty years ago, a part

of his real estate. After his death partition was made of said real estate among his heirs at law, in which partition the three tracts aforesaid fell to the share of Washington Newland. Soon thereafter Washington Newland died, and the said land was sold by his executors, one Bennett becoming the purchaser. Bennett never occupied the land, but soon after his purchase (which in fact seems to have been made for the testator) he conveyed it to the testator who immediately took possession thereof and lived upon it to the time of his death in 1872. These lands adjoin each the other and were sold by the executors of Washington Newland to Bennett as a whole, as did Bennett to the testator. The part known as the "Sal Self" tract having been entered in the name of J. H. Newland, a son of Benjamin Newland, it was found after the sale that the title thereto was in him, and he conveyed his interest thereto to Bennett for the nominal consideration of one dollar. The said Benjamin continued to cultivate the "Home tract" and the "80 acre entry" until his death as one farm, the "Sal Self" tract being wild mountain land, has never been cleared or cultivated. The "80 acre entry" was made by the said Benjamin, after he
(617) purchased the "Home tract" and was called by him and others the "80 acre entry."

A woman named Sal Self had a cabin which she occupied for some time on the "Sal Self" tract before the same was entered, though she nor any one else had a title thereto before the same was entered by J. H. Newland. All these lands were known as, and called by the testator and his family, and the people of the neighborhood, the "Newland lands," the testator owning other lands called the "Austin place" and the "Glade Creek place."

After making his will, the testator made deeds to his three youngest daughters, who were his only children by his second wife, to all of what is called the home tract and a small portion of the "Sal Self" tract, reserving to himself a life estate therein.

Upon this state of facts the court was of the opinion that the "80 acre entry" and the "Sal Self" tract were included in that clause of the will in which the testator declares: "I also will and bequeath all the rest of my tract of land that I now live on, known as the Newland land, to my three youngest daughters, Sophronia J. Teague, Elizabeth A. Montgomery and Amanda L. Teague, to be equally divided."

The court was also of the opinion that the money arising from the lands included in the residue, which were to be sold by the executors, was to be divided among all the heirs of the testator *per stirpes* except the heirs of Elizabeth Austin, who are first to have fifty dollars each.

The court was also of the opinion that though some of the debts due the testator's estate by some of the devisees and legatees may be barred by the statute of limitations, still they are debts and must be satisfied, to enable the parties owing them to claim under the will.

By consent of parties three commissioners were appointed by the court, to lay off and assign to the wife of the testator a year's provisions as provided in the will.

It was further ordered by the court that the clerk state an (618) account of the estate in accordance with the opinion of the court.

From this judgment the plaintiffs appealed.

M. L. McCorkle and Smith & Strong, for appellants.
Armfield and Johnstone Jones, contra.

SETTLE, J. This action was brought to obtain a construction of the will of Vandiver Teague, Sr., and was submitted to his Honor, a jury being waived, to find the facts and declare the law thereon. The first question arises upon the following provisions of the will: "I will and bequeath to my beloved wife, Mary B. Teague, forty acres of land, including the house and building, during her natural lifetime, then to be equally divided between my three youngest daughters, to-wit, Sophronia J. Teague, Elizabeth A Montgomery and Amanda F. Teague. . . . I also will and bequeath all the rest of my tract of land that I now live on, known as the Newland land, to my three youngest daughters, Sophronia J. Teague, Elizabeth A. Montgomery and Amanda L. Teague, to be equally divided."

We concur with his Honor, that the Newland land, embracing the home place, the "Sal Self" place, and the eighty acre entry, constitute one and the same tract or plantation, having been used as such for thirty or forty years, and conveyed as such to the testator, and that the whole passed to his three youngest daughters, subject to the life estate of their mother, in forty acres. The fact that the testator made deeds to his three youngest daughters for portions of this land, subsequent to the execution of his will, cannot vary the construction of the will; and indeed there is nothing in the circumstances attending this case, inconsistent with the idea that the testator intended the portion not conveyed by deeds, to go to his three youngest daughters, under the provisions of his will, which have been quoted.

After disposing of his home place, the testator turns his at- (619) tention to his other lands, and directs "that all the rest of my land, with the exception of the land where my son, William S. Teague, lives, that land the said William must pay for what I paid without interest, then my executors to make him a deed, to be sold and my

daughter Nancy Austin's heirs to have fifty dollars each, the balance to be divided among my other heirs." The testator draws a distinction between his grand children, "Nancy Austin's heirs," and his own children, whom he designates as "my heirs."

But the question is, who are embraced in the description "my other heirs"? We think it evident, that the testator having just made provision, in land, for his three youngest daughters, intended that they should be excluded from all benefit under this clause of the will, which deals exclusively with the fund arising from the sale of land. Nancy Austin's children are clearly excluded from all benefit under the will, save the legacy of fifty dollars to each of them, to paid out of the fund arising from the sale of land.

The mention of William S. Teague's name in the clause under consideration, was neither for the purpose of providing for, nor excluding him, but only to direct that he should pay for the land on which he lived, and thereby increase the land fund, out of which he is to draw as one of "my other heirs," meaning other than the three youngest daughters already provided for. The testator then turns his attention to his personal estate, and after giving directions as to the payment of debts due from his three sons, etc., concludes, "all the rest of my property to be sold and equally divided among my nine heirs, my wife an equal heir."

If we leave out of view Nancy Austin's children, the meaning of the testator is apparent. The money arising from the collection of his debts, (other than the debt due from his son William for land, which goes into the land fund,) and from the sale of his personal property,
(620) not specifically disposed of, is to create a fund in which his eight children and his wife, filling the description, "my nine heirs, my wife an equal heir," are to share equally.

We concur with his Honor, that although some of the debts due from his sons to the testator may be barred by the statute of limitations, they must be paid before the sons owing them can claim any benefit under the will.

This disposes of all the questions worthy of attention.

Let this opinion be certified, to the end that the court below may proceed according to law.

PER CURIAM. Judgment accordingly.

RICHARD P. SPIERS v. HALSTEAD, HAINES & CO.

It is not error for the court below, in an action for unliquidated damages, to permit the plaintiff to amend his complaint, by decreasing the amount claimed, to a sum less than five hundred dollars, in order to oust the jurisdiction of the United States Courts.

A purchased from B in New York, goods to be shipped at a specified time; the goods were not shipped until a month afterwards, during which time they had depreciated in value twenty per cent.: *Held*,

(1) That the goods having been paid for, and A's receiving and selling the same after they did arrive, constituted no waiver of his right to recover damages: and

(2) That the measure of damage in such case, is the difference in the market value of the goods, at the place of delivery, at the time they were to have been delivered, and that value upon their arrival.

CIVIL ACTION for the recovery of damages, tried before *Moore, J.*, and a jury, at December (Special) Term, 1875, of HALIFAX Superior Court.

The defendants filed a petition setting forth that the plaintiff was a citizen of North Carolina; that all the defendants were citizens of the State of New York; that the amount in controversy ex- (621) ceeded five hundred dollars; and prayed the court to order the cause to be transferred to the next Circuit Court of the United States for the Eastern District of North Carolina. The petition was not verified.

The plaintiff moved the court for leave to amend the complaint by striking out $1,219.81, the amount of damages alleged in the complaint, and inserting $499, and tendered to the defendants a waiver in writing of all damages above that sum.

The motion was resisted by the defendants but allowed by the court, and the motion of the defendants to remove the cause was overruled.

From the ruling of his Honor, refusing the motion to remove, the defendants appealed.

The defendants moved the court to continue the case pending the appeal. The motion was overruled, and the defendants entered into the trial under protest.

The plaintiff alleged in his complaint: That on the 20th day of September, 1873, with the purpose of replenishing his stock of goods, at his place of business in the town of Halifax, he bought from the defendants, goods, wares and merchandise to the value of $1,499.50.

On said day he paid to the defendants the price of said goods, and in consideration thereof, and as a part of the terms and conditions of the sale, the defendants agreed and promised to ship said goods on or about

the 23d day of September next ensuing, from the place of business of the defendants in the city of New York, to the town of Halifax.

The defendants in violation of the terms and condition of said sale, did not ship said goods to the plaintiff until the 17th day of October, 1873, and by reason of the failure the plaintiff was damaged to the amount, etc."

The defendants denied the terms of the contract as alleged in the complaint, and alleged a sale of goods, conditional upon the
(622) payment of a policy of insurance upon the life of the father of the plaintiff, for five thousand dollars; and averred compliance with the contract.

Upon the trial, the plaintiff introduced evidence tending to show, that on the 20th of September, 1873, he entered into the alleged contract. That the goods bought by him were not shipped until the 17th of October following. Before the receipt thereof, such goods as he had bought had depreciated in value thirty-three and one-third per cent in the city of New York.

Upon the examination of the plaintiff as a witness in his own behalf, he admitted that he received the goods without objection, used them in the course of his business, and did not make known to the defendants his dissatisfaction until after the receipt of the goods, or in any other way than by bringing suit for the recovery of damages; giving as a reason for his failure to do so, that the defendants had retained from the said policy of insurance the price of the goods, and he found that they would have nothing he could attach in this State.

The following issues were submitted to the jury, and the response of the jury is annexed to each issue respectively:

1. Did the defendants undertake and agree, at the time of the purchase of the goods by the plaintiff, immediately to ship the same to him at his place of business in Halifax?

Answer: They did.

2. Did the plaintiff agree that the goods should be retained until the insurance policy was paid or guaranteed by the Insurance Company?

Answer: He did not.

3. Should the jury find the issues for the plaintiff, then what damage has the plaintiff by said failure sustained?

Answer: Four hundred and ninety-nine dollars.

4. What was the difference in New York, in the value of the goods between the 20th of September and 17th of October?

(623) Answer: Twenty per cent.

The defendants insisted that the receiving and using the goods by the plaintiff was a waiver of his right to claim damages. His Honor ruled otherwise.

The defendants requested the court to instruct the jury:

There is no evidence that the goods were worth in the market of Halifax less than Spiers gave for them, or that he sold them for less than they cost. He cannot recover the loss of a good bargain. He cannot recover the loss of a good bargain. He might not have sold them at a large profit. He cannot recover a speculation. He can only recover damages actually sustained.

His Honor refused the instruction prayed for, and charged the jury:

That if they should find that the defendants under their contract with the plaintiff, were not to ship the goods until the policy of insurance had been paid or guaranteed by the Insurance Company, they should find both the first and second issues for the defendants. But if the contract was, that the goods were to be shipped at once, or in the ordinary course of business, whether said policy were then paid or not, and they failed so to do, then they should find said issues for the plaintiff.

2. That if they should find said issues for the plaintiff, he was entitled to recover damages, the difference in the market value of the goods, if there were any, between the time they should have been delivered in due course of transit, and when they were actually delivered. That the plaintiff could not recover for the loss of a good bargain merely, or other profit he might have made on the goods, but only the actual depreciation in their market value at Halifax, if any, whilst withheld by the defendants. In no event could they allow the plaintiff more than $499.00.

Judgment was rendered in favor of the plaintiff, in accordance with the verdict.

Motion for a new trial. Motion overruled and defendants (624) appealed.

Moore & Gatling and Batchelor & Son, for appellants.
Walter Clark, contra.

PEARSON, C. J. This is an action to recover unliquidated damages, and as in such actions the plaintiff cannot have judgment for more than he claims, the general practice is to set out in the complaint a large sum under a *videlicet*. "That is to say," etc. There is no harm done by this mode of pleading, except when the plaintiff asks to hold the defendant to bail, and exaggerates the alleged damage for the pur-

pose of oppression, by forcing the defendant to give excessive bail. For this the law provides a remedy.

In this case nearly the whole amount of the price paid for the goods is claimed as damages in the original complaint, but there is no suggestion or reason to suppose that the attorney in framing the complaint intended any oppression, or wished to take any advantage of the defendants, and when he found by the affidavit for removal into the Federal Court, that by careless pleading he had exposed his client to this inconvenience, he asked to amend by putting the amount of the supposed damages $499, which if he had thought about "the Federal Court" would have been done in the first instance. His Honor allowed the amendment, and we concur with him as to its propriety. What harm is done to the defendants by the amendment? By it they are assured that the plaintiff can in no event recover more than $499. This assurance takes the case out of the operation of the Act of Congress. The defendants will hardly say this slip in pleading amounts "to an estoppel," a word very much in vogue at this stage in the progress of the practice of the law.

The goods filled the bill in quality and quantity, and the *plaintiff had paid for* them; so it was an executed contract. When the
(625) goods arrived in Halifax, one month behind time, what was the plaintiff to do? The vendors lived in New York and *had his money*. A refusal to take the goods, would leave him without any security for the money he had paid. So prudence suggested, "take the goods and sue the vendors for not sending them in time." We can see no principle of law or of equity which forbade this. In fact, it was the best thing he could do, as well for the defendants as for himself. Suppose he had refused to take the goods, he would have had no security for the money he had paid, and the defendants would have suffered heavy loss in having the goods sent back, or in selling them at auction in the town of Halifax.

It follows, there is no ground on which to presume that, by taking the goods, the plaintiff waived or forfeited his right of action, for the damage he had sustained by a breach of the contract on the part of the defendants. In regard to the measure of damages, we can see no other rule than the difference between the value of the goods in September, when they ought, by the contract, to have been delivered, and the value in October, when they were delivered.

The notion of having an account taken of what the plaintiff sold the several articles of "the goods, wares and merchandise, bought of defendant," cannot be entertained for one moment.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Oldham v. Kerchner, 79 N.C. 112; *Kester v. Miller,* 119 N.C. 479; *Coal Co. v. Ice Co.,* 134 N.C. 588; *Allen v. Tompkins,* 136 N.C. 210; *Cable Co. v. Macon,* 153 N.C. 152; *State's Prison v. Hoffman,* 159 N.C. 571; *Winn v. Finch,* 171 N.C. 276; *Storey v. Stokes,* 178 N.C. 414; *Construction Co. v. R. R.,* 185 N.C. 46; *Troitino v. Goodman,* 225 N.C. 413.

(626)

THOMAS R. HENDRICK AND WIFE AND OTHERS v. JAMES H. MAYFIELD, EX'R.

The Court of Probate has exclusive jurisdiction of proceedings for the recovery of legacies and distributive shares of estates.

When, however, a specific pecuniary legacy has been given, and has been assented to by the executor, it becomes a debt, and must be recovered by action brought to a regular term of the Superior Court.

No assent, however, of an executor to a residuary legacy, uncertain in amount, which is to be ascertained by an account to be taken, will deprive the Probate Court of its appropriate jurisdiction. Nor will the payment of a part of a legacy, leaving a balance unpaid, have that effect.

SPECIAL PROCEEDING, heard upon appeal from the Probate Court, before his Honor, *Judge Watts,* at Chambers, in WARREN County, February 8th, 1873.

The plaintiff filed a petition in the Probate Court, alleging:

That Thomas A. Gholson Palmer died during the year 1840, leaving a will in writing, duly executed, to pass his whole estate, which was admitted to probate at February Term, 1841, of Warren County Court. James O. K. Mayfield, the executor therein named, duly qualified, and took into his possession personal estate and effects sufficient to pay the debts, funeral expenses and legacies of his testator.

The testator, after disposing of certain lands in his will mentioned, devised as follows:

"Item 6th. It is my will and desire that all of my negroes shall be sold by my executor hereinafter named, on a credit of twelve months, to the highest bidder, bond to bear interest from the date of sale, and the proceeds of said sale to be kept by my executor hereinafter named, together with all individual property or money that (627) I shall die possessed of, for the comfortable support of my father, Thomas E. Palmer, as long as he lives, to be administered to his necessities as my executor hereafter named, shall see best.

Item 4th. I give and bequeath to my sister, Mary A. Palmer, and Mary J. Walker, (daughter of Mary J. Walker, my sister,) after the

death of my father, all the money in the hands of my executor hereafter named, and all other not bequeathed, to be equally divided between said Mary A. Palmer and Mary J. Walker. In case Mary A. Palmer should die without lawful issue of her body, the whole of her interest in this will shall belong to Mary J. Walker, and in case Mary J. Walker die without lawful issue of her body, the whole of her interest in this will shall go to Mary A. Palmer. In the event of both Mary A. Palmer and Mary J. Walker's death without lawful issue of their bodies, the whole of their interest in this will shall be equally divided among all of my surviving brothers and sisters."

Thomas E. Palmer died on the 25th day of March, 1861. The money on hand, estate and effects, mentioned in said will were sufficient as to the income thereof, to furnish a comfortable support for the said Thomas E. Palmer, so long as he lived.

The property therein mentioned was sold by the executor on the 20th day of March, 1841, on a credit of twelve months, with interest from date, and an account of sales was returned by him to May Term, 1841, of Warren County Court, from which it appears that the amount of sales was two thousand four hundred and fifty-nine dollars and seventy-five cents.

James O. K. Mayfield, as executor, never returned an inventory of the estate of his testator, or any account current, or any other account than the aforesaid account of sales.

Since the death of the testator, Thomas A. Gholson Palmer, the said Mary A. Palmer has intermarried with James T. Russell, and
(628) Mary J. Walker has intermarried with Thomas R. Hendrick.

The said executor has never paid to Thomas R. Hendrick and wife, or either of them, their legacy, or any part thereof.

The executor on the 27th day of April, 1863, paid to James T. Russell the sum of six hundred and eight dollars and nineteen cents, but has paid nothing more on said legacy, although there was at the time aforesaid a large amount due them.

The said executor did not keep the funds mentioned in the 3rd and 4th items of said will, separate and apart from all other funds for the benefit of the legatees, but mingled the same with his own private funds, and applied the same to his private purposes, except the sum paid to James T. Russell aforesaid.

James O. K. Mayfield died in Warren County during the year 1875, leaving a will in writing, duly executed, to pass both real and personal estate, which was admitted to probate on the 21st day of January, 1875, and James H. Mayfield, the executor therein appointed, qualified as such, and took into possession personal estate more than

sufficient to pays his debts and funeral expenses, and also any legacies for which the said testator had rendered himself personally responsible.

The plaintiffs have demanded of the defendant a settlement and the payment of the amounts due on these respective legacies, with which demand he has failed to comply.

The petition prayed for an account, etc.

The defendant demurred to the complaint upon the grounds following:

1. It appears upon the face thereof, that this court has no jurisdiction of the subject of this action, as to Thomas R. Hendrick and Mary J., his wife, upon the ground that this action is brought to recover a legacy, and the complaint, as appears upon the face thereof, does not allege that said legacy has ever been assented to as to them.

2. As to James T. Russell and wife, the complaint alleges that (629) said legacy has been assented to as to them, by paying a part thereof. The defendant therefore demurs to the complaint upon the further ground that this court has no jurisdiction of the subject of the action, for the reason that the Clerk of the Superior Court has no jurisdiction over actions to recover legacies which have been assented to, the same being a debt recoverable at the regular term of the Superior Court.

Upon the hearing before the Probate Court, the demurrer was overruled, and the defendant appealed to the Superior Court. Upon the hearing, the judgment of the Probate Court was affirmed, and the defendant appealed to this court.

Cook, with whom were *Moore & Gatling* and *Collins, for appellant,* relied upon, and referred the court to Chap. 90, Bat. Rev.; *Hunt v. Sneed,* 66 N. C., 176; *Heilig v. Foard, Ib.,* 710; *Miller v. Barnes,* 65 N. C., 67; *Sprinkle v. Hutchinson,* 66 N. C., 450; *Bell v. King, Ex.,* 70 N. C., 330; *Bidwell v. King,* 71 N. C., 287; *Hodge v. Hodge,* 71 N. C., 616.

Eaton, with whom was *Wilson,* submitted:

This is a special proceeding, commenced for the recovery of certain legacies bequeathed to the *feme* plaintiffs by F. Gholson Palmer, after the death of Thomas Palmer, who died in 1861, and was entitled under the will of said T. Gholson Palmer to a support out of the property and money during his lifetime. See item 3d of the will.

The petition was filed in Warren Superior Court, and the defendant has demurred to the same on the grounds set forth in his demurrer.

I. In relation to the first, we say that it appears from the petition itself, that the proceedings was commenced in Warren Superior Court

in vacation. The petition is dated October 11th, 1875, and the Court takes judicial knowledge of the terms of the Superior Courts.
(630) The petition is addressed to the Clerk of Warren Superior Court, and it was unnecessary to allege that he was Judge of the Court of Probate. The probate jurisdiction is "incident to his office of Clerk." *Vide Stanly v. Sellars,* 66 N. C., 467. The views of the Supreme Court in the above case, are evidently those of the Legislature, as is apparent from reading the general act on the subject of "Special Proceedings." See Bat. Rev., Chap. 17, Sec. 418, *et seq.* to Sec. 423, inclusive. These sections require the Clerk to act in all cases of "special proceedings," but they do not call him Probate Judge.

The proceedings in our case are, in fact, commenced in the Probate Court, though it is called by a different name, but still by a name which, in law, is appropriate and proper. It could be no objection to a petition for a legacy under our old system, that it purported to be in the "County Court," when the statute used the words, "Court of Pleas and Quarter Sessions," because the court was known by both names, and was called by both in many acts of Assembly and in the Supreme Court Reports.

There are two branches of the original jurisdiction of the Superior Courts—one before the court in term time, and the other before the Clerk in vacation, acting in the exercise of the probate jurisdiction incident to his office, and in reference to special proceedings. We think that the above views are sustained by the cases in Battle's Digest, Title, Jurisdiction, pages 295, 296, etc.

Special proceedings are all required to commence in the Superior Courts. See the sections of the general law already referred to; also the following acts: Act in reference to sales of land by executor to make real estate assets, Bat. Rev., Chap. 45, Sec. 61; act in reference to partition, *Ib.*, Chap. 84, Sec. 12; act concerning dower, Chap. 117, Sec. 9; act concerning mills, *Ib.*, Chap. 72, Secs. 4 and 10. The present proceedings are certainly commenced as they should be, as to Hen-
(631) drick and wife, in reference to whose legacy no assent is pretended, it being alleged on the contrary, that no such assent is stated in the petition, and the petition, so far as the demurrer is concerned, is to be taken as true. Petition for legacies, according to the statute, Bat. Rev., Chap. 45, Sec. 134, are expressly required to be in the Superior Court, and the statute has never been declared to be unconstitutional by the Supreme Court, and ought therefore to be carried out.

II. In relation to the second ground of demurrer, we say that the petition merely states the payment of $608.19 to James T. Russell, in part of the legacy bequeathed to his wife, and it is alleged in the petition that more was due. The receipt of Russell to the defendant's testator

ought not, under the circumstances, to be considered as showing an assent except as to the sum paid. The bequest was not for a specific sum, but the amount depended upon the taking of an account of the estate of the testator, and his debts, and on the amount which it was necessary for the executor to expend yearly in the "comfortable support," to use the language of the will, of Thomas Palmer. What sum he had a right to expend for that purpose would depend upon the price of board, clothing and other necessaries, and what the necessities of Thomas Palmer might require as he grew older and more infirm. Under the circumstances of this case, it seems to be proper that the amount of the legacies should be ascertained and recovered in that court which our law regards as holding jurisdiction over legacies generally, and peculiarly fitted for that purpose.

III. Mrs. Russell and Mrs. Hendrick are joint legatees of the effects bequeathed in the 3d clause of the will, after the death of Thomas Palmer, the survivor being entitled to the whole in the event of the death of the other without issue. Russell and wife, and Hendrick and wife, were necessary parties to the suit, either as plaintiffs or defendants, in order that the rights of all parties might be settled, and the executor protected by the decree, and justice would be advanced by a determination of all the matters in controversy in one ac- (632) tion, instead of having one suit in one court and one in another.

IV. If the demurrer shall be sustained as to Russell and wife, the cause may still proceed as to Hendrick and wife. A judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. Bat. Rev., page 200, Sec. 248.

BYNUM, J. The complaint and demurrer thereto, present the question of jurisdiction only. The Court of Probate has exclusive jurisdiction of proceedings for the recovery of legacies and distributive shares of estates. Bat. Rev., Chap. 45, Sec. 134. *Heilig v. Foard,* 64 N. C., 710; *Hunt v. Sneed,* 64 N. C., 176.

When, however, a specific pecuniary legacy has been given and has been assented to by the executor, it becomes a debt, and must be recovered by action brought to a regular term of the Superior Court. Such were the cases of *Miller v. Barnes,* 65 N. C., 67, and *Hodge v. Hodge,* 72 N. C., 616.

In *Bidwell v. King,* 71 N. C., 289, the promise was made by the executor to pay the *interest* on a specific pecuniary legacy; yet that was held to be insufficient to give the Superior Court jurisdiction, and the exclusive jurisdiction of the Court of Probate was sustained. To the same effect is *Bell v. King,* 70 N. C., 330.

In the case before us, no specific sum was bequeathed to the plaintiffs or claimed in the complaint. Nor does the complaint allege a promise of the executor to pay any sum certain or any sum uncertain. It is alleged that the executor had paid one of the plaintiff legatees $608.19, but that can only be construed into an assent to that amount and no more. It is certainly not an assent to pay the balance claimed. No specific sum was willed to the plaintiffs, but only the residue of an estate which might remain after a life support out of it, to the father of the testator. It was uncertain what that residue would be,
(633) and it would only be ascertained by an account to be taken. No assent of the executor to such a legacy as this, will deprive the Court of Probate of its appropriate jurisdiction.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Stancil v. Gay, 92 N.C. 462; *Baker v. Carter,* 127 N.C. 94; *Clark v. Homes,* 189 N.C. 711.

JOHN N. BUNTING v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY

The Act of 1874-'75, Chap. 200 Sec. 2, which provides "that no part of the costs, upon any of the indictments under consideration," (failing to list the poll,) "shall be taxed against the county," repeals the general law, making the county liable in cases where a *nol. pros.* is entered.

Justice RODMAN *dissenting.*

This was a CONTROVERSY submitted without action, heard before *Watts, J.,* at June Term, 1875, of the Superior Court of WAKE County, upon the following

CASE AGREED:

John N. Bunting claims to recover from the Board of Commissioners of Wake County three hundred dollars, and the Board of Commissioners of Wake County resists the claim.

The following are the facts upon which the controversy depends:

1. The plaintiff is now and has been, since the first Monday of September, A.D. 1874, clerk of the Superior Court of said county.

2. At January Term, 1875, of the Superior Court of said county, the grand jury found and returned into court certain indictments
(634) against certain citizens of said county for their several failures to list their polls for taxation for the year 1873, under the pro-

visions of the Act of 1872-73, Chap. 115, Sec. 19; Bat. Rev., Chap. 162, Sec. 19.

3. The said clerk of the Superior Court under the direction of the court and Solicitor for the 6th Judicial District, entered said indictments then and there on the records of the term; and afterwards under like directions, during the months of January and February, 1875, and before the 18th day of March, 1875, issued *capias* for the defendants named in said indictments, and subpoenas for the witnesses endorsed thereon.

4. At Spring Term, 1875, of said court, the Solicitor for the 6th Judicial District, under the control and direction of the court entered *nolle prosequi* as to the defendants in many of said indictments; and that the three hundred dollars claimed by the plaintiff as aforesaid, is the aggregate amount of the half fees claimed by the clerk for entering the indictments, etc., in part of said criminal actions, where in *nolle prosequi* were entered.

5. In none of said criminal actions wherein charges are made by the clerk for services, did the defendants exhibit their tax receipts and pay the one dollar and fifty cents of costs, and move to dismiss the indictments against them respectively, as they were allowed to do by Act of 1874-75, Chap. 200, Sec. 3.

6. After the said *nolle prosequi* were entered and before the 15th day of June, 1875, the plaintiff, as clerk of the Superior Court of Wake County, made up his account against the defendants as required by law, including therein the various items aforesaid, which constitute the sum of three hundred dollars, and regularly demanded payment thereof on the day and date aforesaid at the office of the defendants in Wake County, which payment the defendant then and there refused to make. County poll tax in 1873, was between one and two dollars.

7. On this state of facts the defendant claimed at the time of (635) said demand, and claims now, that it was and is under no liability to pay the plaintiff's aforesaid claim, and was and is entirely free, released and discharged from any such liability, by the operation of the act of 1874-75, Chap. 200, Sec. 2.

8. The plaintiff then claimed, and now claims, that the act of 1874-75, Chap. 200, Sec. 2, does not embrace within its operations a case like his, wherein the indictments had been found, and the official services rendered by the clerk before the ratification of said act.

That if said section purports to embrace a case of this nature, it is repugnant to the provisions of both the Constitution of the United States and of this State, and, therefore, void.

That by Section 4 of said act, in express terms, all parties who fail to comply with the provisions of the act, as contained in Section 3 thereof, are to be proceeded against as if the act had not been passed.

If upon the foregoing state of facts, the opinion of the court shall be with the plaintiff, judgment is to be entered herein against the defendant and in favor of the plaintiff for three hundred dollars and costs, etc. But if upon the foregoing state of facts, the opinion of the court shall be with the defendant, judgment is to be entered herein against the plaintiff, and in favor of the defendant for costs, etc.

Upon the hearing, at Fall Term, 1875, his Honor rendered judgment for the plaintiff, according to the case agreed, from which judgment the defendant appealed.

Busbee & Busbee and Snow, for appellant.

Haywood, contra.

READE, J. The Legislature in 1872-73, made the failure to list polls for taxation a misdemeanor, and intended to make the offence cognizable before a Justice of the Peace; but by limiting the punish-
(636) ment to thirty days instead of one month, it was cognizable before the Superior Court, and a great many were indicted. In 1874-75, the Legislature deprived the Superior Court of jurisdiction, and, in order to relieve those who had been indicted from the hardships of the ordinary bills of costs, it provided that the Solicitors should dismiss all the indictments pending, upon the defendants showing their tax receipts, and paying fifty cents each to the Solicitor, Clerk and Sheriff. And provided further, that *no part* of the costs in *any* of the cases should be taxed against the county. Acts of 1874-75, Chap. 200.

And now the plaintiff, who is the Clerk of the Court, brings this action against the county for his fees, notwithstanding the Act provides that no part of the cost shall be taxed against the county; because, he says,

I. That the Act is prospective only.

It is true, that statutes are to be construed as prospective only, unless the contrary clearly appears. Here the contrary does clearly appear. The Act in express terms refers to "pending indictments."

II. That he had performed the services before the Act was passed, therefore his right to his fees was *vested,* and the Legislature could not deprive him of it.

It is true that the plaintiff's fees were fixed by law, and when he rendered the services he had the right to expect pay. But from whom? If for any *person,* then from that person. If for the *State,* then from the State. If for a *county,* then from the county. C. C. P., Sec. 555.

Here the services were rendered for the *State*, and are to be "paid for by the State, as other claims against it are." C. C. P., Sec. 555. I leave out of view the question of the power of the State to change or abolish the fees of the officers.

It is also true, that the Legislature has the power to prescribe that the counties shall pay the costs of State criminal prosecutions. And the plaintiff says:

III. That the State had made the county liable for the costs (637) in the cases in which the plaintiff claims his fees.

It is true, that before and at the time the plaintiff rendered the services, our statute did provide that "in all State cases, where there shall be a *nolle prosequi* entered, etc., the county shall pay the Clerks, etc., half their fees." Bat. Rev., Chap. 105, Sec. 32. And here there were "State cases" and "*nolle prosequis*." But then the act of 1874-75, Chap. 200, Sec. 2, which provides "that no part of the costs upon any of the indictments, under consideration, shall be taxed against the county," does, as to these indictments, repeal the general law making the counties liable. And so the case stands as if there never had been any law making the counties liable. So that there was not only no *compulsion* upon the county to pay, but an express *prohibition*.

The only thing that can be urged against this view, is the argument, that at the time the services were rendered, the county was bound under the general law. No. The county was not bound until a *nolle prosequi* should be entered. And before that was done, the act of 1874-75, repealed the general law as to these cases. So that, the case stands thus: The State, as we will suppose, is like any other party, liable for its costs. It relieves itself from that liability in certain cases, and puts it upon the counties, which are parts and parcels of the State, to pay, upon the happening of certain contingencies. Before the contingencies happens, the State relieves the counties from liability, there can be no objection to that. No contract of the *counties* is thereby impaired. A owes B, and directs his agent to pay it; before C does pay it, or assumes any personal responsibility, A withdraws his authority, and directs C not to pay it. After this, C is neither bound nor authorized to pay it. *Dixon & Davidson v. Pace*, 73 N. C., 603.

We do not mean to pass upon the liability of the State to pay this claim. All that we decide is, that the *county* is not bound.

There is error. Judgment reversed, and judgment here for (638) defendant.

RODMAN, J., *Dissenting.*

I dissent from the opinion of the court for this reason. When the plaintiff performed the services as Clerk in respect of which he sues,

as the law then stood he was entitled to receive the fees from the county, in the event that *nolle prosequi* should be entered on the indictments. It was a vested right to payment on the happening of a contingency which the Legislature could not deprive him of. If an Accident Insurance Company agrees to pay B a certain sum in case he shall be disabled or killed on a certain journey, his right to receive the money on the happening of the contingency is a vested right, although the right is not complete until the contingency happens. When it happens the right by relation becomes absolute *ab initio*. It cannot be supposed that the Legislature could discharge the Company from its contract at any time before the contingency happened.

The argument for the defendant is that the Legislature had a right to substitute the State as a debtor in the place of the county. But I conceive the Legislature has no right to compel a creditor to give up his claims against a solvent debtor against whom he has a practical remedy, and to substitute in his place the State against whom he has no remedy. Besides it seems plain to me that the Legislature never intended to make the State liable for the plaintiff's claim. I think the Act of 1874-75 violated a contract, and was void as in conflict with the Constitution of the United States.

PER CURIAM. Judgment reversed.

Cited: Blount v. Simmons, 118 N.C. 11.

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(639)

MARTHA EVANS v. ROBERT RAPER.

A covenant, by deed, by a judgment plaintiff to and with the principal defendant therein, that she "will not issue execution upon the judgment," and "will not in any way attempt to collect the same or any part of it," from such principal defendant, releases the surety, also a defendant in said judgment.

MOTION, by defendant to have satisfaction of judgment entered of record, heard before his Honor, *Judge Seymour,* at Fall Term, 1875, of WILSON Superior Court, upon the following

CASE AGREED:

1. That Joseph Ferrell, guardian of plaintiff, had a note against Joseph Watson, as principal, Robert Raper, the defendant, and Pitts Kirby, (now insolvent), as sureties for five hundred and twenty-one dollars and fifty-eight cents, ($521.58); for which sum and interest,

judgment was recorded in 1867 in favor of said guardian; and in 1869, the said judgment was regularly docketed according to law, in Wilson Superior Court.

2. That said judgment was assigned to plaintiff in a settlement had with said Ferrell, her guardian.

3. That Joseph Watson, the principal on the note, is dead, and Martha Watson is his administrator; and that plaintiff received of said Watson's, administratrix, two hundred and fifty dollars ($250) on said judgment; in consideration of which the plaintiff executed the following paper writing, to wit:

"STATE OF NORTH CAROLINA,
WILSON COUNTY.

"In consideration of two hundred and fifty dollars to me paid by Martha Watson, administratrix of Jos. Watson, dec'd., the receipt whereof is hereby acknowledged, I hereby covenant and (640) agree not to issue execution upon a judgment in my favor in Wilson Superior Court, entitled *'Joseph Ferrell v. Joseph Watson,'* against the said Martha Watson, as administratrix aforesaid, and further that I will not in any way attempt to collect the same, or any part of it from the said Martha Watson, as administratrix, or otherwise.

(Signed) "MARTHA EVANS, [SEAL.]

"Witness:
JOHN W. DUNHAM."

4. That the plaintiff did not intend by said paper writing, to release the defendant, nor did the covenantee intend to take or receive any other than a covenant not to issue execution against her.

If the court shall be of opinion, that said paper writing operates as a release to the defendant, then the motion of the defendant shall be allowed; otherwise, it shall be dismissed.

His Honor being of opinion with the defendant, gave judgment according to case agreed.

From this judgment, the plaintiff appealed.

Keenan & Murray, for appellant, submitted:

1. The court will treat the instrument marked "A," as a covenant not to issue execution, and not a release, because "the courts have been slow to adopt the doctrine that a covenant not to sue may operate as a release," and because the covenantor and covenantee are *not* single. *Winston v. Dalby,* 64 N. C., 299.

2. The agreement is *nudum pactum,* being to receive part of a debt in payment of the whole. *Bryan v. Foy,* 69 N. C., 45.

3. There must be a *new consideration* to give binding force to the promise of forbearance. *Abel v. Alexander,* .... N. C., 523.

(641) 4. The seal does not obviate the difficulty, for we are in Equity, and "Equity never regards a seal." SETTLE, J., in *Bryan v. Foy, ut sup.;* and although at law, a seal implies a sufficient consideration in those cases where *any* consideration will suffice. Yet, in cases like this, where the court inquires into the adequacy of the consideration, a seal does not help.

5. The mode and measure of relief which Raper now seeks can only be obtained in Equity. *Snow v. McFarland,* 216; Adams Eq., 106—107; *Ligon v. Dunn,* 133; *Russell v. Adderton,* 64 N. C. at page 420. The relief is in the nature of specific performance, and Equity will decree specific performance only upon valuable consideration, and such as a court of law would notice, and the use of a seal will not dispense with proof of the actual consideration. Adams' Eq., 78.

6. Again, where the covenantor reserves his rights against the surety, he is not discharged. Adams' Eq., 107; *Hagley v. Hill,* 75 Penn. Lt., 108; 3 W & T. Ld. Cos. Eq., star page 824; Am. Notes to same at page 562, near bottom; *Keasly v. Cole,* 16 Mur. & Welsh, at page 135; *Price v. Barker,* 4 Ellis & Blackburn, 760, 772, 779.

7. We may show by parol that the agreement was not intended to have the effect of a release. *Hagley v. Hill,* 75 Penn. Lt., 108; *Wyke v. Rogers,* 1 DeG., Mac. & G., 408.

Here the intent appears in the case agreed, and we have a clear equity for correction. *Phillips v. Thompson,* 73 N. C., 543. And this equity the court here may work out, either under the rule that equity considers that done which ought to be done, or under the large powers conferred by C. C. P., Secs. 132, 133, commented on and explained in *Wade v. City of Newbern,* 73 N. C., 318, and *Bullard v. Johnston,* 65 N. C. 436.

8. Raper is barred by the Statute of Limitations. Battle's Revisal, Chap. 17, Sec. 34, Subsection 9, or by equity's pursuing the ana-

(642) logy of the statute. *Barham v. Lomax,* 73 N. C., 76.

9. Raper might, in the original action, have had a jury to ascertain the fact of his suretyship, and so charge his principal primarily. Bat. Rev., Chap. 110, Secs. 8 and 9. And although it is clear, that a statute conferring jurisdiction on the courts of law did not, under the old system, oust the ancient equity jurisdiction, now that law and equity are blended, the Chancellor's jealousy of encroachment no longer exists, and the courts will not countenance a resort to a collateral equitable proceeding, when the rights of all parties may be fully adjusted in one action in the way pointed out in Battle's Revisal, Chap. 110, Secs. 8 and 9. See *Bullard v. Johnston,* 65 N. C., 436.

10. The position of the parties is varied by a judgment against the surety. *Jenkins v. Robertson,* 351; *Reese v. Berrington,* 3 Ld. Cos. Eq., 824 (notes).

Connor, contra.

BYNUM, J. Learned and excellent briefs were filed in the case by counsel of both sides, but they take, perhaps, a wider range than is required by the particular question submitted in the case agreed. That question is, whether the covenant set forth operates as a release of the defendant, who is the surety in the note and judgment. The covenant stipulates, *first,* that the plaintiff "will not issue execution upon the judgment," and *second,* "will not in any way attempt to collect the same or any part of it, against the said Martha Watson, as administratrix or otherwise." The word "release" is not used, but it was unnecessary, when words of equivalent meaning are substituted. Certainly, the phrases "will not issue execution," and "further, I will not collect, or attempt to collect," the judgment or any part of it, are fairly incapable of any other construction than that of being a release. The covenant is on perpetual obligation, and so professes to be.
A debt that is never to be collected, is discharged. (643)

The legal effect of the covenant is, therefore, to release and discharge the principal in the judgment, and nothing more appearing, it follows from all the authorities that the surety is also discharged. Any discharge or modification of the principal's liability, without the consent of the surety, absolutely discharges the surety; for he has contracted to guarantee a specific agreement; and if a new agreement be substituted without his assent, his contract is at an end. The same effect follows, if the creditor enters into a binding contract to give time for payment to the principal. For it would be a fraud upon the contract, if he were afterwards to receive the debt from the surety, and thus confer on him an immediate right of action against the principal. The surety is therefore discharged altogether from his guaranty. Adams Eq., 107.

It is, however, laid down by most of the authorities, that if the creditor, in giving time, expressly reserves his remedies against the surety, there is no discharge, To use the language of Lord ELDON, in *ex parte Glendenning,* 1 Buck. B. C., 517, "the law has been clearly settled, and is now perfectly understood, that unless the creditor reserves his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to vary or explain the effect of the instrument."

It is thus seen that the creditor can reserve his remedies against the surety only when he gives time to the principal, and not when he absolutely discharges him, and then, that the reservation must be expressed in the instrument itself. Whether this doctrine of the reservation of remedies against the surety, when time is given to the principal, obtains, or should obtain, in this State or not, is immaterial here, for no such express reservation is contained in the covenant, in our case, and the covenant does not give time to, but releases,
(644) the principal absolutely.

But it is insisted by the plaintiff's counsel, that the covenant not to sue or collect, is founded on no new consideration, and therefore, is void; and that it does not express the intent of the parties. It is true, the case states that the consideration of the covenant was the payment of $250 on the judgment, and that the plaintiff did not intend, by the covenant, to release the surety, nor did the covenantee intend to take more than a covenant, that no excution should be issued against her. But none of these matters are set forth in the instrument; and the question is, not what the parties intended, but what they did. The plaintiff does not now seek to reform the covenant as having been executed in mutual mistake, but merely sets out what construction the parties themselves put upon it at the time of its execution. But the construction of the instrument is the business of the court alone. Nor is it all material what the consideration was, or whether there was any, unless an illegal or otherwise insufficient one, had been expressed upon the face of the instrument. That enquiry is precluded by the seal, as the case is presented. The plaintiff does not now repudiate the covenant, or seek to reform it, but on the contrary she is pursuing the surety alone.

The rule that the creditor does not discharge the debtor by taking a less sum in discharge of the whole debt, although he so contracted and intended, is extremely artificial and unsatisfactory; but a rule that the creditor may discharge the principal and pursue the surety alone, even by an express reservation of power to do so, is still more repugnant to a sense of justice and honor. The rights of the surety in such cases, results more from equity, than from contract, and can not be put upon too high a ground. See *Reese v. Berrington,* and notes, 2 White & Tudor's Equity Cases; Hare & Wallace's Notes 856, where the whole doctrine of principal and surety, is discussed and
(645) the authorities reviewed. This case is distinguished from *Winston v. Dalby,* 64 N. C., 299, and *Russell v. Adderton,* 64 N. C., 420, and other cases there cited, in that, here the debt had been pursued to judgment, which constitute a lien upon the lands of the principal and surety. A release, or even a covenant not to sue out execution

against the principal in such case, operated as a discharge of the creditor's lien, and thus deprived the surety of the benefit of one of his securities against loss. This voluntary act of the creditor to the prejudice of the surety, released the surety, at least to the extent of the loss thereby incurred. *Reese v. Berrington,* above cited. This case is further distinguished from *Hagley v. Hill,* 75 Penn. St. 108, and similar cases, in that the covenant is made not before, but after judgment, and is "not to issue execution" or "collect the same or any part of it." As an injunction perpetually enjoining the collection of the judgment, would have lain, under the former system, the practical effect of which would be to discharge the debt, so this court combining the powers of both courts, will put such a construction upon the covenant, as will reach the same end, by the shortest and most direct road. This is done by giving effect to the covenant as a release.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Currie v. Kennedy, 78 N.C. 93; *Craven v. Freeman,* 82 N.C. 365; *Dudley v. Bland,* 83 N.C. 224; *Bank v. Lineberger,* 83 N.C. 457.

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(646)

STATE v. GUS GRAHAM.

A prisoner under arrest for stealing growing corn from a certain field, may be compelled by the officer having him in charge, to put his boot or shoe in a track found in the field, for the purpose of comparison; and the result of that comparison is admissible evidence on the trial of the prisoner for the offence.

INDICTMENT for *Larceny,* tried before *Buxton, J.,* and a jury, at Fall term, 1875, of ANSON Superior Court.

The defendant was charged with the larceny of a growing crop.

It was in evidence that in the latter part of the week before Fall Term, 1875, of Anson Superior Court, the prosecutor, Lewis Ricketts, missed a quantity of corn from his field, having been pulled from the stalks while standing. The defendant was in the employment of the prosecutor. Fresh tracks, apparently of a single person, were discovered in the field, leading from stalk to stalk, where the corn was missing. There was a fence between that portion of the prosecutor's premises where the defendant lived, and the place where the corn was missing. The tracks both going and coming lead to this fence. On Monday of said term the defendant was arrested and the officer found under his

bed about one and a half bushels of corn, apparently new corn. The officer carried the defendant to the prosecutor's field where the tracks were discovered.

The State offered to prove by the officer that he compelled the defendant to put his foot in the track and that it corresponded therewith.

To this evidence, the counsel for the defendant objected, because the prisoner was then under arrest and ought not to have been compelled to do anything calculated to criminate himself, the proposed evidence, partaking of the nature of a forced confession, ought to be excluded.

(647) The objection was overruled and the defendant excepted.

There was a verdict of guilty and judgment accordingly. The defendant appealed.

Busbee & Busbee, for defendant.

Attorney General Hargrove, for the State.

RODMAN, J. The first exception is, because the Judge permitted the officer who had the prisoner in custody to testify, that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *State v. Jacobs,* 50 N. C., 259, is cited.

The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his tract to that found in the corn field. This resemblance was a fact calculated to aid the jury and fit for their consideration.

Evidence of this sort is called by the civilians "real evidence," is always admissible and is of greater or less value according to the circumstances. In Best on Evidence, Sec. 183, the following instances of its value are given. "In a case of burglary, where the thief gained admittance into the house by opening the window with a pen knife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the

(648) wound consisted of a part of a printed paper, the corresponding

part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception however is that the officer made the prisoner put his foot in the track in order to test the resemblance. It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held, that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were, will be received, provided the goods were found at the place described. *Reg. v. Gould,* 9 C. & P. 364; *Duffy v. People,* 25 N. Y. 588; *White v. State,* 3 Heisk. 338; *Selidge v. State,* 30 Tex. 60.

The facts of the goods being found in the place described, proves that he knew they were there, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence. Roscoe Cr. Ev. 211; *R. v. O'Donnell,* 7 C. & B. 138 (32 E. C. L. R.); *R. v. Kinsey,* Id. 447, *R. V. Burgess,* Id. 488; *R. v. Rooney,* Id. 515

If an officer who arrests one charged with an offence, had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found? If when a prisoner is arrested for passing counterfeit money, the contents of his pockets are sacred from search, how can it ever appear whether or not he has on his person, a large (649) number of similar bills, which if proved is certainly evidence of the *scienter?* If an officer sees a pistol projecting from the pocket of a pirsoner arrested for a fresh murder, may he not take out the pistol against the prinsoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identify of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face: May not the court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime?

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during his trial?

We conceive that these questions admit of but one answer, and that is one consistent with the general practice.

We concur with the Judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the tract, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoe would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: S. v. Graham, 76 N.C. 196; *S. v. Lindsey,* 78 N.C. 501; *S. v. Whitfield,* 109 N.C. 878; *S. v. Mallett,* 125 N.C. 725; *Cox v. R. R.,* 126 N.C. 106; *S. v. Hunter,* 143 N.C. 610; *S. v. Thompson,* 161 N.C. 241;*Long v. Byrd,* 169 N.C. 660; *S. v. Lowry,* 170 N.C. 733; 734; *S. v. Neville,* 175 N.C. 732; *S. v. Spencer,* 176 N.C. 713; *S. v. Young,* 187 N.C. 699; *S. v. Godette,* 188 N.C. 503; *S. v. Hollingsworth,* 191 N.C. 598; *S. v. Bazemore,* 193 N.C. 337; *S. v. Hickey,* 198 N.C. 48; *S. v. McLeod,* 198 N.C. 652; *S. v. Myers,* 202 N.C. 353; *S. v. Riddle,* 205 N.C. 593, 594; *S. v. McGee,* 214 N.C. 185; *S. v. Holland,* 216 N.C. 614; *S. v. Cash,* 219 N.C. 821; *S. v. Shoup,* 226 N.C. 72; *S. v. Walker,* 226 N.C. 461; *S. v. Ragland,* 227 N.C. 163; *S. v. Palmer,* 230 N.C. 213; *S. v. Rogers,* 233 N.C. 398; *S. v. Grayson,* 239 N.C. 458; *S. v. Willard,* 241 N.C. 263.

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(650)

E. M. HOLT v. GEORGE W. PATTERSON.

The statute fixing a scale of depreciation for Confederate money during the late war, does not impair the obligation of contracts, and is not in violation of the Constitution of the United States.

CIVIL ACTION on a bond, heard before *Schenck, J.,* at Fall Term, 1875, of the Superior Court of CABARRUS County.

The complaint alleged: That George W. Patterson, the defendant, and one W. R. Denny, on the 5th day of November, 1862, covenanted

under their hands and seals to pay the plaintiff, one day after date, the sum of two thousand dollars. That certain payments have been made thereon, (setting them out,) and that no other part thereof has been paid.

Plaintiff demanded judgment against the defendant for the value of said covenant, according to the legislative scale, subject to the credits above mentioned.

At the return term of the summons, to wit: Fall Term, 1875, the defendant having failed to answer, the following order was made: "Judgment: judgment to be stricken out if a substantial answer be filed at Chamber's Court at Charlotte."

On January 3d, 1876, the defendant moved the court to strike out the judgment, and that he be allowed to file an answer to the effect following:

That the consideration of the covenant sued on, was Confederate money loaned. At the time said covenant was delivered, Confederate currency was worth in the proportion of three dollars in Confederate money to one of gold, and the defendant offers that a judgment may be taken upon this basis, but resists a judgment in the proportion of $2.50 in Confederate money to one of gold, as established by legislative enactment.

The motion of the defendant was overruled by the court, whereupon he appealed.

Shipp & Bailey, for appellant. (651)
Battle, Battle & Mordecai, contra.

READE J. The question is, whether the statute fixing a scale of depreciation for Confederate currency during the late civil war, is in violation of the Constitution of the United States, as impairing the obligation of contracts? The ordinance of the State Convention, and the Acts of the General Assembly upon the subject may be found in Bat. Rev. Chap. 34, Sec's. 5, 6, 7 and 8.

During the war almost the only money in use was Confederate currency, which, day by day, was decreasing in value as compared with gold, and indeed with any thing else. So it was considered, that when A promised to pay B one hundred dollars, it was not to be supposed that he meant gold dollars, for there were no gold dollars in circulation, nor was there any currency in circulation which was convertible into gold dollars; but that he meant Confederate currency dollars. And if he should be required to pay in gold, or any thing else, then the value of one hundred Confederate currency dollars should be the measure of the value of the promise.

To this it is objected that a "dollar" means a *gold* dollar. In a certain sense that is true. But in common acceptation we may certainly say, Confederate currency dollars, United States currency dollars, and gold dollars. And no one would suppose that each expression means the same. And just as we may show by *express words* what we mean by dollars, or what *sort* of dollars we mean, so we may show by *circumstances* what we mean by dollars. And therefore it was enacted, that the circumstances of the war-times show that a promise to pay dollars, meant Confederate currency dollars, or their value. And then for convenience, a scale of value was fixed. But still the statute does not fix an iron rule for the construction of contracts made during the war. It only provides that they shall be deemed to be soluable in money of the value of Confederate currency,
(652) "subject nevertheless to evidence of a different intent of the parties to the contract."

How then is the contract violated? The contract is the "intent" of the parties. The statute allows that intent to be shown and to govern. It is only in the absence of proof of the intent, that the statute directs the intent to be presumed.

Admitting that to be so, still it is further objected that the Legislature had not the power to fix an arbitary scale of depreciation, or standard of value of Confederate currency, but that it must be fixed by the jury in each case.

To this it is answered that if Confederate currency had a definite ascertained value, and that was the value of the contract, then neither the Legislature nor the jury had the right to change or fix it. But if it had no ascertained value why might not the Legislature as well as the jury fix the value? It had no fixed value. It was changing every day. And it was convenient if not absolutely necessary for the administration of justice, that an authoritative scale should be prescribed.

This statute has been for ten years in existence, and has been administered in innumerable instances without question; and it is too late to question it now.

There is no error. Judgment affirmed and judgment here for plaintiff.

PER CURIAM. Judgment accordingly

(653)

ROSANNA KIRK v. BENTON BARNHART, ADM'R., ETC.

A motion to dismiss an appeal, because it does not *appear* that a case had been made and served as prescribed by the Code of Civil Procedure, will not be granted, when an opposing counsel states on oath, in this court, that all the requirements of the C. C. P. were complied with in the court below.

A plaintiff, as a witness, cannot prove her services rendered her deceased mother, in an action against her mother's administrator, to recover the value of such services.

CIVIL ACTION tried before *Schenck, J.*, at the July Term, 1875, of CABARRUS Superior Court.

The pleadings were oral, and the case came up by appeal from the judgment of a Justice of the Peace.

The plaintiff sued the defendant, as the administrator of her mother, Susan Seaman, for one hundred and fifty dollars, for services rendered by her to her mother, during the last eighteen months of her life.

The plaintiff was offered as a witness, to prove that her mother was old and infirm; and that about eighteen months before the death of the latter, the plaintiff and two of her children had moved to the home of her said mother, to aid in taking care of her and in nursing and supporting her. This testimony was objected to by the defendant, but was admitted by the court. Defendant excepted.

Defendant also objected to a recovery, on the ground, that no demand was made before suit brought, and that this court had no jurisdiction of the action.

The court overruled these two objections, and submitted the case to the jury, on the facts proved by the plaintiff and others; and charged, that as the plaintiff was twenty-one years old, the law presumed she worked for herself; and that the burden was on the defendant to show that the services rendered were to be gratuitous and voluntary, or reciprocal.

To this charge the defendant excepted, and asked his Honor (654) to charge: That the relation of the parties rebutted the presumption of a special contract.

Verdict for the plaintiff. Motion for a new trial; motion refused. Judgment, and appeal by defendant.

Barringer and Montgomery, for appellant.
Shipp & Bailey, contra.

RODMAN, J. Mr. Bailey, for the plaintiff, moved to dismiss the appeal, because it did not appear, that a case had been made out by

the appellant and served on the plaintiff or his counsel, within five days after the entry of appeal taken, as required by C. C. P., Sec. 301. It appeared, however, from the affidavit of Mr. Barringer, that the case had been stated and served in due time on Mr. Long, one of the attorneys for the plaintiff, who resided in the county where the action was tried, and had been returned by him without objection, and filed with the clerk. The motion to dismiss the appeal is therefore refused. The motion of defendant for a *certiorari* is also refused.

The Judge clearly erred in receiving the plaintiff as a witness to prove the services rendered by her to the deceased. C. C. P., Sec. 343.

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

Cited: Johnson v. Rich, 118 N.C. 270; *Dunn v. Currie,* 141 N.C. 126; *Price v. Pyatt,* 203 N.C. 800; *Peek v. Shook,* 233 N.C. 262.

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(655)

JAMES MANLY v. THE WILMINGTON & WELDON RAILROAD COMPANY.

The general rule as to contributory negligence is, that when the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself.

This general rule however, is subject to certain qualifications. For instance:

(1) The injured party, although in fault to some extent, at the same time may be entitled to damages for an injury which could not have been avoided by ordinary care on his part.

(2) When the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury; in such cases an action for damages may be maintained.

CIVIL ACTION, for damages, tried before *Moore, J.,* at December (Special) Term, 1875, of HALIFAX Superior Court.

The following are the facts agreed, and sent to this court as a part of the record, upon appeal.

On the—day of June, 1875, the defendant's regular train being somewhat behind time, was at about half-past three o'clock, P.M., running over the defendant's railroad at the speed of twenty-five miles per hour, the schedule speed being fixed at twenty-two and one-half miles per hour, according to circumstances, and the usual speed being twenty-two and one-half miles per hour.

As the train was approaching its terminus, at Weldon, at a point about one mile south of that town, where there is a down grade, and where the track is straight for nearly two miles, it ran over and killed a colored girl, the child of the plaintiff, then about ten years old, who, together with her sister, some fifteen years old, (656) was on the track asleep.

This action is instituted by the plaintiff to recover of the defendant damages for the killing.

On the trial the plaintiff introduced the eldest sister as a witness, who stated, that she and her youngest sister had gone to a neighbor's house in order to get clothes to be washed. The evening was very hot, and when they reached the railroad on their return, being wearied with the burden, both sat down on the track to rest, and the oldest sister to pull off her shoes, which hurt her feet. They soon fell asleep. She was soon aroused by the blowing of the whistle of the engine, and, springing up, jumped from the track.

The engineer who was in charge of the train at the time of the accident, stated: That the day was very hot, the sun shining very brightly upon the track, and his vision was impaired by the glimmer of the track. He did not discover any object upon the track until within two hundred feet of the girls. At first he supposed the objects were small hogs, and blew his whistle. That so soon as he discovered the objects to be human beings, he reversed his engine, threw the whole force of the steam upon the wheels and blew the whistle rapidly, but could not stop the engine until it had run over one of the girls, and passed about one hundred yards beyond. That when he first blew the whistle, one of the girls sprang up, endeavored to drag the other off, but was unable to do so, and escaped from the track.

He further stated that on such a grade and at the speed of twenty-five miles an hour, the engine could not have been stopped under two hundred and fifty yards, but at the speed of twenty-two and a half miles it might have been stopped at about two hundred yards.

The engineer was proved to be ordinarily skillful.

The conductor testified that the brakes were applied so soon as the whistle blew. He saw the brake applied at the end of (657) the car where he then was.

The witnesses differed as to the distance at which the girls might have been seen by the engineer, he looking out for them, some stating it to be a half a mile, and others four hundred feet. There was also a conflict of evidence as to the distance from the girls when the whistle was blown.

The following are the issues which were submitted to the jury, and the several responses thereto:

1. How far could objects of the description shown in the evidence, be seen by an engineer at the time the child was killed?

Answer: Two hundred yards.

2. How far was the train from the children when the whistle was blown?

Answer: One hundred and fifty yards.

3. What damage did the plaintiff sustain by reason of the killing of the child?

Answer: Three hundred dollars.

The defendant requested his Honor to submit the following issue to the jury: "Could the child have escaped from the track after the whistle blew, had she been awake?"

His Honor remarked that this was admitted, and did not submit the issue.

It is admitted that the people are in the habit of walking on the track going to and from Weldon, and that this was known to the engineer.

Upon the evidence and the finding of the jury, the court ruled that there was negligence on the part of the defendant; and rendered judgment for the plaintiff for three hundred dollars.

From this judgment the defendant appealed.

Moore & Gatling, for the appellant.

Day and Batchelor & Son, contra.

(658) BYNUM, J. When the facts are found or admitted, what is negligence, is well settled in this State, to be a question of law for the court, what ever diversities of decision may prevail in some of the other States. The facts here are fully set forth in the case stated, and they are so strikingly like those in the case of *Herring v. Wil. & Ral. R. R. Co.*, 32 N. C., 402, that it is sufficient to refer to that case, for a full discussion of the principles involved in this. The doctrine of contributory negligence, as affecting the right of the plaintiff to recover, as understood and enforced by the law of this State, is further well illustrated in the cases of *Morrison v. Cornelius,* 63 N. C., 346, and *Murphy v. Wil. & Weld. R. R. Co.,* 70 N. C., 437.

In looking abroad at the decisions of our sister States, it is impossible to find any principle in them, by which this action can be maintained. Take, for instance, a case from Massachusetts, where one extreme of the doctrine of contributory negligence is held; and another from Illinois, where the other extreme is held . In *Murphy v. Deane,* 101 Mass., 455, it is decided, that whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause to the

occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish, either that he himself was in the exercise of due care, or that the injury was in no degree attributable to want of proper care on his part. It is not necessary to give an unqualified assent to this decision, as it seems to leave out of view all gross and wanton negligence on the part of the defendant, which would be evidence of willful injury, and enable the plaintiff to maintain the action, although in fault himself. It is not alleged that the negligence of the defendant, in our case, was either gross or wanton, and therefore *Murphy v. Deane,* is an express authority against the plaintiff, who does not deny a want of due care, on the part of the two children.

The *Chicago & Alton R. R. Co. v. Pondron,* 51 Ill., 333, (659) affords an instance of the other extreme of the doctrine of contributory negligence. There the rule was declared to be, that when the negligence of the plaintiff is slight as compared with that of the defendant, a recovery may nevertheless be had. According to this case, the plaintiff here cannot recover, because, admitting for the argument, that the defendant was negligent, the case clearly shows that the negligence of the girl equalled and excelled that of the defendant. In Ohio, the rule of law in cases of mutual negligence is, that when there is negligence on the part of the plaintiff, he is not entitled to recover, where he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. *Timmons v. Central R. R. Co.,* 6 Ohio Lt. 105. By this rule the plaintiff cannot recover, for, with ordinary care on the part of the girls, the accident would not have happened. Even had the place of the accident been a public crossing, to use their faculties for the purpose of discovering and avoiding danger from an approaching train, and the failure to do so, will defeat a recovery. *Clev., Col. & Cin. R. R. Co. v. Crawford,* 24 Ohio Lt. 631. Much more is it negligence, as will defeat an action, when the girls do not cross the road, as they might safely have done, but get upon the road, remain upon it, lie down upon the track and go to sleep, and that too, about the regular time for the train to pass the spot.

The general rule as to contributory negligence, most approved by the decisions and most agreeable to reason and justice, is that when the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied upon the ground that the injured party must be taken to have brought the injury upon himself. For the parties being mutually in fault, there can be no apportionment

of damages, no rule existing to settle in such cases, what one
(660) shall pay more than another. But this general rule is subject to qualifications. It is necessary to notice two only, which are those most favorable to the plaintiff.

1. The injured party, although in fault to some extent, at the same time may notwithstanding this, be entitled to damages for an injury, which could not have been avoided by ordinary care on his part.

2. When the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action for damages is maintainable. *Kerwhacker v. The Clev. Col. and Cin. R. R. Co.*, 3 Ohio 172, where the authorities in this county and England are collected and reviewed. For reasons already given, the plaintiff's action cannot be supported under either of these exceptions to the genral rule, unless the tender years of the child killed, so modifies the rule of law in regard to the negligence of an adult, as to make that conduct which is highly culpable on the part of the man, not culpable at all, or slightly so, on the part of the child. It is true, the responsibility of the two classes is not the same. An infant of tender years is not held to the same degree of discretion, and the degree depends upon its age and knowledge. The caution required is according to the maturity and capacity of the child. *Railroad Company v. Gladmon*, 15 Wall. 401. In our case, the child killed was ten years old and her companion was of the age of fifteen, and seems to have had charge of the younger one, who was her sister. As the capacity of the two is not disclosed in the case, we are to assume that they were of ordinary intelligence and physical activity. The mind of one was near the period of maturity for females. The other, though younger and more immature, was yet of sufficient age and discretion, under the control of her sister, or even without it,
to be subject to the laws of ordinary care and diligence. If by
(661) the proposition of the counsel of the plaintiff, that "If there was negligence on the part of the children, it is not imputable to the parent who is the plaintiff," is meant that the plaintiff is entitled to recover, notwithstanding any degree of negligence on the part of the children, we cannot assent to the proposition. It has no foundation in reason, and would be disastrous to commercial life. Nor do we think the question, upon whom the burden of proof rests, becomes of any practical value here, because the evidence introduced by the plaintiff to establish a cause of action, discloses the defence, and is relied upon by the defendant as constituting the degree of negligence which defeats the action of the plaintiff. The conclusion reached upon this part of the case, is, that supposing the defendant was negligent, yet

the greater negligence of the plaintiff, exempts the defendant from liability.

But it remains to be seen, whether the defendant was negligent at all. The right of the railroad company to the free, exclusive and unmolested use of its track, is not questioned. The train was in the discharge of its daily labor, upon the private property of the company, running near upon time and at a lawful speed. It was a hot afternoon, on the 21st of June. The sun shone brightly, producing a glimmer from the iron rails on the track, which interfered with the vision of the engineer, who was of ordinary skill and at his post. At 150 feet distant the engineer sees two objects upon the track, which he supposed to be small hogs, and blew the whistle. That so soon as he discovered the objects to be human beings, he blew the whistle rapidly, reversed his engine, threw the whole force of the steam upon the wheels, but could not stop the engine until it had run over one of the girls who was lying asleep, the other having sprung up and escaped. The jury found, upon issues submitted, that the objects of the description shown in the evidence, *could* be seen by an engineer, at the time the child was killed, at the distance of two hundred yards, and that the whistle blew at the distance of one hundred and fifty feet of the children. This finding is not inconsistent with the evidence (662) of the engineer that he *did not* see them until within two hundred feet, by reason of the bright sunshine and the glimmer upon the track. But suppose he had seen the sleeping children at the earliest possible moment, to-wit, two hundred yards distant. He believed them to be small hogs. These animals are easily alarmed and of quick and nimble movement. Certainly it is not want of ordinary care, to blow the whistle for these at one hundred and fifty feet, instead of two hundred yards. From their nature, the nearer the whistle, the greater the alarm and the more rapid would be their flight. The engineer did not know, and was not bound to know, they were human beings. Their irrational conduct in lying still upon the track when the train was rapidly approaching at its usual time, repelled the idea that they were intelligent beings. As soon as a nearer approach enabled him to see that they were human beings, he seems to have made every possible effort to avert the disaster, but without success. We do not think the case discloses negligence on the part of the defendant.

The leading cases cited in the full and able briefs by the counsel of the parties, have been examined with care. The principles they establish, we think, are entirely consistent with those announced in this opinion.

There is error.

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

Cited: Johnson v. R. R., 81 N.C. 458; *Murray v. R. R.,* 93 N.C. 96; *Rigler v. R. R.,* 94 N.C. 610; *Nance v. R. R.,* 94 N.C. 623; *Walker v. Reidsville,* 96 N.C. 385; *McAdoo v. R. R.,* 105 N.C. 150; *Deans v. R. R.,* 107 N.C. 690; *Clark v. R. R.,* 109 N.C. 451; *Bottoms v. R. R.,* 114 N.C. 708; *Pinnix v. Durham,* 130 N.C. 363; *Baker v. R. R.,* 150 N.C. 565; *Alexander v. Statesville,* 165 N.C. 536; *Foard v. Power Co.,* 170 N.C. 52; *Horne v. R. R.,* 170 N.C. 658; *Fry v. Utilities Co.,* 183 N.C. 290.

(663)

A. A. McKETHAN v. R. M. McNEILL AND ANOTHER.

The Clerk of the Superior Court is the proper person, and not the Judge in term time, before whom application is made upon proof, for an execution upon a judgment of over three years standing. The execution is returnable to the next term.

This was a MOTION for leave to issue execution, heard before *Buxton, J.,* upon appeal from the ruling of the Clerk of the Superior Court of CUMBERLAND County, Fall Term, 1875.

The motion was refused, on the ground that the Clerk had no jurisdiction thereof, and his Honor sustained the ruling; being of the opinion, that Bat. Rev., Chap. 18, Sec. 7, suspending the C. C. P., required such motion to be made after notice, in term.

From this ruling the plaintiff appealed.

Sutton and Jones & Jones, for appellant.

No counsel, contra in this court.

READE, J. Prior to C. C. P., when a plaintiff wanted to sue out execution upon a judgment, he had nothing to do but to go to the Clerk of the Court and get it, or tell him to issue it, returnable to the next term.

The practice was the same under C. C. P., except that the Clerk made the execution returnable before himself, instead of to the next term, and except that when the judgment was three years old, he could not issue execution at all, unless the plaintiff swore or otherwise proved that the judgment had not been satisfied. C. C. P., Sec. 256.

All that is plain under C. C. P.; but then comes the statute suspending the C. C. P., and providing that executions shall be returnable to the next *term* after they are issued, instead of before

the Clerk, and shall be tested as of the preceding term, which restores the old practice as it was prior to C. C. P., except that (664) it still requires the affidavit as under C. C. P.

And so the question is, whether inasmuch as it is now required that the execution shall be returnable to the next *term,* and tested as of the preceding *term,* it is not to be implied that the application for the execution and the affidavit must be to the Judge in term time? And whether the Judge in term time, and not the Clerk in vacation, must not order the execution to issue.

His Honor was of the opinion, that under the statute suspending C. C. P., the execution could only be issued by order of the Judge in term time. Bat. Rev., Chap. 18, Sec. 7. In that we are of the opinion there is error. The object of that statement was to prevent the hasty return of the execution to the Clerk, and to make it returnable to the next *term* of the court, but still it is to be *issued* by the Clerk, without any order of the Judge in or out of term.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

Cited: Adams v. Guy, 106 N.C. 278.

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(665)

W. M. SMITH v. RUFUS BARRINGER.

If a defendant, (a co-partner,) who is called on for an account, pleads a release, either in full or partial, or matter which in law amounts to a release, or pleads an account stated between the parties, either of all the partnership dealings, or up to a certain date, and these matters are put in issue by a replication, the issues must be found by a jury, before the right to the account can be determined; or if the release or account stated were only partial, before the extent of the account to which the plaintiff is entitled can be determined and the form of decree ascertained.

To exonerate such defendant from accounting prior to a certain date, it is not sufficient therefor, that he should state in his answer, that on that day the plaintiff "called upon him for a dissolution and final settlement of the firm affairs;" and that the plaintiff at the same time signed a receipt, which cannot be construed with any certainty, as purporting to release the prior indebtedness of the defendant; when there is no sufficient averment in such answer of a release, or of accord and satisfaction, or of an account stated and agreed to.

CIVIL ACTION for an account, heard before *Schenck, J.,* at Fall Term, 1875, of the Superior Court of CABARRUS County.

The complaint alleges:

That the plaintiff and the defendant entered into a copartnership for the practice of the law in the county of Cabarrus, and by the terms thereof, the fees arising therefrom were to be equally divided between the plaintiff and the defendant. The partnership commenced on the 4th day of August, 1870, and was dissolved on or about the 12th day of March, 1872.

The defendant has received a considerable sum of money belonging to said partnership, amounting to about seven hundred and fifty dollars.

The plaintiff has frequently demanded of the defendant a settlement, with which demand the defendant wholly refuses to comply.

The defendant, in his answer, alleges:

That the division of profits was to apply only to new business,
(666) and not to the existing practice of the defendant, then a lawyer in full business, while the plaintiff had just obtained his license, and was almost without clients.

The defendant has no money of said firm, to which the plaintiff is legally or justly entitled; on the contrary, the plaintiff is indebted to the defendant in considerable sums, which the defendant pleads as a bar and counterclaim, as follows:

The main object of the defendant in associating the plaintiff with him in the practice of the law, was to rid himself of a large amount of small local business, to which the defendant had not time to attend. The defendant was then, as now, living in Charlotte. He had recently lost his professional partner, Judge Osborne, and this prevented him from visiting Concord as often as formerly. To further this object, it was agreed between them that the defendant would give up his old office, near his former residence, in Concord, and the plaintiff was to erect a new one, at his own expense, on a lot of his father's, about the center of the town, and was to devote himself especially to this small local business, with which the defendant was to be troubled no further than was necessary in the way of advising counsel.

The plaintiff wholly failed to erect or secure an office suitable for the purpose of the firm, and the defendant was forced to make or accept such arrangements as offered.

And much to the defendants surprise, after about eighteen months, the plaintiff notified the defendant of his purpose to leave the State and settle in Virginia. This greatly interfered with the defendant's plans, and not only threw upon him a class of business he did not want, but involved him in a vast amount of trouble and responsibility. The plaintiff had undertaken the collection of a large number of small claims for various persons, and had given the receipt of "Barringer &

Smith" therefor. He had, in the confusion of his affairs carried off many of these claims to Virginia; and others he had stuck away without mark or message in his father's dwelling. Immediately (667) on his leaving, these receipts were presented to the defendant, and caused him trouble and expense well worth to him $500.

In the meantime, the defendant had found the plaintiff of much service to him in releasing him of the local business referred to, and in looking after certain property belonging to the defendant's clients. On this account, and because the defendant fully expected the plaintiff to continue in the office in Concord, the defendant allowed him not only his own share of the partnership profits, but a fair proportion of the defendant's own fees in Cabarrus. In this way the plaintiff without any practice of his own to begin with, in about eighteen months realized not less than $850 or $900, including fees in one of the defendant's individual cases of near $200. The firm had several cases involving gold mines, on which large contingent fees were hoped for.

In this state of their business the plaintiff suddenly, in March 1872, notified the defendant of his purpose to leave the State, and called upon him for a dissolution and final settlement of the firm affairs. This disclosed the fact, that the plaintiff had in his hands considerably more than his share of the profits, to date. He plead his inability then to pay, and offered if defendant would endorse his note in bank or loan him $100, to surrender all claim on the firm, except such sums as the defendant would be willing to allow him, mainly on the contingent fees referred to.

Memorandum was hastily drawn up to that effect, and signed by the plaintiff, of which the following is a copy:

"$100.00.

"Received of R. Barringer one hundred dollars, money advanced by him to me on the dissolution and settlement of the affairs of Barringer & Smith, and he is to go on and wind up the affairs of the firm, and pay over to me such sums as may justly be due me after this date, taking into account the additional trouble he may be at. (668)

"W. M. SMITH,
Staunton, Va.

"6th of March, '72."

The defendant preferred to advance the plaintiff, rather than endorse his note in bank.

Immediately after the departure of the plaintiff, the defendant discovered that he had left his business matters and papers in utter confusion, and from his letters in reply to the enquiries of the defend-

ant, the defendant found him wholly incapable of explaining difficulties, if indeed he was not indifferent to all attempts to do so.

Among other things, the defendant discovered that the plaintiff had collected several sums of money which he had not accounted for, and particularly an item of $100, on an individual debt of the defendant, against A. M. Wilhelm, in regard to all which sums the plaintiff made inconsistent and contradictory statements.

Upon the return of the plaintiff to Concord, the defendant agreed, as an act of favor to him, to turn over to him a certain share of the uncollected claims still on hand, and to allow him on a final settlement, one-fourth of fees received by the defendant since the dissolution of the co-partnership, and charge him for the money so unaccounted for by him, unless in the meantime the plaintiff could properly account for said moneys.

In all this time the plaintiff set up no legal claims to any further part of the assets of the *firm,* except such sums as the plaintiff might voluntarily pay him on the contingent cases referred to, and also a half interest in a fee and commissions on a large debt sued on and collected in Rowan, known as the Shaver debt, which was, in fact, not in the firm at all, but in regard to which the defendant was willing voluntarily to act liberally and allow the plaintiff one-fourth,
(669) amounting to one-hundred and twenty-five dollars, if taken in a final and full settlement of all matters and moneys above mentioned.

The defendant afterward found that the plaintiff, in defiance of his written assent to the article of dissolution and settlement, and in total disregard of his verbal arrangement with the defendant, to be satisfied with such claims and moneys, as the defendant voluntarily allowed him after his return to Concord, the plaintiff went on and collected moneys and fees, with which he had no concern, and which pertained entirely to the rights and duties of this defendant, and has never pretended to make any return thereof, not even now, in calling for a partnership account. Among the moneys and fees he collected, were certain funds received from J. M. McCurdy, as the defendant is informed and believes, and probably many others. The plaintiff, himself, wrote to the defendant March 23d, 1873, that he had "arranged his (my) part of the commissions on the Shaver debt, charging him 107, one-half of the debt, and given him receipt for the same." The defendant further found, that the plaintiff had gotten up and circulated a professional card, calculated, and no doubt, intended to deceive the public in reference to his right to act in the affairs of the late firm, in which card he represented himself still of the firm of "Barringer & Smith."

In consequence of all this, the defendant refused to have any further connection with the plaintiff and denied his pretended legal claims. But at the same time submitting to him a memorandum of the shares of fees and commissions, defendant was ready voluntarily to allow him, on his rendering an account of all he had received. The plaintiff has failed to do so, but has gone on and collected fees and funds solely due the defendant.

That said firm was dissolved on the 5th day of March, 1873. The only claims due the plaintiff are the sums the defendant may think fair to allow him, out of the contingent fees and other cases referred to, and not the subject of judicial ascertainment. That (670) if this should be otherwise, then the defendant insists that the abandonment of his duties by the plaintiff in the way described for about one year, and the consequent extra labor, trouble, expense and responsibility thrown upon the defendant, entitles him to a sum equal to five hundred dollars, which he pleads as a set-off and counter-claim.

As a further counter claim, the defendant pleads the several sums of money collected by the plaintiff and not accounted for by him, together with any other sums that may be so discovered.

The defendant denies that the voluntary arrangement so made with the plaintiff on the dissolution of the firm in 1872, and on his return to Concord in 1873, were accepted or intended by either party as having any legal effect, nor did the plaintiff so pretend until he found it a convenient excuse for his ingratitude and his unfair dealing towards the defendant.

The plaintiff, in his reply, denied each and every counterclaim alleged in the answer, except fifteen dollars collected for the firm, and alleges that he is entitled to judgment for three hundred and seventy-five dollars.

At fall Term, 1875, on motion of the plaintiff, the case was referred, under the Code, to George B. Everett, Esq., and John S. Henderson, Esq., to decide the questions of law and fact.

From this order, the defendant appealed.

Shipp & Bailey and Montgomery, for appellant.
Jones & Jones, contra.

RODMAN, J. The defendant admits that there was a partnership, which has been dissolved, and that there has been no full release or settlement of the partnership dealings. The plaintiff is, therefore, entitled to an account. The defendant contends, however, that the account should be limited to such partnership funds as he has received since 6th March, 1872. The practice is clear, that (671)

if a defendant, who is called for an account, pleads a release, either in full or partial, or matter which in law amounts to a release, or pleads an account stated between the parties, either of all the partnership dealings, or up to a certain date, and these matters are put in issue by a replication, the issue must be found by a jury, before the right to an account can be determined; or if the release or account stated were only partial, before the extent of the account to which the plaintiff is entitled can be determined, and the form of the decree ascertained. *Douglas v. Caldwell,* 64 N. C., 372; *Price v. Eccles,* 73 N. C., 162; *Morton v. Lee,* 73 N. C., 21.

So that the only question before us is, has the defendant in his answer plead matter which if found to be true, would exonerate him from an account of dealings prior to March 6th 1872. In considering the answer, it is necessary to distinguish what is stated as fact, from what appears to be stated as conclusions of law. The answer states that on March 6th 1872, the plaintiff called on the defendant "for a dissolution and final settlement of the firm affairs. *This* disclosed the fact that Mr. Smith had in his hands considerably more than his share of the profits to date," which he said he was then unable to pay, and offered if defendant would loan him $100 to surrender all claim on the firm, except for such sums as the defendant might be willing to allow, mainly on certain contingent fees. It must be assumed that defendant gave plaintiff the $100, although that is not expressly stated, and the plaintiff then delivered to the defendant the following writing:

"$100.00.

Received of R. Barringer one hundred dollars, money advanced by him to me on the dissolution and settlement of the affairs of Barringer & Smith, and he is to go on and wind up the affairs of the firm and pay over to me such sums as may be justly due me after this
(672) date, taking into account the additional trouble he may be at.

(Signed) W. M. SMITH,
Staunton, Va."

March 6th, 1872.

This writing is in ambiguous terms. The defendant is to pay to plaintiff such sums as may be justly due to him after this date. To what do the words, "after this date" apply? It may be, that payment is thereafter to be made. It is not said "which shall become due hereafter." Taking the writing by itself, it cannot be construed with any certainty as purporting to release the prior indebtedness of the

defendant, and the circumstances, attending the execution, do not make it clearer in that direction. The defendant does not positively say that plaintiff agreed to release him. No account was stated which would seem to be the usual, if not the necessary basis of a settlement, nor does defendant say, that nothing was then owing to the plaintiff. It is true, he says, "*this* disclosed," etc.; but "this" refers grammatically, to plaintiff's call for a dissolution and settlement, and it would be a very uncertain way of stating that a settlement was had, from which it appeared that the plaintiff had received more than his share of the profits. We are of opinion that the answer does not amount to a sufficient averment either of release, accord and satisfaction, or of an account stated and agreed to.

The account must be of all the partnership dealings, as well of those before, as after, March 6th 1872.

Judgment affirmed, and case remanded. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: Dean v. Ragsdale, 80 N.C. 218; *Clements v. Rogers,* 95 N.C. 250; *Oldham v. Rieger,* 145 N.C. 260.

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(673)

MARGARET B. MORDECAI, EXECUTRIX, AND OTHERS v. JOHN DEVEREUX AND OTHERS.

This court will never interfere between attorney and client in making allowance for professional services, although there be a fund in the keeping of the court.

This was a PETITION for an allowance for attorneys' fees, filed in this court at the present term.

The petitioners, Merrimon, Fuller & Ashe, and Moore & Gatling, alleged: That Moore & Gatling appearing in behalf of the creditors of the late Thomas P. Devereux, the plaintiffs in this action instituted the action in the Superior Court of Halifax County, on the 25th day of January, 1870, praying to have the defendants, the only heirs at law of Thos. P. Devereux, decreed to execute certain trusts in favor of the creditors of their ancestor, declared in a deed of settlement executed by the late Francis Devereux on the 3d day of July, 1839.

All the matters of law involved in said action, having been referred to the Hon. Samuel W. Watts, were heard and decided and the defendants appealed to this court. Upon the hearing this court adjudged and decreed that the plaintiffs were entitled to the relief prayed for,

and by an order duly made and recorded appointed John Devereux and Walter Clark, Esq'rs, trustees and Commissioners to sell all of the lands mentioned in the said deed of settlement, not disposed of by the said Thomas P. Devereux during his life, except a certain track known, etc.

The said trustees have sold the said lands under the order of the court, and have paid the proceeds into the office of the Clerk, to be held as a fund to be ultimately divided between the said creditors.

A certain bill in equity, wherein Grinifel Blake and wife and
(674) others, nieces of the said Thomas P. Devereux are complainants, has been for many years pending in the Circuit Court of the United States for the Eastern District of North Carolina, claiming to charge the said lands with large sums of money alleged to have been settled upon them, by the said Francis Devereux, in her last will and testament.

The cause was referred by said court to state an account, and the said trustees and commissioners finding the labor involved in taking said account to be very great, retained the petitioners Merrimon, Fuller & Ashe to assist the petitioners Moore & Gatling in representing the said creditors.

The petition sets out other facts not necessary to be stated, and prays for an allowance on account of the services so rendered in taking the account, etc.

Moore & Gatling, Walter Clark, and R. B. Peebles, for the petitioners.

Battle, Battle & Mordecai, D. A. Barnes, and W. W. Peebles, contra.

PEARSON, C. J. The question is decided. *Patterson v. Miller,* 72 N. C., 516. This court has never interfered between attorney and client in making allowances for professional services, and we are not inclined at this late day to assume the power to do so. We make allowance to a Clerk for stating an account or to a commissioner for making sales, on the ground that the work is done by order of the court. But we have never supposed that we could be called on to settle fees between client and attorney, although there be a fund in the keeping of the court.

PER CURIAM. Petition dismissed.

Cited: Gay v. Davis, 107 N.C. 270; *R. R. v. Goodwin,* 110 N.C. 176; *Knights of Honor v. Selby,* 153 N.C. 208; *Durham v. Davis,* 171 N.C. 307; *In re Stone,* 176 N.C. 343; *Roe v. Journigan,* 181 N.C. 183; *Casket Co. v. Wheeler,* 182 N.C. 469; *Parker v. Realty Co.,* 195 N.C.

646; *In re Will of Howell* 204 N.C. 438; *Ellington v. Ellington,* 204 N.C. 785; *Crutchfield v. Foster,* 214 N.C. 553; *Rider v. Lenoir County,* 238 N.C. 635.

(675)

B. W. SPILMAN, TRUSTEE, AND OTHERS v. THE ROANOKE NAVIGATION COMPANY.

The damage to the plaintiffs' land, caused by the flooding of water upon it, and sobbing it, from the dilapidated condition of defendant's canal, may be estimated by comparing the productiveness of the land when flooded, with its productiveness when not so flooded.

An action to recover such damages is not barred by the Statute of Limitations, although the first flooding occurred more than three years before the suit is brought.

This was a CIVIL ACTION, for damages, tried at the December (Special) Term, 1875, of HALIFAX Superior Court, before his Honor, *Judge Moore,* and a jury, upon the following

CASE AGREED:

The plaintiffs declared for damages to their land, for agricultural purposes and otherwise, caused by water flooding over it, from the defendant's canal.

The land was valuable for agricultural purposes.

The following issues were submitted to the jury, to-wit:

2d. Has the defendant negligently permitted the canal or any part thereof to decay, so as to damage the plaintiffs' land, for agricultural purposes, if so, what is the damage to it, by reason thereof?

(Ans.) We allow $50 a year—making $150 for three years, without interest.

3d. Have any of the damages complained of, for agricultural purposes been committed within three years next before bringing this action?

What is the difference, if any, in value of the plaintiffs' land, from the time the suit was instituted, and three years before that time? (Ans.) Nothing.

There was conflicting evidence as to the condition of the canal, (676) and whether the defendant negligently permitted it to become decayed and ruinous, so as to allow the water from it to damage the land—to which there was no exception.

With the view of showing damage to the land for agricultural purposes, the plaintiffs offered to prove, that had not the defendant

negligently permitted the water from the canal to ooze through the canal banks and over their lands, by reason of its dilapidated condition, it would have yielded annually in due course of agriculture, more than it would, with the water percolating from the canal upon it, for three years next before suit brought.

Defendant objected to the evidence; but it was admitted by the court.

Plaintiffs then introduced evidence to show, that some of the land was so damaged by the percolation, or flowing of the water, that it could not be cultivated; and that a portion of it in cultivation was so damaged that it yielded only half a crop. That but for the water percolating, or flowing from the canal, the land would have yielded annually much more corn and other products than it did, or could have yielded, with such percolation, or flowing upon it for three years next before suit was brought, and to prove also the value of the corn within that time.

All this evidence was objected to by defendant, when offered, but admitted by the court. Defendant excepted.

There was conflicting evidence as to the condition of the ditches on the land, and whether they were necessary for its proper cultivation.

His Honor charged the jury, that if the water from the canal damaged the plaintiffs' land, only by the natural effort of the water to escape from the canal by ordinary percolation through its banks, the plaintiffs could not recover; but if they permitted the canal to fall into decay for want of proper repairs, whereby the water escaped and damaged plaintiffs' land, plaintiffs could recover for such
(677) damage as occured within three years before suit was brought.

That in estimating such damage, they should allow the plaintiff for what the land would have yielded in agricultural products for three years, if the defendant had not permitted the water to escape from the canal for want of repairs; and they might consider the foregoing evidence for that purpose.

Verdict, one hundred and fifty dollars damages.

Defendant moved for a new trial; motion overruled. They also moved for judgment *non obstante veredicto;* motion refused.

They also moved to arrest the judgment, because the court could render no judgment on the verdict; motion overruled.

Judgment for the plaintiffs for one hundred and fifty dollars, and costs. Appeal by defendant.

Walter Clark, for appellant.

Day and Batchelor & Son, contra.

READE, J. The substance of the finding of the jury is, that by the continuous flooding and sobbing of the land of the plaintiff for the last three years by the defendant, the land has been injured $50 per year, $150 for the three years, and that the plaintiff has been damaged to that amount.

The jury were permitted to arrive at that conclusion by considering evidence as to the productiveness of the land as flooded, compared with its productiveness when not flooded. To this the defendant excepted, for the reason that the recovery can be for injury to the *land* only and not for injury to the *crops* or loss of crops. And he cites among other authorities, *Sledge v. Reid,* at last term, 73 N. C., 440; in which we held, that in an action for a mule there could not be a recovery for the supposed value of a crop which might have been made with the mule, but only the value of the mule.

We are still of the opinion that that case is right. But how was the value of the mule to be shown? All mules are not of (678) the same value. If it were kept and used for work, it would be proper to enquire into its qualities and strength; if kept to ride, whether it was stylish and its paces easy? If for racing, what was its speed? All this simply to show the value of the mule.

So when the value of land is to be ascertained, if kept for cultivation, as this was, what was its productiveness? How much did it produce when not flooded? How much did it produce as flooded? All this simply to show the value of the *land,* and the injury to *it;* and not to recover for the supposed loss of the crops. When the time *is past,* the comparison of the crops in connection with the seasons and other circumstances, is the best possible test as to the injury to the land. If the net profit of the products when the land is not flooded is $50, and the net profit is nothing when flooded, then it is demonstrated that it is injured $50 by the flooding.

Again, the defendant insists that the first flooding was done more than three years before the action commenced, and that was the time when the injury was done; and so, the action is barred by the statute of limitations.

The defendant's illustration is worth preserving for its amusing fallacy: "Supose he had lamed the plaintiff's horse more than three years ago, and he had continued lame ever since, the action would be barred. So, as he first injured the plaintiff's land more than three years ago, and it has continued injured ever since, the action is barred." The fallacy is in not drawing the distinction between a *single* act of injury and *continuous* acts. In our case, he flooded the land more than three years ago, it is true; and for that the action is barred; but he has also continued to flood it anew every day within three years,

and for that the action lies. See *Garrett and wife v. Dabney and others, ante,* 388.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Garrett v. Comrs., 74 N.C. 390; *Adams v. R. R.,* 110 N.C. 333; *Ridley v. R. R.,* 118 N.C. 1004; *Mast v. Sapp,* 140 N.C. 543; *Roberts v. Baldwin,* 151 N.C. 409; *R. R. v. Wilmington,* 154 N.C. 332; *Earnhardt v. Comrs.,* 157 N.C. 237; *Duval v. R. R.,* 161 N.C. 450; *Savage v. R. R.,* 168 N.C. 242; *S. v. Klingman,* 172 N.C. 949; *Oates v. Mfg. Co.,* 217 N.C. 489; *Tate v. Power Co.,* 230 N.C. 258.

(679)

WILLIAM WHITEHEAD v. JOHN F. HELLEN.

A sheriff may return an execution before the return term thereof, if it be satisfied, or if there can be no property found, out of which to satisfy the same.

This was a Proceeding supplemental to execution, heard before *Moore, J.,* at Spring Term, 1875, of PITT Superior Court, upon appeal from an order of the Probate Court.

Two judgments were rendered against the defendant and in favor of the plaintiff at Fall Term, 1874, amounting in the aggregate sums thereof, to about $1,000, which judgments were regularly docketed in the Superior Court of said county, and executions issued thereon from Fall Term, 1874, returnable to Spring Term, 1875. These executions were returned on the—day of November, 1874 "unsatisfied," and shortly thereafter, to-wit, on the 14th day of November, the plaintiff made affidavit before the clerk as the foundation of these proceedings.

The clerk issued his order for the examination of the judgment debtor, returnable before him on the 18th day of November, 1874, and the hearing was on that day continued until the 20th of November, at which time the defendant appeared with counsel and moved to dismiss the proceeding, for the reason that the executions against the defendant, upon which the proceeding was based, were unduly returned, in that they should not have been returned until the regular term of the court to which they were made returnable, to-wit, Spring Term, 1875, and the sheriff was bound to hold the executions until the actual meeting of the court, and had no right to return them before.

To sustain this motion, the court allowed the defendant to prove by the deputy sheriff, that at the time the sheriff made the return on the executions, he had seized under other and older (680) executions, and then had in his possession, eight bales of cotton, an old iron safe and a wardrobe, the property of the defendant.

Upon the cross examination it appeared that the property seized did not exceed in value $550, and that it was all that could be found belonging to the defendant, after allotting his personal property exemption. It also appeared, that the older executions under which the property had been seized, amounted to more than $900.

The clerk sustained the motion of the defendant and dismissed the proceeding, from which ruling the plaintiff appealed.

The appeal was heard before *Hilliard, J.*, at Chambers, on the 15th day of December, 1875, and upon the hearing the defendant produced the notice served upon the plaintiff, to the effect that he should move the court to set aside the return of the sheriff, upon said execution.

Upon the hearing of this motion the defendant offered to prove that there was collusion between the plaintiff and the sheriff in making said returns. The court refused to hear the evidence, holding that the court must decide the case upon the record.

After argument the court dismissed the proceeding and remanded the case to be proceeded with according to law.

On the—day of January, 1875, after notice to both parties, the case came on for a hearing in the Probate Court, when the defendant appeared and renewed the motion to dismiss upon the grounds aforesaid, producing a notice served upon the plaintiff to the effect that he would move the court to set aside the said returns of the sheriff; and upon this requested the court to hear evidence in support of the motion.

The clerk overruled the motion to dismiss and proceeded to examine the judgment debtor, who admitted under oath that James H. Hellen owed him $41.50, Kinchen Jenkins $95, E. L. Laughinghouse $85, Wiley Clark $1,100, N. R. Covey $10, and T. J. Smith $20. (681)

The clerk thereupon ordered that J. A. Sugg be appointed receiver of the property and effects of the defendant, the judgment debtor, and that said receiver be invested with the usual rights and powers of receivers.

From this order, and the ruling, refusing to dismiss the proceeding, the defendant appealed to the Superior Court.

The case was heard upon appeal before *Moore, J.*, at Spring Term, 1875, when the defendant again moved the court to dismiss the proceeding upon the grounds heretofore set out.

The court inquired of the defendant if he charged that there was fraudulent collusion between the sheriff and the plaintiff in making the return. The defendant replied that he did not, but on the contrary expressly declared that he did not mean to charge that the sheriff had acted corruptly or improperly. He only meant to say that the return was made at the suggestion of the plaintiff to enable him to institute these proceedings, and that this amounted to legal collusion.

Upon this statement, the court declined to dismiss the proceeding, but made the following order:

"The above named defendant, John F. Hellen, having been examined before Henry Sheppard, Clerk of the Superior Court of Pitt County, in proceedings supplemental to execution, and the defendant having appealed from the order appointing J. A. Sugg a receiver of the goods and effects of the defendant, *it is ordered*:

1. That the order of the clerk be approved, and the said J. A. Sugg be appointed receiver of all the property of the said judgment debtor, not execpt from execution.

2. That the said receiver execute to the clerk of this court a bond, with sufficient securities, to be approved by the said clerk in the penalty of three thousand dollars, for the faithful performance of his said trust, and file the same with the clerk of said court for the county of Pitt.

(682) 3. That the said receiver be invested with the usual rights and powers of receivers in such cases, upon the filing of said bond.

4. That the said judgment debtor, John F. Hellen, deliver to the said receiver all money and other property now in his hands not exempt from execution, as well as all the notes, bonds and choses in action given in, in his examination before the said clerk."

From this order the defendant appealed.

Battle & Son, for appellant.

Moore & Gatling, contra.

SETTLE, J. Can a sheriff, who has in his hands an execution issued from Fall Term, 1874, returnable to Spring Term, 1875, return the same in vacation, or must he hold it until term time and return it to court?

This question being determined, everything else, in this case, will follow as a matter of course.

If an execution be satisfied soon after the adjournment of the court from which it issued, why should the sheriff be compelled to retain the money in his own hands until the term to which the execution is

returnable? Would it not be better for all concerned, that he should pay the money, either into office or to the party entitled thereto?

And if, on the other hand, it be apparent that nothing can be found, out of which satisfaction can be had, why may he not return the execution "unsatisfied," at any time before the regular term of court?

That is the limit beyond which he may not delay, but there is no good reason why he should delay so long, if no useful purpose is to be served thereby.

But the defendant says the sheriff had signed, and then had in his possession his property, to-wit: eight bales of cotton, an old iron safe and a wardrobe, under other and older executions in his hands, and had not sold the same when he returned the execu- (683) tions in favor of the plaintiff "unsatisfied." In reply to this it is shown that the value of all the property seized, or to be found, belonging to the defendant, after setting apart his exemptions, does not exceed five hundred and fifty dollars, and that the executions in the hands of the sheriff, older than the plaintiff's executions, and under which the property aforesaid had been seized, amounted to over nine hundred dollars.

The statement renders it perfectly clear that the sheriff could not make the debt by keeping the execution in his hands until term time. Then why should he do so, and thereby put an obstacle in the way of collecting the debt, when by promptly returning the facts he could open the way for supplemental proceedings, and aid the purpose for which the execution was placed in his hands?

It would seem from the record that the supplemental proceedings are about to bear fruit, and this case furnishes a fair illustration of the benefits which may flow from the practice herein sanctioned. *Hutchinson v. Symons*, 67 N. C., 186.

The judgment of the Superior Court is affirmed. Let this be certified, etc.

PER CURIAM. Judgment affirmed.

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(684)

W. A. SMITH AND OTHERS v. G. L. GIBSON.

An affidavit stating "that the defendant has disposed of his property, with the intent to defraud his creditors, in this, that although he has received from the plaintiffs alone, over $7,000 in specie, and $7,289.33 in currency, and from the plaintiff F, the further sum of $300, currency, he has not paid any of his creditors, unless to a very inconsiderable amount, and

that he owes debts exceeding the sum of $3,000, is insufficient, and will not justify the arrest of the defendant."

This was an APPEAL from the ruling of the court in setting aside an order of arrest in a Civil Action in the nature of a Bill in Equity, for the specific performance of a contract; the motion to set aside the order was heard before *Schenck J.*, at July Term, 1875, CABARRUS Superior Court.

All the facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

Upon the hearing, his Honor allowed the motion, vacating the order of arrest, on account of the insufficiency of the affidavit.

From this judgment the plaintiffs appealed.

Bailey, for appellants.

No counsel contra, in this court.

READE, J. The plaintiffs bought of the defendant a tract of land at the price of $15,000, to be paid in specie. Title to be made when money is paid. They paid $8,000 in specie, and failing to pay the balance, the defendant sued them, and got judgment and execution, which went into the hands of the sheriff, and which was paid by the plaintiffs, not in specie, but in currency, which was at a discount of thirty-five or forty cents in the dollar. This, although not a compliance with the *agreement*, was, in law, a satisfaction of the execution. See case between the same parties reversed, 63 N. C., 103.

(685) The plaintiffs bring this action for specific performance, by a conveyance of title on the part of the defendant, and for damages for the delay. It is not alleged that they have been kept out of the possession of the land, nor is any other injury specified for which they demand damages, nor is it alleged that they have complied with their *agreement* to pay the debt in *specie*.

What will be the decision when the case stands upon its merits on the hearing, we are not now to say. We have now to pass upon a preliminary question, the sufficiency of the affidavit for the order of arrest.

The affidavit is, "that the defendant had disposed of his property with the intent to defraud his creditors." If the affidavit had stopped there, it would have been in the words of the statute. C. C. P., Sec. 149. But there is an apparent flinching from having it as strong as that, and so the affidavit proceeds to explain what is meant by the charge, to defraud his creditors: "In this, that although he has received from the plaintiffs alone the sum of over $7,000 in specie, and $7,289.43

in currency, and from the plaintiff Ford the further sum of $300 currency, he has not paid any of the creditors, unless to a very inconsiderable amount, and that he owes debts exceeding the sum of $3,000."

To say that because a man has had, and, so far as appears, now has $17,000 and owes $3,000, which, for ought that appears, may be the very $3,000 demanded in this action, which he denies that he owes, or let it be any other debt or debts, to say from this "that he has disposed of his property with the intent to defraud his creditors," is a "lame and impotent conclusion," upon which no man ought to be deprived of his liberty.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

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(686)

W. S. CLARK v. O. C. FARRAR.

An agreement in writing or deed, which purports on its face to be an agricultural lien, only for future advances, cannot be supported as a mortgage (as against a purchaser,) for a different purpose, and founded on a consideration not expressed, but concealed or disguised in the deed.

In order to create a valid agricultural lien, under the Act of the General Assembly, it must appear:

(1) That the advances must be money or supplies.

(2) They must be made to the person engaged, or about to engage, in the cultivation of the soil.

(3) They must be made after the agreement is perfected.

(4) They must be made to be expended in the cultivation of the crop during that year.

(5) The lien must be on the crop of that year, made by reason of the advances so made.

CIVIL ACTION tried before *Seymour, J.*, at July (Special) Term, 1875, of EDGECOMBE Superior Court.

The facts of this case are substantially as follows:

On the 5th day of July, 1873, one Barnhill executed to the plaintiff a mortgage on his personal property and crop, to be made during that year on the land of Alman Hunt in said county, being indebted to the plaintiff in the sum of five hundred and thirty dollars, for advances made to him to enable him to plant and cultivate, and at the same time and by the same instrument gave the plaintiff a lien on said crop to secure advances to be made after that time for the same purpose, not to exceed $600. The plaintiff continued to make advances to

Barnhill during that year, and on July 19th, 1875, Barnhill was indebted to the plaintiff on account of said advances, in the sum of $515.36.

In December, 1873, the defendant seized 11 bales of cotton of said crop and sold them, and the net proceeds of sale amounted to more than the plaintiff's debt against Barnhill. Said instrument containing a mortgage and lien was duly registered. The plaintiff demanded
(687) of the defendant the proceeds of the sale of said cotton to the amount of his debt against Barnhill, and the defendant refused to pay the same.

On the 22d day of April, 1873, the said Barnhill executed to the defendant an instrument in words and figures as follows:

STATE OF NORTH CAROLINA,
Edgecombe County.

Whereas, John J. Barnhill has applied to O. C. Farrar to aid and assist him in carrying on his agricultural operations during the present year in Edgecombe County, and the said O. C. Farrar has agreed to make advances for that purpose said John J. Barnhill in supplies to the extent of five hundred and seventy-two 15-100 dollars, in value, if required, provided he is made secure against loss by reason thereof. Now, therefore, be it known that the said John J. Barnhill, in consideration of the premises, had agreed, and by these presents does agree to and with the said O. C. Farrar, that as a security for the payment of all such supplies (not exceeding $572.15 in value) the said O. C. Farrar shall have a lien on all the crops which he, the said John J. Barnhill shall grow, produce and harvest in the present year on the land of Alman Hunt, in said county, and now being or about to be cultivated by him, according to the true intent and meaning of an act of the General Assembly, made to secure advances for agricultural purposes; to be null and void however, if the said John J. Barnhill pays the said O. C. Farrar for all such supplies advanced as aforesaid, by or before the 1st day of November, 1873; otherwise the said O. C. Farrar is hereby fully authorized and empowered with full right of ingress and egress to enter and seize the crops aforesaid, and sell the same, and should any balance remain due, then to sell at public sale after ten days advertisement, for cash, so much of the said per-
(688) sonal property conveyed as will satisfy the same and costs of sale.

In the event of the death of the said John J. Barnhill, the said O. C. Farrar is authorized to take possession of the said crops and continue the cultivation and housing of the same, and to sell so much thereof as may be sufficient upon sale thereof to satisfy such advances

and all expenses of making and executing these presents and any debt incurred by the death of said party as aforesaid. And the said John J. Barnhill does covenant, promise and agree to and with said O. C. Farrar that he will by or before the 1st day of January next, sell and deliver to the said O. C. Farrar in Tarboro, all the cotton which he may produce and gather in the present year, at the market price or value at the time of delivery, or that he will deliver the cotton to the said O. C. Farrar to be shipped to New York for sale there and the net proceeds accounted for by the said O. C. Farrar to the said John J. Barnhill, after retaining whatever may be then due him for advances.

In testimony whereof the said John J. Barnhall has hereunto subscribed his name and affixed his seal, the 22d day of April, 1873.

(Signed) JOHN J. BARNHILL, [SEAL.]

Witness:

J. P. DILINGHAM.

This instrument was duly registered on the 23d day of April, 1873.

The defendant testified: That Barnhill owed him a debt for merchandize contracted in 1872, and requested him to postpone the payment thereof until the Fall of 1873, saying it was not convenient, but that he could and would pay it if defendant insisted on it. The defendant told him that the firm of Farrar, Pippin & Co., of which he was a member, would advance the money and take a lien of his crop. Barnhill replied that he did not care to have any transaction with Mr. Pippin, one of the firm. The defendant then agreed (689) that he would take a lien on the crop for the debt of $572.15, saying he would himself advance the money, pay the debt, and take the lien. Thereupon the aforesaid instrument was executed, and the debt paid.

On cross-examination, the defendant testified, that he did not know whether the book containing the account was balanced on that day, but he told his book-keeper to balance it. The transaction between himself and Barnhill was entirely a paper transaction and that no money passed.

Barnhill testified: That he could have raised the money to pay the defendant's debt, but that it would have embarrassed him in his agricultural operations. At the time he executed the instrument to the defendant all of his crop was planted except about twenty-five acres of cotton.

On cross-examination the witness stated that he did not know where he could have obtained the money.

The court held that the said instrument relied on was not an agricultural lien, for the reason that it was not made to secure advances made for agricultural operations.

To this ruling the defendant excepted.

The defendant then insisted that it was valid, as a mortgage on the crop of Barnhill during that year. The court held that it could not operate as a mortgage, for want of operative words, and instructed the jury that the plaintiff was entitled to recover.

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

Johnson and Phillips, for appellant.

Howard & Perry, contra.

BYNUM, J. It is not denied that the agricultural lien of the plaintiff was executed according to the statute, and is valid, and that he is entitled to recover in this action, unless the agreement in writing (690) between Barnhill and the defendant is valid, either as an agricultural lien or a mortgage. So the only question is, whether that agreement is valid for either purpose.

I. Is it an agricultural lien? That depends upon the construction to be given to the act authorizing such liens to be given, Bat. Rev., Chap. 65, Sec. 19. That section is as follows: "If any person or persons shall make any advance or advances, either in money or supplies, to any person or persons who are engaged in, or about to engage in the cultivation of the soil, the person or persons so making such advance or advances, shall be entitled to a lien on the crops which may be made during the year upon the land, in the cultivation of which the advances so made have been expended, in preference to all other liens, existing or otherwise: *Provided,* an agreement in writing shall be entered into before any such advance is made, to this effect," etc., which agreement is to be recorded. From this it is clear, 1. That the advances must be in money or supplies; 2. To the person engaged or about to engage in the cultivation of the soil; 3. After the agreement is made; 4. To be expended in the cultivation of the crop made during that year; 5. And the lien must be on the crop of that year, made by reason of the advances so made.

Now it is found by the jury as a fact, that the defendant made no advances whatever, after the execution of this agreement, or before, towards the cultivation of the crop on which his lien was taken. The lien can only be by force of the statute and by a compliance with its requirements. The statute has not been followed, and to sustain this agreement as an agricultural lien, would be to utterly defeat its letter,

and the public policy embraced in the statute. The agreement, as an agricultural lien, contains a falsehood and a fraud upon its face. Not a dollar was advanced or intended to be, though it was promised in the agreement. The real purpose was to secure an antecedent debt due to the defendant by Barnhill, which was created the (691) year previous.

II. Failing to establish the deed as an agricultural lien, the defendant next seeks to set it up as a mortgage to secure an old debt.

Without stopping to enquire whether the only operative words in the defendant's deed, to wit, "the said O. C. Farrar *shall have a lien* on all the crops," etc., can be construed into a conveyance of the crops to the defendant, we pass to that view of this part of the case which is decisive. It is this: An agreement in writing, or a deed which purports on its face to be an agricultural lien only for future advances cannot be supported as a mortgage for a different purpose, and founded on a consideration not expressed, but concealed or disguised in the deed. A deed must speak the truth. Creditors and subsequent purchasers have the right to know what encumbrances are upon property and the extent of them. They are entitled to this information from the deed itself, and for that purpose are our registration laws enacted. The defendant attempts to sail under false colors. That the law does not countenance. The deed may be good between the parties to it, but the plaintiff is a purchaser for value, and as to him the deed is inoperative. It professes to be an agricultural lien in form and substance, and it must have that effect or none. As it does not have that effect, it is void as to the plaintiff.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Womble v. Leach, 83 N.C. 89; *Patapsco v. Magee,* 86 N.C. 354; *Reese & Co. v. Cole,* 93 N.C. 91; *Knight v. Rountree,* 99 N.C. 394; *Meekins v. Walker,* 119 N.C. 49; *Nichols v. Speller,* 120 N.C. 79; *Bargain House v. Watson,* 148 N.C. 297; *Williams v. Davis,* 183 N.C. 93; *Tobacco Asso. v. Patterson,* 187 N.C. 256; *Rhodes v. Fertilizer Co.,* 220 N.C. 23.

(692)

WM. A. FRENCH AND JOHN McRAE, IN BEHALF OF THEMSELVES AND OTHERS v. THE BOARD OF COMMISSIONERS OF NEW HANOVER COUNTY.

Taxation, for State and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the Constitutional limitation.

There is no limitation however of the power of taxation, upon either State or county, for the payment of their lawful debts, created before the adoption of the Constitution.

This was an application for an INJUNCTION, to restrain the collection of certain taxes, heard by his Honor, *Judge McKoy*, at the Fall Term, 1875, of the Superior Court of NEW HANOVER County.

The following are substantially all the facts, as disclosed by the record sent to this court upon the appeal, which are necessary to an understanding of the points decided.

The plaintiffs, for themselves and on behalf of the other tax-payers in New Hanover County, allege, that the value of the taxable property in said county is about six million, one hundred and seventy-seven thousand dollars; that the aggregate of State tax upon all property liable to taxation, is thirty-eight (38) cents on the one hundred dollars value; and that the amount of the debt, owing by the county, contracted prior to the adoption of the Constitution of 1868, is thirty-five (35) thousand dollars, being evidenced by seventy bonds of five hundred (500) each, issued on the 1st day of March, 1869, payable ten years after date, and bearing interest at the rate of six *per cent.*, payable semi-annually.

The plaintiffs further say, that the county owes a large floating debt, contracted since the adoption of the Constitution; and they charge, that the alleged excess of taxation is not for the purpose of defraying the necessary current expenses of the county, but for the purpose of paying debts contracted long anterior to the year
(693) 1875, and since the adoption of the present Constitution.

That in the month of _____, 1875, the Board of Commissioners levied a tax upon the taxable property of the county, of seventy-two (72) cents on the one hundred dollars value, which, in their levy, they say is to be appropriated as follows: For general county fund, thirty five (35) cents on the one hundred dollars in value, and for the payment of the debts and interest, thirty-seven (37) cents.

That for the payment of the interest on the debt of thirty-five thousand (35,000) dollars, contracted before the adoption of the present Constitution, (the principal due March, 1879,) a levy of four and one-third (4⅓) cents, on the one hundred dollars in value, would produce a sum sufficient to pay said interest and cost of collection.

That by the Constitution, Art. V, Sec. 1, the State and county taxes combined, shall never exceed two dollars on every three hundred (300) dollars of taxable property. That the levy of seventy (70) cents on the one hundred dollars in value, is in excess of the constitutional

limitation; the State having levied a tax of thirty-eight (38) cents on the one hundred dollars in value there would remain but twenty-eight and two-thirds (28⅔) cents, to be applied for all county purposes, except the payment of the debt contracted before the adoption of the Constitution, which has hereinbefore shown to be thirty five thousand (35,000) dollars, the interest of which becomes due semi-annually; and that a levy of four and one-third (4⅓) cents on the one hundred dollars in value of the taxable property of the county, will pay the same. That said excess of taxation, so levied by the Board of Commissioners, amounts to seventy-four thousand and ninety (74,090) dollars.

That the Board of Commissioners has placed this tax list, containing this excess of thirty-nine (39) cents on the one hundred dollars in value of the taxable property of the county, in the hands of the tax collector, who is about to proceed to collect the same: (694) wherefore the plaintiffs pray, etc.

In answer to the complaint, the defendant denies that the value of the taxable property in the county of New Hanover, is as much as put down by plaintiffs, stating, that owing to frequent reductions in the valuation of property, since the tax list was made out, that the value thereof will not exceed six millions of dollars.

The defendant alleges, that the debt of the county contracted previous to the adoption of the constitution, is as follows: Thirty-five thousand (35,000) dollars, evidenced by seventy bonds, due 1st January, 1879, with interest payable semi-annually in gold, and which will amount to about twenty-five hundred (2500) dollars in currency; and the further sum of about fourteen thousand (14,000) dollars due and owing by said county, and incurred, as the Board has been informed, for the payment of divers debts and liabilities, contracted before the adoption of the constitution of 1868.

In regard to the "floating debt," alleged by the plaintiffs to have been contracted since the adoption of the Constitution, and the levies made by the Commissioners in excess of the constitutional limitation, and the appropriation of the aggregate so levied, to specific purposes, the defendant denies the allegations as set out in the complaint, and in explanation thereof, states:—That at a meeting of the Board on the 7th July, 1875, the following order was voted, to-wit:

"Whereas, it is necessary to levy sufficient taxes to meet the current expenses of the county of New Hanover, and to pay the debts created by the county authorities and the interest on the said debt—all created for the necessary expenses of said county: and whereas, the valuation of real property in the township of Wilmington, has been reduced to the amount of seven hundred thousand (700,000) dollars, through

the general reduction of values; it becomes necessary for the Board to levy the following taxes for the year 1875, viz: For current
(695) expenses, on the one hundred dollars of value of real and personal property, thirty-five (35) cents; for the payment of county debts and interest on the same, created for necessary purposes and old debts, on the one hundred dollars value of real and personal property, thirty-seven (37) cents. And at a meeting of the Board, held ____ day of October, 1875, the following order was passed, to wit: The foregoing order was amended by striking out the words "thirty-five," and inserting in lieu thereof, the words "twenty-eight and two-thirds," and the tax list was ordered to be accordingly reformed. And it was further ordered, that the foregoing order be further amended, so as to express the true intent and meaning of the Board, in this; That it was the purpose of the levy, (made by the Board the 7th July,) to set apart the sum of thirty seven cents of the same, for the payment of the old debts and the interest thereon, "it having been made to appear to the Board at the time of the levy aforesaid, that the whole amount of such old debts and interest, due and payable, was about the sum of sixteen thousand five hundred (16,500) dollars"; and the tax of thirty-seven (37) cents was considered by the Board, to be not more than fairly sufficient to raise the sum of sixteen thousand five hundred (16,500) dollars as aforesaid. And it was further ordered, that in that case, if there should be anything remaining of the tax of thirty-seven cents, after the payment and discharge of the debts, to the liquidation whereof it was appropriated, the remaining sum should be set apart to create a Sinking Fund, for the payment of the bonds of the county, issued for debts contracted previous to the adoption of the present Constitution. The defendant further and again states, that the tax of twenty-eight and two-thirds (28⅔) cents, on the one hundred dollar of taxable property, was laid for the necessary and indispensible expenses of the county government; and that the tax of thirty-seven (37) cents on the same, was for the payment of old debts, and the creation of a Sinking Fund, to meet the payment of
(696) the bonds issued for debts made before 1868, at their maturity.

The defendant denies that there is any floating debt against the county, made in 1875, or contracted since the adoption of the Constitution, unless it be for some scattering claims, the certificates for which have not been presented to the Treasurer for payment. The defendant alleges that the tax of twenty-eight and two-thirds (28⅔) cents is sufficient for the payment of the same, the aggregate amount not being greater than usually, and of necessity, exists, in the ordinary administration of the government.

A number of affidavits were filed, chiefly for the purpose of showing the nature of the debts of the county, whether old, (contracted before July, 1868,) or new, contracted since the adoption of the Constitution, and which, for the purposes of the decision in this case, it is deemed unnecessary to set out.

His Honor, upon hearing the complaint, answer and affidavits, and the former order, vacated the restraining order granted upon the first application of the plaintiff, and refused to continue the injunction.

From this judgment, the plaintiffs appealed.

M. London and A. T. & J. London, for appellants.
Russell and W. S. & D. J. Devane, contra.

BYNUM, J. The judgment of the court below, vacating the restraining order, must be affirmed. It admits of no dispute now, that taxation for State and county purposes combined, cannot exceed the constitutional limitation, for their necessary expenses and new debts. It is equally well settled, that there is no limitation of the power of taxation, upon either State or county, for the payment of their lawful debts, created prior to the adoption of the Constitution. If what are often miscalled the "necessary expenses" of a county exceed the limitation prescribed by law, the necessity cannot justify the violation of the Constitution. In such cases two remedies are open to the county. (697) One is to apply to the Legislature, if the tax is required for a special purpose. The Constitution, Art. V, Sec. 7, empowers the Legislature in such cases to give a special approval for an increased levy. The other and better way, however, is *to reduce the expenditures.* The old proverb, "cut the garment according to the cloth," has in it much practical wisdom. It is illustrated every day in private life, and is the foundation of individual integrity, contentment and success. In every relation of wholesome life, men adapt their wants and expenditures to their income. No good reason can exist why the same obligation does not rest upon corporations, and is not equally as practicable. Instead of which, as things now go, those who are entrusted with other people's money and property, whether States or counties, instead of practising prudence and economy in the discharge of their trust, seem emulous of each other in extravagance. The end of such a course is easily seen, and must be one of disaster and disgrace.

This is one of many cases now before the court, where the tax-payer is claiming the protection of the law against the onerous, growing and oppressive weight of taxation. In regard to the payment of the old debt, this court has no power to interfere with the discretion of the

Board of Commissioners as to the time of payment, or other details in the levy and collection of taxes, where they are not more than sufficient to discharge the whole debt. The power of the Board is express and plenary. "To provide by taxation or otherwise, for the prompt and regular payment, with interest, of any existing debt due by bond or otherwise, from any county, except a debt, or the interest on any debt, contracted directly or indirectly in aid or support of the rebellion." Bat. Rev., Chap. 27, Sec. 8. It is not disputed that the county of New Hanover owes an old bonded debt of $35,000, bearing interest, and we are satisfied, also, that the debt of ten thousand dollars, due to the bank of New Hanover, being the sum borrowed to pay an old
(698) debt, is itself an old debt, in the sense of the Constitution. It is the duty of the commissioners to levy and collect a tax sufficient to pay this and every other old debt now due. It is also their duty to pay the accrued interest upon the bonded debt of $35,000. It is, however, not their *duty* to pay any part of the principal of this latter debt until 1879, when it becomes payable. Yet this bonded debt is now due, and became so when it was contracted, though the time of payment is deferred. Unquestionably, the county, just like an individual debtor, may anticipate the day of payment, and pay the debt before compellable by suit to pay it. It is always lawful, and often the highest wisdom, to do so, especially where the debts are large, and their entire payment at one time would be more burdensome than payment in installments, at convenient intervals. This is a matter for the consideration of the Board of Commissioners. They are invested by law with the power and the discretion. When the power is not illegally exercised, the courts cannot interfere. It is alleged in the complaint, that the tax of thirty-seven cents will raise money more than sufficient to pay the interest upon the bonds and the remainder of the old debt—stated by the defendants to be, in the aggregate, $16,500. Admit that to be so. It will not pay all the bonded debt of $35,000. If there is a surplus, after discharging the claim of $16,500, the Board cannot appropriate it to their own, or to other uses than the payment of the bonded debt. The courts will enforce the application of the tax, first, to the payment of so much of the old debt and interest as is now due, and next, the residue to the extinguishment of the principal of the bonded debt. The complaint and affidavits do not charge a fraudulent purpose in the commissioners, either in the assessment of the tax or in the intended application of it. The answer negatives any such purpose. We are to assume, then, that the Board of Commissioners are acting honestly, and in the supposed discharge of their duties. The question, therefore, is simply
(699) one of power. That they have the power to assess and levy

taxes sufficient to pay the old debt, there can be no doubt. That they are illegally abusing their powers, nowhere appears. It follows that there is nothing in the case to invoke the injunctive relief of the court. Whether the commissioners are acting prudently in this tax assessment, is a question about which minds will differ. A sinking fund may not be the best way of paying the debt. The financial history of the country is adverse to that policy, and we do not decide that the law has conferred upon the County Commissioners the authority to create a sinking fund. But they undoubtedly have the power to buy up their bonds before payable, and retire so much of the debt, and it will be a healthy sign if they can do so.

We hold that the State tax of 38 cents and the county tax of 28⅔ cents on the hundred dollars of valuation exhausts the constitutional limitation of taxation for current expenses, and that the tax of 37 cents on the hundred dollars of valuation for the payment of the old debt is legal, and that the sum to be realized thereby must be set apart and applied solely to the payment of so much of the debt and interest as may be now due, and the surplus, if any, must be applied in extinguishment of the bonded debt.

As the Board of Commissioners gave rise to this action by the illegal assessment, (Which was reduced after action begun to the constitutional limit,) and as they have not, in their answer, made a clear and satisfactory exhibit of the county debt, and their own proceedings in relation thereto, they must be taxed with the costs.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Carrow v. Comrs., 74 N.C. 701; *Griffin v. Comrs.*, 74 N.C. 706; *French v. Wilmington*, 75 N.C. 482; *Clifton v. Wynne*, 80 N.C. 147; *Cromartie v. Comrs.*, 87 N.C. 139; *Barksdale v. Comrs.*, 93 N.C. 476; *Board of Education v. Comrs.*, 107 N.C. 112; *Herring v. Dixon*, 122 N.C. 423; *R. R. v. Comrs.*, 148 N.C. 234; *Tarboro v. Staton*, 156 N.C. 512; *Moose v. Comrs.*, 172 N.C. 465; *Bennett v. Comrs.*, 173 N.C. 628; *R. R. v. Cherokee County*, 177 N.C. 90; *R. R. v. Comrs.*, 178 N.C. 452, 453; *Kornegay v. Goldsboro*, 180 N.C. 448, 450; *Proctor v. Comrs.*, 182 N.C. 59; *Huneycutt v. Comrs.*, 182 N.C. 322; *Person v. Watts*, 184 N.C. 538; *Wolfe v. Mt. Airy*, 197 N.C. 452; *Glenn v. Comrs.*, 201 N.C. 236, 238, 240; *Power Co. v. Clay County*, 213 N.C. 703.

(700)
SAMUEL T. CARROW v. THE BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

(For the Syllabus, see the next preceding case of *French and McRae v. The Commissioners of New Hanover, ante*, page 692.)

CIVIL ACTION for an Injunction, heard before *Moore, J.*, at Fall Term, 1875, of the Superior Court of BEAUFORT County.

The action was brought by the plaintiff in his own behalf, and in behalf of all other taxpayers, etc., to restrain the collection by the defendant, the Board of Commissioners of Beaufort County, of the excess of tax levied by the defendant over and above the amount allowed by law.

The following are the facts found by the court: The defendant has levied a tax which, together with the State tax of 40 cents on the $100 valuation, amounts to $1.14 on the $100 valuation, being an excess of 47⅓ cents over and above the supposed limitation in the Constitution of 66⅔ cents on $100 valuation.

The levy made by the defendant on property is absolutely necessary to pay the expenses of the county, and that 26⅔ cents, the unappropriated portion of the supposed limitation not taken by the State, is not sufficient to pay as much as one-third of the expense of the county for one year.

There is an existing debt against the county, contracted since 1868 of about $8,000. The current expense of the county from year to year is from $13,000 to $15,000.

The defendant endeavored to obtain possession of the revenue act before the General Assembly adjourned, but failed to do so, and could not ascertain to what extent the supposed limit had been exhausted.

The defendant has observed the equation, and levied a tax of $3.42 on the poll. The tax levied does not exceed double the State tax.

Upon the hearing the court granted an order to the following
(701) effect: that the defendant be enjoined from collecting for county purposes beyond twenty-six and two-thirds cents upon the hundred dollars valuation of property, and eighty cents upon the poll.

From this order the defendant appealed.

Fowle, for appellant.
Gilliam & Pruden, contra.

RODMAN, J. The only question presented in this case, is decided in *French and McRae v. Commissioners of New Hanover, ante*, 692. It is unnecessary to repeat the reason there stated.

PER CURIAM. Judgment accordingly.

W. W. GRIFFIN AND OTHERS, TAX PAYERS, ETC., v. THE BOARD OF COMMISSIONERS OF PASQUOTANK COUNTY.

(See the Syllabus in the preceding case of *French and McRae v. The Commissioners of New Hanover County, ante,* page 692.)

The County Commissioners of Pasquotank had no authority in 1875, to levy taxes exceeding the Constitutional limitation, under and by virtue of the provisions of an Act of the General Assembly, passed in 1869, and permitting such excess to the amount of twenty thousand dollars, when it appears that since the passage of that act, the Commissioners have levied over twenty thousand dollars for various objects, without regarding the limit and equation fixed by the Constitution.

This was an application for an INJUNCTION, to restrain the defendants from collecting certain taxes, heard by *Eure, J.*, at Chambers, on the 19th day of November, 1875.

The plaintiffs, for themselves and for all others who would (702) come in and be made parties to this proceeding, alleged that the defendants in the month of _____, 1875, levied upon the taxable property of Pasquotank County, a tax of one hundred cents on the one hundred dollars of taxable property, which exceeds the limit fixed by the Constitution by eight thousand dollars, or seventy-three and one-third cents on the hundred dollars of taxable property.

That the tax levied on the poll by the defendants, was only eighty cents, less than the amount levied on one hundred dollars valuation of property, in direct violation of Art. V, sec. 1, of the Constitution; and that the defendants had no right under the Constitution to levy more than eighty cents on every three hundred dollars valuation of property, that being the sum levied on the poll.

That the defendants in their order declare, that seventy-six cents of the one hundred levied, is to be used for ordinary county purposes, and the remaining twenty-four cents for the support of the poor; that said tax was not levied by the defendants to pay debts of the county contracted prior to the adoption of the present Constitution, nor for any special purpose approved by the General Assembly; nor were such taxes levied to defray the necessary expenses of the county.

That the State tax on property and polls in the county of Pasquotank for the year 1875, was $5,765.23 for every and all its purposes, while that levied for county purposes, was $12,326.64, an amount much more than double that levied by the State. That the taxes on property amount to $11,339.05, while that on polls only amount to $987.59, which is wholly iniquitous and unjust, and must have been known to the defendants at the time.

That the proposition to levy this tax was never submitted to a vote of the people; that the defendants have exceeded the constitutional limit of taxation, by the sum of seventy-three and one-third cents on the one hundred dollars valuation of property; and that they
(703) have ordered this unjust and oppressive tax to be collected.

His Honor, upon the plaintiff's giving bond, ordered a restraining order to issue to defendants until the hearing; at the same time requiring the defendants to show cause by the 13th of November, 1875, why the injunction should not be made perpetual.

The defendants answered, denying the material allegations of the plaintiffs, and contended: That Art. IV, Sec. 1, of the Constitution, imposed a limitation only on taxes levied by the State, and not on taxes levied by the counties; that the only restriction upon taxation by the counties is contained in Art. V, Sec. 7, of the Constitution; which provides that the taxes levied by the Commissioners of the several counties for county purposes, shall never exceed the double of the State tax, except for a special purpose, and with the approval of the General Assembly; and the defendants aver, that they have conformed strictly to said Sec. 7, Art. V, in making the levy complained of.

The defendants say, that the aggregate of the State tax levied in said county in 1875, was thirty-eight cents, and not forty cents as alleged; and that under said Sec. 7, Art. V, and under an act of the General Assembly, they have full authority to make the levies as they did in the said year, 1875. They admit that they levied a tax of one hundred cents on the one hundred dollars valuation of taxable property, but deny that by so doing they exceeded the amount they were authorized to levy, seventy-three and one-third cents on said valuation as alleged, or any other sum. On the contrary, the defendants aver that seventy, of said one hundred cents, were levied for county purposes, and not exceeding the double of State tax; they had a right, under Sec. 7, Art. V, of the Constitution, and also by virtue of the provisions of an act of the General Assembly, ratified 9th of April, 1869, (Chap. 142, Laws of 1868-69,) to levy the same; that twenty-four cents
(704) of said tax was for the special purpose of supporting the poor, under the express authority of the act above referred to; and that the remaining six cents was a tax to pay the interest and part of the principal of certain bonds outstanding against the county, and representing a debt contracted prior to the adoption of the present Constitution of the State; and that the taxes levied were essential and necessary for the purposes recited.

The defendants admit the levy of eighty cents tax on the poll, and that the same is less than that levied on the hundred dollars of property, but they deny that this is in violation of the constitutional provisions referred to.

The defendants contend, that under the act of the General Assembly referred to, that they had a right to levy the sum of twenty thousand dollars ($20,000.00) more than double the taxes levied by the State, and that by virtue of said act, they have heretofore only levied twelve thousand, four hundred and twenty-six dollars and forty-one cents, ($12,426.41,) in excess of double of said tax; and that the amounts levied in 1870 and 1871 was for the purpose of paying debts contracted before 1868; and that thus no part of the twenty thousand dollars ($20,000,) authorized to be raised, has been expended for the specific purposes designed and recited in said act.

His Honor, upon the hearing of the complaint and answer, and argument of counsel, delivered the following opinion and judgment:

1. That for the purpose of paying the debts of the county, contracted prior to the adoption of the Constitution in 1868, taxes may be levied by the Commissioners without regard to the constitutional limitation and equation; they are therefore allowed to collect the six cents on the one hundred dollars valuation of property levied by them in 1875 for that purpose.

2. That for the payment of debts contracted since the adoption of the Constitution, and the other expenses of the county, the constitutional limitation and equation between property and poll must be observed and followed. And as the defendants this year (705) (1875,) have levied eighty cents on the poll, they are allowed to collect twenty-six and two-third cents on the one hundred dollars valuation of property, (that being one-third of said poll tax); and as to the excess over these two amounts, they are restrained and enjoined from collecting.

3. It is found as a fact by the court, that the county commissioners have levied and collected since April, 1867, fifteen thousand dollars ($15,000) to pay the debt of the county existing at that time; and for purposes other than paying the outstanding obligations of the county at that time, have collected twenty-seven thousand, one hundred and ninety-seven, 32-100 dollars, ($27,197.32,) both of which amounts were levied and collected without regard to and in excess of the limitation and equation provided for in the Constitution.

It appearing therefore, that more than twenty thousand dollars, ($20,000,) have been levied and collected for purposes other than for the payment of the outstanding obligations of the county in April, 1869, without regard to and in excess of the constitutional limitation and equation, in regard to poll and property: *It is considered* by the court, as a conclusion of law, from the above facts, that the defendants have no further authority to make levies of taxes under the special act of April, 1869. And the defendants are therefore ordered to collect of

the taxes levied this year, (1875,) the six cents on the hundred dollars valuation of property, to pay the debt of the county, contracted prior to the adoption of our existing Constitution, without regard to the limitation or equation therein contained; and then to collect twenty-six and two-third cents on the one hundred dollars valuation of property,—one-third of the eighty cents poll tax; and as to the excess over these amounts, the defendants are hereby enjoined and restrained from collecting.

From this ruling and judgment by his Honor, the defendants appealed.

(706) *Pool, for appellants.*
Gilliam & Pruden, contra.

RODMAN, J. The principal question presented in this case is that decided in *French and McRae v. Commissioners of New Hanover, ante,* 692. For the reasons stated in the opinion in that case, we think the Commissioners in this case have no power to levy a tax exceeding twenty-six and two-thirds cents on the hundred dollars of valuation, or a poll tax exceeding two dollars.

We also concur with the Judge below, that the Commissioners have exhausted their powers of taxation under the special act.

Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: Board of Education v. Comrs., 107 N.C. 112; *R. R. v. Comrs.,* 178 N.C. 453.

(707)

THE RICHMOND & DANVILLE R. R. CO., N. C. DIVISION, v. CURTIS H. BROGDEN, GOVERNOR, ETC., AND OTHERS.

The General Assembly has no right to confer upon the Governor, Treasurer and Auditor, the power to value the tangible, real and personal property of a Railroad corporation; for such power is vested by the Constitution in the Township Board of Trustees alone, and cannot be taken from them.

The franchise of a corporation is property; and the franchise of a railroad corporation should be assessed for taxation separate and apart from its other property, and without taking such other property into consideration.

A dividend of fifteen or twenty per cent, paid in Confederate money, is not such a dividend as was contemplated in the charter of the N. C. Railroad Company, in exempting the real estate of the company from taxation, until the dividend of profits of said company shall exceed six *per cent.;*

nor is the six *per cent*, rent received from the Richmond & Danville Railroad Company, such a dividend of profits.

CIVIL ACTION, for an *Injunction*, heard before *Watts, J.*, at June Term, 1875, of WAKE Superior Court.

The allegations of the complaint are substantially as follows: The plaintiff is a corporation, existing under the laws of the State of Virginia, owning and controlling railroad lines in that State, and in North Carolina.

The North Carolina Railroad Company, by virtue of authority conferred by its charter, leased its property and franchises to the plaintiff for thirty years, and under the provisions of said lease, it is the duty of the plaintiff to pay all taxes accrued on the North Carolina Railroad Company, not to exceed ten thousand dollars in the aggregate.

The defendant, Curtis H. Brogden, is Governor of the State of North Carolina, the defendant, John Reilly, is Auditor, and the defendant, David A. Jenkins, is Treasurer of said State, having been incumbents of their respective offices since the first day of January, (708) 1873.

By an act entitled "An Act to provide for the collection of taxes by the State and several counties of the State on property, polls and income, Chap. 115, Laws 1872-73, re-enacted by Sec. 10, Chap. 133, acts 1873, it was made the duty of the President of the plaintiff corporation, to give in the value of the franchise of the N. C. Railroad Company, on the day fixed by said act, for giving in taxable property to the Treasurer of the State, and the same to be assessed by the Treasurer, the Auditor and the Governor of the State, and their valuation to be returned to the County Commissioners of the counties in which any part of said road lies. And it is provided by said act, that the tax upon such franchise, so valued, shall be the same as upon property of equal value; and that the tax collected in each county and township shall be in proportion to the length of such road lying in such county or township respectfully; and such taxes shall be collected in the same manner as other taxes are required by law to be collected, and that the rolling stock of such company shall be valued with the franchise.

The President of the plaintiff corporation, in accordance with the above act, gave in to the Treasurer of the State a list of all the property, distinguishing real from personal property, including rolling stock of the N. C. R. R. Co., in the manner and form required by said Treasurer, affixing the value to each item of property. The total real estate, including right of way, turn-outs, bridges, depots, etc., was given in at $1,530,579.12, and the total personal property, including rolling stock, tools, etc., at $422,262.05. But the President of the plaintiff corporation *protested* in giving such lists:

1. That no tax could be lawfully levied on any of the real estate of the company, its workshops, right of way, etc.

2. That no tax could be levied lawfully on the franchise, sepa-
(709) rate from the said property, and that the franchise, without the real estate, is valueless.

By Chapter 32, Sec. 5, of an act of the General Assembly, enacted in 1854-55, entitled "An act for the completion of the North Carolina Railroad," which was duly accepted and is a part of the charter of said company. It is enacted "that all real estate held by said company, for right of way, for station places of whatsoever kind, and for workshop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum," and that the contract so made between the State and the corporation plaintiff cannot be violated by the State.

The dividends of profits of the North Carolina Railroad Company have never exceeded six per centum per annum.

By the terms of the lease from the said company to the plaintiff, the plaintiff agrees to pay said company 6½ per centum per annum on its capital stock. Of this amount the North Carolina Railroad Company uses more than one-half per cent in payment of interest, creating a sinking fund, and other necessary expenses.

The defendants insist, that in consequence of the payment of 6½ per centum per annum by the plaintiff on the capital stock of said company under the lease aforesaid, they have a right, and are legally bound, to estimate the value of said real estate in assessing the value of the franchise, and have accordingly, in the year 1872-73, valued the franchise in an unlawful manner, much more than they would have valued the same if the real estate had not been included.

The corporation plaintiff paid the taxes assessed for the year 1872, under protest that the amount was excessive and would be demanded back, and also paid the taxes for 1873 in the same manner.

The plaintiff has petitioned the defendants to revise their assessments of the valuation of said franchise made in 1872 and 1873, and to assess the valuation without reference to the real estate aforesaid, but
(710) they have refused to do so, and avow their intention to include said real estate in the assessment of 1874, and continually thereafter.

The complaint demands judgment:

I. That the defendants be restrained by injunction, especially until the hearing, and thereafter perpetually from including the real estate in the valuation of the franchise of the North Carolina Railroad Company, or to any degree enhancing the valuation of said franchise by reason of its possessing real estate for right of way, for station places

of whatever kind, and for workshop location until the dividends of profits of said company shall exceed six per centum per annum.

II. That defendants be restrained by injunction, specially until the hearing, and perpetually thereafter, from assessing the valuation of the franchise of said North Carolina Railroad Company.

III. That a peremptory *mandamus* issue to the defendants, commanding them to revise the valuation of the franchise of said company, made in the year 1872, and likewise the valuation made in 1873, and to assess said valuation without reference to the possession by said company of any real estate, right of way, for station places of whatever kind, and for workshop location.

Upon motion before *Henry, J.*, at Chambers in Wake County, September 19th, 1874, a restraining order was issued to the defendants and they were ordered to show cause at the next rule day why the relief demanded by the plaintiff should not be granted.

At Fall Term, 1874, the defendants filed an answer to which the plaintiff demurred.

1. Because the admissions therein contained establish the cause of action stated in the complaint.

2. Because the said answer does not deny any material allegation stated in the complaint.

Upon the hearing of the cause the demurrer was sustained and the court rendered judgment in accordance with the prayer of (711) the complaint. The defendants appealed.

Attorney General Hargrove and Smith & Strong, for the appellants.
Battle, Battle & Mordecai, contra.

SETTLE, J. It is decided in the *Wilmington, Columbia & Augusta Railroad Company v. The Board of Commissioners of Brunswick County*, 72 N. C., 10, and in the *Richmond & Danville Railroad Company v. The Board of Commissioners of Orange County, ante*, 506, that the General Assembly has no right to confer on the Governor, Treasurer and Auditor the power to value the tangible real and personal property of a Railroad Company, for that such power is by the Constitution vested in the township trustees alone, and cannot be taken from them. In view of the decisions, the learned counsel of the defendants, admits that the question intended to be presented when this action was brought cannot now arise.

Nor can it be seriously contended that a dividend of fifteen or twenty per cent, paid in Confederate money in 1863-64, was such a dividend as is contemplated by the provision exempting the real estate of the Company from taxation until the dividends of profits of said Company

shall exceed six per centum *per annum*. Nor can it be maintained, because the Richmond & Danville Railroad Company pays to the North Carolina Railroad Company as rent, six and a half per cent per annum upon their capital stock, that that is a dividend exceeding six per cent in contemplation of the charter, for it is admitted that the North Carolina Railroad Company uses one-half per cent and more, in payment of interest, in creating a sinking fund and for other necessary expenses.

Now as to the power of taxing the franchise.

Mr. Justice DAVIS in delivering the opinion of the court in
(712) *Wilmington Railroad v. Reid*, 13 Wall., 264, says: "Nothing is better settled than that the franchise of a private corporation, which in its application to a railroad is the privilege of running it and taking fare and freight, is property, and of the most valuable kind, as it cannot be taken for public use even, without compensation. It is true it is not the same sort of property as the rolling stock, road bed, and depot grounds, but it is equally with them, covered by the general term 'the property of the Company,' and therefore, equally within the protection of the charter." The exemption in the charter of the Wilmington Railroad is larger than in the charter now under consideration, the one extends to *all the property* of the Company, whereas the other only exempts the *real estate* held by said Company for "right of way for station places of whatever kind, and for workshop location;" but leaves the franchise and personal property of the corporation subject to taxation.

Something was said upon the argument as to the manner in which the franchise should be valued. Of course the franchise of running a railroad between large cities and through a rich country would be more valuable than that of a short road between unimportant points. The franchise of running ferry boats between New York and Jersey City is more valuable than that of running them over the Yadkin River. The value of a franchise depends upon divers considerations. And while the charter of the North Carolina Railroad Company protects from taxation the real estate of the Company until a certain event shall come to pass, yet all the privileges conferred by the charter, such as holding valuable real estate free from taxation, etc., may be taken into consideration in estimating the value of the franchise. But in 1874, the Legislature passed an act amending the charter of the North Carolina Railroad Company, and the Company accepted the amendment. And now Mr. Smith contends that this amendment makes, in substance, a new incorporation, and places the charter under the control of
(713) the General Assembly, by virtue of the Constitution adopted in 1868. "Corporations may be formed under general laws, but

shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporations cannot be obtained under general laws. All general laws and special acts passed pursuant to this section, may be altered from time to time, or repealed." Const., Art. VIII, Sec. 1.

The words of the Constitution confines the power of the General Assembly to alter or repeal laws, in the nature of contracts, to such laws as shall be passed after the adoption of the Constitution, and we see no reason for construing them differently from the plain import. The amendment which is said to have effected this great change does not profess to repeal the clause of the charter which exempts the real estate of the Company from taxation, and indeed, has no allusion whatever to the subject of taxation.

So the defendants must maintain that the slightest amendment to an old charter, not professing to alter or in any manner interfere with its most important provisions, works an entire change and puts the whole charter at the will of the Legislature. This cannot be so. In accepting the amendment the Company did not waive any of its privileges under its charter, save such as are embraced by the amendment.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: R. R. v. Comrs., 77 N.C. 5; *R. R. v. Comrs.*, 82 N.C. 262; *Belo v. Comrs.*, 82 N.C. 417; *R. R. v. Comrs.*, 87 N.C. 134.

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(714)

A. A. BROWN v. A. L. KEENER.

The Act of the General Assembly, passed at its session of 1873-74, and entitled "An Act to secure a better drainage of the low lands on Clark's creek and Maiden's creek in the counties of Lincoln and Catawba," is not unconstitutional.

The public power of a State (which is a part of its general legislative power,) extends to the providing for every object, which may be reasonably considered necessary for the public safety, health, good order or prosperity, and which is not forbidden by some restriction in the State or Federal Constitution, or by some recognized principle of right and justice found in the common law.

BYNUM, J., *dissenting.*

CIVIL ACTION, for a penalty, originally commencing in the Court of a Justice of the Peace, was carried before his Honor, *Judge Mitchell,* at

Chambers, in CATAWBA County, and heard 29th of May, 1875, upon the following

CASE AGREED:

"This was an action of debt, brought by the plaintiff to recover the sum of four dollars from the defendant, for failing to work on Clark's and Maiden's creek, under the act of Assembly, passed at the session of 1873-74, Public Laws, Chap. 102, and the act amending the same, passed by the General Assembly at its session, 1874-75, entitled 'An Act to secure the better drainage or low lands of Clark's and Maiden's creeks, in the counties of Lincoln and Catawba.'

"It was agreed by the counsel for both plaintiff and defendant, that the requirements of the act had been complied with; and that the points mentioned in said act, from the bridge at James Caldwell's to the foard at the creek near the Ann Bost Place, is about eighteen miles: that the said creek had been laid off into convenient sections; and that
(715) the defendant had failed to work as notified; that said creeks are about twenty feet wide, and will average when in bank, about two feet deep. That there is a large quantity of low grounds along the said creeks, which are wet and marshy, too much so for cultivation.

"It was further agreed, that along said creeks a number of the resident citizens had chills and fevers."

Upon the foregoing facts admitted, his Honor affirmed the judgment of the Justice of the Peace, which was in favor of the plaintiff. From this judgment, the defendant appealed, stating as ground therefor, that the said acts above mentioned, were unconstitutional and void, and that the Legislature had no power to pass the same.

Shaw, Hoke and Battle, for appellant.
M. L. McCorkle, contra.

RODMAN, J. By the act of 1873-74, Chap. 102, certain persons in Lincoln County were appointed commissioners for Clark's Creek, and certain other persons, in Catawba County, for Maiden's Creek, to lay off portions of said creeks between certain *termini* on each, into sections of convenient length, and to appoint an overseer for each section. Provision is made for the permanence of the commissioners as a body, by the filling of vacancies by the survivors. By Section 3 it is enacted, "that the commissioners shall estimate the number of acres of bottom land on said creeks between said termini, belonging to each land owner within their respective counties, and each land owner, when required, shall furnish one hand for every twenty-five acres (amended in respect to the number of acres by the act of 1874-75,) owned by him, or shall forfeit two dollars for each failure, to be recovered by the overseer of

the section, as in case of failure to work on a public road. The hands so furnished shall work under the overseer not less than four nor more than twenty-four days in each year, at the discretion of the commissioners, "on the channels of said creeks, with power to (716) straighten the same when necessary, within the bounds of their respective sections, removing obstructions and improving the banks thereof, under such directions as said commissioners shall prescribe."

The other sections are not material for this case.

1. It will be seen that the act is defective in failing to define what persons shall work on each particular section, either by authorizing the commissioners to attach all persons living within a certain defined district to each section; or to name the persons subject to work on each section, as is prescribed by law in respect to public roads. Probably a grant of this power to the commissioners might be implied; but as no question is made upon it, we pass it over. The case agreed is also defective, inasmuch as it does not state that the defendant was an owner of bottom land, or had been assigned to any section, or was in any way under a liability to do the work required.

As this evident and fatal objection to the plaintiff's recovery was not taken by counsel, we assume that it was the purpose of the defendant to waive it, and to rest his defence solely on the ground taken by his counsel in argument, viz.: that the act is unconstitutional.

2. It is too late to question that the public power of a State (which is a part of its general legislative power), extends to the providing for every object which may be reasonably considered necessary for the public safety, health, good order or prosperity, and which is not forbidden by some restriction in the State or Federal Constitution, or by some recognized principle of right and justice found in the common law. It is unnecessary to consider at present the limits of this extensive power, since it clearly includes the right to provide for and compel the clearing out not only of such water courses as are naturally navigable, but of all such water courses and drains as are not and never were navigable, but which are necessary for carrying off the sur- (717) plus rain water, thereby promoting the public health, and enabling a considerable portion of territory otherwise uninhabitable to be brought into cultivation. *Norfleet v. Cromwell,* 70 N. C., 634; *People v. Mayor of Brooklyn,* 4 Const. R., 440; *Carter v. Tide Water Company,* 18 N. J., 54; *State v. Blake,* 36 N. J., 442; *Reades v. Treasurer of Wood Co.,* 8 Ohio, N. S., 343. Cooley Const. Lim., Chap. XVI; 2 Dillon Mun. Corp., Sec. 506.

At an early period, the General Assembly of North Carolina, by an Act (Rev. Code, Chap. 100) entitled "Rivers and Creeks," recognized the power and duty of the State, to open and clear out its inland rivers

and streams, and gave to the County Courts powers in that respect similar to those for opening and repairing roads. That Act also prohibited obstructing the passage of boats in such streams by felling trees. Before and since the Revised Code, very numerous Acts have been passed, prohibiting felling trees in particular streams many of which never were navigable, or of use, except as constituting the natural drain ways of the country.

The right to the use of natural drains was in their natural condition, for drainage is as much *publici juris*, as the right to navigable waters for navigation; and at common law no one has a right to obstruct them to the injury of another. *Krufman v. Greisegner*, 26 Pa., 407.

3. Starting with this doctrine as to the extent of the police power of the State, we proceed to consider the objections made to the Act in question.

The act substantially incorporates certain persons named, and empowers them to determine who are the owners of the bottom lands on the creeks named above, and of course what is bottom land, the area of ownership and the consequent liability. These corporators, for ought that appears, are strangers to the lands; they form what is called a close corporation, keeping up a perpetual succession by electing to fill vacancies in the body. The owners of the land have no voice in
(718) the corporation, and are not required to be consulted in regard to the operations. And no means are expressly provided by which any error which the Commissioners may commit, can be reviewed in a court.

That the act is objectionable in several respects, and liable to abuse, and likely in practice, to lead to much litigation, must be admitted. But its wisdom is not the question before us. If it be within the constitutional powers of the Legislature, we cannot declare it void.

It is argued for the defendant: *First*, That it does not appear that the object to be accomplished is one of any public utility, however local. It was said in *Norfleet v. Cromwell*, 70 N. C., 634, that if an object was of the class of those which might be of public utility, an act of the Legislature was at least *prima facie* evidence that the particular object contemplated was of that character.

Whether the object be of *public* utility at all, and whether of general, or only of local utility, is for the Legislature to decide. In general, an act which authorizes a corporation or public officer to make an assessment on the property owners within a given locality, to pay the expense of a certain improvement, must be taken to be a legislative declaration that the improvement is of public, though of local, utility and benefit. No recital or express declaration to that effect, is usual or can be necessary, any more than a recital or express declaration that a railroad (for

example) for the building of which a State tax is laid, is of general public utility, is usual or necessary in its charter, or in the act levying the tax.

Whether the Act authorizing a local assessment for a local improvement, contains such an express recital or declaration, or not, it is open to any one grieved to impeach it as a violation of his private right, and if it can be made clearly to appear that the object proposed is not, in fact, one in which the public has an interest, and that the assessment has been made upon persons who have not consented to it, and are not benefited by the improvement, or that the assessment (719) exceeds the estimated benefit; in all such cases the act is, in effect, the taking of one man's property for the benefit of another, and beyond the constitutional power of the Legislature. The courts are bound to declare such an act void. *Cypress Pond Drainage Co. v. Hooper,* 2 Metcalf, (Ky.) 350; *Coster v. Tide Water Co.,* 18 N. J., 54; *State v. Blake,* 36 N. J., 442.

In this case the object proposed is certainly of a class which may be of public local utility, and there is no evidence to show that in fact it is not. In the absence of such evidence, we cannot presume that the Legislature acted illegally. There is nothing in the record in the case to justify the court in declaring that the cleaning and straightening these creeks did not tend to promote the health and welfare of the public in that locality, and was not of public, as distinct from mere private advantages.

Secondly. That the rate of taxation should be upon each land owner within the locality, according to the benefit that it may be estimated he will receive, and not according to the number of acres he may own. Different tracts may be benefited in very different degrees, and some may be even damaged. And further, that the amount of work which may be required to be done is not limited by the estimated value of the benefit, but may exceed it.

The rule suggested would certainly seem in general to be the just and equitable one, when the value of the benefit to be received can be calculated with reasonable certainty.

There are, however, numerous authorities in this State and others, which hold that the Legislature is not obliged to adopt it, but may assess the owners of the land to be benefited according to the acres owned by them respectively, or by some other rule not evidently unequal and unjust.

In *Buncombe Turnpike Co. v. McCarson,* 18 N. C., 306, the Legislature had chartered a company with power to build a turnpike and take tolls. The act required all men living within two miles of the road to do a certain amount of work on it under a penalty in (720)

case of failure, and exempted such persons from tolls, giving them, however, no choice to pay tolls in lieu of the work if they should prefer to do so. The act was held constitutional.

In *Wilmington v. Yopp,* 71 N. C., 75, the corporate authorities of the city required each owner of a lot fronting on a certain street to pave the sidewalk in front of his lot under a penalty, and this by-law was supported. Cases to the same effect with this in other States are too numerous to be cited.

In *Egyptian Levee Co. v. Hardin,* 27 Mo., 495, the case was that the Legislature of Missouri had incorporated the land owners of a certain district of low land, with power to raise levees and cut canals for the purpose of reclaiming the lands from inundation, and empowered the company, in order to meet the expense, to tax the land not over fifty cents per acre. The constitution of Missouri contains a clause similar to that in ours, requiring uniformity of taxation. But it was held that this was not a tax, but an assessment to which the rule did not apply, and the act was sustained. See also *Ruve v. Treasurer of Wood County,* 8 Ohio N. S., 333.

Thirdly. That there is no provision that the assessment in labor shall not exceed the value of the estimated benefit to the land in respect to which it is required.

This objection might have been made in the Buncombe Turnpike case, but it does not appear to have occurred to either the counsel or the court. On that account we do not consider the decision in that case as being an answer to it. What was not considered, cannot be said to have been decided.

We think, however, that the mere possibility that such may be the case, will not justify us in declaring the act in question void. When such a case shall be presented, it will be time enough to consider it. We have no such case now.

Fourthly. That no provision is made for the compensation of
(721) any land owner who, instead of being benefited, is damaged by the improvement. It will suffice to say, that although such a provision might have been proper, it was not essential. If such a case shall occur, the party injured can obtain redress under the general law, by action against the corporation or its members, according to the nature of the case. It is not for us to point out the manner of the remedy.

Fifthly. That no provision is made by which any errors which the commissioners may commit, either in determining what are bottom lands, or who are the owners of such lands, may be brought into a court for correction.

It is clear that before a recovery can be had for any penalty all the facts necessary to show the liability of the defendant must be alleged and proved.

And if the commissioners shall commit any error to the injury of any one, which cannot be corrected by the ordinary process of law, it is settled that the proceedings of all persons acting in a *quasi* judicial character, may be brought before the courts for review by *certiorari*. *State v. Bill*, 35 N. C., 373.

Our opinion in the present case is, that the plaintiff is entitled to recover.

PER CURIAM. Judgment affirmed.

Cited: Gamble v. McCrady, 75 N.C. 512; *Pool v. Trexler*, 76 N.C. 297; *Winslow v. Winslow*, 95 N.C. 28; *Hutton v. Webb*, 124 N.C. 757; *Porter v. Armstrong*, 139 N.C. 180; *Durham v. Cotton Mills*, 141 N.C. 644; *Lang v. Development Co.*, 169 N.C. 664.

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(722)

GIDEON PERRY AND OTHERS v. H. M. TUPPER.

What amounts to a voluntary withdrawal of members from a religious association, is a question of law; and the exclusion of evidence, tending to establish certain facts from which the legal inference might be drawn, that there was no withdrawal on the part of the plaintiffs from the "Second Baptist Church of Raleigh," but that they still continued to be officers and members thereof, was error, which entitled the plaintiffs to a new trial.

That the plaintiffs, as officers and members of the "Second Baptist Church of Raleigh," met for worship and the transaction of business, in another and different house from the church edifice of that association, makes no difference in determining who are the Second Baptist Church, and whether or not the plaintiffs have dissolved their connection with the association, when it is not required by its laws to meet in any particular house or place, except that the members thereof shall reside, and the meetings thereof shall be held, in the city of Raleigh.

CIVIL ACTION, tried before *Watts, J.*, at Fall Term, 1875, of the Superior Court of WAKE County.

The complaint alleges substantially the following facts:

That the plaintiffs, Gideon Perry, Joel Evans, Abram Nichols, Hilliard Williams and Ed. Jones, are the trustees of the Second Baptist Church of the City of Raleigh, duly elected according to the usage of said church.

The plaintiffs, Gideon Perry and Abram Nichols, together with Beverly Stanly, Merritt Williams and Frederick Dunn, were on the 31st day of March, 1866, the predecessors of the plaintiffs as said trustees.

As such trustees, at the time last aforesaid, they entered into a contract in writing, (in which the said Beverly Stanly is by mistake called Beverly Stewart) with the defendant Henry M. Tupper, for the purchase of the lot of land on which the Second Baptist Church of the city of Raleigh, is now located.

(723) On or before the 27th day of December, 1869, the said contract having been complied with upon the part of the said trustees and their successors, the defendant Henry M. Tupper, and his wife Sarah B. Tupper, executed a deed conveying said lot of land to Joel Evans, Robert Hinton, Hardy Cross, Alexander Chapman, and Ed. Jones; the said Evans, Cross and Jones being plaintiffs in this action.

Said deed was made to the persons aforesaid, as "Trustees of the Raleigh Institute and Second Baptist Church of the city of Raleigh," whereas it should have been made to them only as trustees of the Second Baptist Church.

Under said deed, the plaintiffs and their predecessors have continued to hold said property as trustees, except as hereinafter stated, and have never pretended to hold the same as trustees of the Raleigh Institute.

It is pretended by the defendant that on or about the 11th day of March, 1871, Joel Evans, Robert Hinton, Chapman Alexander and Hardy Cross, representing themselves to be the trustees of the Second Baptist Church, executed to him a paper writing, purporting to be a lease of said premises, or a part thereof, for the term of nine hundred and ninety-nine years, the said instrument being without consideration, and having no seal attached thereto.

The plaintiffs have been informed and aver that said paper writing was not executed by the said Joel Evans and Hardy Cross, and that if their names were placed thereto by their consent, it was under a misapprehension as to the nature and terms of said instrument, and from the confidence they had in the defendant.

The plaintiffs are not acquainted with any person of the name of Chapman Alexander, and aver that no person of that name has ever been a trustee of said church. Said persons did not constitute the entire Board of Trustees of said church, at the time aforesaid, and had no authority to lease said property; and if said instrument had been executed by all the trustees of said church, the same would have been void.

(724) After said contract of purchase, the Second Baptist Church erected their church edifice upon said lot, and for a considerable length of time, the defendant was pastor thereof, and continued to exer-

cise the duties of his office until the 20th day of October, 1872, when, by regular proceedings and action of said church, he was dismissed from his office. Until the defendant was so dismissed, the existence of the said paper writing of the 11th of March, 1871, was entirely unknown and unsuspected by the said church. Some time in the year 1871, a proposition to lease the back room of the church to the defendant, for school purposes, was made, and rejected by a large majority of the members of said church.

About 1873, the defendant and a small faction of the church obtained possession of said church edifice without authority, and held the same without regard to the rights of said church.

On or about the 5th day of January, 1874, the plaintiffs caused to be issued a summons against the defendant as a trespasser, which was heard before W. Whitaker, J. P., who decided that the plaintiffs were entitled to possession, and thereupon they were put into possession of said edifice by the process of the court.

That an appeal was taken thence to the Supreme Court of North Carolina, and under the order and decree of said court they have been required to restore to the defendant the possession of said land and church edifice since the commencement of this action. Said writ of restitution was ordered, not upon the merits of the case, but because the plaintiffs had obtained possession thereof under the judgment of a Justice of the Peace, which was, in the opinion of said court, improperly rendered.

The complaint demanded judgment:

1. That the defendant, H. M. Tupper, be required to restore said land to the plaintiffs.

2. For a reasonable rent of said premises.

3. For costs, etc.

The defendant filed an answer, of which the following are the (725) material parts:

That it is not true that the plaintiffs are the trustees of said church, nor have any of them been such trustees since the year 1872.

It is not true that the conditions of the first mentioned deed had been complied with, nor that the entire purchase money had been paid. One of the five notes mentioned in said deed and part of another had been paid.

A church meeting was held on the 28th day of December, 1867, at which the defendant made a proposition to cancel the notes outstanding for the residue of the purchase money, and to convey the title to a Board of Trustees known as the "Trustees of the Raleigh Institute and Second Baptist Church," so as to obtain funds from the Freedman's Bureau, which could only be used for the purposes of education and

thus aid in the construction of the building. This proposition was accepted; a new Board of Trustees elected; and the deed was made to them the next day according to said agreement.

That the deed made to the Trustees of the Raleigh Institute and Second Baptist Church of the city of Raleigh was drawn in proper form.

It is not true that the plaintiffs and their predecessors have continued to hold said property as Trustees of the Second Baptist Church, and have never pretended to hold the same as Trustees of the Raleigh Institute.

The said land and premises have been held by proper trustees, chosen from time to time, according to the rules and usage of the Baptist denomination, and acting as well for the Raleigh Institute as for said Church, and in recognition of the trusts for each.

Funds amounting to about two thousand dollars were received from the Freedman's Bureau, to be, and which were, expended in the construction of a proper building to be used for a school and the construction of proper rooms therefor. These funds could not have been
(726) obtained except on the condition of being used for school purposes. When the last deed was given, a school for the education of colored people was kept up in the same story and a part of the upper story was used for sleeping apartment. Said school was continued in the lower story until the forcible expulsion of the defendants from the premises.

On the 11th day of March, 1871, the said Joel Evans, Robert Hinton, Alexander Chapman, (or Chapman Alexander, his true name as he is therein called,) and Hardy Cross, being the rightful trustees of said church, leased to the defendant and his successors as "Agt. missionaries of the Am. Bap. Home Mission Soc., New York city," meaning the American Baptist Home Mission Society, a body duly incorporated and organized under the laws of the State of New York, as by a vote of said church they were authorized to do—"the room or rooms, including the whole lower story" of the said "Second Baptist Church edifice, Raleigh, for the term of nine hundred and ninety-nine years, to be used for the highest interest of the colored people, in the way of their education and elevation."

The allegations of the complaint, impeaching said lease, are not true. The same was made with a full understanding of its nature and purposes, and to carry out the action of the church and the pledges made, under which the deed from the Freedman's Bureau was obtained, and in consideration thereof, and for the objects therein declared.

It is not true that the parties executing said lease did not constitute the entire Board of Trustees at that time, and had no authority to make such lease. The defendant is advised that said lease is valid and binding in law.

It is not true that the defendant has been dismissed from his said office by any action of the church, or under its rightful authority.

It is not true, as alleged, that the existence of said deed of (727) lease was entirely unknown and unsuspected by said church until the defendant was dismissed from his said office.

It is not true that in the year 1871, a proposition to lease the back room of the church for school purposes was made and rejected by a large majority of the members thereof.

It is not true that, in 1873, the defendant and a small faction of the church obtained possession of said church without authority, and held the same without regard to the rights of said church.

The plaintiffs have no title to said property, as trustees or otherwise.

Copies of the several instruments referred to in the pleadings, were filed as exhibits, but it is not necessary for the purposes of this decision to set them out at length.

By consent, the case was referred to Joseph B. Batchelor, Esq., to hear and determine all of the issues involved. The finding of the referee with regard to matters of fact to be final, as to matters of law to be subject to appeal.

At January Term, 1876, the referee filed his report of which the portions necessary to an understanding of the case as decided, are as follows:

"The referee finds as a fact that in the year 1872, and before 25th of September, considerable disturbance had arisen among the members of said church, many of them being much displeased with their pastor, the defendant. On that day, a regular meeting was held at the church edifice in Raleigh. The defendant was present and as Moderator called the meeting to order and presided during most of the meeting, calling Augustus Sheppard who was assistant pastor, to the chair when he left it. Sherwood Capps who was then Clerk or Secretary of the Society was also present and acting as Secretary. The meeting was regularly called to order by the Moderator. After much confusion it separated without having taken any legal action and without any motion to adjourn. The Secretary took with him the book in which the minutes of the Society was kept, and being also (728) Sexton, closed and locked the church edifice and took with him the key. Said Capps then was, and for a long time thereafter, continued to be, a student at the Shaw Collegiate Institute, of which the defendant was principal.

After this meeting a large number of the members of the Society including the plaintiffs, Joel Evans, Hardy Cross, Abram Nichols, Ed. Jones and Hilliard Williams, three of these named, being at that time trustees of said Church or Society, ceased to attend the meetings of

the Society which were held regularly at the Church edifice, both for worship and the transaction of business; and since that time, the plaintiffs and those members of the Society acting with them, being a large number thereof and claimed by the plaintiffs to constitute a majority of the same, have not attended the Church either for worship, or the business meetings thereof. Among the number thus ceasing to attend were three of the trustees and all of the deacons. One of the trustees, Robert Hinton, had removed from this State and had ceased to act as a member of the Society, and the fifth trustee, Chapman Alexander, continued to act with the defendant and those acting with him.

The said members thus withdrawing, on the 29th of September, 1872, met at the house of Joel Evans in the city of Raleigh, and from that time up to the commencement of this action, (except during a period in which they had possession of the church edifice,) have continued to hold meetings, both for worship and the transaction of business, on the lot of said Evans, procured by them for that purpose, and have claimed to be and constitute the "Second Baptist Church, Raleigh," which was organized as aforesaid, on the 17th day of February, 1866. On the 20th March, 1874, they appointed two trustees from their body,

(729) to-wit: Gideon Perry and Abram Nichols, in place of Robert Hinton and Chapman Alexander, and afterwards called a pastor to officiate for them.

Since the 25th of September, 1872, the other members of the Society continued to worship and to hold meetings for the transaction of business at the church edifice, at the regular times, and after due notice. The defendant has, during all this time, continued to act as their pastor, with the consent and concurrence of the members acting with him. These members have kept a regular organization as a religious society, with the same covenant and articles of faith which were first adopted, and have appointed deacons and filled all vacancies in the offices of trustees, and claim that they were and continued to be the religious society known as the "Second Baptist Church, Raleigh," which was organized on the 17th day of February, 1866.

Just before, or after the meeting of the 17th day of September, 1872, the defendant said, in a conversation with Hilliard Williams, Joel Evans, Abram Nichols and Hardy Cross, that the church was his own, and he intended to govern it as he pleased. If any of them did not want to hear him, they could leave the church. Evans, Cross and Williams asked the advice of Gov. Holden as to the course they should pursue.

The withdrawal of the plaintiffs and other members of the society as aforesaid, immediately after the meeting of the 25th of September,

1872, was voluntary on their part. They were not expelled or driven out of said society by the other members thereof, but voluntarily and of their own accord withdrew therefrom, and in so far as they could, severed their connection therewith. They could have attended the meetings of the society, both for worship and the transaction of business, if they had thought proper so to do. They were not prevented by force from attending and taking part in the business meetings, and their right to do so was not denied. . . .

In addition to the foregoing facts found by the referee, the plaintiffs offered to prove that certain members of said Society (730) whose names were given, and others, amounting in number to one hundred and five persons, including the deacons of the church and the trustees, except one, worshipped at the house of Joel Evans, after the difficulty at the meeting of the 25th of September, 1872. That they continued to meet principally there, and sometimes at other places for the transaction of business, and for worship, from that time to the present, and kept minutes of such meetings. That they filled vacancies in the offices of trustees on the 20th of March, 1874, and that these persons were members of the Second Baptist Church prior to, and on, the 25th day of September, 1872, and have remained so ever since. That said persons constitute about two-thirds of the entire membership of said Church.

The object of this evidence was to show where the organization known as the Second Baptist Church has been since the 25th day of September, 1872, and was, at the commencement of this action.

The defendant objected to the evidence on the ground that it was immaterial and irrelevant, since it only proposes to show that a majority of the members of an organized religious association, or corporation aggregate, convened at another than their usual place of meeting without notice to the minority, and there assumed to act as the said religious association, or corporation aggregate, which evidence has no tendency to prove where the organization known as the Second Baptist Church has been since the 22d of September, 1872, and was at the commencement of this action.

The evidence was rejected, but in deciding upon the questions of fact and law arising in the action, the referee has given to the evidence the same consideration as if the facts had been proved by the plaintiff and found by him. . . .

The referee found as a conclusion of law, that "the defendant and those acting with him, did constitute the Second Baptist Church of Raleigh," organized on the 17th day of February, 1866, and as such organization, were entitled to all the proper rights and (731) privileges thereof."

The plaintiffs excepted, among other things, to the ruling of the referee in rejecting the evidence offered and hereinbefore set out.

Upon the hearing, the court overruled the exception and the plaintiffs appealed.

The record sent upon appeal to this court is very voluminous, and it is deemed unnecessary to state other matters than those specifically ruled upon by the court.

Lewis and Fowle, for appellants.
Haywood and Smith & Strong, contra.

PEARSON, C. J. When a case is under the provision of C. C. P., submitted to the Judge to decide facts, as well as law, a novel state of things exists. He as Judge, is to admit or reject evidence, and is to charge himself upon the questions of law applicable to the case, and is then, as jury, to find the facts and render a special verdict. The same is the mode of procedure before a referee.

The referee, in the case before us, commits a grave error in assuming that what amounts to a voluntary withdrawal of members from a religious association, is a question of fact.

What amounts to a duress, is a question of law. What amounts to undue influence, is a question of law. On the like principle, what amounts to a voluntary withdrawal of members, is a question of law. The referee erred in not *instructing himself* clearly upon this question of law. Had he done so, he would have seen the relevancy of the evidence which he rejected.

The plaintiffs, and those acting with them, aver that they constitute the Second Baptist church of Raleigh. That by the arbitrary and high-handed conduct of the defendant, (being colored people and unwilling to do any act that might lead to open force on the
(732) part of a white man, who had acted as their "shepherd," and acquired much influence over them,) after the meeting, 25th September, 1872, they procured a house, other than the building in which for several years they had been accustomed to hold meetings for worship and for business, and from which they were expelled by the defendant, and continued to worship and transact business under the organization of the Second Baptist church, Raleigh, consisting of all of the deacons, all of the trustees, save one, and more than two-thirds of the entire association. These allegations, if true, showed that, as a legal inference, they had not withdrawn from the association voluntarily, and the evidence excluded by the referee, tended to prove the allegations to be true in point of fact.

We think the referee also erred in the legal inference, that the house in which the meetings of the association was held, made any *essential difference.* The law of the association requires the members to reside in Raleigh, and the meetings to be had at some place in Raleigh, but there is no provision making it essential that the meetings should be held in any house or at any particular place, like a statute which requires the Legislature to hold its meetings at the State House, in Raleigh, or the Superior Courts to be held at the court houses in the several counties.

The law of this association does not make the place of holding meetings a condition precedent to the regularity or legality of the action of the association. The legal inference, that withdrawing from the accustomed place of worship, supposing it to be done with sufficient cause, by the deacons, trustees and a large majority of the association, is a withdrawal from the association, is not a sound one. That error and the others set out entitles the plaintiff to another trial.

The referee, after rejecting the evidence on the ground that it is inadmissible and irrelevant, goes on to say, that in coming to his conclusions on the questions of fact, he gave to this rejected evidence the same consideration as if it had not been rejected. (733) We are unable to comprehend the idea intended to be expressed

There is error. Report set aside and judgment reversed, and another trial ordered.

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

Cited: Vaughan v. Lewellyn, 94 N.C. 479.

WILLIAM P. BLACKWELL v. WESLEY A. WRIGHT.

It is no good ground for the re-opening and re-hearing of a case decided at the last term of this court, that the defendant, in the opinion and judgment of the court, was assumed to be a citizen of North Carolina, whereas, in fact, he was a citizen and resident of Virginia, when the place of his residence is immaterial, having no bearing on the point decided, and the court, in its opinion and judgment, was not affected by that consideration in the least.

PETITION to rehear the case between the same parties, decided at the last term, and reported in 73 N. C., 310; in which report a full statement of all the facts of the case are set out.

The grounds relied upon for a re-hearing are stated in the opinion of the court.

Merrimon, Fuller & Ashe, for petitioner.
J. W. Graham and Jones & Jones, contra.

BYNUM J. This case was decided at the last term of the court, and is reported in 73 N. C., 310, and it is again before us on a petition to re-hear for alleged error in the former decision. The alleged error consists in this, that the court in the opinion and judgment then
(734) rendered, assumed that the defendant, Wright, was a citizen of North Carolina, and doing business in the town of Durham, when in fact he was not.

It is true that the court did so assume, and the record, to which we are confined, does not show otherwise. But it is immaterial how that fact may be, as the opinion of the court was not affected by that consideration. The decision rests upon the broad ground that the trade mark of the plaintiff, was not infringed upon by that of the defendant, owing to their dissimilarity. It was therefore not material whether the defendant was located and doing business at Durham or at Richmond.

There is no error.

PER CURIAM. Judgment re-affirmed and petition dismissed.

JOHN HARDY, ADM'R., v. THE NORTH CAROLINA CENTRAL RAILROAD COMPANY.

To allow a break in the embankment of a railroad, caused by a storm and unprecedented freshet, to remain open for ten hours, without some one stationed at or near the place to warn passing trains of the danger, is negligence which nothing can excuse.

The track of a railroad, and especially every exposed place, ought to be examined after every storm, before a train is allowed to pass; and if that is not done, and injury results, whether to passengers or servants on the train, the corporation is liable.

This was a CIVIL ACTION, for the recovery of damages, tried before *Henry J.*, at December (Special) Term, 1875, of NEW HANOVER Superior Court.

(735) The complaint alleges: That the plaintiff is the administrator of the estate of Arnold Hardy, deceased.

The defendant is a corporation under the laws of North Carolina, chartered for the purpose of building and carrying on a railroad, and on the day of the wrongful act, neglect and default complained of,

was operating a railroad between Wilmington and Charlotte, North Carolina, and was a common carrier.

On the 17th day of June, 1874, Arnold Hardy, the intestate of the plaintiff, being then on a train of cars of the defendant on his way to Wilmington, N. C., by the wrongful act, neglect and default of the defendant, and of the servants and employers of the defendant, to-wit: the section master of one of the sections of the defendant's railroad, whose neglect of duty was and ought to have been known to the defendant, slain and killed.

The defendant committed a wrongful act, neglect and default by the selection and appointment of said section master, whose negligent character was and ought to have been known to the defendant, and by the continuation of the said section master in a responsible position after his negligent character became known to the defendant.

The complaint demands judgment for ten thousand dollars damages.

The answer of the defendant among other things alleges:

"That on the day alleged in the complaint, the said Arnold Hardy was on a train of cars of the defendant as a brakesman, in the employment of the defendant. His duty required him to be on the platform to tend the brakes while the train was in motion. He was then and had been for some time previous in the employment of the defendant as brakesman, receiving the rate of wages usually paid in that employment and with a full knowledge of the risks incident to that service. Defendant denied that the intestate of the plaintiff was injured or killed by any wrongful act, neglect or default of the defendant, or of the section master of any one of the sections of the defendant's railway, or by any wrongful act or default of (736) any of the servants, agents or employees of the defendant. Denies that the defendant committed any wrongful act, neglect or default in the selection or appointment of the said section master, or that the negligent character of the section master was or ought to have been known to the defendant, or that he was a person of negligent character, and avers that he was a competent and careful person of suitable skill and experience for such an appointment.

The defendant used due care, skill and diligence in the construction of its railroad; in keeping the same in repair; in ascertaining its condition, and in running its trains, and in the selection of its agents, servants and employees. Denies that the alleged death of the intestate of the plaintiff was in any way owing to or caused by the negligence or carelessness of the defendant, its agents or employees."

After the cause had been set for trial the plaintiff was allowed by the court to amend his complaint, so as to make the third paragraph thereof read as follows: "That on or about the 17th day of June, 1874,

Arnold Hardy, the intestate of the plaintiff, being then on a train of cars of the defendant, on his way to Wilmington, N. C., was by the wrongful act, neglect and default of the defendant, slain and killed."

The defendant objected to the complaint, as amended, for the reason that it was too general, and did not inform the defendant of the charge brought against it; and moved that the plaintiff be required to specify the act or acts of negligence upon which he relied.

His Honor held that the complaint was sufficiently specific, and ruled the defendant to trial upon the amended complaint. The defendant excepted.

Pleasant Radcliffe, a witness for the plaintiff, testified: He lived in Anson County, four miles from Lilesville. The accident ocurred in June, 1874. It commenced raining the evening before, and (737) rained heavily until about nine o'clock, when it began to rain very hard, and for two or three hours was the hardest rain he ever saw. The heavy rain seemed to extend two or three miles below, and about a mile and a half above, where the accident happened. The rain did great damage; nearly all the crops were destroyed. About forty feet of the wood work and about thirty feet of the earth work of his mill-dam were torn away. The mill was about eight hundred yards, and his house about three quarters of a mile from where the accident happened. His dam had stood there about nine years, and no part of the wood work had ever been injured before. There was about twenty feet of the defendant's railroad washed out. The train fell in there. At nine o'clock, A. M., the next day, he was at his mill. Just before 10 o'clock, he went to stop the train. He saw it coming about sixty yards off. He waved his handkerchief, and signed the engineer to stop; he saw it, but passed on. He was in about twenty feet of the train when it passed him. The engineer looked back, but did not stop. He did not blow for brakes. He was running faster than usual. They always blow brakes down this grade. He was about eight hundred yards from the place of accident when the trained passed him. He did all he could to stop it, but could not. It was an excursion train. The engineer could have stopped the train if he had tried. This was between nine and ten o'clock, some five or six hours after day break. He went as fast as he could to the place of the accident. He saw the wreck, the engine was down the embankment, the tender on top. One or two cars were off the track, and one had passed entirely over the wreck. About twenty feet of the road was washed away, ten to fourteen feet deep. The dirt off the culvert was gone. He did not think the rocks were washed away. He did not think it rained after 11 o'clock the night before. It was made about 1855 or 1856, and was not then considered large enough by an engineer in charge

of the work. In size, it was about two and a half by three feet. Ordinarily a small amount of water passed through the culvert. (738) It was a small branch. He never saw the water accumulate there. The culvert is now much larger; it has been rebuilt since the accident. This embankment was made several years before the track was laid on it. In 1868 or 1869, Harvy finished up the grading. The culvert had given away at the lower end. He mended it with rock; did not tamper the dirt. He did not pack it, nor fill the holes. Rabbits used frequently to hide in the holes between the rock and the dirt. He had known Galvin, the engineer, for one or two years. He was a careful engineer. As soon as he got to the place, he went to him. They were taking him out of the wreck. He said, "I now see what you meant by your signs. I took them for salutes, as it was a big day."

One Sinclair testified: He was in the train. The train started from Polkton. It rained very hard at Polkton the night before. Polkton is about twelve miles from the place of the accident. He knew Arnold Hardy. He was a brakesman on the train. He was twenty-two or twenty-three years of age. He had been on the road more than a year. Hardy was the main train hand and baggage master. He stood well on the road, was a man of good character. Witness did not know what wages the company paid him. Such hands were getting $20 to $22 per month. At breakfast Galvin, the engineer, said he was going to make up time. It was down grade, and he was running fast when the accident occurred. Witness did not see the section master that day. He saw him afterwards on another section. The section master was provided with a handcar, and could travel on it six or seven miles an hour. The section master lived two miles from the place of the accident. The section was nine or ten miles.

One Sharp testified: He had been a railroad man for twenty six years. He was section master on this road for nine months. He knew Honeycutt and his section. He was off the road for some time after the accident occurred. It is the custom of roads to require section masters to go over their sections after all storms, and (739) look after its condition. It was a standing order on this road. He saw two dead men; the break was ten or twelve feet deep, and about sixty feet wide.

F. M. Wooten testified: He was the conductor on the train. He knew Arnold Hardy. He saw him on the train before he died, and after the accident. Arnold had charge of the baggage car, and was a brakesman. He was a very reliable man, and had been with the witness six months. Hardy did not live more than three hours. He was twenty-five or thirty years of age. His health was good. He was regular in the discharge of his duties. Witness had no notice that

the road was washed up, and did not see Radcliffe that morning. The train was running at the usual rate, not over sixteen miles an hour. Galvin was one of the most careful engineers on the road, and was on that account selected to run the train on that day. Witness considered that portion of the road on which the accident occurred, in good repair. He passed over it the evening before. He thought it was in as good repair as any part of the old road. He had been running on it for two years, and had been conductor for nine years. There was a rain at Polkton the night before. The section master, Honeycutt, discharged his duty very well. There were signs of rain all the way from Polkton to the place of the accident.

One Baker testified: He was at Laurinburg, cleaning the engine that day. He had been on the road since 1868. He had noticed the place where the accident happened, often. One morning a car broke loose, and he got down to couple it, and when the engine moved he saw the dirt falling in the crack in the bank. The crack was five feet long, leading to the culvert. Arnold Hardy was on the train, and the witness told him about it. He also told Galvin, the engineer. This was about three weeks before the accident occurred.

(740) Radcliffe was recalled and testified that Honeycutt was retained by the defendant, as section master, after the accident.

R. Henry testified: He lives about three quarters of a mile from Lilesville. The rain the night before the accident was the hardest rain he ever saw fall. It rained hard from about 9 o'clock until 11 o'clock. The rain seemed to be confined to a space about two miles above, and about two and a half miles below the place of the accident. He was on the train that day. After the accident, Honeycutt, the section master, came down the road to another section. He was still employed by the defendant. The culvert was built by Neal, in the latter part of 1861. He had to alter it before the engineer would receive it. Atkinson was engineer; he was very careful. The clouds were very threatening the morning and night before the accident, coming from different directions, north and south.

S. L. Fremont, a witness for the defendant, testified: He has been General Superintendent and Chief Engineer of the road since 1870. He had passed that portion of the road very frequently, and made a special examination the day before the accident occurred, on account of the excursion train. The road was in excellent order. When he took charge of it this portion of the road was an old and well-settled embankment. The longer the embankment stands the firmer it becomes. Honeycutt's section was in good order, and the culvert sufficient to carry off the water. The culvert put there since the accident is thirty-three per cent larger than the one which was there

before. He has been engaged on railroads for twenty years. The section master is required to watch the track, and to go over it after every storm. He did not think the section master was to blame, after he had investigated the case. He kept him on the road afterwards. The road master telegraphed him the evening before, about four o'clock, to line the track on the trestle immediately east of Wadesboro, before the excursion train passed, the next morning. He understood that Honeycutt did not receive the telegram until about dark. The work could not be done after dark. He did it the next (741) morning. There was a section master for every ten miles, and that was as many as was required. This was the number employed on railroads generally. At the place of the accident there was a valley, where much water might accumulate. In making the inspection, he went over the road in a superintendent's car. He did not stop at the place of the accident. There is a seat on a platform, in the rear of the car, made for the purpose of enabling the superintendent to examine the road as he passes over it. He occupied this seat as he passed over the road, and he went over the road for the express purpose of making an examination of its condition.

When asked why he thought no one was to blame, after he ascertained that Honeycutt was working on the trestle, the witness replied: That he was ordered to the trestle by the road-master and that one man could not be in two places at one time. That if he had received no order to go to that part of his section it would have been his duty to have gone there first any way, as that was a part of the new road that had been very recently constructed, and upon which the track had been laid but a short time, when the accident happened on the old road where the embankment had been standing for years. The road master Mulchaly, had charge and supervision of the road-bed and track over the whole line, and controlled the section masters, and appointed and discharged them at his pleasure. Mulchaly was on the train of inspection with the witness and sent the telegram from Rockingham. He did not know what message the Road Master sent Honeycutt, or that he sent him any message, and did not so learn until after the accident had occurred.

Captain Everett testified: He is a civil engineer and has been for fifteen years. He had charge of this portion of the road from 1866 until 1873. This culvert was well constructed and in good condition up to 1873, and amply sufficient to carry off all the water. It carried the water off for twelve years without any trouble. The (742) culvert was made to carry off the water of two branches, but during the war the ditch was filled up, so that the water of the upper branch could not pass through it. This caused the water of the upper

branch to flow along through its former channel. After the war instead of re-opening the ditch, another culvert was made to carry off the water of the upper branch, so that after that time the culvert where the accident occurred had to carry off the water of only one branch.

One Brown testified: He is a civil engineer and had charge of the road when the culvert was built. Atkinson was chief engineer. He objected to the culvert and Atkinson had it pulled down and re-built. He left before it was re-built. This was when it was first constructed.

Murdock Mulchaly testified: He is the Road Master. He appointed Honeycutt section master. He is a competent section master. Witness passed over the road with Fremont the day before the accident. He observed as he passed the long trestle just east of Wadesboro that the track was not exactly in line. When he reached Rockingham about 3 o'clock in the afternoon he telegraphed to Honeycutt, "to line the track over the trestle just east of Wadesboro before the train passes in the morning." To do this would not have required more than an hour's work. He did not direct him to stop anything else.

One McKethan testified: He delivered the telegram from the Road Master to Honeycutt about dark. It was raining very hard. The witness received the telegram about four o'clock in the afternoon. It is about nine miles from Wadesboro to the place of the accident.

The counsel for the defendant requested the court to charge the jury:

"1. If the defendant exercised reasonable care in the selection of the section master, Honeycutt, and if the jury should be satisfied
(743) that the injury to the intestate of the plaintiff on the 17th day of June, 1874, was caused by the negligence of Honeycutt in not ascertaining and reporting the damaged condition of the roadway, before the train passed on the day aforesaid, the intestate of the plaintiff and Honeycutt both being at the time employees in the service of the defendant, one as brakesman and the other as section master, the plaintiff cannot recover.

2. If the section master was a fit and competent person, well qualified to discharge the duties of section master, and if the injury to the plaintiff's intestate was caused by the negligent act of the section master, at the time and in the manner aforesaid, they then being servants of the defendant, the plaintiff cannot recover.

3. That if the defendant used reasonable care in the selection of its engineer, conductor, section master and road master, and they were competent persons, well qualified to discharge the duties of their respective positions, then if the injury to the plaintiff's intestate, (he then being a brakesman on the road of the defendant,) was caused

by the negligent act or acts of any one of said employees or servants, on the day before mentioned, the plaintiff cannot recover.

4. That there is no evidence of any negligence on the part of Murdock Mulchaly.

5. If the jury should believe the testimony of Col. Fremont, that he, the General Superintendent and Chief Engineer of the Company, selected to be run on the day the injury was sustained by the plaintiff's intestate, a new and first-class engine in good order and condition, and a most skillful engineer was placed in charge of the same, and that he, the Superintendent, passed over and made an examination of the road the day before, and they should find from the testimony of Col. Fremont, Capt. Everett and others, that the railroad was well and properly constructed and in good order and condition, up to the time the roadway was washed out and the break made in the embankment as discovered the day the injury was sustained, then (744) although the train ran into the break made in the embankment and the plaintiff's intestate was thereby injured, still there was no such evidence of negligence on the part of the defendant as would entitle the plaintiff to maintain this action, and the plaintiff cannot recover.

7. If, upon the whole testimony, the jury should be satisfied that the road was well and properly constructed, and was in good repair and condition up to the time the roadway was washed out and the break made in the embankment, as discovered the day the injury was sustained, then, although the train ran into the break, so made in the embankment, and the plaintiff's intestate was thereby injured, the plaintiff cannot recover.

8. That if the railroad was out of repair, and in an unsafe condition at the place where the injury was sustained, and the plaintiff's intestate knew or was informed of this condition of the railroad and did not communicate this to the defendant, and still continued in the service of the defendant as brakesman, notwithstanding his knowledge of the unsafe condition of the railroad, the plaintiff cannot recover.

9. That if the railroad was out of repair and in unsafe condition at the place where the injury was sustained, and the plaintiff's intestate knew or was informed of this condition of said road, and still continued in the service of the defendant as brakeman, notwithstanding his knowledge of the unsafe condition of the railroad, the plaintiff cannot recover."

The plaintiff requested the court to charge the jury:

1. "If Mulchaly, being a superior and general officer of this company, having charge of its whole line, ordered the section master to work on a certain trestle, and by such order suspended the general

regulation, requiring section masters to go over their line after every rain, and in consequence of this order the accident occurred, the defendant is liable.

2. That to allow a railroad track to remain broken and
(745) washed away for a space of from twenty to sixty feet, until five hours after daylight, the crevasse having occurred the night before, without having ascertained the fact, and the failure to ascertain it, being in consequence of the orders of a general and superior officer of the company, rendered the company liable.

3. Every Railroad Company is expected to use reasonable care in watching its line, and thus preventing accidents. Where it appears that it was a standing order of the company for all section masters to go over their line frequently, and always immediately after a heavy rain, and this section master failed to do so, in consequence of orders from a superior general officer, this company is liable to an employee for an accident, which would not have occurred, had the track been examined as usual.

4. If Galvin, having had notice of the dangerous condition of the culvert, ran at more than ordinary speed, down grade, and after being warned by Radcliffe, the defendant is guilty of negligence.

5. If the defendant constructed its road with insufficient culverts, and over and around the culvert failed to pack the dirt, simply throwing some dirt on the sides, and merely covering up the holes without filling and packing them, and if the accident occurred by reason of the rain water washing against the road thus constructed, this will be negligence.

6. If the jury believe Gal Baker, then the dangerous condition of the road ought to have been known to the company, and its failure to make immediate repair, or at least to notify its engineers to run with caution, renders defendent guilty, and the plaintiff's intestate, though he knew it, is not guilty of contributory negligence.

7. If the section master was acting under the direct order of his superior officer, it is a matter of indifference whether he was competent or not."

His Honor refused the special instructions prayed for, as well
(746) those of the plaintiffs as those of the defendant, and charged the jury: "That it was the duty of the defendant to have the road examined, after the rain. And if it failed to do so, (under the circumstances stated,) and put the train in motion, and it went down, they are responsible to every one on it, for any damage suffered, whether the person was a passenger or an employee."

To this charge of his Honor the defendant excepted.

The jury found all the issues in favor of the plaintiff, and rendered a verdict for two thousand dollars damages.

The defendant moved for a new trial. Motion overruled. Judgment and appeal by defendant.

Strange and Battle, Battle & Mordecai, for the appellant.
Russell, W. S. & D. J. Devane, contra.

READE J. There was an unprecedented rain and freshet. A culvert theretofore sufficient, was then insufficient to let the water pass; and thereby an embankment of the defendants road, ten feet high and sixty feet long, was washed away. About ten o'clock the next day, and some ten hours after the road was washed away an excursion train came on at the usual speed and pitched pell-mell into the gorge; and the intestate of the plaintiff who was a brakesman upon the train was killed.

Was this the result of negligence on the part of the defendant? Or was it an unavoidable accident? That is the only question. The defendant says, that the conductor, the engineer, the brakesman and other servants running the train were all skillful and careful, and knew nothing of the break in the road. That he had a skillful and attentive section master and hands to keep the road bed in order; and that if the section master had known of the break (which he did not) it was so large that all the hands on the road could not have repaired it in time; and that the flood was unprecedented, and that the break could not have been prevented. And so the defendant insists that he is not guilty of negligence. (747)

The case was well argued, and there are full briefs on both sides, embracing the questions.

(1) First, whether a servant of a road can recover of the corporation for injury sustained?

(2) Secondly, whether a servant can recover for injury resulting from the neglect of his fellow servant?

(3) Thirdly, whether the deceased was a fellow servant with the section hands to keep the road-bed in order, by reason that he was a servant on the train?

(4) Fourthly, whether if the defendant employed skillful and usually careful servants, he was liable for negligence in this, or in any given case? These and other question were fully considered. But the question upon which the case turns, is outside of all these. Concede everything in the defendant's favor but this; was it not his duty to have some one at the break in the road to stop the train? Unquestionably it was. Nothing else but that could have prevented the catastrophe, and that would have prevented it. To allow the gorge to stand for ten hours with no one to guard it; and to allow the train

on time, without warning, to pitch into it, was negligence which nothing can excuse. The track, and especially every exposed place, ought to be examined after every storm before a train is allowed to pass; and if that is not done, and injury results, whether to passengers or the servants on the train, the corporation is liable.

No error.

PER CURIAM. Judgment affirmed.

Cited: Crutchfield v. R. R., 76 N.C. 324; *Johnson v. R. R.*, 81 N.C. 458; *Sellars v. R. R.*, 94 N.C. 659; *Conley v. R. R.*, 109 N.C. 697.

(748)

JOSEPH WILSON AND OTHERS v. THE BOARD OF ALDERMEN OF THE CITY OF CHARLOTTE.

The Board of Aldermen of the City of Charlotte, under the amendments to the charter of said city, passed by the General Assembly the 25th of January, 1872, has the power to levy an *ad valorem* tax on the bonds, solvent credits and stock in incorporated companies held and owned by the resident citizens of said city, and also to tax their several incomes.

Said Board of Aldermen is not prohibited by Sec. 7, Art. IV, of the Constitution, from levying a tax on the taxable property of the city, without submitting the same to the qualified voters of said city, for the purpose of paying the necessary expenses of the city government, and paying the interest on certain bonds heretofore issued to pay such necessary expenses. Nor do Secs. 24 and 25 of the charter of said city prohibit the levying such tax.

BYNUM, J., *dissenting.*

This was a CONTROVERSY, submitted without action, to his Honor *Judge Schenck,* at the Spring Term, 1875, of the Superior Court of MECKLENBURG County, and determined upon the following facts:

Certain persons, citizens and residents of the city of Charlotte, who are tax payers, being advised that they are not subject to be taxed on account of debts and securities for money held by them, and lately demanded for the year 1875, having proposed to the Board of Aldermen of said city to submit the matter in controversy, without action, upon a case agreed—the said Joseph H. Wilson representing himself and other citizens of said city, from whom the said tax has been demanded, on the one part, and the Board of Aldermen of the city of Charlotte, on the other part, submit the controversy on the following statement of facts.

I. The Board of Aldermen of the city of Charlotte, in the (749) early part of the year, 1874, passed an ordinance levying taxes for city purposes, for the said year, 1874. That by the 6th section of said ordinance, it is enacted as follows:

"There shall be an *ad valorem* tax of seventy-five (75) cents on one hundred (100) dollars of the assessed valuation of all real and personal property within the city; and the like tax upon the real value of all bonds, stock or other investments in banks, National, State or private, railroads and other incorporated companies; and a like tax on cash on hand or deposit, and on solvent credits, *provided,* however, that he or they may deduct from the amount of debts owing to him, the amount owing to him, and the residue only shall be liable to taxation."

"Section 17th. There shall be a tax of one dollar upon every one hundred dollars, upon the amount of net income derived from all sources, not hereinbefore taxed. The net income shall be estimated, by deducting from the gross income, 1st, taxes; 2d, rent for the use of buildings or other property, or interest on incumbrances on property, and in the business from which the income is derived; 3d, usual or ordinary repairs of the building, from which the income is derived; 4th, cost or value of the labor, (except that of the tax-payer himself,) raw material, food, and any other necessary expense incident to the business, from which the income is derived, together with the necessary expenses of supporting the family, which shall, in no instance, exceed one thousand dollars."

"Section 8th. In addition to the taxes above levied, there shall be a specific tax of one quarter of one *per cent,* (¼) on all real and personal property, as described in the preceding section, for the purpose of paying the interest on the bonds of the city, and to constitute a Sinking Fund, in pursuance of Sec. 26, charter of the city of Charlotte."

That said Wilson and others have paid the taxes assessed by said city upon their property, with the exception of that assessed upon their solvent credits, stocks and money on hand. (750)

II. That by the terms of the last mentioned ordinance, the tax-payers of the city were required to make returns, on oath, to the city Clerk and Treasurer of all property, and other subjects of taxation embraced within the provisions of the said ordinance, and owned by the said tax-payers respectively, on the 1st day of February, 1874; and of their respective incomes received by them during the fiscal year immediately preceding the said 1st day of February, 1874, which said return was required to be made within thirty days after the 1st day of June, 1874.

III. That on the said 1st day of February, 1874, the said Joseph H. Wilson owned solvent credits to the amount of thirty-eight thousand eight hundred and seventy-five dollars, and bank stock to the amount of nine thousand dollars. That his net income for said fiscal year, was six hundred and fifteen dollars ($615).

IV. That the debt of the city of Charlotte is about forty-five thousand (45,000) dollars, twenty-five thousand of which is admitted to be legal, consisting of bonds issued by said city, in conformity to law. That in addition thereto, said city has contracted other debts, which have gradually increased from year to year, from the adoption of the present Constitution, to the year 1874, amounting to twenty-four thousand (24,000) dollars, consisting of three thousand nine hundred and thirty-two (3,932) dollars, due by notes to the different banks of the city of Charlotte, for money borrowed and expended in defraying the necessary expenses of the city government; also six thousand two hundred and eighty-eight (6,288) dollars, due to different persons, upon notes given to them, for damages to real estate, arising from widening the streets of the city, which last mentioned notes contain a stipulation, that they are to be paid by giving the holders credit on their respective notes for the amount of their taxes, year, by year, until said notes are paid. That by this
(751) means, a considerable portion of said notes has been paid. That the balance of said indebtedness consists of accounts for work done, or for materials furnished for improving the streets, and other expenses of the government deemed necessary. That this indebtedness was incurred without a popular vote of the citizens; and that after its contraction, to wit, in November, 1873, a proposition was submitted by the Board of Aldermen of said city, to the citizens thereof, to clothe said Board of Aldermen, by a popular vote, with authority to fund said debt, which was refused and the proposition voted down.

That the tax in question is levied to pay off the interest on the debt; to pay the current expenses of the city government, and to pay off the twenty-four thousand (24,000) dollar debt, contracted as aforesaid, as far as it will go.

V. That the said Joseph H. Wilson, and those interested with him, being of opinion that said solvent credits, bank stock and income were not subject to taxation by said Board of Aldermen of said city of Charlotte, refused to make return thereof; and after the time had elapsed, within which tax-payers were required to make return of their taxable property and other subjects of taxation, the said Board of Aldermen ordered the Clerk and Treasurer of the city to complete the tax list by reference to the returns for the State and county taxes. That this was accordingly done, and the said Joseph H. Wilson was

assessed on the said solvent credits, bank stock and income, the sum of three hundred and sixty-five dollars and twenty-one cents, (365.21,) which sum was duly demanded of him, and payment thereof refused.

The charter of the city of Charlotte, with the amendments thereto, and the ordinances for raising revenue, as hereinbefore set out, is made a part of the case agreed, but which it is unnecessary farther to notice.

If the court should be of opinion, that the said solvent credits, bank stocks and incomes are subjects of taxation by the Board of Aldermen of the said city of Charlotte, and the tax thus levied (752) by said Board of Aldermen is legal, then judgment is to be rendered for the said Board. If, on the other hand, the court should be of opinion, that said property is not the subject of taxation by said Board of Aldermen, and that the tax thus levied is illegal, the judgment is to be entered for the plaintiff.

His Honor, being of opinion with the defendant, rendered judgment as follows, to wit:

The facts of this case are agreed, and raise two questions:

First. Whether or not the city of Charlotte, under the charter as present amended, has power to levy a tax upon all the property mentioned in Art. V, Sec. 3, of the Constitution, including solvent credits, bond, etc., etc. This depends upon the construction of Sec. 2 of the amendment to the charter, dated 25th of January, 1872, which reads as follows:

"That said tax shall be levied on all real and personal property, trades, licences and *other subjects of taxation,* as provided in Sec. 3 of Art. V of the State Constitution." For the power of city authorities to tax debts and securities for money, depends upon the charter. *Pullen v. Commissioners of Raleigh,* 68 N. C., 451. On this point, the court is of opinion, that "other subjects of taxation," means all property subject to taxation, and that the word "provided" refers to the rules governing the taxation; that is, it must be "uniform" as to credits, etc., and according to its true value, as to real and personal property. That, therefore, the city of Charlotte has the power to tax solvent credits, debts, etc., and that the plaintiff's are liable to this tax.

Second. Whether the tax levied under Sec. 8 of the city ordinance is constitutional. The section is as follows:

"In addition to taxes above levied, there shall be a specific tax of one quarter of one per cent on all real and personal property, as described in the preceding section, for the purpose of paying the interest on the bonds of the city; and to constitute a sinking fund, in pursuance of Sec. 26, charter of the city of Charlotte." (753)

The case shows that the "bonds" alluded to, are legal, by which we presume it is admitted that they are "old debts," and their

validity not controverted. The twenty thousand (20,000) dollars of "deficiencies do not appear to be floating debts," as defined by Justice BYNUM, in *Weinstein v. City of Newbern*, 71 N. C., 537; and we think the presumption of law, from the facts stated, is, that they are not.

The court is therefore of opinion, that the tax being levied to pay interest on "old debts," and debts occurring by inadvertence, or unexpected contingency, from year to year, is valid and constitutional.

His Honor, for the reasons stated, gave judgment in favor of defendant. From this judgment plaintiffs appealed.

Shipp & Bailey, for appellants.
Jones & Johnston, contra.

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

1. Have the corporate authorities of the city of Charlotte a right to tax the bonds, solvent credits and stocks of incorporated companies belonging to the plaintiff, who resides within the city, and also his income?

2. Have they a right to levy and collect taxes for all or any of the purposes stated in the case agreed, unless by a vote of the qualified voters of the city?

1. *As to the first question:* It is admitted by all that a municipal corporation has no power to lay and collect taxes unless such power be expressly or impliedly given by law, that is, either by its charter, or by some general law. In this case the amendment to the city charter, ratified January 25th, 1872, does undertake to give to the city, power to levy taxes "on all real and personal property, trades, licenses, *and other subjects of taxation, as provided in Sec. 3,* (754) *Art. V, of the State Constitution.*" Among the subjects of taxation there mentioned, are "moneys, credits, investments in bonds and stock." So that as far as the Legislature can give it, the city has the power to tax bonds, etc. But it is contended for the plaintiff, that the act of January 25th, 1872, is contrary to Sec. 9, of Art. VII, of the Constitution, which reads as follows: "All taxes levied by any county, city, town or township, shall be uniform and *ad valorem* upon all *property* in the same, except property exempted by this Constitution." It is contended for the plaintiff if we correctly understood his argument, that this action contains a grant of the power of taxation to municipal corporations, which the Legislature cannot increase, and that it is confined to *property,* which in the sense in which it is there used, means only tangible property, and excludes bonds, etc.

We do not concur with the plaintiff in this view of the intent and effect of the section quoted. The Constitution does not expressly provide for the division of the State into counties. In many places, however, it recognizes the existing division. In Art. VII, of Sec. 3, it provides for the division of counties into townships. In Sec. 4, of Art. VIII, (which obviously belongs under Art. VII,) it expressly empowers and directs the Legislature to provide for the organization of cities, towns and incorporated villages. This is a direct grant to the Legislature of a power to incorporate cities, etc.

The grant of such a power carries with it, by necessary implication, the power to endow cities with the usual and necessary incidents of an incorporated city, one of which undoubtedly is to tax all lawful subjects of taxation within it for all lawful purposes.

What the power of a city would be in respect to a power to tax, if the Legislature should merely incorporate it and impose on its corporate authorities the usual duties, without making any express provision for taxation, we need not enquire, as there is prob- (755) ably no instance of that sort.

The origin of the power of cities to tax, is not to be sought in the section of the Constitution quoted (Sec. 9, Art. VII), but in the Act of the Legislature creating them, under the power for that purpose given by Sec. 4, of Art. VIII. Section 9, of Art. VII, is not an enabling statute. It does not confer on cities, a power to tax, or on the Legislature a power to give them that power. Its purpose and intent was to restrain the power of the city by requiring an uniformity of taxation upon all property *ad valorem*, notwithstanding any possible attempt by the Legislature to give the power without such restraint. The terms of the section do not profess to give a power, but to regulate what it supposes to exist by virtue of a legislative act of incorporation. The existence of a power to tax in cities is also assumed in that clause of Sec. 4, Art. VIII which requires the Legislature to restrict the power. If the power be not derived entirely from the charter of incorporation, either as expressly given, or by necessary implication, it cannot be derived elsewhere, for the Constitution nowhere confers this power on cities, either expressly or by necessary implication.

If this view be correct, it is not material for the present purpose, whether the word "property" in Sec. 9, is confined to tangible property or not. For if it be so confined, it is a *limitation of a restraint* on the taxing power, and not on the power itself, and it would be competent to the Legislature to confer on a city a power to tax intangible property otherwise than uniformly and *ad valorem*.

We are of opinion however, that the word as here used, is not confined to tangible property. The word "property" is not such a techni-

cal one, that if properly used it has everywhere the same precise and definite meaning. Its meaning varies according to the subject treated of, and according to the context.

(756) In its most general sense, it embraces every thing which a man may have exclusive dominion over. In this sense it is used in Section 17 of the Declaration of Rights. "No person ought . . . to be deprived of his life, liberty or *property* but by law of the land." So in Sec. 19. In all controversies at law respecting *property,* the ancient mode of trial by jury ought to remain sacred. So in Sec. 22. No *property* qualification ought to affect the right to vote or hold office. In Sec. 35, the words "lands" and "goods" have a like extensive signification, including things in action.

Pipkin v. Ellison, 34 N. C., 61, which is cited to show that the word does not include bonds, etc., decided only that where a testator bequeathed *all his property* to his wife for life, and after her death *to be sold and the proceeds divided, etc.,* he did not intend to include his notes, as notes were not usually the subjects of sale for division. Any general remarks in the opinion of the court, as to the meaning of the word, must be referred to the facts of the case, or else they are merely *dicta.* There can be no doubt I suppose, that a bequest of "all my property" to A. would pass bonds belonging to the testator. In *Pullen v. Commissioners of Raleigh,* 68 N. C., 451, it was held in conformity with our present opinion, that the power of a city to tax is derived from its charter, and as the charter of Raleigh, in enumerating the subjects of taxation, did not use the word "property," or any other word which could include securities for money, the city had no right to tax them. In *Lilly v. Commissioners of Cumberland,* 69 N. C., 300, it is held that solvent credits are property.

It is argued that as by Sec. 3 of Art. V, the Constitution, after saying that "laws shall be passed taxing by an uniform rule, moneys, credits," etc., says, "and also, all real and personal property, *according to its true value in money;*" it thereby defined "property" as not embracing moneys, credits, etc. Such an inference is hasty, and cannot be fairly drawn. The intent seems to have been to leave

(757) it to the Legislature, in taxation for State purposes, to tax moneys, credits, etc., at their face value, or by some other standard than their "true value in money," whereas tangible property should be always taxed by the latter standard. If this construction be correct, and the words "all property," in Sec. 9 of Art. VII include bonds, etc., then these, when *taxed by cities,* must be taxed *ad valorem,* that is, "according to their true value in money," although for State purposes, they are not required to be.

We think that the city authorities had a right, under the amendment to the charter, to tax the bonds, etc., of the plaintiff, and also his income. There is no suggestion that the bonds, etc., are taxed otherwise than uniformly *ad valorem*.

2. *As to the second question*: The purposes for which the taxes complained of are laid, are to pay the interest and principal, in part at least, of certain debts owing by the city. These are described in Sec. 4 of the case agreed, from which they will be copied by the Reporter, and they need not be repeated here. None of them were submitted to a vote of the people before being contracted. That the voters of the city rejected a proposition to fund them, we consider immaterial.

If the charter contains any restriction on the power of the city to contract debts in the performance of its usual duties, and to lay taxes to pay such debt, it is found in Sections 24 and 25. It is argued that these sections gave to the city government the power to incur a bonded debt, not to exceed $200,000, for any purpose which, in its opinion, would promote the general good of the city provided the object be first approved by a vote of the citizens; and that this proviso restricts the city from incurring debt, or at least from giving its bonds or notes to secure any debt without such approval. We think, however, that these sections relate only to the issue of city bonds in aid of railroads, and the restriction is confined to such bonds. It is only the surplus which may be raised by the sale of its bonds in aid of railroads that may be applied to other objects, if the citizens (758) approve of them.

The restriction relied on by the plaintiff is in Sec. 7, Art. VII of the Constitution:

"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 of the same, *except for the necessary expenses thereof*, unless by a vote of a majority of the qualified voters therein."

We think the natural and proper construction of this section, is that the exception extends to every part of the preceding lines, to the prohibition to contract a debt, as well as to that against levying a tax. We are not at liberty to read it as if there were a period after the word credit, and a distinct sentence began after that. The effect of such reading would be to prohibit every municipal corporation from contracting any debt, absolutely and without qualification, and to make every debt contracted for whatever purpose, and under all circumstances illegal and void. Such a prohibition would be unreasonable. The duties of a county or city government cannot be performed

without often contracting debts. Officers and servants of divers duties must be engaged, payable at some fixed interval daily, monthly, or quarterly, as the case may be. The contract for employment creates a debt as soon as the service has been performed. It must necessarily remain a debt for some space of time, however short; and if the debt be thus made illegal, the corporation cannot lawfully pay, and the creditor cannot recover it. So of contracts to execute a certain work. For example, to build a bridge. An absolute prohibition to contract a debt, is a prohibition to contract, at all, for every contract may and naturally does end in a debt. We cannot suppose that the Constitution intended to deprive these great and necessary public corporations of a power which is usual to all corporations, which these have possessed,

(759) and which is necessary to their usefulness, if not to their very existence, except upon language which admits of no other meaning. It must sometimes happen that the city revenues for the year are insufficient to pay the necessary expenses of the year. This may happen accidentally or purposely for several years in succession, and thus a debt is contracted, made up of the several annual deficiencies. Such seems to be the origin or one class of the city debts, which the plaintiff contends are illegal. But if a debt be for necessary expenses and lawful in its origin, it cannot become unlawful, by a delay of the debtor to pay, which the creditor cannot prevent. Neither can it become unlawful because money is borrowed to pay the original creditors, and a note is given as a security for the loan. In such case the lender stands in the place of the original creditor.

The other class of debts objected to, are for the expenses of widening the streets of the city. It was argued that this was not a necessary expense. It would be difficult or impossible to draw a precise line between what are, and what are not, the necessary expenses of the government of a city. The analogy of the law of necessaries for infants is the only one that occurs to us. It is held, that if, considering the means and station in life of the infant, the articles sold to him *may* be necessaries under any circumstances, they come within a class for which the infant may be liable, and upon his refusal to pay, it is for a jury to determine whether under the actual circumstances they were necessary. If, however, the articles are merely ornamental, and such as cannot, under any circumstances, be necessary to one of the means and station of the infant, a court may, as matter of law, declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application. But if treated merely as an analogy, in the absence of other guides, it may be of some general use. It was held in *Broadnax v. Groom*, 64 N. C., 244, that if the object for which the money was to be raised

came within the class of such as might be necessary for the county, it was left to the county commissioners to decide whether (760) in fact it was necessary or not, and their decision could not be reviewed by the court. This was also held in *Mitchell v. School Committee,* 71 N. C., 400.

No other rule could be adopted without inconvenience and injury. If no one could contract with a county for the building of a bridge, or with a city for the building of a market house, or other work coming apparently within the class of necessaries, and which the government of the corporation has deemed necessary, except at the risk of having the contract avoided by the decision of a court, which may take a view of the actual necessity different from that of the city government; then no one would contract without either charging an extra proportionate to the risk, or insuring safety by *getting* the opinion of the court if possible. The public business would be sacrificed or seriously obstructed, and the courts would assume the duties of municipal government, for which they were not intended. To make and repair the streets of a city is a duty generally, if not always, imposed on its authorities by the charter. It is within the class of necessary expenses. Widening the streets must come under the same class. The narrow and crooked ways which suffice for a village, may be insufficient for the passage and traffic of a populous and flourishing city. Whether the widening was in fact needed was in the discretion of the city authorities, as the building of a bridge was held to be in *Broadnax v. Groom.*

Admittedly, this power is liable to abuse. But the same may be said of all power wherever lodged. The Constitution has enjoined upon the Legislature the duty of restricting the power so as to prevent its abuse. If they neglect to do so, it is beyond the power of the courts to give relief. The only remedy is in the ballot box.

There must be judgment against the plaintiffs according to the case agreed.

BYNUM, J., *dissenting.* I concur in the opinion of the court, (761) except that part of it, with its results, which puts a construction upon Art. VII, Sec. 7, of the Constitution. I regard that clause, rightly understood, as the most important and beneficial provision in it, and believe that the ultimate solvency of these corporations, depends upon the vigorous enforcement of this salutary provision. To my mind, the construction presents no difficulty whatever, except that which grows out of a mistaken idea, that constitutions must be short and sententious, at the sacrifice of perspicuity. The obscurity of this section arises out of the fact, that it contains *two* propositions and *one* qualification to them. This enables the verbal critic, in violation of

the rules of grammar, to apply the qualification to one proposition only, and regardless of both logic and grammar, exclude its application to the other.

To illustrate: 1. *Proposition:* "Sec. 7. No county, city, town, or other municipal corporation, shall contract any debt, pledge its faith or loan its credit." *Qualification:* "Unless by a vote of the majority of the qualified voters therein."

2. *Proposition:* "Nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof." *Qualification:* "Unless by the vote of the majority of the qualified voters therein." The fallacy consists in not applying the qualification to both propositions. Every writing contains these ellipses or omissions, which are to be supplied by the interpreter. Deeds contain the fewest, laws next, and constitutions, from this attempted brevity, contain the most ellipses. Supplying thus, what is omitted and must, in every written language, be understood, the whole section will read thus: "No county, city, town, or other municipal corporation, shall contract any debt, pledge its faith or loan its credit, unless by a vote of the majority of the qualified voters therein; nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This is the natural and grammatical con-
(762) struction, and by it only, can the obvious meaning and purpose of the Constitution, be carried into effect. These corporations, within certain limits and qualifications are the judges of the expenses necessary for their due administration, and they are invested with power to levy taxes sufficient therefor. They are prohibited from levying taxes for purposes not necessary, and they are prohibited from *creating debts for any purpose, without the permission of the voters therein.* When they are forbidden to expend money for any other than necessary purposes, and are expressly authorized to *levy taxes* for such purposes only, why superadd the power to *create debts* for the same purposes?

1. *Objection:* This cannot be the true construction, because Art. VIII, Sec. 4, declares: "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessments, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." If corporations were already restricted by Sec. 7, Art. VII, why empower the Legislature to impose restrictions?

1. *Answer.* Sec. 4, Art. VIII, applies to future corporations, and does not affect restrictions already imposed upon existing corporations.

It enables the Legislature to impose further restrictions upon future corporations, if the existing constitutional restrictions are not sufficient to prevent abuses. No other construction can be placed upon this section, without making the constitution stultify itself.

2. *Objection. Ab inconvenienti.* These corporate governments cannot be administered without creating debts, as for payment of salaries, the police and other employees, the building of court houses, bridges and other necessary improvements, which are done by contract, which must result in a debt.

2. *Answer.* It may be *convenient* to contract debts, but it is not *necessary* to do so. If the money is in the treasury to pay (763) salaries, employees and to discharge contracts as they become due, it is absurd to call such matters debts in legal contemplation. Our salaries are paid by the State as they fall due, and all its obligations for necessary expenses are paid when the obligations are contracted, or the service is performed. All the States, the United States, and many of the counties and towns of this State, act upon this cash principle, and find their advantage in it. Why may not all do so? Every county or town knows the value of the taxable property in it. The necessary expenses are easily computed, and the tax necessary to be levied to raise the required sum. If a miscalculation happens to be made, or unexpected expenses create a deficit, just as the State is authorized to supply a casual deficit, (Art. V, Sec. 5, Const.) just so it would be competent for counties and cities, to meet the deficiency by the next year's assessment. What a State can do, a county or city can do, and what all the States of the Union do, all the counties and cities of this State may do—pay their necessary expenses without creating debts, in the sense and spirit of the Constitution. Every creditor of a county or city is entitled to his pay when the service is performed. Merchants generally make a deduction of from 10 to 20 per cent on cash purchases. If cities and counties acted upon like principles, a like or greater saving would follow. As it is, nothing is more common than to see their "scrip" hawked about at fifty cents on the dollar in some places, to the injury if not ruin of the employees, who are the poor and needy of our population.

Suppose a court house is burnt down or a bridge is washed away, must a vote of the people be taken before a contract can be made for re-building it, or a debt contracted therefor? That would be a necessary but an unexpected expense, falling under the head of a "casual deficit" to meet, which it would be the duty of the county or city, if the money was not on hand to assess and collect taxes, at the earliest period. Or, if deemed more for the ease of the tax

(764) payer, to re-build on credit, he may be allowed to make his choice by his vote, for which express provision is made.

A distinction has been drawn between the power to borrow money and the power to contract a debt. According to the construction of the court, one is prohibited and the other is allowed, by this clause of the constitution. The distinction is rather attenuated and of but little practical value. It is generally "robbing Peter to pay Paul." If you borrow money to pay a debt, both sums bearing the same interest, you are no better or worse off. If you can make a better bargain with cash than credit, it is better to borrow. But I hold that, both to borrow and to create a debt, are prohibited unless the power is conferred by popular vote. Neither is necessary in a well-regulated State, county or city government, and both are the crying sins of the present times, alike threatening universal disaster, moral and pecuniary. It is not a question of convenience, but of power. When the Constitution speaks, we must obey. Here, obedience is wisdom and our gain.

3. *Objection:* Employees and others making contracts, would be defrauded, as they would not know whether the money was collected and in the treasury, or even whether the obligation was enforceable under this construction of the Constitution.

Answer. This matter would soon regulate itself. If the law required the money to be in the treasury to meet necessary expenses, it would be there. If it was not there, it would soon be found out, and no harm would be done. As it is, scrip is issued, either at a depreciated value, to the loss of the county or city, or it is sold by the creditor at a depreciated rate, to his loss. Generally both parties are losers. It is the duty of every contractor to see that the person or corporation making a debt, has the power conferred on him or it to do so. Here, it is to be observed, the power to create debts is not withholden from corporations by the Constitution, but is expressly conferred *sub modo,* to-wit, by a vote of the corporators. All

(765) act with their eyes open, and no one is deceived, for all have equal and full means of knowing whether the essential prerequisite to the creation of a valid debt, to-wit, the sanction of a popular vote, has been complied with. It was expressly so held by this court in *Broadnax v. Groom,* 64 N. C., 244, and strongly intimated in *Weinstein v. City of Newbern,* 71 N. C., 535.

4. *Objection.* The restriction upon the power to contract debts, was intended to apply so as to prohibit subscriptions to railroads and the like purposes.

Answer. Such an intention cannot be implied from the language of the Constitution. It is not so declared. Where, then, do we derive

our right as Judges, to say the restriction applies to one purpose more than another, when the plain terms of the section apply to every purpose? I can well conceive cases where it would be more necessary to the growth and prosperity of a county or city to build railroads through or to them, than to build a market house or a bridge. Under the term "necessary expenses," there are many other purposes for which debts may be contracted, as dangerous to the tax payers as the building of railroads. Such a construction only avoids one evil by flying to another. There is only one way of escape, and that is by applying the plain prohibition against the contraction of any debt, for any purpose, except in the way prescribed, to-wit, by popular vote.

According to the construction put upon it by the court, Art. 7, Sec. 7, had as well be struck from the Constitution; as I am of opinion that practically, it is thereby made inoperative. If the counties and cities are the judges of what are their necessary expenses, and they have the power to contract debts without limitation for these purposes, it is difficult to see what the prohibition against contracting debts is to act on, or wherefore "a vote of the majority of the qualified voters therein" should be taken. In my opinion, to such an impotent conconclusion are we led. But is it right?

The benefits to be derived and the evils to be avoided by a (766) cash administration of government, are too obvious for further comment. The county of Mecklenburg, for one, wisely and with the most beneficial results, acts upon that system. No sufficient reason can be suggested why the city of Charlotte may not administer the city government upon the same principle. In my opinion the Constitution enjoins it.

PER CURIAM. Judgment affirmed.

Cited: Bank v. Comrs., 74 N.C. 388; *Cobb v. Elizabeth City*, 75 N.C. 7; *Tucker v. Raleigh*, 75 N.C. 271; *Young v. Henderson*, 76 N.C. 422; *Redmond v. Comrs.*, 106 N.C. 149; *Mayo v. Comrs.*, 122 N.C. 17, 26; *Fawcett v. Mt. Airy*, 134 N.C. 126; *Greensboro v. Scott*, 138 N.C. 184; *Wharton v. Greensboro*, 146 N.C. 360; *Swinson v. Mt. Olive*, 147 N.C. 612; *Hightower v. Raleigh*, 150 N.C. 571; *Howell v. Howell*, 151 N.C. 579; *Henderson v. Wilmington*, 191 N.C. 277; *Newton v. Highway Com.*, 192 N.C. 65; *Martin v. Raleigh*, 208 N.C. 376; *Green v. Kitchen*, 229 N.C. 461; *Trust Co. v. Wolfe*, 243 N.C. 475.

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ELISHA PORTER v. DAWSON T. DURHAM AND BRYANT BROWN.

An owner may not use his property absolutely as he pleases, his dominion is limited by the maxim "*sic utere tuo ut alienum non lœdas.*"

Therefore, in the absence of a license or grant, the owner of land has no right to divert a stream of water flowing through his land from its natural course, so as to discharge it upon the land or into the ditches of a lower land owner to his damage; and where it appears with reasonable probability that a defendant is about so to do, *it is error* in the court below to vacate an injunction restraining him therefrom until the hearing of the cause.

An owner of land is obliged to receive upon the same the surface water which falls on adjoining higher lands, and which natually flows thereupon. When the water reaches his land he may collect it in a ditch and carry it to a proper outlet, but he cannot raise any dyke or barrier whereby it will be intercepted and thrown back on the lands of the higher owner; neither can the higher owner artificially increase the natural quantity or course of the surface water, by collecting it in a ditch and discharging it upon the servient land, in a different manner from its natural discharge.

Where the right to an easement is claimed by long enjoyment from which a grant is presumed, the grant presumed is for the precise right which has been enjoyed.

Therefore, long enjoyment of one ditch, raises no presumption of a grant of the right to use another ditch, differing therefrom in any appreciable degree, either in locality or dimension.

This was a MOTION to vacate an injunction, heard before his Honor *Judge* MCKAY, at Chambers in NEW HANOVER County on ____ of January, 1875.

The plaintiff instituted an action against the defendants at Spring Term, 1874, of New Hanover Superior Court, in his complaint alleging:

He is the owner of a tract of land in said county, on which there are about one hundred acres of very fertile swamp land, most of which is cleared and well adapted to cultivation. Said swamp land was low, and in its natural state there was a good deal of water
(768) thereupon, and the same was too wet to be used successfully for farming purposes. The plaintiff and those under whom he claims, by expending large sums of money in cutting various ditches thereupon, and by expending much time and labor in its improvement succeeded in draining said land, and the same is now, not only cleared, but in so high a state of cultivation as to yield twelve hundred bushels of corn, besides other products.

The defendant, Dawson T. Durham, is the owner of land adjoining the said land of the plaintiff, and the defendant Bryant Brown, and the defendant Council Brown as tenants in common, are also the

owners of land adjoining that of the plaintiff, and have owned the said land for several years.

There being some disagreement and ill feeling between the plaintiff and the defendant Durham, which has now existed for several years, the latter disregarding the rights of the plaintiff and intending to render his farm less valuable formed the deliberate purpose as the plaintiff believes, and threatened to drown out the plaintiff's farm by ditching certain ponds and low places, among which was a large basin containing from fifty to seventy-five acres, lying on the lands of said Durham near the plaintiff's farm, and turning the water therefrom upon the farm of the plaintiff. The natural way and course of draining the same is not by directing the waters therefrom, to and in the direction of the plaintiff's farm, and that the real purpose which said Durham had in view, was not to enhance the value of his land, but to impair and depreciate that of the plaintiff.

The defendant Durham in the prosecution of his unlawful purpose has actually ditched the low places, ponds and basin aforesaid, and has directed the waters thereon from their usual and natural course, so that it runs upon the said land of the plaintiff.

There are upon the lands of the defendants Brown two of several branches, and a third branch on the land of one Sparkman and the "Walker estate" which carry off from said land, large (769) quantities of water. Said branches do not flow in the direction of the plaintiff's farm. The natural, usual and cheapest course of drainage of the land aforesaid, is down the course of said branches, which hereinafter will be designated as branches No. 1, 2 and 3 respectively. No. 1 being nearest to the farm of the plaintiff; No. 3 farthest, and No. 2, intermediate between No. 1 and No. 3. (See plot *post.*)

The defendant, Durham, as the plaintiff believes, has confederated with the defendant, Bryant Brown, who is not well disposed toward the plaintiff, and is partial to Durham in the disagreement aforesaid, for the purpose of further impairing the value of the plaintiff's farm. Under some arrangement between them, the terms of which are to the plaintiff unknown, the defendant, Durham, is now actively engaged with hands in cutting a ditch about three feet wide and varying from four to six feet in depth, beginning at a point near the plaintiff's farm, and running in a direction to enter and cross said branches, for the purpose of directing the waters thereof from their natural course and throwing them upon the plaintiff's farm. This ditch has already been cut to and across branch No. 1, and to a point near branch No. 2, the whole distance finished being between six and seven hundred yards. After said ditch had been cut through a ridge near branch No. 1, the

defendants, Durham and Bryant Brown, seeing that it was not deep enough to turn the waters of said branch down the ditch in the direction of the plaintiff's farm, caused the said ditch to be cut deeper, and carried it up the course of said branch for a short distance, thence out on the other side, making such a dam on the lower side thereof as is sufficient under ordinary circumstances, to force the waters of branch No. 1 to follow the course of said ditch.

The ditch has been finished to within two hundred yards of branch No. 2, and the work is being prosecuted with vigor, and if the
(770) same is not arrested, the waters of branch No. 2, which is the largest of said branches, will be thrown upon the plaintiff's farm. The plaintiff is informed, and believes, and therefore avers, that it is the purpose of the defendants to carry the said ditch to branch No. 2, and then up branch No. 2 to a ditch leading into branch No. 3, known as "Devil's Ditch," which is no great way off, digging it to such a depth as may be necessary to turn the waters of said branches down said ditch upon the plaintiff's farm, their object being to destroy the same.

That part of said ditch which has been finished is, and the whole thereof, when finished, will be, upon the lands of the defendant, Brown. It does not drain any land belonging to the defendant, Durham, and he owns no land in the direction in which it is being cut. The ditch will direct the waters in said branches from their natural and usual course, to the great injury of the plaintiff, and is not necessary and proper for the draining of the lands of the defendants, Brown, and that only a shallow surface ditch is required for that purpose. If carried through the said ditch, the waters of said branches will be diverted at least one thousand yards from their natural course.

The plaintiff is satisfied that the main purpose for which said ditch is being cut, is to destroy his farm.

That if the waters of branches Nos. 2 and 3, or either of them, should be directed into said ditch, they will flow down the same and upon the plaintiff's farm in such quantities that it will be irreparably injured, and he will not be able to raise thereupon more than one-third of the average yearly crop. In addition to this, a great part of the labor and money which he has already expended in draining and improving the same will be lost, and he will not, in the future, be able to cultivate or use it to any advantage.

He believes that the defendants, Durham and Bryant Brown, intend to complete the ditch for the purpose aforesaid without delay,
(771) and if they are not restrained from so doing by an injunction, the work will be very soon completed, and the value of the plaintiff's farm will, in a great measure, be irreparably destroyed.

Damage has already been done to the farm of the plaintiff by turning thereupon the waters of branch No. 1.

The defendant, Council Brown, is an invalid, and generally confined to his room, and the plaintiff believes, and so avers, that he has had no part in cutting said ditch, and that the same is not being done by his direction, and that he has in no way been connected with the conspiracy and collusion above referred to.

The complaint demands judgment against the defendants, Dawson T. Durham and Bryant Brown, for—dollars damages, and for a perpetual injunction restraining them "from working on, cutting or digging the said ditch, and from doing any and every thing towards its completion."

Upon the foregoing complaint, the same being verified, his Honor, *Judge Russell*, at Chambers, on April 17th, 1874, on motion, granted an order restraining the defendants from further working upon the ditch until further order of the court.

The defendants filed affidavits and the following answer, and thereupon moved the court to vacate the injunction:

The defendants admit that the plaintiff is the owner of the said tract of land, as alleged, and the defendants are the owners of lands adjoining the same. (See plot *post.*) All of these lands were at one time owned by Dr. J. F. McRee. More than twenty years ago, he conveyed to W. B. Meares all the land represented on the plot as the "Meares Tract," which includes the land now owned by the plaintiff, and marked on said plot as the Pigford tract, (200 acres,) as well as the lands belonging to the defendant, Durham, adjoining them, and also another tract of land owned by the plaintiff, lying west of the W. & W. Railroad. In 1858, McRee sold and conveyed to the defendants, Bryant Brown and his brother Council Brown, as (772) tenants in common, the land represented on the plot as the "B. Brown land," and they have owned and occupied the same ever since. In 1858, Meares being then the owner of the said two adjoining tracts now owned by the plaintiff and the defendant Durham respectively, conveyed the lower tract described on the plot as the "Pigford tract," to B. W. Berry, as trustee for the wife of Samuel Berry, and in the deed of conveyance reserved to himself, his heirs and assigns the right and privilege of draining any of the said lands, through the tract thereby conveyed. About 1868, the heirs at law of Mrs. Berry conveyed the same to the plaintiff. On the 28th of January, 1860, W. B. Meares conveyed the upper tract to Hinton E. Carr, and conveyed therewith the right of drainage, through the said Berry land, now the property of the plaintiff. On the 10th of December, 1867, Carr sold the same, with all the rights and privileges, to the

defendant Durham. More than thirty years ago, Levin Lane, who was the owner of the land immediately south of the "W. B. Meares tract," for the purpose of draining his land, cut a large canal from the North East river, up near to the southern line of the plaintiff's land, then owned by McRee, being that portion of the canal represented on the plot by the letters A, B, C, D, E, which extends from A to C. About the same time, McRee cut a portion of said canal about five or six hundred yards from the letter D, about the center of the tract now owned by the plaintiff, in a southerly direction toward the southern line of said tract of the letter C. In 1858, Samuel Berry, then the owner of the said tract, cut that portion of the canal extending from the point to which McRee had cut, so as to connect at the letter C, with the canal opened by Lane, and which was done by his consent, and under an agreement with said Lane, as the defendants have been informed and believe.

In 1861, the said Berry cut that portion of the canal extending
(773) from the letter D westwardly to the western line of said tract in the direction of "E." The balance of the canal from the said point in the western line of the Berry (now the plaintiff's) tract, passing through a portion of the defendant, Durham's, and through the defendant Brown's lands toward the centre thereof at P, was cut some years ago by the defendant Brown and Hinton, E. Carr being then the owner of this land, now owned by the defendant Durham, and which joins the Brown land on the south. This was done at the instance of Brown and his brother, Council, in order to drain their land, under a contract with Carr for that purpose, the Browns paying the entire cost of that portion of the canal on their land, and one-half of that portion running through Carr's land.

In 1853, W. B. Meares cut the canal represented on the plot as the Meares canal, extending from a point here in the canal, heretofore described, and near the western line of plaintiff's land, through the said tract in a northeasterly direction to Clayton's creek. One of these canals will average about eight feet wide and from four to six feet deep; the other about five feet in width and about three feet in depth, and are of sufficient capacity if kept open and cleaned of obstructions to carry off the water from the lands of the defendants and from the plaintiff's land, and thus furnish the means of effectually drawing the same in ordinary seasons; so that when the plaintiff became the purchaser of the land, which he complains is in danger of being injured by the opening of the ditch described in the complaint, the Browns had already acquired the right to drain their lands through the canal, hereinbefore described, and the defendant, Durham, had acquired the right to drain his lands through the lands of the plaintiff.

It is not true, as alleged, that the defendants are engaged in cutting a new ditch from a point near the plaintiffs' farm. It is true that the defendant, Bryant Brown and his brother, Council, have opened and cleared out a portion of an old ditch, which was (774) cut a great many years ago, represented on the plot by the letters, J. K. L., which, upon an average, is about two feet in width, and about three feet in depth.

The defendant Brown says that their purpose in opening said ditch was to improve their lands and the health of their residence and with no intention of in any way doing any injury to the plaintiff. The plaintiff's land has not and will not be injured by opening said ditch. The ditch which is altogether on the land of the defendant Brown, begins at a point indicated on the plot by the letter I, west of and near to the canal above described, which for convenience, may be called the main canal and runs west about two hundred and fifty yards to K, passing south of and about two hundred yards from the dwelling of the defendant Brown, thence nearly a north course on the east side and near to and along the Duplin road to branch No. 1, (which save in a wet season has little or no water in it,) thence up said branch and across Duplin road and across Duplin road, thence along said road on the west side thereof to L. The whole length of said ditch is about seven hundred and fifty yards to a ridge of considerable elevation, and about fifty or sixty yards wide, which separates the waters of branches Nos. 1 and 2. The effect of opening the ditch is merely to confine the water and carry it along the same to the main canal at letter O, instead of suffering it to flow over the land of the defendant Brown into the said canal, thereby injuring the land and seriously impairing the health of his place. The opening of this ditch does not throw into the canal or the lands of the plaintiff one drop of water more than would find its way there without it. From this ditch to the nearest point of the plaintiff's land, (the northwest corner,) is about three hundred yards, but to that portion of his lands which he complains is injured, is about a half a mile. It is true that the defendant Durham has superintended the employees of Brown engaged on the work; this he has done at the request of Bryant and Council Brown, one of whom is confined to his house by disease (775) and the other is so much disabled that he gets about his farm with great difficulty. The ditch is on the defendant Durham's way from his house to his plantation and he passes there nearly every day, so that with very little trouble he could give directions to the employees engaged in opening the ditch. What he has done was simply a neighborly act, prompted solely by a disposition to aid neighbors who were unable to direct the work themselves, on account of physical

inability, and without the remotest idea of doing any injury to the plaintiff.

The defendant Brown says that he had no idea of continuing the ditch through the ridge, or to branch No. 2, with a view of turning the water thereof in that direction, for as the plaintiff truly says, he would then be directing the water about one thousand yards from its natural course, and would also have turned the waters thereof on his own land.

There was no purpose entertained by either of the defendants of extending the ditch to branch No. 3, or of endeavoring to turn the waters of branch No. 2 along the ditch, in the ditch in the direction of the plaintiff's land. The defendant Brown did intend to open the ditch on the north side of this ridge beginning at the letter Q and extending to branch No. 2, R, so as to carry off the surface water into branch No. 2, about the letter R and clear out and open said branch below that point to where it empties into "Red Hill canal," down this canal to Clayton creek, and thence into the river, thereby more effectually draining the lands of the defendant Brown, the effect of which would be to turn the waters away from the plaintiff's land more effectually.

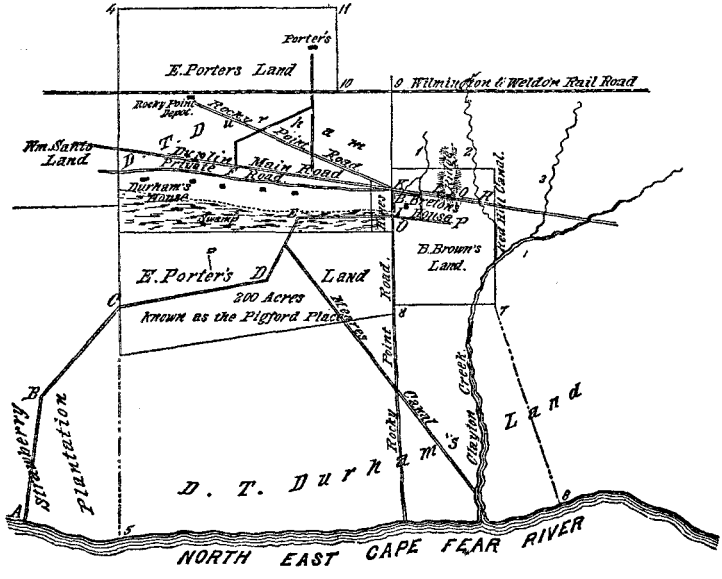
The opening of said ditch from letter Q to R, so as to drain the water into branch No. 2, is necessary, to drain a considerable part of the land owned by himself and his brother, Council Brown, and render it fit for proper cultivation. The order restraining the defendants opening said ditch, does great injury to them and seriously
(776) interferes with and hinders their farming operations during the crop year, and does them a great wrong and injury. That if the plaintiff could sustain any injury by the acts of the defendants, as he has complained, the defendants are amply able to answer in damages for such injury, and there is, therefore, no necessity for the interference of the court by its extraordinary writ of injunction, even upon the case as set forth in the plaintiff's complaint.

It is true that the defendant, Durham, has cut the ditch, F, G, H., but it is not true that it was done for any such motive as alleged. The ditch, from F to G, was cut in September, 1873, and from G to H, in January and February last, and for the purpose of draining some ponds in front of his residence and the residences of his tenants, thereby improving the health of both, as also to benefit an academy, which was near the ponds, and for the further purpose of draining his lands around the depot, on the east side of the railroad, so as to make the lots at the depot more valuable as building lots. The ditch empties into the swamp about seven hundred yards from Porter's line, designated in the plot as the "Pigford" place. This intervening land, which

is all swampy, is owned by the defendant, Durham, and the opening of this ditch does not cause any additional flow of water on Porter's land. The waters of the swamp are carried off by the main canal, and none of it goes upon Porter's land except through the canal, and at the point where the canal strikes Porter's land, he has thrown up dams on both sides of the canal, north and south, the effect of which is, that when the canal overflows, the water is ponded back on the waters of the defendant, Durham, until it is absorbed by the earth or finds its way through the canal.

The defendants deny each and every allegation in said complaint contained, which is not herein specifically admitted.

The answer was verified, and defendants produced copies of the several writings mentioned therein, and also filed several affidavits, which are not necessary to be set out in order to understand the (777) case as decided in this court.



Upon the hearing, it was ordered by the court that the injunction theretofore granted be so modified that the defendants be restrained from cutting the ditch mentioned in the complaint through the ridge which separates the waters of branch No. 1 and branch No. 2 to branches Nos. 2 and 3, but so much of the injunction as restrains the defendants from keeping open and cleared the said ditch which has already been cut by the defendants, be dissolved, etc.

From this order the plaintiff appealed.

W. S. & D. J. Devane and D. L. Russell, for the appellant.
Robert Strange, contra.

RODMAN, J. His Honor, the Judge below, refused to vacate that part of the injunction which prohibited the defendants from continu-
(778) ing their canal so as to turn the water of branch No. 2, (or Morefield branch,) towards the plaintiff's land. The defendants did not appeal from the judgment in this respect, and we are not called on to examine it.

The principal question presented to us is, as to the right of the defendants to carry the water from branch No. 1 to or near the plaintiff's land. In considering this we are obliged to form some opinion as to the facts which are disputed between the parties, as it is upon these that their respective rights depend. These conclusions are, however, only provisional, and for the present purpose. It may be that on the final hearing, upon fuller evidence, the facts may appear to be very different from what, in our opinion, they now appear to be. We consider it proved with sufficient probability for the present purpose, that the natural flow of the water which finds its way into branch No. 1, is into Walker's swamp, (or Clayton's creek). Several witnesses acquainted with the locality, swear positively to this, and so far as we have seen, no witness swears that it passes over the land between the branch and the plaintiff's land. This view is supported by the admitted fact, that in order to conduct the water from the branch to the plaintiff's land, it was found necessary to cut the ditch six feet deep, and to dam up the branch below the point where the ditch departed from it. Taking this to be the fact, it will scarcely be contended that the defendants at common law, and in the absence of any license or grant of the right, have a right to divert a stream of water flowing in a part of its course through their land, from its natural course and outlet, and to conduct it to discharge itself upon the plaintiff's land, or into his ditches, to his damage. An owner may not use his property absolutely as he pleases. His dominion is limited by the maxim, *"sic utere tuo ut alienum non lœdas."* This maxim is so familiar, and the illustrations of it in decided cases are so numerous that any particular reference to them is unnecessary.
(779) The defendants allege that there is an ancient ditch running from branch No. 1, nearly in the direction of the one recently cut by them, and hence claim as we suppose a prescriptive right to their ditch. But when the right to an easement is claimed by long enjoyment from which a grant is presumed, the grant presumed is for the precise right which has been enjoyed, and long enjoyment of one ditch

can raise no presumption of a grant of a right to a ditch differing in any appreciable degree from that enjoyed, in locality or dimensions. It does not appear that the old ditch, remains of which were found on each side of the public road, ever carried down the water from branch No. 1, upon the lands of the plaintiff, or that it has been in a condition to do so within twenty years.

If, as seems to us upon the evidence to be the fact, the natural flow of the water of branch No. 1 is to Walker's swamp, the defendants have the right to cleanse it and restore it to that natural condition in which it once discharged, and may still discharge the injurious surplus of water from their lands. If that means of drainage shall from any cause be impossible, or extremely inconvenient, they may obtain a right to drain their lands into the ditches of the plaintiff or through his lands by the means prescribed by our Acts of Assembly.

Such being our opinion on the question as to the defendants' right to divert the branch, very few observations are necessary upon the right of the defendants over the surface water which falls upon their land, and which would naturally flow over the surface upon the lower lying lands of the plaintiff. It has been held that an owner of lower land, is obliged to receive upon it the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot however raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. (780) While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water, or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place, or in a different manner from its natural discharge. These elementary principles being founded on reason and equity are common to both the civil and the common law, and are impliedly recognized by our Acts of Assembly respecting draining. They do not present any absolute or inequitable impediment to the drainage of higher lands through lower. If it be necessary (using this word in its legal sense) for the sufficient drainage of the higher lands, to collect the surface water in one or more ditches and carry it off through the lower lands, the higher owner may obtain a right to do so, on the just condition that he will not discharge the water on the lower land to its damage leaving the owner to get rid of it as best he may, but will at his own expense, conduct it through, and entirely from, the lower land to a proper outlet.

We have not given any attention to the alleged motives of the defendants. Their motives are immaterial. The question is only as to

their rights. The Judge erred in vacating any part of the injunction before a final hearing.

The Judge's order in vacating part of the injunction is reversed, and the injunction as to the whole of the ditch complained of is continued until the hearing. The plaintiff will recover the costs of this court.

Let this opinion be certified.

PER CURIAM. Judgment accordingly.

Cited: Staton v. R. R., 109 N.C. 341; *Fleming v. R. R.,* 115 N.C. 696; *Mizzell v. McGowan,* 120 N.C. 138; *Porter v. Armstrong,* 129 N.C. 102; *Mullen v. Canal Co.,* 130 N.C. 502; *Davis v. Smith,* 141 N.C. 109, 110; *Clark v. Guano Co.,* 144 N.C. 76; *Greenwood v. R. R.,* 144 N.C. 448; *Briscoe v. Parker,* 145 N.C. 17; *Brown v. R. R.,* 165 N.C. 395, 396; *Yowmans v. Hendersonville,* 175 N.C. 578; *Jackson v. Keans,* 185 N.C. 419; *Winchester v. Byers,* 196 N.C. 384; *Bonapart v. Nissen,* 198 N.C. 183; *Holton v. Oil Co.,* 201 N.C. 748; *Darr v. Aluminum Co.,* 215 N.C. 771; *Cotton Mills v. Henrietta Mills,* 219 N.C. 283; *Phillips v. Chesson,* 231 N.C. 569; *Johnson v. Winston-Salem,* 239 N.C. 704.

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(781)

HAWKINS & CO. v. L. M. LONG AND ANOTHER.

Where an account has been stated between the parties, and there is no dissent thereto within a reasonable time, it will be presumed that the account, as stated, is correct. When the assent of a party thus appears, the balance struck becomes an original demand, and amounts to an express promise to pay the actual sum stated. The balance of the account stated is principal, and the account cannot be re-examined to ascertain the items, unless for alleged fraud or mistake.

CIVIL ACTION for the recovery of money only, originally instituted in a court of a Justice of the Peace, and carried thence on appeal to the Superior Court of HALIFAX County, where it was tried before *Moore, J.,* at December (Special) Term, 1875.

The action was brought to recover certain moneys paid by the plaintiffs on account of drafts drawn upon them by the defendant.

Upon the trial in the Superior Court the plaintiffs recovered judgment of $28.00, and from this judgment appealed to the Supreme Court.

All other facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

Walter Clark, for the appellants.

Day and Batchelor & Son, contra.

BYNUM, J. On the first of April, 1874, the plaintiffs rendered to the defendant an itemized account of their dealings with him, consisting wholly of debits for cash advanced, merchandize sold, and drafts paid for the defendant, amounting to $1,671.63, without any payments thereon. On the 21st of September, 1874, the plaintiffs rendered (782) to the defendant another account, including therein the aggregate amount of the first account, designated as the "balance" due on the said first day of April, and embracing other items, being their dealings from April to September the 21st, and increasing the whole debit to $1,764.66. This account, last rendered, gives the defendant credit for cash, drafts paid and cotton delivered and sold, since the 1st of April, to the amount of $1,266.56, and then subtracts the credits from the debits, and strikes the balance due the plaintiff, which is $498.10. As thus stated, the account is signed by the plaintiffs and delivered to the defendant, three months before this action was commenced. As no dissent appears, we must assume that the account was approved by the defendant as rendered. 1 Greenl., S. 167 and notes.

When an account rendered is not objected to in a reasonable time,—here, three months—the failure to object, will be regarded as an admission of its correctness by the party charged. *Wiggins v. Burkham,* 10 Wall., 129. The conversion of an open account into an account stated, is an operation by which the parties *assent* to a sum as the correct balance due from one to the other; and whether the operation has been performed or not, in any instance, must depend on the facts. This may appear from either express agreement, or from words or acts and the proper inferences from them. The plaintiffs here consolidated into one aggregate sum the items of their account against the defendant; then consolidated the items of the defendant's credits in like manner. They then apply the consolidated credits in payment of the consolidated debt, strike the balance and claim that round sum as the debt. The plaintiffs are bound by this application, because they themselves made it. The defendant is bound, because he received the account thus stated, and acquiesced in it, until action brought three months afterwards, without any dissent. When the assent of the defendant thus appears, the balance struck becomes an original demand and amounts to an (783) express promise to pay the actual sum stated. The balance of the account stated is principal; and it seems that it cannot be re-examined to ascertain the items, except for fraud or mistake. *McLelland v. West,* 70 Pa. St., 183; *White v. Campbell,* 25 Mich., 463. What is an account stated? It is nothing but the agreement of both parties that all the articles are true. But it is really not material whether in this case it is called an account stated or an account rendered. The same legal consequences will follow the same state of facts. The plaintiffs

apply the solid sum of the credits in extinguishment of the solid sum of the debits, and claim the balance struck, as the true debt. That binds *them.* The defendant accepts the account thus stated and assents to it. That binds *him.*

This case is clearly distinguishable from *Waldo v. Jolly,* 49 N. C., 173; *Jenkins v. Beall,* 70 N. C., 440; *Boyle v. Rollins,* 71 N. C., 130; *Caldwell v. Beatty,* 69 N. C., 365; *Jenkins & Co. v. Smith,* 72 N. C., 296, and that class of cases, in that in none of them, did the plaintiff himself make the application of the payments to the extinguishment of a specific debt in mass, which is our case. His Honor in the court below was governed by the case of *Jenkins & Co. v. Smith,* 72 N. C., 269, and applied the first item on the debit side and so on. But in that case, it was held that the plaintiffs had made no specific application of the payments, nor had the defendant made the application. In such case the law makes the application in running accounts, according to the rule there adopted. That case has no application, because here the specific application of the credits was made by the plaintiffs and acquiesced in by the defendant. The plaintiffs had no right to split the account, and the magistrate had no jurisdiction.

There is error.

PER CURIAM. Judgment reversed and the action dismissed.

Cited: Flemming v. Flemming, 85 N.C. 131; *Marks v. Ballance,* 113 N.C. 29; *Wallace v. Grizzard,* 114 N.C. 495; *Davis v. Stephenson,* 149 N.C. 116; *Blanchard v. Peanut Co.,* 182 N.C. 23; *Brooks v. White,* 187 N.C. 658; *Fish Co. v. Snowden,* 233 N.C. 270.

(784)

D. A. AND L. W. HUMPHREY v. R. W. WARD, EX'R., AND OTHERS.

As the jury is the tribunal, whose peculiar province it is to try issues of fact, their finding, though not conclusive in a Court of Equity, will, as a general rule, be adopted as the finding of the court, when issues have been submitted to a jury under the direction of the court.

This was a BILL IN EQUITY, (under the old system,) tried before *McKay, J.,* at Fall Term, 1875, of the Superior Court of ONSLOW County.

The case was before this court at January Term, 1871, when certain issues were made up from the pleadings and ordered to be submitted to a jury.

At January Term, 1874, the defendants moved this court to dismiss the bill on the ground that the court had no jurisdiction thereof. The case is reported in 70 N. C., 280.

At Fall Term, 1875, of the Superior Court of Onslow County, the issues directed by this court to be submitted to the jury were tried, all of which were found in favor of the defendants. The plaintiffs excepted to the charge of the court and assign as error:

"That his Honor erred as a matter of law in his charge to the jury as follows: The plaintiffs' counsel called the attention of his Honor to the 3d and 5th issues which had not been denied by the answer of the defendants, and were therefore admitted, and requested the court to instruct the jury as a matter of law. His Honor refused so to do, and charged the jury, 'that the Supreme Court having the pleadings before them had sent the issues submitted to be passed upon by a jury. That the pleadings in the case had been read for information, that they might aid the jury in understanding and coming to a correct conclusion upon the issues submitted by the Supreme Court. That they must pass upon the issues and decide them according to the evidence submitted to them upon the trial.' Holding that if an issue had been ordered by the Supreme Court upon a matter settled by the pleadings they had (785) a motive therefor, and if useless they would so perceive from an inspection of the pleadings and disregard the finding."

All other facts necessary to an understanding of the case as decided, are stated in the opinion of the court.

The plaintiffs appealed.

Smith & Strong, for appellants.

Battle & Son and A. G. Hubbard, contra.

BYNUM, J. This is a suit in equity, begun in 1867, under the old system. G. J. Ward, as principal, and Robert White, as surety, were indebted to William Humphrey by note, in the sum of $3,471.20. Ward died insolvent, and on the 9th of January, 1866, White, for the alleged consideration of $10,000, payable in ten equal yearly installments with interest, conveyed by deed all his real estate, consisting of a large and valuable plantation, to the defendants, Sanderlin and Venters. He also, at the same time, conveyed by deed, to the same parties, all his chattel property, with some small exceptions, taking as the consideration therefor, their obligation to support him during his life. William Humphrey, the creditor, died, leaving the plaintiffs as his executors; and both Ward and White are dead, the defendant, R. W. Ward, being the executor of the one, and the defendant, Etheridge, being the administrator of White. The prayer of the bill is, that the said deeds made by White, may be

declared void for fraud, and the property thereby conveyed be decreed to the satisfaction of the said debt. The defendants answered that they were purchasers in good faith, for a valuable and fair consideration, and denying any fraudulent intent. The cause being heard in the Superior Court, upon the pleadings and proofs, the bill was dismissed, and the plaintiffs appealed to this court. See 70 N. C., 280. This
(786) court, not undertaking to decide the issues of fact involved, upon which much evidence was sent up with the record, ordered, among others, the following material issues, to be sent down and tried in the Superior Court by a jury, to-wit:

"Was the deed, set forth in the bill, from Robert White to D. E. Sanderlin and S. W. Venters, dated the 9th of January, 1866, for the real estate, executed with the intent to hinder, delay or defraud the creditors of Robert White?"

"Was said deed executed with the intent to hinder, delay or defraud William Humphreys, his executors, administrators or assigns?"

Similar issues were submitted in respect to the deed for the chattel property. Upon the trial in the court below, the jury responded in the negative, upon each of these issues, and the case is now before us for final hearing.

As the jury is the tribunal, whose peculiar province it is to try issues of fact, their finding, though not conclusive, in a Court of Equity, will, as a general rule, be adopted as the finding of this court, when such issues are submitted by our direction.

The bill seeks to avoid the two deeds upon the single ground of fraud, but the jury, by their verdict, negative any idea that the deeds were made with intent to hinder, delay or defraud creditors, and the evidence before us fully supports the verdict. It establishes that White sold his land for the sum of $10,000, which was a fair price for it; that the defendants purchased in good faith and have paid all the purchase money except $2,000, which they admit to be yet unpaid; that White owed no other but this security debt due to the plaintiffs; and of the existence of this the defendants had no knowledge at the time of their purchase; nor had they any reason to suspect a fraudulent purpose in the bargainor, because he had a good character for economy, prudence and honesty in his life and dealings. But an absolute conveyance, for a valuable consideration, is good, even notwithstanding the intent
(787) of the maker to defraud, if the grantor was not a party to the fraud and bought without any knowledge of the corrupt intent. *Reiger v. Davis*, 67 N. C., 185; *Lassiter v. Davis*, 64 N. C., 498. The deeds being good upon their face, and the jury having negatived fraudulent intent on the part of the defendants, the plaintiffs have failed to make out a case, and the judgment of the Superior Court dismissing the bill, must be affirmed.

It was suggested by the counsel of the plaintiffs that they might have a decree for the amount of the two unpaid notes, admitted to be due and unpaid by the defendants. This cannot be allowed, because it would be wholly inconsistent with the frame and prayer of the bill, and because it may be that the unpaid notes have been assigned for value to third persons. If unassigned they may, by the proper action, be subjected to the plaintiffs' debt.

There is no error.

PER CURIAM. Judgment affirmed.

STEPHEN M. THOMAS v. R. H. CAMPBELL.

It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien under the statute, that a summons should be issued to the defendant.

This was a SPECIAL PROCEEDING, to enforce an agricultural lien under the statute, heard before *Buxton, J.*, at Fall Term, 1875, of the Superior Court of RICHMOND County.

The proceeding was instituted before the Clerk of the Superior Court, no summons or other notice having been served upon the defendant. The plaintiff filed an affidavit and bond in pursuance of the provisions of the statute, and thereupon the clerk issued a warrant directing the sheriff to seize the crop upon which the lien was given. The (788) sheriff seized the crop and duly advertised the same for sale on the 6th day of December, 1875.

On the 30th day of November, 1876, the Clerk of the Superior Court, at the instance of the defendant's counsel, issued an order to the plaintiffs to appear on that day and show cause why the proceedings should not be dismissed on the grounds:

1. That no summons was issued to the defendant.
2. That the requisites of the statute concerning the claim and delivery of personal property had not been complied with.
3. That the court had no jurisdiction of the subject matter of the action.

Upon the hearing, after argument, the proceeding was dismissed, and the plaintiffs appealed to the Superior Court.

Upon the hearing in the Superior Court, the judgment was affirmed and the plaintiffs appealed.

Steele & Walker, Busbee & Busbee and Cole, for the appellants.
Shaw, Hinsdale and McNeill & McNeill, contra.

PEARSON, C. J. His Honor, after some discussion in regard to other points, rests his decision on the ground "a proceeding to enforce a lien on crops must be accompanied with notice to the party affected." By this we suppose his meaning to be a "summons," because that is the first ground upon which the defendant put his motion to dismiss.

By Statute, see Bat. Rev., Ch. 65, Sec. 19, it is enacted, that any person who makes advances either in money or provisions, to enable a party to make a crop, shall have a lien on the crop, provided an agreement in writing is executed and recorded.

(789) Section 20 gives a summary remedy, if the party who has made the advances, makes affidavit before the Clerk of the Superior Court that the cultivator is about to sell or dispose of the crop, or in any other way is about to defeat the lien, accompanied with a statement of the amount then due. The summary remedy is that the Clerk shall thereupon issue a warrant to the sheriff commanding him to seize the crop, or so much thereof as may be necessary, to satisfy the amount sworn to in the affidavit, and after due advertisement, sell the same for cash, and pay off the debt. The Act then provides that the cultivator, may within thirty days after the sale give notice in writing to the sheriff, accompanied with an affidavit, that the amount claimed is not justly due, whereupon it shall be the duty of the sheriff to hold the proceeds of sale, subject to the decision of the court, upon an issue to be tried at the next term of the Superior Court. The purpose of the statute is to give a summary remedy, where there is reason to believe that the cultivator is attempting to commit a fraud upon the lien of the party who has made the advances. It is clear from a perusal of the statute, that in order to prevent an attempted fraud it was the intent of the law making power to dispense with a summons to the next term of the Superior Court, and to allow the crop or so much thereof as was necessary to satisfy the debt, which is required to be set out in the affidavit, to be seized and sold by summary process—leaving the cultivator to his remedy by civil action in case he was not in default, and also by indictment against the party who makes the affidavit, in case it be false in regard to the fraud charged or in regard to the amount alleged to be due.

There can be no doubt that the General Assembly may in its wisdom, especially to prevent fraud, allow a summary proceeding and dispense with the necessity of a summons to the next term of the Superior Court. As in the case of a summary judgment against securities for an appeal, or for prosecution or for the forthcoming of property in an action for claim and delivery.

(790) See *Harker v. Arendell, ante,* 85, furnish full analogies. The cultivator is supposed to know the law as to summary proceedings.

If by using the word "notice" instead of the word "summons," which is the word used by the counsel of the defendant in his first objection, his Honor means, that the clerk had no power to issue the warrant unless notice of the application had been given to the cultivator. The reply is, there is no provision to that effect in the act, and it may be asked, *cui bono?* As the order is peremptory to the clerk,—issue the warrant provided the proper affidavit is filed. If the cultivator had notice, what could he say before the clerk? That he had not sold or disposed of any of the crop, or otherwise attempted to defeat the lien? In other words, deny the truth of the affidavit. This matter the clerk has no power to try. Nor could he deny the existence of the debt. The clerk had no jurisdiction to try the question, and the act expressly provides a mode for the trial of that issue. Thus it is seen, that to require notice of the application, would defeat the purpose of the act, which is to give a summary remedy in order to prevent fraud upon the lien or statutory mortgage.

It has never been supposed that a Justice had jurisdiction of an action to recover personal property, and the action of a mortgagee, although its ultimate object may be to obtain payment of his debt, has for its immediate object the recovery of the mortgaged property, and is not directly founded on contract, but on the right of possession. The amount of the debt, therefore, cannot affect the jurisdiction. Under our old system a Justice had exclusive jurisdiction of an action on a note of $100 or less, but it was never supposed that he had jurisdiction of an action of replevin or trover to recover property mortgaged.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

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(791)

WILLIAM CLARKE v. D. M. WAGNER AND OTHERS.

In an action for the recovery of land, evidence of long continued possession and claim of a part of the *locus in quo*, consisting of dry land, is no evidence of the possession of another part of the *locus in quo* covered with water adjoining the same; and in the absence of such evidence, the court below erred in allowing the jury to find a verdict in favor of the defendant as to that part of the *locus in quo* covered with water.

CIVIL ACTION, in the nature of *Ejectment*, tried before *Furches, J.*, at the Fall Term, 1875, of IREDELL Superior Court.

In support of his title, the plaintiff introduced a grant from the State dated in 1802, on a survey made some time before that date, to one

Samuel Houston, Sen., calling for fifty acres of land, described as follows: "Beginning on a stake, the upper end of the island, thence south 35° east fifty-three poles to a stake, the lower end of the island; thence east 125 poles to a post oak; thence north 45 poles to a black oak; thence west 20 poles to Samuel Houston's old corner; thence with said Houston's line west, in all 154 poles, to the beginning, including two small islands in said river," and describing said land as lying on the Catawba River.

Plaintiff then introduced *mesne* conveyances from the said Samuel Houston down to himself.

The plaintiff then introduced one Clegg, a surveyor, (who had surveyed the land in the grant, and also the adjacent land claimed by the defendant) (see plot *post,*) who testified that he commenced his survey at the upper end of island No. 2, (there being two islands opposite the land described in the grant, lying nearly parallel with each other and the bank of the river,) the one nearest the bank being designated as island No. 1, and the one farthest from the bank as island No. 2; that he ran to the lower end of island No. 2; that the courses corresponded precisely with the courses of the grant; that the distance was
(792) greater than called for—this line was run on the western margin of said island. He then went to the upper end of island No. 1, and run down its western margin to the lower end of the same; that the course of this line varies about fourteen degrees from the call of the grant, and the distance was greater.

He then went to the upper end of island No. 1, and run down till he came opposite the upper end of island No. 2, a distance of twenty poles, and then crossed over to island No. 2, and run along its western edge to its lower end; that the course of this line corresponded precisely with the call of the grant, but the distance was greater.

That he then commenced at the lower end of island No. 2, and run to a post oak, on the main land, which was admitted by the plaintiff and defendant to be the third corner called for in the Houston grant; that the course of this line varied three degrees from the call of the grant, and the distance was greater.

The course from the lower end of island No. 1, also varied three degrees, though in the opposite direction.

He then run to the black oak north, and that the line corresponded precisely with the call of the grant, but the distance was greater. From the black oak, he run with the old marked line, west, to the upper end of island No. 1.

The plaintiff then introduced one R. C. Plott, who testified that he had heard old man George Campbell, now dead, say that the lower end of Island No. 2, was the Houston corner, and one Jacob Parker, who

testified that Mrs. Campbell, under whom the defendants claim, had told him that her beginning corner was at the lower end of Island No. 2, (being then in sight of said point and pointing to it.) The defendant introduced a grant to the heirs of one Kyle, dated in the year 1816, and showed *mesne* conveyances from the heirs of Kyle to themselves. Said grant called for "commencing on a stake, the lower end of Houston island, then, with his line, past his corner," etc. They also (793) introduced a surveyor, who stated that he commenced at the post oak, the admitted third corner of the Houston grant, and ran along an old marked line to a white oak, in the river bank, which was marked as fore and aft and across to a point about 5 poles above the lower end of Island No. 1; that he blocked the white oak and post oak corners and four other trees along said line, including the post oak corner; that the white oak, post oak and two other trees corresponded in age with the Houston survey, and one with the age of the Kyle survey. They also introduced one Jno. Davidson, a surveyor, and several other persons, who testified that they were present between 30 and 40 years ago, when the surveyor was surveying other land in the neighborhood, and a dispute arose between Samuel Houston, Jr., a son of the grantee in the Houston grant, and one Crawford, as to whether if, the second line of the Houston grant was run out, according to its call, it would come out at the post oak corner or not, and to settle it, Samuel Houston, Jr., took the surveyor to the white oak, marked as fore and aft, at the bank of the river, and set his compass for him and sighted to the lower end of Island No. 1, and told him to run from them and by the post oak. The surveyor run the line according to the sight granted him, and came out above the post oak (4 or 5 poles.) Houston following the old line and calling to the surveyor, Davidson, as he went along, that he was leaving the line, said Samuel Houston, Sr., had formerly been one of the owners of this land; that he said nothing about the lower end of Island No. 1, being the corner, but set the compass as above stated.

It was in evidence that the ground between the post oak corner and the river was broken and wooded, so that the river could not be seen from there. That the distance from the white oak on the river bank to the lower end of Island No. 2, was about 100 yards. That the distance from the said white oak to the line running from the lower end of Island No. 2 to the post oak, (the greatest width of the (794) disputed land on the shore,) was 110 yards.

There was other evidence tending to show that the marked line from the white oak to the post oak, was the line surveyed and marked out for the Houston grant, and that it had always been recognized as the true line until 1862 or 1863.

It was in evidence that there is now a corner of an old field of about three-fourths of an acre, extending from the Kyle tract in the disputed land; and several of the children of Elizabeth Campbell, under whom the defendants claim, testified that the same had been cleared for forty or fifty years, and that their mother and themselves had cultivated said field, including the part in the disputed land, for more than twenty years previous to A.D. 1860, and that they had cut fire wood, rail timber, boards and shingles off the remainder of the disputed land which lays between the field and the marked line; that the old line of marked trees, from the white oak to the post oak, had always been recognized as the line between the Kyle lands and the Houston lands. That one David Clark, under whom the plaintiff claimed, when he owned the land had asked permission of Elizabeth Campbell to set his fence a few feet below the white oak, on the disputed land, to get a bluff on the river, and she had granted it. It was further in evidence, that when the present defendants purchased from Elizabeth Campbell, they went after the plaintiff to draw the writings for them, and that on returning with them to the house of Elizabeth Campbell he had put his hand on and pointed out to them the white oak on the river bank as a line tree between him and Mrs. Campbell.

It was in evidence, on the part of the plaintiff, that the cultivation of the field, which ran upon the disputed land, was suspended several years before A.D. 1860, and that long before that the fence had been drawn in, leaving out that part that was in the disputed land, and the plaintiff himself testified that he had not known of any cultiva-
(795) tion of said field for twenty years or more; that he had known the disputed lands thirty-five or forty years, and had never known any one to cut timber or wood of any kind upon it in that time.

Plaintiff further testified that he had always thought that the line from the white oak to the post oak, as marked, was the line between him and the Campbells, until he found the Houston grant, in 1872, though he always thought that island No. 2, the lower end, was his corner. That his deeds all commence at the post oak, and run around the other way, he not having ever seen the Houston grant until by accident he found it in the year A.D. 1872, after the present defendants had purchased.

The court, after rehearsing the evidence, instructed the jury that they must find all the disputed facts, from the testimony, and apply them to the law as given them by the court. And in doing this, it was proper that they should take in consideration the arguments and theories of the counsel on both sides. That it was agreed by both sides that the post oak was the third corner called for in the grant. But the parties disputed as to where the second corner called for in the grant was.

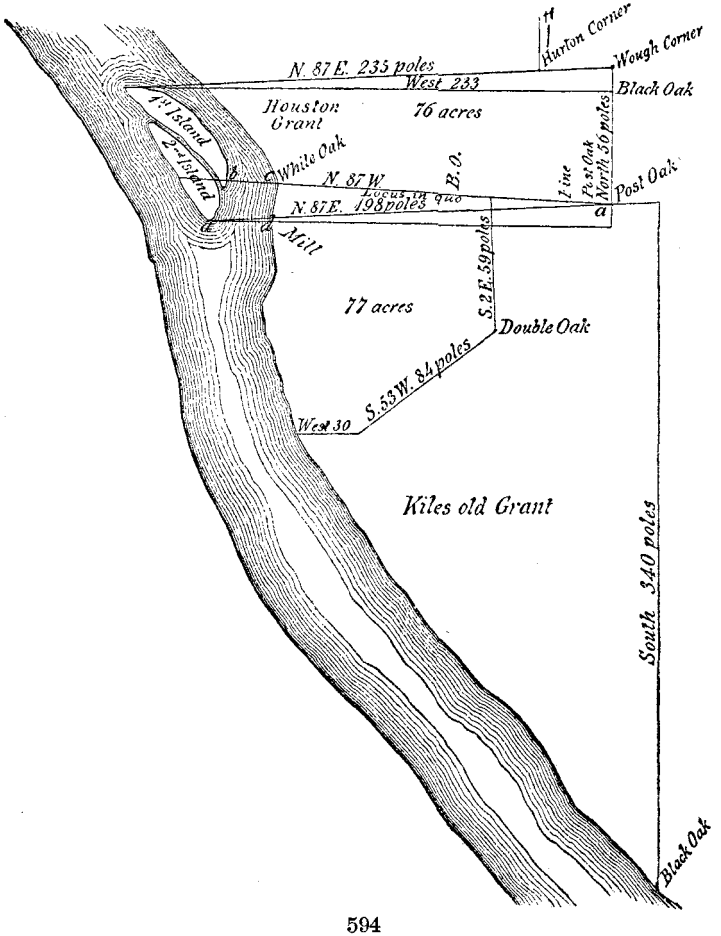
That the plaintiff contended it was at the lower end of island No. 2, and the defendants contended that it was at the lower end of island No. 1, and that was a question for them to determine. That the court instructed them that it was at one or other of these points. And, as a matter of convenience, they might consider that question first. And if they should find that it was at the lower end of island No. 1, they need not go any further with their enquiries, as a line ran from that point to the post oak would not cover any land in possession of the defendants, plaintiff would not be entitled to recover, and their verdict should be for the defendants.

But if they should not find that the lower end of Island No. 1 was the second corner called for in the grant, and that the lower end of Island No. 2 was, the plaintiff's line would be a true and direct line, from that point to the Post Oak, nothing else appearing, (796) and plaintiff would be entitled to recover, and their verdict should be for plaintiff. But defendants further contend that if you find that the lower end of Island No. 2 is the second corner called for in the grant, that they have shown a line of marked trees extending from the Post Oak corner west to the river, and that the same was run and marked by the surveyor in making the survey for the Houston grant, and that that line has always been known and recognized as the dividing line between the respective owners until about 1872, and that said marked line is the true line, although not a direct line from the lower end of Island No. 2 to the post oak corner. And the court instructed the jury that if they should so find the facts, that as this was the location of a grant from the State, that said marked line would be the true line, and plaintiff would not be entitled to recover and their verdict should be for the defendant. But defendants also further contend that if you should find that the lower end of Island No. 2 was the second corner called for in the grant and should not find the marked line from the post oak to the white oak was the true line under the instructions as given you, that they have shown a sufficient adverse possession to give them title and to defeat the plaintiff's right to recover. And upon this the court instructed the jury, that as it was shown that this land had been granted by the State to either Houston or Kyles, that if they found as a fact that the defendants and those under whom they claim had had an actual adverse possession of the land in dispute for twenty years, that this would defeat the plaintiff's right to recover the land so held in possession; and if they further found that those in possession were claiming up to the marked line from the post oak to the white oak, the law would presume possession up to that line and plaintiff would not be entitled to recover, although he might originally have had the title to the same. That this possession must (797)

have been an actual possession of a part of the land in dispute—a possession of other land under the Kyles grant not in dispute would not do, neither would the occasional cutting board timber, etc., do. But it must be such a possession as farmers in that neighborhood usually have of land they cultivate. Plaintiffs excepted:

1st. That his Honor left it as a matter of fact to the jury to say whether the second corner of the land, included in the Houston grant, was at the lower end of Island No. 1, or lower end of Island No. 2, when he ought to have told them, as a matter of law, that it was at the lower end of Island No. 2.

(798)



2d. That his Honor told the jury, in effect, that if the line from the white oak to the post oak was the line actually run for the location of the Houston grant, it would be the true line, though seemingly located there by mistake, and differing from the actual call of said grant.

3d. That his Honor told the jury that as the defendants claim up to a known marked tree (the line from white oak to the post oak) if they had actual possession of a part of the land between the line from the white oak to the post oak, and true line from the lower end of Island No. 2, to the post oak, (supposing that to be the true line) the law would presume this possession to be a possession of all the land between the two lines aforesaid, sufficient if long enough to bar plaintiffs' claim to all the land between said lines.

Verdict and judgment for defendants.

Motion for a new trial. Motion disallowed. Appeal by plaintiff.

M. L. McCorkle, R. F. Armfield and Johnstone Jones, for the appellant.

Scott & Caldwell, contra.

PEARSON, C. J. The statement of the case does not set out with distinctness the *locus in quo*, but we learn from it and the plot and the statement of counsel at the bar, that it composes a slip of dry land lying between a direct line from the lower end of Island No. 2 to the post oak corner, and a line of marked trees from that corner (799) to a white oak on the bank of the river, marked as a "fore and aft;" and also a parcel of land covered by water. In regard to the dry land, there was evidence of a long continued possession by those under whom defendant derives title, claiming up to the white oak and marked line to the post oak. There was conflicting evidence as to how long this possession had been abandoned, to which his Honor seems not to have called the attention of the jury; but supposing, as to this part of the *locus in quo*, there was evidence to be left to the jury; in regard to the parcel covered by water, there was no evidence whatever of any possession or of any definite line up to which claim was made. It may have been from the white oak down the river bank, which was the extent of the possession, or from the white oak to the lower end of Island No. 2; or to the island, by an extension of a line from the post oak to the white oak, or from the white oak to the lower end of Island No. 1, which the case states was the point claimed by the defendant.

His Honor erred in allowing the jury to find for the defendant in respect to this part of the *locus in quo*. There will be a *venire de novo*. As the case goes back, it may be well to observe that his Honor is very indefinite on the question of boundary, which is the main purpose of

the action, and for this the plaintiff has a right to complain, as well as for error above referred to. The object is to locate the Houston grant—it begins at a stake at the upper end of *the island,* thence, etc., to a stake at the lower end of *the island,* thence, "including two small islands."

The difficulty arises out of the fact, that the grant does not designate which of the two islands is meant by the words, a stake at the upper end, and a stake at the lower end of "the island." This is the governing fact in the case, and ought to have been distinctly left to the jury, with instructions to consider all of the evidence and the surroundings
(800) of the case, including the marked line trees and corners, and the plot annexed to the grant, the tradition of old persons, the land and the nature of the river; were the islands permanent or liable to change by washing away at one place and gaining at another and other like matters.

His Honor was at liberty, by way of illustration and to aid the jury, to say the grant includes two islands. If you adopt No. 1, how can you include both islands? On the other hand, there are certain marked line trees that cannot be reconciled with a corner at the lower end of No. 2. How can you adopt No. 2? and he ought then to have added: Can a solution of this difficulty be found in the supposition that since 1790, the upper part of No. 2 has washed off and there has been an accretion at the lower end? If the jury find that No. 1 is the island meant, the verdict should be in favor of the defendant. If the jury find that No. 2 is the island meant, then the court instructs them: The beginning corner of the grant is at a point which was the upper end of the island at the date of the survey, 1790, and the second corner is at a point which was the lower end of the island at that date, and the line must be run from the second corner, wherever the jury may fix it, directly to the post oak, an agreed corner.

PER CURIAM. *Venire de novo.*

Cited: Graybeal v. Powers, 76 N.C. 70; *Clarke v. Wagner,* 76 N.C. 463; *Clarke v. Wagner,* 77 N.C. 368.

JOSEPH H. ETHERIDGE AND OTHERS v. MELFORD VERNOY.

A assigned to B a portion of a note, specifying the sum assigned; subsequently A assigned to C another part of the same note, likewise designating the same: *Held*, that B took the sum assigned to him in severalty, and was entitled to be paid out of the proceeds of the note, before C could claim any part thereof.

CIVIL ACTION in the nature of a Bill in Equity, heard upon exceptions to the report of the Clerk of this court, to whom the case was referred at the last (June) Term.

The Clerk filed the following report: "In obedience to the (801) order of the court directing the Clerk to inquire and report upon the respective rights of the plaintiffs *inter se*, in the funds derived from the sale of the lands in said cause, reports that the assignment of Lewis T. Bond, in the Vernoy note to the amount of $2,515.74, to the plaintiff, H. A. Benbury, administratrix of John A. Benbury deceased, was made before the assignment to the plaintiff Etheridge. He therefore finds, that the plaintiff H. A. Benbury's claim is entitled to be paid first out of said fund with interest thereon from February 16th, 1867, the date of the assignment."

The following exhibits accompany the report of the Clerk:

A.

I, Lewis T. Bond, have for value received, transferred and assigned to H. A. Benbury, administratrix of John A. Benbury with will annexed of John A. Benbury, deceased, twenty-five hundred and fifteen dollars and seventy-four cents of a bond given by Melford Vernoy to me dated 26th day of February, 1866, and due two years after date, bearing interest from date, which said bond is in the possession of L. S. Webb and secured by a mortgage bearing even date with said bond and recorded in the Register's office of Bertie County, and I do hereby authorize and empower the said H. A. Benbury or his executors and assigns to use my name for the collection of the same in any proceeding in law or equity which may be necessary for that purpose, and for me and in my name to grant and receipt or acquittance for the amount hereby transferred or assigned, which said sum is to bear interest from date. Witness my hand and seal, this 16th day of February, 1867.

(Signed) LEWIS T. BOND, [SEAL.]

B.

I, Lewis T. Bond, have, for value received, transferred and assigned to Joseph H. Etheridge and William T. Sutton, surviving trustees of David Outlaw, thirty-three hundred and seventeen 17-100 (802)

dollars of a bond given by Melford Vernoy, to me, dated the 26th day of February, 1866, and due two years after date, bearing interest from date, which said bond is in possession of L. S. Webb, and secured by a mortgage bearing even date with said bond, and recorded in the Register's office of Bertie County. And I do hereby authorize and empower the said Joseph H. Etheridge and William T. Sutton, trustee, etc., their executors and assigns, to use my name for the collection of the same, in any proceeding in law or equity, which may be necessary for this purpose and for me and in my name to grant and receipt or acquittance for the amount hereby transferred or assigned, which said sum is to bear interest from this date.

Witness my hand and seal this 18th Feb'y, 1867.

(Signed) LEWIS T. BOND, [SEAL.]

The counsel for the plaintiff, Etheridge, excepted to the finding of the Clerk, claiming "that the plaintiffs are entitled equally *pro rata* to the fund in question.

Smith & Strong and D. M. Carter, for the plaintiffs.

No counsel contra, in this court.

PEARSON, C. J. We think the view, taken by the Clerk of the question made by the exception, is correct. The legal effect of the assignment of Bond, was to vest in Benbury a specific sum in the note of Vernoy, to which Benbury was entitled in severalty, leaving the residue of the amount of the note in Bond, to be enjoyed by him or his assignee in severalty, after taking out the specific sum assigned to Benbury. So the idea of having a "tenancy in common," has nothing to rest on, and Etheridge, who took an assignment of another specific sum after the assignment to Benbury, stands in the shoes of Bond.

Exception overruled and report confirmed.

PER CURIAM. Judgment accordingly.

Cited: Bank v. Trust Co., 199 N.C. 585.

MEMORANDUM

PROCEEDINGS OF THE BAR AND THE COURT UPON THE DEATH OF HON. WILLIAM A. GRAHAM.

At a meeting of the members of the Bar, held in the rooms of the Supreme Court to-day, (August 12th, 1875,) for the purpose of expressing their sense of sorrow on account of the death of the late Hon. Wm. A. Graham, on motion, the Hon. Bartholomew F. Moore was called to the chair, and Charles M. Busbee, Esq., appointed Secretary.

On motion, Hon. William H. Battle, Hon. Wm. B. Rodman and Hon. A. S. Merrimon, were appointed a committee to draft suitable resolutions, expressive of the sense of the meeting.

The committee reported the following resolutions: (See the resolutions presented to the court by Attorney General Hargrove.)

Judge Battle, in submitting the resolutions, referred in appropriate terms to the unsullied record of the deceased as a lawyer; and after remarks by George H. Snow, Esq., Chief Justice R. M. Pearson, R. C. Badger, Esq., S. A. Ashe, Esq., D. M. Carter, Esq., Judge E. G. Reade, Hon. W. N. H. Smith and Judge G. W. Brooks, the resolutions were unanimously adopted.

On motion, the Attorney General was requested to present the resolutions to the Supreme Court, on August 13th, at 12 o'clock, M.

On motion, it was resolved, that the members of the legal profession assemble in the Supreme Court room at 3:30 tomorrow afternoon, for the purpose of receiving the remains of Gov. Graham at the gate of the capitol.

B. F. MOORE. *Chairman.*

C. M. BUSBEE, *Secretary*

AUGUST 13th.

The Court met: Present, Chief Justice Pearson, and Justices Reade, Rodman, Settle and Bynum.

Attorney General T. L. Hargrove arose and addressed the Court as follows:

MAY IT PLEASE YOUR HONORS: The death of William Alexander Graham, one of North Carolina's most honorable, patriotic and distinguished sons, was the occasion of a meeting of members of the Bar of the State on yesterday. That meeting unanimously adopted these resolves and requested that I should on to-day present them to this Court, and move that your Honors order them to be entered upon your records. I now make that motion. And in performing this solemn duty, it may not be improper for me to say that I have been acquainted for a long time with the deceased, he having practiced in

my native county since my earliest recollection of the Bar. I have been associated with him in the trial of causes and have appeared on opposite sides to him. He was universally respected as a faithful counsellor to his clients, an honorable and high-toned gentleman, an able, learned and successful lawyer. But his great and good example as a man, a lawyer and a statesman, is too well known to all North Carolina and the whole nation to need that I should declare his excellencies. I sincerely concur in the sentiments of these resolutions and join in the general sorrow for his loss.

RESOLUTIONS.

The members of the legal profession assembled for the purpose of expressing their esteem and affection for the Hon. William A. Graham, and their sense of the loss which they, in common with the whole state, have sustained by his death, do resolve:

1. *Resolved,* That we find in the Hon. William Alexander Graham a bright example of all the virtues of a private citizen, as well as an illustration of the able and faithful performance of all the duties of professional and official life.

2. *Resolved,* That as a member of the bar he was diligent and careful in the preparation of his causes, able and skillful in an argument, kind and considerate to his fellow members, and courteous and respectful to the court.

3. *Resolved,* That as a public officer, whether of his own State or the United States, he was always equal to the occasion, filling the many high offices to which he was called, with unswerving fidelity and distinguished ability.

4. *Resolved,* That as a proper tribute of respect to our deceased brother, whom many of us loved and all respected, it is requested that these resolutions be presented to the Supreme Court, with a request that they may be entered upon the minutes of the court.

5. *Resolved,* That a copy of these resolutions be sent to the family of the deceased by the chairman.

6. *Resolved,* That a copy of the proceedings of this meeting be furnished for publication in all the city papers.

7. *Resolved,* That the chairman be requested at his convenience to select a member of the bar to deliver an address upon the life and character of our deceased brother.

CHIEF JUSTICE PEARSON responded as follows:

The Associate Justices concur with me, in expressing the opinion, that we all heartily approve of the resolutions passed at the meeting of the members of the legal profession, and it is ordered that the resolutions be entered upon the records of this court.

William A. Graham was a great man. After, by his prudence, good conduct, application and talents, acquiring a reputation at home, he, by the same means, acquired a national reputation, of which his native State has a right to be proud.

The Reporter of the Court will put all of the proceedings in an appendix to the Reports.

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