ANNOTATIONS INCLUDE 170 N. C.

NORTH CAROLINA REPORTS

VOL. 75

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1876

REPORTED BY
TAZEWELL L. HARGROVE, ATTORNEY-GENERAL.

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1876

GEORGE W. COBB AND OTHERS v. THE CORPORATION OF ELIZABETH CITY.

Taxes—Municipal Corporation—Set Off.

1. It is not error in the court below, in an action instituted against a municipal corporation, for the purpose of restraining such corporation from collecting an illegal tax, to allow all citizens, other than the original plaintiff, to be made parties plaintiff.
2. An assessment of the property subject to taxation by a municipal corporation, made by the mayor and commissioners of such corporation is void. Such assessment, under the provision of the Constitution, must be made by the township board of trustees.
3. All taxes must be levied as well on personal as on real property; and a levy of tax upon real property alone, by a municipal corporation, is unconstitutional and void.
4. In levying taxes, municipal corporations are bound by the limitations in their charters, except for the purpose of paying debts lawfully incurred before such limitation was enacted.
5. In the absence of a special contract to that effect, debts owing by a town cannot be set off against a demand for town taxes.

INJUNCTION, heard before *Eure, J.*, at chambers, in PASQUOTANK, 25 October, 1876.

The plaintiff, G. W. Cobb, suing in behalf of himself and the other taxpayers of the town of Elizabeth City, filed his com- (2) plaint, alleging substantially as follows:

1. That the town of Elizabeth City is a part of and embraced in Elizabeth City Township, in the county of Pasquotank, but does not contain all the property within said township, and includes some property in Nixonton Township.

2. In 1874 all the property in said township was reassessed for taxation by the board of trustees of said township, and the assessment so made was submitted to the board of county commissioners, and by them adopted.

3. The plaintiff and all other owners of real estate in said town, from that time to the present, have paid their county and State taxes upon said valuation.

4. No other assessment has since been made upon property within the corporate limits of said town by the board of township trustees.

5. On 21 June, 1875, at a regular meeting of the board of commissioners of said town, the following order was made: "Ordered, that the mayor and commissioners sit in their office on Thursday and Friday, the 24th and 25th inst., to assess the taxable value of the real estate within the corporate limits." In pursuance of said order, the mayor and commissioners did meet and assess the real estate situated in said town.

6. Said assessment was largely in excess of the assessment made as aforesaid by the township board of trustees, and tax lists thereupon have been placed in the hands of the town constable for collection.

7. In addition to this general tax, the mayor and commissioners have levied a special tax of thirty-five cents on the one hundred dollars valuation of property in said town, and have taken as the basis of taxation the assessment made by them as aforesaid.

8. Said special tax was not levied to pay the necessary ex-
(3) penses of the corporation, nor to pay indebtedness of the town existing prior to the adoption of the present Constitution.

9. The commissioners of said town have levied said tax exclusively upon real property, and the constitutional limitation and equation has not been observed.

10. That no vote of the qualified voters of said town has been taken, as to whether or not said special tax should be levied.

11. The constable of said township has threatened and is about to enforce the collection of this tax, and will do so unless restrained by an order of this court, by a sale of the property of the plaintiff and others, to the irreparable injury of the taxpayers of said town.

12. That G. W. Cobb, the plaintiff, tendered to the constable, in payment of his special tax, corporation orders for the full amount thereof, but said officer refused to receive the orders in payment of said tax at more than seventy-five cents in the dollar of their face value.

13. The commissioners of said town declared the purpose of the special tax was to pay off the indebtedness of the corporation existing prior to 17 May, 1875, and the plaintiffs insist that these orders should be taken at their face value in payment of said tax.

Wherefore the plaintiffs pray that an injunction may issue restraining the defendant, its agents, etc., from proceeding further in the collection of the general tax levied upon the assessment of property, made by the mayor and commissioners of said town; and that they be ordered to collect upon the valuation made by the township board of trustees of Elizabeth City and Nixonton townships. That they be restrained from the collection of the special tax of thirty-five cents on the one hundred dollars valuation, levied upon the assessment made by the mayor and commissioners of said town. That if said tax is allowed to be collected, the defendants be ordered to receive in (4) payment thereof orders of the corporation at their face value.

Upon the filing of this complaint and upon motion of the plaintiff's counsel, an order was issued restraining the defendant from further proceeding in the collection of the taxes, as prayed for in the complaint, and requiring the defendants to show cause on Monday, 25 October, 1875, at Hertford, in said judicial district, before his Honor M. L. Eure, why the prayer of the complaint for a perpetual injunction should not be granted.

The defendants appeared and filed an answer substantially as follows:

Admitted that an assessment was made by the township board of trustees, as alleged, for the purpose of State and county taxation, but not for corporation purposes.

Admitted that the assessment was made by the mayor and board of commissioners, as alleged, but averred that the act admitted was one expressly required to be done by the corporate authorities of said town by its charter, ratified by the General Assembly of North Carolina on 25 December, 1852. That the same authority is vested in said corporation, as provided for in Revised Code, chap. 111, sec. 19. That the charter of said town expressly requires "that said mayor and commissioners shall assess or cause to be assessed, the real estate in said town, in February, 1853, and reassessed every five years thereafter, and they shall annually assess all improvements made since the preceding assessment and not assessed therein."

Admits that the assessment, made by the mayor and commissioners, was slightly in excess of that made by the township board of trustees, but avers that this arose mainly from the fact that said board failed to assess a considerable quantity of real estate in said town, which real estate, omitted in their assessment, was included in (5) the assessment of the mayor and commissioners.

Avers that said special tax was properly and rightfully levied by virtue of chap. 189, Laws 1874-'75, by virtue of the charter of the town, and by the law of the State.

Admits that said special tax was not levied to pay debts of the corporation existing prior to the adoption of the present Constitution, but avers that said tax was levied to pay the necessary expenses of the corporation.

Admits that said tax has been levied upon property exclusively, but avers that it was not required that the tax should be levied otherwise than has been done; that by the charter the property permitted to be taxed is the real estate of the citizens of the town; a poll tax is also permitted, but that has long since been abrogated, and the male citizens, subject to poll tax, are required to work on the streets of the town in lieu thereof.

That the voters of the town were not called upon to vote upon the special tax complained of; and defendants aver that the same was not necessary or required; that the tax was for the necessary expenses of said corporation; that the special authority therefor was given by the General Assembly, and the same is, in all respects, regular and proper.

Denies that the collection of said taxes will be an irreparable wrong to the taxpayers of said town, and avers that its collection will greatly benefit them, as it is intended to pay the debt of the town, and thereby relieve it of financial embarrassment, and restore its credit.

For a further defense, the defendant denies that any attempt has been or will be made to collect any part of said tax from the plaintiff Cobb, by a sale of his property, as alleged, or otherwise, and avers that said plaintiff is not the owner of any real estate in said town; that his name does not appear on the corporation tax list; that not being a taxpayer, he has no interest whatever in the tax complained of, and
(6) cannot, in any way, be damaged by its collection; that he is improperly made party plaintiff in this action.

If it be true, as alleged, that said officer refused to receive corporation orders in payment of said tax, at more than seventy-five cents in the dollar of their face value, it is no cause of complaint, the tax lists being an execution, its payment could have been demanded in money, and the offer to take orders in payment at seventy-five cents in the dollar was merely a favor, specially allowed by the act of Assembly, authorizing the tax.

The defendant filed an affidavit setting forth that George W. Cobb, the only plaintiff whose name was written out in the complaint, was not a taxpayer in the town of Elizabeth City. The plaintiff offered to file a counter affidavit, but at the suggestion of the court this was dispensed with, and the oral statement of Jas. D. Whedbee, counsel in the cause, was taken.

Upon the testimony offered the court found the following facts: That George W. Cobb did pay poll tax to the town of Elizabeth City,

by being subject to work the streets, that being substituted for city poll tax, and was therefore a taxpayer. That G. W. Brooks, John A. Raper, C. C. Allen and others, all owners of property and taxpayers within said town, had directed this suit to be brought, and by a paper-writing had bound themselves to pay their proportionate share of the cost; and thereupon his Honor allowed the said parties to be made parties plaintiff. The defendant excepted.

Upon the intimation of his Honor that enough appeared upon the pleadings and facts proven to authorize the court to grant the injunction prayed for, the defendants' counsel requested his Honor to allow them to collect the tax upon the valuation of property by the township board of trustees, and so modify his order issued in the cause.

The court refused the motion, and continued the restraining order until the hearing. From this judgment the defendants (7) appealed.

W. F. Poole for appellant.
Gilliam and Pruden contra.

RODMAN, J. 1. We think the amendment made by the judge, by permitting other taxpayers to be joined as plaintiffs, was within his power and was proper.

2. It is decided in *R. R. v. Wilmington,* 72 N. C., 73, that any provision in the charter of a town, whereby the town officers are authorized to value the property in the town for taxation, is superseded by the provision in the Constitution that the township trustees shall value all the property of the township, subject to the revision of the county commissioners. The town authorities must accept the valuation thus made. The valuation complained of was therefore void, and so was the tax levied on the basis of it.

3. Art. VII, sec. 9 of the Constitution says: "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." All taxes, therefore, must be levied as well on personal as on real property, notwithstanding any contrary provision in the charter. The word "property" includes bonds, stocks, solvent notes, etc. *Wilson v. Charlotte,* 74 N. C., 748.

4. The town officers in their levying of taxes are bound by the limitation in the charter, except for the sole and express purpose of paying debts lawfully incurred before such limitation was enacted. In levying within such limit they must observe the proportion between property and polls fixed by the Constitution. *Weinstein v. Commissioners,* 72 N. C., 536.

5. Debts owing by the town corporation, in whatever form
(8) they may be evidenced, cannot be set off against a demand for town taxes, unless there be a special contract to that effect. *Battle v. Thompson,* 65 N. C., 406.

The above are all questions presented for our consideration in this case, and it will be seen that they have all been heretofore considered and decided.

There is no error in the judgment below continuing the injunction to the hearing, and it is

PER CURIAM. Affirmed.

Cited: Young v. Henderson, 76 N. C., 423; *Gatling v. Comrs.,* 92 N. C., 540; *Redmond v. Comrs.,* 106 N. C., 128, 150; *Wiley v. Comrs.,* 111 N. C., 400; *Harper v. Comrs.,* 133 N. C., 109; *Wilmington v. Bryan,* 141 N. C., 679; *Graded School v. McDowell,* 157 N. C., 317.

W. T. BRASWELL v. THE AMERICAN LIFE INSURANCE COMPANY.

Life Insurance—Cancellation of Policy—Agency.

1. A person whose life is insured by a life insurance company must have *actual* notice of the revocation of an agent's authority to receive premiums, to whom the insured has theretofore paid his premiums and obtained proper receipts, and to whom he paid his last premium, but got no receipt, before he can be charged with any default, or before the company can legally cancel his policy.

2. If a policy is wrongfully canceled, the insured has a right to recover back the amount paid as premiums and interest thereon, as "money had and received for his use," or upon a promise of the defendant to indemnify and save him harmless, which the law implies from the wrongful act of defendant, in the cancellation of the policy; in which case the measure of damages would be the amount necessary to enable the insured to obtain another policy.

APPEAL from *Moore, J.,* at May Term, 1876, of EDGECOMBE.

A jury being waived, his Honor found the following facts: The plaintiff insured his life in the defendant company in the sum of $2,000, and held a policy for that amount, the continued obligation of which was dependent upon the regular annual payment to defendant
(9) of a premium of $54.40. The policy bore upon its face the following condition: "And it is also agreed that this policy and the insurance hereby effected shall be subjected to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were

incorporated in this policy." Printed upon the back of the policy were the following conditions or regulations: "Receipts for premiums excepting first (to be found on the face of this policy) will invariably be given on a separate paper, and will not be valid without the seal of the company." "Policies expire at noon on the last day of the period for which payment has been made."

One Dearing had been the agent of the company to collect the premiums on said policy, and to him the plaintiff had regularly paid his premiums, and had invariably received from said agent the receipt of the company, under its corporate seal, up to the time of the payment of the last premium in 1872. The plaintiff paid said last premium to Dearing, but did not obtain from him before, at, or after said payment the regular receipt of the defendant company, under its corporate seal.

Before the payment of the last premium the agency of Dearing had been revoked by the defendant company, but the plaintiff had no notice of such revocation, other than that gathered from the facts hereinbefore stated. Up to the commencement of this action the plaintiff had paid five annual premiums, amounting to $272.

The defendant company not having received the last premium, and considering that the plaintiff had forfeited his policy, canceled the same on its books, and notified the plaintiff of such cancellation, and thereupon the plaintiff instituted this action to recover of the defendant the amount of all the premiums paid by him.

His Honor being of the opinion that actual notice was necessary to determine the agency of Dearing, and there being no (10) actual notice, rendered judgment for the plaintiff. From this judgment the defendant appealed.

Kenan & Murray for appellant.
Howard & Perry contra.

PEARSON, C. J. If the plaintiff was in default, by failing to pay the premium when due, he forfeited his policy and lost the amount before paid as premiums. If the defendant was in default by canceling the policy positively and peremptorily, the plaintiff has a right to recover back the amount paid as premium and interest thereon as "money had and received for his use"; or upon a promise of the defendant to indemnify and save him harmless, which the law implies from the wrongful act of the defendant in the cancellation of the policy; in which case the measure of damage would be the amount necessary to enable the plaintiff to obtain another policy, if so minded, which, of course, would be much higher in respect to the premium, inasmuch as he is several years older than he was when he first obtained the policy;

but the case need not be complicated by this consideration, as the plaintiff is content to take back his money with interest, and be quits of all further connection with defendants.

The question is, who was to blame for the default of Dearing, the insurance agent? The defendant's place of business was in Philadelphia, the plaintiff resided in the county of Edgecombe, and Dearing, the insurance agent, kept his office in Wilmington, N. C. The plaintiff made several payments of premiums to Dearing, by sending him the money and receiving in return a receipt under the corporate seal of the defendant. This course of dealing was known and ap-
(11) proved of by the defendant, and it furnished Dearing with the proper receipt, under the corporate seal of the company. For some cause satisfactory to itself, the defendant revoked the agency to Dearing, and did not, as before, furnish him with receipts under the corporate seal; the plaintiff sent the money to Dearing, having no notice of the revocation of his agency, except what is claimed to be *constructive notice*—by reason of the entry on the back of the policy "receipts for payments will not be valid unless given under the seal of the company."

The fact that the defendant had revoked the agency of Dearing and refused to furnish him with receipts under the seal of the company, was a matter peculiarly within its own knowledge. We hold that the defendant was guilty of gross negligence, *if not fraud,* by failing to communicate to such of its insured as the books showed were in connection with Dearing, and who had been in the habit of sending him the money and getting a receipt in return.

The company says, in order to guard against unfaithful agents, it is put on the back of policies "no receipt valid unless under the seal of the company." Let it be so; but when by the previous course of dealing the defendant had knowledge of the fact that the money was transmitted in the first place to Dearing and then the receipt was returned, how can the defendant excuse itself for failing to notify the plaintiff not to transmit the money to Dearing, as his agency was revoked? Fair play required this much. The suggestion that Dearing was the agent of the plaintiff, that is to say, that the gentlemen who go about the country soliciting people to take life insurance policies are the agents of the insured and not the company, is simply ridiculous, and must be disregarded or treated as an attempt to swindle. These agencies by which a corporation in Philadelphia is enabled to do business in North Carolina, are for the benefit of the corporation. The
(12) corporation appoints the agent, pays him, and he is its creature; how can his unfaithfulness be charged to the insured?

PER CURIAM. Affirmed.

Cited: *Lovick v. Life Association,* 110 N. C., 99; *Burrus v. Ins. Co.,* 124 N. C., 13; *Hollowell v. Ins. Co.,* 126 N. C., 404; *Strauss v. Life Association, ib.,* 976; S. c., 128 N. C., 468; *Gwaltney v. Assurance Society,* 132 N. C., 930; *Scott v. Life Association,* 137 N. C., 521, 527; *Rounsaville v. Ins. Co.,* 138 N. C., 197; *Green v. Ins. Co.,* 139 N. C., 313; *Caldwell v. Ins. Co.,* 140 N. C., 105; *Brockenbrough v. Ins. Co.,* 145 N. C., 355; *Sykes v. Ins. Co.,* 148 N. C., 18.

STATE v. SIMON RAGLAND.

Freeholder—Tales Juror.

1. A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds.
2. A mortgagor in possession is a freeholder, within the meaning of the act relating to tales jurors, Rev. Code, chap. 31, sec. 29. (Bat. Rev., p. 860.)

INDICTMENT for rape, tried before *Moore, J.,* at Spring Term, 1876, of EDGECOMBE.

A tales juror was drawn, and challenged for cause, by the State. The juror swore that all of his real estate was under mortgage, but that he was in possession thereof. The prisoner insisted that the juror was a freeholder. The court allowed the challenge upon the ground that the juror was not a freeholder.

There was a verdict of guilty. Motion for *venire de novo.* Motion overruled. Judgment was pronounced, and the prisoner appealed.

Attorney-General Hargrove and Fred. Philips for the State.
No counsel for the prisoner.

RODMAN, J. By Rev. Code, chap. 31, sec. 29, it is required (13) that tales jurors shall be freeholders. This section is reprinted in Bat. Rev., p. 860, and is recognized as in force in *Lee v. Lee,* 71 N. C., 139.

A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds. The act does not say that a tales juror must have a legal freehold. The words and apparent reason are satisfied by the ownership of an equitable one; as, for example, if he be a *cestui que trust* entitled to the possession and to the legal title.

The question is: Is a mortgagor a freeholder in the view of this act? He has not any legal estate. But in equity he has the entire estate subject to the incumbrance of the debt secured. The value of the estate will be greater or less according to circumstances. But the act does not prescribe that the freehold shall be of any particular value; it is sufficient if it be a freehold in law or in equity. The current of modern opinion is in favor of regarding a mortgage as simply an incumbrance, diminishing the value, but not the quality of estate, just as a docketed judgment does. We are of opinion that a mortgagor in possession is a freeholder within the meaning of the act. This conclusion is contrary to the opinion of the judges in the contested election case, *Waddell v. Berry* (1848), 31 N. C., 519. We do not feel ourselves bound by the opinion in that case, because it was not a judicial opinion, that is, not given in any case which the court had jurisdiction to decide, and the reasoning is almost altogether technical.

The opinion *assumed* that the Constitution intended a *legal* freehold, and with that granted there was no necessity for further argument on that point, as admittedly a mortgagor does not possess a legal estate. We say assumed, because there was no line of argu-
(14) ment by which it could be demonstrated, whether by the word "freeholder" the Constitution meant simply to regard the legal ownership, or to look to the real interest in the land shown by a rightful receipt of the rents and profits, or required that both should be united in the same person (which was the conclusion of the Court). Wherever the line might be drawn, it was to some extent arbitrary, the arguments on each side of the question being equally strong. So in the present case, no one can say with certainty what idea the Legislature had in mind when it required tales jurors to be freeholders. Probably, as is often the case, it had no definite idea. We are required, nevertheless, to affix a definite idea to the word, and we think it more probable that the legislative idea of a freeholder was one who not being a tenant for years or at will, etc., was rightfully and actually in possession of land and of its rents and profits, although not seized of the legal estate. This rule, we think, will be found more convenient in practice; it simplifies the inquiry into qualification, and, to say the least, it cannot be shown to violate the legislative will.

PER CURIAM. New trial.

Cited: *S. v. Mills,* 91 N. C., 593.

(15)

STATE v. JORDAN MCNEILL.

Misdemeanor—Punishment.

1. Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both: *Hence*, a general verdict of "guilty" upon an indictment containing three counts, to wit, one for an assault with a deadly weapon with intent to kill; another, for a similar assault, with intent to injure; and a third, for a common assault and battery will not, since Laws 1870-'71, chap. 43, justify imprisonment in the penitentiary.
2. Fine and imprisonment at the discretion of the court does not confer the power to imprison in the penitentiary.

ASSAULT, tried before *Buxton, J.*, at the Spring Term, 1876, of MOORE.

The facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

There was a verdict of "guilty," and judgment thereupon. The defendant appealed.

Attorney-General Hargrove and Pemberton for the State.
Neill McKay for the prisoner.

BYNUM, J. This indictment contains three counts: the first is for an assault with a deadly weapon, with intent to kill; the second, for an assault with a deadly weapon, with intent to injure; and the third is for a common assault and battery.

There was a general verdict of guilty, without the verdict specifying upon which count the finding was made. The question is, whether upon this verdict and for the offenses charged in the indictment, the court can sentence the defendant to imprisonment in the penitentiary. We think it cannot.

Sections 7 and 8, chapter 167, Laws 1868-'69, prescribing the punishment for the offenses set out in the first and second counts, are repealed by Laws 1870-'71, chap. 43, sec. 1, and by the second (16) section of the latter act it is enacted that "in all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court." So that now, all assaults, of whatever character, are put upon same footing, and are subjected to the same character of punishment. So it is not material to inquire whether the verdict should have been rendered upon any particular count. The question, then, is narrowed down to this: Do the terms "fine and imprisonment at the discretion of the court" confer the power to imprison in the penitentiary? We think not, clearly.

All punishments in this State are now prescribed and regulated by statute, or when not so prescribed, are punishable as misdemeanors at common law; *unless* the crimes are infamous or done in secrecy and malice, or done with deceit and intent to defraud; *when* they may be punished as prescribed in sec. 29, chap. 32, Bat. Rev. (see sec. 108), that is by imprisonment in the state prison or county jail. The assaults charged in the indictment, not being infamous crimes, or done in secrecy and malice or with deceit and intent to defraud, cannot be punished in the state prison, under section 108; and not having been punishable with whipping or other corporal punishment, prior to the adoption of the present Constitution, cannot be punished by imprisonment in the penitentiary under sec. 29, ch. 32 Battle's Revisal; and finally, the penitentiary, being a modern device, unknown to the common law, punishment by imprisonment in the penitentiary could not be imposed by the common law. The conclusion is, that misdemeanors, made punishable as at common law, or punishable by "fine or imprisonment, or both," which is our case, can be punished only by fine or imprisonment in the county jail, one or both. No other reasonable construction can (17) be put upon sec. 29, 108 and 111, chap. 32, Bat. Rev., collated and construed together.

In further illustration of this construction, it will be seen throughout chap. 32 on "Crimes and Punishments," that wherever imprisonment in the penitentiary is annexed as the punishment of the offense, the crime is either "infamous, or done in secrecy and malice, or done with deceit and intent to defraud." On the other hand, where the punishment prescribed "is fine or imprisonment," nowhere will it be found that the imprisonment is prescribed to be in the State prison or penitentiary. All offenses, therefore, which are misdemeanors at common law or made such by statute, where no punishment is specified, or prescribed to be as at common law, or by imprisonment, can be punished by imprisonment in the common jail only, unless the offenses are infamous, done in secrecy and malice, etc., as prescribed in secs. 29 and 108 as before cited. This rule covers our case. *In re Schenck,* 74 N. C., 607.

The exception taken to the admission of the previous declarations of the prosecutrix was not pressed in this court, and is not tenable. The witness was impeached in her cross-examination, as having made contradictory statements about the occurrence, and her previous declarations consistent with her evidence were admissible in corroboration.

PER CURIAM. Error.

Cited: *S. v. Norwood,* 93 N. C., 579; *S. v. Manly,* 95 N. C., 662.

(18)

JOSEPH A. HINTON v. CHARLES T. DEANS.

Appeal from J. P.—Amendment in Superior Court.

1. The provision requiring appeals from judgments for twenty-five dollars, or less, to be tried on matters of law appearing on the papers, does not apply to a case where a plaintiff brings suit for more than twenty-five dollars, and recovers that sum or less, or has judgment against him and appeals. It applies only to cases in which the demanf controverted is twenty-five dollars or less.

2. In an appeal from a justice's judgment to the Superior Court it is in the discretion of the judge presiding to allow or disallow the amendment of any plea made before the justice, upon such terms as to him seem just; and he may, in his discretion, allow a new plea to be entered, upon the applicant's paying all costs up to that time, although there is no rule in C. C. P. requiring him to do so.

ACTION begun in a court of a justice of the peace, and carried by appeal to the Superior Court of HERTFORD, where it was tried before *Moore, J.*, at Spring Term, 1876.

On the trial in the court below, before the jury was empaneled, the defendant asked leave to add the plea of the statute of limitations to the defense set up in the justice's court, which, being refused, the defendant excepted.

It appearing in evidence, that the plaintiff had sold cotton to the defendant in January, 1870, to the amount of $83.95; that the defendant was a creditor of one Joshua White in a greater amount; and that the plaintiff directed the defendant to credit White's account with the amount due him, which the defendant promised to do. He never gave such credit to White, but collected his whole debt from him, White, before the commencement of this action.

The plaintiff being indebted to White in the sum of one hundred dollars, informed him of his instructions to the defendant. White agreed that if the defendant would credit his account with that amount he would give the same credit to the plaintiff. (19)

The defendant here contended that this was a novation and substitution, whereby White became the creditor of the defendant for eighty-three dollars and ninety-five cents, and his, White's debt against the plaintiff was extinguished to that amount, and moved to nonsuit the plaintiff. The court reserved the motion, and submitted to the jury the following issue:

"Did the defendant pay to White the sum due the plaintiff?"

The jury found that he did not. It was in evidence that White had paid off his indebtedness to the defendant without receiving this credit.

Upon the facts as above stated, his Honor refused to give a judgment

of nonsuit, but gave judgment in favor of the plaintiff in accordance with the verdict.

From this judgment the defendant appealed.

Smith & Strong for appellant.
No counsel contra.

RODMAN, J. In this Court the following exceptions were taken to the judgment below:

I. That inasmuch as the justice's judgment was for less than $25, it could not be tried *de novo* in the Superior Court. Bat. Rev., chap. 63, sec. 59, taken from C. C. P., sec. 539. It is very clear that the provision requiring appeals from judgments for $25 or less, to be tried only on matters of law appearing on the papers, does not apply to a case where a plaintiff brings suit for more than $25, and recovers that sum or less, or has judgment against him and appeals. It applies only to cases in which the demand controverted is $25 or less. This was decided in *Cowles v. Haynes,* 69 N. C., 128.

II. The defendant moved in the Superior Court to be allowed (20) to plead the statute of limitations, which the judge refused.

Section 503 of C. C. P., prescribes the rules of proceedings in a justice's court. The pleadings may be oral and informal, but the defendant must of necessity state his defense. Rule IX says the pleadings may be amended "upon appeal when by such amendment substantial justice will be promoted." By section 539, if the judgment exceeds twenty-five dollars, exclusive of costs (which is explained above), there shall be on the appeal "a new trial of the whole matter" in the Superior Court. This means only a new trial of the matters in issue before the justice.

The amendments spoken of in Rule IX are to be made before the justice. The power and duty of the judge in respect to amendments after the appeal has reached his court depends on sections 131, etc., of C. C. P., and there is nothing in those sections requiring the judge to allow a new plea to be put in, though he may do so on payment of all costs up to that time. The Code is liberal in allowing amendments, but the adding of a new plea stands on different grounds from the amending of a formal or even a substantial defect in a plea which does not introduce a substantially new defense. We think the plea of the statute was not a matter of right in the defendant, but was in the discretion of the judge, who might allow it on such terms as seemed just, or or refuse it altogether.

PER CURIAM. No error.

Cited: *Lane v. Morton,* 78 N. C., 7; *Johnson v. Rowland,* 80 N. C., 3; *Henry v. Cannon,* 86 N. C., 25; *Long v. Logan, ib.,* 537; *Poston v. Rose,* 87 N. C., 282; *Wiggins v. McCoy, ib.,* 500; *Moore v. Garner,* 109 N. C., 158; *Beville v. Cox, ib.,* 268.

(21)

JOHN H. WHEELER v. C. L. COBB AND K. R. COBB

Service of Summons by Publication—General Appearance—Non-residence.

1. Where service of summons is made by publication, the requirements of the statute, Bat. Rev., chap. 17, sec. 83, must be strictly complied with; and the affidavit so required will be fatally defective in the absence of an allegation that the person on whom the summons is to be served cannot, after due diligence, be found within the State. Everything necessary to dispense with personal service must appear by affidavit.
2. But if the defendant enters a general appearance to the action, all antecedent irregularity of process is cured, and places the defendant on the same ground as if he had been personally served with process.
3. Where one voluntarily removes from this to another State, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such person is a nonresident of this State for the purpose of attachment, notwithstanding he may visit this State, and have the intent to return at some time in the future.

ACTION, on a money demand, tried by *Eure, J.,* at February Term, 1876, of PASQUOTANK.

The summons in this case was issued against both defendants 9 June, 1875; and on the same day proceedings were had before the clerk of the court, in respect to issuing an attachment against the defendant K. R. Cobb founded on the following affidavit:

"Wm. F. M. Eringhaus, attorney for J. H. Wheeler, the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant K. R. Cobb is indebted to the plaintiff in the sum of eleven hundred and ninety-seven dollars and forty-eight cents ($1,197.48), due as acceptor of a draft by C. L. Cobb, dated Washington, D. C., 10 March, 1875, payable sixty days after date, for eleven hundred and ninety-seven dollars and forty-eight cents ($1,197.48), to the order of John H. Wheeler, which draft was (22) endorsed by said Wheeler and afterwards paid by him.

2. That the said defendant is a nonresident of the State of North Carolina, and has property within the State."

Upon the foregoing affidavit an order of publication was issued, and publication made; also a warrant of attachment issued, and on 9 June, 1875, the sheriff levied the same on certain real estate.

On the hearing a motion was made to dismiss the action as to K. R. Cobb, his attorney appearing for the purpose of demurring to the complaint. The docket shows that at the return term of the court J. P. Whedbee's name is entered as attorney for the defendants; and at the same term this entry was made upon the docket: "Defendants allowed until 1 December to file pleadings—order mutual to take depositions at ten days notice."

Upon the hearing the motion to dismiss the action, by consent of counsel on both sides, his Honor heard testimony as to the residence of the defendant K. R. Cobb at the time of issuing the summons and attachment and before and since that time. And from this testimony the court found as facts, that on 9 June and continually thereafter, and up to the trial, K. R. Cobb is and has been a resident of the State of North Carolina.

The testimony on the question of residence was heard at the bar, from witnesses sworn, to which the plaintiff excepted, because it should be heard only in the shape of affidavit.

On the question of the residence of the defendant K. R. Cobb the plaintiff's counsel offered to read a letter received by him, written by the plaintiff touching the matter, which the court declined to hear as evidence of facts stated in said letter. Plaintiff excepted.

The court finds further, that there was no affidavit filed for publication of summons, nor any other paper filed or affidavit made
(23) than the copies accompanying the statement of the case.

Upon further question of evidence, the defendant K. R. Cobb was permitted by the court to testify, after exception, that he was a resident of Pasquotank County, North Carolina, where he was raised and his mother's family still reside; that when he was appointed Supervisor of Internal Revenue by the proper department of the United States Government, and assigned to duty in the States of Louisiana and Texas, he claimed his home in said county and State, exercising the privilege of citizenship therein, and spent what time he could spare from his official duties in said county and State, and never voted, nor claimed the right to do so elsewhere.

The counsel for the plaintiff then asked the court for leave to put in an affidavit for publication of summons, and for leave to amend in the other matters of which defendants complained. The court refused this application for the reason that in the opinion of the court many of the objections were not only as to form but also as to substance, and the court had no power to amend in matters of substance.

Plaintiff then demanded judgment against the defendants for want of an answer, for the amount demanded in the complaint, for the following reasons:

1. That the affidavit of the publication of the newspaper in which the summons was ordered, with the affidavit of the deposit in the post-office of a copy of the summons, showed that service was made, without any affidavit by the plaintiff as to the publication of the summons.

2. That the defendants appeared at the last term of the court, August, 1875, by counsel; that that appearance was to the action, and not, as claimed by counsel for K. R. Cobb, only to take objections to defects in the papers; and if there were defects of service, objections should have been then taken. The court refused to give the (24) plaintiff the judgment asked for.

The plaintiff then asked to be permitted to issue an alias summons for defendants. This was also refused by the court; and it was adjudged that the action as to K. B. Cobb be dismissed, and that the plaintiff pay the costs. From this judgment the plaintiff appealed.

Gilliam and Pruden for appellant.
No counsel contra.

BYNUM, J. The service of summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication is an affidavit that "the person on whom the summons is to be served cannot, after due diligence, be found *within the State.*" Bat. Rev., chap. 17, sec. 83. This requirement was omitted in the affidavit, why, it is hard to conceive, as it was made by the attorney himself, who, as a prudent practitioner, should have had the statute before him in drafting the affidavit. For this court had repeatedly held that the provisions of this statute must be strictly followed. *Spiers v. Halstead,* 71 N. C., 210. Everything necessary to dispense with personal service of the summons must appear by affidavit. The mere issuing of a summons to the sheriff of the county of Pasquotank and his endorsement upon it the same day after it came to hand, that "the defendant is not found in my county," is no compliance whatever with the law; for it might well be that the defendant was at that time in some other county in the State, and that the plaintiff knew it, or by due diligence could have known it, and made upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence.

But the case states that "the docket shows that at the return term of the court J. P. Whedbee's name is entered as attorney for (25) the defendants," and at the same term this entry was made upon

the docket: "Defendants allowed until the first of December to file pleadings—order mutual to take depositions upon ten days notice." There being nothing in this appearance by attorney, qualifying it, the only reasonable construction is, that it was a general appearance, that is, for all purposes. A general appearance to an action cures all antecedent irregularity in the process, and places the defendant upon the same ground as if he had been personally served with process. *Pollard v. Dwight,* 4 Cr., 421; *Taylor v. Longworth,* 14 Pet., 172, 14 Pet., 293. It was, therefore, too late, at a subsequent term of the court, to raise the objection to the regularity of the service. The court will the more readily give this effect to an appearance entered without qualification, because such objections, raised by the defendant himself, who *appears* in court to make them, are generally for delay, and to avoid an answer to the merits of the action.

The defendant being thus regularly in court, it was competent for him to show that the attachment was void, and to move to vacate it. His ground is, that he was a resident of the State, and therefore, in his case, no attachment lay.

In *Horne v. Horne,* 31 N. C., 99, and *Abrams v. Pender,* 44 N. C., 260, a distinction was taken between domicil and residence. To acquire a new domicil, there must be not only residence, but the *animus manendi;* but one may be a nonresident without his domicil or rights of citizenship in the State of his origin, or gaining a domicil in another. The facts of our case are, that the defendant had accepted an office of indefinite tenure under the government of the United States, and had been assigned to duty in the States of Louisiana and Texas, and that the proper discharge of these duties required his residence there for
(26) an indefinite and undefined time.

Now, although the defendant may have continued to claim the rights and privileges of citizenship in the State of North Carolina; never voted or claimed the right to vote out of the State, and occasionally visited the State; yet all this is consistent with his having a domicil in North Carolina and a residence elsewhere.

In *Abrams v. Pender,* before cited, A enlisted in the army during the war with Mexico, and during his absence B sued out an attachment against his property. The question now presented was raised in that case but not decided, because the case went off on the ground that the statute then in force required that the removal of the defendant should have been fraudulent or with intent to evade process, before an attachment lay. Not so now. An attachment is now made a provisional remedy in the progress of a cause, and can be sued out, whenever the defendant is a nonresident, regardless of intent. Bat. Rev., chap. 17, sec. 197. Without deciding who, in law, is a nonresi-

dent in other respects, but confining the decision to a construction of this statute, the conclusion is that where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which require his continual presence there for an unlimited time, such a one is a nonresident of this State for the purpose of an attachment, and that notwithstanding he may occasionally visit this State, and may have the intent to return at some uncertain future time.

His Honor in the court below decided the question of nonresidence, as one of fact, whereas it is one of law and fact. The facts as found constitute the defendant a nonresident under the statute. The affidavit for the attachment complies with the requirements of the act, Bat. Rev., chap. 17, sec. 201-2, and is therefore sufficient.

There is error. The judgment is reversed and the case remanded, that the defendant may have leave to answer, and that (27) further proceedings may be had according to the course of the court.

PER CURIAM. Reversed.

Cited: Etheridge v. Woodley, 83 N. C., 16; *Faulk v. Smith,* 84 N. C., 503; *Weaver v. Roberts, ib.,* 495; *S. v. Jones,* 88 N. C., 685; *Bank v. Blossom,* 92 N. C., 699; *Penniman v. Daniel,* 95 N. C., 343; *Roberts v. Allman,* 106 N. C., 394; *Carden v. Carden,* 107 N. C., 216; *Bacon v. Johnson,* 110 N. C., 117; *Fulton v. Roberts,* 113 N. C., 428; *Davison v. Land Co.,* 118 N. C., 370; *Chitty v. Chitty, ib.,* 651; *Caldwell v. Wilson,* 121 N. C., 453; *Holland v. Marshall,* 127 N. C., 430; *Mahoney v. Tyler,* 136 N. C., 41; *Laney v. Hutton,* 149 N. C., 266; *Harris v. Bennett,* 160 N. C., 342; *Luther v. Comrs.,* 164 N. C., 245; *Hassell v. Steamboat Co.,* 168 N. C., 298.

STATE v. SIMON JORDAN.

Attempt to Commit a Felony—Intent.

Whenever there is a criminal intent to commit a felony, and some *act* is done amounting to an attempt to accomplish the purpose without doing it, the perpetrator is indictable as for a misdemeanor.

INDICTMENT for an attempt to commit burglary, tried before *Moore, J.,* at December (Special) Term, 1875, of HALIFAX.

The bill of indictment charges that the defendant "did attempt to commit an offense prohibited by law, to wit: did feloniously, burg-

lariously, maliciously and secretly attempt to break and enter the dwelling-house of one Spier Whitaker, there situate, in the night-time of the day aforesaid, by being then and there in the porch of said dwelling-house, and by then and there endeavoring feloniously, burglariously, maliciously and secretly, to break open the door and window of said dwelling-house with the intent," etc.

Upon motion of the prisoner's counsel his Honor quashed the bill and the State appealed.

Attorney-General Hargrove, with whom was Bledsoe, for the State. Walter Clark for defendant.

READE, J. Whenever there is a criminal intent to commit a (28) felony—as in this case the burglary— and some *act* is done amounting to an attempt to accomplish the purpose without doing it, the perpetrator is indictable as for misdemeanor. Wharton's Criminal Law, sec. 2696. *The King v. Higgins,* 2 East., 4, is a very full and satisfactory authority.

It was error to quash the indictment.

PER CURIAM. Reversed.

Cited: S. v. Colvin, 90 N. C., 718; *S. v. Stephens,* 170 N. C., 746.

ALPHA WATERS v. LEVI STUBBS.

Execution—Homestead—Amendment After Verdict.

1. A plaintiff, after judgment in her favor, has no right to have the defendant's land sold, without first having his homestead laid off. The excess only, after a homestead has been assigned to the defendant, is subject to execution sale.
2. The plaintiff brings an action in the nature of ejectment, and after trial and verdict, asks leave to amend the pleadings, so as to change it into an action to remove a cloud from her title, caused by fraudulent deeds set up by third persons: *Held,* that such amendment was irregular, and ought not to have been allowed.

Ejectment, tried before *Moore, J.,* at Spring Term, 1876, of BEAUFORT.

The facts necessary to the understanding of the case as decided are fully stated in the opinion of the Court.

Verdict and judgment for the plaintiff, whereupon the defendant appealed.

G. H. Brown, Jr., and Mullen & Moore for appellant.
Carter, contra.

READE, J. Without laying off the defendant's homestead to which he was entitled, the plaintiff had the land levied on and (29) sold, and bought the same, and instituted this action to recover the possession. The plaintiff has no right to recover the possession. If the land had been worth more than the homestead, and the plaintiff had caused the homestead to be laid off, then, of course, the excess would have been subject to execution sale; but it was not done, and it was found as a fact that the homestead will cover the whole of the land. There must be judgment, therefore, for the defendant.

After trial and verdict the plaintiff asked leave to amend her complaint, so as to change it into an action to remove a cloud from her title caused by fraudulent deeds set up by third persons. This was irregular and ought not to have been allowed.

PER CURIAM. Reversed, and judgment here for defendant.

Cited: Mebane v. Layton, 89 N. C., 401;

A. M. SLOAN & CO. v. R. J. MCDOWELL.

Demurrer—Another Action Pending—Entries in Merchants' Books.

1. The provision in the Code of Civil Procedure, allowing as a cause of demurrer, that there is another action pending between the same parties, for the same cause, must be confined to the courts of this State, where the remedies are precisely the same—the object being to protect parties from vexation and the courts from multiplicity of suits. But in different States or Governments the remedies are not the same; and there may be reason why our courts should not take notice of proceedings outside of the State, which would not be applicable to our own courts.
2. The entries of a merchant's clerk are not evidence against third persons. They are not under oath, and not subject to cross-examination.

APPEAL from *Schenck, J.,* at Spring Term, 1876, of MECKLENBURG.

The case was before this Court at June Term, 1874, and is reported in 71 N. C., 356. The case was heard at this term upon (30) the following case agreed:

It was in evidence that John H. Sloan, one of the original plaintiffs, died since the commencement of this action and the case was prosecuted in the name of A. M. Sloan, surviving partner. Upon the trial of the cause, before going into the facts before the jury, the plaintiff offered in

evidence a record of the Circuit Court of the United States for the Southern District of Georgia, showing the pendency of the suit which had been instituted in that court prior to the commencement of this action, which suit was still pending, in which R. J. McDowell, the defendant herein, was plaintiff, and A. M. Sloan, the plaintiff herein, was the defendant, based upon the same cause of action set up in the counterclaim in this suit, said record being properly authenticated under the Act of Congress, upon which evidence the counsel for the plaintiff moved the court to exclude said counterclaim. The motion was overruled and the plaintiff excepted.

The deposition of A. M. Sloan, the plaintiff, was then read in evidence, in which he testified that the items in the account sued on, with the exception of the oats, cotton seed and guano, therein set forth, were contracted by a young daughter of R. J. McDowell, with different merchants in the city of Savannah, Ga., where the plaintiffs lived and did business as commission merchants, and were charged to A. M. Sloan & Co. The said items were approved by Miss McDowell, and upon such approval were paid by A. M. Sloan & Co. That Mr. McDowell requested defendant to pay any bills his daughter might contract for articles required by her. That she was in the city receiving music lessons. That all these bills were paid by A. M. Sloan & Co.
(31) That as to the guano, oats and cotton seed, they were purchased from A. M. Sloan & Co., by a verbal order, in the way customers of A. M. Sloan & Co. usually order.

The deposition of A. N. Soller was then offered in evidence in which he testified: That he was the bookkeeper and cashier of A. M. Sloan & Co. at the time the items set forth in the account sued on were contracted. The account between McDowell and A. M. Sloan & Co. is correct. He knew it because he was their bookkeeper, and paid out the amount, as stated in the account, for A. M. Sloan & Co. The accounts were paid by him when presented, upon the approval of Miss McDowell. As to the guano, oats and cotton seed, they were charged to R. J. McDowell, by the witness, on the books of A. M. Sloan & Co. at the time said goods were ordered, as likewise the other items in the account, and there was no individual account kept between A. M. Sloan and R. J. McDowell.

As to the counterclaim, A. M. Sloan testified: That he and McDowell, who were brothers-in-law, had been engaged in Georgia in a banking business, buying and dealing in notes. McDowell furnished the capital and he managed the business; that the note in the counterclaim was given in 1864, as a memorandum of the amount he had at that time belonging to McDowell. Subsequent to the giving of said memorandum note, under instructions from McDowell to that effect, he had

invested the amount thereof in cotton for McDowell, which had been lost by the result of the war.

McDowell, the defendant, testified: That all the items in the account were contracted with A. M. Sloan individually, with the understanding that the amount thereof was to be credited on the note set up in the counterclaim. Said note was given in settlement of the banking partnership business, as the amount due him on such settlement, and for the payment of the money therein mentioned. He gave no instructions to invest said money in cotton. Various payments have been made thereon, which have been credited on the note: that the guano, oats and cotton seed were credited on said note, and that (32) Sloan assented thereto.

Counsel for the plaintiff contended, and asked the court to charge the jury, that the testimony of Sollers in regard to the entries made by him in the books of A. M. Sloan & Co., charging the items in the account to R. J. McDowell, was original evidence to go to the jury as part of the transaction and should be considered by them in that light.

Upon this point his Honor charged that the entries on A. M. Sloan & Co.'s books by the witness did not bind McDowell unless he assented thereto or authorized it. That it at last depended on the contract between McDowell and Sloan as to who really sold McDowell the articles in dispute. That Soller's testimony may be considered by the jury as a contemporaneous entry made by Sollers, under A. M. Sloan's order, as confirming Sloan's version of the transaction. To this charge the plaintiff excepted.

There was a verdict and judgment in favor of the defendant for the amount of the counterclaim; thereupon the plaintiff appealed.

Wilson & Son for appellant.
Vance & Burwell and Guion & Flemming, contra.

READE, J. The rights and liabilities of the parties, as they were then before us, were declared in 71 N. C., 356. We then held that under C. C. P., sec. 248, the defendant was entitled to set up his claim against *one* of the plaintiffs as a counterclaim.

We now have the case before us upon two points:

1. First, is a suit pending in the Circuit Court of the United States for the State of Georgia by the defendant, McDowell, against one of the plaintiffs, Sloan, for this same counterclaim a bar (33) to its being set up in this action?

The impolicy and injustice of pursuing a man in several suits at the same time for the same cause of action seem scarcely to lie at the defendant's door in this case. He sued one of the plaintiffs, Sloan,

in the United States Court in Georgia, and Sloan, instead of offering it as a defense in that suit, unites with the other plaintiff to prosecute a claim against the defendant in this Court. And the defendant simply says, well, as you have chosen this forum I will contend with you here. So that it is the plaintiff Sloan, and not the defendant, who is multiplying suits. To this, however, the plaintiffs reply that they could not have used their claim as a setoff or counterclaim to the defendant's claim in the United States Courts. How that is, we do not know. It is not so alleged in the pleadings.

The provision in C. C. P., sec. 95, allowing as cause for demurrer that there is another action pending between the same parties for the same cause, must be confined to the courts of the State, where the remedies are precisely the same; the object being to protect parties from vexation and the courts from multiplicity of suits. But in different states or governments the remedies are not the same, and there may be reasons why our courts should not take notice of proceedings outside of the State which would be applicable to our courts.

The general bearing upon the subject may be seen in 1 Robinson's Practice, p. 323-6. It has been held in New York that a suit pending in Massachusetts for the same cause could not be pleaded in New York. *Browne v. Joy,* 9 Johns, 221. And so it was held of a suit pending in the Court of the United States for the District of Virginia. *Walsh v. Durbin,* 12 Johns, 99. The same is also the English doctrine in regard to suits in foreign countries and in her provinces.

(34) 2. The entries of a merchant's clerk are not evidence against third persons. It would be very dangerous if they were. They are not under oath and not subject to cross-examination. The clerk himself must be produced. If his memory be at fault it may be that he can refresh it by his entries—that is all.

PER CURIAM. No error.

Cited: *Redfearn v. Austin,* 88 N. C., 415; *Curtis v. Piedmont Co.,* 109 N. C., 405; *Kesterson v. R. R.,* 146 N. C., 277; *Roberts v. Pratt,* 152 N. C., 738; *Carpenter v. Hanes,* 162 N. C., 50; *Ball-Thrash v. McCormick, ib.,* 473.

A. E. MOORE v. J. W. GIDNEY, ADMINISTRATOR.

Appointment of Guardian ad Litem—Irregular Judgment.

1. When infant defendants, in a civil action or special proceeding, have no general or testamentary guardian before a guardian *ad litem* can be appointed a summons must be served upon such infants, and a copy of

the complaint also be served or filed according to law. After the guardian *ad litem* is thus appointed in a special proceeding, a copy of the complaint, with the summons, must be served on such guardian.

2. An administrator filed his petition to sell the lands of his intestate for assets, and had the widow appointed guardian *ad litem*, before the infants were in court by the service of any summons upon them; the widow answered for such infants only, and not in her own right—the attorney for the petitioning administrator drafting and filing her answer; a decree was obtained, and under it the lands were sold. Afterwards the widow became apprised of facts which constituted her equitable right to one of the tracts of land sold under said decree, and she thereupon moved in the cause still pending, to set aside the decree and sale: *Held*, that the decree thus obtained was irregular, and not binding either upon the infants or widow, and that the sale under such decree should be set aside.

MOTION in the cause, heard before *Schenck, J.*, at chambers in CLEVELAND, 5 May, 1876, upon an appeal from the ruling of the probate court.

The plaintiff, as guardian *ad litem* of the infant heirs of John L. Moore, deceased, and in her own behalf, moved the (35) court to set aside an order of sale and final decree theretofore made in the cause. The motion was based upon affidavits to the following effect:

That on 10 September, 1874, the plaintiff filed a petition against the heirs of his intestate, J. L. Moore, setting forth, among other things, that deceased was indebted to the amount of $10,000 or $20,000, and that his personal estate was worth from $10,000 to $15,000. That at his death deceased was seized of several tracts of land, and prayed that the same might be sold by order of the court to make assets, etc. On 9 April, the day preceeding the filing of said petition, the court made a decree appointing this petitioner guardian *ad litem* of said minor heirs, and she, on 24 September, 1874, not knowing her rights, and in her great distress and trouble, and acting under the advice of the plaintiff and his counsel, was induced to sign an answer in her capacity as guardian *ad litem*, admitting all the allegations of said petition and consenting to the sale as prayed for. This answer was written by the plaintiff's counsel, at his own suggestion, and without fee.

That she never would have consented to the sale of one of the tracts of land, described in the petition as the "Thos. Wilson tract," had she known the effect of such consent, for the reason that she claimed that the said tract was bought with her own money, advanced to her deceased husband with the positive agreement that the deed when made should be made to her and her children, and she is advised by counsel that she is the proper owner thereof, and demands that an issue be made to try the title thereto.

That on 5 October, 1874, this court made a decree ordering a sale of the lands mentioned in the pleadings for the purpose therein
(36) set forth, to be made on 9 November, 1874. That the plaintiff afterwards reported to this court that he had sold the lands on 10 November, and not on the 9th, as he was ordered to do.

That on 16 April, 1875, a decree was made by this court confirming the sale of 10 November, 1874.

That after having been induced to sign an answer as guardian *ad litem* she was ignorant of all other proceedings in the matter for a considerable time, and was not aware that she could assert her claim to the "Wilson tract."

Petitioner therefore moved the court to set aside the decree made on 16 April, 1875, confirming the sale of 10 November, 1874, and that the petitioner may be made a party to the cause, as to her rights concerning the "Wilson land," etc.

The plaintiff in the cause filed an answer to this petition, among other things alleging:

That the decree which the petitioner seeks to set aside was rendered more than one year before this petition was filed and before any notice thereof was issued or served upon the plaintiff.

"That the petitioner became the purchaser of lands sold under said decree, and is estopped from denying the regularity of the decree or sale thereunder."

Upon the hearing the probate court found the following facts:

That there was no undue influence exercised by the plaintiff or his counsel, upon the guardian *ad litem,* in procuring the filing of her answer.

That the administrator reports that he sold the land on 10 November, 1874, but that the sale was actually made on 9 November as ordered by the court.

The court found as conclusions of law:

That the irregularity in the appointment of guardian *ad*
(37) *litem* was cured by her voluntary appearance and answer.

That Annie E. Moore is estopped by her own voluntary act from denying the title of J. L. Moore to the "Wilson land." That she is not entitled to a jury to try the issue. That she is not entitled to the relief demanded in the complaint.

From this ruling the petitioner appealed to the Superior Court, and upon the hearing his Honor found the following facts: A summons issued on 9 September, 1874, against the minor defendants and against A. E. Moore, guardian *ad litem,* to appear before the clerk of Cleveland County, within twenty days. This summons was only served on Ann E. Moore as guardian *ad litem,* and not on the heirs. It was served on 10 September, 1874.

Ann E. Moore was appointed guardian *ad litem* on 9 September, 1874. On 24 September, 1874, Ann E. Moore filed an answer as set forth in the pleadings.

That the facts stated in the affidavit of W. A. Hoke are correct. The following is the affidavit:

"He was attorney for J. W. Gidney in the petition for sale of lands of J. L. Moore. He drew up the answer of the defendant Ann E. Moore as guardian *ad litem* in said petition, and delivered the same to her with the statement that if she had no defense to make to said sale the answer would be sufficient, but that if she desired to resist the sale of said lands she had better employ counsel. That the petitioner Ann E. Moore took the answer and had the same under advisement for some time and the hearing of the cause was delayed to give the present petitioner opportunity to answer and defend the title for sale, if she so desired.

That this affiant never advised the plaintiff in the premises; that petitioner came to affiant in reference to her claim for dower in the lands of John L. Moore, and affiant declined to appear, (38) for the reason that he was of counsel for the administrator of John L. Moore; that affiant never heard of any claim to said land by the petitioner, and is informed and believes that petitioner never set up claim to said land until some time after the sale of the same and the execution of the notes for the purchase money."

The court further found: On the complaint and answer, a decree for sale was made on 5 October, 1874.

On 13 October, 1874, the decree was presented to D. Schenck, judge of the Ninth Judicial District, for approval, which was at first declined, on the ground that no summons was executed on the minor heirs, but it being represented as agreeable to all parties, the decree was affirmed. It was suggested that a summons should yet issue and be served on the heirs. This was done, and the summons was served on them 14 September, 1874. The land was sold for a fair price.

The case now comes up on the petition to set aside the sale of the "Wilson tract," because the plaintiff Ann E. Moore claims the same, and because the decrees are void as to the minor heirs.

The court is of the opinion that the decree for sale, as well as those confirming the same as to all the tracts, and the whole proceedings are void as to the minor heirs, for want of service of process upon them.

From this ruling of the court the defendant Gidney appealed.

Shipp & Bailey and Hoke & Son for appellant.
No counsel contra.

BYNUM, J. When infant defndants, in a civil action or special proceeding, have no general or testamentary guardian, before a guardian *ad litem* can be appointed, a summons must be served upon such infants and a copy of the complaint also be served or filed according to law. After the guardian *ad litem* is thus appointed in a special proceeding, a copy of the complaint, with the summons must be served on the guardian. All this does not give the court jurisdiction to proceed at once in the cause; for it is further provided, that not until after twenty days notice of said summons and complaint, and after answer filed, can the court proceed to final judgment and decree therein. Bat. Rev., ch. 17, sec. 59. See *Allen v. Shields,* 72 N. C., 504, where it is doubted by the court whether personal service on the infant is not indispensable, with a strong intimation that it is; so careful is the law to guard the rights of infants, and to protect them against hasty, irregular and indiscreet judicial action. Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside.

(39)

In this case the guardian *ad litem* was appointed before the infants were brought into court by summons. No summons or copy of the complaint was served on them until after the decree of sale. In law, they were undefended. Their rights and property were attempted to be adjudicated upon and taken from them under the sanction of law, but in violation of its letter and spirit. They had no day in court, and, as to them, the proceedings were irregular, and subject to be set aside.

It may be, and it is alleged, that inasmuch as the estate is insolvent, and the proceeds of the sale of lands must all be applied in payment of the debts of the intestate, the infants have no substantial interest to be affected by the decree, and are, therefore, not injured. But as they were not in court, and could not be heard, these alleged facts do not judicially appear to us, and we cannot assume them to be true. What they may be able to show in defense of this proceeding, when they are properly brought in court, and are represented by a guardian, duly constituted, who will discharge his duty to them, we cannot anticipate. Sufficient for the day is the evil thereof.

(40)

This application is treated as a motion in the original proceeding for the sale of the land (which action is still pending), to set aside for irregularity the decree of sale and all subsequent proceedings. We have disposed of the case as far as the infants are concerned. We next proceed to examine it so far as it affects the widow herself.

She filed no answer in her own right, but answered in the right of the infants only. She alleges that she was not, at the time of her answer, apprised of the facts which constitute her equitable right to the largest tract of land, to wit: the Wilson tract. She further alleges that her answer to the petition for the sale of the land was filed for her by the attorney of the plaintiff; and that she was at the time so troubled and distressed in mind by the recent death of her husband, as to be disqualified for business, and thus was induced to assent to the answer, without a knowledge of her rights. These allegations are not directly denied. But it is denied that the counsel of the plaintiff acted as the defendant's counsel, farther than in drawing up her answer; and we are satisfied that no improper influence was intended. Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby. The presumption, in such cases, is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs. Moore, the defendant, was not influenced to her prejudice and thrown off her guard (41) thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question.

Our attention has been called by the plaintiff, since the argument, to *White v. Albertson,* 14 N. C., 241, cited in *McAden v. Hooker,* 74 N. C., 24. That was an action of ejectment, and the plaintiff, in making out his title, introduced in evidence the record of a suit and judgment against the heirs of one Muse, under whom he claimed. There was no service of the *sci. fa.* upon the heirs, but service was accepted for them by *Blount,* the guardian. It was held by the Court, that although the service of *scire facias* was erroneous, as not having been against the heirs themselves, and that the judgment was therefore voidable, yet it was not void and could not be impeached in this *collateral* way. The case is not an authority for the plaintiff. An irregular judgment may be set aside by a *direct* proceeding for that purpose. That cannot be disputed, and that is the purpose here. This is a proceeding in the cause where the error was committed and the object of the motion is to vacate and set aside the irregular decree, and sale under it. *Wolfe v. Davis,* 74 N. C., 597.

PER CURIAM. Affirmed.

Cited: Molyneux v. Huey, 81 N. C., 113; *Gully v. Macy, ib.,* 367; *Nicholson v. Cox,* 83 N. C., 46; *Young v. Young,* 91 N. C., 362; *Cates v. Pickett,* 97 N. C., 27; *Lowe v. Harris,* 112 N. C., 490; *Arrington v. Arrington,* 116 N. C., 179; *Cotton Mills v. Cotton Mills, ib.,* 652; *Ellis*

v. Massenburg, 126 N. C., 134; *Carraway v. Lassiter,* 139 N. C., 154; *Johnson v. Johnson,* 141 N. C., 92; *Rackley v. Roberts,* 147 N. C., 205; *Hughes v. Pritchard,* 153 N. C., 141, 142; *Holt v. Ziglar,* 159 N. C., 279.

PAUL COBLE v. NANCY SHOFFNER, ADMINISTRATOR, AND ANOTHER.

Usury—Forfeiture of Interest, When.

1. In an action on a bond wherein eight per cent is named as the rate of interest, but it was not expressed to be given for the loan of money as the consideration: *It was held,* that the entire interest was not forfeited, but that the plaintiff was entitled to recover interest on such obligation at the rate of six per cent.
2. The penalty of forfeiture of the entire interest attaches in only two cases: *First,* when *no* rate is named in the obligation, and a greater rate than six per cent is reserved, and *second,* when a *greater* rate than eight per cent is named.

ACTION upon a bond, tried before *Kerr, J.,* Spring Term, 1876, of ALAMANCE.

The defendants relied upon the plea of usury, the bond bearing interest at 8 per cent upon its face, and not setting forth that the consideration thereof was money loaned.

The court rendered judgment in favor of the plaintiff for the amount of the bond, with interest from the date of the judgment until paid. From this judgment the plaintiff appealed.

Dillard & Gilmer and Gray & Stamps for appellants.
Boyd, contra.

BYNUM, J. The action is on a bond wherein eight per cent is named as the rate of interest, but is not expressed to be given for the loan of money as the consideration of the bond. We are to assume, therefore, that the bond was not executed for money loaned. The question is, does the penalty prescribed in Laws 1866, Battle's Revisal, chap. 114, apply to this case? That act provides:

1. That the legal rate of interest upon all sums of money
(43) where interest is allowed, shall be six per cent per annum for such time as interest may accrue.

2. That for the loan of money, but upon no other account, interest may be taken at so high a rate as eight per cent if the consideration and rate are set forth in the obligation.

3. The penalty. It is thus prescribed in the act: (1) "If any person shall agree to take a greater rate of interest than six per cent, when *no* rate is named in the obligation; (2) or a greater rate than eight per cent when the rate *is* named, the interest shall not be recoverable at law." In our case the rate of interest *is* named in the obligation, and, therefore, it is not embraced in the first category. The interest reserved is not greater than eight per cent, and, therefore, the case is not embraced in the second category. The statute, then, does not expressly embrace our case.

There is no question but that a statute prescribing a forfeiture of all interest is a penal statute, and is to be construed strictly. It cannot be construed by implication, or otherwise than by the express letter. It cannot be extended, by even an equitable construction, beyond the plain import of its language. *Smithwick v. Williams,* 30 N. C., 268; *S. v. Knight,* 3 N. C., 109.

If, therefore, even the intent of the Legislature to embrace such a case as this was clear to the Court from the statute itself we cannot extend the act, because such a construction is beyond the plain import of the language used. But such an intent is by no means clear. On the contrary, construing the whole act together, the intent would seem to be that six per cent shall be the legal rate of interest and recoverable on all contracts, except for the loan of money. The lending of money at excessive interest being the mischief, and the special object of legislative check by usury laws from time immemorial, it was the purpose of the act, while prohibiting the taking a greater rate of interest than six per cent on the former class of contracts, that the penalty of the forfeiture of the entire interest shall apply only to con- (44) contracts for the loan of money, which last class of contracts has always been the object of legislative jealousy. Bac. Abr., Tit. Usury. The intent of the lawmakers, however, is a matter of mere conjecture. In construing a *penal* statute we are not allowed, as in the case of those which are not penal, to look at the motives or the mischief which was in the legislative mind. The rule is peremptory that the case must fall within the plain language of a penal statute before the penalty can attach.

The plaintiff is entitled to recover interest upon his obligation. He is entitled to six per cent, because that is the rate of interest established by law. The penalty of forfeiture of the entire interest attaches in only two cases; first, when no rate is named in the obligation and a greater rate than six per cent is reserved, which is not our case; and second, when a greater rate than eight per cent is named, which also is not our case.

There is error. The judgment is reversed in part, and judgment is given here for the amount of the bond and interest thereon from its date, at the rate of six per cent per annum, that being the legal rate of interest at the date of the execution of the bond.

PER CURIAM. Reversed.

Cited: *Comrs. v. R. R.*, 77 N. C., 293; *Kidder v. McIlhenny*, 81 N. C., 133; *S. v. Midgett*, 85 N. C., 541; *Hines v. R. R.*, 95 N. C., 439; *Hughes v. Boone*, 102 N. C., 163; *McGloughan v. Mitchell*, 126 N. C., 683; *Whitfield v. Garris*, 131 N. C., 149; *Turner v. McKee*, 137 N. C., 258; *Alexander v. R. R.*, 144 N. C., 99; *Grocery Co. v. R. R.*, 170 N. C., 244.

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(45)

THE FARMERS & MERCHANTS BANK OF BALTIMORE v. THE BOARD OF ALDERMEN OF THE CITY OF CHARLOTTE.

Pleading—Denial in Answer—When Sufficient.

A denial of the allegations of the complaint, made in the form prescribed, *i. e.*, of any knowledge or information thereof, sufficient to form a belief, being allowed by the Code of Civil Procedure, raises, when interposed, a sufficient issue; and such answer is not subject to the objection of being insufficient or frivolous.

ACTION upon a bond, heard before *Schenck, J.*, at Spring Term, 1876, of MECKLENBURG.

The plaintiff moved for judgment upon the ground that the answer filed was frivolous and irrelevant.

The facts necessary to an understanding of the case are substantially stated in the opinion of the Court.

The motion was overruled, and the plaintiff appealed.

Shipp & Bailey for appellant.
Jones & Johnston, contra.

SETTLE, J. The counsel for both parties upon the argument here, stated that the sole question for this Court is—whether the answer is insufficient or frivolous.

The alleged insufficiency is in that part of the answer which says that, "the defendant has no knowledge or information sufficient to form a belief in regard to the truth of the allegations contained in the third section of the complaint"; which third section is as follows; "That the same (the note sued on) was afterwards and before maturity,

to wit, on 12 April, 1875, assigned and endorsed, for value, by said Bank of Mecklenburg, to the plaintiff, a corporation under the laws of the United States."

The statute gives the defendant the alternative, either to deny the plaintiff's allegations or to deny any knowledge or informa- (46) tion thereof sufficient to form a belief. Bat. Rev., chap. 17, sec. 100.

The language of the act can admit of but one construction; and an answer in the latter form is not affected by section 127 of the same chapter.

This Court has held that an answer cannot be deemed frivolous when it raises a serious question or one worthy of consideration. *Erwin v. Lowery,* 64 N. C., 321; *Swepson v. Harvey,* 66 N. C., 436.

To the same effect are the decisions from other States, upon the same language in the Code: "A denial of the allegations of the complaint, made in the form prescribed, *i. e.,* of any knowledge or information thereof sufficient to form a belief, being allowed by the Code, raises, when interposed, a sufficient issue." 2 Whitaker's Pr., sec. 176, and cases there cited. In *Caswell v. Bushnell,* 14 Barb., 273, it is held that when a defendant in his answer which is sworn to, denies any knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint, the plaintiff cannot, on affidavits showing that the fact alleged was within the knowledge of the defendant, move to strike out the answer as sham, false and frivolous.

PER CURIAM. Affirmed.

Cited: Morgan v. Roper, 119 N. C., 368; *Wagon Co. v. Byrd, ib.,* 461; *Cobb v. Clegg,* 137 N. C., 162.

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(47)

JOHN BOLIN, EXECUTOR, v. CHARITY BARKER.

Dissent from Will—Fraud.

1. In an action by an executor against the widow of his testator, an ignorant woman, to recover certain articles which had been assigned to her for her year's support, before she had dissented from her husband's will, which she did not do within the time prescribed by the statute, because of the advice of the executor: *It was held,* that there was no error in the charge of the judge below, to wit: "that if the executor, through fraud and deception, induced the widow not to dissent from the will of her husband within the time required by law, the proceedings assigning her year's support were binding on him"; and the jury having found that fraud and deception were used, the executor could not recover in this action.

2. An executor is not bound to give the widow of his testator any advice as to her action at all. If, however, he consents to become her adviser, and assumes such position of trust and confidence, he is bound that the advice given should not only be honest in the sense that it was not knowingly and willfully false; but also that it should be correct and true, as far as by any reasonable efforts on his part he could ascertain the truth.

CLAIM AND DELIVERY of personal property, tried before *Furches, J.*, at Spring Term, 1876, of WILKES.

The plaintiff was the executor of Lewis Barker, deceased, and the defendant was his widow. It was in evidence that the testator of the plaintiff died on 27 July, 1874, possessed of the property the subject of this action. The plaintiff offered the will for probate in common form, and it was admitted to probate on 4 August, 1874, and the plaintiff duly qualified as executor thereof. The executor testified that a few days thereafter he informed the defendant of the contents of said will, and that it had been admitted to probate, and advised her to dissent therefrom. That the defendant insisted that a year's allowance should be allotted to her out of the personal estate of her husband, and the plaintiff, supposing that she was entitled thereto, in good faith applied to a justice of the peace, who proceeded to summon two freeholders and set apart to the defendant as such
(48) provision the property sought to be recovered in this action.

The report of the justice and the freeholders allotting to the defendant was confirmed by the judge of probate in March, 1875, subsequent to the commencement of this action. The defendant dissented from the will on 12 April, 1875.

The plaintiff further testified, that this action was instituted at the demand of the legatees, and that he intended to sue, if the defendant failed to dissent from the will, and that he said nothing to her concerning the property, after the year's allowance was set apart, until he made the demand upon which this action was brought, which demand was made six months after the probate of the will.

The defendant testified that she did not learn that her husband had made a will, or that the same was admitted to probate, for some time after the will had been proved. She applied to a justice of the peace for a year's allowance and obtained the same. She did not dissent until after the commencement of this action. She denied that the plaintiff ever advised her to dissent from the will or told her anything about dissenting.

The other facts necessary to an understanding of the case as decided, are stated in the opinion of the Court.

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

BOLIN *v.* BARKER.

Armfield & Folk for appellant.
No counsel contra.

RODMAN, J. As the property sued for belonged to the testator of the plaintiff, he is entitled to recover, unless the defendant can show some defense, legal or equitable.

She says that the property was regularly assigned to her as widow of the testator, for her year's provision. She admits that she did not dissent from her husband's will within six months (49) after the probate thereof, which is the time limited by the statute for her dissent. But that she ought, nevertheless, to be entitled to a year's provision as fully as if she had dissented within the established time, for three reasons:

1. That being ignorant of the law, she was induced by the plaintiff to believe that she would be entitled to her year's provision without dissenting from the will; that plaintiff fraudulently induced this belief; and for that reason alone, she omitted to dissent in due time, having always claimed her year's provision.

2. That her husband, by his will, gave her *nothing,* and that by reason thereof she was put to no election whether to take under his will or against his will; and that in such case she was not required to dissent in order to entitle herself to a year's provision.

3. That the proceedings, by which her year's provision was assigned, could not be collaterally avoided in this action, and were valid until avoided by some direct proceeding for that purpose.

On the first point the judge instructed the jury that "if the plaintiff, through fraud and deception, induced the defendant not to dissent from said will, in the time required by law, then the proceedings (assigning the year's provision) would be binding upon him, and he would not be entitled to recover," etc. Under this instruction the jury found for the defendant.

It is not denied that there was evidence to go to the jury on the question submitted by the judge. The only question presented to us is on this instruction. If it was right in law, the defendant is entitled to judgment in her favor; if wrong, the plaintiff is entitled to a new trial.

We think the judge was right. No person can, in equity and good conscience, retain an advantage procured through his own fraud, or that of another acting for him. The executor was a trustee of the property of the deceased, for his creditors and legatees, and (50) they cannot (if they would, and it does not appear that they wish to) acquire any advantage from this fraud. It is true, that the executor of a testator does not stand towards the widow in any of the

well-known relations of trust and confidence, such as attorney and client, guardian and ward, etc. As she took nothing by the will, he was not a trustee for her, and her interests and those which he represented were adverse. He was not bound to give her any advice as to her action at all. But it was natural, that being brought into relations with him, as representing her deceased husband's estate, she should consult him respecting what she should do to obtain her rights in it. When he accepted her confidence, undertook to advise and act for her in respect to such rights, he consented to assume a position of trust and confidence, and a court of equity will protect her against any abuse of it. If, under these circumstances, he gave her any advice, he was bound not only it should be honest, in the sense that it was not knowingly and willfully false; but also, that it should be correct and true, as far as by any reasonable efforts on his part he could ascertain the truth. Measuring the plaintiff's duty by this standard, which is not higher than that which is ordinarily acted on in the semi-confidential relations of life, it is evident that the plaintiff fell far short of it. The defendant confided in him to advise her as to her right to a year's provision, and the necessity for her dissent. He accepted her confidence, and misadvised her to her injury, and in the interest of those whom he represents.

It is not material, if he was himself ignorant of the law, and did not knowingly and willfully mislead her. Having undertaken to advise her, he was bound to inform himself as to the law, on a matter where it was so familiar, and where correct knowledge was so easily accessible. He should either at once have put her at arm's length by refusing all advice, or should have advised her to consult an attorney, or
(51) have consulted one himself before he undertook to advise her.

He cannot now take advantage of his error, or his fraud, to defeat the assignment of her year's provision.

PER CURIAM. No error.

GEORGE W. BRODIE v. JACK BATCHELOR AND OTHERS.

Lien for Purchase Money—Homestead.

A. borrowed of B. a sum of money for the purpose of paying for a lot, the title to which was made to A. and his wife. In action against A. for the money borrowed: *Held*, that the money so borrowed was no lien on the lot so purchased, and that A. was entitled to his homestead therein.

BRODIE *v.* BATCHELOR.

ACTION on a money demand, commenced in a justice's court, and carried by appeal to the Superior Court of WAKE and there heard before *Watts, J.,* at June Term, 1876, upon a case agreed.

The following are the substantial facts: Batchelor, the defendant, borrowed of the plaintiff, Brodie, one hundred and sixty-five dollars, giving the other defendants as sureties. This money was obtained to pay for a lot in Warrenton, which was done, and the title went to Batchelor and wife. Failing to repay the money to the plaintiff at the time appointed, he was warranted and the plaintiff had judgment.

The justice of the peace who gave the judgment, issued execution in which he ordered the said lot to be sold absolutely, (52) and not subject to the homestead claimed by the defendant. From this order the defendant Batchelor appealed.

His Honor, on hearing the case in the Superior Court, reversed so much of the judgment of the justice as directed the lot to be sold absolutely, affirming the balance of said judgment. The plaintiff appealed.

Moore & Gatling for appellant.
Batchelor & Son, contra.

BYNUM, J. In *Whitaker v. Elliott,* 73 N. C., 186, Whitaker was the bargainor and Elliott the bargainee, who in payment for the land gave the plaintiff notes of third persons, which he endorsed, and thus made his own. There it was held that these notes were obligations contracted for the purchase of the premises, and that the defendant was not entitled to homestead against their payment.

In this case the plaintiff Brodie was not the bargainor. The defendant purchased of a third person, who has received the purchase-money, executed a deed, and has no cause of complaint. The bargainor is out of the case. The land was bought from A, the money was borrowed from B, transactions independent of each other, made at different dates, and in no wise connected the one with the other.

The language of the Constitution is, "but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises."

It is clear that the obligation must be contracted with the bargainor, and as the consideration for the purchase. The intent of the borrower to make a certain application of the money is not the measure of his liabilty. When he obtained the money it was his own, unaffected by any trust, and he could apply it or not in payment of his note for the land. It was not a contract of purchase of land, but a contract of borrowing. The consideration for the money was not land, but the note of the defendant with security for its repay-

(54) ment, and the additional promise to make the plaintiff a mortgage of the land, which was void for want of writing.

The defendant is entitled to his homestead as against this lebt.

PER CURIAM. Affirmed.

Cited: *Lawson v. Pringle,* 98 N. C., 453.

PIPPEN & GANNON v. THE WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Evidence—Negligence, when Rebutted.

In an action against a railroad company for killing certain mules of the plaintiff, where negligence is established by force of the statute (Bat. Rev., chap. 16, sec. 11), it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them.

ACTION to recover damages for negligence, tried by *Moore, J.,* at Spring Term, 1876, of EDGECOMBE.

The suit was brought to Fall Term, 1873, of said court, the plaintiffs alleging that on 16 August of that year, two of their mules, worth five hundred dollars, were so damaged and injured by being run against by the cars of the defendant company, through negligence of their servants and agents running and controlling said train, as to be totally worthless.

The defendant company denied the material allegations of plaintiffs' complaint, and at July Term, 1874, the case was submitted to a jury upon the following issues, to wit:

1. Was such wounding and injury done without negligence (55) on the part of the defendant's agents, then controlling defendant's train of cars?

2. If not done without negligence on their part, what was the value of said mules?

For certain causes (not stated in the transcript), a juror was withdrawn, the jury discharged, and at January Term, 1876, of said court, the case was referred to John H. Thorpe, Esq., who, at the succeeding May Term, filed his report substantially as follows:

1. That on the night of 14 August, 1873, a train, consisting of an engine and passenger cars of the defendant company, in passing over the road near Whitaker's, ran against two mules belonging to plaintiffs, and so injured them as to make them valueless and a total loss. This action was instituted to recover for said loss, within six months

after it occurred. The mules got out of plaintiffs' lot after dark on the night mentioned.

2. That at the place where the injury occurred the road was straight, on a small embankment, on either side of which was a ditch grown up with shrubbery, and slightly up grade. The train was running in the accustomed manner and upon usual time, as per schedule, to wit, about twenty miles an hour. The night was quite dark.

3. That the said mules were not seen by the agents of the defendant company until the train was not more than thirty feet from them, when said agents did all they could to stop the train by blowing on brakes and reversing the engine—all done about the time the mules were struck.

4. That at the place and time of the injury the mules might have been seen at a distance of about seventy-five yards in front, in which space (seventy-five yards) the train might have been stopped.

5. The mules ran in front of the train, on the road, two hundred and fifteen yards before they were struck; and could they have run thirty yards more before being struck, they would have reached a part of the road where, under the circumstances stated, they (56) would have probably turned off.

6. The mules were worth five hundred dollars.

As a matter of law, the referee found:

1. That the defendant's agents were negligent under the circumstances.

2. That the defendant is indebted to the plaintiffs to the value of the mules, to wit, the sum of five hundred dollars, with interest thereon from 14 August, 1873.

The defendant excepted to the conclusion of the referee in regard to the law, and his Honor sustained the exception, being of opinion, upon the facts found, that there was no negligence on the part of the defendant company that entitled the plaintiffs to recover, and so gave judgment.

From this judgment the plaintiffs appealed.

W. H. Johnston for appellants.
J. L. Bridgers, contra.

BYNUM, J. The material facts as found by the referee are "that the mules were not seen by the defendant's agents until the train was not more than thirty feet from them, when the said agents did all they could to stop the train by blowing on the brakes and reversing the engine—all done about the time the mules were struck. That at the place and time of the injury the mules might have been seen at least seventy-five yards in front, and the train could have been stopped

within that distance. That the mules ran in front of the train two hundred and fifteen yards before they were struck." It was also found that the road was straight at the place of the injury, the time night, and that it was quite dark.

The only question presented by the facts found is whether there was negligence on the part of the defendants. The statute
(57) enacts that "when any cattle or any other live stock shall be killed or injured by the engine or cars running upon any railroad, it shall be *prima facie* evidence of negligence on the part of the company in any suit for damages against such company." Bat. Rev., chap. 16, sec. 11.

Proof having been made of this injury, the effect of the statute is to declare that the company's agents were guilty of negligence, of which they could not acquit themselves except by showing that there was no neglect whatever. The heavy burden of establishing a negative is thus imposed upon them. The only evidence to show that there was no negligence is the single fact found that "the night was quite dark." But it is also found that the mules might have been seen at least seventy-five yards in front, within which distance the train could have been stopped. So that notwithstanding the night was dark, the mules could have been seen at that distance, we suppose by the headlight, upon a straight road. It is immaterial, however, whether the mules were visible by artificial light or starlight, the fact that they could have been seen is established and does not seem to have been denied. Then, why were they *not* seen until the engine was within thirty feet, and so near that no human exertion could save them? No explanation of this is given and no suggestion even made. By force of the statute, negligence is established. It was not rebutted, or offered to be by the defendant. That could be done only by showing that by the exercise of due diligence the stock could not have been seen in time to save them. That was not done. Even without the aid of the statute, it would seem that the plaintiffs are entitled to recover. The defendant had not only the seventy-five yards, but the additional distance of two hundred and fifteen yards run by the mules, within which to discover them and stop the train. No reason is given for this plain neglect of duty. *Clark v. R. R.*, 60 N. C., 109; *Battle v. R. R.*,
(58) 66 N. C., 343.

There is error. Judgment reversed and judgment here according to the finding of the referee.

PER CURIAM. Reversed.

Cited: Doggett v. R. R., 81 N. C., 466; *Wilson v. R. R.*, 90 N. C., 73; *Carlton v. R. R.*, 104 N. C., 369; *Randall v. R. R., ib.*, 421; *Baker v. R. R.*, 133 N. C., 34.

STATE v. JOHN RINEHART.

Homicide—Indictment.

An indictment which concludes thus: "giving to him, the said J. T., then and there, with the leaden bullet aforesaid, so as aforesaid, discharged and shot out of the rifle gun aforesaid, by force of the gunpowder aforesaid, by the said J. R., in and upon the back of, and a little above the hip of him, the said J. T., one mortal *wound* of the depth of six inches and the breadth of one inch, of which the said mortal (omitting the word "wound") he, the said J. T., then and there instantly died," is sufficient, and the judgment thereon should not be arrested under sec. 60, chap. 33, Bat. Rev.

INDICTMENT for murder, tried before *Watts, J.*, at Spring Term, 1876, of MADISON.

There was a verdict of "guilty," whereupon the prisoner moved in arrest of judgment. The motion was overruled, and judgment pronounced, and the prisoner appealed.

The other facts necessary to an understanding of the case, as decided in this Court, are found in the opinion of Justice BYNUM.

Attorney-General Hargrove for the State.
No counsel for the prisoner.

BYNUM, J. The prisoner was tried and found guilty of murder by the jury. His counsel, in the court below, moved in arrest of judgment, upon the ground that the indictment was insufficient, in that it omitted the word "wound" in a material part of it, and (59) thus not showing how the deceased came to his death.

The indictment is in the usual form and regular in all respects, except that in the conclusion, after alleging that the prisoner discharged his gun in and upon the deceased, it proceeds thus: "giving to him, the said Joseph Turner, then and there, with the leaden bullet aforesaid, so as aforesaid, discharged and shot out of the rifle gun aforesaid, by force of the gunpowder aforesaid, by the said John Rinehart, in and upon the back of, and a little above the hip of him, the said Joseph Turner, one mortal *wound,* of the depth of six inches and the breadth of one inch, of which said mortal (omitting the word "wound") he, the said Joseph Turner, then and there instantly died."

It is clear that the omission of the word "wound" in this place is not material, inasmuch as the wound had just before been described and charged to have been a "mortal wound." It would not, therefore, have impaired the sufficiency of the indictment if it had ended after the words "one inch, in the following manner: of which the said Jo-

seph Turner then and there instantly died." Certainly any such irregularity is cured by the statute—Bat. Rev., chap. 33, sec. 60—"and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment."

The charge of his Honor to the jury was correct, and the record, on examination, containing no error to the prejudice of the prisoner, the judgment must be affirmed.

PER CURIAM. No error.

Cited: S. v. Walker, 87 N. C., 543; *S. v. Van Doran,* 109 N. C., 867; *S. v. Ratliff,* 170 N. C., 709.

(60)

V. L. BECK, TRUSTEE, v. N. R. ZIMMERMAN AND CATHARINE ZIMMERMAN.

Damages—Removal of Building.

1. The purchaser of a house, with notice that the same is subject to a deed of trust, and who removes said house from the premises upon which it is located, is liable in damages to the trustee.
2. The measure of damages in such case is the value of the house standing on the premises, the subject of the trust.

APPEAL from *Eure, J.,* at February Term, 1876, of WASHINGTON.

The action was brought to recover a balance alleged to be due upon a bond, secured by a deed in trust upon certain real property, executed by B. D. Bunnell to the plaintiff, and to subject a store-house, a part of the property conveyed by the deed in trust, which had been removed from the premises, to the payment of said balance.

In 1872, F. D. Bunnell purchased of the plaintiff and Sarah Laverty, a lot in Elizabeth City upon which there was a store-house. A part of the purchase money was paid in cash, and for the residue, amounting to $594, Bunnell executed his bond, secured by deed of trust upon the store-house and lot. The deed was registered on the 10th day of April, 1872, and the plaintiff was named trustee therein. The store-house constituted one-half the value of the property conveyed by the deed of trust. The land without the house was insufficient to pay the debt secured, but the land and the house together were sufficient. After the registration of the deed to the plaintiff, Bunnell went into possession of the property, and on April 26th, 1873, by parol agreement, sold the house to the defendant N. R. Zimmer-

man, who had notice of the deed of trust to the plaintiff, and who was expressly notified by the plaintiff's attorney that the trust was upon the house and lot, and that the debt had not been paid.

There was no written instrument conveying the house from Bunnell to N. R. Zimmerman, nor the defendant Catherine (61) E. Zimmerman, his wife.

On 4 April, 1875, the plaintiff, by her attorney, sold the lot conveyed in the deed of trust at public auction, when the defendant, C. Zimmerman, became the purchaser for the sum of $364, and a deed was made to her for said lot. Prior to said sale the plaintiff's attorney demanded of both the defendants that the store-house which had been removed under the pretended sale by Bunnell, and put upon C. Zimmerman's lot, should be replaced or its value ascertained and applied as a credit on the note secured by the deed of trust. The proceeds of the sale of said lot were not sufficient by $361 to pay off the debt and interest. At the time of the sale it was announced that only the land was being sold, and that the sale did not embrace the claim or interest of the plaintiff in the store-house.

The bond given by Bunnell to the plaintiff had upon it her indorsement in blank, and was so indorsed before the land was sold and before the commencement of the action.

It was in evidence that the note had been given to W. F. Martin, an attorney, for collection; that the plaintiff owned one-half the note and a niece of the plaintiff the other half.

The defendant's counsel insisted that the action could not be maintained in the name of the plaintiff, as her legal title passed by the indorsement.

The counsel for the plaintiff insited that the plaintiff was a trustee of an express trust, and in that capacity had a right to sue without reference to her interest in the note.

His Honor, without deciding the point, remarked that he supposed the object of all parties was to settle the controversy in one suit, and that he would direct the record to be amended by making ..... Smith, the niece of the plaintiff, a party plaintiff. The defendants excepted.

The following issues were submitted to the jury:

1. What was the value of the town lot in April, 1875?

2. What was the value of the house removed from the lot? (62)

Counsel for the defendant requested the court to charge the jury:

1. That if a mortgagor in possession of land sells a house from the same to a third party and the same is removed from the land the mortgagee cannot follow said house in the hands of the purchaser,

nor in the hands of the party to whom the purchaser may sell the same; nor can he maintain an action against either of them to recover the value of said house.

This instruction was refused, his Honor remarking that in the case at bar the defendants had both actual and constructive notice of the trust upon the house and lot, and in the instruction asked for nothing is said about notice.

2. That a mortgagor of land in possession owns the same as a freehold, and that the mortgagee has no interest in equity in said land except as a security for the debt named in the mortgage, and that this action brought to recover the house or its value, and being brought long after the house was removed, the same cannot be maintained.

3. That the mortgage being only a security for the debt, and it being in evidence that the mortgagor is dead, and the personal estate of the mortgagor being primarily liable for the debt, and there being no evidence of his insolvency, the plaintiff cannot recover.

The court declined this instruction, remarking that it was alleged in the complaint that unless the house was applied to the debt the balance due would be an entire loss, but that the jury might find the facts upon the issues submitted, and the court would deal with the questions of law afterwards.

4. That there being no charge or proof of any conspiring or combination between the purchaser, N. R. Zimmerman, and the mortgagor, Bunnell, the plaintiff could not recover.

The court declined to charge as requested.

5. That there being no evidence of any connection of C. Zim-
(63) merman with the purchase or removal of the house from the land of the plaintiff, the plaintiff cannot recover.

This instruction was also refused by the court.

6. That the land having been sold by the plaintiff and purchased by the defendant, C. Zimmerman, and by deed conveyed to her, and the house now sued for being an appurtenant to said land, the title to said house was by said purchase of said land (if not by her previous one) vested in said Zimmerman, and therefore the plaintiff cannot recover in this action.

This instruction was refused by the court.

7. That if the plaintiff is entitled to anything, she can only recover the value of the house off the premises.

The court refused the instruction, and charged the jury that the plaintiff was entitled to the value of the house standing on the lot, that being its condition when conveyed in the trust deed, but directed the jury to respond to each of the issues submitted.

In response to the issues the jury found:

1. That the value of the town lot in April, 1875, with the house on it, was $537.50.

2. That the value of the house removed from the lot was $125.

Thereupon the court rendered judgment for the plaintiffs for $172, the difference between what the property was worth with the store-house on it and what it was worth with the store-house removed, and granted the prayer of the complaint.

From the judgment the defendants appealed.

No counsel for appellant.
Gilliam and Pruden, contra.

SETTLE, J. A mortgagor in possession, having executed the mortgage upon a house and lot, in Elizabeth City, to secure the payment of the purchase money, sells, by parol, the house to the (64) defendant N. R. Zimmerman, who, after constructive notice, by registration of the mortgage deed, and also by actual notice by the plaintiff's attorney, that the debt secured by the mortgage had not been paid, removed the house, which constituted half the value of the mortgaged premises, to a lot belonging to his wife; and they now gravely contend that they are not liable to the trustee in the mortgage deed for the damages arising from the tortious act of removing the house to the lands of the *feme* defendant and appropriating the same to their own use.

The statement of the proposition carries the answer with it, and is too plain for argument.

We also concur with his Honor as to the measure of damages.

PER CURIAM. No error.

MARGARET McCLENNAN v. ALEXANDER McLEOD.

Ejectment—Answer.

After a defendant has entered a defense to an action of ejectment he cannot be permitted to allege that others are also in possession with him, and have the title and the sole possession. If such defendant meant to disavow any possession in himself, he should not have entered any defense.

EJECTMENT instituted prior to the adoption of the C. C. P., and tried before *Buxton, J.*, at Spring Term, 1876, of MONT- (65) GOMERY.

The record is voluminous, the declaration containing many counts, and a great deal of evidence was introduced.

The facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

J. D. McIver, Merrimon, Fuller & Ashe for the appellant.
Neil McKay and Pemberton, contra.

BYNUM, J. All the other counts have been abandoned except the count upon the demise of Farquhar Martin, and by a former decision of this Court that demise has been held to be sufficient to maintain this action, 70 N. C., 364. The lessor was a purchaser at sheriff's sale under a *fi. fa.* against the defendant. The defendant was living on the land at the time of the sale and at the beginning of this action, and is still living on it. The defendant cannot defend, as he attempts to do, by setting up title in third persons. After entering a defense to the action he cannot be permitted to allege that others are also in possession with him and have the title and the sole possession. If the person thus sued meant to disavow any possession in himself, he should not have entered any defense. *Thomas v. Orrell,* 27 N. C., 569; *Judge v. Houston,* 34 N. C., 108. These established principles are decisive of this case. The McDuffie tract of land only is in dispute in this action. As to that, it appears that when the lessor of the plaintiff purchased, the defendant was only one of several heirs who inherited the land upon the death of John McLeod, who was known as "Bahama John." If that is so, the lessor of the plaintiff, by the purchase of Alexander McLeod's interest, became a tenant in common with the other heirs. The judgment in this action cannot affect
(66) their rights, as they are not parties. The writ of possession upon the judgment to which the lessor of the plaintiff is here entitled will be executed by him at his own peril.

The exceptions to the charge of his Honor are not tenable.

There is

PER CURIAM. No error.

T. J. HAMLIN, EXECUTOR OF B. J. CRAWLEY v. JAMES NEIGHBORS.

Executor—In Forma Pauperis.

The executor of a testator, who has been allowed to carry on a suit *in forma pauperis*, may continue such suit without giving bond, if, at the time he applies to be made a party, he files a petition showing a proper case.

ACTION originally commenced by Crawley, tried on a motion in the cause, before *Kerr, J.,* at Fall Term, 1875, of RANDOLPH.

The court permitted, on a proper cause shown, Crawley, the testator of the plaintiff, to sue *in forma pauperis*. After the action had been pending in court for several terms, it was submitted to referees. The defendant excepted to the report of the referees, which exceptions were overruled at Fall Term, 1874, whereupon the defendant gave notice of an appeal to this Court. Pending this appeal (which has not yet been brought up and docketed in this Court) and since the Spring Term, 1875, of Randolph Superior Court, the then plaintiff, Crawley, died, leaving a last will, and appointing the plaintiff, T. J. Hamlin, his executor, who proved said will and qualified as executor thereto.

At Fall Term, 1875, of said Superior Court, Hamlin, the executor, upon the suggestion of the death of the former plain- (67) tiff, his testator, moved to be made plaintiff in his stead. This motion was opposed by the defendant on the ground that the case was not within the jurisdiction of the Superior Court of Randolph, an appeal then pending in the Supreme Court; and further, that the privilege of suing *in forma pauperis* was strictly personal, and that an executor had no right to be made a party and allowed to prosecute the suit without filing a prosecution bond.

The executor alleged that there were no assets, the defendant contending to the contrary. No proof in regard to assets was offered by either party.

The motion of the executor was allowed, and the plaintiff allowed to continue the suit without giving bond.

From this ruling the defendant appealed.

Mendenhall & Staples, Walter Clark, Tourgee and Gray & Stamps for appellants.

L. M. Scott, contra.

READE, J. If the executor, Hamlin, when he applied to be made party plaintiff, had filed a petition and shown a proper case, he might have been permitted under the authority of *Mason v. Osgood,* 71 N. C., 212, to continue the suit *in forma pauperis*. But, as he did not do that, then under the authority of *Osborne v. Henry,* 66 N. C., 354, he ought to have been required to give a prosecution bond. There is error.

PER CURIAM. Reversed.

Cited: Christian v. R. R., 136 N. C., 322.

ELI PENNY v. E. R. BRINK AND L. G. ESTES.

Parties—Witnesses.

A party *may be compelled to attend court,* and be examined in behalf of a co-plaintiff, or a codefendant, "as to any matter in which he is not jointly interested or liable," etc.; and in such case he is entitled to pay as a witness.

TRESPASS on the case, brought before the enactment of the Code of Civil Procedure, and tried before *Cloud, J.,* at Spring Term, 1876, of ROWAN.

The following are the facts relating to the points raised and decided in this Court, so far as they could be gleaned from the imperfect transcript sent to this Court as the record:

The plaintiff, among other things, declared that in 1865 he rented to the defendants his store-house in the town of Lexington, for the purpose of carrying on the business of merchandising under the name and style of "Brink & Estes." That during the occupation of said store by the defendants, and whilst the same was under their control in accordance with their contract of leasing, they, the defendants, failed to use proper care, and for the want of proper care on their part, the said store-house was burned, to the great damage of the said plaintiff.

The defendants joined in the plea of the *"general issue."* E. R. Brink, one of said defendants, was subpœnaed as a witness, at first for both, to wit, Brink & Estes; and afterwards, to wit, from 16 October, 1873, he was summoned as a witness for his codefendant, L. G. Estes. On the trial he was examined and did testify, as the case states, *"on behalf of the defendants."* There was a verdict for the defendants.

On the return of the execution issued against the plaintiff for costs, his counsel moved for a rule to retax the bill of costs sent out by the clerk of the court; and on the hearing it was alleged for the plaintiff that the said E. R. Brink, one of the defendants, was allowed the sum of one hundred and sixty-nine dollars and eighty cents ($169.80) for his fees and mileage, he being paid as a witness; whereas, he (69) was in attendance both as a party and witness, and examined in behalf of the defendants.

The court refused the plaintiff's motion, holding that Brink was entitled to pay as a witness, and adjudged accordingly. The plaintiff appealed.

Clement for appellant.
McCorkle and Bailey, contra.

PEARSON, C. J. The question lies in a nutshell, and but little can be said on either side.

A party to an action may be examined in his own behalf, C. C. P., sec. 343. In that case he is not entitled to pay as a witness.

A party may be *compelled to attend court* and be examined in behalf of a coplaintiff or codefendant, "as to any matter in which he is not jointly interested or liable," etc. C. C. P., sec. 340. In that case he is entitled to pay as a witness.

We are of opinion upon the facts stated that Brink was examined in his own behalf, and section 343 applies. According to the record, plaintiff brought his action to recover of the defendants, E. R. Brink and L. G. Estes, trading as partners under the name of "Brink & Estes," damages for an injury to certain property leased to them, by reason of their negligence.

So the liability, if any, was joint, and section 340 does not apply. The case sets out that Brink was examined in behalf of the defendants—in fact, the interest of the defendants was identical, and Brink could not swear for Estes without swearing for himself.

PER CURIAM. Reversed.

(70)

MARY A. MILLER v. JOHN C. MILLER.

Alimony.

A married woman is entitled to alimony *pendente lite*, from her husband's estate, when the income from her separate estate is not sufficient for her support, and defray the necessary expenses in prosecuting her suit. She need not resort to the *corpus* or capital of her separate estate before calling on that of her husband.

ACTION for divorce and alimony, heard upon motion of the plaintiff that she be allowed alimony *pendente lite*, before *Cloud, J.*, at Spring Term, 1876, of ROWAN.

The motion was based upon the complaint and affidavits filed in the cause, from which his Honor found as a fact that the plaintiff was the owner of a separate estate, but that the income arising therefrom was not sufficient to support her during the pendency of the action and to pay the necessary and proper expenses thereof. The court held that the plaintiff should resort to the *corpus* of her separate estate, which should first be exhausted before she could sustain the application. The decision of his Honor was based upon his construction of the statute pertaining thereto, and on that ground alone refused the motion.

From this decision the plaintiff appealed.

Shipp & Bailey for appellant.
McCorkle and Henderson, contra.

BYNUM, J. The defendant contends that by the proper construction of the statute (see Bat. Rev., chap. 37, sec. 10) the plaintiff is entitled to no alimony *pendente lite,* until both her separate income and the *corpus* or capital producing it are exhausted in her support. We think such a construction is too narrow and harsh to the wife, and cannot be supported. The statute provides that if the com-
(71) plaint states facts which, if true, will entitle her to the relief demanded, and it shall appear "that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties."

That the term "alimony" means "income," and not the *corpus* or capital yielding it, is clear from the preceding section (9) of the statute in relation to divorces from bed and board, which declares that there shall be given "such *alimony* as the circumstances of the parties may render necessary, which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom judgment shall be rendered."

As the husband, therefore, pays alimony out of his income and not out of his capital estate, so the wife's "sufficient means" whereon to subsist pending the action must, in like manner, be her income and not her capital.

The court has found as a fact that her income is not sufficient for her support and necessary expenses pending this litigation. It then became the duty of the court to order the husband to pay the wife such alimony "as shall appear to him just and proper, having regard to the circumstances of the parties."

The statute relating to divorce and alimony proceeds upon the natural duty of the husband to support the wife as well before as after divorce, and must be liberally construed to express that duty.

Alimony is not itself an "estate" in a technical, legal sense of the word, nor is it necessarily a charge upon the husband's estate. He may have no estate. But alimony is a mere personal charge
(72) upon the husband, or a duty imposed upon him, which the courts will enforce against him from time to time, at discretion, compelling the payment thereof from his income, whether he have an estate or not. 37 Wis., 206. This income may be derived

from personal labor, wages or salary, as well as from lands or personal property. What the amount of the allowance should be must be left to the sound discretion of the court, considering the wife's condition in life and the income of both her husband and herself. The rule which seems the most proper one is thus expressed by Bishop: "If the wife has a separate estate, and then her husband commits a breach of matrimonial duty entitling her to a divorce or a judicial separation, when she applies for alimony, her income from this estate will be taken into account, on the question of amount, as well as his income. And if her income is sufficient to furnish an adequate proportion of itself, she will have nothing from him." Law of Married Women, sec. 894.

His Honor was of opinion that the statute gave him no power to resort to the income of the husband until all the separate estate of the wife, principal and interest, was first exhausted in her support. This is error.

Judgment is

PER CURIAM. Reversed.

(73)

STATE v. HAMAN MILLER.

Attorneys—Imprisonment.

1. A defendant, under an act of Assembly, has a *right* to have more than one of his counsel, or all that represent him, heard by the judge and jury in his defense, upon his trial in the Superior Court. The presiding judge has no authority to refuse to hear but one, or to restrict the counsel in their remarks to any particular length of time.
2. Can a judge of the Superior Court imprison a defendant, convicted of an assault with intent to kill, in the county jail for five or more years. *Quære?*

INDICTMENT, for an assault with intent to kill, tried before *Kerr, J.*, at Spring Term, 1876, of RANDOLPH.

At the conclusion of the evidence, his Honor remarked that he would hear but one of the prisoner's counsel, he being represented by three. One of the counsel thereupon addressed the jury, and at the conclusion of his remarks another of the counsel arose and stated to the court that in order to make a proper presentment of the defendant's case it was necessary that another of the counsel should address the jury, and asked permission so to do. The court refused to hear the counsel. The prisoner excepted.

There was a verdict of guilty and motion for a new trial. The motion was overruled, and the prisoner appealed.

Attorney-General Hargrove for the State.
Tourgee for the prisoner.

READE, J. Anciently, and until lately, the judge holding his court was the principal personage. He was clothed with the insignia of dignity, and represented majesty—the majesty of the law. It is so now to some, but not to the same extent. We have no disposition to enter upon the discussion, whether the change is for the better
(74) or for the worse. It may still be said that the judge *holds* his court as a driver holds the reins (Webster), to govern, guide restrain, except where he is himself restrained by law.

The restraints which have been put upon the judges in this State have been very few. Some twenty-five years ago a circuit judge restrained a lawyer from arguing the *law* to the *jury,* suggesting that the argument of the law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury.

And again, some two years ago, a circuit judge, in a criminal case, restricted the prisoner's counsel to one hour and a half in addressing the jury, allowing two of the counsel to divide the time between them. From that ruling there was an appeal to this Court. We expressed our disapprobation with its exercise in that case, but still we held that it was a power vested in the presiding judge, and that we could not control its exercise. *S. v. Collins,* 70 N. C., 241. And thereupon the Legislature passed an act, as follows: "That any counsel appearing in any civil or criminal case in any of the courts of this State shall be entitled to address the court or the jury for such a space of time as in his opinion may be necessary for the proper development and presentation of his case."

That is about as broad as language can make it. *Any* counsel *appearing* . . . may address either the *court* or the *jury,* as long as he pleases.

In the case before us his Honor, upon closing the testimony, remarked that he would hear but one counsel for the defense. There were three counsel "appearing" for the defense, and they insisted that it was necessary that two of them should be heard; but his Honor refused. The question is, whether the defendant had the *right*
(75) to have two of his counsel address the court and jury, or whether it was discretionary with his Honor to refuse to hear more than one.

Nothing can be clearer from the language of the act, and from the history of the legislation upon the subject, than that it was the inten-

tion of the Legislature to give to persons, charged with crime, the full benefit of counsel. Indeed, it is a constitutional privilege. Precisely how to allow this privilege, without the chances of occasional abuse, may be found to be difficult, if not impossible. It certainly cannot be supposed to be the policy of the Legislature to embarrass the courts so that they cannot dispatch business. Nor can it be supposed that it would, from any pique, subject the judge to indignity. What we have to suppose is, that it is to be left to the discretion of *counsel,* instead of to the discretion of the *presiding judge,* how they shall address themselves to the court and jury. It must be left either to the judge or the counsel; and the Legislature has left it with the counsel. It may be that the confidence is not misplaced. But one instance is recorded (see dissenting opinion in *S. v. Collins*) where any counsel has felt himself at liberty to abuse his privileges to the obstruction of the due administration of the law. And that was before the profession had many of the advantages which they now possess; and it may be before it was fully known that "we cannot do evil that good may come of it." At any rate, the law is plain, and the experiment has to be made whether it is prudent to entrust the discussion in the courts to the *counsel* instead of to the *judge.*

It is suggested that the control of the subject is divided between the court and the counsel—that the court may limit the *number* of counsel speaking to *one,* and then that *one* may speak as long as he pleases.

The foundation for this suggestion is Rev. Code, chap. 31, sec. 15: "The plaintiff or defendant may employ several attorneys in his case, but more than one shall not speak thereto unless al- (76) lowed by the court."

From that it is insisted that if the court is allowed to limit the number speaking to *one,* that *one* cannot have the physical ability to consume an unreasonable length of time.

There are several objections to that construction. In the first place, when we have an act, the avowed object of which is to give the defendant *unlimited time,* it would be discreditable by an evasion to deprive him of the benefit of it by saying that "unlimited time" means as long as one frail counsel, already worn out with a long trial, can stand up and speak. It is always uncomely in anybody, and especially in a court, to try how near they can come to disregarding a law without incurring responsibility. It is due to every law that it should have its full effect, not grudgingly given. And then if seen to be mischievous it may be the sooner corrected. Here we have three laws: First, that every one charged with crime shall be entitled to counsel; but nothing is said about the number. Secondly, we have an act (Rev.

Code) allowing him to have as many as he pleases, with the power in the presiding judge to limit the speaking to one; and thirdly, the late act which allows *any* of his counsel appearing in the case to speak as long as *he* pleases. It is aid that the effect of this will be to obstruct the administration of justice. But, then, who is to be the judge of that? Judge Watts, in *Collins's case, supra,* thought he was the judge, and undertook directly and avowedly to limit the time to an hour and a half, to be occupied by two counsel. And the Legislature immediately said that shall not be, but any counsel appearing in the case may speak as long as he pleases. And then Judge Kerr, in this case, thought he would be the judge, and that he would do indirectly what the act prohibited from being done directly—limit the *time* by limiting the *number.* Why limit the number except to limit the
(77) time? What does it matter to the judge whether one or a dozen speaks, except as it affects the *time* of the court? It was not mere caprice in his Honor in not wanting to hear two counsel; but it was to save the time of the court. And *that* the Legislature has said he shall not do, so as to deprive any counsel appearing of the right to speak as long as he pleases.

For this error there must be a *venire de novo.* This makes it unnecessary to notice several other grounds, which were argued before us, as they may be avoided on the next trial. But there is one interesting and important question which must arise if the defendant is convicted. Can his Honor imprison him for five years in the county jail?

The crime charged is an assault—not a battery—with intent to kill. It is a serious one against society and ought to receive exemplary punishment, but it is not classed with the highest grades of offenses where the punishment is usually specified by the Legislature, but is left to fine or imprisonment, or both, at the discretion of the presiding judge. Bat. Rev., chap. 32, sec. 111.

It is, for instance, not an offense of as grave a character as those enumerated in sec. 48: "If any person shall on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off a nose or lip, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, etc., shall be imprisoned at least six months and fined at the discretion of the court." In our case his Honor imprisoned the defendant for five years, not in the penitentiary, where one may live so long, but in the county jail, where it is strongly probable that confinement and fœtid air would cause a lingering death. The oldest member of this court does not remember an instance of five years' imprisonment in a county jail for *any offense.*

Since the establishment of our penitentiary, it would seem to be the intention of the Legislature to make all long terms of (78) imprisonment in that institution, so that while the convict is undergoing punishment, he may be made useful, and his health and morals guarded. And so it was provided in the penitentiary act, Bat. Rev., chap. 85, sec. 41: "Criminals in any of the jails of the several counties under sentence of imprisonment for a longer term than twelve months may be conveyed by the sheriff to the penitentiary." The intention of this was to rid the jails of all persons who had been sentenced there for more than a year. And yet, what good would that do if they could be immediately filled up for five years?

We will not pursue the matter further, and do not decide it; but only invite attention to it. Can a man be imprisoned in the county jail for five years at the discretion of the court?

PER CURIAM. *Venire de novo.*

Cited: *S. v. Driver,* 78 N. C., 425; *S. v. Pettie,* 80 N. C., 369; *Horah v. Knox,* 87 N. C., 486; *Puett v. R. R.,* 141 N. C., 336.

J. W. HEPTINSTALL v. J. E. RUE, JR.

Jurisdiction of Torts—Contracts.

1. A justice of the peace has no jurisdiction of a civil action for a tort.
2. A promise made without consideration is void.

APPEAL from *Moore, J.,* at November (Special) Term, 1875, of HALIFAX.

The cause was heard in this Court upon the following case agreed:

This action was instituted in a court of a justice of the peace to recover the value of a bale of cotton alleged to have (79) been converted to his own use by the defendant.

The plaintiff claimed title to the property under a mortgage executed to him by Wesley Thorne and Turner Thorne.

The plaintiff introduced Wesley Thorne as a witness, who swore that he rented a tract of land from J. E. Rue, Sr., the father of the defendant, for the year 1873, and agreed to allow Turner Thorne to cultivate a part thereof during that year. That Turner Thorne and James Airland entered into an agreement to cultivate said land together, and after paying rent and all other expenses, to divide the surplus of the crop, if there should be any. That Wesley Thorne and

Turner Thorne executed the aforesaid mortgage on 3 April, 1873, and the said mortgage was recorded on 16 April, 1873. Prior to that time the plaintiff had sold a mule to Turner Thorne for $220, and the said mortgage was in part intended as a security for the purchase money thereof.

It was agreed between Turner Thorne and James Airland that the mule should be paid for out of the proceeds of the crop of that year, and was to be owned equally by them. This contract was made prior to the execution of the mortgage aforesaid, and was assented to by Airland after the execution thereof. Airland had notice of the execution of the mortgage and assented thereto.

It was also in evidence that the bale of cotton was raised by Thorne and Airland on the said land, and having been ginned and packed at the defendant's gin, was demanded of the defendant by the plaintiff, who refused to deliver the same and converted it to his own use. It was in evidence that the bale of cotton was worth between $56 and $75.

The defendant introduced James Airland, who testified: That in the early part of the year 1873 he entered into a contract with Turner Thorne to cultivate a crop on said farm. The labor was to be
(80) performed by them equally, and after payment of the cost of cultivating the crop the same was to be equally divided between them. He never agreed that the mule should be paid out of the proceeds of the crop and that he should become the one-half owner of the same; that he never assented to the execution of the mortgage aforesaid. He did agree that if they made a good crop, and if the balance due for the mule was not more than $60, it might be paid out of the crop. That the contract between himself and Thorne was reduced to writing. The following is a copy thereof:

This is to certify that Turner Thorne of the one part, and James Airland, have agreed to raise crops together on the following conditions, viz.: The crops that we raise for year 1873 are corn and cotton. Each agrees with the other in raising their crops on the plantation of J. E. Rue that each shall do an equal share of the work and have an equal share of the said crops raised. That as soon as the crops are raised and gathered then the division shall be made.

In witness whereof, we have this first day of March, A. D. 1873, mutually set our hands and seals.

TURNER THORNE, [L. S.]
JAMES AIRLAND, [L. S.]

Witnessed by J. E. RUE.

Witness further testified: That after the crop was made the rent had been paid, and that the bale of cotton in controversy was delivered by him to the defendant in payment of a debt.

His Honor being of the opinion that the mortgage under which the plaintiff claimed was a mere chattel mortgage, and not an agricultural mortgage, instructed the jury that the plaintiff was not entitled to recover in any view of the case. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Batchelor & Son for appellant. (81)
Cooke, Moore & Gatling, contra.

READE, J. If the action is for the conversion of the bale of cotton, as it seems to be, it is a tort, of which a justice has no jurisdiction. If upon the promise to deliver the bale of cotton, the promise seems to have been without consideration, and therefore void.

The case will be remanded that it may be dismissed, and then the parties may proceed upon the other questions as they may be advised. Plaintiff pay cost of this court.

PER CURIAM. Judgment accordingly.

Cited: Nance v. R. R., 76 N. C., 10.

F. J. McMILLAN v. MORGAN EDWARDS AND ANOTHER.

Sheriff's Deed—Registration—Parties.

A sheriff executed and delivered to the plaintiff a deed for certain lands sold under execution, of which the plaintiff became the purchaser. This deed from the sheriff was lost before registration; whereupon the plaintiff brought an action against the sheriff and the party in possession of the land, seeking to compel the execution of another deed, and to recover possession of the land: *Held* (1) That the title to the land does not pass, until the registration of the deed. (2) That it was *not error* for the plaintiff, in the same action, and at the same time, to demand the execution of another deed, to be made effectual by registration, and also for the possession of the land. And (3) Tthat the sheriff was a proper party to the action.

APPEAL from *Furches, J.*, at Spring Term, 1876, of ALLEGHANY.

The complaint alleges substantially the following facts:

That the plaintiff is the owner of the *locus in quo,* consisting of about five hundred acres of land. (82)

Said land was sold under execution against one Archibald Edwards, who was the owner thereof at the time of said sale, and was purchased by the plaintiff.

That the sheriff of said county executed a deed conveying said land to the plaintiff, and that the deed has been lost or mislaid. Said deed has never been registered.

That the defendant is in possession of the *locus in quo* and withholds the same from the plaintiff.

The defendants answered the complaint, denying the material allegations of the complaint.

The defendant Wyatt, who was sheriff at the time of the sale under execution, answered, admitting the sale and the execution of the deed, and offered to execute another deed for the land.

The defendant Edwards moved the court to dismiss the action on the ground that the complaint did not state facts sufficient to constitute a cause of action, and because the sheriff was improperly made a party to the action.

His Honor being of the opinion with the defendant, judgment of nonsuit was rendered, and the plaintiff appealed.

Armfield and Folk for the appellants.
M. L. McCorkle and Smith & Strong, contra.

BYNUM, J. If the allegations of the complaint are true, and the deed from the sheriff had been registered, the plaintiff would be entitled to recover in this action. The title to land does not pass until the registration of the deed. Bat. Rev., chap. 35, sec. 1; *Wilson v. Sparks,* 72 N. C., 208; *Hogan v. Strayhorn,* 65 N. C., 279; *Triplett v. Witherspoon,* 74 N. C., 475. It was the duty of the sheriff not only to execute the deed, but such a deed as would be effectual to pass all the interest of the defendant subject to sale and that was (83) sold under the execution. If by loss of the deed before registration, it failed to pass the title, it would seem clearly to be the duty of the sheriff to execute another and still another, until by registration, the sheriff, who is an officer of the law charged with the duty, had made a deed effectual to convey the interest sold under the execution. This generally, he would be compelled to do.

If the action here had been ejectment under the old system, the plaintiff, to recover, must have shown a legal title existing at the commencement of the action. But now both legal and equitable rights are administered in the same action, and no sufficient reason can be assigned why the plaintiff may not, at the same time and in the same action, ask for the execution of another deed, to be made effectual by

registration and also for the possession of the land. It is true the deed must be executed before the title to the land can be tried, but this makes it necessary only to stay the trial for the land until the deed is established. It is competent for the plaintiff to set up the lost deed by proving the loss and establishing a copy, but here the sheriff, who is a party to the action, offers to execute another deed, to which there seems no valid objection.

The objection made here that two distinct and independent causes of action are joined, is not raised by answer or demurrer, as required by the Code, and therefore need not be considered. But there is no gound for the objection under this section of the Code: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they arise out of the same transaction or transactions connected with the same subject of action." This action falls within the provision.

So in regard to parties defendant; the sheriff had executed the lost deed to the plaintiff, and whether his purpose was to set up a copy, or to call for the execution of another deed in place of the lost one, it was equally competent, if not necessary, to join the sheriff (84) as a party defendant.

It was error in his Honor to direct a nonsuit. The judgment is reversed, but the trial for the land will be stayed until the sheriff shall execute another deed for it.

PER CURIAM. *Venire de novo.*

Cited: Beaman v. Simmons, 76 N. C., 44; *Hare v. Jernigan, ib.,* 474; *England v. Garner,* 86 N. C., 370; *Southerland v. Hunter,* 93 N. C., 312; *Ely v. Early,* 94 N. C., 6; *Jennings v. Reeves,* 101 N. C., 450; *Respass v. Jones,* 102 N. C., 12; *McMillan v. Baxley,* 112 N. C., 588; *Outland v. Outland,* 113 N. C., 75; *Kiger v. Harmon, ib.,* 408; *Teague v. Collins,* 134 N. C., 64; *Brown v. Hutchinson,* 155 N. C., 208; *Chemical Co. v. Floyd,* 158 N. C., 462.

WYATT EARP AND OTHERS v. W. H. RICHARDSON AND OTHERS.

Referee—Report.

It is the duty of a referee to state positively and definitely all the facts constituting the grounds of defense, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and of fact

must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, its peculiar province, and the report of the referee will be set aside as being defective, and the cause remanded.

APPEAL from *Kerr, J.*, at Spring Term, 1876, of WILSON, upon exceptions by the plaintiffs to the report of the referee, to whom the case had been referred under the provisions of the Code of Civil Procedure.

Among others, the plaintiffs filed the following exception: "Because the referee finds, as a conclusion of law, that the plaintiff's cause of action is barred by the statute of limitations."

His Honor overruled the exceptions, and the plaintiffs appealed.

Smith & Strong and Smedes for appellants.
Busbee & Busbee, contra.

RODMAN, J. The duty of a referee under section 246 of Code of Civil Procedure is to report on all the facts constituting the grounds of action or defense. It may not be necessary that he should in (85) all cases state, as found by him, matters which are alleged and admitted by the pleadings. But it is better and more convenient to do so; for, considering how vague and indefinite pleadings often are, it may be uncertain what facts he assumes to be alleged and admitted by them. He must state his conclusions of fact separately from his conclusions of law. Otherwise, it will be impossible for an appellate court, which can review conclusions of law only, to review his conclusions of law. *Klutts v. McKenzie*, 65 N. C., 102.

It is evident that the report of the referee in this case falls short of the requirement. It does not profess to find even upon all the facts put in issue by the pleadings. Taking only the facts found, no judgment could be given in favor of any party. Nor could this be done with the help of the admissions in the pleadings. Scarce any facts are set forth distinctly. A finding should state positively and definitely the fact found, and not leave to inference what is the precise fact intended to be found. Conclusions of fact and law are not stated separately, thus forbidding a review. For example: the time when the cause of action arose is a mixed conclusion of fact and law. The referee should have set forth the facts upon which the cause of action arose, and their dates.

A more detailed notice of the report would only exemplify these general propositions, which are sufficiently intelligible without being illustrated by example. It does not appear that either party excepted to the report before the referee, or called his attention to its imperfec-

tions, or requested him to correct it by making it more specific. The Code may not *require* this, and we would be reluctant to hold that it does, because such a course would be often inconvenient. But the Code contemplates it, and when it can be done it should be, as it would tend to avoid the return of irregular and defective reports, and to expedite and cheapen the decision of actions. The omission to (86) except before the referee, will also affect the costs when the report is set aside as defective.

When in a case of omission like this, neither excepts before the referee, both are equally responsible for the defectiveness.

Judgment below is reversed. The report is set aside. The cause is remanded to be proceeded in, etc. Neither party will recover costs in this court.

PER CURIAM. Reversed.

Cited: Norment v. Brown, 79 N. C., 368; *Knight v. Killebrew,* 86 N. C., 403; *Humble v. Mebane,* 89 N. C., 415; *Cooper v. Middleton,* 94 N. C., 93; *Cummings v. Swepson,* 124 N. C., 585.

SAMUEL REID AND OTHERS v. JOSEPH CHATHAM AND OTHERS.

Estoppel—Limitations.

J. B. died possessed of a tract of land in 1821, intestate, and leaving him surviving six children, one of whom was H. M., who, prior to his, J. B.'s death, had intermarried with J. M., and was, together with her husband, living upon the *locus in quo* at the time of his death. J. M. continued to live upon the *locus in quo* and receive the rents and profits until 1843, when he sold the same to J. J., in fee simple. J. J. entered and held possession until 1852, when he conveyed the same to S. in fee simple; S. entered and has had possession ever since. Z., also a son of J. B., was living upon the *locus in quo* at the death of his father, and continued to live thereon until 1831, when he died, leaving issue him surviving; but they did not continue to live thereupon. Within seven years after the death of J. M., the children and heirs at law of H. M. brought an action to recover the *locus in quo*: *Held,* (1) That the defendants claiming under J. M., who held as tenants by the curtesy, are estopped to deny the title of the plaintiffs to an undivided sixth of the *locus in quo;* and (2) that the plaintiffs are not barred by the statute of limitations.

EJECTMENT, tried before *Furches, J.,* at Spring Term, 1876, of ALEXANDER.

The plaintiffs are the children and heirs at law of Hannah Marley, who was the wife of John Marley and the daughter of (87)

Jehu Barnes. Barnes was in possession of the *locus in quo* at the time of his death, which occurred in 1820 or 1821. John Marley and his wife Hannah had intermarried prior to the death of Jehu Barnes, and were also living upon the *locus in quo* at the time of his death. John Marley continued to live upon the *locus in quo* and to receive the rents and profits thereof until 1843, when he sold and conveyed the same to James James in fee simple. James went into possession of and occupied the same until 1854, when he sold and conveyed the *locus in quo* unto one Stewart in fee simple. Stewart entered and has had possession ever since.

John Marley departed this life in 1860, and his wife Hannah Marley in 1863. Jehu Barnes died in 1820 or 1821, as aforesaid, intestate, leaving him surviving six children, one of whom was Hannah, the wife of John Marley. Zack, another of the surviving children, was also living upon the *locus in quo* at the death of his father, and continued to reside thereupon until about the year 1831, when he died, leaving issue him surviving, but they did not continue to live thereupon after the death of their father. There was no evidence of the other children of Jehu Barnes, other than that they did not continue to live upon the *locus in quo* after the death of their father. John and Hannah Marley had issue, born alive and living, at the time of the death of Jehu Barnes. This action was commenced within seven years after the death of John Marley.

The plaintiffs offered no written evidence of their title, nor of the title of any one under whom they claimed, nor was there any evidence offered to show that the State had ever actually granted the *locus in quo* to any one.

The plaintiffs offered in evidence deeds from John Marley to James James, which together covered the *locus in quo;* one dated 11
(88) April, 1836, another dated 2 May, 1842, and another, 6 December, 1842. Also, a deed from James James to one Stewart, the father of one of the defendants, and under whom the defendants claim, dated ....., 1852, stating at the time that they were offered, to be used only by way of estoppel. There was evidence to show that Jehu Barnes had lived upon and claimed the *locus in quo* as his own for some thirty years, and that John Marley entered upon said lands as the tenant of Jehu Barnes, and after his death held said lands in the right of his wife Hannah. That Jehu Barnes during his possession claimed to known lines and boundaries outside of his actual possession, and which boundaries include the *locus in quo.* There was evidence tending to show the yearly value of the *locus in quo* for the three years preceding the commencement of this action.

Mary E. Marley, a plaintiff in the action, was introduced for the plaintiffs, and asked if she ever heard her father, John Marley, while in the possession of the *locus in quo,* tell her mother Hannah how and in whose right he held possession of the same?

The question was asked for the purpose of showing that John Marley said he held the *locus in quo* in the right of his wife. The defendants objected; the objection was sustained by the court, and the plaintiff excepted.

For the purpose of proving the same fact, the plaintiffs asked the witness if she had ever heard her father, the said John Marley, while in possession, say to other persons, whose names she did not remember, and therefore did not know whether they were dead or living, how he held said lands?

The defendants objected; the objection was sustained by the court, and the plaintiffs excepted.

The defendants offered no evidence. All questions of law being reserved by the court, the following issues were submitted to the jury:

1. Did Jehu Barnes live on the land in controversy for twenty-eight or thirty years before his death, claiming and (89) using the same as his own for all that time?

Answer. Did not, according to evidence.

2. How much of said land did he have in actual possession; all or only a part, and if only a part, what part and how much?

Answer. All.

3. Was there known and visible lines and boundaries to said tracts of land to which he claimed, outside of the land in actual possession, or not?

Answer. Yes.

4. Did John Marley enter upon said lands in the lifetime of Jehu Barnes as his tenant, or not?

Answer. He did.

5. What has been the yearly rental value of the land in controversy for the three years preceding the commencement of this action?

Answer. $175.

6. How did John Marley claim to hold the land in dispute after the death of Jehu Barnes; in his own right or in the right of his wife?

Answer. In his own right.

Upon the finding of the jury, and the questions of law reserved, the plaintiffs moved for judgment, and a writ of possession for the whole tract of land. The motion was overruled by the court. The plaintiffs then moved for judgment for one-sixth part of the land. This motion was also overruled by the court.

The defendants then moved for judgment of costs and that they go without day. The motion was allowed and the plaintiffs appealed.

Folk & Armfield for the appellants.
M. L. McCorkle and Scott & Caldwell, contra.

RODMAN, J. 1. For the reasons which are clearly and concisely stated in the able argument of the counsel for the plaintiff, and upon the authorities there cited, we are of opinion that the defendants are estopped to deny the title of the present plaintiffs to an undivided sixth of the land sued for. Claiming under Marley, who held as ten-
(93) ant by curtesy under the mother of the plaintiffs, they cannot deny the estate of such ancestor, or of the plaintiff, as her heir.

2. Upon the authorities cited, we think also that the plaintiffs are not barred by the statute of limitations.

3. We do not concur with the learned counsel, that the plaintiffs are entitled to recover the whole land, or more than one-sixth of it.

If John Marley and his wife had been personally in possession of the whole land for the forty years which elapsed from the death of Jehu Barnes to that of John Marley, an actual ouster of his cotenants would be presumed for his or her benefit, and releases from them to him or her. It might be somewhat difficult to say whether the releases would be presumed to be to the husband or to the wife; but it is not a material inquiry in this case.

Marley and his assignees held one undivided sixth of the land by virtue of his wife's estate, and assuming twenty years to be the period after which an actual ouster of his cotenants will be presumed in favor of the tenants in possession, until the termination of that period, the possession of John Marley and his assignees was, as a cotenant, entitled to an undivided share, and in right of and for the benefit of their cotenants as well as for their own. But when there has been an actual ouster, whether really or by presumption of law, by one cotenant or the others, the possession is held by him for his own benefit, unless he be in some relation to some other person such as agent, trustee or other similar, which makes it his duty to hold it for the benefit of such other person. Cases of that sort may be conceived of, and in such cases the possession would be presumed to be consistent with the duty. If any such relation would have existed between Marley and his wife, had he have been personally in possession, none such existed between his assignees and him, or between them and his wife. They might at any time without any breach of duty to Marley or his wife, have
(94) taken releases from the ousted cotenants, and when a presumption of such releases is to be made from their long possession,

there is no reason for presuming that the releases were to Marley or his wife, rather than to the actual possessors. Their possession was adverse to all the world except Hannah Marley, and was adverse to her except as to the undivided sixth, on which they had entered by virtue of her husband's conveyance, and therefore in subordination to her title.

PER CURIAM. New trial.

JAMES C. COOPER, ASSIGNEE, v. THOS. L. WILLIAMS AND OTHERS.

Summary Judgment—Official Bonds.

Where A obtained a judgment against B, clerk of the Superior Court, for a sum of money in his hands by virtue of his office, and B died, and his administrator, upon demand, failed to pay the money: *Held*, that the court below erred in overruling a motion by the plaintiff for judgment upon the official bond of the clerk, under the provisions of Bat. Rev., chap. 80, sec. 24.

CASE AGREED, heard before *Henry, J.*, at Spring Term, 1876, of GRANVILLE.

On 2 October, 1872, the late Calvin Betts was clerk of the Superior Court of Granville County, and the defendants were sureties upon his bond, executed to secure the faithful performance of his duty as clerk aforesaid.

On said day said clerk received by virtue of his office the sum of $337.95 for and on account of one Simon Philpot.

Afterwards, to wit, on 2 November, 1872, said money while in the hands of said clerk was, at the suit of Augustine Landis (95) against said Philpot, who was a nonresident of this State, attached. At July Special Term, 1875, of the Superior Court of said county, said Augustine Landis recovered a judgment against said Philpot in said suit for the sum of $375 with interest on $200 from 5 July, 1875, and said sum of $337.90, in the hands of said clerk, was condemned by said judgment to the satisfaction of said Landis' judgment against said Philpot.

It is further agreed that Calvin Betts died intestate in said county on 6 March, 1874, and that the defendant John W. Hays is his administrator. It is further agreed that a demand for said money ($337.90) was made upon said administrator and also upon B. H. Cozart, the present clerk of the Superior Court of said county and the immediate successor of said Betts in said office, before the issuing of

the notice upon which this motion is based; and that the defendants had more than ten days notice before the beginning of this term of the purpose of the plaintiff to make this motion.

It is further agreed that the said Landis has assigned his interest in said judgment to the plaintiff. The notice, upon which this motion is based, was directed to John W. Hays, as administrator of Calvin Betts, as well as to the defendants; but upon the trial the plaintiff by leave of the court entered a *nol. pros.* as to the administrator.

If the court shall be of opinion for the plaintiff, judgment shall be entered in his favor for $337.90, with interest on the same from 2 October, 1872, and for his cost of action. Otherwise judgment is to be entered for the defendants.

The court being of opinion with the defendants, rendered judgment accordingly, and thereupon the plaintiff appealed.

(96) *Batchelor & Son for appellant.*
No counsel contra.

RODMAN, J. This case comes before us upon a case agreed, which the reporter will insert.

The substance of it is that Landis recovered a judgment against Betts, clerk of the Superior Court of Granville, for a sum of money which he had in his hands by virtue of his office. Landis assigned that judgment to the plaintiff; the clerk died, and his administrator has failed to pay the money after demand. The plaintiff then moved for judgment upon the clerk's bond under Bat. Rev., ch. 80, sec. 14, which was refused by the judge below, and the plaintiff appealed. No reason is assigned upon the record, nor has any been suggested in this Court, why the plaintiff should not have judgment on the case agreed. None occurs to us.

Judgment below reversed. The plaintiff is entitled to judgment in this Court according to the case agreed.

PER CURIAM. Reversed.

W. P. MARTIN v. JOHN G. CHASTEEN.

Appeal in Forma Pauperis.

The clerk of the Supreme Court is not bound to render his services gratuitously to a party whom the judge of the court below has allowed to appeal without giving the bond required by law.

MARTIN *v.* CHASTEEN.

MOTION to the Court, in the cause heretofore dismissed at the instance of the appellee for want of an appeal bond. The facts pertinent to the point decided are fully set out in the opinion (97) of Justice RODMAN.

Ferguson for appellant.
Smith & Strong, contra.

RODMAN, J. At Spring Term, 1875, of the Superior Court of Cherokee, the plaintiff recovered judgment against the defendant, who thereupon appealed to this Court without giving any bond or undertaking to the appellee, as required by C. C. P., sec. 303, etc. This he was allowed to do by the judge on his making affidavit that by reason of poverty he was unable to give security, under Laws 1873-'74, ch. 60.

It may be remarked in passing, that the appellant does not appear to have conformed to the act by accompanying his affidavit with a written statement from a practicing attorney of the court that he had examined the appellant's case and was of opinion that the judgment of the Superior Court was contrary to law.

The transcript was received by the clerk of this Court before the calling of the twelfth district at June Term, 1875, and he omitted to enter it on the docket for the reason that his fee for that service was not paid. After the cases docketed from the district had been called and disposed of the appellee, in conformity with the practice of the Court, caused the clerk to docket the case by paying him his fee, and moved to dismiss the appeal for want of prosecution, which motion was allowed and the appeal dismissed. The appellant moves at the present term of the Court to vacate the judgment dismissing the appeal, and that the case be docketed and heard on the record of appeal.

His counsel contends that under Laws 1873-'74, above referred to, he was allowed, on complying with its provisions, to appeal *as a pauper,* and that the officers of the appellate court were bound to render him their services gratuitously, and that he could (98) neither be adjudged to pay or to recover costs.

We do not think this was the intention of the act. Every act which is claimed to be derogatory to common right must be strictly construed. And, certainly, to require one man to serve another gratuitously, and to compel one who has recovered a judgment in a Superior Court, and who *prima facie* must be presumed to have a just claim, to undergo expense and fees in maintaining his judgment in an appellate court, without the possibility of indemnity, must be conceded to be derogatory to common right. Several recent statutes, including the one in question, seem to indicate that mistaken opinions are current on this subject.

The law was never so false to justice and humanity as to deny a man access to the courts by reason of his poverty. If he could find any counsel who would certify that in his opinion he had a just claim, a judge would thereupon order that all necessary process be issued and other services be performed for him by all the officers of the court gratuitously.

Among the officers to whose gratuitous labors he thus became entitled were the attorneys of the court, one of whom would be assigned, to him. The services of counsel were always in England so far regarded as gratuitous that no action could be maintained upon them. In early times what are called contingent fees, by which the attorney or counsel shares in the recovery, were not only considered improper, but criminal as champerty. When a learned and impartial judge had decided that a pauper party had no just claim or defense, the decision was presumed to be right and he could not appeal except on the ordinary terms. Under this state of the law, while the demands of justice and humanity were met, there was no invitation to speculative
(99) litigation, or to that intended to wrong an adversary or to extort from him an unjust demand. The injustice and impolicy of some of the recent legislation on this subject will probably be conceded by all whose experience enables them to form an opinion. While it is a duty which we shall always cheerfully perform to give effect to the declared will of the Legislature, yet we do not feel bound to impute to the Legislature an intent to extend the right to sue as a pauper beyond the fair meaning of its words. The act in question only enacts that on a party complying with its provisions it shall be the duty of the judge "to make an order allowing said party to appeal from said judgment to the Supreme Court, *as in other cases of appeal* now allowed by law, *without giving security therefor.*" Now, as is well known, the object of an undertaking by an appellant is not to secure the fees which the appellant may become liable for to the officers of the court, pending his appeal, but only to secure reimbursement to the appellee of such fees as he may have to pay. The act puts an appellant who has complied with its conditions in the condition he would have been in if he had given an undertaking. Now an appellant who has given an undertaking is not entitled to the gratuitous services of the officers of the court, but must pay for them as he procures them if the officers demand it. *Office v. Lockman,* 12 N. C., 146.

In *Biggerstaff v. Cox,* 46 N. C., 534, it was held that an order of court authorizing a plaintiff to prosecute his suit *without further security* did not authorize him to prosecute it thereafter as a pauper, but that both he and the security he had before given continued liable for the subsequent costs. This case seems very nearly in point.

We think the clerk of this Court had a right to demand payment of his fee for docketing the appeal before he performed the service, and he was not compelled to perform it gratuitously.

The practice adopted by this Court and expressed in a rule which will be printed in this volume, is neither novel nor un- (100) reasonable. It is substantially that of this Court before 1868. Rev. Code, ch. 4. It is almost identical with that of the Supreme Court of the United States. *Every* court, of whatever grade, must *of necessity* require suitors in it to prosecute their suits in *due* time, which it is for the court to determine on principles of justice and convenience. It would be obviously unjust to keep one against whom a demand is made (and that is the position of an appellee or defendant in error) attending court indefinitely to await a demand which is not made, and which it would often be for the interest of the appellant never to make. The law cannot permit the enforcement of presumably a just demand to be thus procrastinated. Every unwilling debtor would resort to it, and the court would be a mockery.

If the clerk had docketed the judgment it would still have been necessary for the appellant to have attended personally or by attorney to prosecute his suit. He has had all that the act intended to give him, the opportunity of prosecuting his appeal without securing his adversary from costs, and if he has not had a hearing on the merits, it has been from his own want of diligence in prosecuting his right.

PER CURIAM. Motion refused.

Cited: Andrews v. Whisnant, 83 N. C., 448; *Bailey v. Brown,* 105 N. C., 129; *Ballard v. Gay,* 108 N. C., 545; *Speller v. Speller,* 119 N. C., 357.

Dist. S. v. Nash, 109 N. C., 823.

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(101)

MARTIN V. HORNE v. MARY E. HORNE.

New Trial in Supreme Court—Newly Discovered Evidence.

The allowance of a motion to vacate a judgment and grant a new trial, for newly discovered evidence, and for the matters occurring since the trial and final judgment, under the supervisory power and equitable jurisdiction of this (the Supreme Court), is a matter of sound discretion, in the exercise of which the Court will be governed by the peculiar circumstances of each case: *Therefore*, when, in a petition for divorce, the following issue, to wit: "Did the plaintiff commit adultery with," etc.? was submitted to, and found by the jury against the plaintiff, and

final judgment was rendered against him in such petition: *It was held*, that this Court would not set aside the judgment and grant a new trial, upon the ground that the principal witness who testified as to the adultery of the plaintiff had subsequently been convicted of perjury, for swearing falsely upon the trial of said issue, when it appeared that the principal witness for the prosecution, upon the trial of the indictment for perjury, was the plaintiff and petitioner, who now makes this motion to vacate, etc.

PETITION to rehear the same cause between the same parties, heretofore decided in this Court, to wit, at January Term, 1875.

The grounds upon which a rehearing is now asked will be found in the opinion delivered by Justice BYNUM; and the facts of the case are fully stated in the report of the same in 72 N. C., 530.

Battle, Battle & Mordecai for petitioner.
Busbee & Busbee, contra.

BYNUM, J. The case of *Horne v. Horne,* 72 N. C., 530, was determined finally by this Court, and the decision in *Jarman v. Saunders,* 64 N. C., 367, and *Bledsoe v. Nixon,* 69 N. C., 81, is authority for the present application and motion here. But the allowance of the motion to vacate the judgment and grant a new trial, for newly discovered evidence and for matter occurring since the trial and final
(102) judgment, under the supervisory power and equitable jurisdiction of this Court, is a matter of sound discretion, in the exercise of which the Court will be governed by the peculiar circumstances of each case. "There must be an end of litigation," is a maxim of law that must be rigidly adhered to, unless the case presented to us for relief appears divested of all traces of suspicion, and with all the insignia of *bona fides* and integrity on the part of the petitioner.

This application does not come before us in this friendly light.

In the action for divorce, 72 N. C., 530, the fifth issue was, "Did the plaintiff commit adultery with one Fannie Horne in January, 1865?" This issue was found against the plaintiff, upon the testimony of one Sol. Rickets. The plaintiff was an incompetent witness on the trial of that issue. But after the verdict and final judgment against the plaintiff in that action, he, the plaintiff, caused the witness against him—Rickets—to be indicted for perjury in giving in his evidence against him on the trial of the said issue. The witness was convicted of perjury, partly upon the testimony of the plaintiff himself. This conviction of the witness, procured in this way, the plaintiff now presents as the ground of his application for a new trial.

It is not denied that a new trial may be granted where the witnesses upon whose testimony the verdict was obtained have since been con-

victed of perjury. 4 Chit. Pr., 62; *Benfield v. Petrie,* 3 Doug., 24 and 27; *Ford v. Yates,* Tidd, 907. But in exercising the discretion to grant or refuse a new trial, the Court will distinguish between a conviction of the witness, procured by the oath of a convicted and deeply interested plaintiff, and a conviction procured by disinterested testimony.

If a party to an action, who is an incompetent witness, after his trial and conviction can thus by his own evidence break down the character and credibility of the adverse witness, and thus relieve himself of the consequences of the verdict by obtaining (103) another trial, in which the convicted witness would be disqualified or discredited, not only would a wide door be opened to perjury, but the party would obtain indirectly what he is debarred from directly, to wit, the benefit of his own evidence in his own behalf. The plaintiff, Horne, in the divorce suit, is not a competent witness in his own behalf (C. C. P., sec. 341), but after a verdict against him he can avoid the consequences and obtain another trial by convicting the witness against him of perjury, by his own oath; and upon the second trial can offer this conviction in discredit of the witness. The mischiefs which would result from such an adjudication are too great to be overlooked. How it would be had the adverse witness been convicted by disinterested evidence we are not called upon to say. As the case now stands it is clear that Horne, as a witness against Rickets, upon the indictment for perjury, had more motives to commit perjury himself than had Rickets to commit perjury in the divorce suit.

In the exercise of a sound discretion we think the motion should be denied.

PER CURIAM. Petition dismissed.

Cited: Carson v. Dellinger, 90 N. C., 230; *Wiley v. Logan,* 94 N. C., 566; *Farrar v. Staton,* 101 N. C., 83; *Black v. Black,* 111 N. C., 303; *Moore v. Gulley,* 144 N. C., 85.

(104)

STATE v. BENJAMIN SMALLWOOD.

Witness—Jury—Judge's Charge.

1. The law imposes upon a juror no obligation to believe a witness who is unimpeached, nor does it give to testimony any artificial force, but leaves it to operate on the mind of each juror, with that force only which it may naturally have upon the mind in producing belief: *Therefore,* it is error in the court below to charge the jury that they are bound to believe a witness unless he was impeached, either by the testimony of some other witness, or by some fact or circumstance in the case.

2. The solicitor is sole judge as to what witnesses shall be introduced on the part of the State, but it does not follow that the jury cannot consider the omission of the solicitor to introduce a witness, and draw from it any reasonable and natural inference: *Therefore*, it is error for a judge, on a trial in the Superior Court, to charge the jury that they cannot at all consider such omission.

INDICTMENT for murder, tried before *Moore, J.*, at Spring Term, 1876, of BERTIE.

The facts, necessary to an understanding of the case, are stated in the opinion of the Court.

There was a verdict of guilty, and judgment thereupon. The prisoner appealed.

Attorney-General Hargrove for the State.
Walter Clark and Busbee & Busbee for the prisoner.

RODMAN, J. Several grounds for a new trial are assigned on behalf of the defendant, a few only of which it is material to pass on.

1. The defendant requested the judge to instruct the jury that they had the right to disbelieve the testimony of the witness Clark.

The judge did not give this instruction, but told the jury that they were bound to believe a witness unless he was impeached, either
(105) by testimony of another witness, or by some other fact or circumstance in the case.

This instruction can scarcely be distinguished from that which was said to be improper in *Nolan v. McCracken*, 18 N. C., 594, and, in all material respects, is identical with it. The error in the instruction is that it seems, or at least may be understood to assert, that *the law* imposes on a juror an obligation to believe a witness who is unimpeached, or that the testimony of such a witness is entitled to a force greater than its natural tendency to produce belief; whereas, *the law* imposes no such obligation, and gives to testimony no artificial force, but leaves it to operate on the mind of each juror with the force only which it may naturally have upon his mind in producing belief.

The instruction *may* also be understood to mean that if the general character of a witness is unimpeached there is an obligation on a juror to believe him, unless the juror can fix on some *particular* fact or circumstance in the case as a reason for unbelief. Probably a person, accustomed to weigh and balance one against the other, the reasons for accepting or distrusting testimony, is able always to specify the precise ground on which he accepts, doubts or rejects it. But juries are not commonly composed of such persons.

This instruction of the judge was especially liable to be misunderstood and to mislead the jury in the case on trial, because there were

circumstances which the jury ought to have considered in estimating the credit to be given to the witness, and which, *so far as appears,* were not presented to the jury in that light, so as to explain or qualify the expressions complained of.

(1) The witness had quarreled with the prisoner.

(2) The testimony of the witness to the fact that the confession was made was uncorroborated, when, if true, it could have been corroborated by Bond.

(3) The truth of the confession, supposing to have been made, *does not appear* to have been corroborated by the finding of the sword and ramrod, where, by the confession they were said to have (106) been left.

2. The judge told the jury that they could not consider *at all* the circumstances that Bond was not introduced as a witness on behalf of the State.

It is settled that the court could not require the solicitor to introduce Bond as a witness for the State. He is the sole judge of what witnesses he shall introduce. *S. v. Martin,* 24 N. C., 101. But it does not follow that the jury cannot consider such omission and draw from it any reasonable and natural inference.

We will not say that ordinarily any inference adverse to the State may be drawn from the omission of the solicitor to introduce all the witnesses present at the commision of any alleged offense. It may be that in his opinion the case is strong enough without them. Our remarks are confined to the circumstances of the present case.

The witness testified that Bond overheard the confession of the prisoner and repeated it to the witness. Speaking for myself alone, it seems to me improbable that Bond, the employer of the prisoner and of the witness, should have been behind a bank near enough to hear this confession, just when it was made, without the knowledge of the prisoner or of the witness; and that having overheard it, instead of giving information to a magistrate with a view to the arrest of the prisoner, he should have informed the witness, then the friend of the prisoner, of his knowledge of the guilty secret, and thus enable the witness to inform the prisoner of the discovery and thus induce his escape.

Bond was in attendance on the court under a subpœna and was not examined. The witness did not have the corroboration which, if his testimony was true, it was in the power of the solicitor to have given to it. In a civil action, as for example, to recover a debt, the interest of a plaintiff will naturally lead him, in a case of any (107) doubt, to bring forward all the evidence he can to support his claim, and it is not an unreasonable inference, from his failure to bring forward a particular witness or a particular piece of evidence,

which if it exists, must be in his power, that such witness would not strengthen his case and that the supposed evidence in his favor does not exist. The same rule will apply in criminal actions, where it is the duty and naturally the desire of the solicitor to make out the case of the State if he fairly can. When the testimony of the only witness for the State is open to a suspicion of being biased by ill-will and is somewhat improbable in itself, yet if true can be corroborated in a material particular, it is natural to expect that the solicitor will corroborate it if he can.

The inference, that Bond would not have corroborated the witness Clark, because he did not overhear the confession, or did not hear it as Clark relates it, is not so unreasonable that a jury shall be prohibited from drawing it. And if he could not corroborate the witness, his testimony is the more exposed to suspicion from being incorrect in that particular.

The instruction that the jury should not *at all* consider the omission to examine Bond was too strong.

The other exceptions we do not think it necessary to pass on. The occasion for them will probably not arise again. Those which we sustain entitle the defendant to a new trial. We are sensible that in putting a meaning upon sentences from the instructions from the judge which, isolated from the context as they are presented to us on the record, are liable to exceptions, we may do him injustice, because they may perhaps have been explained or qualified by other parts of the instructions, so as not in fact to have been likely to mislead the jury. We cannot, however, for this reason conjecture that they were so qualified,
(108) but we must take them detached from the possible context as they are presented on the record.

There was error in the proceedings below.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Jones,* 77 N. C., 521; *S. v. Smallwood,* 78 N. C., 560; *S. v. Lucas,* 124 N. C., 827; *S. v. Harris,* 166 N. C., 246.

JACKSON ELLIS AND WIFE AND OTHERS *v.* DAVID A. SCOTT.

Guardian and Ward—Confederate Money.

A, who was a guardian prior to the war, in 1867 resigned his guardianship and procured D to be appointed in his stead, in order that he might settle his account with his wards, under the provisions of the Act of 1866; D filed a petition against A, calling upon him for a settlement.

before a judge of the Superior Court. A filed an answer, setting forth his account, and claiming a reduction of his liability by reason of the depreciation of Confederate money, etc. The petition and answer were both filed by A's counsel, who also drew the receipts given by the wards after the adjudication of the cause. At the same term the petition and answer were submitted to the presiding judge, and he rendered his decision thereon. Immediately thereafter D resigned his guardianship, and A was reappointed; it was admitted that D was appointed only for the purpose of the settlement. Subsequently A paid in notes the amount found to be due by him as guardian. In an action brought by the wards to surcharge and falsify A's account, upon the ground of collusion and fraud: *It was held*, that the proceeding was not warranted by the Act of 1866, as the wards were not parties thereto; and that the determination of the presiding judge being, for that reason, void, it was not necessary to submit to a jury the question whether or not the order made by him was obtained by fraud: *Held, further*, that the plaintiffs were entitled to an account.

ACTION, to surcharge and falsify an account, tried before *Kerr, J.*, at Spring Term, 1876, of WILSON.

The facts necessary to an understanding of the case as decided are fully stated in the opinion of the Court.

There was judgment for the plaintiffs, and the defendants ap- (109) pealed.

Smith & Strong and Smedes for appellants.
Fowle and Kenan & Murray, contra.

BYNUM, J. Prior to the late war the defendant became the guardian of the female plaintiffs, who are his sisters. After the close of the war, in 1867, the defendant resigned his guardianship and procured one Davis to become guardian in order that he might settle his accounts with his late wards, in pursuance of the provisions of chap. 39 of the acts of 1866. Davis accordingly filed a petition adressed to the judge holding the court for Wilson County, calling upon the defendant, Scott, for a settlement of his guardian account. Scott answered the petition, setting forth his account and his claims to a reduction of his liability to his wards by reason of the depreciation of Confederate money during the war, and for other causes therein set forth. Both the petition and answer thereto were filed by the same counsel of the defendants, who also subsequently drew the receipts given by the wards, after the adjudication of the judge presiding. The petition and answer and the statement of the account were submitted by Davis and Scott to the determination of the judge, who at the same term of the court filed his determination therein, awarding that the defendant was liable to Davis, the then guardian, in the sum of fifty-four dollars and eighty-two cents, and the further sum of one hundred and forty-three

dollars and seventy-four cents, in full settlement of his guardianship. Immediately after this determination by the judge, Davis resigned as guardian and Scott was reinstated as guardian, it being admitted by the answer that Scott resigned and Davis had been appointed only for the purpose of this settlement. After his reappointment Scott paid his wards, in notes, the sum of $54.82 to one, and the sum of
(110) $143.74 to the other, in full of his guardianship liability, in pursuance of said determination of the judge.

The plaintiffs allege that this judicial determination and subsequent settlement with them were procured by collusion and fraud, were void in law, and their prayer is to falsify and surcharge the account and settlement, and for an account.

Davis, the temporary guardian, admits in his testimony that he became guardian at the request and for the benefit of the defendant, for the single purpose of settlement, and that he made no examination whatever of the account filed, and knows nothing of the correctness of it.

The defendant relies upon the judicial determination just described as a bar to any further account; and this defense calls for the construction of the act under which it purports to have been made.

The preamble and the act are as follows: "*And whereas,* many grave and difficult disputes may arise between executors, administrators, guardians and trustees, and their legatees, distributees, wards and *cestuis que trust,* in the settlement of their accounts and trusts arising from the depreciation of Confederate currency, State treasury notes and bank notes, incident to and growing out of the late war; and that law suits and expensive litigation may be obviated; Sec. 2. *Be it therefore enacted,* That in all such cases, the parties are hereby empowered to form a full and perfect statement of the case on both sides, which case shall be submitted to the determination of one of the judges of the Superior Courts, chosen by the parties, who is hereby authorized to consider and determine the same, according to equity and good conscience: *Provided, however,* that no part of this section shall be construed to estop or hinder any person from proceeding in the usual course of law, if he shall deem the same necessary.

It is entirely clear that the statute applies to settlements be-
(111) tween guardians and their wards, and that they must be the parties who are to make the mutual statements of the case, choose the judge and submit the matters in dispute to his determination. It would be a monstrous perversion of justice if such a piece of legerdemain as this was between the real guardian and a sham guardian of the same wards, created for the occasion, should have the effect of binding the wards, who were not parties to the proceeding. Such

was not the purpose of the act, and such are not its provisions. The settlement here was simply a transaction between two guardians of the same estate, both of whom were equally accountable to the wards. However it might have affected the relation between the guardians, it could not alter the relation in which they both stood to their wards. If such a device could succeed, wards, legatees and others would have little or no security for their estates, and would be wholly at the mercy of unscrupulous guardians and other trustees. When the defendant reinvested himself with the guardianship he reinvested himself with all its responsibilities, in the same plight and condition as they existed before he devolved the office upon Davis, for apparently a mercenary and fraudulent purpose. Bat. Rev., ch. 53, sec. 45. The statute is plain and express to "settle grave and difficult disputes that may arise between executors, guardians, etc., and their legatees, wards," etc. The statement here submitted and determined by the judge was not between a guardian and his wards, but between two guardians. It was *ex parte,* not authorized by the act; the court had no jurisdiction, and the determination was null and void.

That the wards, who were not parties to this fraudulent proceedings, could not be affected by it is plain from the last clause of the act, which enacts: "That no part of this section shall be construed to estop or hinder any person from proceeding in the usual course of (112) law, if he shall deem the same necessary."

As the act in question cannot be construed so as to embrace our case, it is needless to inquire into its constitutionality.

As the judgment or determination of the judge was void for want of jurisdiction, it was unnecessary to submit it to the jury to say whether the order made by the judge was not obtained by Scott by fraud and collusion between Davis and Scott. However, such issue was submitted, and on the evidence found against the defendant. His Honor being of the opinion that there was error in the settlement between the guardian Scott and his wards, made in pursuance of the void judgment, made a decree vacating and setting aside the said settlement, and directing the account between the defendant Scott and the plaintiffs, his wards, to be restated. There is no error.

PER CURIAM. Affirmed.

Cited: Batts v. Winstead, 77 N. C., 242.

ALBERT L. SCOTT v. JUSTINE C. JONES.

Bond—Consideration—Seal.

Proof of a consideration is not necessary to entitle a plaintiff to recover upon a bond to pay money. The seal imports a consideration. A voluntary bond to pay money is good, even if it be proved that there was no consideration. It is only when a plaintiff is obliged to invoke equity to enforce a bond that it is required of him to show a consideration.

ACTION upon a bond, tried before *McKoy, J.*, at Fall Term, 1875, of CARTERET.

The husband of the defendant was indebted to the plaintiff in 1862 in the sum of $2,500, for which he gave his note. The defendant joined him in giving a mortgage upon certain property, represented as (113) her separate property, to secure the payment of the note. The mortgaged property really belonged to the mother of the defendant.

Prior to the execution bonds, which are the subject of this action, the mother of the defendant died, and the property mortgaged as aforesaid became the property of the defendant. The husband of the defendant died in 1865. On 9 May, 1866, the defendant executed the bond sued on with other bonds amounting to $1,000, and gave a mortgage upon an office situated upon the land of another person in New Bern to secure the payment of $1,000, in place of the $2,500 bond of her husband. The defendant said at the time of this compromise that she desired to pay what of the debt she could, as the plaintiff had been a good friend to her and her family, furnishing her with money to feed and clothe her children during the war, and receiving the bond sued on for the $2,500 bond secured by the mortgage.

There was much evidence introduced which is not necessary to be stated in order to understand the case as decided.

The counsel for the defendant requested the court to charge the jury that there was no consideration for the bond, and that if there was no consideration and the defendant was of such weak mind that she did not understand the effect of what she was doing, to wit, that she was subjecting other property than that embraced in the mortgage to the payment of the debt, she was not bound, and the plaintiff could not recover.

The court refused the instructions as asked, but instructed the jury that there was some evidence of a consideration for them to consider. That if any fraud or undue influence had been resorted to to obtain the notes the plaintiff was not entitled to recover. That if the notes (114) had been executed under undue influence or fraud, or if the de-

fendant was insane, or of such weak mind that she did not understand what she was doing, the plaintiff could not recover.

The following are the issues which were submitted to the jury, and the several responses thereto:

1. Did the defendant execute the note declared on, made 9 May, 1866?

Answer. Yes.

2. Had the defendant at the time of the execution of said note a capacity to make a note?

Answer. Yes. But we find that the defendant did not intend to encumber any property save the office or building belonging to her husband.

3. Was there any fraud or undue influence exercised in procuring said note?

Answer. There was not.

4. Was the defendant a person of weak mind?

Answer. Yes.

5. Was there any consideration for said note?

Answer. There was.

The plaintiff had judgment; whereupon the defendant moved for a new trial. The motion was overruled, judgment pronounced, and appeal by defendant.

Green for appellant.
Hubbard and Bryan, contra.

READE, J. Proof of a consideration is not necessary to entitle a plaintiff to recover upon a bond to pay money. The seal imports a consideration. And, besides, a voluntary bond to pay money is good, even if it be proved that there was no consideration. It is only where a plaintiff is obliged to invoke equity to enforce a bond that it is required of him to show a consideration.

But if it were necessary for the plaintiff to show a consideration, he has shown it ample. He held a bond against the defendant and her deceased husband for $2,500, with a mortgage on land, sup- (115) posed to be hers, and which, in fact, became hers upon the death of her mother; he surrendered that bond and mortgage to the defendant upon her executing the bond sued on. That was the loss to the plaintiff. The gain to the defendant was that she got clear of the $2,500 and the mortgage on her land, relieved her husband's estate, of which she was entitled to a wife's share, and became the creditor of his estate to the amount of the new bond which she gave.

There is

PER CURIAM. No error.

I. B. DAVIS v. SMITH & STRAUS.

Evidence—Fragmentary Conversation.

The testimony of a witness (called by the plaintiff), who stated that he heard the bargain, or terms of the contract, which was the subject of controversy, but did not hear the whole of the conversation between the plaintiff and the defendants, is competent to prove what such contract was, and is not open to the objection of its being "fragmentary."

ACTION on contract, tried at January Term, 1876, of CUMBERLAND, before *Buxton, J.*

The plaintiff, a coppersmith, sought to recover a balance due for a turpentine still and fixtures furnished the defendants, doing business in Bladen County.

On the trial in the court below there was much evidence heard irrelevant to the point decided in this Court, viz., as to the competency and effect of certain evidence; as also several exceptions taken, which were, in this Court, abandoned, etc.

The defendants alleged that they had suffered loss, by reason
(116) of the plaintiff failing to deliver the still on a day certain, thus disappointing them, as they had collected and engaged turpentine with the view of starting operations at once, which turpentine had wasted by leakage in consequence of such delay.

One of the defendants, Smith, who made the contract with the plaintiff, testified that in February, 1872, or the first of March, when he made this contract with the plaintiff at the shop of the latter in Fayetteville, the plaintiff expressly agreed to deliver the still and fixtures by the last of March or the first of April following; and that, relying upon the plaintiff's fulfilling this agreement, he had previously to 1 April, 1872, bought and made engagements for a large quantity of turpentine, and that considerable leakage had occurred from evaporation, etc., of the virgin dip, during the delay from 1 April, the stipulated time, and 6 June, the actual time of delivery.

Another witness estimated the loss by leakage, etc., at $180.

In reply to this evidence for the defendants, the plaintiff testified that there was no certain day named for the delivery of the still; that he was very much crowded with work, and was unable to do so and did not do so; that he agreed to deliver the still as soon as he could, and that he had done so.

Jordan Branch, a witness for the plaintiff, testified that in 1872 he was in the employ of the plaintiff as a coppersmith; that he was engaged in hammering on a still the day that the defendant Smith came and made the bargain with the plaintiff for the exchange of stills. That the plaintiff and defendant were engaged in conversation, when

he was called up to them by the plaintiff and asked by him when he could get the still ready. Here the defendants' counsel interrupted the witness and asked him if he could repeat the substance of all the conversation which occurred on that occasion between the plaintiff and defendant. Witness answered that he could state the sub- (117) stance of what occurred while he was present, and thought that he heard the whole of the bargain, but that he found them talking and left them talking when he went back to his work; and so he could not say that he heard the whole conversation.

The defendants' counsel objected to the witness testifying to a part of a conversation, as he had not heard the whole of it. Objection overruled, and the witness proceeded.

The plaintiff told the witness that he had engaged a still to Smith, the defendant, and asked him when he could get it ready. Witness answered that he could set no certain time, as he was pressed with work, but that he would do it as soon as he could. Davis then said to Smith, "You shall have it as soon as we can do it." They went over the terms in the witness's hearing—the new still at fifty-five cents per pound for all except the worm, which was to be at sixty cents; and the old still two for one, except the worm, which was to be at twenty cents. Smith said he wanted a good 15-barrel still of good workmanship and material. The still furnished was of that character. While the witness was at work upon it he was hurried up by the plaintiff.

To the reception of this evidence the defendants excepted.

There was a verdict and judgment for the plaintiff for $531.75. The court refused the defendants a new trial, whereupon they appealed.

MacRae & Broadfoot for appellants. (119)
Hinsdale, with whom was Guthrie, contra.

READE, J. The plaintiff sold the defendant a still and sued him for the price. The defendant set up a counterclaim for damages which he sustained by reason that the plaintiff did not deliver the still as soon as he had agreed to deliver it. The plaintiff and the defendant were both witnesses, and the point in dispute between them was whether the still was to be delivered on a day certain, as the defendant alleged, or as soon as it could be made, as the plaintiff alleged. To sustain his version, the plaintiff called his workman, who testified that while hammering on a still he was called by the plaintiff, who was in conversation with the defendant, and when he got in their presence the plaintiff told him that he had engaged a still to the defendant, and asked him when he could have it ready. He replied that he could not fix a time certain; that he would finish it as soon as he could. The

plaintiff then said to the defendant, "You shall have it as soon as we can do it."

This certainly tends to prove that no time was fixed, and to sustain the plaintiff.

But the defendant objects to the testimony upon the ground that the witness did not hear all the conversation between the plaintiff and defendant; they were talking before he went into their presence, and they talked afterwards. They went over the terms of the contract and he thinks he heard all the bargain, but not all the conversation.

(120) And so the defendant insists that the testimony is subject to the objection of being "fragmentary," as it is called in the books.

We do not think so, for the reason that if he heard all the bargain, as he thinks he did, then the balance of the conversation, whether it was the chaffering about the bargain, or whether about other matters, was unimportant. At any rate the witness heard what he was called up to hear, and all that they wanted him to hear; he was, to that extent, a witness called on by both parties, and it was competent for him to tell what they agreed he should hear. It is not like the case of a meddler who chooses to hear a fragment of a conversation in the interest of one party, without hearing how it may have been explained or varied by other parts of the conversation. Such evidence is worth very little, and generally is not competent at all.

The other exceptions by defendants were abandoned in this Court. There is

PER CURIAM. No error.

Cited: *S. v. Carson,* 95 N. C., 596; *S. v. Robertson,* 121 N. C., 553.

W. W. PEGRAM v. COMMISSIONERS OF GUILFORD COUNTY.

Prosecutor—Costs.

When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same.

MOTION heard before *Kerr, J.,* at Fall Term, 1875, of ROCKINGHAM.

The motion was made in behalf of W. W. Pegram, who was a witness for the State in the case of *State v. John W. Thomas.*

(121) An indictment for perjury was found against the defendant at Fall Term, 1869, of Guilford Superior Court, and the cause

was removed to Rockingham for trial. W. B. March was, by order of the court, endorsed upon the bill as prosecutor.

At Fall Term, 1870, a *nol. pros.* was entered and judgment rendered against the prosecutor for cost.

Upon the hearing of the motion, the court granted an order to the board of commissioners of Guilford County to pay the cost.

The only question presented upon the hearing was as to the power of the court to grant such order.

The defendants appealed.

Mendenhall & Staples and Walter Clark for appellants.
Scott & Caldwell, contra.

SETTLE, J. "All witnesses summoned or recognized in behalf of the State shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits." Rev. Code, ch. 35, sec. 37.

The act proceeds to define in what cases the defendant shall pay costs, and also in what cases the court may, in its discretion, order the prosecutor to pay costs.

But suppose the court should order an insolvent prosecutor to pay costs, can it be that the county would thereby be discharged from its primary liability to State's witnesses? Such cannot be the fair construction of either ch. 35, sec. 37, or of ch. 28, sec. 9 of the Revised Code.

If the prosecutor is not insolvent and is made to pay, well and good; otherwise, the county remains liable.

In all cases where the county is liable to pay costs, that county wherein the offense shall have been charged to be committed shall pay them. Rev. Code, ch. 28, sec. 10.

In the case at bar his Honor, Judge Tourgee, ordered the prosecutor to pay costs, and it now appears by the sheriff's re- (122) turn upon an execution that the prosecutor is insolvent.

True, his Honor required of the prosecutor a bond to secure the costs, which was given, and while it may be good and made available as a bond at common law, yet as there was no authority in the court to require such a bond, we may dismiss it for the present from our consideration.

Our attention was called to Laws 1868-'69, ch. 178, sec. 40, but that only applies to the costs of officers in preliminary proceedings, which by said act are placed at the discretion of the judge before whom the case shall be tried.

But the defendants deny the power of his Honor, Judge Kerr, the successor of Judge Tourgee, to make an order upon the county of

Guilford for the payment of these costs. If this objection be founded upon Laws 1868-'69, ch. 178, sec. 40, we have already seen it has no application to the case before us.

If it be based upon the broader ground that Judge Kerr could make no order in a cause which had been disposed of by Judge Tourgee, the reply is, the cause for the purpose of collecting costs is still pending, and the order of Judge Tourgee for that purpose, having proved abortive, it was already within the province of Judge Kerr, or whoever might be the judge of that district, to make orders in that as in all other causes pending at the close of Judge Tourgee's term.

The judgment of the Superior Court is

PER CURIAM. Affirmed.

Cited: *Guilford v. Comrs.*, 120 N. C., 28.

(123)

STATE v. SHEPPARD JOHNSON.

Verdict—Two Counts in Indictment.

A general verdict of "guilty" upon an indictment containing two counts, one for stealing a horse, and the other for receiving a horse, knowing the same to have been stolen, is error, and entitles the prisoner to a *venire de novo*.

INDICTMENT for larceny and receiving stolen goods, tried before *Cloud, J.*, at Spring Term, 1876, of FORSYTH.

At the preceding term the defendant was put upon trial upon the same bill of indictment, and the jury failing to agree upon a verdict, his Honor ordered a juror to be withdrawn and a mistrial entered, and remanded the prisoner.

When the case was called for trial at Spring Term, 1876, counsel for the prisoner insisted that he could not again be put upon trial for this offense, and moved the court to discharge the prisoner. The motion was overruled and the defendant pleaded "not guilty" generally.

The jury rendered a verdict of "guilty," and thereupon the prisoner moved the court to arrest the judgment upon the ground that the bill of indictment contained two counts charging different offenses with different punishments, to wit: the first count charging the larceny of a horse, and the second charging the prisoner with receiving a horse, knowing him to have been stolen, and that the jury had returned a verdict of guilty generally.

The motion was overruled by the court and judgment of imprisonment in the State penitentiary pronounced.

The prisoner appealed.

Attorney-General Hargrove and Bailey for the State.
Starbuck and Tourgee for the prisoner.

PEARSON, C. J. Since the establishment of the penitentiary offenses against the public are divided into three classes: (1) (124) Offenses that are punished by hanging. (2) Offenses that are punished by confinement in the penitentiary. (3) Offenses that are punished by fine or imprisonment in the county jail, or both.

If on a trial for an offense of the first class the judge directs a mistrial, he is required to find the facts and his action is the subject of review in this Court, a practice based on the sacred principle of the common law—no man shall be twice put in jeopardy of life or limb. The word "limb" having reference to the barbarous punishment, which has now become obsolete, of striking off the hand. Coke Litt., 227; 3 Inst., 110.

On a trial for an offense of the other two classes the discretion of the presiding judge is not the subject of review, and as in trials of civil actions, he assumes the responsibility of making a mistrial whenever he believes it proper to do so in furtherance of justice. *S. v. Weaver,* 35 N. C., 203; *Brady v. Beason,* 28 N. C., 425.

In *S. v. Williams,* 33 N. C., 140, it is said: "The jury should be satisfied that the prisoner was guilty in one of the modes well charged; and if so, it was manifestly of no consequence whether the conviction was on any one or all of those counts, since the offenses were of the *same grade and the punishment the same.* The instruction might relieve the jury of some trouble in their investigation, but could work no prejudice to the prisoner."

It is clear our case does not come within that principle, for the offenses charged in the two counts are not of the same grade, and the punishment is not the same; so upon a *general verdict* "the record" does not enable the court to know upon which count, in other words, for which offense the prisoner should be sentenced, and no judgment can be given without inconsistency and error apparent (125) upon the face of the record. By the Act of 1868 "stealing a horse" is made both as to the principal and the accessory *before* the fact subject to much severer punishment than ordinary larcenies (see Bat. Rev., ch. 32, sec. 17), while the offense of receiving a horse, knowing it to have been stolen, is left as before. The judge, in passing sentence, would feel it to be his duty, in order to observe the grade of punishment, to be more severe in punishing "horse stealing" than

receiving a stolen horse, but the record does not inform him of which one of these two distinct offenses the prisoner is convicted. During the war *actual* horse stealing grew into alarming proportions. This crime was "a survival of the war," and the Act of 1868 was passed to remedy the evil by increasing the punishment. The evil was so great in the western part of the State that a bill was offered in the General Assembly to make "horse stealing" a *capital* crime. It may admit of question whether, construing the act in reference to the evil intended to be remedied, it can be made to embrace *constructive* horse stealing, that is, obtaining a horse with the consent of the owner by means of a forged order, or other fraudulent contrivance, as distinguished from *actual* horse stealing, that is, taking and carrying away a horse without the consent of the owner. However this may be, the offense certainly comes within the words and the meaning of the act (Bat. Rev., ch. 32, sec. 66), making it a misdemeanor to obtain possession of property by means of any forged or counterfeit paper, etc., with intent to defraud the owner, etc. This embraces a horse as well as any other chattel. There is an apparent incongruity in making the same act amount to "horse stealing" under the highly penal Act of 1868, or to a misdemeanor, at the discretion of the solicitor who draws the bill. This may account for the reluctance of two juries to convict for the crime of "horse stealing."

This suggestion is made for the consideration of the solicitor, (126) in case he shall consider it to be his duty to prosecute the matter any further after the arrest of judgment.

In *S. v. Bailey,* 73 N. C., 70, where there was a general verdict upon two counts, it is assumed in the opinion that one of the counts was bad, and the question is not discussed.

In *S. v. Wise,* 66 N. C., 120, it did not appear by the record proper, to wit, the bill of indictment, plea, issue and verdict, whether the prisoner was convicted under the Act of 1869, which punishes the crime of arson by imprisonment in the penitentiary, or under the Act of 1871, which punishes the crime by hanging.

For this error the judgment is reversed, and the Court takes no notice of the fact set out in "the statement of the case," that the crime was committed in August, 1871, after the Act of 1871 had gone into effect, on the ground that "the court must be informed judicially, by the record, under which of these two statutes the prisoner is convicted, before it can proceed to judgment." Error, apparent on the face of the record, cannot be cured by a statement of the judge. So, in our case the error, apparent on the face of the record, is not cured, because his Honor sets out the fact that "on the trial no evidence was offered bearing upon the second count." Upon motion in arrest of judgment,

as upon demurrers and writs of error, the Court is confined to what is apparent on the face of the record. This is familiar learning, which applies both to the civil and ciminal side of the docket. A statement of the case from the judge's notes is only relevant to motions for a *venire de novo* and the like. There is error.

PER CURIAM. Reversed.

Cited: *S. v. Lawrence,* 81 N. C., 526; *S. v. Watts,* 82 N. C., 658; *S. v. Bass, Ib.,* 573; *S. v. Jenkins,* 84 N. C., 815; *S. v. Thompson,* 95 N. C., 601; *S. v. Goings,* 98 N. C., 767; *S. v. Cross,* 106 N. C., 651; *S. v. Collins,* 115 N. C., 719; *S. v. Upton,* 170 N. C., 770.

(127)

JAMES WAUGH'S HEIRS v. JONATHAN MILLER AND ANOTHER.

Construction of Deed.

A "granted, bargained and sold, conveyed and confirmed to" B and C "three thousand and seventy acres of land" (describing it), "together with all and singular my right and title of, in and to the three thousand acres above described to the aforesaid" B and C, "to which I bind myself, my heirs, executors, administrators and assigns to warrant and forever defend the aforesaid land and premises to the aforesaid" B and C, "their heirs, executors, administrators and assigns, with all the appurtenances and improvements thereunto belonging, to have and to hold," etc.: *Held,* that A therein conveyed to B and C an estate in fee simple, and not simply a life estate.

EJECTMENT, tried before *Furches, J.,* at Spring Term, 1876, of ASHE.

At Fall Term, 1875, the death of the original plaintiff was suggested, and the heirs at law were made parties plaintiff.

The only question considered in this Court was the construction of a deed under which the plaintiffs claim by mesne conveyance. The material parts of this deed read as follows: "That for and in consideration of, etc., . . . hath granted, bargained and sold, conveyed and confirmed to the aforesaid William P. Waugh and John Finley three thousand and seventy acres of land, lying, etc., . . . together with all and singular my right and title of, in and to the three thousand acres of land above described, to the aforesaid William P. Waugh and John Finley, to which I bind myself, my heirs, executors, administrators and assigns to warrant and forever defend the aforesaid land and premises to the aforesaid William P. Waugh and John Finley, their heirs, executors, administrators and assigns, with all the appurtenances and improvements thereunto belonging or in any wise

(128) appertaining thereto, to have and to hold and peacefully possess free and clear from all encumbrances and claims of any person or persons whatsoever."

His Honor was of opinion that only a life estate was thereby conveyed to Waugh and Finley.

Whereupon the plaintiffs submitted to a nonsuit, and appealed.

M. L. McCorkle for appellants.
Folk & Armfield, contra.

READE, J. The *habendum* and the warranty are mixed and confused, as if written by one who had heard such words used, but the precise order, connection and meaning of which he did not understand. He conveys the land itself, "together with all and singular his right and title of, in and to the same" to the aforesaid Waugh and Finley, "to which he binds himself, his heirs, executors, administrators and assigns to warrant and forever defend," etc., "to the said Waugh and Finley, their heirs," etc., "to have and to hold and peacefully to possess free and clear from all incumbrances and claims of any and all persons whatsoever."

There is nothing indicating that the grantor intended only a life estate, for he says "all his title and interest," and he binds his *heirs* to the grantee's *heirs*. He evidently contemplates an everlasting thing of it, and the words may be so transposed as to give the conveyance of a fee simple, both form and substance. *Phillips v. Thompson,* 73 N. C., 543; *Phillips v. Davis,* 69 N. C., 117.

There is error.

PER CURIAM. Reversed.

Cited: Bunn v. Wells, 94 N. C., 69; *Hodges v. Fleetwood,* 102 N. C., 125; *Anderson v. Logan,* 105 N. C., 271; *Real Estate Co. v. Bland,* 152 N. C., 229.

Dist. Stell v. Barham, 87 N. C., 67.

(129)

STATE v. CATO POTTS.

Burglary—Store-house.

1. If a part of a store-house, communicating with the part used as a store be slept in habitually by the owner, or by one of his family, although he sleeps there to protect the premises, it is his dwelling-house.

2. If the person who sleeps there is not the owner, nor one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling-house.

INDICTMENT for burglary, tried before *Buxton, J.*, at Spring Term, 1876, of CUMBERLAND.

The prisoner's counsel requested the court to charge the jury: "That according to the evidence they should in no event convict the prisoner of the crime of burglary, for the reason that the store-house was not a dwelling house in the sense contemplated by the law relating to burglary; nor was it a dwelling house of John Davis, for he did not occupy it himself. Nor was it occupied by his clerk or servant, or by any member of his family or household, but merely by a person employed to sleep there to watch the premises and goods."

His Honor declined the instruction, and charged the jury:

"If you believe from the evidence that John Davis, the prosecutor, had partitioned off a little room in his store for a sleeping room; had put a bed in there and fitted it up for a sleeping apartment, and had employed John A. Lamb to sleep there for the sole purpose of protection to the premises and goods, and that he had slept there for a month for that purpose only; and that the little room had been occupied regularly as a sleeping room for that purpose only for four years by John Davis or others employed by him for that purpose; then in the eye of the law the store-house was a dwelling house, in reference to which the capital crime of burglary could be committed; and it was a dwelling house of John Davis, although John A. Lamb was not his clerk, nor servant, nor a member of his family or household, or (130) in any way connected with him except as an employee, employed by him to sleep there as a guard, for the protection of the premises and goods."

To the refusal of his Honor to charge as requested, and to the charge of his Honor, the prisoner excepted.

There was a verdict of "guilty," and thereupon the prisoner moved for a new trial and *venire de novo*. Rule discharged. Judgment, and appeal by prisoner.

Attorney-General Hargrove, Battle & Son and Sutton for the State.
MacRae & Broadfoot for the prisoner.

RODMAN, J. There is no statute in North Carolina changing the common law definition of burglary, which is: The breaking and entering of *the dwelling house* of another in the night time, with intent to commit a felony therein. The question in this case is, was the house into which the prisoner broke and entered *the dwelling*

house of the presecutor Davis? The house belonged to Davis and was used as a store; a small space was partitioned off from the storeroom for a bedroom, and it has been occupied as such regularly for about four years, either by Davis, or by some clerk, or other person by his license. It was slept in on the night of the breaking, and had been on every night for a month before that night, by one Lamb who was employed by Davis to sleep there for the purpose of protecting the premises. Lamb was not a member of the family of Davis, nor employed by him otherwise than as stated.

The Attorney-General relies on *S. v. Outlaw,* 72 N. C., 598. That case can only be distinguished from the present by the fact that Harris (the person who slept in Cunningham's store) was a clerk of Cunningham and boarded in his family. It was in evidence that he
(131) slept in the store for the protection of the premises. We do not doubt the decision in that case. The differences between that case and the present may seem very slight, yet if they be such as are recognized by the authorities from which we derive the law on this subject, we are bound to recognize them as distinguishing the two cases. Considering the various ways in which houses may be occupied, it is not the fault of the law if the line of separation is thin, or even artificial. The following quotations are all from 2 East P. C., 497, 498. It is clear that if no person sleeps in a house it is not burglary to break in it. *Hallard's case.* In *Brown's case* all the judges agreed that the fact of a servant having slept in a barn the night it was broken open, and for several nights before, being put there for the purpose of watching against theives, made no sort of difference in the question whether burglary or not. *So a porter lying in a warehouse to watch goods, which is only for a particular purpose,* does not make it a dwelling house.

In *Fuller's case,* the house, which was a new one, was finished except the painting and glazing, and a workman employed by the owner slept in it for the purpose of protection; but no part of the owner's family had taken possession of it: Held, not a dwelling house.

In *Harris's case,* it appeared that the prosecutor had lately taken the house, and on the night of the offense, and for six nights before, had procured two hair dressers, none of his own family, to sleep there for the purpose of taking care of his goods and merchandise therein deposited; but he himself had never slept there, nor any of his family: Held, not a dwelling.

In *Davis's case,* one Pearce owned the house, but resided at a distant place. It was not inhabited in the daytime, but a servant of the owner slept there constantly for about three weeks, solely for the pur-
(132) pose of protecting the furniture till a tenant could be procured. Held, not a dwelling house.

It seems, from these cases, that if part of a storehouse communicating with the part used as a store, be slept in habitually by the owner, or by one of his family, although he sleeps there to protect the premises, it is his dwelling house. If the person who sleeps there is not the owner or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house.

The distinction is not altogether arbitrary or without reason. To break in a house where the proprietor or any of his family sleep is apparently a more heinous offense and calculated to produce greater apprehension and alarm than to break into a house occupied primarily for business, although a watchman is employed to sleep there. It is competent for the Legislature to punish the latter offense in any manner otherwise than capital that it may think proper. I have not seen that by the legislation of any State such an offense is capital, as it would be in this State if held to be burglary. In New York it is burglary by statute, but it is punishable only by imprisonment in the penitentiary.

As our opinion on this question entitles the prisoner to a new trial, it is unnecessary to consider the other questions raised on the record. There is

PER CURIAM. Error.

Cited: *S. v. Pressley,* 90 N. C., 733.
Dist. *S. v. Williams,* 90 N. C., 728.

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(133)

JOHN HAWKINS v. LEWIS SAVAGE, ADMINISTRATOR.

Tort—Limitations.

In an action for a tort committed in 1867, the statute of limitations does not begin to run until 1 January, 1870.

ACTION, to recover damages, tried before *Moore, J.,* at May Term, 1876, of EDGECOMBE.

In March, 1867, the intestate of the defendant converted to his own use a quantity of fodder, the property of the plaintiff. The defendant relied upon the statute of limitations as a defense to the action. The summons was issued 30 December, 1872. Prior to the commencement of the present action, to wit, 1 April, 1870, the plaintiff commenced an action for the same cause, but in November, 1871, entered a nonsuit therein.

His Honor held that the Act of 1 March, 1867, sec. 1, 2, entitled "An act explanatory of an act entitled an act to change the jurisdiction of the courts and the rules of pleading therein," did not apply to actions for torts. The court rendered judgment for the plaintiff, and thereupon the defendant appealed.

W. H. Johnson for appellant.
Bridgers, Jr., contra.

SETTLE, J. At the last term of this Court it was held that the time elapsed from 20 May, 1861, until 1 January, 1870, shall not be counted so as to bar actions or suits, or to presume satisfaction or abandonment of rights, save only that actions of debt, covenant, assumpsit or account upon any contract, demand or penalty incurred since 1 May, 1865, and the remedies thereon shall be in all respects the same as they were in 1860. *Edwards v. Jarvis,* 74 N. C., 315.

The exception leaves all causes of action *ex contractu* arising (134) before 1 May, 1865, and all actions *ex delicto* between 20 May, 1861, and 1 January, 1870, subject to the provisions of the first and general proposition.

This being an action in tort, the statute did not begin to run until 1 January, 1870, and consequently is not barred.

It is proper to remark that the decisions of the last term were not published at the time this appeal was taken.

PER CURIAM. Affirmed.

Cited: Pearsall v. Kenan, 79 N. C., 474; *Bruner v. Threadgill,* 88 N. C., 366; *Patterson v. Wadsworth,* 89 N. C., 409.

STATE v. WEBSTER WILLIAMS AND OTHERS.

Voluntary Associations—Assault.

Rules of discipline for all voluntary associations must conform to the laws: *Hence,* when a member of such associations refuses to submit to the ceremony of expulsion established by the same, which ceremony involved a battery, it cannot be lawfully inflicted.

ASSAULT and battery, tried before *Moore, J.,* at Spring Term, 1876, of MARTIN.

The defendants and prosecutrix were members of a benovelent society in Hamilton, N. C., known as the "Good Samaritans," which society

had certain rules and ceremonies known as the ceremonies of initiation into and expulsion from the society. The prosecutrix, having been remiss in some of her obligations, and having been (135) called upon to explain, become violent.

The defendants, with others, proceeded to perform the ceremony of expulsion, which consisted in suspending her from the wall by means of a cord fastened around her waist. This ceremony had been performed upon others theretofore, in the presence of the prosecutrix. She resisted to the extent of her ability.

There was conflicting evidence as to whether they lifted her from the floor or intended to treat her differently from others who had been expelled, and it was shown that as soon as she cried out that the cord hurt her she was released, and fainted immediately. Her dress was torn from her.

The defendants' counsel contended that if defendants only intended to peform the usual ceremony of expulsion and were actuated by no other motive, and did not intend to hurt her, they were not guilty. That in order to commit a crime there must be an unlawful act, coupled with a vicious will.

His Honor held that in any view of the case, if the defendants tied the cord around the waist of the prosecutrix as stated, they were guilty.

There was a verdict of guilty and judgment thereupon. The defendants appealed.

Attorney-General Hargrove for the State.
Mullen & Moore and Walter Clark for the prisoner.

BYNUM, J. When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent society it could not lawfully be inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery had the parties concerned not been members of the society of "Good Samaritans," it is not the less a battery because they were all members of that humane institution. (136) The punishment inflicted upon the person of the prosecutrix was willful, violent and against her consent, and thus contained all the elements of a wanton breach of the peace. *Bell v. Hansly,* 48 N. C., 131. There is

PER CURIAM. No error.

STATE v. CAMERON WATSON.

Judge—Special Terms.

The Governor, under sec. 14, Art. IV of the Constitution, can require a judge of the Superior Court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such court, expressing in the commisssion that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command.

LARCENY, tried before *Schenck, J.*, at the Spring Term, 1876, of ANSON.

The defendant was indicted for stealing ten pounds of bacon, and on the trial in the court below was found guilty. His counsel moved in arrest of judgment, for the want of jurisdiction. Judge Schenck, presiding in the Ninth Judicial District, had partially exchanged courts with Judge Buxton, of the Fifth District, in which Anson County is included. This exchange was with the consent of his Excellency, Governor Brogden, who commissioned Judge Schenck to hold Anson court.

The defendant's motion to arrest the judgment was refused by his Honor, whereupon the defendant appealed.

Attorney-General Hargrove for the State.

(137) *No counsel for defendant.*

RODMAN, J. The defendant was convicted of larceny at Spring Term, 1876, of the Superior Court of Anson (which is in the Fifth Judicial District), held by Schenck, judge of the Ninth Judicial District, under a commission from the Governor, and he therefore moved in arrest of judgment "for want of jurisdiction," without specifying more particularly the ground for the motion. As the indictment is in the usual form, and the defendant has no counsel in this Court, we should have been at a loss to conjecture the ground; but the Attorney-General suggests that probably the supposed ground is to be found in the language of the commission under which his Honor, Judge Schenck, acted. The commission is addressed to Hon. D. Schenck, judge of the Ninth Judicial District, and proceeds as follows: "By virtue of authority vested in me as Governor, etc., by sec. 14 of Art. IV of the Constitution, I hereby *consent to a partial exchange* of circuits between Hon. D. Schenck, judge of the Ninth Judicial District, and Hon. R. P. Buxton, judge of the Fifth Judicial District, by which *exchange* and *consent* his Honor, Judge Schenck, is authorized and

empowered to hold the Superior Courts in the said Fifth Judicial District for the Spring Term, 1876, in the counties of Anson and Richmond. In witness," etc.

The Constitution, Art. IV, sec. 14, says:

1. The judges may exchange *districts* with each other with the consent of the Governor.

2. And the Governor *for good reasons,* which he shall report to the Legislature, etc., may *require* any judge to hold one or more specified terms of said courts in lieu of the judge in whose districts they are.

In *Myers v. Hamilton,* 65 N. C., 567, the question here made, though not presented for decision, was noticed and an opinion was intimated that judges could not exchange one or two counties even with the consent of the Governor, by reason of the many incon- (138) veniences that may result from such a practice. The meaning and policy of the Constitution was evidently as here intimated. By the general rule judges are confined to their respective districts. Two exceptions are made: They may exchange *districts* for their own convenience, but to provide against a detriment to the public, the consent of the Governor is required, which it is supposed he will not give if the public is to be injured or incommoded. Then to provide for the possible cases in which a judge cannot (as from sickness), or ought not (as from being interested, or having been of counsel in certain cases, or other good reason), to hold a certain term, which nevertheless the public good requires to be held, the Governor is authorized to *require* some other judge to hold that term. The mandate of the Constitution is directed to the Governor, without whose commission no court can be held by any judge except in his own district. But how if the Governor shall consent to an exchange of one or two counties for any or for no reason, and shall commission a judge to hold a specified term in a county out of his proper district? The question before us: Can this Court, in such a case, hold the commission and the acts of the judge nullities on the ground that actions tried before him were *coram non judice?*

As to the point that the Governor did not *require* Judge Schenck to hold Anson Court. We consider that when the Governor authorized and empowered the judge to hold the court, and the judge under that authority held the court, as between the judge and suitors in the court the authority was equivalent to a command. How it would be if the judge in such a case should refuse to hold the court, whether he would be punishable for a breach of duty, it is unnecessary for us to say. That the reason assigned by the Governor in the commission is stated to be that the two judges had agreed to a partial exchange (139) of districts, does not in our opinion avoid the commission. The

Governor is not obliged to assign any reason in the commission, or to this Court. As to all the world, except the Legislature, he is the final judge of the fitness of his reasons. It may be that he desired to accommodate the two judges, and no public inconvenience occurred to him as probable. If so, *we* cannot say that the reason was insufficient; and that being insufficient, it avoided the commission. By doing so we would clearly encroach on the Executive duty and responsibility. There is

PER CURIAM. No error.

Cited: *S. v. Graham, post* 256; *S. v. Lewis,* 107 N. C., 974, 981.

STATE v. ARTHUR AND OTHERS.

Peace Warrant—Prosecutor.

1. *It is error* for a justice of the peace to bind to the Superior Court an applicant for a peace warrant against whom no charge is made.
2. When an applicant swears that she hath reason to fear, and doth fear, that A. B. will injure or kill her hogs or cows, he having repeatedly dogged them with a severe dog; and that S. B. will do her bodily harm, having threatened to whip her the first time she caught her on her way to O., she is entitled to a peace warrant, and it is error to refuse it.

APPEAL by the State from *Watts, J.,* at GRANVILLE, Spring Term, 1876, upon a motion to quash a peace warrant.

The defendants were arrested by authority of a warrant issued (140) by a justice of the peace, the material parts of which are as follows: "Whereas, Nellie Anderson has complained, on oath to the undersigned, an acting justice of the peace in and for said county, that she hath reason to fear, and doth fear, that Arthur Bass, of said county, will injure or kill her hogs or cows, he having in said county dogged repeatedly her hogs with a severe dog, and that Sallie Bass, of said county, will do her bodily harm, she having threatened to whip her the first time she caught her on her way to Oxford in said county, and hath prayed that the said Arthur and Sallie Bass may be bound with surety to keep the peace: These are, therefore, to command you," etc.

In pursuance of the warrant the defendants were arrested, and upon the hearing the justice of the peace rendered the following judgment: "This case coming on to be heard before me on 2 November, 1875, and the evidence of both parties having been by me heard and the argu-

ments of counsel therein having been considered, it is now adjudged that Nellie Anderson, Arthur Bass and Sallie be recognized in the sum of twenty-five dollars each, conditioned for their personal appearance at the next term of the Superior Court," etc.

No complaint in writing other than the warrant was made, and the examination of the witnesses was not reduced to writing.

Upon motion of the counsel for the defendants, the proceeding was quashed and the State appealed.

Attorney-General Hargrove and J. E. Bledsoe for the State.
No counsel contra.

READE, J. There is no charge whatever against the defendant Anderson, and, therefore, it was proper to quash the proceeding as to her. But the charges against the other defendants are suf- (141) ficient, and as to them it was error to quash.

PER CURIAM. Judgment accordingly.

STATE v. HENRY SMITH.

Indictment—False Pretense—Appeal.

1. If, upon a case agreed, a special verdict, or a demurrer to evidence, it appears that there was no evidence of a fact, necessary to make the defendant guilty, this Court cannot affirm a judgment against him, notwithstanding the objection is raised for the first time in this Court.
2. Upon the trial of an indictment for "cheating by false tokens," it was in evidence that the defendant obtained fifteen cents in money from the prosecutor, the bill of indictment charging him with having received three dollars: *Held*, that the variance was immaterial.

INDICTMENT, under the statute, for *cheating by false tokens,* tried before *Buxton, J.,* at Fall Term, 1875, of CUMBERLAND.

The bill charged that the defendant "unlawfully, knowingly and designedly did falsely pretend to J. W. Vickers that two barrels of sand and turpentine, then and there produced by the said Henry Smith and offered for sale to the said J. W. Vickers, was good yellow dip turpentine and was then and there of the usual market value. . . . The said Henry Smith did then and there unlawfully, knowingly and designedly obtain from the said J. W. Vickers the sum of three dollars of the money of the said J. W. Vickers, with the intent," etc.

The prosecutor testified: The barrels containing turpentine and sand were brought to my house by the defendant on Saturday before

the third of June last. He told me he had some turpentine to
(142) sell me. He had two barrels. I weighed it and marked the barrels with his name, my usual precaution. I bought it and paid the usual market price. When I went to distill the turpentine I turned it into the still and found a considerable amount of black sand in the bottom of the barrel, and a good deal had run in the still. I rolled the barrel off and emptied it on the ground. Several days afterward I tried the other barrel. Black water had risen on the top of it, and upon emptying it I found sand in this too, and had to pour it back to keep from ruining my still. There was more than half a bushel of sand in each barrel. I had asked him if it was good turpentine. He said it was yellow dip. He did not say anything about sand. What turpentine was in the barrel was good yellow dip. I was paying at that time $1.60 per barrel for turpentine. I paid him fifteen cents in money, to pay the boy for hauling, and the balance in goods.

Upon the foregoing evidence there was by agreement a verdict of guilty, subject to be set aside in case the court should be of the opinion with the defendant:

1. That the false pretense charged was not calculated to deceive.

2. That there was a fatal variance between the *allegata* and the *probata,* for that the bill of indictment charged the defendant with obtaining the sum of three dollars, whereas it was in evidence that he only received fifteen cents of the prosecutor's money.

His Honor ruled against the prisoner upon both of these points. Judgment was pronounced, and the prisoner appealed.

Attorney-General Hargrove and Battle & Son for the State.
Guthrie for the prisoner.

RODMAN, J. 1. The record shows that certain evidence was introduced for the State, and proceeds: "Upon the foregoing evidence
(143) there was, by agreement, a verdict of guilty, subject to be set aside by the court, and a verdict of not guilty to be entered in case the court should be of opinion with the defendant upon either of the two points of law, one growing out of objections to the sufficiency of the indictment, the other growing out of a variance between the allegations and the proof."

The judge refused to disturb the verdict or to arrest the judgment. A new trial is moved for in this Court on the ground that there was no evidence of a *scienter,* that is, that defendant knew of the mixture of the sand with the turpentine. It is admitted that such evidence was necessary to justify the verdict. It is also clear that the judge professed to set forth all the evidence, and that there was none tending to establish the guilty knowledge. It is said for the State, however, that

this objection was not taken below, and that, by the agreement, the verdict was to stand unless the judge should be of opinion with the defendant on one of the two given propositions, and that our consideration must be confined to those. We are of opinion that notwithstanding the objection was not taken below, it is open here under the circumstances. Upon a case agreed, or a special verdict, or a demurrer to evidence, under one of which heads this proceeding must come, if it appears that there was no evidence of a fact necessary to make the defendant guilty, this Court cannot affirm the judgment against him.

For the reason above there must be a new trial.

2. It is unnecessary to express any opinion as to the sufficiency of the indictment, as probably the solicitor will think it prudent to send a new bill.

3. We concur with the judge that the supposed variance was immaterial.

PER CURIAM. *Venire de novo.*

(144)

BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY v. P. C. RILEY.

Attachment—Personal Property Exemption.

The personal property of a resident of this State, exempted from sale under execution by the Constitution, cannot be sold under process of attachment.

MOTION to vacate an attachment, heard before *Buxton, J.*, at Spring Term, 1876, of MONTGOMERY.

The board of commissioners of Montgomery County commenced an action against the defendant, Peter C. Riley, former sheriff of said county, upon his official bond, to recover the sum of $2,500, the amount of county and poor taxes collected for the year 1868, which it was alleged he had failed to account for and pay over. The summons was issued 8 December, 1875, and served by publication.

The defendant was elected sheriff of said county at the State election held on 21, 22 and 23 April, 1868, and gave bond in the sum of $2,500 on 25 July, 1868, conditioned as follows:

"The condition of the above obligation is such that, whereas, the above bounden Peter C. Riley has been elected high sheriff of Montgomery County; if therefore, the said Peter C. Riley shall collect, pay over and account for the county and poor tax, then the above obligation to be void, otherwise to be and remain in full force and effect."

The attachment was issued 13 December, 1875, upon affidavit made before the clerk of the Superior Court by William McAllister, chair-

man of the board of county commissioners, to the effect following: "That he was advised and believed that Peter C. Riley, the defendant, has departed from the State with intent to defraud his creditors,
(145) or keeps himself concealed so that the ordinary process of law cannot be served upon him, and that he has assigned, disposed of or secreted, or is about to assign, dispose of or secret some of his property, with intent to defraud his creditors." The attachment was levied on certain real and personal estate of the defendant. The defendant appeared at the return term and moved the court, upon affidavit, to vacate the attachment; among others upon the following grounds:

1. The defendant is here to answer process:

2. No established indebtedness is stated in the affidavit upon which the attachment was issued:

3. The affidavit is defective, in not setting forth that the property therein alleged to have been assigned by the defendant to defraud his creditors was in excess of his homestead and personal property exemption.

4. That if the act of Assembly in relation to attachment authorizes the seizure of property, real or personal, not liable to execution, the law is unconstitutional.

5. The levy upon the personal property was void, because it only amounted in value to $100, and the defendant, who was a citizen of this State, with his wife and family here in possession of the property, was entitled, under the Constitution, to personal property to the value of $300, exempt from execution, and *a fortiori* from seizure by attachment.

6. The levy of attachment upon the realty was void, because it does not appear that the sheriff assigned to the defendant his homestead of $1,000, exempt from seizure by the Constitution.

The court refused to vacate the attachment, and the defendant appealed.

Neill McKay and Pemberton for appellant.
Mauney and M. S. Robins, contra.

SETTLE, J. The incident, though sometimes more important in results, generally follows the principal.

The process by attachment is a mode of enforcing the collec-
(146) tion of a debt ancillary to a suit, regularly instituted in the courts, and followed by a judgment and execution thereon.

Can a party, who proceeds by attachment, place himself in a better position than one who sues regularly in the courts and obtains a judgment, and sues out execution thereon?

We need not seek beyond the last number of our Reports to find the dignity of the personal property and the homestead exemptions under our Constitution.

In *Curlee v. Thomas,* 74 N. C., 51, the ruling in *Duval v. Robbins,* 71 N. C., 218, is quoted with approbation: "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."

In *Crummen v. Bennett,* 68 N. C., 494, it is held that a grantor who makes a conveyance of his land, which is fraudulent as to his creditors, does not thereby forfeit his right to a homestead as to such creditors. They can sell, under an execution, only the remaining part of his land, leaving the homestead to be contested between the alleged fraudulent grantor and grantee.

And this is further supported by the ruling in *Lambert v. Kinnery,* 74 N. C., 348, where it is held that 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.

And this Court has gone so far as to hold that the maker of a note, having at the time a wife and children, cannot by stipulation to that effect in the note waive the benefit of the homestead ex- (147) emption as to the debt evidenced by the note, for that the owner of the homestead can part with it only by the formalities prescribed by law, to wit, by deed with the consent of the wife, evidenced by her privy examination.

In *Grubbs v. Ellyson,* 23 Ark., 287, it is said: "An attachment is but a preliminary execution, so that a homestead is not subject to attachment any more than it is to an execution."

The personal property and homestead exemptions are fixed by the Constitution, and are not subject to legislation.

The Legislature can only facilitate or impede the remedies by which the constitutional rights may be enforced, but the rights themselves are beyond the province of the Legislature.

This Court, from *Hill v. Kesler,* 63 N. C., 437, to this instance, has given a fair and reasonable construction to these beneficent provisions of the Constitution, and will adhere to its decisions unless they are reversed, in a proper case, by the Supreme Court of the United States.

The judgment of the Superior Court is

PER CURIAM. Reversed.

Cited: Gamble v. Rhyne, 80 N. C., 186; *Cowan v. Phillips,* 122 N. C., 74; *Lynn v. Cotton Mills,* 130 N. C., 622; *Chemical Co. v. Sloan,* 136 N. C., 124.

(148)

J. M. MILLER v. WILLIAM E. THAREL.

Rescission of Contract—Promissory Note.

A made his promissory note payable to B or bearer, as the consideration for the purchase of a tract of land; subsequently the contract as to the sale was rescinded, A giving up B's bond for title and B returning a paper, purporting to be the note for the purchase of said land, to A, and which A at once destroyed; the paper returned by B to A was not the note B said it was, and, at the time, A believed it to be; afterwards B deposited the said note given by A as above set forth with one C as collateral security, C having no notice of the rescission of the contract concerning the sale of the land. In an action by C against A, to recover the amount due upon the note: *It was held,* that when A gave up to B his (B's) bond to make title to said land, and B gave up to A a paper purporting to be his note, which he destroyed, the liability of A on said note was as much discharged as if he had paid it in money; and further, that C was not entitled to recover in this action.

ACTION upon a bond, tried before *Schenck, J.,* at Spring Term, 1876, of MECKLENBURG.

In May, 1872, the defendant sold to one Houston a tract of land for the price of $1,600, of which $300 was paid in cash, and Houston gave his note for the balance. A few days thereafter the defendant, becoming dissatisfied, repurchased the land from Houston for the sum of $1,800, and gave the note sued on to secure the purchase money. At this time defendant surrendered to Houston the note for $1,300 aforesaid and had the amount thereof credited upon the note for $1,800, and took from Houston a bond for title. Some two weeks afterward the defendant and Houston rescinded this contract, the defendant surrendering to Houston the bond for title and Houston surrendering to defendant, as he supposed, the note sued on. This transaction took place about dark. Houston went into his house, got a pocket-book and took therefrom a paper and handed it to the defendant, saying, "Now, tear it up." The defendant, thinking it was his note, did tear it (149) up. Before the maturity of the note sued on it was transferred by Houston to the plaintiff under the following circumstances: Miller sold and conveyed to Houston a tract of land for the sum of $1,500, and took his note for the purchase money. At the time of the execution of the conveyance from Miller to Houston, and as a part of

the contract, Houston gave Miller certain notes on other persons for a sum exceeding the purchase money as collateral security therefor. Thereafter Houston made payments, reducing the note to the plaintiff to about $800, for which balance he gave Miller a new note, taking up the old one. This $800 note Miller endorsed to the First National Bank and received the money therefor. Some months afterward, the note in bank having been reduced by payments to $525, the plaintiff, at the request of Houston, exchanged the notes held as collateral security for the note sued on.

It was further in evidence that before the note was transferred to the plaintiff Houston, without the knowledge or consent of Tharel, the defendant changed the credit upon the back of said note by erasure from $1,300 to $130.

It is agreed:

1. That the credit should be $1,300.

2. That the plaintiff took the note before maturity and without notice of any equity as between the defendant and Houston, or that Houston was withholding the note fraudulently from Tharel.

3. That the $1,300 was paid in June, 1872, by the surrender of the note Houston gave the defendant.

4. That the amount due upon the note last given by Houston to Miller and endorsed to the bank was $525, with interest thereon at 8 per centum since April, 1874, and that Houston has paid the interest only to April, 1874. This balance has not been paid. (150) The balance due upon the note sued on, principal and interest, was $570.

5. It is admitted that Houston is in bankruptcy.

His Honor being of the opinion that the plaintiff was entitled to recover the balance due upon the note after deducting the credit of $1,300, gave judgment accordingly. From this judgment the defendant appealed.

Dowd for appellant.
Jones & Johnston, contra.

RODMAN, J. When the contract for the sale of the land by Houston to Tharel was rescinded, and Tharel gave up to Houston the bond for title which Houston had made to him and received from Houston a paper which Houston said and Tharel believed was the note now sued on, and Tharel destroyed that paper, the liability of Tharel on the note was as much discharged as if he had paid it in money. The case is the same in effect as if he had received the note and put it in his pocket, from which it was afterwards stolen, and the same as if he had received and torn it in pieces and thrown them away, and the pieces had been

afterwards picked up and so artfully put together that the tearing could not be detected. It must be concluded that *at that time* he was under no legal or equitable liability by virtue of the note to any one.

It then only remains to consider whether such liability subsequently arose by reason of the transfer of the note by Houston to the plaintiff, under the circumstances stated in the case. The note was *under seal* and was payable to Houston *or bearer*. Notwithstanding this it is to be regarded, so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note under a seal, and payable to a payee or order. The act of Assembly, Rev. Code, ch. 13, sec. 1 (Bat. (151) Rev., ch. 10, sec. 1), enacts in substance: "All notes signed by any person . . . whereby such person . . . shall promise to pay any person . . . the money mentioned in such note, shall be construed to be by virtue thereof due and payable to such person . . . to whom the same is made payable, and the person . . . to whom such money is payable may maintain an action for the same as they might upon inland bills of exchange; and the same as likewise all *bonds,* bills and notes for *money, with or without seal, and expressed or not to be payable to order,* or for value received, *may be assignable over in like manner as inland bills of exchange are by custom of merchants in England;* and the person . . . to whom such promissory note, bill, bond or sealed note is assigned or endorsed may maintain an action against the person . . . who shall have signed such promissory note, etc., or any who shall have indorsed the same, as in cases of inland bills of exchange: *Provided,*" etc.

It is conceded that Houston transferred the note to the plaintiff for a valuable consideration before its maturity, in the usual course of business, and without actual notice, or anything from which notice would be implied, or any defense to it. If Houston had *endorsed* the note to the plaintiff at the time of such transfer he would thereby have passed the legal title according to the law merchant, and the plaintiff's right would probably have been good against the maker by whose misfortune or negligence it had been permitted to remain in the hands of the payee after it had been paid. We say *probably,* because it is not necessary to decide the question. The note sued on was not endorsed to the plaintiff, but was assigned to him by an oral contract. It is true that under this assignment, by virtue of our recent legislation (C. C. P., sec. 55), the assignee may sue in our courts in his own name, as an equitable assignee or *cestui que trust* could formerly have done (152) in equity; but he does not acquire by such an assignment the peculiar rights by which the law merchant, founded on the policy of promoting the circulation of promissory notes, attach to an *en-*

dorsee of each paper. All the authorities from Parsons on Bills and Notes, cited by the learned counsel for the plaintiff, to sustain the proposition that a holder of a promissory note, taken under the circumstances stated, can recover against the maker, notwithstanding any equitable or other defense, such as payment before maturity, he may have, apply only to holders who hold by an assignment recognized by the law merchant, viz., an endorsee. The distinction between a title by assignment and by endorsement is stated, but not as clearly as it might be, in 2 Pars. Notes and Bills, 52. It is also made in *Thigpen v. Horne,* 36 N. C., 20; *Lindsay v. Wilson,* 22 N. C., 85.

Whistler v. Forster, 14 C. B., 248; 108 E. C. L., which probably escaped the attention of Mr. Parsons, is in point and is decisive on the question. The defendant drew the check sued on before 3 October, and handed it to Griffiths without any other consideration than a promise to furnish funds to take it up, which he failed to perform. On 3 October Griffiths gave the check to plaintiff for value, but did not then endorse it. Afterwards he did. At the time the plaintiff received the check he had no notice of the way in which Griffiths had obtained it, but at the time of the endorsement he had. The judgment was for the defendant. The observations of *Willis, J.,* are so clear that I extract from them:

"The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* To this there are some exceptions, one of which arises out of the law merchant as to negotiable instruments. . . . This rule, however, is only intended to favor transfers in the ordinary and usual manner whereby a title is acquired according to the law merchant, (153) and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognized, and in many instances enforced by courts of law; and it is, therefore, clear that in order to acquire the benefit of this rule the holder of the bill must, if it be payable to order, obtain an endorsement, and that he is affected by notice of fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor." To the same effect is *Haskill v. Mitchell,* 53 Me., 468.

The right of the plaintiff to recover if it has any foundation at all, must stand not on his having the legal title, or any principle of mercantile law, but on his having some equity which makes it unconscientious in the defendant to refuse payment. It is said that such an equity arises out of the fact that the defendant, by his negligence, permitted the note to exist and to remain in the hands of Houston after it had been discharged by payment, and thus enabled Houston to commit a

fraud on the plaintiff; and that the maxim applies that where one of two innocent persons must suffer by the fraud of another, he must be the victim whose negligence enabled that other to commit the fraud. The rule is not disputed, but probably it will be found to be confined in its application to cases in which the defendant is guilty of some complicity in the fraud, or where by his negligence, he has enabled the person committing the fraud to pass a legal right to the plaintiff. In this last case the maxim would apply that where equities are equal the legal title will prevail. But where no legal title passed the case would come under the maxim that where the equities are equal the prior equity prevails. The authorities to this effect are very numerous. In *Turton v. Benson,* 1 P. Wms., 496, the payee of an unnegotiable bond assigned it to one of his creditors as a security, and it was held (154) that the maker could avail himself of an equitable defense. The Master of the Rolls said: "Supposing a man should assign over a satisfied bond, the assignee could not set up this bond in equity, which, being satisfied before, could receive no new force from the assignment." On appeal *Lord Chancellor Parker* considered all the arguments which could be used by the plaintiff in this case, considering him as a mere assignee, and confirmed the decree.

See 2 vol., 2 part, Leading Cases in Eq.; Note to *Royall v. Rowles,* 218-36; *Moody v. Sutton,* 37 N. C., 382; *King v. Lindsay,* 38 N. C., 77; *Mosteller v. Bost,* 42 N. C., 39.

We think there was error in the judgment below.

PER CURIAM. Judgment reversed, and judgment that defendant go without day and recover his costs in this Court.

Cited: Fortune v. Watkins, 94 N. C., 315; *Lewis v. Long,* 102 N. C., 207; *Jenkins v. Wilkinson,* 113 N. C., 535; *Christian v. Parrott,* 114 N. C., 219; *Breesee v. Crumpton,* 121 N. C., 123; *Tyson v. Joyner,* 139 N. C., 73.

Dist.: Bank v. Mitchell, 96 N. C., 57.

ERVIN MEDLIN v. W. C. STEELE.

Tenants in Common—Contract—Statute of Frauds.

1. A contract between tenants in common for the partition of lands, is a contract concerning realty, within the purview of the statute of frauds, Bat. Rev., ch. 50, sec. 10; and in order to be valid must be in writing and signed by the party to be charged, etc.

2. Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon: *It was held*, that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant, under chap. 64, Bat. Rev., between the parties.

SUMMARY PROCEEDING, in the nature of ejectment, under the Landlord and Tenant Act, heard before *Buxton, J.*, at Spring Term, 1876, of UNION, upon appeal from a court of a justice of the (155) peace.

The facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

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

Wilson & Son for appellant.
Dowd, contra.

RODMAN, J. This action was commenced before a justice of the peace under sec. 19, etc., of the Landlord and Tenant Act, Bat. Rev., ch. 64. This section says, in substance: Sec. 19. Any lessee who shall continue in possession of the demised premises without permission of the landlord *may be removed* as hereinafter prescribed:

1. When his time has expired, etc. Sec. 20 gives jurisdiction in such cases to a justice of the peace, on application by the lessor or his assigns. In the present case the defendant and his brother, J. C. Steele, were tenants in common of a piece of land, each being entitled to an undivided half. In the spring of 1874 the cotenants ran and marked a division line between them, but no writing was entered into. It was orally agreed between them that defendant should remain in possession of the whole land and pay to J. C. Steele one-fourth part of the crop which he should raise on the share orally assigned and laid off to J. C. Steele, as aforesaid. The defendant accordingly remained in possession of the whole land until March, 1875, when he surrendered possession of all but a small part of it to the plaintiff. On 23 March, 1874, J. C. Steele sold and conveyed the share of the land laid off to him as aforesaid to the plaintiff. The plaintiff had judgment in the Superior Court and the defendant appealed to this Court.

The first question is as to the effect of the oral partition between the two brothers. By sec. 10 of the well-known statute (156) of frauds, Bat. Rev., ch. 50, "all contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, shall be void and of no effect unless such contract, or some memorandum or note thereof, shall be put in writing and signed by the

party to be charged therewith," etc. A partition of lands clearly comes within this act, and the oral petition was, therefore, void for the purpose of conveying to either a separate estate in the share assigned to him. Browne on Stat. Frauds, secs. 68, 70; *Anders v. Anders,* 14 N. C., 529.

This being so, the subsequent agreement by which the defendant was to occupy the whole, and pay to his brother a portion of the crop raised on it, although valid as an agreement for a year, was not a *lease,* and did not constitute, between J. C. Steele and the defendant, the relation of landlord and tenant. In Taylor on Landlord and Tenant, sec. 115, it is said: "One joint tenant or tenant in common *may make a lease of* his part to his companion, and this gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; he may contract with his companion for that purpose as well as with a stranger." This learned writer probably did not mean here to use the word "lease" with technical accuracy; for the authorities he cites do not support that proposition. The rest of his doctrine is unquestioned. It would seem to be necessary, in order to constitute the relation of landlord and tenant, that the one should take or hold possession by the authority or under the title of the other. But a tenant in common is entitled, by force of his own estate, to the possession of the whole land in common with his cotenant. At all events, it is clear upon the language of the Landlord and Tenant Act, above cited, that no person is regarded as a tenant within the provisions of this act, who cannot be rightfully removed from the possession which a tenant in common cannot be; and no person as a landlord who cannot be put in the exclusive possession as against the tenant. Of course there may be several landlords entitled to a joint or common possession between themselves. We are of opinion, therefore, that a justice of the peace had no jurisdiction of the action.

(157)

What may be the legal effect of the deed from J. C. Steele to the plaintiff, and what is the plaintiff's remedy, are questions not presented in this case.

PER CURIAM. Judgment reversed and action dismissed for want of jurisdiction.

Cited: Thigpen v. Staton, 104 N. C., 43; *Fort v. Allen,* 110 N. C., 190; *Rhea v. Craig,* 141 N. C., 609.

T. E. ASHCRAFT AND OTHERS v. T. N. LEE AND OTHERS.

Petition for Highway—Appeal.

Where a petition was filed before the township board of trustees to establish a highway, and the prayer of the petition was granted; and subsequently a petition was filed for the purpose of setting aside the proceeding establishing the highway, and the cause was carried by appeal to the Superior Court: *It was held*, that a motion to amend the original petition establishing a highway could not be entertained by the Superior Court, as a motion in the original proceeding, because no appeal was taken from the ruling of the township board of trustees establishing said highway; and further, that the Superior Court had no jurisdiction to constitute the petition, as a motion to vacate a road order made in another cause, and before another tribunal.

MOTION heard before *Buxton, J.*, at Spring Term, 1876, of UNION.

The facts necessary to an understanding of the case are fully stated in the opinion of the Court.

The motion was overruled, and the plaintiffs appealed.

Dowd for appellant.
Wilson & Son, contra. (158)

BYNUM, J. This is a petition filed before the trustees of Lane's Creek Township, in Union County, to discontinue a public highway, theretofore laid out and established in that township. The township trustees, upon the hearing upon the merits, refused to discontinue and dismissed the proceedings. The petitioners appealed to the board of county commissioners, who also, upon the hearing, refused the application; whereupon an appeal was taken to the Superior Court. In that court a motion was made by the plaintiffs to amend the petition so as to make it a motion in the original petition and proceedings, whereby the road was a short time before laid out and established, to the end that the proceedings establishing the said public road might be vacated and set aside. An amendment of the petition for that purpose was wholly inadmissible, because the proceedings establishing the road were had before the township trustees, and no appeal having been taken, remained there; whereas, the petition to discontinue the road, and proceedings thereon, by successive appeals had reached the Superior Court. That court had no jurisdiction to constitute the petition there a motion to vacate a road order made in another case and before another tribunal.

Even if the court had the power to make the amendment the exercise of it is a matter of discretion, and no appeal lies from an order

disallowing the amendment. *S. v. Davis,* 68 N. C., 297; *Piercy v. Morris,* 24 N. C., 168; *McArthur v. McEachin,* 64 N. C., 454. There is no error.

PER CURIAM. Affirmed.

(159)

WORDSWORTH AND MCDOWELL v. M. L. DAVIS, ADMINISTRATOR.

Creditors' Bill—Statute of Limitations.

Where a creditors' bill is filed against the estate of a person deceased, and the assets are not sufficient to pay the outstanding debts, each creditor is at liberty to dispute the debt of any other creditor; and the debt so disputed must be proved *de novo;* the debt of the original plaintiff in the bill may be thus disputed by any other creditor. And in such case it is competent for any creditor who has proved his debt to plead the statute of limitations in bar of the debt of any other creditor of the estate.

MOTION in the cause, heard before *Schenck, J.,* at Fall Term, 1875, of MECKLENBURG. The record upon appeal discloses the following case agreed:

James H. Davis, late of Mecklenburg County, died in 1867 intestate, and at October Term of said year the defendant administered upon his estate. The estate of the intestate proving largely insolvent, the plaintiffs filed a creditors' bill in equity, returnable to Fall Term, 1868, to have the assets of the estate marshaled, the realty sold and the proceeds distributed equitably among the creditors.

At Spring Term, 1869, an interlocutory decree was made in the cause, by which it was ordered:

1. That the case be referred to E. A. Osborne, clerk of this court, to take an account of the assets of the estate as well as of the extent of the indebtedness thereof.

2. That said Osborne cause public notice to be given in the *Western Democrat* and other papers printed in Charlotte, for the creditors of said J. H. Davis to come before him and prove their debts, and that he fix a peremptory day for that purpose; and that such of them as may fail or refuse to come in and prove their debts by the time so to be limited shall be excluded from the benefit of this decree.

That in pursuance of this decree said Osborne made publication as thereby directed, for all creditors of said estate to come in and
(160) prove their debts before him within sixty days of the said notice, and made his report of the debts thus proved, as well as the assets in the hands of the administrator, to the next term of the court.

At a special term of said court held in 1871 another decree was made in said cause, in which the defendant was ordered and decreed to distrib-

ute the assets in his hands among the creditors of the estate, according to their respective legal rights; and it was further ordered that publication be made for sixty days for other creditors to come in and prove their debts before the clerk within said time. That publication was made in pursuance of said order in one of the newspapers published in the city of Charlotte.

That in pursuance of said decree two installments have been paid to creditors who came in and proved their debts. There is a considerable sum undistributed, and the cause is still pending.

At May Term, 1874, one N. H. D. Wilson, an assignee in bankruptcy of the Bank of Cape Fear, filed his petition in this cause, praying the court to allow him to prove a debt against said estate, alleged by him to be owing to the Salem branch of said bank, to the amount of $9,000, due by note dated 2 December, 1861, and payable ninety days thereafter. To this petition the defendant filed an answer. The motion prayed for in the petition was heard at May Term, 1874, and upon argument was refused by the court, but the court did not find the facts in the case or enter a formal judgment therein.

At Fall Term, 1875, a petition was filed in the cause by I. G. Lash, setting forth that he was the owner of the note set forth and described in the aforesaid petition of N. H. D. Wilson, and praying that he might be allowed to prove the same in his own name against the estate of the defendant's intestate. To this petition an answer was filed by the defendant. The case coming on to be heard, the (161) court made the following order:

"Motion by I. G. Lash to open the account in this case and allow him to prove an alleged claim against the estate of James Davis, deceased. This motion was based on the affidavits filed, and the court finds:

"1. That there is a *prima facie* case of indebtedness established by said Lash against James Davis, deceased.

"2. That said Lash has not been guilty of negligence in presenting his claim, and that he did not have notice of the order for creditors to establish their debts.

"It is therefore ordered by the court that the administrator be restrained from paying out the funds in his hands to the other creditors until the further order of this court. It is further ordered that the following issues be submitted to a jury:

"1. Did James Davis, deceased, as security for A. A. N. M. Taylor, execute and deliver to I. G. Lash a promissory note for $9,000, dated 2 December, 1861, and due ninety days after date?

"2. Is said note barred by the statute of limitations?

"This motion is retained for further order."

From this order the defendants appealed.

Wilson & Son for appellant.
Jones & Johnston, contra.

BYNUM, J. In a creditors' bill seeking payment out of assets in a course of administration the first inquiry is as to the debt. If there is any question about that the court will require the parties to establish their right at law before proceeding to administer the estate, and to enable them to do so will sometimes retain the bill with liberty to bring an action or submit an issue to the jury. But if the facts are before the court, so that it can be seen that the petitioning creditor is
(162) not entitled to relief, the court will not put the parties to the expense and useless formality of submitting an issue to the jury.

When it is admitted or found on reference that the fund is sufficient to pay the debts, one creditor has no interest in disputing the claim of another creditor. But when the fund is not sufficient to pay the debts, each creditor is allowed to dispute the debt of any other, and the debt of such other must be proved *de novo* before the referee, for in such case the creditors have a direct interest in the question of debt or no debt, inasmuch as its allowance will diminish the fund *pro tanto*. *Overman v. Grier,* 70 N. C., 693. And a creditor may thus impeach the debt of another creditor who offers to prove his debt, though such last mentioned creditor may have been the plaintiff in the suit and obtained the decree for an account for the debts. 2 Spencer Eq. Jurisdiction, 361; *Tomlin v. Tomlin,* 1 Hare, 248; Seton on Decrees, 252; *Watson v. Parker,* 2 Phillips, 8.

The note offered to be proved against the estate of the intestate was executed in 1861. The statute of limitations was suspended until January, 1870, when it began to run against the note. The petition to be allowed to prove the debt in the creditors' suit was not filed until May, 1874. The statute had then barred the creditor's right of action upon the note, and the estate of the intestate being insufficient to pay the debts, it was competent for the creditors, who had made themselves parties to the bill and proved their debts, to object to the proof of the Lash note, and plead the statute of limitations in bar of such debt.

Nothing is shown or offered to take the case out of the operation of the statute. After January, 1873, Lash could not have maintained an action on the note without a new promise.

As the debt could not be recovered in an action against the
(163) administrator, of course it cannot be proved against the estate.

PER CURIAM. Reversed.

Cited: *Glenn v. Bank,* 80 N. C., 99; *Oates v. Lilly,* 84 N. C., 644; *Long v. Bank,* 85 N. C., 357; *Dobson v. Simonton,* 86 N. C., 497; *Barrett v. Brown, ib.,* 558; *Speer v. James,* 94 N. C., 424; *Hancock v. Wooten,* 107 N. C., 20; *Smith v. Summerfield,* 108 N. C., 286; *Clayton v. Ore Knob Co.,* 109 N. C., 398; *Dunn v. Beaman,* 126 N. C., 769.

Overruled: *Dobson v. Simonton,* 93 N. C., 273.

J. R. PALMER v. J. R. LOVE'S EXECUTORS.

Confederate Money—Contract.

1. A bond executed in June, 1863, nothing to the contrary appearing, is presumed to be solvable in Confederate currency.
2. Where a note, payable in Confederate currency, is given for property, the value of that currency at the time and place of the contract is the true measure of the value of the contract.

APPEAL from *Cannon, J.,* at Spring Term, 1876, of HAYWOOD.

This action was brought upon a bond given by J. R. Love to J. C. Palmer, dated 5 June, 1863. Upon the trial the plaintiff offered to prove the consideration of the note and its value by parol testimony. The court received the evidence and the defendants excepted. The objection of the defendant to the reception of parol testimony to prove the consideration of the bond was based upon two grounds:

1. That the act authorizing it was void, because it was in violation of the Constitution of the United States.

2. That the plaintiff had not set forth in his complaint the consideration for which the note was given; nor had he given the defendants notice of the kind of property for which the bond was given.

There was evidence tending to show that the bond was given to secure the payment of the purchase money for various articles of personal property, and also tending to show the value of these (164) articles.

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

J. H. Merrimon for appellant.
No counsel contra.

BYNUM, J. The obligation sued on was executed in June, 1863, and it is, therefore, presumed to have been solvable in Confederate currency. *Hilliard v. Moore,* 65 N. C., 540.

In *R. R. v. King,* recently decided in the U. S. Supreme Court, 91 U. S., 3, it was held, reversing the decision of this Court in the same case (66 N. C., 277), that where a note payable in Confederate currency is given for property the value of that currency, at the time and place of the contract, is the true measure of the value of the contract. See also, *Thorington v. Smith,* 8 Wall., 1. As the decision of that Court in *King's case* was based upon the construction of the clause in the Constitution of the United States forbidding all laws impairing the obligation of contracts, as applied to Confederate notes given for property, it is a binding authority in this Court. Accordingly, here the plaintiff must establish what his Confederate note of $525, the agreed price of the property sold, was worth in national currency at the time and place of the contract.

It may not always be easy to arrive at the value of Confederate money, at a given time and place. In default of other and better proof, it would doubtless be competent to give in evidence the value of the property for which the note was given, for the purpose of showing, as near as may be, the value of the Confederate currency named in the note.

(165) In the present case the court decided that the plaintiff was entitled to recover the value of the property sold. In this there is error.

PER CURIAM. *Venire de novo.*

Cited: S. c., 82 N. C., 478; *Brickell v. Bell,* 84 N. C., 84.

F. M. MOYE, ADMINISTRATOR, v. P. S. PETWAY, ADMINISTRATOR, AND OTHERS.

Judgment—Parties.

In case a judgment setting aside a former judgment in the same cause be rendered, and by accident such judgment may not have been recorded, or, if recorded, the record thereof may have been lost or destroyed, every person interested in the record of such judgment, setting aside such former judgment, is entitled to have it restored to its former integrity.

MOTION heard by *Kerr, J.,* at Spring Term, 1876, of WILSON.

The motion was based upon the following affidavits:

"W. T. Dortch maketh oath . . . that this affiant was retained as attorney for said Petway, and entered the words 'time to plead for Adm.' That afterwards these words were stricken out, and 'judgment' written over them without the consent of this affiant. That

at the next term of the court, as affiant recollects, affiant gave notice to Mr. Whitfield, the attorney of the plaintiffs, that he would move to strike out said judgment. Said attorney accepted service of notice, and was present in court when the motion was made; and after the introduction of evidence, in support of the motion, consented that said judgment should be stricken out, and it was so ordered by the court, and the judgment, which was entered on a rough docket, was stricken out. Since that time affiant has seen said docket, with the entry of said judgment stricken out, but is informed that said docket (166) cannot now be found. That said alleged judgment is the same on which this action is brought."

"George V. Strong maketh oath that he was present in court when said motion to strike out said judgment was made by W. T. Dortch, attorney for P. S. Petway, Adm., and that the same was ordered to be stricken out by the court. That affiant has since seen the rough docket on which said judgment was entered and stricken out, and is informed that said docket cannot now be found."

"Isaiah Raaly and P. S. Petway, defendants, make oath that they were present at Spring Term, 1868 (they think), of this court. That a motion was made by the attorney of defendants in the case of this plaintiff against the defendant P. S. Petway and others to set aside the judgment theretofore taken in said action. That G. W. Whitfield, one of the attorneys of the plaintiff, was present in court, and after the introduction of evidence on the part of the defendant the said Whitfield consented that said judgment should be set aside, and the court thereupon ordered the same to be set aside, and affiants have since several times seen said docket with the entry of judgment stricken out. Said docket was a rough paper docket."

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

The motion was allowed and the plaintiff appealed.

Isler for appellant.
Smith & Strong and Smedes, contra.

RODMAN, J. At Spring Term, 1876, of WILSON, before *Kerr, J.*, the defendants moved to amend the records of Fall Term, 1867, of said court by inserting *nunc pro tunc* in the record of this action the following: "The judgment rendered in this action, stricken out and set aside, and that wherever said entry of judgment appears the same be stricken out. And it is considered that the said purported judgment is not the judgment of this court, and the clerk of (167) this court is ordered to erase said entry of judgment wherever the same may appear upon the records of said court."

The language of this motion cannot be commended as clear, nor can anything in the whole record sent up, except the judge's statement. Nevertheless, upon a favorable construction, the meaning of the words may be got at. The propriety of granting the motion depended upon a mere question of fact, to wit, had a judgment been previously (at Fall Term, 1867) rendered setting aside a former judgment against the defendants? If such judgment setting aside, etc., had been rendered, and by accident had not been recorded, or, if after being recorded, the record had been by accident lost or destroyed, every person interested in the record was entitled to have it restored to its former integrity. On this question the judge heard the evidence and considered that a judgment setting aside, etc., had been rendered at Fall Term, 1867, and that the record of it had been lost or destroyed, and directed that the entry above quoted be made on the record as of Fall Term, 1867. From this order the plaintiff appealed.

The plaintiff now contends that there was *no* evidence before the judge to support his conclusion of fact. We are of opinion that the affidavits of Dortch, Strong and Petway were evidence which supported the finding of the judge. Our opinion on this point disposes of every material question presented by the appeal, and the judgment below is

PER CURIAM. Affirmed.

Cited: *S. c.*, 76 N. C., 327.

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(168)

VIRGINIA C. MORRIS v. Z. L. MORRIS.

Divorce—Pleading.

1. A petition by a wife for a divorce *a vinculo matrimonii*, charging the defendant with adultery and with separating from her, but which does not allege that after such separation he continued to live in or committed adultery, is fatally defective, and will not entitle the petioner to a decree of divorce from the bonds of matrimony.
2. And as there was no prayer in the plaintiff's petition for a divorce *a mensa et thoro*, for that reason, if for none other, a decree for separation from bed and board cannot be allowed, and the petition will be dismissed.

ACTION for divorce, tried before *Schenck, J.*, at August Term, 1875, of MECKLENBURG.

The complaint substantially alleged:

That the plaintiff and defendant were residents of Mecklenburg County; that they were legally married and lived together as man and

wife until 27 July, 1873, when the plaintiff quit the bed and board of the defendant; that at that time the plaintiff discovered that the defendant had committed adultery with one Josephine Hunter, and that adulterous intercourse had taken place between said parties for some years; that in the absence of the plaintiff the defendant had taken said Josephine to his home, and there had adulterous intercourse with her; that he had at other places habitually committed adultery with said Josephine; that at different times the defendant had inflicted personal violence upon the plaintiff; that the plaintiff has resided in this State three years prior to the commencement of this action.

The complaint prayed for a decree of divorce *a vinculo matrimonii.*

In response to the issue the jury found:

1. There was a marriage solemnized between the plaintiff and the defendant. (169)

2. The petitioner has resided in the State of North Carolina three years next preceding the exhibition of her petition.

3. The defendant has been guilty of adultery with one Josephine Hunter.

4. The facts set forth in the complaint as ground for divorce have been known to the plaintiff six months prior to the filing of her complaint.

Upon the hearing his Honor held that upon the facts found the plaintiff was not entitled to a divorce *a vinculo matrimonii* for the reason that no separation and subsequent adultery was proved against the defendant. There being no prayer for a divorce *a mensa et thoro,* the court rendered judgment against the plaintiff for costs. From this judgment the plaintiff appealed.

Wilson & Son for appellant.
Vance & Burwell, contra.

BYNUM, J. "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on application of the party injured, made as by law provided, in the following cases: 1. If either party shall separate from the other and live in adultery. 2. If the wife commits adultery. 3. If either party at the time of the marriage was and still is naturally impotent." Bat. Rev., ch. 37, sec. 4.

The application here is for divorce from the bonds of matrimony. A separation is charged, but there is no allegation that the husband after separating from the wife *lived in adultery,* nor was any issue submitted to and found by the jury to that effect. By the plain words of the statute, therefore, the petitioner is not entitled to a decree of divorce *a vinculo matrimonii* in this action. There is no prayer for a divorce *a mensa et thoro,* and for that reason, if for no other, a (170)

decree for separation from bed and board cannot be allowed. *Hansley v. Hansley,* 32 N. C., 506. As from the facts stated in the complaint, it is more than probable that the defendant has lived in adultery since the separation, and that it could have been established had the proper allegation been made in the complaint, the action will be dismissed without prejudice. There is no error.

PER CURIAM. Affirmed.

CHRISTIAN MORETZ v. G. W. RAY AND OTHERS.

Register of Deeds—Official Bonds.

An action cannot be maintain on the official bond of the register of deeds for issuing a license to marry a girl under eighteen years of age without the written consent of her father or mother. The remedy of the plaintiff is either by indictment or an action for damages against the register of deeds individually.

ACTION to recover a penalty upon the official bond of the register of deeds, tried before *Furches, J.,* at Fall Term, 1875, of ASHE.

The plaintiff alleged in his complaint that the defendant Ray is the register of deeds for the county of Ashe and that the other defendants are the sureties on his official bond in the penal sum of five thousand dollars.

That the defendant E. C. Bartlett is acting deputy register for said Ray in his said office.

That said defendant Ray, by his deputy Bartlett, on 11 March,
(171) 1873, did issue a license, by virtue of his said office, to any minister of the gospel or to any justice of the peace of said county, to solemnize the rites of matrimony between one George Clawson and Alice Moretz, both of Watauga County; that the said Alice is the daughter of the plaintiff, and was at the time of issuing said license under the age of eighteen, and living with the plaintiff; and that said license was issued without the written consent of the plaintiff or his wife, and against the form of the statute in such case made and provided, and to the great damage of the plaintiff.

That by reason of the unlawful issuing of said license the defendants are liable on the official bond of the defendant Ray, register as aforesaid, in the sum of two hundred dollars.

Wherefore, the plaintiff demands judgment for five thousand dollars, to be discharged upon the payment of two hundred dollars, etc.

The defendants demurred, because:

That there was a misjoinder of parties;

That the complaint does not show that the sureties, E. C. Bartlett, L. C. Gentry and John Dickson, ever gave any bond or other obligation as sureties;

That the demand does not exceed two hundred dollars, and is, therefore, under the jurisdiction of a justice of the peace;

That the complaint alleges that the license was issued to George Clawson to marry his own daughter without alleging that the defendant knew the fact;

That the complaint does not allege that the defendants knew of the said Alice's being under the age of eighteen.

His Honor sustained the demurrer and gave judgment against the plaintiff for costs.

From this judgment the plaintiff appealed.

Smith & Strong for appellant. (172)
Folk & Armfield, contra.

BYNUM, J. This case comes up to this Court on a demurrer to the complaint. Neither the bond of the register of deeds is set out in the complaint or the conditions thereof, so that the Court can see that any breach has been committed, or even that the bond required by law has been executed by the defendants.

Waiving all this, however, and assuming that the usual register's bond has been filed by the defendants, we have decided at this term of the Court, *Holt v. McLean,* 347 *post,* the facts of which are almost identical with this, that an action on the bond cannot be maintained. The remedy of the plaintiff is either by indictment or an action for damages against the register of deeds individually.

PER CURIAM. Affirmed.

Cited: Kivett v. Young, 106 N. C., 569; *Daniel v. Grizzard,* 117 N. C., 108; *Hudson v. McArthur,* 152 N. C., 455.

A. HENLY v. J. B. LANIER.

Bankruptcy—New Promise—Personal Property Exemption.

1. One who has been adjudged a bankrupt may maintain an action in his own name, upon a promissory note, which has been assigned to him as a part of his personal property exemption, under the 14th section of the Bankrupt Act.
2. A verbal promise made by a bankrupt, after he has received his certificate of discharge, to pay a note theretofore executed by him is valid and binding.

HENLY *v.* LANIER.

ACTION, upon a promissory note, tried before *Cloud, J.,* at Spring Term, 1876, of DAVIE.

All the facts necessary to an understanding of the case are (173) decided in this Court, as stated in the opinion delivered by Justice BYNUM.

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

Shipp & Bailey for appellant.
J. M. Clement, contra.

BYNUM, J. After the defendant executed his promissory note to the plaintiff he was adjudicated a bankrupt; and after the plaintiff had begun action thereon he also was adjudicated a bankrupt, and the note sued on was assigned to him, the plaintiff, as a part of his personal property exemption, pursuant to the fourteenth section of the act.

The defendant pleaded his certificate of discharge in bar of the action; the plaintiff replied a new promise made since the discharge.

The two questions are raised: First, can the plaintiff maintain the action in his own name? Second, must the new promise be in writing?

1. The case states that the note sued on was a part of the plaintiff's estate when he became a bankrupt, and after the adjudication was assigned to him, under sec. 14 of the act, as a part of his personal property exemption. That section excepts from the operation of the act the exempted property, the title to which does not pass to the assignee, but remains in the bankrupt; so that, as to that, his right of property, his possession and his right of action remain as they were before the adjudication. The action, therefore, is well brought.

2. We know of no law of this State and no provision of the Bankrupt Act which requires the new promise to be in writing. Upon contracts entered into since the adoption of the new Code it is (174) provided by statute (see Bat. Rev., ch. 17, sec. 51) that to take them out of the operation of the statute of limitations the new acknowledgment or promise must be in writing. But this applies to the statute of limitations only, and has no application to promises which will take a case out of the operation of the Bankrupt Act. In *Fraley v. Kelly,* 67 N. C., 78, and *Hornthal v. McRae,* 67 N. C., 21, it was held to be sufficient to repel the bar of an adjudication in bankruptcy to prove an unequivocal promise to pay the debt, made after the adjudication, without reference to its being in writing. The jury in our case found that such a promise was made.

PER CURIAM. No error.

Cited: Fraley v. Kelly, 79 N. C., 349; *Riggs v. Roberts,* 85 N. C., 155; *Fraley v. Kelly,* 88 N. C., 229; *Wells v. Hill,* 118 N. C., 908.

STATE v. MARCUS JOHNSON.

Assault and Battery—Father and Son—Self-defense.

1. A son is allowed to fight only in the necessary defense of his father; and to excuse himself he must plead and show that his father would have been beaten had he, the son, not interfered.
2. If a father and his adversary are engaged in a fight on equal terms, the son's interference is not justifiable.

ASSAULT AND BATTERY, tried before *Furches, J.*, at Spring Term, 1876, of WILKES.

The facts necessary to an understanding of the case are stated in the opinion of the Court.

There was a verdict of guilty. Rule for a new trial. Rule discharged. Judgment was pronounced, and the defendant appealed.

Attorney-General Hargrove for the State.
No counsel for defendant.

BYNUM, J. The defendant, Marcus Johnson, is indicted for an (175) assault and battery upon one Absalom Shipwash. The case is this: The defendant is about nineteen years of age. His father, Wyatt Johnson, was engaged in a fight with Absalom Shipwash. Each had a stick the size of an ordinary walking cane, and both being men of about the same size and strength. While the father and Shipwash were so engaged the son Marcus picked up a rock, threw at and knocked down the said Shipwash.

The defendant's counsel asked the court to instruct the jury that the defendant Marcus, being the son of Wyatt Johnson, who was then engaged in a fight with Shipwash, had the right to fight in defense of his father, and was not guilty upon the evidence. The court refused to give the instruction asked for, but charged the jury that if they believed the evidence the defendant Marcus was guilty.

The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of the master, and reciprocally; but the act of the assistant must have the same construction in such cases as the act of the assisted party should have had if it had been done by himelf; for they are in a mutual relation one to another.

Although the law respects the human passions, yet it does not allow this interference as an indulgence of revenge, but merely to prevent injury. The son, therefore, is allowed to fight only in the necessary *defense* of the father; and to excuse himself he must plead and show that Shipwash could have beat his father had not the son inter-

ferred. 3 Bl., 3, and note; 1 Hale Pl. Cr., 484; Bac. Ab., Master and Servant, P. The evidence in the case that the father and Shipwash were engaged in a fight upon equal terms, and it not appearing
(176) which was the aggressor, the law presumes that they were fighting by mutual consent, and were both guilty. The son, therefore, had no right to make the assault.

PER CURIAM. No error.

Cited: *S. v. Brittain,* 89 N. C., 504; *S. v. Bullock,* 91 N. C., 616; *S. v. Greer,* 162 N. C., 648, 653.

CHLOE DAVENPORT AND OTHERS, EX PARTE.

Construction of Will.

A devised as follows: "I give to Chloe D. and husband, and Catherine H. and husband, and Alfred D. and wife, . . . etc., my tract of land called . . . etc. The said Chloe and husband, and Catherine and husband, and Alfred and wife, to hold their part of said land during their lives, and then to their children": *Held,* that only the children of Catherine H., begotten by Henry H., the children of Chloe D., begotten by David D., and the children of Alfred D., by his then wife, were entitled under the will, and not the children of said parties generally.

APPEAL from *Moore, J.,* construing the last will and testament of W. D. Davenport, deceased.

This was a petition for partition, and the only question decided in this Court was upon the construction of the tenth clause of the will, which reads as follows: "I give to my daughter Chloe Davenport and husband, and Cathrine Harrell and husband, Alfred Davenport and wife, William A. Davenport's children, Samuel Davenport's children, my grand-daughter Mary Ann Ward, Mary Amanda Spruill, wife of Charles Norman, my tract of land called the Jas. Chesson land, in the Ben Spruill patent. The said Chloe and husband, and Cathrine and husband, and Alfred and wife to hold their parts of said land during their lives, and then to go to their children. The children of the said William to take and have one share between them, and the said children of the said Samuel to take and hold one share be-
(177) tween them, the said Mary Ann to have one share and the said Mary Amanda to have one share."

At the date of the said will and at the decease of the testator Alfred Davenport was married to Penelope Steelman. He died in 1864, leaving him surviving as issue of said marriage the petitioners, William C.

Davenport and Angelica, wife of Henry L. Barnes, and three other children, the issue of a former marriage, who have by deed assigned their interest in said land to the petitioner Thomas J. Basnight.

The court held that only the children of Catherine Harrell begotten by Henry Harrell, the children of Chloe Davenport begotten by David Davenport, and the children of Alfred Davenport by his wife Penelope are entitled under said clause, and not the children of Catherine, Chloe and Alfred generally.

From this decision Thomas J. Basnight appealed.

Gilliam & Pruden for appellant.
No counsel contra.

SETTLE, J. This is an appeal by Thomas J. Basknight and wife from the judgment following the construction which his Honor, Judge Moore, has placed upon the tenth clause of the last will and testament of W. D. Davenport. The language of this clause (which the reporter will set forth in full) is too plain to admit of any other construction than that which his Honor has placed upon it, to wit: "That only the children of Catherine Harrell begotten by Henry Harrell, the children of Chloe Davenport begotten by David Davenport, and the children of Alfred Davenport by his wife Penelope are entitled, and not the children of the said Catherine, Chloe and Alfred generally.

This being so, the decision of the other questions growing out of the changed circumstances by death, assignment of interest, etc., follow as a matter of course, and we fully concur with his (178) Honor in all the conclusions at which he has arrived.

PER CURIAM. Affirmed.

JOHN L. HINTON v. B. F. WHITEHURST, ADMINISTRATOR, AND OTHERS.

Creditors—Heirs at Law.

A creditor has the right to subject the land *itself* of his deceased debtor to the satisfaction of his debt, although there has been partition among the heirs. And one of the heirs cannot discharge his share of the land by offering to pay his part of the debt, or the amount at which it was assessed to him in the partition.

ACTION, originally brought to subject land to the payment of debts, tried before *Eure, J.*, at Spring Term, 1876, of PASQUOTANK.

The facts of the case have been heretofore fully set out in the several reports thereof, to be found in 68 N. C., 316; 71 N. C., 66; 73 N. C., 157.

The judgment of this Court at June Term, 1875, being sent down to the court below, the presiding judge proceeded in accordance with that judgment to declare the rights of the parties and adjudged agreeably thereto.

From this judgment the defendant W. T. Whitehurst appealed. The points raised by defendant are stated in the opinion of the Court.

No counsel for appellant.

(179) *Smith & Strong, contra.*

READE, J. This case has been heretofore twice before us, and the rights of the parties so fully declared that there is no necessity to consider them further. His Honor followed those cases, and of course there is no error.

A creditor has the right to subject the land *itself* of his deceased debtor to the satisfaction of his debt, although there has been partition among the heirs. And one of the heirs cannot discharge his share of the land by offering to pay *his part* of the debt; or the amount at which it was assessed to him in the partition. Nor will it make any difference that his share has increased in value, as in this case by the diminished burden of a life estate, unless by improvements which he has made above the rents and profits; in which case, it may be, he would be allowed for the improvements to the extent that they increased the market value of the land. *Hinton v. Whitehurst,* 73 N. C., 157.

PER CURIAM. Affirmed.

Cited: Lee v. Beaman, 101 N. C., 299; *Hooker v. Yellowley,* 128 N. C., 301.

(180)

C. B. RILEY v ALLEN JORDAN.

Summary Ejectment—Contract.

One who enters upon land, under a contract of purchase, cannot be evicted therefrom by summary proceeding under the Landlord and Tenant Act. But if the party so entering, unconditionally surrenders his rights under the contract of purchase, and enters into a contract of lease, he may be evicted by summary proceeding under that act; and it is not necessary that he should actually surrender the possession of the land and receive it again at the hands of the lessor.

SUMMARY PROCEEDING in ejectment under the Landlord and Tenant Act, tried before *Buxton, J.,* at Spring Term, 1876, of MONTGOMERY upon appeal from a court of a justice of the peace.

The affidavit of a tenancy and holding over was made by the plaintiff, who claims the possession of the premises as the assignee of P. C. Riley. The affidavit was made 20 January, 1876, and the term of the defendant was alleged to have expired 31 December, 1875.

The defendant in his answer denies the lease and alleges that he purchased the premises from one Neill Gattis, through P. C. Riley as agent. That P. C. Riley advanced the purchase money, and as a security therefor took the title in his own name. That he agreed to wait with the defendant for repayment upon receiving 12½ per centum per annum upon the amount advanced. He entered upon the premises in October, 1871, in pursuance of this agreement, and has complied each year with his contract, and has always been recognized by P. C. Riley as the purchaser and owner of the premises. He denies that the relation of landlord and tenant has ever existed between the plaintiff or his assignor and the defendant.

Upon reading the answer the defendant insisted that it was apparent that the title to the property came in question, and (181) moved the court to dismiss the action upon the ground that a justice of the peace had not jurisdiction thereof.

The plaintiff insisted that upon a development of the case it would appear that the title to the property was not involved, and that the evidence would disclose a case of tenancy.

His Honor overruled the motion to dismiss *pro tempore,* and a jury was impaneled. To this ruling of the court the defendant excepted.

It was in evidence that in 1871 P. C. Riley purchased the *locus in quo* at the request of the defendant, taking a deed therefor in his own name. The defendant then entered into possession under a verbal contract of purchase. The defendant was to repay the $200 and $25 annually as rent, as claimed by the plaintiff, but as interest, as claimed by the defendant, until the repayment of the $200. The $25 was regularly paid by the defendant under this agreement, but no part of the purchase money was paid until May 26, 1875, when P. C. Riley, being on the eve of leaving the State, he and the defendant adopted a different arrangement. There was evidence tending to show that on that day the defendant agreed to relinquish his claim to the *locus in quo* and to pay rent for the balance of the year, and at the end of the year to surrender the possession to P. C. Riley.

The defendant introduced evidence tending to show that on the day aforesaid, in order that Riley's family might not be disturbed in his absence by unsettled business between himself and the defendant, the defendant agreed to relinquish his claim on the *locus in quo,* provided Riley should not get back, and on further condition that he should be reimbursed for certain improvements which he had made, all

(182) of which conditions had failed, as P. C. Riley had returned, and he had not been reimbursed for his improvements.

There was no dispute as to the assignment by P. C. Riley to the plaintiff.

The defendant asked his Honor to charge the jury:

1. That if the defendant was let into possession under a contract of purchase he was entitled to a specific performance, consequently a justice of the peace did not have jurisdiction, and the jury should find a verdict for the defendant.

2. That it was necessary for the affidavit of the plaintiff to allege that the defendant *entered* as tenant to entitle him to a verdict.

3. If there was anything to be done by P. C. Riley which he had not done, or if there were any conditions to be performed by him, the conditions must have been performed before a verdict can be rendered against the defendant.

4. That if the defendant entered upon a contract of purchase he could not surrender possession as such purchaser, so as to render himself liable to this proceeding, without actually coming out and then returning as tenant. There must be a going out of possession by Jordan, and then a going back by him—and as that has not been done the defendant was entitled to a verdict.

In response to the instructions asked his Honor charged the jury:

1. That if the defendant originally entered under a contract of purchase he was not liable to eviction under the Landlord and Tenant Act, unless subsequently he unconditionally relinquished his interest in the contract and agreed to remain there, paying rent to Riley; in that event he would become such a tenant as would render him subject to the jurisdiction of a justice of the peace.

The defendant excepted.

2. That it was not necessary to aver that the defendant *en-*
(183) *tered* as tenant if, being *in*, the defendant agreed unconditionally to be a tenant.

The defendant excepted.

3. His Honor charged as requested.

4. That the formality of going out and then going back was not necessary to constitute a tenancy within the purview of the act, if there was an absolute relinquishment by the defendant of his contract of purchase and an unconditional agreement to become a tenant.

The defendant excepted.

The following issue was submitted to the jury by his Honor:

Did the defendant unconditionally relinquish the original contract of purchase on 26 May, 1875, and agree to pay rent for the remainder of the year?

The jury responded to this issue : Yes.

There was a rule for a new trial; the rule was discharged and judgment of eviction rendered against the defendant, and thereupon he appealed.

Wilson & Son for appellant.
Neill McKay and S. J. Pemberton, contra.

READE, J. The defendant entered under a contract of purchase, and while so possessed a justice of the peace would have no jurisdiction to oust him under the Landlord and Tenant Act. *McCombs v. Wallace,* 66 N. C., 481; *McMillan v. Love,* 72 N. C., 18.

But the defendant unconditionally surrendered that contract and his rights under it and agreed to hold under a new contract of lease.

This brought the case under the Landlord and Tenant Act and gave the justice of the peace jurisdiction.

The point made by the defendant was, that in order to change his relation with the plaintiff he must have used the actual ceremony of going out of possession as purchaser and returning as lessee. (184)

We agree with his Honor that that was not necessary for the purpose of this suit.

PER CURIAM. No error.

Cited: Johnson v. Hauser, 82 N. C., 376; *Durant v. Taylor,* 89 N. C., 353; *Benton v. Benton,* 95 N. C., 561; *Taylor v. Taylor,* 112 N. C., 30; *May v. Getty,* 140 N. C., 316; *Lewis v. Gay,* 151 N. C., 170.

WILLIAM DANIEL AND WIFE *v.* WILLIAM CRUMPLER.

Statute of Frauds—Betterments.

1. Although a parol contract to convey land is void by our statute of frauds (Bat. Rev., chap. 50, sec. 10), yet if the vendee relying thereupon pays the purchase money and makes improvements, he cannot be ousted until the vendor repays the purchase money and makes compensation for the value of the improvements:

2. *Therefore,* upon the trial of an action for the recovery of land, for the purpose of supporting the equitable counterclaim of the defendant, evidence is admissible to show: That A executed a deed to the defendant for the *locus in quo,* and that at the time of executing said deed, A, the plaintiff, and the defendant, both believed that A held the legal title thereto in trust for the plaintiff; that the plaintiff sold the land, received the purchase money and directed the land to be conveyed to the defendant; and that the defendant entered upon and improved the land with the consent and approval of the plaintiff; it is also admissible to prove the value of the improvements.

DANIEL *v.* CRUMPLER.

ACTION to recover two acres of land, tried before *Seymour, J.*, at the January Term, 1876, of WAYNE.

All the facts pertinent to the case, as decided in this Court, are fully set out in the opinion of Justice RODMAN.

On trial in the court below, his Honor refused to receive cer-
(185) tain evidence (detailed in the opinion of the Court) offered by the defendant, and gave judgment absolutely for the plaintiff.

From this judgment the defendant appealed.

Faircloth & Grainger for appellant.
Smith & Strong and Smedes, contra.

RODMAN, J. The land in dispute is two acres out of a tract assigned to the *feme* plaintiff as dower, she being the widow of Dickson Thompson. In 1839 she went into the actual occupation of all her dower land except the piece in dispute, and was in the constructive possession of that piece until 1859, when the defendant took possession of it, and has lived on it ever since, and made improvements on it with the knowledge of plaintiffs, and without objection from them, until the institution of this suit on 12 September, 1870. The *feme* plaintiff married the other plaintiff in 1846.

On this case the plaintiffs were entitled to judgment for the possession of the land. The defendant, however, in support of an equitable counterclaim to the value of his improvements, less the annual value of his occupation, offered to prove:

1. That in 1859 one Haywood Ham executed a deed of conveyance to the defendant for the said two acres, and that the plaintiffs, the defendant and Ham understood and believed that said Ham held the legal title to said land in trust for the plaintiff.

2. That the plaintiff sold said two acres, received the purchase money, and directed said deed to be made to defendant, and that he possessed and improved said two acres with the consent and approval of the plaintiffs.

3. The value of said improvements.

The judge refused to receive this evidence.

(186) There was judgment that plaintiffs recover the possession and damages, from which defendant appealed.

We suppose that the judge rejected the evidence because in his opinion it was immaterial, and did not tend to support any available defense, legal or equitable.

In this we think he was in error. It tended to prove what was equivalent to a parol agreement by plaintiffs to convey the land, and acceptance of the purchase money from the defendant, or from some one

from him, and that on the faith of this contract the defendant entered and expended money in improving.

It is settled law in this State that although a parol agreement to convey land is void by our statute of frauds (Bat. Rev., ch. 50, sec. 20), yet if the vendee in reliance on it pays the purchase money and makes improvements, he cannot be evicted until the vendor repays the purchase money and makes compensation for the value of the improvements. *Baker v. Carson,* 21 N. C., 381; *Albea v. Griffin,* 22 N. C., 9. The doctrine stands on general principles of equity. It is extended by ch. 147 Laws 1871-'72, Bat. Rev., ch. 17, sec. 262, etc. (which, however, was not passed until after the commencement of this action) to cases in which it had not before been held in this State to apply. An illustration of the principle in the case of partition among cotenants is found in *Pope v. Whitehead,* 68 N. C., 191.

The rule for estimating the value of the improvements is declared in *Wetherell v. Gorman,* 74 N. C., 603. It is not what they have cost the defendant, but how much they have added to the value of the premises. See also, Laws 1871-'72, ch. 147, Bat. Rev., ch. 17, sec. 262d.

If the equitable defense or counterclaim of the defendant shall be established in his favor a question may arise as to what share of the value of the improvements estimated by the rule referred to the plaintiff must pay. She has but an estate for life. The im- (187) provements, we may suppose, add to the value not only of her life estate, but of the inheritance. Whether the *whole* increased value of the lands must be paid by her, leaving it to her to recover out of the reversioners their equitable proportion, if she can, or whether she shall pay for the improvements only their value *to her estate,* leaving it to the defendant to recover the residue of the value out of the reversioners, if he can, are questions of importance. They are provided for by the Act of 1871-'72 above cited as to cases where that act is applicable. Whether that act is retrospective and applies to defendant's case as a legislative enactment, or whether the principles there stated are genral principles of equity and applicable to it by their virtue as such, it is unnecessary for us to consider.

We are of opinion that as the rejected evidence went not to impeach the plaintiff's legal right, but only to support the equitable counterclaim of the defendant, the judgment here should be to affirm the judgment below, which determines only the legal right to possession in the plaintiffs, with a stay of execution until the equitable rights of the defendant shall be ascertained and execution be ordered to issue. This is an analogy to what would have been the former practice, if after a judgment at law in ejectment the defendant had filed his bill in equity to restrain execution and to have the equitable relief which he claims

by his counterclaim. The defendant's right to the relief must be ascertained according to the course of the court.

Judgment below affirmed, and ordered that the writ of possession be stayed until the further order of the Superior Court, to which the case is remanded to be proceeded in, etc.

The defendant will recover his costs in this Court.

PER CURIAM. Remanded.

Cited: *R. R. v. McCaskill,* 98 N. C., 537; *Fortescue v. Crawford,* 105 N. C., 34; *Vann v. Newsom,* 110 N. C., 126.

Overruled: *Scott v. Battle,* 85 N. C., 189; *Smith v. Ingram,* 130 N. C., 105; *Kelly v. Johnson,* 135 N. C., 648; *Ford v. Stroud,* 150 N. C., 365.

(188)

SEYMOUR STEELE v. S. P. HOLT AND WIFE.

Illegal Contract—New Bond.

1. A contract, void for illegality of consideration, secured by a bond to pay money, is not cured by the substitution of a new bond in place of the old one, for the same or some other amount, between the same parties.
2. Nor does the adding of a mortgage as an additional security make any difference.

APPEAL from *Kerr, J.,* at Spring Term, 1876, of ALAMANCE.

The following are substantially the facts as agreed:

The plaintiff loaned the defendant, S. P. Holt, fifteen hundred dollars in Confederate money, during the late war in 1863, with which to hire a substitute to go into the Confederate army in place of said defendant, the plaintiff knowing the use to which said money was to be applied; and the defendant gave his bond for that amount to the plaintiff. Some time after the close of the war the defendant S. P. Holt and the plaintiff agreed to a scale of said bond, and the defendant gave the plaintiff a new bond for eight hundred dollars, taking up the original bond for fifteen hundred dollars. On 14 December, 1870, the defendant S. P. Holt and the plaintiff agreed to a compromise of the eight hundred dollar bond previously given, and the four bonds sued on and described in the plaintiff's complaint were executed by said S. P. Holt, and at the same time the mortgage in said complaint described was executed and delivered by said defendant to said plaintiff, to secure the ultimate payment of said bonds, as was so agreed upon the compromise of the said eight hundred dollar bond, and that the payment upon the said four bonds as set forth in the complaint had been made by the

defendant S. P. Holt, and that all of said bonds were due before the institution of this action.

Upon these facts his Honor held that the bonds sued on and the mortgage to secure them were founded upon an illegal con- (189) sideration, and that the plaintiff could not recover. To this the plaintiff excepted.

Judgment for defendant for costs, from which judgment plaintiff appeals.

Parker for appellant.
Boyd and Tourgee, contra.

READE, J. A contract void for illegality of consideration secured by a bond to pay money is not cured by the substitution of a new bond in place of the old one, for the same or for some other amount between the same parties. Nor does the adding of a mortgage as (190) an additional security make any difference.

There is no error.

PER CURIAM. Affirmed.

JOSEPH BALLARD v. ISAAC BALLARD, ADMINISTRATOR.

Witness Under Code, Secs. 589 *and* 590.

1. Under the provisions of the C. C. P., secs. 342, 343, no person is excluded from becoming a witness in a matter affecting the estate of a party deceased, sought to be charged thereby, by reason of the fact that he is a party to the action or a party in interest, except in regard to any transaction or communication between such witness and a person at the time of such examination, deceased.
2. A executed a bond to B, who assigned it to C, making his (X); C endorsed the bond to D. The assignment by B was attested by E; upon the death of B, E was appointed his administrator. In an action brought against E to recover on said bond: *It was held*, that E was not a competent witness to prove the assignment by B to C, and that C was not a competent witness to prove that E did sign his name as attesting witness to the assignment.

SPECIAL PROCEEDING originally commenced in the probate court and transferred to the Superior Court of JONES, where it was tried before *Seymour, J.*, at Spring Term, 1876.

The following issue was submitted to the jury: "Did Council Gooding endorse the note mentioned in the proceedings?"

All other facts necessary to an understanding of the case are stated in the opinion of the Court.

There was a verdict and judgment for the plaintiff, and the (191) defendant appealed.

Hubbard and Kornegay for appellant.
Green and Stevenson, contra.

BYNUM, J. One Kilpatrick executed the bond sued on to Council Gooding, who, it is alleged, assigned it to J. F. Wooten, who endorsed it to the plaintiff. Council Gooding assigned the bond to Wooten by making his mark (X), which was attested by J. Gooding. Upon the death of Council Gooding the attesting witness, J. Gooding, became his administrator and is the defendant in this action.

J. Gooding was called by the plaintiff to prove the endorsement of the intestate to Wooten and, under objection, did testify in substance that he did not witness the endorsement and that it was not his signature as attesting witness. The plaintiff then introduced J. F. Wooten, the assignee, and under the same objection proved by him that he saw J. Gooding write his name as witness to the assignment. Was either Gooding or Wooten a competent witness for the purpose for which he was examined?

It is not by becoming a party to the action, or a party in interest, that a person is excluded from becoming a witness in a matter affecting the estate of the deceased sought to be charged; but whether a party or not, and whether having an interest or not, such person is a competent witness for all purposes *except* "in regard to any transaction or communication between such witness and a person at the time of such examination, deceased," etc. C. C. P., secs. 342, 343. Both Gooding and Wooten were, therefore, competent for all purposes except to prove a transaction or communication between them and the deceased.

J. Gooding was the administrator of Council Gooding, and as such had a direct interest in the result of the action, as being the de- (192) fendant sought to be charged. But he was introduced by the plaintiff to prove a transaction between himself and the intestate, to wit, that he was called on by the intestate and Wooten to attest, and that he did attest the execution of the assignment from the intestate to Wooten. He was an incompetent witness to prove the transaction.

But Gooding was a competent witness at the time of the alleged attestation, and having become incompetent by the act of the law, on his appointment as administrator of the intestate, it was competent to prove by other testimony his handwriting as the subscribing witness to the assignment. 1 Strange, 34; *McKinder v. Littlejohn,* 23 N. C., 66; *Saunders v. Ferrell,* 23 N. C., 97; *Ellis v. Hetfield,* 1 N. C., 71.

This proof the plaintiff attempted to make, and introduced for that purpose J. F. Wooten, the assignee of the intestate. Wooten then had, or had had, an interest in the matter of the action, as the assignee of the intestate and the assignor of the plaintiff. That, however, did not disable him from proving the handwriting of the attesting witness Gooding.

In *Peoples v. Maxwell,* 64 N. C., 313, it was held that although it was competent for the plaintiff to prove the handwriting of the intestate of the defendant, it was incompetent for him to prove that he saw the intestate actually sign a particular paper. The distinction is that handwriting is proved by a general knowledge of it, and the proof is abstract, and as applicable to one case as another. But proof by him that he say the deceased sign a particular paper is proof of a transaction between him and the deceased.

In our case Wooten, the assignee, it is true, was not called to prove directly the assignment to him by the intestate, but he was called to prove, and did prove, that he saw J. Gooding "sign his name as a witness to the endorsement of the intestate, Council Gooding." The signature of the intestate was a cross mark, incapable of identification and proof without an attesting witness; whereupon the defendant Gooding was called in by the parties as this witness to the (193) ceremony of transferring the bond from the intestate of Wooten.

And now Wooten, a party to that "transaction," is called to prove, and under objection does prove, all the facts necessary to make effectual this transaction between him and the intestate, to wit, that he saw the defendant sign his name as a witness. He thus indirectly but conclusively testifies to a transaction between himself and a person since deceased. The case falls directly within the principle established in *Peoples v. Maxwell,* above cited, and *Whiteside v. Green,* 64 N. C., 307; *Murphy v. Ray,* 73 N. C., 588; *McCandless v. Reynolds,* 74 N. C., 301. The witness Wooten, having endorsed the bond to the plaintiff with a guaranty, the result of this action, of course, can affect his interest or the interest previously owned by him. C. C. P., sec. 343. We are not disposed to relax the common law rules of evidence beyond the innovations clearly established by he recent Legislature. There is error.

PER CURIAM *Venire de novo.*

Cited: Thompson v. Humphrey, 83 N. C., 418; *Carey v. Carey,* 104 N. C., 174; *Bright v. Marcom,* 121 N. C., 88; *Johnson v. Cameron,* 136 N. C., 244; *Zollicoffer v. Zollicoffer,* 168 N. C., 329.

Dist.: Loftin v. Loftin, 96 N. C., 99.

JOHN W. GORDON v. SAMUEL J. LOWTHER AND WIFE.

Waste—Damages—Injunction.

Owners of executory bequests and other contingent interests cannot recover damages for waste already committed. They are entitled, however, to have their interest protected from threatened waste or destruction by injunctive relief.

INJUNCTION, tried before *Eure, J.*, at Fall Term, 1875, of GATES.

The plaintiff applied to his Honor for an injunction to re-
(194) strain the commission of waste, and demanded in his complaint judgment for damages for waste heretofore committed on the tract of land therein described.

Plaintiff claims that he has such an estate of inheritance in the lands upon which the alleged waste has been committed so as to enable him to maintain this action, which estate is derived under the will of his grandfather, John C. Gordon. The portions whereof that are pertinent to this case are fully set out in the opinion of Justice SETTLE.

It is agreed as a fact in the case that Martha S. Lowther, the *feme* defendant and life tenant, is about fifty-two years of age, has been married twelve years, and has never given birth to a child.

To the plaintiff's complaint the defendant demurred, assigning as cause of demurrer:

1. That the plaintiff had not the legal capacity to sue; in that he did not have the immediate estate of inheritance in the lands, and therefore could not maintain this action.

2. For defect of parties, in that the person in whom the immediate estate of inheritance was vested should be party plaintiff.

His Honor overruled the demurrer, and the defendants appealed.

Gilliam & Pruden for appellants.
Moore & Gatling, contra.

SETTLE, J. The testator "lends" to his daughter Martha (now Mrs. Lowther) certain lands described in his statement, and adds: "Should my said daughter have no child or children to live to be twenty-one years old, my will and desire is that my grandson John Gordon, son of George B. Gordon, shall have it after her death; if she should
(195) have child or children to arrive at the above age, my desire is that they shall have it after her death."

This makes the defendant Martha Lowther a tenant for life, with a contingent remainder in fee to such child or children as she may have, who live to the age of twenty-one years, with an executory devise over to the plaintiff in the event that no child of Martha Lowther lives to the age of twenty-one years.

The allegations of the complaint are that the defendants, at various times from 1863 to 1875, have sold timber trees from the land and have torn down buildings, and have allowed the farm to go to ruin, thereby committing voluntary and allowing permissive waste, and that the defendants are now, at the time of commencing this action, still committing waste by selling timber trees from the land, and that the injury to the estate of inheritance is equal to the value of the life estate.

And, therefore, the plaintiff brings this action:

First, to restrain waste; second, to recover damages for the waste already committed. The defendants demur.

While owners of executory bequests and other contingent interests cannot recover damages for waste already committed, they are entitled to have their interests protected from threatened waste or destruction by injunctive relief.

This is clear both upon principle and authority. *Braswell v. Morehead,* 45 N. C., 26; *Douthit v. Bodenhammer,* 57 N. C., 444; *Watson v. Watson,* 56 N. C., 400.

Inasmuch as Martha Lowther is now fifty-two years of age, has been married twelve years and has never had a child, and admits by the demurrer the waste charged in the complaint, this would seem to be a very proper case for such relief.

Per Curiam. Affirmed.

Cited: Cowand v. Meyers, 99 N. C., 201; *Jones v. Britton,* 102 N. C., 170, 195, 205; *Farabow v. Green,* 108 N. C., 343; *Peterson v. Ferrell,* 127 N. C., 170; *Coffin v. Harris,* 141 N. C., 713.

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MARGARET A. McEACHERN v. ANGUS GILCHRIST and Others.

Construction of Deed—Condition precedent—Partition.

1. J. F. executed and delivered deeds of gift, conveying certain real property to each of his four children; he conveyed to M. and E. three tracts of land, as tenants in common for life, with remainder in fee to such children as they might have living at the time of their death, reserving to himself a life estate in said lands, subject to the following encumbrances, to wit: "And if there shall be any indebtedness existing against the estate of the said J. F. (the grantor), at the time of his death, which the property belonging to his estate, and not disposed of by him in his lifetime, shall not be sufficient to pay off and satisfy," he directs that the same "shall be paid in equal parts by his four children, to wit: R. E. M., and H., and the property, both real and personal, hereby given, etc., to them and each of them, or for their benefit

severally, is hereby charged and encumbered with one-fourth part of such indebtedness, which is to be paid off and satisfied before said children, or any of them, is to take benefit from this indenture." J. F. executed a mortgage to A., W., and S., the children of E., and remaindermen under said deed, conveying his life estate in said lands, and also other property not before disposed of by him, to secure the payment of the debt. E. died, leaving her surviving A., S., and W., remaindermen, and tenants in common with M.; J. F. died, leaving the mortgage debt unpaid; and his (J. F.'s) property undisposed of by him, is not sufficient to pay off said debt. M. brought an action against A. W., and S. for a partition of said land. Upon the foregoing facts: *It was held*, that the terms of the deed did not constitute a condition precedent, but a charge and encumbrance upon the land, into whosoever's hands the same may come:

2. *Held, further*, that the fact that M. was seized of an estate for life only, and A., W., and S. were seized in fee simple, was no bar to an action for partition; and that the pendency of an action for the foreclosure of the mortgage was no defense to the action for partition.

PARTITION, tried before *Schenck, J.*, at Spring Term, 1876, of RICHMOND.

The facts necessary to an understanding of the case are stated in the opinion of the Court. There was judgment for the plaintiff, and the defendants appealed.

Busbee & Busbee for appellants.
W. McL. McKay, contra.

BYNUM, J. In 1855, John Fairly, being the owner of a large (197) estate in lands and personal property, executed a deed of gift of lands and negroes to each one of his four children. Among them he made a deed of gift of the three tracts of land, the partition of which is sought in this action, to his two daughters, Margaret and Effey, for life, to hold as tenants in common, and at their death to such children as they might have living at their death, in fee; subject, however, to two encumbrances. He first reserves a life estate to himself in the lands conveyed; and the second encumbrance is in the following words: "And if there shall be any indebtedness existing against the estate of the said John Fairly, at the time of his death, which the property belonging to his estate and not disposed of by him in his lifetime shall not be sufficient to pay off and satisfy, he directs that the same shall be paid in equal parts by his four children, Robert, Effey, Margaret and Henry; and the property, both real and personal, hereby given, etc., to them and each of them or for their benefit, severally, is hereby charged and encumbered with one-fourth part of said indebtedness; which is to be paid off and satisfied before said children or any of them is to take benefit from this indenture."

Long subsequent to this deed of gift, to wit, in 1868, John Fairly, being indebted in the sum of $6,300 to Angus, William and Sally Gilchrist, children of his daughter Effey, and the remaindermen in said deed of gift, conveyed to them in mortgage to secure the payment of said debt a large amount of other property, not before disposed of, and also his own life estate in the lands and slaves conveyed to the plaintiff and the defendants by the deed of 1855.

Effey Gilchrist is dead, and the defendants, Angus, William and Sally, are her children, remaindermen in the deed of gift and tenants in common with the plaintiff Margaret.

John Fairly died in 1872, leaving the mortgage debt outstanding, and a charge upon the estates conveyed to his four (198) children in the deed of gift.

It is admitted that the property which was undisposed of by John Fairly, at his death, and that named in the mortgage, is insufficient to discharge the whole of the mortgage debt. After the application of this property to the debt, what amount of it will remain unpaid is not known and is a matter of conjecture only.

The prayer of the complaint is for a partition of the three tracts of land between the plaintiff and the defendants, the remaindermen, and also for an account by them of the rents and profits from the time they took exclusive possession.

The defendants deny the plaintiff's right to partition upon two grounds: First, because by the terms of the deed of gift no estate vests in the plaintiff until a performance by her of the conditions of the deed, to wit, until she pays off and discharges one-fourth of the debt of $6,300, which John Fairly owed at his death, and which is made a charge upon this land.

We do not think that this is the proper construction of the deed. The terms of the deed do not constitute a condition precedent, but a charge and encumbrance upon the land, saddled upon it, in whosoever's hands it may come. The language of the deed admits of no other construction; the land "is hereby charged and encumbered with one-fourth part of said indebtedness." No advantage to the creditor or to the remaindermen can result from an opposite construction. If no estate has vested in the plaintiff, none has in the defendants, and in any view the debt is a charge upon the lands.

The second ground of defense is that in law no partition lies between a tenant for life and tenants in fee.

Originally partition could be made only between parceners, but afterwards, by statute (31 Henry VIII), the writ was extended to joint tenants and tenants in common. Litt., sec. 241-3; I Inst., 164. As partition at first only lay between parceners, who were seized of

(199) of an estate of inheritance, it was afterwards contended that under the stat. 31 Henry VIII, partition could be had only between tenants in fee or in tail. But it was held at a very early day that partition may be brought by a tenant in fee of one moiety against tenant for life of the other moiety, under the statute of Henry VIII, 2 Lester, 1015. And such is the received doctrine at this day. *Hobson v. Sherwood,* 4 Bear, 184, was where the plaintiff was tenant for life and the four defendants were each entitled to one-fifth of the estate as common in tail, and were together entitled to the remaining one-fifth, subject to the plaintiff's interest therein. The Master of the Rolls, Lord Langdale, said: "The plaintiff alone, who is tenant for life, determinable on his second marriage, desires a partition; all the other parties desire to keep the estate together. If, however, the plaintiff is entitled to the relief he asks, he must have it, however inconvenient it may be to the other owners." No question was made but that the plaintiff was entitled to partition, but the doubt was whether all the shares were to be divided, when all the defendants desired their shares to be kept together. It was finally determined that one-fifth alone should be partitioned off.

In this country parties having limited interests, as for example, tenants for life or years, may have a partition in equity, as well as at law, in respect of their own interests only. But if a complete partition be desired all parties interested may be brought before the court, and all estates, whether in possession or expectancy, including those of infants and of persons not *in esse,* may be bound by the decree, Adams' Eq., 230-2; *Jackson v. Edwards,* 7 Paige, 386, 405; *Horne v. Falloner,* 4 Dessau, 86.

The action for the foreclosure of the mortgage, now pending in the court below, is no defense against this suit for actual partition of the lands between the tenants in common. The encumbrance will (200) remain upon the parts in severalty as it was before division, and the remedy for the nonpayment of the debt will be the same to the defendants.

The plaintiff is entitled to have her life estate allotted in severalty; and as the defendants do not deny in their answer that they are in the exclusive possession of the land, they are liable for occupation rent. The plaintiff is, therefore, entitled to an account of rents and profits.

PER CURIAM. Affirmed.

STATE v. N. P. OVERTON.

Homicide—Evidence.

1. The declarations of a party deceased, made in the presence of the defendant, are competent evidence against him upon the trial of an indictment for murder.
2. It is a matter of sound discretion to be left to the jury, what portion of the statement made by one charged with murder, after the commission of the alleged offense, and offered in evidence by the State, may be considered, and what not.

MURDER, tried before *Moore, J.*, at Fall Term, 1875, of BEAUFORT.

The bill was found in EDGECOMBE and the cause was thence removed to BEAUFORT.

Upon the trial the State offered in evidence the declarations of Nathan Grimes, the deceased, made in the presence of the defendant. Counsel for the defendant objected. The declarations offered in evidence were made on the morning of 1 November, 1874. It was in evidence that on 31 October, 1874, defendant, with other neighbors, was present in the house in which the deceased had been found wounded on that morning. That he left towards night, and was followed, arrested and brought back to said house. Defendant was kept (201) under guard from that time until he was committed to jail.

Bennett Carlisle, a witness for the State, testified: On the morning of 1 November, 1874, about 9 o'clock, I was guarding the prisoners, Overton and Taylor. I had been verbally deputized to guard them by George W. Howard, a justice of the peace. We were in the same room with the deceased and about six or eight feet from him. The witness was proceeding to state a conversation which took place then and there, when counsel for the prisoners objected. The court overruled the objection and the witness continued: Deceased said, "Perry Overton tried to kill me. He struck me with an axe three times." Overton then said, "I would be willing to bear it if I thought he was conscious." This occurred prior to the examination before the magistrate.

The State also offered in evidence statements of the defendant Overton made while in jail. He stated in substance that on the night of the murder he went to the store where deceased was wounded, to see him. When he reached the store he found the door open, and upon entering saw the defendant, Noah Taylor, standing at the money drawer. He asked him how much money was in the drawer. Taylor replied, "Not a damned cent." He then heard a groan, and going to the place whence it proceeded, he saw the deceased lying on the floor behind the counter. Deceased raised his right hand and asked him to

save him. He proposed to go for a doctor, when Taylor seized an axe and told him he would kill him if he went for a doctor, or even told anybody what he had seen. He came out of the store and Taylor came out after him, locked the door and they left the store.

These statements were made to parties to whom Overton had written, requesting them to go to see him, as he had something of great importance to communicate.

Counsel for the defendant asked the court to charge the jury: (202) That as the State has introduced the confessions of the prisoner, the jury must (the confessions not being contradicted in any particular) take them as an entirety, and are not justified in arbitrarily receiving part and rejecting part.

His Honor declined the instruction and charged the jury: That it was for them to say what portions of the prisoner's own statements they would receive and what they would reject in their sound discretion, having regard to all the evidence in the case. The defendant excepted.

There was a verdict of "guilty," whereupon the defendant moved for a new trial. The motion was overruled, judgment pronounced, and the prisoner appealed.

Attorney-General Hargrove, Howard & Perry and W. H. Johnson for the State.

J. L. Bridgers, Jr., and D. M. Carter for the prisoner.

PEARSON, C. J. We have examined the record and see no error. We have considered the two points made in the statement of the case as grounds for a *venire de novo* and are satisfied that neither of them is tenable. In fact both of them are so plain as not to admit of discussion.

PER CURIAM. No error.

Cited: S. v. Overton, 77 N. C., 486; *S. v. Hardee,* 83 N. C., 622.

STATE v. ROBERT HARDISON.

Larceny—Indictment.

A and B agreed that A was to place in the possession of B a hog; that the hog was to be fattened by B. and the meat equally divided between them when the hog was killed. Upon the trial of an indictment for the

larceny of the hog: *It was held* (1) that the agreement constituted a bailment to B, the bailee, to have the exclusive possession until the hog was killed; and (2) that the property was well charged in the bill of indictment as the property of B.

INDICTMENT for the larceny of a hog, tried before *Moore, J.,* at Spring Term, 1876, of MARTIN.

The jury returned the following special verdict:

1. That one Alex. Wiggins, the owner, had put in the possession of George Bond a hog to be raised on shares.

2. That Wiggins was to give Bond one-half of the hog after the same was fattened and killed.

3. The hog was charged in the bill to be the property of George Bond alone.

Upon this verdict the court held that the property was not well charged, and declared the defendant "not guilty." From this judgment the State appealed.

Attorney General Hargrove for the State.
Mullen & Moore and Walter Clark for the prisoner.

PEARSON, C. J. By their agreement Bond was to take the hog and raise it and fatten it and kill it after it was fit for pork, and then Wiggins was to give Bond one-half of the pork for his trouble and outlay. Under this agreement Bond was put into possession and held it at the time of the larceny.

His Honor was of opinion that these facts created the relation of tenants in common or of copartners. We do not concur, and have a very decided opinion that the relation was that of a bail- (204) ment for him, the bailee, to have exclusive possession until the animal was fatted and killed. Up to that time Wiggins had no right to the possession, and would have been guilty of a trespass if he had taken the hog away. So there was not a "unity of possession," which is of the very essence of the relation of tenants in common and of copartners.

That an indictment may charge the property to be in a bailee for him who is in possession at the time it is stolen, without joining the bailor, is well settled.

Indeed, it may be doubted whether in this case a joinder of Wiggins would not have made the indictment fatally defective. An indictment for stealing a hog is not supported by proof that the prisoner stole the carcass of the hog—that is, the meat of the hog after it was killed. Wiggins had parted with his property in the hog, but was entitled to the carcass after it was fatted and killed. If the pork had been stolen it would have been proper to charge it as the property of Wiggins, but

as the live hog was the subject of the larceny, it was proper to charge it as the property of Bond.

There is error. The court below will proceed to sentence on the case agreed.

PER CURIAM. Reversed.

Cited: *S. v. Bishop,* 98 N. C., 776; *S. v. Allen,* 103 N. C., 434.

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(205)

STATE v. WILLIAM ELWOOD.

Pardon—Amendment of Judgment.

A. was indicted for murder, convicted, and sentenced to be hanged; he appealed, and the judgment was affirmed. Subsequently he was pardoned: *Held*, that the court below had no power to amend the original judgment, by adding "that the cost of the indictment be taxed against the defendant by the clerk, and that the defendant be in custody until the costs were paid."

MOTION in the cause, heard before *Schenck, J.,* at Spring Term, 1876, of MECKLENBURG.

The defendant was convicted upon an indictment for murder at Spring Term, 1875, and sentenced to be hanged. From that judgment he appealed to this Court, where the judgment was affirmed. Subsequently the defendant was pardoned. Thereupon a capias was issued, and the defendant appeared in court and moved the court that he be discharged. The solicitor moved that he be committed to jail until the cost of the action was paid, and for an amendment of the record by adding "the cost in this indictment shall be taxed against the defendant by the clerk."

The court allowed the motion of the solicitor, and ordered the defendant into custody. From this judgment the defendant appealed.

Attorney-General Hargrove and Bledsoe for the State.
Shipp & Bailey for the prisoner.

RODMAN, J. We concur with counsel for the defendant that the judge had no power at Spring Term, 1876, to amend the record of Spring Term, 1875, as of that term, by entering a judgment which, at that term, he had no power to render. He might at May Term, 1875, have given judgment against the defendant for costs, upon which a *fi. fa.* might have afterwards issued. But he could not then, in addition

to the judgment that the defendant be capitally executed, have (206) given judgment that he pay the costs and be imprisoned until they were paid, or until his discharge as an insolvent. Such a judgment would be inconsistent with itself.

So much of the judgment below as directs that the defendant be imprisoned until the costs are paid is

PER CURIAM. Reversed.

LEWIS JOHNSON AND OTHERS v. OWEN W. JONES AND OTHERS.

Injuncton.

1. The extraordinary remedy by injunction will not be granted where it appears that the petitioner has an adequate remedy by regular proceeding in the cause:
2. *Therefore,* in an action against an administrator *de bonis non,* to enjoin him from selling the land of the intestate for assets, it appearing that a petition for that purpose was pending in the probate court, and that the defendants therein denied the legality of the appointment of said administrator *de bonis non;* and it further appearing that no account had been taken of the personal property of the intestate: *It was held,* that the plaintiffs had an adequate remedy against the sale of said land in the probate court, and that therefore it was not error in the court below to dissolve the injunction theretofore granted.

INJUNCTION, heard before *Seymour, J.,* at Fall Term, 1875, of GREENE.

The facts necessary to an understanding of the case as decided are fully stated in the opinion of Justice RODMAN.

Upon the hearing the court below rendered judgment dissolving the injunction, whereupon the plaintiffs appealed.

Fowle, Haughton, Woodard and Kenan & Murray for appellants. (207)

Moore & Gatling contra.

RODMAN, J. The plaintiffs (except Johnson) are the heirs of John Turnage, and Johnson is the assignee of another of the heirs.

They allege that Tunnage sold to one Grimsley a piece of land for $7,500, which was paid, and that there was an agreement between the parties that if the piece should be found to contain a greater number of acres than Turnage represented, Grimsley should pay for the excess at the rate of $12 per acre, and if it should be found to contain a less number, that Turnage should refund for the defi-

ciency at the same rate. Turnage died in July, 1862, and one Hardy, who is alluded to as being a plaintiff, although not expressly made one, became his administrator. That Grimsley represented to Hardy that there was a deficiency in the quantity of the land sold, and by promising to receive payment in Confederate money induced Hardy to confess a judgment against himself, as administrator of Turnage, for a sum which is left blank. That afterwards (no date is given) Hardy tendered to Grimsley the amount of the judgment in Confederate money, which Grimsley refused to receive, and afterwards assigned the judgment to the defendant Bell. Afterwards the defendant Jones, pretending to be administrator *de bonis non* of Turnage, filed in the probate court of Greene a petition for the sale of the lands of Turnage for the purpose of paying the said judgment, which is still pending. The plaintiffs further say that there was no deficiency in the quantity of land, but an excess. They do not charge expressly any collusion between Hardy and Grimsley, nor do they say what has become of the personal estate of Turnage which was in the hands of his administrator Hardy. They pray:

1. That the judgment against Hardy may be set aside.

(208) 2. For an injunction against Jones from prosecuting his petition for the sale of the land.

An injunction was granted which, on the coming in of the answer, was dissolved, and from this order the plaintiffs appealed. The propriety of this order dissolving the injunction is the only question before us.

We need not consider the answer. Upon the statement of the plaintiffs they have a good defense to the action of Jones in the probate court.

1. If he is not the administrator *de bonis non* of Turnage, he has no right to the order.

2. Before he can obtain an order to sell the land there must, if the plaintiffs require it, be an account taken of the administration of the personal property of Turnage, and it must be made to appear that it has been exhausted in due course of administration or wasted by the administrators. No doubt, also, the probate judge, on being informed that an action was being prosecuted to set aside the judgment, would delay a decision on the petition until that action could be decided, when, if the plaintiffs succeed, the petition of Jones to sell the land must fail.

The plaintiffs, therefore, have, so far as appears at present, an adequate defense in the probate court, and are not entitled to the extraordinary remedy of an injunction. The judgment below dissolving the injunction must be affirmed.

Here we might stop. The defendants, however, contend that the plaintiffs' action should be dismissed, because they might obtain relief against the judgment by a motion in that cause to set aside on the ground of the fraud of Grimsley, or to enter satisfaction upon payment of the whole of the Confederate money according to the scale.

We do not mean to express an opinion on the merits of the plaintiffs' case. Our remarks relate only to the remedy.

No doubt if the only ground of complaint was the refusal of Grimsley to receive Confederate money the administrator (209) Hardy might obtain that relief in the manner suggested by a motion in the cause. But the plaintiffs demand to have the judgment set aside. All the cases cited for the defendant, in which it is held that a motion in the cause is the proper proceeding to set aside a judgment, are where there has been an irregularity in taking the judgment, or a fraud practiced on the defendant in the judgment, and the motion to set aside is made by him. The remedy, by a motion in the cause, must be confined to the parties to the cause. In the present case the substantial plaintiffs (if we consider Hardy as a plaintiff at all) are the *cestuis que trust* of Hardy, and they were not parties to the action against him. It is true no fraud is distinctly charged on Grimsley in inducing Hardy to confess the judgment nor is any fraudulent collusion between Hardy and Grimsley. The complaint is unskillfully framed. But the allegations that Grimsley's assertion of a deficiency of acres was false, and that Hardy admitted it without examination, could have no purpose but to charge a fraudulent collusion between them. In the present stage of the case we may properly consider it as meaning that.

Understanding it in this sense, we think the plaintiffs are not confined to seek relief from the judgment by a motion in the cause, even if they are entitled to do so, but may do it in a separate action. We decline, therefore, to dismiss the action.

The plaintiffs should have leave to amend their complaint as they may be advised, on such terms as may be just.

Order dissolving the injunction affirmed. Case remanded. The defendants will recover costs in this court.

PER CURIAM. Affirmed.

Cited: Gulley v. Macey, 81 N. C., 365; *Wahab v. Smith,* 82 N. C., 233.

(210)

STATE v. MONROE EARWOOD.

Evidence—Declarations.

The declarations of an alleged conspirator, made in the absence of his co-conspirators after the transaction, are not competent evidence against any one except the party making such declarations.

INDICTMENT, tried by *Watts, J.*, at Spring Term, 1876, of HENDERSON.

The defendants were indicted for a conspiracy to take away the wife and the goods and chattels of N. J. Moore.

N. J. Moore and Julia Johnson intermarried in January, 1875, and lived together some months, when they separated. She soon returned to her husband and remained two weeks, when she again left him. On the night of the day she left, together with the defendants, among whom were her mother, two brothers and a brother-in-law, she went to the house of her husband, who forbade them to enter. They walked in, and stated that they had come for the wife's clothes. He forbade them to touch anything. They did take her things, and offered no further violence.

Upon the trial the solicitor offered in evidence the declaration of Monroe Earwood, one of the defendants, made after the transaction above set forth, but not in the presence of the other defendants. The counsel for the defendant objected; the objection was overruled, and the defendant excepted.

There was a verdict of guilty, and the defendants moved for a new trial. The motion was overruled, and defendants appealed.

Attorney-General Hargrove for the State.
J. H. Merrimon for the prisoners.

READE, J. The declarations of one of the alleged conspirators, made in the absence of the others, after the transaction was over, intro-
(211) duced by the State to prove the conspiracy, were clearly incompetent against any one except himself. There is error.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Jackson,* 82 N. C., 568; *S. v. Van Pelt,* 136 N. C., 645.

STATE v. SYLVANUS BEASLEY.

Bastardy—Issue.

A defendant in a bastardy proceeding, who alleges that he has paid the mother of the child a certain sum, for which he exhibits her receipt, which receipt, it is contended and so charged by said mother, was obtained from her by fraud, is entitled to have the issue thus joined tried by a jury; and it was error in the court below to refuse a trial by jury, when demanded by the defendant.

PROCEEDINGS in bastardy, heard before *Watts, J.*, at Spring Term, 1876, of JOHNSTON.

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

There was judgment against the defendant, and thereupon he appealed.

Attorney-General Hargrove and J. E. Bledsoe for the State.
No counsel for defendant.

BYNUM, J. This was an action of bastardy, in which an order of affiliation was made, and the defendant gave a bond for the maintenance of the child, and filed a receipt signed by the plaintiff for $30 in satisfaction of an order in her favor made by the court for that amount. Afterwards, upon a suggestion that no money had been paid the plaintiff, and that the receipt was procured by fraud, a notice (212) was served on the defendant to appear and show cause why execution should not issue for the amount, pursuant to Bat. Rev., chap. 9, sec. 6. The defendant appeared and gave evidence himself and introduced other testimony tending to show that the money had been paid, and that no fraud had been committed. The plaintiff was introduced in her own behalf, and also other testimony was given, going to show that no money had been paid and that the receipt was procured by fraud. Upon this issue the defendant demanded a jury trial, which was refused by the court, who proceeded to find the fact adversely to the defendant, and committed him in custody until the amount due to the plaintiff was paid. The defendant appealed.

We think this was an issue of fact joined upon a material if not the only fact arising in the case, and the defendant, on demand, was entitled to a jury trial, and for the refusal of the court there must be a new trial.

In *S. v. Palin*, 63 N. C., 472, the Court said: "Is the duty of maintaining a bastard child, imposed upon the father by our statute, such a debt as is contemplated by the Constitution, Art. I, sec. 16, abolishing imprisonment for debt? We think not. It is a police regulation, the

object of which is to compel the father of a bastard child to support his own offspring and save the public from the burden of its maintenance."

The usual practice in such cases is for the court to order the defendant to pay down a certain sum for the immediate support of the child, and to give bond to comply with the future orders of the court, and save the county harmless. Such was the probable course pursued here. If so, it was as competent to enforce the payment of the money order as for the execution of the bond for future maintenance by the imprisment of the defendant. Whether the father is released from per-
(213) sonal coercion by giving the bond even, or whether the police power of the court does not as much extend to orders against the defendant for the support of the child, made after as well as before the execution of the bond, are questions which we do not now decide. The bond is an additional security for the benefit of the child, rather than an exemption and release of the defendant from personal obedience to the orders of the court. These bonds are generally straw bonds. But suppose they are good when given, but soon become worthless; the purpose of the bastardy act would be defeated if the defendant could thus escape. But these are but suggestions. There is error.

PER CURIAM. *Venire de novo.*

Cited: *S. v. White,* 125 N. C., 682; *S. v. Morgan,* 141 N. C., 731.

J. L. BLACKWELL v. J. A. CLAYWELL AND OTHERS.

Bankruptcy—Partnership—Limitations.

Where one of the members of a copartnership is adjudicated a bankrupt, the copartnership is thereby dissolved; and the statute of limitations begins to run against any purchaser of a chose in action at the sale by the assignee from the date of such adjudication.

CASE AGREED, heard before *Cloud, J.,* at Fall Term, 1875, of YADKIN.

The following are the facts: James A. Claywell, James L. Blackwell and William Masten entered into partnership for the purpose of merchandising in the town of Wilkesboro in 1853, for the term of three years. They continued in business only two years, when they ceased to transact business under the written articles of copartnership. There has never been any final settlement between the parties.

In 1868 the plaintiff filed his petition in bankruptcy and was duly adjudged a bankrupt, and Anderson Poindexter was appointed his as-

signee in bankruptcy. The plaintiff received his discharge in (214) bankruptcy in 1869. That the claim upon which the suit is based was filed by the plaintiff in the schedule of credits accompanying his application. Said claim was duly received and regularly assigned by R. H. Broadfield, register in bankruptcy, to said assignee. That said assignee in 1870 sold all of the assets of all kinds, including the claim upon which this action is brought, and the plaintiff became the purchaser.

This action was commenced on 2 September, 1874. The defendant Claywell pleads the statute of limitations in bar of the plaintiff's demand.

It is agreed that if the court shall be of the opinion that the action is not barred by the statute of limitations, the case shall be referred and an account taken; that if the court shall hold otherwise, judgment is to be rendered against the plaintiff for cost.

His Honor, being of opinion that the action was not barred by the statute of limitations, rendered judgment according to the case agreed, and thereupon the defendants appealed.

J. G. Bynum for appellants.
Clement and McCorkle, contra.

BYNUM, J. It is not denied that the partnership was dissolved by the plaintiff's being adjudicated a bankrupt. It is also clear that the statute of limitations began to run from that date against any purchaser of the choses in action of the bankrupt at the sale by the assignee. It can make no difference whether such purchaser be a stranger or the bankrupt himself, as the latter, after the dissolution and adjudication, as a purchaser of the effects, stands upon the same footing as a stranger.

It is unnecessary to consider whether the limitation of three years, prescribed by Bat. Rev., ch. 17, sec. 34, or the limitation of two years, prescribed by the bankrupt act, applies; for according to (215) either, the action is barred.

But as the plaintiff in effect admitted in this Court that he could not recover, nothing more need be said.

There is error. Judgment reversed and case dismissed at the cost of plaintiff, according to the case agreed.

PER CURIAM. Reversed.

T. PULLEN v. JOHN R. GREEN.

Contract.

Where a special contract for labor is proved, which continued in force until terminated by the act of the plaintiff, he can recover only upon that contract, and only the balance due up to its termination.

APPEAL from *Watts, J.*, at Spring Term, 1876, of NASH.

The action was instituted to recover damages for a breach of contract.

The plaintiff alleged: That the defendant employed him on 29 December, 1874, to clerk in his store during 1875, for the sum of $25 per month. That he entered upon the discharge of his duties as clerk on 6 January, 1875. That the defendant discharged him on 15 March, 1875, without good cause and against his consent. He claimed $300 damages.

The defendant denied that he hired the plaintiff for the year, and alleged that he hired him by the month; that he discharged the plaintiff on account of the negligence in the discharge of his duties as clerk.

The following issues were submitted to the jury:

(216) 1. Was the contract for the year or by the month?

2. Was the defendant justified in discharging the plaintiff?

3. What does the defendant owe the plaintiff by reason of said contract?

Counsel for the defendant requested the court to charge the jury that, if they responded to the first issue that the contract was by the month, they need not respond to the others, as this finding would oust the jurisdiction of the Superior Court, as the sum demanded under that contract could not exceed two hundred dollars.

The instruction was refused, and the defendant excepted.

Counsel then asked the court to charge that, if they should respond to the second issue in the affirmative, they need not respond to the third issue.

The instruction was refused, and the defendant excepted.

His Honor charged the jury that, if they found that the contract was for the year, they should consider the second issue, and if they found that the defendant was not justified in discharging the plaintiff, they should give him such damages as he was entitled to from the evidence; but if they found that the defendant was justified in discharging the plaintiff, then they should respond to the third issue, $14.06, this being the difference between $57.50, the value of the plaintiff's labor from 6 January, 1875, to 15 March, 1875, at $25 per month, and $43.44, the amount paid the plaintiff by the defendant. And if in response to the first issue they found that the contract was by the month, they should also give the plaintiff $14.06. That the plaintiff was entitled to $14.06

even if they should find both of the first issues in favor of the defendant. That the defendant must pay to the plaintiff his wages as long as he remained in his employment, even if he was justified in discharging him.

The record states that the jury found in response to the first issue that the contract was by the month. The case agreed by (217) counsel states that it was by the year. In response to the second issue the jury found in the affirmative, and to the third, $14.06.

The plaintiff moved for judgment for $14.06, with interest. The court allowed the motion, and the defendant appealed.

Bunn & Williams for appellant.
No counsel, contra.

BYNUM. J. The construction of a contract is a matter of law. But if the contract is verbal, as it was here, and the terms are uncertain and disputed, they may be submitted to the jury as a matter of fact. *Festerman v. Parker,* 32 N. C., 474.

An issue was directed whether the contract was by the year or by the month, and the jury found that it was by the month. The case signed by counsel states that the jury found that the contract was by the year, and not by the month. The record proper must control, because that imports absolute verity. Counsel, therefore, must look to it that no such incongruity in matters material shall appear between the record and the statement of the case.

The allegation of the plaintiff, therefore, is that the contract was an entire year, but the proof and fact is that it was by the month. Having been discharged for good cause in the third month of his services, of course the plaintiff, in no form of action and before no tribunal, can recover more than the balance due for the time he actually served. That balance is found by the jury to be $14.06.

Even had the contract been an entire one for the year, as the plaintiff alleges, as the jury found upon the second issue that the defendant was justified in discharging the plaintiff, he (218) could not recover in any form of action upon either a general or special *assumpsit. White v. Brown,* 47 N. C., 403; *Winstead v. Reid,* 44 N. C., 76. Nor can he recover upon a *quantum meruit,* when a special contract is proved and it appears that he has refused to perform his part of the agreement.

In our case a special contract is found, which contract continued in force until the plaintiff himself put an end to it by his misconduct. He therefore can recover only upon that contract, and only the balance due up to its termination by his own act. *Lane v. Phillips,* 51 N. C., 455.

But by the contract the plaintiff is entitled to recover only $14.06, as is found by the jury. Of this amount due by contract the Superior Court had no jurisdiction. "Of all civil actions founded on contract, wherein the sum demanded shall not exceed $200, etc., the several justices of the peace shall have exclusive original jurisdiction," etc. Constitution, Art. IV, sec. 33. There is error.

PER CURIAM. *Venire de novo.*

Cited: *Raby v. Cozad,* 164 N. C., 290.

V. MAUNEY, ADMINISTRATOR, v. S. J. PEMBERTON AND OTHERS.

Summary Judgment—Sale of Land to Make Assets.

1. A sale of land for assets, made by an administrator, pursuant to a judgment in the probate court, in a proceeding instituted for that purpose, is a judicial sale; and summary judgment may be rendered against the purchaser and his sureties, under the provisions of chap. 31, sec. 129, Rev. Code. Such judgment can only be rendered by such statute in the court ordering the sale.
2. The confirmation of an order of sale, made by the judge of probate, does not draw to the Superior Court any jurisdiction, nor does it impart any additional validity to the proceedings had in the cause in the probate court, only whenever the petitioners are infants and the proceedings *ex parte.*

MOTION for summary judgment, heard before *Buxton, J.,* at Spring Term, 1876, of MONTGOMERY.

The plaintiff is the administrator of Thomas Stokes, who died intestate in 1874. Proceedings were regularly instituted in the probate court for the sale of the intestate's land to make assets, and the plaintiff was directed by the court to sell said land upon a credit. The defendant Pemberton became the purchaser of one tract of said land and executed his note with the other defendants as sureties for the payment of the purchase money. The note falling due and remaining unpaid, the plaintiff, after ten days' notice to the defendant, moved the court for judgment upon the note under the provision of Rev. Code, ch. 31, sec. 129, and upon the further ground that he was entitled thereto *by order in the cause,* the proceeding being originally instituted in the Superior Court, and was to be considered as there pending until the payment of the notes taken by the order of the court to secure the purchase money.

The defendants moved to dismiss the proceeding upon the following grounds:

1. That the court did not order the sale, but the same was ordered by the probate judge in a special proceeding instituted (220) before him.

2. The court has never had control of the notes.

3. The sale was not a judicial sale. And a summary motion for judgment does not lie against the defendant.

4. There is nothing taking this case out of the general law, requiring an action for the collection of a money demand to be commenced by summons and complaint.

His Honor being of the opinion that the sale was not judicial, and that the proceeding could not be sustained as an order in the cause, inasmuch as if the proceeding was ever pending in the Superior Court, as distinguished from the probate court, it was at an end upon the confirmation of the order of sale and the order to collect and make title, refused the motion for judgment and dismissed the proceeding. Thereupon the plaintiff appealed.

J. W. Mauney for appellant.
Neill McKay, contra.

BYNUM, J. 1. No authority is cited or good reason shown why a sale of land for assets, made by an administrator, pursuant to the judgment of the court of probate, in a special proceeding therein instituted for that purpose, is not a *judicial* sale as much as a sale for partition or any other purpose, previous to the adoption of the present Constitution. The sale made by the administrator was a judicial sale.

2. By force of ch. 31, sec. 129, of the Rev. Code, the courts ordering a judicial sale may, on motion, after ten days' notice, etc., enter judgment as soon as the money may become due, etc. This section of the Rev. Code is not brought forward in Battle's Revisal, but for the reasons given in *S. v. Cunningham,* 72 N. C., 469, is in force and applicable to this case.

3. But judgment can be taken under the statute in that court only ordering the sale. The order in our case was made in the (221) court of probate, whereas the motion for judgment was made in another court, to wit, the Superior Court, which had no jurisdiction.

4. A cause is pending in court until the judgment or decree is performed. It was, therefore, competent for the plaintiff to make his motion in the court of probate, and for that court, which ordered the sale, to render the judgment demanded. If an issue of fact should be

made requiring the intervention of a jury, which might sometimes happen, the issue would have to be transmitted to the Superior Court for trial, there being no trial by jury in the court of probate.

5. The confirmation of the sale and several orders of the court of probate by the judge of the Superior Court did not draw to that court any jurisdiction and imparted no additional validity to the proceedings of the court of probate. In *Stafford v. Harris,* 72 N. C., 198, it is decided that the cases required by C. C. P., sec. 420, to be submitted to the judge of the Superior Court for approval are those only where the petitioners are infants and the proceedings *ex parte.* Here the proceedings are *adversary.*

PER CURIAM. Affirmed.

Cited: Chambers v. Penland, 78 N. C., 55; *Lord v. Beard,* 79 N. C., 10; *Hoff v. Crafton, ib.,* 595; *Long v. Jarrett,* 94 N. C., 446; *Spencer v. Credle,* 102 N. C., 76; *Campbell v. Farley,* 158 N. C., 43.

(222)

STATE v. W. H. WITHERSPOON.

Public Road—Report of Commissioners.

1. Where commissioners were appointed by an act of the Legislature to lay off and establish a public road between certain points, and in obedience to said act they did establish the road as contemplated, and reported their proceedings in the premises to the county commissioners, who received and adopted their report, no one bound by said act to work on the construction, or the opening of the said road, can fail or refuse to do so on account of the vagueness of said report; if he does so, he is liable to a criminal action for the penalty.
2. The time for the defendant to have objected to the report was when it was made to the county commissioners and offered for acceptance by them.

CRIMINAL ACTION, commencing in a justice's court, and thence carried by appeal to the Superior Court of ASHE, where it was tried by *Furches, J.,* at Spring Term, 1876.

The following are the facts as contained in the statement of the case accompanying the record:

The defendant was charged with having failed and refused to work on the construction of a public road, leading from Greer's Store, by Martin's Mills and Ore Knob, to intersect with the public road leading from Jefferson to Wilkesboro, by the way of Daniel's Gap, in the Blue Ridge, which was being constructed under the provisions of Laws 1875, ch. 161.

Upon the trial the report of the commissioners appointed to lay out, stake and mark the said road was read, which report had been accepted and adopted by the county commissioners. The defendant's counsel suggested that the said report was too indefinite and uncertain, and was not a sufficient compliance with the act of Assembly and the law to locate and establish such a road as would make the defendant liable to this action for not working on the same. This was denied by the State, and intimated that if the court (223) should agree with the defendant in this opinion the State would like to have the opinion of the court reviewed.

His Honor reserved the opinion of the court as to sufficiency of the report of the commissioners, and gave the case to the jury, who found, upon the fact admitted, that the defendant was guilty. The defendant's counsel moved that the verdict be set aside and the defendant go without day, etc. His Honor, upon consideration of the question reserved, allowed the motion and gave judgment in favor of defendant.

The Solicitor, for the State, appealed.

Attorney-General Hargrove for the State.
M. L. McCorkle for defendant.

PEARSON, C. J. The persons appointed by the act of the General Assembly had laid off a road, staked and marked it, and had made their report to the county commissioners. This report was accepted by the commissioners and filed among the records of the county. An overseer was appointed and hands assigned to open the road. Admit that the report is too indefinite, or that the road is not laid off by the most eligible route, still, according to well settled principles of law this action of the commissioners cannot be impeached collaterally, and must be annulled by some direct proceeding.

The time for the defendant to have objected was when the report was made to the county commissioners and offered for acceptance. To allow him to refuse to work on the road because, in his opinion, the report is too indefinite, or for any other reason, while the report and the action of the commissioners stands unrevised and in force, would demoralize the whole county police in respect to roads and violate a fundamental principle in regard to the action of the public authorities. *S. v. James,* 74 N. C., 393. (224)

Judgment will be entered below upon the verdict.

PER CURIAM. Reversed.

Cited: S. v. Joyce, 121 N. C., 612; *S. v. Yoder,* 132 N. C., 1114.

THOS. DAVIS AND WIFE, DOCEY, AND OTHERS *v.* NATHAN HILL.

Witness—Trial—Evidence.

Upon a disagreement of counsel as to the testimony of a witness, upon the trial of a cause in the Superior Court, the court recalled the witness and reduced his testimony upon the disputed matter *verbatim* to to writing, which, upon being read to the witness, was acknowledged by him to be correct. Counsel made no objection to the correctness of the written evidence, and same was read to the jury by the court: *Held*, that it was not error in the court below to refuse to allow counsel to argue to the jury that the witness when recalled had made a different statement from that read to the jury by the court.

APPEAL from *Seymour, J.*, at Spring Term, 1875, of LENOIR.

The action was instituted for the purpose of having the defendant declared a trustee of certain lands for the benefit of the plaintiffs. There was evidence tending to show that the land was purchased at a sale under execution against the plaintiff by Council Wooten in 1867, and was in January, 1872, sold by Wooten to the defendant for the sum of $800, of which $200 was paid in cash and three notes given for the balance, to wit, one for $300, one for $150, payable on 1 January, 1873, and another for $150, payable 1 January, 1874. All of these notes were paid by the defendant before the commencement of this action.

(225) There was also evidence tending to prove that the defendant bought the land in consequence of an agreement to the effect that he should buy the land from Wooten in order to befriend Davis, and that when Davis repaid the purchase money the defendant was to convey the land to the *feme* plaintiff and her children.

Evidence was offered on behalf of the defendant tending to prove that there was no such agreement.

The following issue was submitted to the jury: Did the defendant purchase the land described in the pleading in trust for the wife of the plaintiff Thomas and her children?

To this the jury responded in the negative.

Upon the argument one of the counsel for plaintiffs stated that a witness for defendant, one B. F. Sutton, had testified as to the terms of the contract, according to their views of the same. Counsel for the defendant interrupted him and stated that he was misrepresenting the testimony. Upon reference to his notes his Honor found that the witness had testified as stated by the defendant's counsel, and so stated. Counsel for the plaintiff insisted that his view of the testimony was correct, and that he was supported by his associates. Thereupon his Honor recalled the witness and examined him himself upon the point

in question, taking down his testimony *verbatim,* and read the same to the witness, in order that he might correct it if erroneous. Counsel for the plaintiff again resumed his argument, and insisted that the witness had given the same evidence when recalled as he had claimed that he had given, and proceeded to state what he had at first claimed to be the testimony, and then what he claimed to have been his testimony when recalled. The court, being of the opinion that counsel had given an incorrect statement of what the witness had said upon being recalled, interrupted him and so stated, and read the evidence of the witness to the jury. Counsel for the plaintiff insisted that he had a right to argue to the jury his version of the last statement of the witness, and that what the witness testified was a matter for (226) the jury. The court held that counsel could not further argue the matter to the jury nor contend before them that the witness when recalled had made a different statement from that which his Honor had reduced to writing. Counsel excepted.

Concerning the testimony of this witness, his Honor charged the jury: That while it was the duty of the judge to narrate to them the evidence, they were not bound by his statement of it, but were sole judges of what was the testimony.

Upon the verdict of the jury the court rendered judgment for the defendant, and the plaintiffs appealed.

Smith & Strong and A. K. Smedes for appellants.
Faircloth & Grainger, contra.

BYNUM, J. The material issue submitted to the jury was: "Did the defendant purchase the land described in the pleadings, in trust for the plaintiffs, Docey and her children?" Evidence was given in support of the affirmative and negative of this proposition, but the jury found in the negative. This verdict ends the controversy, unless some one of the exceptions taken by the plaintiffs will avail them. The only exception relied upon in this Court is that which arose upon the testimony of Mr. Sutton. After the evidence was given, in his address to the jury, counsel for the plaintiff stated "that the witness Sutton had given the terms of the agreement according to his views. Counsel for the defendant interrupted him and claimed that counsel was misrepresenting the testimony. Upon reference to his notes the presiding judge found the testimony to be there given as claimed by the defendant, and so stated. Counsel for the plaintiff still insisting that his view of the testimony was correct, and that he was supported by his associates, the judge recalled Sutton and himself examined him, taking down his testimony *verbatim,* and then reading it (227) over to him, and asking him if he had any corrections to make.

Counsel then resumed, and insisted that the witness had, upon being recalled, given the same evidence which he, the counsel, had before claimed that he had given. Counsel proceeded to state what he had at first claimed to have been Sutton's testimony. The judge being of the opinion that counsel had given an incorrect statement of what the witness had stated upon his recall, interrupted him and so said; at the same time reading from his notes the witness's testimony. Counsel then insisted that he had a right to argue to the jury his version of the last statement of the witness, and that *what* the witness testified to was matter for the jury. The judge remarked that while that was so, he would not allow counsel any further to argue the matter to the jury, or to now contend before them that the witness when recalled had given a different statement from that which he had upon his notes; to which counsel excepted."

It is difficult to extract a legal exception from this statement. It appears to be only an altercation between counsel and the court, not at all to the advantage of the former. Upon a disagreement of counsel as to the testimony of the witness, and a reference to the court to decide the dispute, his decision, as a general rule, should be acquiesced in. But when counsel persist against the decision of the court, and he thereupon recalls the witness and reduces his testimony *verbatim* to writing, which is read over to the witness and acknowledged by him to be correct in the presence of counsel, who makes no objection to the correctness of the written statement, then for him to still persist in giving to the jury another and different version of the testimony is at least unseemly and opposed to the orderly and dignified ad-
(228) ministration of justice. It was the duty of the judge to have ended the controversy sooner than he did.

In trials by jury it is in the province of the presiding judge to decide all questions on the admissibility of evidence to the jury as well as to determine whether there be any evidence or not. This power necessarily includes the power to decide in cases of dispute what the evidence is which has been admitted. The jury can consider the weight and effect of that evidence only which has been allowed by the court to go to them. 1 Greenl., sec. 49; *Munroe v. Stultz,* 31 N. C., 49. In cases where the court is not distinct in his recollection of the testimony he may, and it is generally advisable to refer it to the jury for their better recollection. If they have doubts as to the precise terms of the testimony the court will, at their suggestion, have the witness recalled and reëxamined upon the doubtful point.

In our case counsel was first corrected from the judge's notes, and that not giving satisfaction, the witness was recalled, and his evidence was reduced to writing *verbatim* and read to the jury. The jury do

not seem to have shared the incredibility of counsel. How could they? The evidence became a writing, having the fixity and unchangeableness of a deposition, a bond or a deed. It was conclusive. We do not understand the judge to have precluded counsel from further argument to the jury upon the testimony, but that he did disallow further argument as to what was the testimony of Sutton. This is apparent from his subsequent charge to the jury, wherein he instructed them "that while it was the duty of the judge to narrate to them the evidence, they were not bound by his statement of it, but were the sole judges of what was the testimony." We do not concur in this statement of the law, but it was error in favor of the plaintiffs, and they have no cause of complaint in that.

The case was fairly submitted to the jury, and the verdict disposes of the action. Indeed, from the evidence which is made a part of the case, the jury could not have found otherwise; for even (229) upon the plaintiff's testimony alone it is clear that there was no trust in the defendant which this Court could enforce. *Patton v. Clendennin,* 7 N. C., 68; *Reed v. Cox,* 41 N. C., 511.

The other exceptions were not insisted on here, and are untenable. There is

PER CURIAM. No error.

Cited: S. v. Sykes, 79 N. C., 619.

STATE v. GEORGE APPLEWHITE.

Amnesty—Appeal—Habeas Corpus.

1. The general words of the Amnesty Acts of 1872 and 1874 include the band of outlaws known as the "Lowery band."
2. The prisoner, who was a member of that band, was convicted and sentenced to be hung in 1870; while the cause was pending upon appeal in this Court he made his escape. Upon the hearing of the appeal this Court decided there was no error on the trial below, and in 1875 the prisoner was brought to the bar of the court below, and judgment was prayed in accordance with the decision of this Court. Thereupon the prisoner moved the court that he be discharged, upon the ground that he had been granted amnesty and pardon by the General Assembly: *Held,* that the effect of the appeal was to vacate the sentence pronounced in 1870; and that the decision of this Court was not a sentence or judgment, but simply an order to the court below toproceed to sentence and judgment; and that therefore the prisoner was entitled to his discharge.

MURDER, tried before *McKoy, J.,* at Fall Term, 1875, of COLUMBUS.

The case was before this Court at June Term, 1870, and is reported in 64 N. C.

At Fall Term, 1875, in pursuance of the decision of this Court the prisoner was again brought to the bar of the court and the
(230) solicitor prayed the judgment of the court. Upon being asked by the court what he had to say why sentence of death should not be pronounced against him, the prisoner, through his counsel, answered that amnesty and pardon had been granted him by an act of the General Assembly of North Carolina, ratified 8 December, 1874, and prayed the court that he might be discharged. The court refused the motion, and the prisoner appealed.

Attorney-General Hargrove for the State.
W. F. French for the prisoner.

PEARSON, J. The objection that it does not appear by the transcript sent to this Court that the prisoner was a member of the "Lowery band," which had been notorious for outrages committed in the county of Robeson, or that the prisoner is the same individual who was convicted in 1870, upon an indictment against him and others of said band for the murder of Reuben King, is met by the statement of the Hon. Daniel L. Russell (who presided as judge at the trial), which the Attorney-General, with the approval of this Court, consents may be filed as a part of the case.

It is clear the general words of the Amnesty Acts of 1872 and 1874 include the Lowery band; if there could have been any doubt about it the exclusion of "Stephen Lowery," one of the band, from the benefit of the amnesty act of 1874, leaves no room for doubt.

The prisoner being at the bar for sentence, prayed the benefit of the "Amnesty Act," and asked to be discharged. His Honor refused to discharge him.

As a general rule it is in bad taste for a judge of the Superior Court to encumber the record with an argument in support of his opinion, but sometimes, especially in a "criminal action," when prisoners are not able to procure the aid of counsel before this Court, it is de-
(231) sirable that his Honor should set out briefly the ground on which he puts his decision.

We are left to conjecture that his Honor put his decision upon the ground that the prisoner was "under sentence," and was consequently not embraced by the words of the act of 1874. The prisoner was convicted and sentenced to be hung in 1870. He appealed to the Supreme Court. That Court decided in 1870 there is no error, and ordered its decision to be certified to the Superior Court, to the end that further proceedings should be had agreeable to law. In the meantime the prisoner had made his escape, and no further proceedings could be had until he was brought up to receive sentence in 1875.

The effect of his appeal was to vacate the sentence pronounced upon him in 1870. The effect of the decision of the Supreme Court was not a judgment or sentence, but simply an order to the court below "to proceed to judgment and sentence agreeable to this decision and the laws of the State." Rev. Code, ch. 33, sec. 6, proviso.

That enactment makes a marked distinction between the action of the Supreme Court in civil and criminal cases. C. C. P. modifies the effect of an appeal in civil actions, but has no reference to an appeal in criminal actions. So the appeal vacated the sentence. The Supreme Court decided there is no error, and directed its decision to be certified to the end that the Superior Court should proceed agreeable to law and pronounce sentence. Until such action was taken by the Supreme Court the prisoner was not "under sentence." That the judgment or sentence is vacated by the appeal, and that the prisoner is subject to punishment by the judgment or sentence pronounced after the decision of the Supreme Court is certified, has been taken to be the law ever since "the Court of Conference" was abolished.

We can hardly suppose his Honor applied the maxim, "No one shall have advantage of his own wrong." For although the (232) escape of the prisoner prevented sentence from being pronounced against him "agreeable to the decision of the Supreme Court and the laws of the State" at the regular term, still it was only a question of time, provided he was afterwards arrested. We are unable to see any ground upon which the General Assembly may not, in its wisdom, grant amnesty to every criminal. We are of opinion that the act relied on in the plea is a bar to the further prosecution of this criminal action. For, if we suppose it to be a fact, and if we admit such a fact could be noticed by the Court, that the members of the Legislature who voted for the Amnesty Act, December, 1874, while excepting "Stephen Lowery," omitted to name the prisoner, one of his fellows, because of the general impression that after his escape he had been killed, this mistake or omission cannot be corrected by the action of a coördinate branch of the government.

The court of equity may require a deed to be reëxecuted on the ground of ignorance or mistake, but the judiciary has no power of that kind in respect to an act of the General Assembly. So the prisoner can avail himself of the general words of the statute. There is error.

By our decision the prisoner will at the next term of the Superior Court, as of course, be discharged, and the question is, for what purpose is the county to be subjected to the costs of his jail fees, and why should he be subjected to imprisonment any longer?

Upon consideration of this subject, we are of opinion that the case is provided for by the *habeas corpus* act. Battle's Revisal, ch. 54, sec. 10.

Let a writ of *habeas corpus* issue to have the body of the pris-
(233) oner before us forthwith, so that the cause of his imprisonment may be inquired into.

PER CURIAM. Judgment accordingly.

Cited: *S. v. Miller,* 94 N. C., 909; see Rev., 3281, 3282; *S. v. Bowman,* 145 N. C., 454.

HIRAM PRIVETT v. JAMES CALLOWAY.

New Trial—Limitations.

1. Whether or not the court below will allow a defendant's counsel to insist upon the statute of limitations as a defense to the action, where the same has not been pleaded or mentioned until the argument before the jury, is a matter of discretion which this court cannot review.
2. Granting or refusing a new trial is also a matter of discretion with the court below, and this Court cannot review the ruling thereupon.

APPEAL from *Furches, J.,* at Fall Term, 1875, of WILKES, upon appeal from a justice's court.

The facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

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

G. N. Folk and R. F. Armfield for appellant.
No counsel contra.

READE, J. His Honor's charge was very full and there was no exception to what he did charge, and when he got through he asked counsel on both sides whether there was any other charge desired, and they answered "no." There is, therefore, nothing to consider of the charge in this Court. There was no objection to the introduction or
(234) rejection of evidence, so there is nothing to be considered on that ground. And the jury found for the plaintiff. That reduces the case to this single point: After the evidence was closed and the argument progressing, the defendant's counsel insisted upon the statute of limitations, which had not been pleaded or mentioned up to that time. And his Honor refused to hear it. This was discretionary with his Honor, and we cannot review him. If we could, we see nothing to blame.

After verdict defendant moved for a new trial upon the alleged ground that it had been agreed between counsel that the statute of

limitations should be considered as pleaded, and he offered to verify it by affidavits. The plaintiff's counsel denied it, and said he could support his denial by affidavits. But his Honor refused the motion. This also was discretionary with his Honor, and we cannot review him, and we see nothing to blame if we could.

It is stated that defendant's counsel insisted on the argument to the jury that the plaintiff could not recover because he had not returned the notes to the defendant or tendered them on the trial. As we have already said, there was no exception which brings that point before us, but still, we do not see how it could avail the defendant, because the plaintiff did offer to return the notes if the defendant would pay, and the defendant refused. And further, and chiefly, because the defendant owes the plaintiff a debt, and the notes were put into his hands as collaterals, which the plaintiff was to collect if he could, and out of the proceeds pay off his claim. There was no such agreement as that; the debt was extinguished by the delivery of the notes to the plaintiff, to be revived by the return of the notes to the defendant uncollected; but the defendant has never been discharged from the debt to the plaintiff. The defendant owes the debt to the plaintiff according to the verdict of the jury, and the plaintiff has in his hands for collection certain notes belonging to the defendant which he has offered to the defendant, and which he refused to receive and which he (235) will be entitled to receive upon paying the plaintiff's claim. There is

PER CURIAM. No error.

WATSON WHITE AND WIFE *v.* R. H. AND S. F. HALL.

Construction of Contract.

A rented of B for "the full term of two years," from and after 1 January, 1874, "Strawberry Hill" farm at $1,200 a year; the contract was in writing, and contained the following provision, to wit: "All the cotton seed and manure to be left on the farm at the termination of the lease"; the contract contained no other provision concerning cotton seed. The cotton raised on the farm was ginned on the premises, as was also other cotton raised elsewhere. The seed from the cotton raised on the farm and the seed taken as toll were so mixed that it could not be ascertained how many of each there was. A abandoned the contract before the expiration of the term, and removed the cotton seed. In an action brought to recover the value of the cotton seed removed by A: *It was held*, (1) that the contract applied only to seed from cotton raised on the premises; and that the use of the gin passed under the lease; and that the defendant was not liable for the value of the cotton seed taken as toll. (2) It not appearing that there was any difference between

the value of the cotton seed raised on the farm and the seed taken as toll, the fact that the defendant had mixed them so that he was unable to say how many of each there was, did not entitle the plaintiff to the whole, especially where the jury found that there were so many of each, and no objection was raised to the finding of the jury, on the ground that there was no evidence to support it.

ACTION for the recovery of the value of certain cotton seed, tried before *Eure, J.*, at Fall Term, 1875, of CHOWAN.

The following are substantially the facts as contained in the (236) statement of the case accompanying the record:

The defendants rented of the plaintiffs, for "the full term of two years" from and after 1 January, 1874, "Strawberry Hill" farm, at $1,200 a year. The contract was in writing and contained the following, and no other provision, with reference to the matter in dispute: "All the cotton seed and manure to be left on the farm at the termination of the lease."

The year before the plaintiffs and defendants had cultivated this farm together, receiving each one-half of all the crops raised, and using the gin on the premises for the equal benefit of each, and with it ginned the cotton raised, cotton bought by the partners, and also much cotton for the seed as toll.

The plaintiffs left their seed thus realized on the premises, and they were used in 1874 by defendants for planting and manure, without charge by the plaintiffs.

The defendants used the "Strawberry Hill" gin in 1874 (run by their own mules) to gin their crops, and also other cotton for the seed as toll; and of their own will, without the knowledge or consent of the plaintiffs, mixed the cotton seed realized from every source in the same common pile, and kept no account of those thus mixed. Some of these seed, 200 bushels, were sold for 25 cents per bushel by the defendants; the balance were worth 15 cents per bushel.

The defendants testified that they believed they had ginned 150 bales of cotton at this gin during the season; but they did not know how much of that was raised on the farm, how much bought, or how much was ginned for toll.

On 5 January, 1875, without the fault or consent of the plaintiffs, and without notice to them, the defendants quit the prem-
(237) ises and abandoned the lease, carrying away all the stable manure and cotton seed. Demand was made therefor and refused; when this action was brought to recover the property or its value the sheriff seized 2,400 bushels of seed.

Upon these facts the plaintiffs argued and asked the court to charge that all the cotton seed from cotton raised, bought or ginned for toll, which was ginned at "Strawberry Hill," belonged to them under the

contract. This the court refused, and charged the jury that the plaintiffs were entitled only to those seed raised on "Strawberry Hill" farm. To this the plaintiffs excepted.

The plaintiffs then asked the court to charge that if the defendants had of their own accord, without the knowledge or consent of the plaintiffs, so mixed their seed with the plaintiffs' as that the interest of each could not be distinguished or ascertained, that the seed belonged to them. This charge the court also refused to give, and the plaintiffs again excepted.

The jury found that 1,320 bushels of seed were raised on the said farm, and $1,080 derived from cotton bought and that ginned for toll; that 200 bushels of the whole were worth 25 cents per bushel and the balance 15 cents.

The court thereupon rendered judgment for $209, being 15 cents for 1,210 bushels, and 25 cents for 110 bushels.

From this judgment plaintiffs appealed, alleging error in his Honor's charge.

Gilliam & Pruden for appellants.
No counsel contra.

RODMAN, J. 1. We are of opinion, from the terms of the lease, that the parties had in contemplation only the seed of cotton which should be raised on the premises. The lessees were (238) under no obligation either to gin cotton for toll or to purchase cotton and gin it on the premises for the benefit of the land. The use of the gin for the purposes passed to them by the lease, and they might use it in that way for their own profit if they pleased.

There is no error in the construction which his Honor put on this lease.

2. It is contended for plaintiffs that because defendants intermingled the seed of the cotton raised on the premises with that of cotton bought and with that of cotton ginned on toll, the plaintiffs thereby became entitled to have the whole of the seed applied as that which was raised on the land was agreed to be. Certainly it was the duty of the defendants to have kept such accounts as would have enabled them to ascertain the quantity of seed which they had contracted to leave on the premises as distinct from those they were at liberty to remove. If those which were raised on the premises had been of exceptional value by reason of the particular variety, as is sometimes the case, it would have been their duty to have kept these particular seed separate from all others of a different variety, and any fraudulent intermixture, with others would have vested the title to the plaintiffs. But no such fact appears. For the purpose of manure there

is no material difference in the value of the seed of any one variety of cotton over others. And although the defendants testified that they had kept no account and did not know separately how much they had ginned of cotton raised on the premises as distinct from that ginned from other sources, yet there must have been evidence from which the quantity of cotton seed raised on the premises could be ascertained, for the jury do ascertain it without objection for the want of evidence from which conclusion could be legitimately reached.

It could hardly be that data for that purpose, more or less satisfactory, could be entirely wanting. The jury would have been (239) justified in drawing any inferences adverse to the defendants as to the quantity of seed for which they were liable, which they fairly and consistently, with the evidence, might by reason of their admitted default in not keeping an account. This they probably did, and there is no exception on that account.

Taking the whole case together, it sufficiently appears that the judge was justified in refusing the instruction prayed for on this point, or, at least, it does not appear that he erred in refusing it.

PER CURIAM. No error.

STATE AND F. E. FOWLER v. ELIAS ROSE.

Bastardy—Presumption of Legitimacy.

Where a child is born in wedlock the law presumes it to be legitimate, and the presumption can only be removed by proof of impossibility of access or impotency of the husband.

BASTARDY, tried before *Watts, J.*, at Spring Term, 1876, of JOHNSTON.

The defendant was recognized to appear at Spring Term, 1876, when he moved the court to quash the proceeding, and in support of the motion introduced evidence showing that at the time of the birth of the child the prosecutrix was a married woman.

The court allowed the motion, and the State appealed.

Attorney-General Hargrove for the State.
A. M. Lewis for defendant.

READE, J. There is no error in the order appealed from. (240) Where a child is born in wedlock the law presumes it to be legitimate; and this presumption can only be removed by proof of impossibiltiy of access or impotency of the husband.

This will be certified, that the proceedings may be quashed.

PER CURIAM. Affirmed.

THE BOARD OF COMMISSIONERS OF MACON COUNTY v. THE BOARD OF COMMISSIONERS OF JACKSON COUNTY.

Voluntary Payment—Guard for Jail.

1. A payment voluntarily made, with a knowledge of all the facts, cannot be recovered back, although there was no debt. This rule applies as well to a payment made by one corporation to another as to a payment by one individual to another.
2. When a judge of the Superior Court, upon proper application made, requires the commanding officer of a county to furnish the jailer with such guard as may be required for the safe-keeping of prisoners, under the provisions of Bat. Rev., chap., 89, sec. 10, the expenses of the guard so incurred are to be paid by the county from which the prisoners are removed.

CASE AGREED, heard before *Cannon, J.*, at Spring Term, 1875, of JACKSON.

The following are the facts: In 1872, one Bagless Henderson was indicted for murder in the county of Macon and committed to the jail of said county. Upon the affidavit of the prisoner, the cause was removed to the county of Jackson, and the sheriff of Macon County was ordered to deliver the prisoner into the custody of the sheriff of said county. From the time the prisoner was confined in the jail of Jackson County until the time of his execution, a strong (241) guard was kept over the prisoner. Accounts of the expenses of keeping this guard were sent to the county of Macon from time to time, and upon these accounts the sum of $430.31 was paid. The money was paid upon orders drawn by the register of deeds of Jackson County upon the treasurer of Macon County. The guard was ordered by the court to be employed. It is not contented that the jail of Jackson County was insecure, but the guard was employed for the purpose of preventing the release of the prisoner from the outside. The board of commissioners of Macon County, being advised that they were not authorized to make the payments aforesaid, have demanded of the defendants the repayment of said sum, and this demand has been refused.

It is agreed that if the court shall be of opinion that the plaintiff is not entitled to recover of the defendant, then there is to be judgment in favor of the defendant for cost. But if the court shall be of the opinion that the plaintiff is entitled to recover, then the judgment is to be rendered against the defendant for four hundred and thirty dollars and thirty-one cents.

Upon the hearing the court rendered judgment in favor of the defendant according to the case agreed, and thereupon the plaintiff appealed.

C. A. Moore and Smith & Strong for appellant.

J. H. Merrimon, contra.

BYNUM, J. A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt. *Pool v. Allen,* 29 N. C., 120; *Adams v. Reeves,* 68 N. C., 134. No reason can be suggested, and no authority is cited, to show why the same rule which prevents one individual from recovering against another does not (242) likewise prevent one corporation from recovering against another. It is not alleged that all the facts out of which this action arose were not well known to the plaintiff corporation at the time the claims were paid to the defendant corporation. The payment was not under process, and no fraud or false representation was used to procure it; it was purely voluntary. *Comrs. v. Setzer,* 70 N. C., 426.

But we are of opinion that the payment was rightfully made by the plaintiff, and that in default of payment the defendant could have recovered the claim by action.

By ch. 80, sec. 5, Bat. Rev., the judge of the Superior Court, upon proper application, in the cases therein provided for, may require the commanding officer of the county to furnish the jailer with such guard as may be required for the safekeeping of prisoners. And by ch. 71, sec. 91, Bat. Rev., the expenses of the guard thus incurred are to be paid by the county from which the prisoners are removed. The prisoner here was removed from the the county of Macon to the county of Jackson. In the latter county the judge of the Superior Court ordered the guard to be furnished. We must presume that in ordering the guard the judge followed the directions of the statute in the details. The costs of the guard were a proper charge upon the county of Macon and properly paid.

Being of the opinion with the defendant, as agreed in the case stated, the action is dismissed at the cost of the plaintiff.

PER CURIAM. Action dismissed.

Cited: Devereux v. Ins. Co., 98 N. C., 8; *Lyle v. Siler,* 103 N. C., 265; *Brummitt v. McGuire,* 107 N. C., 357; *Jones v. Jones,* 118 N. C., 447; *Bank v. Taylor,* 122 N. C., 571; *Bernhardt v. R. R.,* 135 N. C., 263; *Jones v. Assurance Society,* 147 N. C., 544; *Simms v. Vick,* 151 N. C., 80.

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(243)

AUG. M. MOORE, ADMINISTRATOR OF HENRY KNOBEN, AND NELLY KNOBEN v. H. A. BOND, JR., ADMINISTRATOR OF ——— HUDGINS, MOSES HOBBS, AND M. C. BRINKLEY, SHERIFF.

Judgment—Mortgage—Homestead.

In 1861 a judgment was obtained against A; execution issued and was levied upon his land, which was regularly kept alive until the said land was

thereunder sold by the sheriff. In January, 1869, A sold the same land to C, making title, and taking a mortgage thereupon to secure the purchase money. In 1872, A died intestate, and B became his administrator. January 1, 1874, the land being worth less than the judgment, interest and costs, and the bond given by C as the purchase money for said land, by agreement C substituted for that note one for a less sum, signed by himself with D as surety, payable to B as administrator of A, whereupon B surrendered the note first given and secured by mortgage. Several months thereafter B, without the knowledge or consent of either C or D, and without any consideration, caused "Satisfaction" to be entered on the registry of the mortgage. In 1875, C. died intestate, leaving F, his widow and sole heir at law; E became his administrator. The land was subsequently sold under a *ven. exp.* issuing under the judgment aforesaid, and after paying off the same, interest and costs, a surplus of the proceeds of said sale remained in the hands of the sheriff. Upon this state of facts: *It was held*, (1) that the entry of "Satisfaction" made upon the registry of the mortgage did not satisfy the debt, nor did such entry release the land; but that the security attached to the substituted note; (2) that B, the administrator of A, was entitled to the surplus to be paid in extinguishment, *pro tanto*, of the note of C and D; (3) that C never had any beneficial interest in the land, except as subject to the paramount judgment and mortgage; and therefore F, the widow of C, was neither entitled to a homestead or dower.

CONTROVERSY, submitted without action, to *Eure, J.*, at the Fall Term, 1875, of CHOWAN, upon the following case agreed:

At the Fall Term, 1861, of CHOWAN, judgment was rendered against Hudgins, the intestate of the defendant, for $506.63, with interest from January, 1860. Upon that judgment execution was issued, and on 4 November, 1861, levied upon the plantation of said intes- (244) tate, and *ven. ex.* have regularly issued to the day of sale, 6 December, 1875.

On 1 January, 1869, Hudgins sold the farm to Knoben, made title to him, and took a reconveyance in trust to secure purchase money. Hudgins died intestate in 1872, and defendant Bond qualified as his administrator.

On 1 January, 1874, the land being of less value than the amount of said judgment, interest and costs and the bonds given for the purchase money, and Knoben having failed in business, by agreement Knoben gave his note payable to Bond, administrator, with the defendant Hobbs as surety, for a less sum, and Bond surrendered his notes originally given for the land and secured by the deed of trust.

Thereafter, on 15 September, 1874, the defendant Bond caused the register of deeds of said county to enter upon the margin of the registry of the deed of trust from Knoben to Hudgins this memorandum: "The within trust satisfied," which he signed as administrator and caused the register of deeds to subscribe as witness. This was done by Bond with-

out the knowledge or permission of either Knoben or Hobbs. Knoben died intestate in October, 1875, and the plaintiff Moore qualified as his administrator. The plaintiff Nelly is the intestate Knoben's widow and sole heir at law. He has no kindred. The land was sold by the sheriff under a *ven. ex.* issued upon said judgment, and brought the sum of $\$\ldots\ldots$ in excess of the principal, interest and costs of the judgment, which the sheriff holds for the party entitled. All the parties interested are before the court.

The defendant Henry Bond asks that if, in the judgment of the court, the entry by him made upon the registry has any effect upon the rights of any party, that the same be ordered to be stricken out; that the same was by him made and done upon no consideration from any person, and without the direction, knowledge or authority of the defend-
(245) ant Hobbs, or any other party interested; that the same was inadvertently done by him, and in ignorance of any possible wrong or injury to his intestate's estate, or to defendant Hobbs. All of which is admitted by the plaintiff and Hobbs to be true.

The plaintiff Nelly Knoben claims that she is entitled to homestead or dower in said fund as the representative of land.

Plaintiff Moore claims: 1. That the surrender of the old bond and the acceptance of a new bond, with surety, releases the lien the land conveyed.

2. That if this is not so, then the entry made upon the registry, the voluntary act of the defendant Bond, has the legal effect to satisfy and discharge the trust and release the land conveyed, and that the money be paid him as the assets of his intestate.

The defendant Hobbs demands judgment in his favor, because, 1st: This substituted note, which he signed as surety for the debt secured by the trust, attached to the security provided for the original debt; and that by the voluntary act of the defendant Bond, the payee, that security was released and discharged, and by the act, in law, discharged him who was surety to the debt.

The defendant Bond demands judgment, that the defendant Brinkley pay to him the amount of sales of the land in his hands, for that the security attached to the substituted note, and he has a right to receive it as a part of the assets of his intestate.

His Honor being of the opinion that the security attached to the substituted note and that the entry of the registry did not satisfy the debt nor release the land, gave judgment that the money be paid to defendant Henry A. Bond, administrator of Hudgins.

From this judgment the plaintiffs appealed.

Badger & Devereux for appellants.
(246) *Gilliam & Pruden, contra.*

RODMAN, J. Novation is mentioned as one of the modes by which a debt may extinguished. This takes place when a creditor, by note or otherwise, accepts some other promise of the debtor (with or without additional security), or of some other person, for the same or a different sum, *in substitution* for the original demand, and thereupon agrees that it shall be discharged. 2 Chitty on Contracts (11 Am. Ed.), 1371. To have the effect of discharging the original demand it is essential that the new promise should be *accepted as a substitute* for the old, which, by the terms of the acceptance, would then be agreed to be discharged.

Whether in any given case a new promise was so accepted is a question of fact and not of law. Like all other facts, it must be proved if disputed, and it may be proved either by direct evidence of the agreement or by inference from other facts. In no case is there any presumption of law as to whether a new security is a substitute for a prior one, or is collateral to it.

There is, however, presumption of fact applicable to such cases, arising out of the maxim that if a certain condition of things is once shown to exist, that condition will in general be presumed to continue until there is proof of a change. So, if a debt or security be once shown to be existing and valid, it will be presumed to continue so until proof of a change. The burden of proof, therefore, is on him who alleges that an original debt has been discharged.

In the present case it is not directly stated that it was a part of the agreement between Bond, the administrator of Hudgins, and the debtor, Knoben, that the mortgage security should be discharged. We are asked, however, to infer as a fact that it was agreed to be (247) discharged from the following admitted facts:

1. That upon the agreement the creditor took the debtor's note, with Hobbs as surety, for a sum not less than the original debt, and

2. Canceled or delivered up the original note, and

3. That Bond some seven months afterwards caused an entry of satisfaction of the mortgage to be made on the register's book.

It may be remarked here that it strikes us as strange that Bond, who was one of the parties to the agreement, and must have known its terms, did not state with perfect clearness, and that he was not asked whether the discharge of the mortgage was then promised and agreed to by him or not. This was probably an oversight, and as the admission is equally, so far as appears, the act, or with the consent of all the parties, no inference to the prejudice of either can be drawn from it.

The first two facts relied on are consistent with the idea that the new note was to be collateral, and that the security of the mortgage

was to be retained—and also with the idea that it was to be discharged; and no certain conclusion can be drawn from them.

As to the entry of satisfaction. If it had been made shortly after taking the new note from Knoben, to which Hobbs became surety, an inference might have been drawn that the entry was made in performance of an agreement that it should be made. But the entry was not made until about seven months after the taking of the new note, and Bond says that the entry was made by his direction, but "upon no consideration from any one, and without the direction, knowledge, or authority of Hobbs or of any other party in interest; that the same was inadvertently done by him," etc., which is admitted. Although Bond gives no reason why he directed the entry, and does not expressly (248) say that it was not made in compliance with an agreement on his part with Knoben, yet, it being a case agreed, the words of which are those of all the parties, on a fair construction, his statement is incompatible with any such agreement. And that being so, the entry amounts to nothing as between these parties.

Our conclusion is that there is nothing in the facts admitted from which it can reasonably be inferred that Bond agreed to discharge the mortgage security. Hence, notwithstanding the change in the form of the debt, the mortgage remained alive as a security for the debt, and Hobbs is entitled to the benefit of it for his indemnity.

As to the claim of the widow and heir of Knoben to dower and homestead from the fund, it is scarcely necessary to say that it cannot be supported, inasmuch as Knoben never had any beneficial interest in the land except as subject to the paramount judgment and to the mortgage.

We think that his Honor erred in directing the fund, after payment of the judgment, to be paid to the administrator of Hudgins, to be dealt with by him according to law.

The judgment should be that it be paid to the administrator of Hudgins in extinguishment *pro tanto* of the note of Knoben and Hobbs.

Subject to the modification above mentioned, the judgment below is affirmed, and a decree will be drawn in conformity with this opinion.

The costs in this Court will be equally divided between Bond, administrator of Hudgins, and Moore, administrator of Knoben.

PER CURIAM. Judgment accordingly.

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STATE v. W. R. PARKER.

Arrest without Warrant.

Men may not be arrested, imprisoned and released upon the judgment or at the discretion of a constable, or any one else: *Therefore*, where a town constable arrested a person who was intoxicated, without warrant, and imprisoned him in the "lock-up" until he became sober, when the constable released him, having never carried him before a magistrate or other person to have the charge investigated, he, the constable, was guilty of an assault and battery.

ASSAULT AND BATTERY, tried before *Moore, J.*, at Spring Term, 1876, of PITT.

On the trial below the jury returned the following special verdict, to wit:

1. That the defendant did arrest the prosecutor, Robert Starkey, and against his consent put him in the "lockup" at Marlboro, and released him as soon as he became sober.

2. That the defendant was town constable for the village of Marlboro, and arrested and imprisoned Robert Starkey, as he thought, in discharge of his official duty, as he so declared at the time, though he had no kind of process upon which to make the arrest.

3. That Starkey, at the time arrested and imprisoned, was intoxicated on or near the public streets of Marlboro, in full view of the citizens thereof, though at the time he was saying nothing and using no profane or vulgar language.

4. That the town of Marlboro was incorporated, and the commissioners had passed the following ordinance, which was in force at the time of the alleged assault:

"Any person found in a state of intoxication, or using vulgar or profane language, is declared a nuisance, and shall incur a penalty not to exceed ten dollars for each offense." (250)

Upon this special verdict his Honor adjudged the defendant not guilty and discharged him.

From this judgment the solicitor, for the State, appealed.

Attorney-General Hargrove for the State.
No counsel for defendant.

BYNUM, J. Admitting that the ordinance in question is a valid one, it nowhere confers, and it could not constitutionally confer, upon a constable, a ministerial officer, the power to arrest and imprison for a penalty incurred or for any other violation of law, except it may be for safe custody. Men may not be arrested, imprisoned and released

upon the judgment or at the discretion of a constable or any one else. If the alleged offense be criminal in its character and committed in the presence of the officer, he may arrest and take the offender before a magistrate for trial. If the offense is penal only, and not a misdemeanor, the penalty can be recovered by action only. *Comrs. v. Frank,* 46 N. C., 436; Bat. Rev., ch. 111, sec. 20.

If the offense be a misdemeanor, then it must be tried as other misdemeanors. Here the prosecutor was not sued for the penalty of ten dollars imposed by the ordinance, nor was he arrested and taken before a magistrate for trial for a criminal offense; but the constable arrested and imprisoned him, not for safekeeping until he could be tried before a competent tribunal, but he imprisoned him until he became sober, according to his judgment, and then released him. The constable thus constituted himself the judge, jury and executioner. This is the best description of despotism.

It is unnecessary to decide whether the ordinance, from its generality and vagueness, is not inoperative and void.

Upon the special verdict, defendant is, in law, guilty.

PER CURIAM. Reversed.

Cited: S. v. James, 78 N. C., 458; *School Directors v. Asheville,* 137 N. C., 509.

Dist.: S. v. Freeman, 86 N. C., 687.

WILLIAM E. LEWIS AND OTHERS v. WILLIE B. FORT.

Witness under Code, Sec. 590.

B executed his note with C as surety, payable to the guardian of the plaintiff, who is now dead; the note was assigned by the guardian to the plaintiff after he became of age. In an action to recover the amount of the note : *It was held,* that B was not a competent witness to prove that he had paid the note to the deceased guardian before its assignment to the plaintiff.

APPEAL from *Seymour, J.,* at January Term, 1876, of WAYNE.

The action is brought against the administrator of Coley on a note made by B. T. Bardin, as principal, and by Coley and another, who is now dead, as his sureties. The note was payable to the guardian of the plaintiff, who is now dead, and was assigned by the guardian to the plaintiff after he came of age.

The defendant offered to prove by Bardin, the principal in the note, that he, Bardin, paid the note to the deceased guardian before its as-

signment to the plaintiff. The judge held the witness incompetent and refused to allow his testimony, to which defendant excepted, and after a verdict and judgment against him, appealed to this Court.

Faircloth & Grainger for appellant. (252)
Smith & Strong and Smedes, contra.

RODMAN, J., delivering the opinion of the Court, after stating the case as above:

It must be admitted that if a judgment for or against the defendant would be evidence against Bardin, the principal in the note, in an action against him by the plaintiff, or in an action against him by the defendant for indemnity after payment of a judgment against him, then Bardin would be interested in the result of the action, and would be an incompetent witness at common law, whether the payee of the note was dead or not.

This proposition embraces two distinct and different questions:

First. Would a judgment on the plea of payment for or against the sureties have been evidence in an action by the present plaintiff, the assignee of the note, against the principal? There is some conflict of authorities on this question. By accepting the decisions of this Court as controlling upon us, we consider that independent of the act of 1844 (Rev. Code, ch. 44, sec. 10) it would not be.

McKellar v. Bowell, 11 N. C., 34, was argued on opposite sides by Ruffin and Gaston, and the opinion of *Chief Justice Taylor* is distinguished by its good sense and learning. It was then held that the record of a recovery against a guardian was not evidence in an action brought by the plaintiff in that action on the guardian bond.

In *Armistead v. Harramond,* 11 N. C., 339, it was held that a judgment against an administrator for a debt of his intestate was in an action against his sureties upon the administration bond, *evidence of the debt,* but not that the administrator had assets to discharge it. In *S. v. Fullenwider,* 26 N. C., 364, it was held that the receipt of a constable for a claim to collect was not evidence against the sureties to his bond. See, also, *Bullinger v. Allen,* 15 N. C., 358; (253) 1 Greenleaf Ev., sec. 539a, (12 Ed.); *Chairman v. Clark,* 11 N. C., 43; *Governor v. Montford,* 23 N. C., 155; *Governor v. Carter,* 25 N. C., 338; *Ives v. Jones, ib.,* 538; *Gaither v. Teague,* 26 N. C., 65.

The act of 1844 is confined to actions on the official bonds of clerks, etc., executors, etc., and has no bearing on the question in the present case.

Second. Would a judgment against the sureties in the present action be evidence for them in an action by them against the principal for indemnity?

In our opinion, independent of the circumstances that the principal had notice of the present action against his sureties, and either did defend it or might have done so, the record of a judgment against the sureties would be evidence that they were *compelled* to pay *on the note recovered on,* and of the *amount* that they were so compelled to pay. 1 Greenleaf Ev., sec. 537.

In the present case the principal, B. T. Bardin, had notice of the action against his surety, and either did defend it or was entitled to do so.

He was therefore a privy to the judgment, and would be estopped in an action by his sureties for indemnity, to set up anything to defeat the action which would have availed as a defense in the action against the sureties. Rawle on Covenants for Title, 210; Bigelow on Estoppel, 65; *Duffield v. Scott,* 3 Tenn., 374; *Love v. Gibson,* 2 Fla., 598; *Smith v. Crompton,* 3 Barn. & Ad., 407; *Littleton v. Richardson,* 34 N. H., 179-187.

By the common law he was incompetent in the present action to prove payment by reason of an interest in the result. The Code of Civil Procedure (Bat. Rev., ch. 17, sec. 342) abolishes, in general, the disqualification of interest. But sec. 343 provides that no person who has an interest to be affected by the result of an action shall be examined in regard to any transaction or communication with a per-
(254) son at the time of such examination deceased, etc., as a witness against a party then prosecuting the action as assignee, etc., of the deceased.

The proposed witness comes within the letter of the prohibition in this proviso, and no less clearly within the mischief intended to be provided against.

Long before the adoption of our present rules of evidence by the State of New York, eminent writers on the theory of evidence had taught that the rules of common law governing its admission were too narrow. They had been framed rather with the view of excluding falsehood than of ascertaining the truth. They supposed an incapability of jurors to distinguish the false from the truth in conflicting testimony, which experience, in modern times at least, has contradicted. Interest had never been a disqualification from testifying in the civil law. In conformity to these enlightened doctrines the State of New York, and subsequently England and most of the American States, remodeled their rules of evidence in the direction of greater liberality in admitting witnesses to be heard by the triers of facts. It was thought that parties and persons interested might safely be permitted to testify concerning any transaction between them. It was expected that their testimony would sometimes be willfully false and

perjured, and that in general it would be partial, that some things would be suppressed, some exaggerated and twisted out of their right meaning and significance, and that the truth would come, even from honest witnesses, colored by their interests, prejudices and feelings. In short, no more was expected of human nature than it is usually found to give. But it was thought that, notwithstanding this, the intelligence of a jury could be trusted to distill the truth from its mixture with falsehood, provided both parties to the transaction could speak. So far as I know, no writer, either professional or merely philosophic, ever proposed that one party to a transaction should testify concerning it, when the other from death or incapacity could not. In such a case there could, in general, be no check (255) on falsehood, no means of correcting or explaining the testimony of the surviving party. Except in the rare cases in which its falsity might be demonstrated from its improbability, it must be received as the pure truth with all the suppressions, omissions, discolorations, exaggerations and distortions, which experience has shown to be almost inevitable in *ex parte* statements, when without restraint by fear of contradiction. Such an unlimited license to testimony would imply a confidence in the truthfulness and unselfishness of men which is not justified by the experience of any age. It would expose, without the possibility of defense, the estates of all persons deceased or otherwise incapacitated, to be plundered by the unscrupulous, and also by all of that class of men—a not very uncommon one—who, while not consciously false, are deluded by their selfish passions into believing things which have no foundation in fact, or who state real occurrences in so partial, exaggerated and distorted a way as to produce all the effects of falsehood.

In the present case, for aught that we can know, the guardian, if living, would deny the alleged payment to him.

The Code not only never intended to make competent against a deceased party to an action a witness who by reason of interest would have been incompetent at common law against a living party, but it apparently excludes some who would not have been excluded at common law.

In our opinion the witness was incompetent and in rejecting his testimony there was

PER CURIAM. No error.

Cited: Hare v. Grant, 77 N. C., 204; *Peebles v. Stanly, ib.,* 245; *Leak v. Covington,* 99 N. C., 562; *Moore v. Smith,* 116 N. C., 669; *McGowan v. Davenport,* 134 N. C., 528, 529.

(256)

STATE v. GUS GRAHAM.

Judges—Exchange of Circuits.

A partial exchange of circuits between two of the judges of the Superior Court, with the approval of the Governor, is legal.

LARCENY, tried before *Schenck, J.*, at Spring Term, 1876, of ANSON.

The case was decided upon appeal in this Court at January Term, 1876, and is reported in 74 N. C.

The case coming on to be heard upon the certificate of this Court, at Spring Term, 1876, the prisoner's counsel moved the court to arrest the judgment upon the ground that *Schenck, J.*, had no authority to hold that term of the court, in that the law does not authorize the exchange of two counties of a district unless the two counties constitute the entire district.

The motion was overruled, and the prisoner appealed.

Attorney-General Hargrove and R. H. Battle, Jr., for the State.
No counsel for the prisoner.

BYNUM, J. The question raised here has been settled at the present term of this Court, *S. v. Watson, ante,* 136. It is there held that a partial exchange of circuits between two judges, with the aproval of the Governor, as here, is legal. Judge Schenck, therefore, had jurisdiction and the right to pronounce sentence upon the defendant.

PER CURIAM. Affirmed.

Cited: S. v. Graham, 76 N. C., 196.

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(257)

STATE v. JASPER A. DILL.

Larceny—Indictment.

An indictment charging the defendant with the larceny of "one bill of fractional currency of the value," etc., and concluding at common law, and not against the statute, is bad; and it was error in the court below not to arrest the judgment.

LARCENY, tried before *Cannon, J.*, at Spring Term, 1876, of JACKSON.

The defendant was charged with stealing a bill of the fractional currency of the government of the value of fifty cents, the indictment concluding at common law, and not against the statute.

The defendant was found guilty, and his counsel moved in arrest of judgment, basing his motion upon the ground (among other exceptions unnecessary to be mentioned) that the indictment was bad, because it did not conclude against the statute.

His Honor overruled the motion and the defendant appealed.

Attorney-General Hargrove for the State.
Ferguson for defendant.

PEARSON, C. J. Larceny at common law was the stealing of the *goods* and *chattels* of another. A promissory note or other chose in action was neither "goods nor chattels," hence the necessity of a statute to make the stealing of a promissory note or other chose in action an offense of the grade of larceny at common law; in like manner stealing growing corn was not larceny at common law, because it was attached to the realty, and a statute was necessary to create that an offense of the grade of larceny, in other words, to make it larceny.

The indictment concludes at common law, and makes no reference to the statute by which the offense is created. Note the (258) distinction between the cases where the statute merely affects the punishment, and where a statute creates the offense.

The Attorney-General conceded that this defect was not embraced by the statute concerning formal defects in indictments, and he was not able to cite any authority charging as an offense at common law an act that is created an offense by statute. There is error.

PER CURIAM. Judgment arrested.

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(259)

HAWKINS & CO. v. PARHAM & DUNN.

Mortgage—Constructon of Contract.

On 8 May, 1873, S. executed a deed to P. & D., whereby, in consideration of supplies furnished, he agreed to deliver to them 8,000 pounds of lint cotton, to secure the amount of $1,200, and gave a lien with a power of sale on the crops raised on his land; this deed was registered October 10, 1873. On the same day, but by a different instrument, which was never registered, S. agreed to deliver to the said P. & D. before 1 December, 1873, 8,000 pounds of cotton, and they agreed to pay him 15 cents per pound therefor; and on 2 June, 1873, the said S. executed to H. & Co., a deed reciting therein that they had advanced to him $909.80 to enable him to cultivate certain lands belonging to his children during that year, and giving him a lien on said crops after

paying to the said P. & D $900. This deed was registered 1 July, 1873. S. delivered to P. & D. the 8,000 pounds of cotton raised on his children's land, which they sold for $1,800; at the date of the deed to P. & D., S. owed them $900: *Held*, (1) that evidence tending to show that the advances mentioned in the deed of 23 June, 1873, had in fact been made in 1870, was immaterial; for although the deed might not create a valid agricultural lien, yet it was good at common law to create a lien upon a crop then growing, and the Court would presume that the crop was growing on the said 23 June; (2) that the excess of the sum ($1,800), for which P. & D. sold the 8,000 pounds of cotton over the sum ($900), which S. owed them, passed to H. & Co. to the extent of the debt due them by S., and not merely the excess of the price ($1,200) which S. was to receive for the cotton.

APPEAL from *Watts, J.*, and a jury, at Fall Term, 1875, of WARREN.

The necessary facts to an understanding of the case as decided are stated in the opinion of the Court.

There was a verdict and judgment in favor of the plaintiffs, and the defendants appealed.

Batchelor & Son and Edwards for plaintiffs.
W. H. Young, contra.

RODMAN, J. On 8 May, 1873, Swain executed a deed to defendants, whereby in consideration of supplies purchased, he agreed to de-
(260) liver to defendants 8,000 pounds of lint cotton to cover the amount of $1,200, and made a lien on his crops to be raised on his lands and gave a power of seizure and sale on failure to deliver. This deed was registered on 10 October, 1873. On the same day, but by a separate writing, he (Swain) agreed to deliver to defendants 8,000 pounds of cotton before 1 December, 1873, and they agreed to pay him 15 cents per pound for it. This writing was never registered.

On 23 June, 1873, Swain executed a deed to plaintiffs which recited that plaintiffs had advanced to him $909.80 to enable him to cultivate certain lands belonging to his children for that year, and gave to plaintiffs a lien on all his crops made on said lands during said year, after paying to defendants $900, and Swain therein agreed to deliver said crop of cotton to the R. & G. R. R. Co., consigned to plaintiffs at Baltimore, on or before 1 November, 1873. This deed was registered 1 July, 1873.

At the date of the deed to the defendants Swain owed the fall of 1873, deliver to defendants 8,000 pounds of cotton raised on his children's land, the value of which at 15 cents per pound would be $1,200, but defendants sold it for $1,800.

At the date of the deed to the defendants, Swain owed them $900, and it does not appear that they made him any further advances.

Defendants offered to prove that the advances mentioned in the deed to plaintiffs of 23 June, 1873, had been in fact made in 1870 and 1871.

The judge rejected the evidence. We concur with the judge that it was immaterial, for although the deed might perhaps not be good to create an agricultural lien under the act, on a crop not planted, yet it was good at common law to create a lien upon a crop then growing, as we must assume the crop conveyed was on 23 June. *Petch v. Tutim,* 40 M. & W., 110; *Lunn v. Thornton,* 1 C. B., 379; (261) Notes to *Ryall v. Vowles,* 2 L. C. Eq., 218-236.

It appeared at the trial that Swain, prior thereto, had paid the plaintiffs all of his debt to them except $375, which with interest from 1 January, 1875, he still owed.

The plaintiffs claimed that the *excess of the sum* ($1,800) *for which defendants sold the* 8,000 *pounds of cotton* over the $900, which Swain owed the defendants, passed to them (the plaintiffs) to the extent of Swain's debt to them, and not merely the excess of *the price to which Swain was to receive* for the cotton ($1,200). The judge was of opinion with the plaintiffs, and gave judgment accordingly, from which the defendants appealed.

This we conceive to be the only question fairly presented upon the facts.

To determine it, we must ascertain what estate in the cotton the defendants acquired by Swain's contract with them on 8 May. Undoubtedly as between them and Swain they acquired an estate in the cotton at the price of 15 cents per pound, as a security for the $900 owing to them, and on payment of the residue of the price their estate in the cotton was absolute. And it would have been so as to all the world if their contract (embracing both writings of the same date) had been registered on the same day. But the mortgage was not registered until 10 October, and it took effect as to creditors and purchasers from Swain only from that day, before which the plaintiffs had acquired their rights and estate.

If we consider both writings of 8 May as forming a single contract, both were void as to the plaintiffs for want of registration, and the plaintiffs' title to the cotton was valid and complete at law, although subject to an equity to pay defendants $900, and to certain equities to Swain which need not be noticed. The defendants, however, contend that the writings of 8 May were two distinct contracts, and that although the mortgage might be void for want of registra- (262) tion, the other writing was an executed contract of sale which required no registration, and passed the property in the cotton to them from its date. If the writing in which the price of the cotton is agreed on was a contract of sale, a question of some interest might arise as

to its effect. But we think this writing is clearly executory. No cotton is particularly described in it, and it might be satisfied by the delivery by Swain of any cotton, wherever raised.

It follows, then, that as the plaintiffs were entitled to the cotton in specie, subject to the equity of the defendants above mentioned, they may waive the tort and claim the value of the cotton in the hands of the defendants to the extent of the debt in excess of the $900, and are not confined to the excess over the price which the defendants were to pay. We consider the case as meaning that the value of the cotton, when it should have been delivered to the plaintiffs, was $1,800.

By force of the registration law, the deed to the defendants must be considered as having been made on 10 October, the day of its registration, and consequently with notice of the deed to plaintiffs which was registered on 1 July. Defendants, as between them and the plaintiffs, are not entitled to retain their $900 by virtue of their deed of 8 May, but by virtue of its appropriation to them in the deed of 23 June.

PER CURIAM. No error.

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(263)

ARCH'D R. MASON, BY HIS NEXT FRIEND, FOSTER MASON, v. RACHEL MCCORMICK, ADMINISTRATRIX, AND OTHERS.

Next Friend—Witness under Code, Sec. 590.

1. The next friend of an infant plaintiff is not a party to the suit. A party must be named as such in the process; and no person is a proper party who has no interest in the subject of the action.
2. One who is next friend, and also surety for the prosecution, has a certain "legal interest which might be affected by the event of the action," being liable for costs if the plaintiff fails to recover; and this interest renders him incompetent to testify as to any transaction or communication with a party deceased.

ACTION for the recovery of land, tried at CUMBERLAND, at Spring Term, 1876, before *Buxton, J.*

The case was decided in this Court upon only one of the exceptions taken by the appellants in the court below, where it was heard fully upon its merits; and the facts pertinent to the point decided here are fully stated in the opinion of the Court.

To the reception of certain evidence by the plaintiff the defendants objected; and upon the evidence being allowed to be introduced by his Honor the defendants excepted and appealed.

Guthrie, Fuller & Ashe and Neill McKay for appellants.
Wright & Ray, contra.

RODMAN, J. This action was brought by the present plaintiff, who was then an infant, but, at the time of the trial, of full age, by his next friend, Foster Mason, who is surety to the prosecution bond, against Duncan McCormick, who was deceased at the time of the trial. The present defendants are his heirs, having been made parties since his death.

Foster Mason was allowed, after objection by defendants, to testify to a conversation between him and the deceased ancestor (264) of the defendants, in which the deceased said: "What did you enter so much land for? There was not as much as you entered, and you won't get as much as you thought you would, though there was some vacant land there."

The defendants insisted that this was incompetent under sec. 343, C. C. P., because:

1. The witness was a party to the action. We think the authorities cited for the plaintiff show that the next friend of an infant plaintiff is not a party. A party must be named as such in the process, and no person is a proper party who has no interest in the subject of the action.

2. He had as next friend and as surety to the prosecution a certain "legal interest which might be affected by the event of the action," because he was liable for costs if the plaintiff failed to recover.

That the witness had such an interest, and that it might be thus affected, must be admitted. At common law he would have been incompetent by reason of such interest. *Buie v. Wooten,* 52 N. C., 441; 1 Greenl. Ev., sec. 402.

The plaintiff, however, contends that the interest to be affected must be one in the subject-matter of the action, as distinct from an interest in the event of it. The words of the section, following those quoted, by speaking of the interest as one which may have "been transferred or come to the party," "nor any assignor of anything in controversy," etc., do imply that the interest spoken of *in those words* is one in the subject of the action. But they do not necessarily contradict or qualify the generality of the preceding words, "that no party to the action, nor any person who has a legal or equitable interest to be affected by the event of the action, nor," etc., "shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased," etc. If the words quoted were intended, as we think they were, to exclude (265) all persons interested, it might still be thought necessary to add the words following in reference to persons who did have an interest in the subject of the action. We construe sec. 343 as having a double object: (1) to admit parties to testify except against deceased persons, etc.; and (2) to make an exception to the generality of sec. 342,

by which exception interested persons were forbidden to testify as to transactions with a deceased, etc. Our construction, however, is founded less on the words of the section than on what seems to be its general object and policy, viz.: to forbid persons whose interest might induce them to speak falsely from testifying as to a transaction, etc., with a deceased person, who might, if living, contradict them. In this view of the policy of the section, it can make no difference whether the interest is in the event of the action or in its subject. The temptation and the danger are the same in both cases.

Nor was the evidence rendered competent by any evidence introduced by defendants of the declarations of the deceased respecting the corners of his land. His statements, testified to by McDuffie, the surveyor, were not received as evidence that the corners were as he claimed, or of any fact in dispute, but only to show his *claims,* and to explain why the surveyor ran such lines. We think the evidence was incompetent, and regret that the expensive litigation about so small a subject must be prolonged by another trial; and especially, as it is probable that the incompetent evidence had but little influence on the verdict. We cannot, however, say it had none.

It may be that on another trial there will be no occasion for the other exceptions of the defendant. As, however, we have a clear opinion on them, it is well enough to say that none of them can be sustained.

(266) The verdict of the jury could be rendered certain by ascertaining the length of the lines bounding the area in respect to which the jury gave damages. It is true that it is always better and more convenient, where it is possible, for the verdict to fix absolutely the amount of damages by finding a certain sum. Because, in case of a difference between the parties on the return of the surveyor's report, it might be necessary to try the issue as to the area by a jury, thus adding to the expense. But there is nothing to forbid the course taken by the judge.

The judge did not err in saying that there was evidence that the poplar in the branch was a corner of the 120-acre grant; and that if the jury found it was a corner, the line would stop there without going on to the Williams line, which was very indefinitely located. *Cansler v. Fite,* 50 N. C., 424, does not apply, because the Williams line was not located by any evidence. *Carson v. Burnett,* 18 N. C., 546; *Dula v. McGhee,* 34 N. C., 332.

We also agree that the call in the 120-acre grant for the Williams line as being at the poplar, did not tend to prove that it was in fact there. *Sasser v. Herring,* 14 N. C., 340.

PER CURIAM. *Venire de novo.*

Cited: *Peebles v. Stanly,* 77 N. C., 244; *Mason v. McCormick,* 80 N. C., 245; *McLeary v. Norment,* 84 N. C., 236; *George v. High,* 85 N. C., 113; *Owens v. Phelps,* 92 N. C., 235; *Bank v. Mfg. Co.,* 96 N. C., 308; *Smith v. Smith,* 108 N. C., 368.

(267)

W. H. & R. S. TUCKER v. THE CITY OF RALEIGH.

Municipal Corporation—Debt for Necessary Expenses—Mandamus—Set-off.

1. Article VII, sec. 7, of the Constitution does not require that a debt, contracted for necessary expenses by a city or town, shall be submitted to a vote of the qualified voters therein.
2. When a body is authorized to contract a debt it is implied that the usual evidence or security must be given: *Hence,* having contracted a debt for necessary expenses, a city can issue a bond as evidence thereof and as security therefor.
3. When a city is sued upon such bond, wherein it is admitted that the consideration thereof was for necessary expenses, in the absence of fraud or collusion, such admission is the best evidence of the fact.
4. The act ratified 16 February, 1875, authorizing the City of Raleigh to fund its present debt, did not require the sanction of a popular vote to make it valid.
5. When a city exercises the powers of taxation to the utmost, and the amount realized is not more than sufficient to pay necessary current expenses, no portion of such taxes can be diverted to the payment of antecedent debts.

APPEAL from *Watts, J.,* at January Term, 1876, of WAKE.

The complaint alleged substantially the following facts: That prior to 11 June, 1872, the defendant contracted various debts to divers persons for necessary expenses incurred in performing its municipal functions, amounting in the aggregate to three hundred dollars, and issued to each of said persons its written order, signed by the mayor and countersigned by the treasurer of the city, requiring said treasurer to pay to the order of such person the amount of money due him by said city, which orders in the aggregate amounted to the sum of three hundred dollars.

That on 11 June, 1872, each and all of said creditors, for a valuable consideration paid to each of them, assigned their claims against the defendant to the plaintiff, and by endorsement thereon transferred the same to the plaintiff. (268)

On 1 July, 1872, plaintiff surrendered to the defendant each and all of said orders, and accepted on account of the debt then due the plaintiff three several bonds signed by the then mayor and counter-

signed by the then treasurer of said city and sealed with the corporate seal thereof, bearing date 1 July, 1872, whereby the defendant promised to pay to the plaintiff, or bearer, three several sums of one hundred dollars one year from the date of each of said bonds; each of which bonds was issued in pursuance of an ordinance of the City of Raleigh to pay the necessary expenses thereof.

After 1 July, 1873, and before the institution of this action, the plaintiff presented each and all of the bonds aforesaid to the treasurer of said city, and demanded payment thereof; but payment of the same, or any part of the same, and of every part thereof, and no part of any one of the said bonds, except the interest thereon, which was eight per centum per annum, up to 1 July, 1873, has been paid to the plaintiff.

That by an act of the General Assembly, ratified 16 February, 1875, it was provided: "That the board of aldermen may, in its discretion, abolish the office of the commissioners of the sinking fund, and make suitable provision for the payment and management of the city debt. That the board shall fund the present debt of the city by issuing bonds payable in twenty and thirty years at six per centum interest, with coupons payable semianually, receivable for taxes or other indebtedness to the city. And the board shall contract no debt of any kind, unless the money is in the treasury for its payment, except for the necessary expenses of the city government, until the taxes for the payment thereof can be collected.

The plaintiff's demand for three hundred dollars, with in-
(269) terest thereon at the rate of eight per centum per annum from 1 July, 1873, until paid, constitutes a part of what is called in said act "the present debt of the city."

Before instituting this action, and after the ratification of said act, the plaintiff demanded of the defendant that it should fund the said claim, or otherwise make provision for its payment, or pay the same, with which demand the defendant refused to comply; but on the contrary the question of funding the debt aforesaid, as well as other like debts, has been submitted to the qualified voters of the city at an election regularly and lawfully held for deciding said question, and a majority of the qualified voters thereof had voted not to fund said debts.

The plaintiff demands judgment:

1. For three hundred dollars and interest thereon, etc.

2. For a *mandamus* commanding the defendant that unless it show good cause to the contrary when called by the court, it pay, or cause to be paid by the officers of the city, the said judgment with interest thereon from the date of its rendition until paid, and that upon its failure to show such cause, it be absolutely and peremptorily commanded by the court to pay as aforesaid.

3. For costs, etc.

The answer of the defendant alleges substantially the following facts:

That the defendant is not informed by the complaint what was the specific consideration of the orders therein mentioned, and therefore denies that the same were issued for the necessary expenses of the city.

That the Constitution, Art. VII, sec. 7, that no city shall contract a debt, etc., unless by a vote of the qualified voters therein, and that by said section the city was prohibited from issuing said bonds and the same are void.

By the charter of the defendant it is restricted to the limitation of taxation therein specified, and from all the sources of revenue given to the defendant in said charter, it is barely able to pay (270) the necessary current expenses of the city, and if the defendant is compelled to pay the debt attempted to be contracted by former boards, the city will not have sufficient revenue to carry on its government. The plaintiff had full knowledge of these limitations at the time said debt was contracted.

The taxes levied for the current year were levied solely to pay the current expenses of the city, and not to pay the debts contracted by former boards; and that all of the taxes which could be levied under the charter were levied, and the total amount is necessary to carry on the government of the city.

The act of the General Assembly requiring the defendant to fund the debt of the city required the approval of the qualified voters of the city, under the Constitution, and a majority thereof voted not to fund said debts; but if the court shall decide that the bonds mentioned in the complaint are valid and a part of "the present debt," and the act does not require the approval of the popular vote, then the defendant will issue the refunding bond demanded.

The prayer for judgment is not warranted by the complaint.

The plaintiff demurred to the answer, "for insufficiency in not stating facts sufficient to constitute a defense to the case made by the complaint, and the relief demanded therein."

Upon the hearing, his Honor sustained the demurrer, and rendered judgment as prayed for in the complaint. The defendant appealed.

Busbee & Busbee for appellant.
Haywood, Fowle and Snow, contra.

READE, J. 1. Can the city of Raleigh contract a debt for *necessary expenses,* without a vote of a majority of the qualified (271) voters therein?

Answer: Yes. Art. VII, sec. 7 of the State Constitution; *Wilson v. Charlotte,* 74 N. C., 748, and the cases there cited.

2. Was the debt contracted in this case for *necessary expenses?*

Answer: Yes. It is true that the complaint does not set out in *detail* what the debts were for; but generally that they were for the ordinary city purposes, as work on streets, wells, cemeteries, etc., and to pay the police. And the complaint offers for excuse for not stating, in detail, that he had given up the original orders to the defendant, and taken in their stead the bond sued on. The answer denies, for the purposes of this suit, that the debts were for necessaries, but admits the bond. The bond expressly states that the debts were for necessaries. In the absence of fraud or collusion, the admission of the defendant must be the best evidence. *Mitchell v. Township,* 71 N. C., 400.

3. Having contracted a debt for necessaries, can the city issue a bond as evidence thereof and as security therefor?

Answer: Yes. City ordinance, 1862. And, furthermore, the general rule is, that when a body is authorized to contract a debt, it is implied that the usual evidence or security may be given.

4. Is the debt sued on a part of the "present debt of the city?"

Answer: Yes. Self-evident.

5. Does the Funding Act of 1875 require the sanction of the popular vote?

Answer: No. The act does not require it in terms, and the debt being for necessaries, as already said, the Constitution, Art. VII, sec. 7, does not require the popular vote. *Wilson v. Charlotte, supra.*

6. If the city exercise its powers of taxation to the uttermost, and the amount realized is not more than sufficient to pay current expenses, can any portion of it be diverted to the payment of antecedent debts?

(272) Answer: No. Because that would be to destroy the city. In such case the creditor would have to wait until a surplus should accrue, just as any other creditor has to wait upon an impecunious debtor. And every creditor is presumed to know the extent of the power to tax and the means to pay on the part of the city at the time of the contract. This may make it necessary for the city, at the time of levying the taxes, to determine what part, if any, may be paid in coupons, etc., where such are outstanding receivable in taxes.

7. An alternative, and not a peremptory mandamus is the proper judgment, because the city may have good cause to show why it cannot pay now, and to explain when and how it can pay.

PER CURIAM. Affirmed.

Cited: Fowle v. Raleigh, post, 273; *Gas Co. v. Raleigh, post,* 274; *Young v. Henderson,* 76 N. C., 422; *McCless v. Meekins,* 117 N. C., 38; *Mayo v. Comrs.,* 122 N. C., 8, 17; *Smathers v. Comrs.,* 125 N. C., 487; *Edgerton v. Water Co.,* 126 N. C., 97; *Greensboro v. Scott,* 138 N. C., 184; *Wharton v. Greensboro,* 146 N. C., 360; *Charlotte v. Trust Co.,* 159 N. C., 390.

W. H. & R. S. TUCKER v. THE CITY OF RALEIGH.

Mandamus.

(For the syllabus, see case between the two parties, *ante*, page 267.)

APPEAL from *Watts, J.*, at January Term, 1876, of WAKE.

The facts are substantially the same as in the preceding case between the same parties.

There was judgment in favor of the plaintiff according to the prayer of the complaint, and the defendant appealed.

Busbee & Busbee for appellant. (273)
Haywood, Fowle and Snow, contra.

READE, J. An alternative, and not a peremptory mandamus is the proper judgment. See opinion filed in a case between same parties at this term. No error.

PER CURIAM. Judgment accordingly.

Cited: *Gas Co. v. Raleigh, post,* 274; *Fry v. Comrs.,* 82 N. C., 306.

[1.]

DANIEL G. FOWLE v. THE CITY OF RALEIGH.

[2.]

DANIEL G. FOWLE v. THE CITY OF RALEIGH.

Contract.

In the absence of fraud or collusion, the price agreed upon by the parties to a contract must be presumed to be fair.

(For other points decided, see *Tucker v. Raleigh, ante,* 267.)

APPEAL from *Watts, J.*, at January Term, 1876, of WAKE.

The points raised by this case were decided in *Tucker v. Raleigh, ante,* 267.

There was judgment in favor of the plaintiff, and the defendant appealed.

Busbee & Busbee for appellant.
Haywood, Fowle, and Snow, contra.

(274) READE, J. All the points in this case are covered by *Tucker v. Raleigh, ante,* 267, except that in this case the defendant denies that the price of the services rendered was reasonable.

In the absence of fraud or collusion, the price agreed on by the parties must be taken to be fair.

PER CURIAM. Affirmed.

THE RALEIGH GAS LIGHT CO. v. THE CITY OF RALEIGH.

Municipal Corporation—Mandamus.

The proper judgment in an action against a city or town, upon a recovery for necessary expenses, is an *alternative*, and not a *peremptory, mandamus.*

(The other points decided are the same as those in *Tucker v. Raleigh, ante,* 267.)

APPEAL from *Watts, J.,* at January Term, 1876, of WAKE.

The same points were involved in *Tucker v. Raleigh, ante,* 267.

There was judgment in favor of the plaintiff according to the prayer of the complaint, and the defendant appealed.

Busbee & Busbee for appellant.
Haywood, Fowle, and Snow, contra.

READE, J. The only point in this case is covered by *Tucker v. Raleigh,* at this term. It is there decided that the Funding Act of February, 1875, did not require the sanction of the popular vote.

We think, however, that the judgment ought to have been an *alternative mandamus,* as the city may show cause, as that it prefers to pay the debt rather than fund, etc.

PER CURIAM. Judgment accordingly.

Cited: Mayo v. Comrs., 122 N. C., 22; *Wadsworth v. Concord,* 133 N. C., 593; *Water Co. v. Trustees,* 151 N. C., 175.

(275)

STATE v. GEORGE DIXON.

Manslaughter—Judge's Charge.

1. A judge is not justified in expressing to the jury his opinion that the defendant is guilty or not guilty upon the evidence adduced.
2. One may oppose another attempting the perpetration of a felony, if need be, to the taking of a felon's life; as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is under no obligation to fly.
3. But if the assault is without any felonious intent, the person assaulted may not stand his ground and kill his adversary, if there be any way of escape open to him, though he is allowed to repel force by force and give blow for blow. The character of such assault, with its attending circumstances, should be submitted to the jury, with instructions as to the legal effect of their finding upon it.

INDICTMENT for manslaughter, tried before *Moore, J.*, at January Term, 1876, of EDGECOMBE.

The facts necessary to an understanding of the case as decided are fully set out in the opinion of the Court.

There was a verdict of guilty and judgment thereupon. The prisoner appealed.

Attorney-General Hargrove for the State.
Howard & Perry and Philips for the prisoner.

BYNUM, J. The prisoner is indicted for manslaughter. The testimony of several witnesses was introduced in his behalf, and at the conclusion of the evidence the court asked the counsel for the prisoner what they had to say. The counsel replied: "We shall take the ground that it was in self-defense." His Honor: "It is manslaughter in any phase, with many elements of murder. I shall tell the jury to return a verdict of manslaughter." And he so directed, and the verdict was so entered.

Rev. Code, chap. 31, sec. 130, provides that "no judge, in delivering a charge to the petit jury, shall give an opinion, whether a (276) fact is fully or sufficiently proved, such matter being the true office and province of the jury." This statute is but in affirmance of the Constitution, Art. I, secs. 13-17, and the well-settled principles of the common law, as set forth in *Magna Carta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. Experience has demonstrated that few juries are found firm enough to

render a verdict in opposition to the declared opinion of the judge upon the bench, whose abilities, learning and high position give his opinion the force of a command upon a body timid from inexperience and misdirected by the authority constituted for their instruction and guidance, both as to their rights and their duties. And seldom would a lawyer argue his case to the jury when he knew that the judge had already declared against him and preoccupied the minds of the jury adversely to his cause. Cooley Const. Lim., 320, and notes; *S. v. Harris,* 46 N. C., 190. If, in the case before us, the evidence had made a clear case of guilt against the prisoner, still its credibility was for the jury, and it should have been so submitted to them by the court, for they must say whether they believe or disbelieve it.

But assuming that his Honor meant to charge the jury, and they understood him to charge, that if they believed the testimony, the prisoner was guilty, and they should so find, did the evidence warrant such an instruction? Certainly not, if the testimony was fairly sus-
(277) ceptible of any construction consistent with the prisoner's innocence. How is that? The witness Sherrod, for the prisoner, testified that on Sunday the deceased and a large number of other persons were in the store, which was also the dwelling-house of the prisoner; that the prisoner said, "all get out of here, I want to go to the baptizing"; that he repeated the order to get out several times; that the crowd moved slowly. When near the door the prisoner "shoved" the deceased, who, it appears, was one of the hindmost. The deceased asked "what he shoved him for?" and the prisoner replied, "I must protect my house"; that when the deceased got out he pulled off his coat, got a club, admitted to be a deadly weapon, and advanced towards the door where the prisoner was; that the prisoner told him to go away, presenting a pistol; that the deceased cried out, "Shoot! I don't value your pistol"; that the deceased had his stick drawn back and was advancing to the door and was in one or two feet of it, and the prisoner about three feet inside of the door, when the pistol was fired by him.

C. Neal, a witness for the State, presents another version. He does not appear to have seen any "shove," but testified that when the crowd got out the deceased pulled off his coat, got the club and started for the door; that the prisoner asked him, "Are you mad?" and the deceased replied, "I am"; prisoner, "You can't help yourself"; deceased, "I will smash every bone in your body"; that the deceased was then advancing to the door; that the witness caught the prisoner by the arm, and being swung around by him the hat of the witness fell off, and while he stooped to pick it up the pistol was fired.

Mayo, a witness for the prisoner, does not appear to have seen any "shove," but heard the prisoner tell the crowd seven or eight times to

go out; that when out, the deceased pulled off his coat and started for a stick; that Daniel Broadnax broke a leg out of a bench (witness describing it) and pitched it to him, saying, "Isn't he a brave (278) boy"; that this made him worse; that Broadnax himself took another leg of the bench, and Bob White had a stick, but none of them did anything except the deceased; that prisoner told the deceased if he did not go away he would shoot him; that the deceased advanced, and the prisoner shot him.

The innocence of the prisoner depends upon whether, from the whole testimony or from that of any witness, he himself at the time of killing was without fault, and then had a reasonable ground to believe the attempt of the deceased was with the design of taking his life. *S. v. Harris,* 46 N. C., 190. It is not denied that the advance of the deceased with the drawn club was an assault. Was the assault made with a felonious intent, or did the prisoner have reasonable ground to believe it was? The reasonableness of his apprehensions was not a question to be decided by the prisoner or the court, but by the jury, to whom it was not submitted. Assuming that there was evidence from which the jury could infer that the prisoner had reasonable apprehension of the felonious intent, the remaining question is, Was the prisoner himself without fault? That depends upon several considerations. Did the prisoner use more force than was necessary to remove the deceased from his house? He had ordered the crowd out as many as seven or eight times, and they "moved slowly." Was this from sullenness and on purpose? If so, the prisoner had the right to use the necessary means of enforcing compliance with his orders. Was the deceased "shoved" at all? The witnesses do not agree as to that. But if he was, what was the character of the shove? Was it in a rude, angry or insulting manner, so as to constitute it an assault or battery and put the prisoner in fault? These were questions for the jury, with instructions as to the law, in case they found the facts to have been the one way or the other.

If the evidence thus considered established that the prisoner was not in fault, and that the attempt of the deceased was with felonious intent, the authorities establish that it is a case of justifiable self-defense.

The general rule is, "that one may oppose another attempting (279) the perpetration of a felony, if need be, to the taking of the felon's life; as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is justified." 2 Bish. Cr. Law, sec. 632. A distinction which seems reasonable and is supported by authority is taken between assaults with felonious intent and assaults without felonious intent. In the latter the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force and

give blow for blow. In this class of cases, where there is no deadly purpose, the doctrine of the books applies, that one cannot justify the killing of the other, though apparently in self-defense, unless he first "retreat to the wall."

In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground and kill his adversary, if need be. 2 Bish. Cr. L., sec. 6333, and cases there cited. And so Mr. East states the law to be. "A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends or endeavors, by *violence or surprise,* to commit a known felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense." 1 East P. C., 271; 2 Bish. Cr. L., sec. 633. The American doctrine is to the same effect. "If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he
(280) kill the assailant, the killing is justifiable." 2 Bish. Cr. L., sec. 644, and cases referred to in the notes; *S. v. Roane,* 13 N. C., 58; *S. v. Scott,* 26 N. C., 409. The attempt to commit a felony upon the person may be resisted to the death, without flying or avoiding the combat. *Ibid.,* sec. 652. There was some evidence tending to show justifiable self-defense on the part of the prisoner, and it should have been submitted to the consideration of the jury, with instructions as to the legal effect of their finding upon it.

The prisoner offered to prove, as part of the *res gestæ,* that immediately after firing the pistol, he exclaimed to the witness, "Now help me!" and also that the "crowd" at the same time "made a rush at the door."

We have before seen that if the attack upon the prisoner was felonious, and he blameless of provoking it, he had the right to stand his ground and slay his antagonist. In that point of view the excluded testimony becomes wholly immaterial, and need not be considered. If, however, the attack was made without a felonious intent, or if the prisoner engaged in the fight willingly, he is not excused, unless he was sorely pressed—put to the wall—so that he must be killed or suffer great bodily harm unless he kill his adversary and under such circumstances did kill. In this point of view the excluded testimony, if admissible as part of the *res gestæ,* might become material as tending to show that the prisoner was or was not driven to the wall, as the jury might consider it. As it was not denied in the argument that the assault of the deceased upon the prisoner with the club was felonious, and as a new trial must be granted because of the error in his Honor's direction to the jury, it

is unnecessary now to decide these questions of evidence, and they may not arise on the next trial. We express no opinion upon them.

The whole matter may be thus summed up: Did the prisoner and the deceased, upon a sudden quarrel, engage in the combat willingly, the one armed with a pistol and the other with a deadly club? If so, it is a case of manslaughter. Or did the deceased make a felo- (281) nious assault upon the prisoner, who was in no default at the time? If so, it is a case of justifiable self-defense. *S. v. Floyd,* 51 N. C., 392; *S. v. Roane,* 13 N. C., 58; *S. v. Massage,* 65 N. C., 480; *S. v. Yancey,* 74 N. C., 244. There is no error.

PER CURIAM. *Venire de novo.*

Cited: S. v. Turpin, 77 N. C., 480; *S. v. Dancy,* 78 N. C., 438; *S. v. Kennedy,* 91 N. C., 577; *S. v. Riley,* 113 N. C., 649; *S. v. Harris,* 119 N. C., 862; *Gold Brick Case,* 129 N. C., 675; *S. v. Clark,* 134 N. C., 704; *S. v. Hough,* 138 N. C., 667; *S. v. Blevins, ib.,* 670; *S. v. Hill,* 141 N. C., 772; *S. v. Lilliston, ib.,* 870; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Stevens,* 153 N. C., 605; *S. v. Rowe,* 155 N. C., 447; *Park v. Exum,* 156 N. C., 231; *S. v. Dove, ib.,* 657; *S. v. Blackwell,* 162 N. C., 683; *S. v. Lucas,* 164 N. C., 473, 474; *S. v. Robertson,* 166 N. C., 365; *S. v. Johnson, ib.,* 401; *S. v. Ray, ib.,* 431; *S. v. Pollard,* 168 N. C., 121 *S. v. Hand,* 170 N. C., 705.

Dist.: S. v. Vines, 93 N. C., 498; *S. v. Gentry,* 125 N. C., 736, 737, 740.

STATE v. EDWARD P. POWERS.

Registrar of Voters—Officer.

1. The registrar of voters provided for in the private act ratified 21 December, 1870, relating to the registration of voters in the municipal elections of the town of Fayetteville, is a judge to determine, decide and adjudge who is entitled to register up to the day of election; and in the exercise of his judgment or discretion, in a matter pertaining to his office, he is not liable *criminally* for any error he may commit.
2. Any officer, judicial or ministerial, who acts corruptly, is responsible both civilly and criminally, whether he acts under the law or without the law.

MISDEMEANOR, tried at Spring Term, 1876, of CUMBERLAND, before *Buxton, J.,* and a jury.

Upon the trial in the court below the jury returned the following *special verdict,* to wit:

1. They find that the defendant was, on the said 24 April, 1876, appointed, qualified and acting as registrar of voters for a municipal

election to be held in the town of Fayetteville on the first Monday in May, 1876, for a mayor and seven commissioners.

2. That on said 24 April, 1876, the prosecutor made application to the defendant to be registered as a voter at said election; and said application was refused for the reason that although otherwise qualified, he, the prosecutor, had not paid to the mayor and commissioners of said town of Fayetteville the taxes which had been charged against him.

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3. That said taxes, which had been legally and duly charged against him, the said prosecutor, had not been paid.

4. That said refusal by the defendant to register the prosecutor as a voter for said election was simply because the charter of said town, under which the defendant was acting, required the payment of all taxes due to said town as a qualification for voters; and that the qualifications, as laid down in ch. 5, Private Laws 1870-'71, ratified 21 December, 1870, were required of all applicants for registration; and there was no malicious or improper motive on the part of the defendant to prevent the prosecutor from voting at said election.

5. That the said defendant, under the election law of the town of Fayetteville, was required, and actually did take, an oath to perform the duties of his said office or appointment of registrar of voters aforesaid.

That there was an act changing the time of said election from the first Monday of January to the first Monday in May in each and every year.

Whether upon the foregoing state of facts the defendant is guilty the jury are unable to say, and refer it to the court. If the court shall be of opinion, as matter of law, upon the foregoing facts, that the defendant is guilty, then the verdict of the jury is that the defendant is guilty. But if the court shall be of opinion that the defendant is not guilty, then the verdict of the jury is that the defendant is not guilty.

Upon the special verdict, his Honor, being of opinion that upon the facts found the defendant was not guilty, directed a verdict of not guilty to be entered. From this judgment the solicitor appealed.

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Attorney-General Hargrove, with whom were Guthrie and Battle & Son for the State.

N. W. Ray for defendant.

READE, J. Any officer in the State who is required, in entering upon his office, to take an oath of office, who shall willfully omit, neglect or refuse to discharge any of the duties of his office, shall be deemed guilty of a misdemeanor. Bat. Rev., ch. 32, sec. 107.

It may be that "officer in the State" may mean State officers, as distinguished from town officers or other officers; but it is not necessary to decide it in this case, because, taking the defendant to be within the statute, still we think he is not guilty.

The act of 21 December, 1870, under which the defendant was acting as registrar, provides: "That the right of any person to register shall be subject to challenge, and that the registrar shall determine whether the person challenged is a duly qualified voter at any time prior to the day of election, and that all challenges made on the day of election shall be determined by the judges of the election." Now, this makes the defendant registrar a *judge*. He is to "determine," decide, adjudge who is entitled to register up to the day of election, and then, on that day, the "judges of the election" pass upon the challenges. He was just as much a judge to pass upon challenges before the day of election as the judges of election were upon that day. Indeed, he was just as much a judge as to the matter he had in hand as the members of this court are judges in the matters before us.

Now, it is so well settled that there is nothing to the contrary (284) that an officer who has to exercise his judgment or discretion is not liable *criminally* for any error which he commits, provided he acts honestly.

The statute under which the defendant was acting forbids him to register any one who has not paid his taxes. It is, therefore, only by declaring that statute unconstitutional that he can be declared to have erred at all; but it is not usual and can scarcely be safe for inferior officers to declare solemn acts of the Legislature unconstitutional until the higher courts have so declared them. Certainly nothing is to be inferred against such officer for assuming that a statute is valid. And, in our case, the jury finds that the defendant acted from "no malicious or improper motive."

It may be that a *ministerial* officer must often act at his peril and be responsible, at least, although he act under a statute, if it be void. And any officer, judicial or ministerial, who acts corruptly is responsible, both civilly and criminally, whether he acts under the law or without law.

Here the defendant was a judicial officer, and honestly determined the law, as he understood it, and indeed as it was plainly written, and, therefore, although he committed an error, he is not criminally liable.

PER CURIAM. No error.

Cited: *S. v. Heaton,* 77 N. C., 508; *Staton v. Wimberly,* 122 N. C., 110; *S. v. Cole,* 156 N. C., 623.

(285)

MARY COWDRY v. THOMAS CHESHIRE.

Ejectment—Trustee—Parties.

In an action by a *cestui que trust* for the recovery of land devised to a trustee for her sole use and benefit during her natural life, and then over to the heirs of her body, and which land had beeen sold by said trustee, under a petition in equity, without said *cestui que trust's* knowledge or consent: *It was held,* that the trustee was a necessary party to the action, and the case was remanded in order to make him one.

ACTION, tried before *Furches, J.,* and a jury, at Spring Term, 1876, of IREDELL, to recover possession of a tract of land.

The following issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to the immediate possession of the land in possession of the defendant?

2. What damages is the plaintiff entitled to recover for the use and occupation?

The plaintiff claimed the land under the following clause of the will of John McLelland, who died in 1850:

"Item 5. I give and bequeath to my neighbor and friend, Dr. R. H. Parks, 225 acres of land, lying on the waters of Dutchman's Creek, being a part of the plantation on which I formerly resided, including the dwelling and outhouses, *in trust and confidence, nevertheless,* for the sole use and benefit of Mary Cowdry, wife of Thomas Cowdry, and the heirs of her body, during her natural life, and at her death to the heirs of her body, to their own use, them and their heirs, in *fee simple* forever."

The plaintiff further proved by her own deposition that her husband, Thomas Cowdry, died in the State of Georgia, in June, 1858. She also testified that she never authorized the trustee, Dr. R. H. Parks, to file a petition in equity for the sale of the said land, and never assented thereto, or to the sale, or approved the same. Plaintiff also proved by Dr. Parks, the trustee, that the petition was filed and the sale made without consulting the plaintiff, and as far as he recollected, without her knowledge or consent, she being at the time, and is now, a (286) nonresident. The plaintiff has children who are still living.

The defendant offered as evidence the petition of R. H. Parks, trustee of Mary Cowdry, and the heirs of her body, for the sale of said land, filed in the court of equity, at Fall Term, 1858; also a decree to sell, report of sale, and an order of confirmation. He also proved the payment of the purchase money for the land by Holmes to R. H. Parks, trustee, through the clerk and master. Also an order to make title, and the deed from the clerk and master to Nathaniel Holmes. Defendant

also proved that said land was divided by said Nathaniel Holmes between the wife of the defendant, who was his daughter, and her brother, a son of said Holmes, who gave to the parties deeds for their respective parts; that since 1861 he has been in possession of 105 acres of the land, claiming the same for his wife.

Both parties offered evidence as to yearly rental value of the land.

For the defendant, it was contended that the action being to recover possession of the land, under plaintiff's title, as a legal estate, could not be maintained, and that on the first issue the plaintiff could not recover.

That Dr. R. H. Parks is a necessary party to any action by the plaintiff; that the trust fund, the land having been converted into money by a court of equity, the money in the hands of the trustee is held by him on the same trust, and the plaintiff must look to him.

The plaintiff contended that upon the death of her husband in 1858 she became immediately vested with the title to the whole estate in fee, legal and equitable, and the estate of the trustee, Parks, ended. That as to her the petition in equity and the subsequent proceedings were nullities, she not having assented thereto, and that she is entitled in this action to recover the land itself.

By consent of counsel his Honor reserved the questions of law (287) arising in the case, and a verdict was entered for the plaintiff.

Afterwards, upon consideration, being of opinion with defendant, the verdict was set aside and a judgment of nonsuit entered. From this judgment the plaintiff appealed.

Armfield & Folk for appellant.
Scott & Caldwell, contra.

READE, J. PER CURIAM. Case remanded to make Dr. Parks a party defendant and the children of Mrs. Cowdry parties plaintiff.

CHARLES SKINNER v. J. Y. BRYCE AND OTHERS.

Continuance—Excusable Neglect.

The illness of the family of one of the defendants in an action, so that he cannot be present at the trial of the cause, is a circumstance which may properly be addressed to the discretion of the court upon a motion to continue the cause. But where such defendant is represented by counsel, who has knowledge of the fact, and does not ask for a continuance, but enters into a trial by consent upon the plaintiff's agreeing to permit certain letters to be read in evidence, and in

pursuance of the agreement the letters are read, the facts do not present a case of "surprise, mistake," etc., contemplated by the statute, and the judgment will not be vacated.

MOTION in the cause, heard before *Eure, J.*, at Spring Term, 1875, of PERQUIMANS.

The defendants moved to set aside a judgment theretofore rendered against them. The defendants resided in the city of Charlotte, and the plaintiff resided in Perquimans County. When the action commenced, but before the trial of the cause, he had removed to Hertford County, where he now resides.

(288) The case was called for trial at Spring Term, 1875, when counsel for the defendants stated that he had information that the family of the defendant Gregory, who was the managing partner, were sick, and that he did not expect him at that court, but did not move for a continuance. By agreement of counsel, the case was put at the end of the docket, the plaintiff's counsel consenting to the reading of certain letters upon the trial, because of the absence of the defendants. The case was tried, and the plaintiff had a verdict and judgment.

After the adjournment of the court, the defendants' counsel received affidavits showing the illness of the family of the defendant Gregory, at the time of the trial, which he forwarded to his Honor, at home, and asked him to consider at chambers, as upon a motion to set aside the judgment and verdict. His Honor refused to do so, but agreed to hear evidence upon both sides at the next term of the court.

Gilliam & Pruden for plaintiff.
Fleming and Gray & Stamps for defendants.

READE, J. The sickness of the family of one of the defendants at the time of the trial, so that he could not attend, was a circumstance which might have been addressed to the *discretion* of his Honor upon a motion to continue. But the defendants' counsel was present, knew of the sickness, did not ask for a continuance, but went into the trial by consent, upon the plaintiff's agreeing to permit to be read in evidence certain letters which he had, and which were in fact read.

When judgment has been rendered against a party by reason of his "surprise, mistake, inadvertence, or excusable neglect," the statute allows the court to vacate it at any time within a year. But this motion (289) was not supported by any of these considerations. It was a trial by consent. And we agree with his Honor that there is no ground for vacating.

PER CURIAM. Affirmed.

S. H. McRAE v. N. M. LAWRENCE, ADMINISTRATOR.

Judge's Charge—Right to Open and Conclude.

1. In passing upon the credibility of a witness, even where no corruption is imputed, the jury must consider the intelligence of the witness, his means of knowledge, his interest, etc.: *Therefore*, it is error in the court, upon the trial of the cause, where there is conflicting evidence, to charge the jury that "both the witnesses are gentlemen, and it is purely a matter of memory."
2. Where but one issue is submitted to the jury, and the affirmative is upon the defendant, or where the affirmative of all the issues is upon the the defendant, he has the right to open and conclude the argument.

NOTE.—See Superior Court Rules No. 6, (128 N. C., 656).

APPEAL from *Moore, J.*, at Spring Term, 1876, of PITT.

The action was brought to recover upon certain promissory notes. The record sets out the evidence in the cause, but it is not necessary to an understanding of the case, as decided, that the same should be stated.

The following issue was submitted to the jury: "Have the notes sued on been paid?"

Counsel for the defendant insisted that as the defendant had to maintain the affirmative of this issue he was entitled to open and close the argument. The court ruled otherwise, and the defendant excepted.

His Honor charged the jury: "That both the witnesses were gentlemen, and that it was a pure matter of memory. That it was the duty of the defendant to make out the fact of payment."

There was a verdict and judgment in favor of the plaintiff, and (290) the defendant appealed.

Howard & Perry for the appellant.
Phillips, contra.

READE, J. 1. In a popular government, where the people found their own institutions, elect their own officers, make their own laws, and assist in their execution, probably the quality in an officer next highest to those of capacity and integrity, is good manners, so to behave as to make himself respected and the government popular. The bearing of a judge on the bench over the crowd, towards witnesses and parties and officers, ought to be such as to impress all with the feeling that the courthouse has a high and refining atmosphere, that it is not a slaughterhouse of rights or reputations, but a place where these are declared and secured, and where there is such courteous behavior observed and enforced that all are the better for its influence.

It was no doubt in that spirit that his Honor gave the charge complained of: "Both the witnesses are gentlemen, and it is purely a matter of memory."

Precisely what his Honor meant by "gentlemen" we do not know, nor is it necessary that we should. He certainly meant to tell the jury that both the witnesses, in so far as the jury need consider them, were just the same except in the particular of their memories. Now, how would his Honor know that fact? In passing upon the credibility of a witness, even where no corruption is imputed, the jury must look to the intelligence of the witness, his means of knowledge, his relation to the parties, which may insensibly bias, as also may his interest in the question. Were these two witnesses the same in all these particulars? If they were, it was for the jury to find it out, and not for his Honor. He could not tell the jury that the witnesses were of the same intelligence,
(291) had the same means of knowing the facts, had the same interest in the question, and the same relations with the parties.

Again, one of two witnesses, where they differ, may be corrupt. And the party against whom his evidence is may so insist before the jury. And his Honor cannot tell the jury that he is not corrupt, but that he is a "gentleman." His Honor would have kept within the rule if he had told the jury that to find against the testimony of either of the witnesses did not necessarily impute corruption, as the memory might be at fault.

2. The general rule of practice is now, as it has always been, that when the defendant introduces evidence, the plaintiff is entitled to begin and to conclude the argument. And the rule has no exception in actions for unliquidated damages, or for libel, slander and injuries to the person. And so where there is any affirmative issue upon the plaintiff, although there may be many affirmative issues upon the defendant. But where there is but *one* issue and the affirmative is upon the defendant, or where the affirmative of all the issues is upon him, then he has the right to begin.

A useful test, stated by Mr. Archbold, is: "Suppose no evidence at all is given, who would be entitled to the verdict? If the defendant, the plaintiff must begin; if the plaintiff, the defendant must begin."

As authority for what we have said, see Archbold's Nisi Prius, Introduction, p. 4; 1 Chitty's Practice, 872. There is error.

PER CURIAM. *Venire de novo.*

Cited: Churchill v. Lee, 77 N. C., 344; *Hudson v. Weatherington,* 79 N. C., 4; *Mayo v. Jones,* 78 N. C., 406; *Roberts v. Roberts,* 82 N. C., 32; *Syme v. Broughton,* 85 N. C., 370; *Gold Brick Case,* 129 N. C., 673; *S. v. Ownby,* 146 N. C., 678.

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WILLIAM J. MILLS AND WIFE AND OTHERS v. THE SALISBURY BUILDING AND LOAN ASSOCIATION.

Building and Loan Association—Usury.

There is no device or cover by which "Building and Loan Associations" can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower "a partner," or substituting "redeeming" for lending, or "premium" for bonus, for an amount they profess to have advanced and yet withhold, or "dues" for interest, or any like subterfuge, will not avail. The court looks at the substance.

APPEAL from *Cloud, J.*, at chambers, in FORSYTH, 24 May, 1876.

The summons was issued on 12 May, 1876, returnable to ROWAN. On that day the plaintiff filed an affidavit substantially as follows:

1. That the defendant is a corporate body duly created under an act of the General Assembly of North Carolina.

2. The plaintiff W. J. Mills took three shares of stock in said corporation of the nominal value of $600, and by the terms of said contract said plaintiff was paid in cash the sum of $300, and in the time of eight months he was required to pay the sum of $69.69, by way of interest and fines. Said shares of stock were taken on 1 June, 1874, when said advancement was made, and that by reason of this exorbitant interest, it greatly exceeded 8 per cent, and is more than 20 per cent upon said shares of stock. Apart from the fines and dues imposed plaintiff was charged $48 as interest for eight months, commencing 7 September, 1875, and ending in April, 1876, whereas the rate of interest is 16 per cent or thereabout.

3. On the.....day of....., 1874, the plaintiffs executed to (293) the defendant a mortgage upon a lot situated in the town of Salisbury to secure the payment of the sum of $300 advanced as aforesaid. The defendant has advertised said lot to be sold on the 15th inst. to pay off and satisfy said mortgage, and plaintiffs say that said sale will take place unless defendant is restrained therefrom by an order of this court.

4. That the plaintiffs are advised and believe that the demand of the defendant is based upon a grossly usurious contract.

Upon motion based upon the foregoing affidavit, and without notice, his Honor directed an order to be issued restraining the defendant from selling the said land until the further order of the court.

The cause was heard before his Honor on 24 May, 1876, upon a motion by the defendant to dissolve the restraining order theretofore granted. The following facts were admitted:

The defendant is a corporation duly created and organized on 2 March, 1874, under an act of the General Assembly authorizing the in-

corporation of "Homestead and Building Associations in this State," ratified 25 March, 1872. The plaintiff, W. J. Mills, joined said association at its organization, and at that time subscribed for and became the owner of five shares of the stock thereof, of the ultimate par value of $200 per share, by agreeing to pay $1 per month on each share until the dissolution of said corporation; but according to the by-laws, said plaintiff, in November, 1874, withdrew two of said shares and received the cash value thereof from the defendant. Said plaintiff is now and has always been a member and stockholder of said corporation, and is entitled to all the privileges of such member, and to a full participation in the profits of the association.

On the first Monday in June, 1874, the plaintiff attended the regular monthly meeting of the stockholders, when three shares of the stock of the corporation of the ultimate par value of $600 were offered for (294) redemption, and put up at auction to the highest bidder among the members of the corporation. None but members were allowed to bid. The plaintiff bid the sum of $221 as a premium or bonus for the privilege of having an advance of $600 made by the corporation to him, on account of the redemption of his stock, and the defendant did advance said sum of $600, the ultimate par value of said three shares, and the amount which the plaintiff would ultimately have been entitled to receive from said corporation at the maturity of said shares. In consideration of these facts the plaintiff, as he had agreed to do, paid to the defendant said premium of $221 and executed to the defendant a mortgage, signed by all of the plaintiffs, upon the real estate aforesaid for the purpose of securing the payment of the unpaid installments, thereafter to be paid, at the rate of $1 per share upon each of said shares so redeemed, together with interest at the rate of 6 *per centum per annum,* upon the sum of $600, payable monthly, and also to secure the payment of such fines and penalties for the nonpayment of said dues and interest as should at any time be prescribed by the articles of association of said corporation. The plaintiff promptly paid the regular installments and interest up to and including the first Monday night in August, 1875, the same being $3 per month for dues and $3 per month for interest. Since that time the plaintiff has failed to pay either the interest or dues upon said shares of stock. For the eight months ending 4 April, 1876, the plaintiff is charged on the books of the defendant as follows:

To monthly dues on three shares of stock	$24.00
To interest on advancement	24.00
To fines for nonpayment of fines and interest	21.60
	$69.60

At that time his account with the defendant stood thus: (295)

DR.

To advancement on account of the redemption of three shares of stock	$600.00
To monthly dues in arrears	24.00
To interest	24.00
To fines for the nonpayment of dues and interest	21.60
	$669.60

CR.

By premium to be returned	$177.00	
By the withdrawing value of three shares, to be returned.	86.88	
		$263.88
		$405.72

Upon the hearing his Honor, being of the opinion that the affidavits disclosed an usurious contract, refused the motion and continued the injunction until the hearing. From this ruling the defendant appealed.

J. S. Henderson for appellant.
J. M. McCorkle, Shipp & Bailey, contra.

READE, J. We have the following statute, headed "Building Associations":

"Whereas divers persons, chiefly of the industrial classes, are desirous of forming associations for the purpose of accumulating by small periodical deposits a savings fund with which they may secure a homestead, and for their mutual benefit; and whereas it is the dictate of a sound policy that the protection and encouragement of the Legislature should be given to associations having in view ends and objects (296) so commendable in their character; therefore,

"1. From and after the passage of this act it shall and may be lawful, and authority is hereby given to any individuals or persons in any city or county in the State, under any name by them to be assumed, to associate for the purpose of organizing and establishing homestead and building associations, and being so associated shall, on complying with the provisions of this chapter, be a body politic and corporate, etc." And then the statute proceeds in the usual way to authorize the association to hold property, make by-laws and transact business. Bat. Rev., ch. 12.

The declared object of the Legislature is to enable and to encourage persons, chiefly poor persons, to save and deposit their littles, and, when sufficiently accumulated, to draw them out in bulk and secure home-

steads. This is a most beneficent act, and it is our duty and our pleasure to sustain it. Although not within the letter of the act it would doubtless be within its spirit if the associations were so organized that instead of a member in all cases waiting to pay in by littles and take out in bulk he could, at the beginning of his connection with the association, take out in bulk and pay back by littles. And that is what the defendant says the plaintiff did in this instance. If so, and the contract is otherwise legitimate, it will be our duty to sustain it. In considering the subject it is to be noticed to the prejudice of the defendant that, instead of making its plans and by-laws exceedingly plain, to be understood by plain men, they are exceedingly complicated, so that they cannot be understood at all by plain men, and are explained with great labor, as the twenty-five pages of brief in this case will show to men accustomed to abstruse investigations.

Depositing, borrowing, lending, paying, and interest are familiar terms used in money transactions, but they have substituted unusual words with perverted meanings known only in their vocabulary,
(297) and they say that we must look *there* for their meaning. But we must use language which, in its common acceptation, will explain the transaction between the parties.

The plaintiff borrowed of the defendant $379 and received that sum in actual cash. To secure the payment thereof he executed to the defendant his bond—not for $379, but for $600—and a mortgage upon land to secure, not the $379 and interest thereon, but the interest on $600, and an additional 6 per cent, which they call "dues," but which is only another name for interest. So the plaintiff agrees to pay 12 per cent interest upon $600 in monthly installments, which is equal to about 19 per cent interest upon $379, the amount which he borrowed. Although this looks bad in the beginning for the plaintiff, yet he is assured that in the end it will work out well, for after he shall have paid this 19 per cent for eight, nine, ten, or some indefinite number of years, he will not be required to pay any more, but his bond and mortgage will be surrendered and he will be discharged from all further liability.

Now, from a calculation which we have made, approximating accuracy, it appears that if the plaintiff is discharged at the end of eight years, the shortest period which the defendant names, he will have paid about ten and a half per cent upon the amount borrowed. And, if held longer, the rate of interest is increased in proportion to the time. So that it is really in the power of the defendant, by prolonging the time, to oppress the plaintiff indefinitely. And all this time is upon the supposition, most favorable to the plaintiff, that he will be able to pay up his monthly installments at the rate of nineteen per cent upon the amount borrowed, or twelve per cent upon the $600; for the moment

he fails to pay his monthly installments they begin to impose "fines and penalties" upon him, which are added to the 12 or 19 per cent, so that the less straw he has the more bricks they require. (298) How burdensome these fines are will appear from the fact that for eight months, in which he failed to pay his monthly installments, the interest is $24, the dues $24, and the fines $21.60. So that at a time when he could not pay at all, they required him to pay about 25 per cent interest upon the sum borrowed. Failing to meet this demand upon him, the plaintiff's land is advertised for sale under the mortgage.

This whole proceeding is so unconscionable that no one would ever recognize it as within the purview of the very beneficent statute which we have quoted, and under which it professes to operate.

We are told that these associations are common in Europe and in many of our sister States. We are aware of it. They *commenced* in Europe under as simple legislation as ours, but were soon perverted. The same may be said of them in America. They are numerous and influential. They influence legislation. By their liberal advertising they influence the press. And even the courts may be insensibly affected. We are told by defendant's counsel that there are already forty in this State, with a capital of $1,500,000, and we are already urged that the business is too large to be disturbed. As other vices spread, so does this. And it is our purpose to "nip it in the bud" in this State, and save our people, not from associations properly conducted (and we are informed that there are such), but from those who seek to enforce unconscionable contracts, and from those which violate our usury laws. This not being a trial of the case upon its merits, but only a question as to the propriety of continuing the injunction against a sale under the mortgage until the final hearing, we have said more than was absolutely necessary to say now, but we have done so because it was the desire of the defendant, as it is of other like associations, that we should express our views, if they have been formed, as they have been upon pretty full consideration. But still the profession will understand that the general question is open. We know of no (299) device or cover by which these associations can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower "a partner," or substituting "redeeming" for lending; or "premium" for bonus, for an amount which they profess to have advanced and yet withhold; or "dues" for interest, or any like subterfuges, will not avail. We look at the substance.

If the parties should desire to settle upon the basis of what we have intimated there will be an account stated, charging the plaintiff with $379 and interest at 6 per cent, that being the rate agreed on up to the

time of starting the account. He will then have credit for all the interest, dues and fines and all other payments, if any, which he has made, with interest thereon from the time the payments were made. And the balance will be the amount due the defendant. This will be a charge upon the land under the mortgage, and for it the land may be sold after reasonable time.

It is suggested that the plaintiff ought not to have credit for the *fines* paid, because they were imposed for his default in not paying interest and dues. True, they were so imposed, but then the interest and dues were unlawful, and they had no right to require him to pay them, or to fine him for not doing an unlawful thing. There is no error.

PER CURIAM. Affirmed.

Cited: Vann v. B. & L. Asso., post., 494; *Latham v. B. & L. Asso.,* 77 N. C., 146; *Overby v. B. & L. Asso.,* 81 N. C., 64; *Hoskins v. B. & L. Asso.,* 84 N. C., 838; *Dickerson v. B. & L. Asso.,* 89 N. C., 39; *Pritchard v. Meekins,* 98 N. C., 247; *Heggie v. B. & L. Asso.,* 107 N. C., 596; *Rowland v. B. & L. Asso.,* 115 N. C., 829; *S. c.* 116 N. C., 879; *Meroney v. B. & L. Asso., ib.,* 908, 922; *Smith v. B. & L. Asso.,* 119 N. C., 259.

Dist.: Thompson v. B. & L. Asso., 120 N. C., 425.

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(300)

J. W. DERR v. J. F. DELLINGER AND OTHERS.

Bond to Make Title—Equitable Estate.

1. The legal effect of a contract of sale, and a bond for title in pursuance thereof, is to create an equitable estate in the vendee, leaving the legal title in the vendor, in trust to secure the payment of the purchase money, and then in trust to convey to the vendee.
2. Such equitable estate may be annihilated by the act of the party holding the legal title, in passing it to a purchaser for valuable consideration without notice; in which case the owner of the equitable estate must look to the trustee for compensation. If the purchaser has notice he takes the legal title subject to the equitable estate.
3. One does not forfeit his equitable estate by failing to make payment on the day his bond falls due; nor because he did not pay the money himself, but procured another person to pay and take the deed in his own name, under a verbal trust for such owner; nor because the agreement between them was not in writing, and void under the statute of frauds; nor because such agreement was without consideration. The owner of such equitable estate will not forfeit the same for any of the foregoing reasons, or for all combined.

DERR *v.* DELLINGER.

EJECTMENT, tried before *Buxton, J.*, at Spring Term, 1876, of LINCOLN.

The plaintiff filed a complaint in the ordinary form against the defendants to recover the possession of the *locus in quo*. Mrs. Hettie Smith, one of the defndants, filed an answer, alleging that the *locus in quo* was the property of herself and J. F. Dellinger, and that the other defendants were her tenants, and she claims title thereto, as follows:

That by a deed dated 15 January, 1859, executed by J. F. & R. D. Johnson, the plaintiffs obtained title to and possession of several tracts of land, among others one known as the "Meadow tract"; and further, that she claims that the J. F. Dellinger tract, which is in the possession of and owned by the defendant, is included in the "Meadow tract," or some of the other tracts attempted to be conveyed by the aforesaid deed.

That on 13 January, 1857, J. F. Johnson entered into a bond to make title to J. F. Dellinger for about 122 acres of land, and (301) Dellinger being unable to comply with the conditions of the bond, assigned the same to J. M. Smith, who did comply with said conditions, and received from J. F. & R. D. Johnson a deed in fee simple for said tract of land. This tract of land was devised by J. M. Smith to the defendant, and the same is now in her possession, except the tract owned by Dellinger. She supposes this land is the *locus in quo*, or a part thereof.

For a second ground of defense she alleges: That the deed under which the plaintiff claims is void because of the uncertainty of the description of the land attempted to be conveyed thereby.

That the plaintiff had full notice of said bond for title, and that he received from R. D. & J. F. Johnson, with full knowledge of the outstanding bond for title to J. F. Dellinger.

R. D. & J. F. Johnson moved the court that they be made parties to the action, alleging that J. F. Johnson, prior to the execution of the deed from R. D. & J. F. Johnson to J. W. Deer, had contracted by bond to convey the *locus in quo* to J. F. Dellinger, upon payment of the purchase money as stipulated in the bond, and that it was understood and agreed at the time of the execution of the deed to Deer that if the Dellinger tract was paid for at the maturity of the notes as stated in the bond, that then J. F. & R. D. Johnson were to convey the land to Dellinger, and that if the notes were not paid then the land was to belong to Derr. That they had conveyed the same piece of land to Derr and to Dellinger with warranty. That, however the action might terminate, they were liable on their warranty. They therefore prayed that they might be allowed to set up this defense, and that the deed from them to Derr might be reformed. The motion was refused by the court and exception taken.

(302) The plaintiff introduced a deed from R. D. & J. F. Johnson to himself, dated 15 January, 1859, and duly registered, conveying to him the *locus in quo*. He also introduced evidence as to the amount of damage he had sustained.

The defendants offered in evidence the bond for title made by J. F. Johnson to J. F. Dellinger, and offered to prove that Smith had paid for the land. The court rejected the evidence as to the payment of the purchase money by Smith, holding that no equity was set up in the answer, as it was not alleged that Dellinger had paid any part of the purchase money to Johnson prior to the purchase by Smith or the conveyance to Deer. That the bond for title was assigned by Dellinger to Smith by parol, and that there was no allegation of any consideration for the assignment.

The court instructed the jury that there was only one issue for them to try, and that was as the amount of damages the plaintiff was entitled to recover; and declined to hear evidence upon any other issue.

There was a verdict for the plaintiff, whereupon defendant moved for a new trial. The rule was discharged and judgment rendered; thereupon the defendant appealed.

Jones & Johnston, Montgomery and Cobb for appellants.
Hoke & Shaw, contra.

PEARSON, C. J. The legal effect of a contract of sale and a bond for title in pursuance thereof is to create an equitable estate in the vendee, leaving the legal estate in the vendor, in trust to secure the payment of the purchase money, and then in trust to convey to the vendee.

In our case Dellinger had the equitable estate, and the question is what has become of it? How has it been lost and annihilated, as is assumed to be the fact, by the rejection of the evidence tending (303) to show at one time it had an existence? We do not concur in the view taken of this action by his Honor.

The question recurs, how has Dellinger's equitable estate been annihilated? Such an effect may be produced by the act of the party holding the legal title in passing it to a purchaser for valuable consideration without notice, then the "equitable estate perisheth for want of a legal estate to feed it," and the owner of the equitable estate must look to the trustees for compensation; but if the purchaser has notice, he takes the legal title subject to the equitable estate. Derr had notice of this outstanding bond for title, in other words, of this equitable estate, and took the legal title, subject to this equity. So the deed to Derr did not annihilate the equitable estate of Dellinger.

It is then said Dellinger forfeited his equitable estate by failing to make payment on the day his bond fell due. If this is to be taken in reference to time, suffice it, "time is not of the essence of a contract." *Falls v. Carpenter,* 21 N. C., 237. If it be taken that Dellinger did not himself pay the money, suffice it, "what you do by another you do yourself." It could make no difference whether the money was paid by Dellinger or Smith. The money was paid or *caused* to be paid by Dellinger, and was accepted as a performance of Dellinger's part of the contract. Again, it is said Smith paid no consideration, and his agreement with Dellinger to pay the purchase money for him and take the deed was *"nudum pactum."* It is true Smith could have refused to comply with this agreement, but he chose to perfect it by paying the money and taking a deed from the Johnsons. We are at a loss to see any ground for the notion that this arrangement between Dellinger and Smith relieved Derr from the trust with which the estate was burthened when he acquired the legal title. Suppose Smith had paid Dellinger $50 for the bargain, or that Dellinger had paid Smith $50 to take the bargain off his hands and relieve him from his (304) notes; or suppose they had agreed that, inasmuch as Dellinger could not pay for the land, he would, without any consideration let Smith have the benefit of the contract of sale, provided he would pay the purchase money, how does this in anyway concern Derr or affect his rights?

Again, it is said the agreement between Dellinger and Smith is not in writing. Admit it to be true that under the statute of frauds this parol agreement was void, and that neither party could have compelled the other to a specific performance; still as the parties chose to perform it, and as the Johnsons have executed a deed and taken up the title bond for the land without requiring "an assignment of the bond in writing," we are at a loss to see how this concerns the plaintiff, or in anywise relieves him from the burthen of the trust.

As a dernier resort—a last effort— it was urged by Mr. Hoke in his very able and ingenious argument, "the bond for title is executed by only one of the Johnsons, and Dellinger acquired, under the contract of sale, an equitable estate in one undivided moiety only." Suffice it, there was evidence tending to show that James F. Johnson, in making the contract of sale to Dellinger, acted for himself and his tenant in common, R. D. Johnson, and his agency was ratified at the time of the execution of the deed to Derr, and also by the deed to Smith.

PER CURIAM. *Venire de novo.*

Cited: Todd v. Outlaw, 79 N. C., 239; *Barnes v. McCullers,* 108 N. C., 53; *Hairston v. Bescherer,* 141 N. C., 207; *Beeson v. Smith,* 149 N. C., 145.

(305)

STATE EX REL ROSETTA BIGGS v. ABNER BENNETT.

Bastardy—Evidence.

The defendant on the trial of issues in a bastardy proceeding offered to prove that just nine months previous to the birth of the child the prosecutrix had illicit intercourse with another man; and that on one occasion, about that time, they were caught in the act, which evidence his Honor, the presiding judge, ruled out: *Held*, that there was no error in his Honor's ruling; and that the evidence offered did not tend to rebut the presumption of paternity which the statute, Bat. Rev., chap. 9, sec. 4, creates upon the oath of the woman.

BASTARDY, tried before *Moore, J.*, at Spring Term, 1876, of MARTIN.

The defendant offered to prove that just nine months prior to the birth of the child the prosecutrix had illicit intercourse with another man, and that on one occasion about that time they were caught in the act.

The State objected to the evidence, it was ruled out by the court and the defendant excepted.

There was a verdict and judgment against the defendant and thereupon he appealed.

Attorney-General Hargrove for the State.
Mullen & Moore and Walter Clark for defendant.

RODMAN, J. The only question is, did the evidence offered tend to rebut the presumption of paternity, which the statute creates upon the oath of the woman? Bat. Rev., ch. 9, sec. 4. If it did not, it was irrelevant. We think it did not. Taken in connection with the oath of the woman, it would only tend to prove the physiological fact that two men may have connection with a woman about the same time, and one of them get her with child. It would not tend to rebut the presumption that the defendant was the one. If the defendant had further proposed to prove that he had had no connection with the woman during the time in which, according to the course of nature, the
(306) child must have been begotten, the presumption would have been rebutted. But this he did not offer to do. The proceeding in bastardy is not a criminal action, and the paternity need not be proved beyond a reasonable doubt. There is

PER CURIAM. No error.

Cited: S. v. Britt, 78 N. C., 442; *S. v. Rogers,* 79 N. C., 610; S. v. *Parish,* 83 N. C., 614; *S. v. Giles,* 103 N. C., 395; *S. v. Burton,* 113 N. C., 664; *S. v. Perkins,* 117 N. C., 701; *S. v. Warren,* 124 N. C., 809; *S. v. McDonald,* 152 N. C., 805.

STATE v. ISAAC H. SMITH.

Remarks of Counsel.

1. A court below commits error in allowing a solicitor, prosecuting for the State, to use such language as follows, in his address to the jury on the trial:

"The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known"; and again:

"The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me that if I did he would get the Legislature to impeach me."

2. Such language is calculated to create a prejudice against a prisoner, and when used before a jury on his trial, entitles him to a *venire de novo.*

FORGERY, tried before *Seymour, J.*, at Spring Term, 1876, of CRAVEN, having been removed from JONES.

The facts necessary to an understanding of the case, as decided, are fully stated in the opinion of the Court.

There was a verdict of guilty and judgment thereupon, and the prisoner appealed.

Attorney-General Hargrove for the State. (307)
W. J. Clarke & Son for the prisoner.

BYNUM, J. It is necessary to notice only one of the defendant's exceptions, as upon that he is entitled to a new trial. The solicitor, prosecuting in behalf of the State, in addressing the jury, was allowed by the court to use the following language: "The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known." And again: "The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me that if I did he would get the Legislature to impeach me."

The purpose and natural effect of such language was to create a prejudice against the defendant, not arising out of any legal evidence before them; for the jury were precluded from inquiry into the causes or motives for removing the trial, and even from the knowledge whether the trial was moved by the State or the defendant. So in respect of the letter, alleged to have been received from the defendant, and the epithets predicated upon it, it was not in evidence, and could not be, yet its alleged contents were allowed to go to the jury with all the force and effect of competent testimony. Such a letter constituted a new and distinct offense, and was the proper subject of another indictment and prosecution. These charges and invectives were not only allowed to go to the jury,

but were unexplained and uncorrected by his Honor in his charge to the jury. In *Dennis v. Haywood,* 63 N. C., 53, the course here pursued by the solicitor is strongly reprobated. "Suppose," said the Court, "a defendant is to be tried for his life, and to escape unreasonable prejudices in one county he removes his trial to another, the fact that he does so may be used to excite prejudice that he is endeavoring to escape justice, and thus he would escape the prejudices of one com-
(308) munity to find them intensified in another. Would the court allow the fact to be given in evidence or commented on by counsel? Certainly not." So in *Jenkins v. Ore Co.,* 65 N. C., 563, it is said: "Where the counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the duty of the judge to stop him there and then. If he fails to do so, and the impropriety is gross, it is good ground for a new trial." And in *S. v. Williams,* 65 N. C., 505, a new trial was granted in a case where language less harsh and violent was allowed by the court; and it was there said that it was the duty of the court to interpose for the protection of witnesses and parties, especially in criminal cases where the State is prosecuting one of its citizens. The defendant was arraigned at the bar of the court mute and helpless, without raising an unseemly controversy with the solicitor. The court is his constituted shield against *all* vituperation and abuse, and more especially when it is predicated upon alleged facts not in evidence, or admissible in evidence. There is

PER CURIAM. Error.

Cited: Coble v. Coble, 79 N. C., 592; *S. v. Tyson,* 133 N. C., 697, 702.

(309)

ALEXANDER ENGLAND v. WILLIAM DUCKWORTH.

Motion for New Trial.

A judge of the Superior Court should pass on a motion for a *new trial* at the term of the court at which the trial was had. He has no authority to continue such motion to a subsequent term. (C. C. P., sec. 236, subsec. 4).

APPEAL from *Cannon, J.,* at Fall Term, 1875, of TRANSYLVANIA.

The facts pertinent to the decision of this Court are set out in the opinion of Justice RODMAN. There was judgment for the defendant, and the plaintiff appealed.

J. H. Merrimon for appellant.
J. C. L. Harris, contra.

RODMAN, J. The plaintiff recovered a judgment for $44.18 before a justice of the peace, and the defendant appealed. There was a trial *de novo* in the Superior Court, where the jury found a verdict for the plaintiff, and a judgment was enteed accordingly. At the same term of the Superior Court the defendant moved for a new trial, whereupon the judge ordered that the motion be continued until the next term, and that the judgment be stricken out, and that the plaintiff be allowed to take the deposition of a certain witness. At the next term the judge granted a new trail, and the plaintiff appealed.

We are of opinion that under sec. 236 of C. C. P., subsec. 4, the judge should have passed on the motion for a new trial at the term at which the trial was had, and had no right to decide on it at a subsequent term. He is expressly forbidden to do so by the section cited. One reason for this rule is that at the trial term the evidence will be fresh in the judge's memory; and another is that a party having a (310) verdict should not be unreasonably delayed of his judgment.

PER CURIAM. The judgment granting a new trial is reversed, and the plaintiff will have judgment in this Court.

Cited: Beck v. Bellamy, 93 N. C., 133; *S. v. Bennett, ib.,* 505; *Clemmons v. Field,* 99 N. C., 401.

JOSEPH McDOUGALD AND PETER SINCLAIR v. JOSEPH GRAHAM.

Bond to Make Title—Contract.

A. bought of B. a tract of land on time, executed his note for the purchase money and took a bond for title. Being unable to pay the purchase money as it became due, they agreed that the land should be publicly sold for cash, the proceeds of such sale to be applied in payment of the purchase money due, and the residue, if any, to be paid over to A. It was further agreed that B. should bid for the land, to prevent its selling for less than the balance due, B. at the same time informing A. that he would bid no more than said balance amounted to, and became the purchaser at that sum. The bond for title and the notes for the purchase money were canceled. Shortly afterwards B. sold the land at an advance of $500. In an action by A. to recover of B. the amount so realized: *It was held,* that there being no allegation of fraud, the plaintiff A. was not entitled to recover.

APPEAL, by plaintiff from *Henry, J.,* at Spring Term, 1876, of McDOWELL.

Plaintiffs bought of defendant a tract of land on time, executed notes for the purchase money, and took bond for title. Plaintiffs, after paying considerable part of the purchase money, were unable to pay the

balance; whereupon it was agreed that the land should be sold at auction for cash, the proceeds of sale to be applied, first to the payment of the unsatisfied part of the purchase money, and the residue, if any, to be retained by the plaintiffs. According to this arrange-
(311) ment the plaintiffs advertised the sale at auction, and the land was sold and bought by defendant, at a bid just equal to the amount due for the purchase money. It was understood that the defendant was to bid, so as to keep the land from going at a less sum than the balance due, but he told the plaintiffs he would not run the land up any higher. Accordingly the defendant became the purchaser at a bid amounting to the balance of the purchase money. The bond for title and the notes given by plaintiffs for the purchase money were canceled. A short time afterwards the defendant sold the land at an advance of some $500.

This action is to recover that sum of money "had and received" for the plaintiffs—or on any other ground, legal or equitable—that will sustain the action.

Busbee & Busbee for plaintiffs.
Walter Clark for defendants.

PEARSON, C. J., delivering the opinion of the Court, after stating the case as above, proceeds:

After giving to the very learned argument of the plaintiffs' counsel due consideration, we are unable to see any ground on which the action can be sustained.

1. Had the defendant, after he had sold the land at an advance on his bid, expressly assumed to pay the amount of the sum received in advance to the plaintiffs, possibly this promise might be taken out of the rule *nudum pactum* upon the idea of a moral obligation, as where one promises to pay a debt barred by statute of limitations, by reason of the fact that the defendant had been paid a considerable part of the purchase money.

But there is no obligation of any such promise, and this novel question is not presented.

2. There is no allegation of fraud; on the contrary, the defendant, throughout the whole transaction, both by himself and his agent, acted fairly, openly and above board. True, it would have been more liberal to have consented to a sale on credit instead of insisting upon a sale for cash, but he was not obliged to do so by any rule of law or equity, and as the plaintiffs were in default by not paying as they were bound to do, he had a right to require a sale for cash.

3. Mr. Folk took the position that by the contract of sale before the payment of the purchase money the plaintiffs acquired an equitable

estate, and the defendant held the land in trust to secure the purchase money and then as a trustee for the plaintiffs. There can (316) be no doubt as to the correctness of this position. He then insisted that the relation of trustee and *cestuis que trust* being established, the court will scrutinize very closely any dealing between the parties in regard to the trust fund. There can be no doubt as to the correctness of this doctrine, but the defendant has submitted to this scrutiny, and it is proved that he used no undue influence, but without making any delusory promises simply urged the right to have his money.

4. It is claimed that defendant, being a trustee, had no right to buy at his own sale, and will be held to have bought in the land for the benefit of the trust fund. In the first place this was not a sale made by the defendant, but was made by the plaintiffs, with his concurrence, and in the second place it was agreed that he might bid to prevent the land from going at less than his debt, and he expressly refused to agree to run the land up any higher; he complied literally with this arrangement, and it was the plaintiff's misfortune that no other person was prepared to bid more, according to the terms of the sale, which had been fully advertised by the plaintiffs, whose interest it was to make the land bring more if they could. So it comes back to the complaint that the defendant was not liberal enough to allow the sale to be made on credit.

5. It is insisted that as plaintiffs had an equitable estate in the land, the agreement to let it be sold was not binding under the statute of frauds, because not in writing.

We are inclined to the opinion that so long as this agreement was executory, to wit, at any time before the land was actually sold and the agreement had been executed by a surrender and cancellation of the title bond and notes given for the purchase money, the plaintiffs might have refused to allow the sale to be made, but it is too late to fall back on the statute of frauds after the agreement is executed and the equitable estate of the plaintiffs had been extinguished.

We conclude that by force of sale and the cancellation of the notes and title bond the defendant became the absolute owner of the land, and was well entitled to sell it for his own benefit, and was under no liability to account to the plaintiffs for the sum he received in advance of his bid.

PER CURIAM. Affirmed.

Cited: Tucker v. Baker, 86 N. C., 3; *Conley v. R. R.,* 109 N. C., 696; *Taylor v. Taylor,* 112 N. C., 31; *Gorrell v. Alspaugh,* 120 N. C., 368.

STATE v. ROBERT ORRELL.

Examination of Witness.

1. A witness has the right, upon his redirect examination, to give evidence explanatory of his testimony brought out upon his cross-examination, although such evidence might not have been strictly proper in the first instance.
2. The court below committed no error in refusing permission to the defendant to ask an immaterial question, and the answer to which could not have been used for any proper or useful purpose.
3. Where testimony (of what has been said to the defendant) has been permitted to go to the jury without any objection on his (the defendant's) part, and it is not now seen how an objection could have inured to his benefit—it being competent to give evidence as to what was said to defendant in relation to the charge against him—still, if he so desired, he was entitled to have the benefit of any reply he may, at the time, have made as such charges, etc.

LARCENY, tried before *Cloud, J.*, at Spring Term, 1876, of DAVIE.

On the trial below the State introduced one Gus. Hairston, the prosecutor, who upon cross-examination was asked if he had not taken out a warrant before a justice of the peace and had not had two (318) jury trials as to the ownership of the pig which was alleged to have been stolen. He replied in the affirmative. He was then asked if he did not afterwards come to court and employ counsel to assist the solicitor in the prosecution. To this he replied that he had not, and stated that the defendant would not allow his witneses to testify before the magistrate, and that he had put the matter into court to get justice. Upon objection by the defendant the witness stated on cross-examination that at the trial before the magistrate the defendant had cursed him and his witness and brandished weapons around him. That after the indictment had been found he had threatened himself and his witnesses in case they came to court to testify against him. The defendant excepted.

There was evidence tending to show that shortly after the pig was missing the defndant advised the prosecutor to sue out a search warrant against one Markland; and it being in evidence that one of the witnesses lived near Markland the witness was asked by the defendant "who employed counsel to assist the solicitor?" The question was ruled out by the court and the defendant excepted.

There was a verdict and judgment against the defendant, and thereupon he appealed.

Attorney-General Hargrove for the State.
Clement for the prisoner.

SETTLE, J. Without pausing to inquire whether the testimony of Hairston, the prosecutor, on his redirect examination would have been competent in the first instance, it was clearly so in explanation of what had been called out by the defendant on the cross-examination.

The refusal of his Honor to permit the defendant to ask the question, "who employed counsel to assist the solicitor?" furnishes no just ground of exception. The question was altogether imma- (319) terial, as the answer to it, one way or the other, could not have been used for any proper or useful purpose.

The record states that the testimony of Jane Crump, "that her daughter Alice told the defendant, in reply to something that defendant was saying to her about being a witness, that the defendant's own daughter had told her, Alice, that defendant had stolen the pig and had it fastened up in the crib," went to the jury without objection on the part of the defendant, and it is not now seen how an objection could have inured to the benefit of the defendant, as it was clearly competent to give in evidence what was said to the defendant.

Of course if he desired it, he was entitled to have the benefit of any reply he may have made to the charge.

PER CURIAM. No error.

(320)

MONROE OLIVER AND WIFE AND OTHERS v. F. A. WILEY, EXECUTOR, AND H. F. BRANDON, ADMINISTRATOR.

Parties—Pleading—Jurisdiction.

1. In an action against an executor, who is also guardian and trustee, for an account and settlement, and for the payment of a bond given to the testator of the defendant, in trust for the plaintiffs and others, and for a proper distribution of the proceeds of said bond, the obligor therein is a necessary party.
2. In such action the administrator of one of the *cestuis que trustent*, entitled to a part of the proceeds of said bond, is also a necessary party.
3. Where the several accounts demanded against one occupying the several relations of executor, guardian and trustee are all so united that they cannot be conveniently separated, they may be embraced in the same complaint; and that the several causes are so combined is no good ground of demurrer.
4. Where one of the objects of an action is to enforce an express trust created by contract, and also some constructive trust arising *ex delicto*, the Superior Court is the proper tribunal. The judge having jurisdiction over one main ground of relief is not obliged to dismiss the case with a mere declaration of the trusts, but may go on and give full relief.

ACTION for an account and settlement, tried before *Kerr, J.*, at Spring Term, 1876, of CASWELL, upon complaint and demurrer.

The facts of the case are found in the pleadings, which are fully set out under the direction of Justice RODMAN.

Plaintiffs filed the following complaint, alleging:

1. That Alexander Wiley, late of Caswell County, died in September, 1861, leaving a last will and testament, which was duly admitted to probate in said county, and by the terms of which the defendant F. A. Wiley was appointed his sole executor, and that he qualified and entered upon the duties of his said office.

2. That among the paper effects of the said testator, which came to his hands as executor as aforesaid, was a bond, of which the following is a true copy:

Sixty days after date, I promise to pay Alexander Wiley, or
(321) order, the sum of six hundred and fifty dollars, to be applied to the use and benefit, to wit: Alexander Hooper, Ann Hooper, Ziphania Hooper, Martha Hooper and Susan Hooper, who are at this time living with my father, Woodliff Hooper. Witness my hand and seal, this 30 November, 1846. SPENCER HOOPER, [Seal.]

Witness:

JOHN K. GRAVES.

3. That the said Spencer Hooper resides beyond the limits of this State, and has so resided ever since the date of said bond; that he has no property or effects in this State out of which to satisfy said bond or any part thereof, except as hereinafter mentioned and described.

4. That Susan P. Hooper, one of the children of Spencer Hooper, mentioned in said bond, died intestate in August, 1861, in the county of Caswell, and at December Term, 1861, of the late Court of Pleas and Quarter Sessions of Caswell County letters of administration were granted to J. C. Griffith; that the said Griffith took into his hands and possession all of the estate of the intestate, and that after paying all just charges, debts and cost of administration there in his hands belonging to Spencer Hooper, the father of said Susan P. Hooper, who was entitled to recover as next of kin, about the sum of one thousand dollars.

5. That F. A. Wiley, as executor as aforesaid, did, by a decree of the late court of equity of Caswell County, procure said sum of $1,000 to be applied in part payment of the said bond, so held by him as executor of A. Wiley, deceased, of which sum $270 was for the use and benefit of A. Hooper, deceased, the intestate of the defendant H. F. Brandon, of whom said F. A. Wiley was guardian.

6. That the said F. A. Wiley, as such guardian, did receive
(322) the said sum due his ward, and fraudulently failed to apply the same to the use and benefit of his ward, or to make any return of

the same to the probate court of Caswell County, as required by law, and in violation of his duty as such guardian.

7. That Alexander Hooper died in Caswell County in 1871, and the defendant H. F. Brandon is his administrator, and there are no outstanding debts against the estate of the said intestate.

8. That at the death of the intestate of the defendant H. F. Brandon, the said F. A. Wiley, as guardian, had in his hands, exclusive of the $270, funds belonging to his ward, A. Hooper, deceased, amounting to $1,500; and that he held in his hands, as executor of A. Wiley, deceased, the aforesaid bond of Spencer Hooper, which at that time was due and unsatisfied to an amount greater than the value of the estate of the intestate of the defendant Brandon; and that he fraudulently failed and refused to take any steps or any legal proceedings to subject the fund held by him, and belonging to Spencer Hooper as next of kin, to the payment and satisfaction of the aforesaid bond, in utter violation of his duty as trustee of said bond.

9. That the said F. A. Wiley, as executor as aforesaid, and trustee of said bond, has fraudulently purchased for his own use and benefit Spencer Hooper's interst in the estate of his said deceased ward, A. Hooper, which interest he held in his own hands as guardian.

10. That Alexander Hooper, intestate of defendant Brandon, left surviving him his father, Spencer Hooper, and the plaintiffs, his brothers and sisters, and surviving *cestuis que trust,* Ann L., intermarried with Monroe Oliver, Martha, intermarried with Isaac N. Coleman, and Ziphania Hooper, a person of insane memory, who sues by his next friend J. L. Oliver.

Wherefore the plaintiffs demand judgment:

I. That the plaintiffs recover of the defendant F. A. Wiley (323) the sum of $2,000.

II. That an account be taken of the guardianship of F. A. Wiley with his wards, Susan P. and Alexander Hooper, deceased; and also of his trusteeship of the bond of Spencer Hooper.

III. That the defendant H. F. Brandon, administrator as aforesaid, be ordered to pay to the plaintiffs in part satisfaction of the said bond, out of the estate of his intestate, the sum of $2,000.

IV. For such other and further relief as to the court may seem just.

To the foregoing complaint, the defendant F. A. Wiley demurs, assigning as grounds of demurrer:

1. That there is a defect of parties defendant in the omission of Spencer Hooper and those who purchased his interest, the said Hooper being the sole legatee of A. H. Hooper.

2. That there is a defect of parties defendant in the omission of J. C. Griffith, administrator of Susan P. Hooper.

3. That several causes of action have been improperly united; one being an action against F. A. Wiley as executor of A. Wiley; and the second being an action against F. A. Wiley as guardian of A. H. Hooper and Susan P. Hooper; and the third being an action against F. A. Wiley as trustee of a bond under the will of A. Wiley.

4. That H. F. Brandon, administrator of A. H. Hooper, is improperly made a defendant in the action.

5. That this Court cannot have jurisdiction of an action to recover the interest of a legatee, but that the jurisdiction of the same belongs to the probate court.

Upon the hearing his Honor sustained the demurrer and dismissed the plaintiff's action.

From this judgment the plaintiff appealed.

Graham & Graham for appellant.

(324) *No counsel contra.*

RODMAN, J. The causes of demurrer assigned by the defendants will be considered separately.

1. That there is a defect of parties defendant in the omission of Spencer Hooper and those who purchased his interest, the said Hooper being the sole legatee of A. H. Hooper.

Observations. We conceive that Spencer Hooper ought to be a party, because he was the obligor in the bond to Alexander Wiley in trust, etc., for $600, and the payment of that bond is one of the objects of this action. The cause assigned does not *appear to be true, in fact,* as Alexander Hooper is stated to have died intestate. This cause of demurrer is sustained.

2. That there is a defect of parties defendant in the omission of J. G. Griffith, administrator of Susan P. Hooper.

Observations. We think Griffith is a necessary and proper party to the taking of the accounts which will be necessary in this action. This cause of demurrer is sustained.

3. That several causes of action have been improperly united; one being an action F. A. Wiley as executor of A. Wiley; and the second being an action against F. A. Wiley as guardian of A. H. Hooper and Susan P. Hooper; and the third being an action against F. A. Wiley as trustee of a bond under the will of A. Wiley.

Observations. We are of opinion that the several accounts which are demanded are all so united that they cannot be conveniently separated into several actions. If any inconvenience shall be found to arise from the union it will be in the power of the judge to remedy it. This cause of demurrer is overruled.

4. That H. F. Brandon, administrator of A. H. Hooper, is improperly made a defendant in this action.

Observation. The same reasons that made the administrator (325) of Susan a proper party make the administrator of Alexander Hooper a proper party, and it is immaterial whether he is a plaintiff or defendant. If no judgment shall be obtained against him he can recover his costs. This cause of demurrer is overruled.

5. That this court cannot have jurisdiction of an action to recover the interest of a legatee, but that jurisdiction of the same belongs to the probate court.

Observations. One object of the action is to enforce an express trust created by contract, and also some constructive trusts arising *ex delicto*. The other relief prayed is ancillary or incidental to this, or so connected with it as not to be conveniently separable. The probate court has no jurisdiction to enforce a trust created by contract and not arising out of the official duty of an executor or administrator, etc., or a constructive trust arising out of fraud or the like. Whenever it is necessary to have a trust of either of these kinds declared, before the account of an executor, administrator or guardian can be properly taken, the plaintiff can always go before a judge of the Superior Court, and the judge having jurisdiction over one main ground of relief is not obliged to dismiss the case with a mere declaration of the trusts, but may go on and give full relief. This cause of demurrer is overruled. The case is remanded to be proceeded in according to this opinion.

As the demurrer assigned causes partly good and partly bad, neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Cain v. Nicholson, 77 N. C., 412; *Devereux v. Devereux,* 81 N. C., 18; *Gulley v. Macy, ib.,* 364; *Wahab v. Smith,* 82 N. C., 233; *Sparger v. Moore,* 117 N. C., 453; *Sumner v. Staton,* 151 N. C., 202.

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(326)

J. M. HOWIE v. R. R. REA.

Witness—Testimony.

The evidence of a witness who stated: "I have no present recollection of the transaction, and can only speak now of the amount by what I swore on a former trial of this action," is inadmissible, and was properly ruled out by the judge below.

ACTION, upon a special contract, with a count in the nature of a *quantum valebat,* tried before *Schenck, J.,* at Spring Term, 1876, of MECKLENBURG.

The plaintiff sought to recover of the defendant $462.80 for a lot of castings, upon a special contract, with a count in the nature of a *quantum valebat,* under the suggestion of this Court in a former report of the case. See S. c. 70 N. C., 559.

Several counterclaims were set up in the defendant's answer, and among them a claim for certain goods alleged to have been furnished the plaintiff by one Wilkes at the request of the defendant.

To prove the delivery of these goods the defendant introduced Wilkes, who testified: "I kept three books in my business; one of original entries, one day book and one journal and ledger. The book of original entries would show, within a few dollars, what Howie got on Rea's account. I had this book before last court and examined it, but it is now lost. The entries were sometimes made by myself and sometimes by a clerk. I do not recollect whether I delivered the articles or not. I have no present recollection of the transaction, and can only speak now of the amount by what I swore on a former trial of this action." Plaintiff objected to witness speaking of the account. Objection sustained and defendant excepted.

There was a verdict for the plaintiff and judgment for $227 and interest. From this judgment defendant appealed.

(327) *Flemming, Jones & Johnston and Busbee & Busbee, for appellant.*

Dowd, contra.

PEARSON, C. J. We concur with his Honor in the opinion that the evidence was not admissible. The question is a new one and is not alluded to in the books. So it must be decided by the aid of legal analogies and the reason of the thing.

What a witness swore on a former trial may be proved on a second trial, provided the witness be dead. This rule is put on the ground of necessity, for the party shall not lose the benefit of evidence by the act of God if it can be supplied by a substitute, authenticated by the two great tests of truth, an oath and a cross-examination. In our case the witness is living and present in court. So the analogy does not apply.

When a deed or other instrument is lost or destroyed the party may read a copy or give evidence of its contents by giving notice, etc. This rule is put on the ground that a party shall not lose the benefit of evidence by the effect of a mere accident, if he be able to prove the contents of the lost paper. The analogy does not apply, for in such case the lost paper was direct evidence to be offered and read to the jury, whereas, in our own case, the lost "book of entries" was not direct evidence and could not have been offered and read to the jury, but was only allowed to be used by the witness in order to *refresh his memory.* If

after referring to the entries he was able to say that his memory was so far refreshed as to enable him to recollect the fact that the goods had been delivered, it was admissible for him so to state to the jury. Note the diversity.

It is somewhat curious that the witness has no "present recollection of the transaction" and cannot testify in the absence of the book of entries, although at the present trial he stated (we presume by (328) having his memory refreshed) he did recollect the transaction. This tends to show that at the former trial he, in effect, spoke from "the book of entries" and not from his recollection revived thereby. This was a departure from the principle on which the rule is founded, to wit, persons, especially old persons, may have no recollection of a transaction, but upon being shown a paper or an entry will then have the recollection of the matter recalled, and can then give testimony founded on this knowledge of the matter. This I can assert as a truth from personal experience. The rule is founded on this truth, but the witness must then speak from his recollection and not from the book of entries or other papers. The rule extends to any circumstance by which the memory of the witness is refreshed and his knowledge of the matter is recalled, for instance, if by referring in his own mind to what he had stated on a former trial the matter is recalled and he is enabled to say that he now has a recollection of it, he may state it to the jury; but this is altogether different from our case, where the witness says he has no present recollection of the transaction, and is offered to prove what he had sworn to at the former trial as direct substantive evidence.

PER CURIAM. No error.

Cited: Trust Co. v. Benbow, 135 N. C., 309.

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(329)

THE PEOPLE, ETC., ON THE RELATION OF K. M. McNEILL v. JOHN A. GREEN.

County Commissioners—Official Bonds.

1. Under Art. VII, sec. 2 of the Constitution the county commissioners have the power to summon a sheriff to justify or enew his official bond, whenever in fact, or in their opinion, the sureties have become, or are liable to become, insolvent. And it is not only the right, but the duty of the commissioners, to declare the office of sheriff vacant, and appoint some one for the unexpired term, whenever the incumbent thereof is found to be, on a reëlection, in arrears in his settlement of the public taxes; or when he takes no notice whatever of a summons by the commissioners to appear before them on a day certain and justify or renew his official bond.

2. The act, Bat. Rev., chap. 27, sec. 5, does not prevent the county commissioners from the transaction of business, upon due notice to all concerned, at other times than the days prescribed for their regular meetings. The act is directory, and also intended to prohibit the commissioners from receiving compensation for their attendance, except on the appointed days for their regular meetings.

QUO WARRANTO, tried before *Buxton, J.*, at Spring Term, 1876, of HARNETT.

When the case was called for trial in the court below, it was agreed by both plaintiff and defendant to waive a trial by jury, and that his Honor should try and determine all questions and issues both of law and fact.

His Honor found the facts of the case to be in accordance with the statements contained in the minutes of the board of county commissioners, the admissions contained in the pleadings and the admissions of the parties during the progress of the cause, for the purpose of the trial only; all of which facts, so far as they are pertinent to the points decided in this Court, are sufficiently set out in the opinion of Justice RODMAN.

(330) As to the law, his Honor was of the opinion: (1) That the relator, K. M. McNeill, had no right to qualify as sheriff for a second term, upon his reëlection in 1874, because he was at that time, and has been ever since, debtor to the county in a large sum, to wit, $7,600.14, on account of public taxes on the tax list of 1874, which had been placed in his hands.

(2) That the county commissioners of Harnett County had no right to permit him to qualify, and in doing so committed a grave error, which it was their duty to correct at the earliest moment.

(3) That upon the relator's failing to appear on 7 June, 1875, according to notice, and failing to justify his official bond, which was insolvent —coupled with the fact that he was then still in arrears for taxes upon the tax list of 1874, it was the right and the duty of the county commissioners, as trustees and guardians of the finances and public interests of the county, to declare the office vacant and to appoint some one for the unexpired term.

(4) That the defendant, John A. Green, was duly appointed for the unexpired term and is entitled thereto.

In accordance with this opinion his Honor gave judgment in favor of the defendant, from which judgment the relator appealed.

Neill McKay and Hinsdale for appellant.
Sutton, McLean and McNeill contra.

RODMAN, J. This is an action in the nature of *quo warranto* to try the titles of the defendant and of the relator to the office of sheriff of Harnett County.

The relator was duly elected sheriff in August, 1872, gave bonds which were accepted, and he was duly inducted into office. He duly renewed his bonds in September, 1873. He was again elected in August, 1874, and on the first Monday of September of that year gave the usual bonds, which were accepted by the county commissioners, and he qualified as sheriff in due form. The defendant offered in evidence a report of the committee of finance of the county to the county commis- (331) sioners, which showed that on 4 February, 1875, the relator was indebted to the county for taxes of 1874 to a large amount, which, or some part of which, remained unpaid at the commencement of the action. This was objected to, but admitted by the court.

We are unable to see how this evidence was material. The county commissioners do not profess to have acted on it in declaring the office of sheriff vacant. It is not stated that when the relator was qualified and inducted as sheriff in September, 1874, he did not then produce the receipts of the proper officers for the taxes payable by him up to that date, as required by sec. 3, ch. 106, Bat. Rev. That he did not was probably intended to be inferred from the evidence. Considering it immaterial, it would, for that reason alone, have been incompetent to go to a jury. But as the decision of the present case turns on admitted facts, that evidence may be disregarded as not affecting the case.

We may also disregard the proceedings of the county commissioners against the relator before 17 May, 1875. On that day the board ordered him to be notified to appear before them on the first Monday in June next to renew or justify his official bonds. The notice was served, and on his failing to appear the board, on 7 June, declared his office vacant and on 5 July elected the defendant, who, on 17 July, gave bonds which were accepted, and he duly qualified. It is admitted that the official bonds of the relator given on the first Monday (7th) of September, 1874, had become insolvent on 7 June, when the board declared the office vacant as aforesaid, and that is the only reason assigned by the board for their action.

The question here presented is this: Have the board of county commissioners the power to summon a sheriff to justify or renew his official bonds whenever in fact or in their opinion the sureties (332) have become or are likely to become insolvent? We are cited on this question to secs. 9, 10, 11 of ch. 106, Bat. Rev. Section 9 says it shall be the duty of the commissioners of every county in the State to make *immediate* examination of the bonds of sheriffs, etc. "Immediate" means next after some event or some point of time, and occurring where it does it makes the section insensible. By referring, however, to the act of 1868-'9, ch. 245, from which those sections in the Revisal are taken, it will seem from the two last sections (which are omitted in the

Revisal) that the word "immediate" had a sensible meaning, and that the act was temporary and should not have been inserted among the permanent acts. There is no act directly giving the power. If it exists it must be implied from the Constitution, Art. VII, sec. 2, by which the duty is imposed on the county commissioners to exercise a general supervision and control over "levying of taxes and finances of the county, as may be prescribed by law." We concur with the judge of the Superior Court that it may be implied from this section.

The general rule is well known that where a duty is imposed all the powers are implied which are necessary and proper for performing the duty. The duty of the commissioners in respect to the taxes and finances is a continuing one and is not performed by the single act of passing on the sheriff's bond annually. There is a continuing supervision and control.

This view is strengthened by Bat. Rev., ch. 27, sec. 8, subsecs. 32-33, which empowers the commissioners to require from each county officer a report under oath at any time on any matter connected with his duties and to compel the attendance of such persons before them for examination. Why examine and ascertain that an officer is in default, or
(333) that his sureties have become insolvent, if there be no power to remedy, or at least to arrest the mischief?

Taking this conclusion as established there is no necessity for considering the duty of the commissioners when the relator in September, 1875, tendered to them bonds conditioned for the performance of his duty as sheriff in executing process, etc., but refused to tender bonds to secure the State and county taxes. As they had theretofore lawfully declared the office vacant and filled it by appointing the defendant, they could not then remove him without default on his part and restore the relator. There is no necessity to consider whether the county commissioners could separate the duty of collecting the taxes from the other duties of the sheriff.

It remains only to notice an objection made by the relator to the action of the commissioners in removing him from office, in that it was done at a time when they had no right to meet. We are of opinion that the act cited, Bat. Rev., ch. 27, sec. 5, is directory and also intended to forbid the commissioners from receiving compensation for attendance on other days. It did not, however, disable the commissioners from acting at other times on due notice to all concerned.

PER CURIAM. Affirmed.

(334)

STEPHEN W. ISLER v. JENNIE COLGROVE.

Lien of Judgment—Sale Under Execution.

1. The lien acquired by a judgment obtained in 1861, upon which execution issued and was levied upon the land in controversy, which lien was kept alive by subsequent alias executions duly issued from term to term, until under the last of them the said land was sold by the sheriff, 7 May, 1872, is not waived or lost, because the judgment on 30 November, 1868, was docketed in another county, especially when the transcript of the judgment so entered upon the docket contained an abstract of the several writs of execution, issued from time to time, with the returns thereon, from which the relation of the lien back to the date of the judgment fully appeared.
2. A sheriff having sundry executions in his hands against the same defendant, and levied on the same tract of land, sold the land, when the plaintiff, in one of the executions, claimed by said plaintiff to have priority over all the others, bid said land off, demanding of the sheriff that the amount of his bid should be credited on the execution held by the sheriff in his favor; this was refused and the plaintiff's bid demanded to be paid in cash, which the plaintiff failed to do: *Held*, that the plaintiff acquired no title by his supposed purchase; that the sheriff had a right to require the purchase money to be paid in cash, and had also the right to resell the land if the purchase money was not so paid.
3. A sheriff who sells under execution *may take* on himself to decide which of several executions in his hands is entitled to priority of payment out of the purchase money. But such decision will be at his peril, and he is not required to make it.
4. A plaintiff who has put an execution in the hands of a sheriff may withdraw it before it is so acted on that its withdrawal would be injurious to third parties. He may equally direct the sheriff not to act on it, which would be equivalent to withdrawing it.
5. In the case of a sale under a junior lien (docketed judgment) the purchaser acquires in effect only an equity of redemption. To perfect his title, he must pay off all prior liens; which, if not done within a reasonable time, will justify a sale under a first or prior lien, and the purchaser at such second sale will acquire a good title.

EJECTMENT, originally commenced in JONES, and thence re- (335) moved by consent to CARTERET, tried before *McKoy, J.*, at August Term, 1875.

The following are the substantial points in the statement of the case accompanying the record, omitting only those which have no bearing whatever upon the points raised and decided in this Court.

The plaintiff, in support of his title, introduced the transcript of a record of the Superior Court of Jones County, from which it appeared that at August Term, 1861, of the Court of Pleas and Quarter Sessions of Wayne County a judgment was rendered in said court in favor of one

Benjamin Aycock (use of B. M. Isler) against F. B. Harrison, J. W. F. Harrison, and W. A. Cox for the sum of $7,488, and that execution regularly issued thereon from term to term until May Term, 1866. The execution issuing from February Term, returnable to the ensuing May Term, 1866, was returned levied on the tract of land in controversy, 13 April, 1866. A *ven. ex.* was issued, returnable to August Term, 1866, on which was endorsed, "No sale on account of the stay law." The plaintiff in said execution thereupon, at the said August Term, 1866, moved the court for an alias *ven. ex.*, which being refused, he appealed to the Superior Court; which also refusing his motion, he appealed to the Supreme Court. In this Court the judgment of the Superior Court was overruled, and it was decided that the plaintiff was entitled to his alias *ven. ex.*

In 1868 the plaintiff Aycock, to the use of B. M. Isler, having transferred his case to the Superior Court of Wayne, procured the same to be docketed there, and sent a transcript thereof to the Superior Court of Jones, in which said judgment was docketed 30 November, 1868.

On said judgment so docketed in Jones Superior Court said plaintiff Aycock sued out a *ven. ex.*, with a special *fi. fa.* clause, from said court to the sheriff of said county, which was duly delivered to said
(336) sheriff by the clerk of said court; and under this the said *ven. ex.* the sheriff sold the land, which is the subject of this controversy, on 7 May, 1872, and the plaintiff in this action became the purchaser, receiving therefor a deed from one John Pearce, the said sheriff. The plaintiff then introduced a deed from one Arctus Gilbert to said F. B. Harrison, one of the defendants in the execution of Aycock, to the use of Isler, for the land so sold, bearing date 29 May, 1847, and further proved by a witness that said Harrison and those under whom he claimed have held possession of the same for thirty years prior to 7 May, 1872.

In support of her title the defendant introduced a transcript of the record of a judgment from the Superior Court of Craven County in favor of William Foy against the said F. B. Harrison for the sum of $3,100 and costs, rendered by said court at its Fall Term, 1868; also a transcript of said judgment, docketed in the Superior Court of Jones on 10 November, 1868; and also an execution from the Superior Court of Craven on said judgment, which was issued 6 November, 1868, and levied on the said land, the subject of this controversy.

The sheriff of Jones sold the land on 2 January, 1869, while the said execution in favor of said Foy against F. B. Harrison and a *ven. ex.* from Jones Superior Court in the case of Aycock, before fully set out, and several other executions levied on the land were in his hands, as proved by the clerk of Jones Superior Court and one L. D. Wilkie; and the plaintiff in this action bid off said land at the sum of $4,950 and

insisted on crediting the execution of Aycock aforesaid, as the agent and attorney of the plaintiff therein, with the amount of his bid, and that on his paying the costs he further insisted that the sheriff should make him a deed for the land. This proposal the sheriff declined (337) to accede to, assigning as his reason that he had other executions in his hands against said Harrison besides the two above named, all of which were levied at the same time with the Aycock execution on the land in dispute, amounting to three thousand or more, and that he had been advised by his counsel to demand and receive the cash from the purchaser and return it to court and ask the advice of his Honor as to its proper application.

Upon the refusal of the bidder (the plaintiff in this action) to pay the amount of his bill in cash, the sheriff at once resold the land, when D. D. Colgrove became the purchaser at the price of $1,060. When the sheriff offered the land for sale the second time the plaintiff forbade the sale, stating that he had purchased the land, and whoever bought it would buy a lawsuit.

The defendant next introduced as evidence a deed from O. R. Colgrove, sheriff of Jones, for the land so resold to the purchaser, D. D. Colgrove, dated 2 January, 1869, in which he recited that he sold the land by virtue of the aforesaid execution of Foy against said Harrison. The copy of the last will and testament of D. D. Colgrove, deceased, devising the land to the defendant Jennie Colgrove was also introduced. It was further proved that the sheriff, O. R. Colgrove, was also dead.

His Honor stated that the executions themselves were the best evidence (from the returns made thereon) of what the sheriff had done in pursuance thereof. That the executions must be introduced, or transcript of the same, or their loss must be shown, before parol testimony could be admitted. That the defendant had shown from a transcript that the executions were in the sheriff's hands, and no parol evidence was necessary to prove that point, as it was sufficiently (338) established by the transcript.

His Honor further held that anything occurring at the sale going to prove that the sheriff sold under the execution of Aycock, or any other material fact which occurred at the sale, might be proved by parol. The evidence showed that the executions of Aycock, Foy, and others were in the hands of O. R. Colgrove, sheriff of Jones County, at the time of the sale, at which D. D. Colgrove became the purchaser. That Thomas Wilcox, who was interested in the sale, approached Colgrove, the sheriff, while going from the sheriff's office to the place of sale, and that D. D. Colgrove was in company, but Wilcox could not say whether he heard the conversation or not, though he was near enough for that purpose, when Colgrove, the sheriff, said that he was going to sell under the Foy

execution and not under the other executions, which evidence was objected to by the defendant, but the same was admitted by the court. The defendant introduced a deed, the recital of which shows that O. R. Colgrove, sheriff of Jones, sold the land in dispute under an execution in favor of William Foy and recited no other execution. Upon this the court said that there was not evidence to go to the jury showing that the sheriff had sold under the execution of Aycock and Harrison and others.

Thereupon the defendants' counsel agreed that was then only a question of law to be heard by the court, and there was nothing to submit to a jury, and asked the court to instruct the jury:

1. That *ven. ex.* issued from Jones Superior Court on the said judgment of *Aycock,* to the use of *Isler v. Harrison* and others, under which the plaintiff in this action purchased, was void for the reason that the Superior Court of Jones had no power to issue it, but that it could have been issued by Wayne court only, whence the *fi. fa.* in said case, which had been levied on the land, had been issued, and that the plain-
(339) tiff in said judgment had waived his lien acquired by his levy on the land by docketing his judgment in Jones County; and

2. That the sale by the sheriff of Jones to D. D. Colgrove, under the execution in favor of William Foy against Harrison and the sheriff's deed, vested the title to the land in Colgrove, and that the plaintiff could not recover.

His Honor declined to charge the jury as above prayed, and instructed them if they believed the evidence the plaintiff was entitled to a verdict.

Verdict and judgment for the plaintiff, from which the defendants appealed.

Hubbard for appellants.
Strange contra.

RODMAN, J. It is admitted, of course, that the burden is on the plaintiff to show a title in himself to the land in controversy. This he claims to have done by the following evidence, briefly stated:

A judgment in favor of *Aycock v. Harrison,* former owner of the land, at August Term, 1861, of Wayne County Court. An execution issuing thereon levied on the land, which levy was kept alive by subsequent *alias* executions duly issued from term to term until under the last of them the land was sold by Pearce, sheriff of Jones, on 7 May, 1872, when plaintiff became the purchaser, and a deed from said sheriff to the plaintiff.

If these were the facts fully and accurately stated, the case for the plaintiff would be clear. The defendant, however, attempts to break the chain of the plaintiff's title by several objections founded on facts not denied but omitted from the foregoing statement. These objections we

will state and consider in succession. Before doing so, however, we will dispose of an objection to the plaintiff's title, which on examination is seen to be based on a mistake about a date. It was said that the execution under which the plaintiff purchased on 7 May, 1872, (340) was irregular, inasmuch as it was issued from the Superior Court of Jones, whereas it was required by Laws 1871-'72, ch. 74, to be issued from the Superior Court of Wayne, where the judgment was originally obtained. The act cited was ratified on 27 January, 1872. Section 3 contains a provision that all executions previously issued from either court should be valid. The act, by Bat. Rev., ch. 108, sec. 3, went into effect on the twentieth day after its ratification. It is admitted that the execution was issued within that time.

I. The defendant says that although the plaintiff Aycock acquired a lien by his judgment in Wayne and the subsequent proceedings thereon, which related back to the date of the judgment (this being identical with the *teste* of the *fieri facias* under which the levy was made), yet this lien was waived and lost upon the docketing of the judgment in Jones on 30 November, 1868, and that the lien afterwards only had effect from that day. And that inasmuch as prior to 30 November, 1868, to wit, on 10 November, 1868, a judgment in favor of *Foy,* plaintiff, *v. Harrison,* recovered at Fall Term, 1868, of Craven Superior Court, had been docketed in Jones County, this Foy judgment had a priority of lien over the Aycock judgment.

How it might be if the Aycock judgment *alone* had been docketed in Jones, and without any statement of or reference to the proceedings thereupon which gave to a *venditioni exponas* issued upon it, a lien relating to the date of the judgment, it is unnecessary to say. For, in fact, the transcript from Wayne entered upon the docket in Jones contained an abstract of the several writs of execution from time to time, from which the relation of the lien back to the date of the judgment appeared. The effect of this statement was to inform all concerned of the prior date of the lien and to preserve its priority. (341) So that the Aycock judgment, although docketed after the Foy judgment, continued to have a priority over that judgment and, so far as appears, over all others.

II. Defendant contends that D. D. Colgrove acquired a title to the land by his purchase at the sale by Sheriff Colgrove on 2 January, 1869. His argument is:

1. That the sale on the same day at which the plaintiff bid off the land was avoided by the failure of the plaintiff to comply with the terms by paying the amount of his bid.

2. That upon such failure the sheriff had a right to resell immediately.

3. That the sheriff had a right to resell, and did in fact resell, both under the Aycock and the Foy executions.

4. That whether he actually sold under both or under the Foy execution alone, the sale, when completed by a deed, as it was, passed the title of the defendant in the land to D. D. Colgrove, the purchaser, free from any lien or incumbrance.

5. Consequently, the subsequent sale under the Aycock execution on 7 May, 1872, when plaintiff purchased and obtained a deed, passed nothing, there being no estate left in the defendant on which it could operate.

On consideration of these propositions, the following observations have occurred to us:

1 and 2. It is plain that the plaintiff acquired no title to the land by his supposed purchase on 2 January, 1869, because he never obtained a deed. By a rule on the sheriff, to which all persons in interest were made parties, and upon proof that the Aycock execution had priority over all others then in the sheriff's hands, and that he, the present plaintiff, was authorized to apply his bid as a payment *pro tanto* on that execution, he might have obtained an adjudication of the Superior Court of Jones to that effect, and an order to the sheriff to enter such
(342) payment on the execution and to make a deed to the plaintiff, in which case the deed would have related back to the sale, and would thereby have avoided the sale to Colgrove. *Festerman v. Poe,* 19 N. C., 103. This is substantially what was held in *Isler v. Andrews,* 66 N. C., 552. See, also, Herman on Executions, sec. 211, p. 325, and cases there cited.

A sheriff who sells under execution *may* take on himself to decide which one of several executions in his hands is entitled to priority of payment out of the purchase money. But such decision would be at his peril, and he is not required to make it.

It may appear clear to us now that Aycock, or the present plaintiff as his representative, was entitled to priority of payment. But it was a question not settled, and doubtful at the time of the sale in 1869, and the sheriff was entitled to payment of the plaintiff's bid or to an adjudication of the court establishing his priority, and in default thereof could resell immediately. See *Grier v. Yontz,* 50 N. C., 371; *McKee v. Lineberger,* 69 N. C., 217. What is said on this point in *Grier v. Yontz* is in relation to a sale of personal property, but it is equally applicable to a sale of real estate.

III. Under what executions did the sheriff resell? A plaintiff who has put an execution in the hands of a sheriff may withdraw it before it is so acted on that its withdrawal would be injurious to third parties. He may equally direct the sheriff not to act on it, which would be equivalent to withdrawing it. What the plaintiff in this case said and did

after the sheriff refused to credit his bid on the execution can be understood only as a direction to the sheriff to proceed no farther under the Aycock execution, which he claimed to be *functus officio*. To permit the sheriff to proceed to resell under that execution would have been to waive his claims as purchaser, which it is plain he did not intend to do. The sheriff, therefore, had no right to resell under the Aycock execution, which was in effect taken out of his hands. And it (343) appears that in fact he did not sell under it, for in his deed to Colgrove he recites that he sold under the Foy execution, and refers to no other.

That the sheriff still held the Aycock execution in hands, and that it was not actually taken from him cannot make any difference, if he had been directed not to resell under it, and in fact did not resell under it. *Seawell v. Bank,* 13 N. C., 279.

IV. Taking it then that the sheriff sold under the Foy execution alone, what did the purchaser at that sale acquire?

The rule expressed in *Haliburton v. Greenlee,* 72 N. C., 316, is considered applicable. In that case it is said: "If a sale of land is made under a junior docketed judgment, the purchaser buys in effect only an equity of redemption, that is, the title to the land on paying off the prior liens."

It is argued, however, that this case is not applicable because in it there were two judgments docketed at different dates, and priority is expressly given by statute to the senior one, whereas in this case the Foy judgment was first docketed and the prior lien of the Aycock judgment is a consequence of the law existing before the Code and which was superseded by it. We do not consider that the Legislature intended to destroy antecedent liens, or that it could constitutionally do so. Perhaps it was not necessary to docket the Aycock judgment in Jones County at all. Its being docketed there in the form in which it was docketed did no harm. The principle of the decision cited is not so narrow as is supposed by counsel. The reason of it reaches to every case of sale under a junior lien. It is immaterial how the prior lien was created, whether by mortgage, prior docketed judgment, or by execution and levy. The priority of lien is of the essence, the mode of its creation only an incident. It seems to us impossible to come to any other conclusion without injuriously affecting the prior lien. To change it from a lien upon the land to a lien on the proceeds of the sale (344) would be injurious.

V. Colgrove was entitled to the land on paying off the Aycock execution, and he was entitled to a reasonable time for this purpose. Having permitted this time to pass without redeeming, the plaintiff was entitled to sell the land. This was held in *Haliburton v. Greenlee, supra.* By

his purchase the plaintiff acquired the title of the defendant in the execution, and is entitled to the possession against all persons coming in under him.

PER CURIAM. No error.

Cited: Sharpe v. Williams, 76 N. C., 90; *Titman v. Rhyne,* 89 N. C., 68; *Bernhardt v. Brown,* 118 N. C., 710.

WEINSTEIN & BRO. v. JOHN PATRICK, ADMINISTRATOR OF S. T. STILLY, MARSHALL STILLY, AND A. McF. CAMERON AND WIFE, LOUISA.

Witness Under Code, Section 590.

1. Although a defendant, called by the plaintiff, may be competent to testify as to transactions and conversations had with a person at the time he deceased, against his own interest, he cannot be thereof examined against the interests of other defendants.
2. Where the proposed witness is only a defendant in form, but in substance a plaintiff, his interest being identical with that of the plaintiff, he cannot be examined, under section 343 of the Code of Civil Procedure, as to any communication or transaction between himself and a person, at the time of such examination, deceased.

SPECIAL PROCEEDINGS instituted in the probate court of GREENE to sell land for assets, and transferred to the Superior Court of said county and there tried before *Seymour, J.,* at Spring Term, 1876.

The petition was filed against Patrick, the administrator of the deceased debtor, and against others, who it was alleged had received
(345) the land attempted to be sold under a fraudulent conveyance, and who had conveyed the same by like conveyance. Issues as to the alleged fraud being raised it was sent to the Superior Court for trial.

On the trial in the court below it appeared that in 1867 S. T. Stilly, the intestate, by deed of bargain and sale, conveyed the land, the subject of this controversy, to his brother, the defendant Marshall Stilly, for the expressed consideration of $600; and Marshall Stilly on the same day, by deed with warranty and in consideration of love and affection, conveyed the same to Louisa Stilly, wife of the said S. T. Stilly, now Louisa Cameron, defendant. Both deeds were written and witnessed by the defendant Patrick and one W. T. Lewis, no relation of the family.

The intestate S. T. Stilly had no issue, and the deeds above alluded to were executed in his last sickness and about ten days before his death. No money or other consideration was actually paid by said Marshall Stilly for the land. He gave a note for the $600, and has never seen or heard of it since. He was a creditor of the intestate for about $800, which has never been paid.

The plaintiffs introduced Marshall Stilly as a witness to prove the transactions and conversations connected with the sale of said land between the intestate and himself, the witness. This proposed evidence the defendants objected to on the ground that section 343, C. C. P., rendered him, the proposed witness, incompetent. His Honor overruled the objection and permitted the witness to be examined. Defendants excepted. No other witness to prove said transactions and conversations was introduced.

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

Faircloth & Grainger for appellants.

Gray & Stamps contra.

READE, J. It is clear that under C. C. P., sec. 343, Marshall (346) Stilly could not have offered himself as a witness to speak of the transaction between him and the deceased debtor; but here he does not offer himself, but is offered by the plaintiff to prove that the transaction between the deceased debtor and himself (Marshall Stilly), under which he claims title to the land, was fraudulent against the plaintiff. It would seem that there could be no objection against allowing Marshall Stilly to be offered to testify against his own interest. And so far his Honor was right. But he not only allowed him to testify against his own interest as against *himself,* but also as against the interest of the *other defendants.* And in that his Honor was in error.

So much for general principles. But there is a special reason in this case why Marshall Stilly should not be called even by the plaintiff, because Marshall Stilly, although a defendant in form is a plaintiff in substance. His interest is identical with the plaintiff's. The plaintiff is a creditor of the deceased, and if the sale of the land to Marshall Stilly is declared void he gets his debt. Marshall Stilly is also a creditor of the deceased, and if the sale of the land is void gets his debt. So that this case is like *Redman v. Redman,* 70 N. C., 257, where a defendant is treated as plaintiff.

It is true that Marshall Stilly, in his conveyance of the land to one of his codefendants, warranted the title, so that it is to that extent his interest to support the transaction between him and the deceased, and we do not know on which side this interest predominates; but under all the circumstances we do not think that he was competent to speak of the transaction between him and the deceased. *Reynolds v. McCanless,* 74 N. C., 301. There is error.

PER CURIAM. *Venire de novo.*

Cited: Gulley v. Macy, 84 N. C., 445; *Tredwell v. Graham,* 88 N. C., 211; *Owens v. Phelps,* 92 N. C., 235; *In re Worth's Will,* 129 N. C., 225; *Seals v. Seals,* 165 N. C., 412.

(347)

GEORGE W. HOLT v. THOMAS G. McLEAN AND OTHERS.

Register of Deeds—Official Bond.

1. A register of deeds is not liable on his official bond for issuing a license for the marriage of an infant female under eighteen years of age, without the written consent of her parent or guardian.
2. Although an officer is not liable upon his bond for the performance of duties not therein enjoined, yet he is liable personally for the non-performance of every duty prescribed by statute, to the parties injured, and to the extent of the damage received, and he is also liable criminally to the public.

APPEAL from *Kerr, J.*, at Spring Term, 1876, of ALAMANCE.

The defendant McLean is the register of deeds in Alamance County and the other defendants are the sureties on his official bond. The parties are sued by the plaintiff for an alleged breach of said bond, in that McLean, as register, issued a license for the marriage of the plaintiff's daughter, Alice Jane, with one William A. Roney without the written consent of the plaintiff, the said Alice being under 18 years of age.

The question discussed in the court below as to the sufficiency of the inquiry made by the register to ascertain the age of the daughter need not be considered, and the facts relating to the points decided in this Court will be found stated in the opinion of the Court delivered by Justice BYNUM.

His Honor, on the trial below, ruled that although the alleged facts were proved, still there was no breach of the official bond of the defendant. From this judgment the plaintiff appealed.

(348) The defendant had appealed from a previous ruling of his Honor in regard to the sufficiency of the inquiry instituted by the register to find out the age of the infant female, which being necessary—the appeal of the plaintiff disposing of the whole case—need not be further noticed.

Boyd for appellant.
Parker contra.

BYNUM, J. This is an action on the official bond of the register of deeds for the county of Alamance. The plaintiff alleges that in 1874 the said register of deeds, contrary to the statute, ch. 69, sec. 7, Bat. Rev., issued to one Roney a license to marry Alice, the daughter of the plaintiff, whereby the said register of deeds and his sureties incurred a penalty of $200, for the recovery of which this action is brought.

The conditions of the official bond sued on are: "That whereas the said Thomas G. McLean has been duly elected register of deeds for Alamance County by the qualified voters of said county on 1 August, 1872,

now if the said Thomas G. McLean shall safely keep the records and books of his said office, and shall in all respects truly and faithfully discharge the duties of the said office, then the above obligation to be void; otherwise to remain in full force and effect."

The particular duty here enjoined is that the register of deeds "shall safely keep the records and books of said office." The general duty enjoined upon him is that he "shall in all respects truly and faithfully discharge the duties of the said office." The authorities are full to establish that this general engagement, afterwards inserted in the condition, shall receive such a construction as will restrain it to the particular duty for which the bond was given, to wit, to the "safe-keeping of the records and books of his said office," and that the concluding words mean that the register shall truly and faithfully discharge the duties of the office as far as relates to the particular duties set (349) forth in the preceding part of the bond. *Crumpler v. Governor,* 12 N. C., 52; *S. v. Long,* 30 N. C., 415; *Eaton v. Kelly,* 72 N. C., 110, where all the cases are cited and commented on.

It is thus seen that there is no provision in this bond which covers the particular delinquency here complained of as a breach of the bond.

The liability of the sureties is measured by the conditions of the bond and not by the duties imposed upon the register of deeds by law. As to duties clearly enjoined upon the principal, but not covered by the conditions of the bond, the sureties may all say, "we have entered into no such covenant." If the performance of all the duties of the office are not provided for in the conditions of the bond, those are to blame whose duty it is to take the bond, but any resulting loss to the public or individuals from the omission cannot be fixed upon the sureties. Parties injured are, however, not without remedy, though it may sometimes be inadequate. Although the officer is not liable upon his bond for the performance of duties not therein enjoined, yet he is liable personally for the nonperformance of every duty prescribed by statute to the parties injured and to the extent of the damage received, and he is also liable criminally to the public. Bat. Rev., ch. 100, sec. 17.

The official bonds of public officers could and should be so drawn as to secure the due discharge of all the duties of the office and make the sureties liable for every default. Through the ignorance or carelessness of the draughtsman they are not always so drawn.

We can but repeat the language of *Judge Nash,* in delivering the opinion of the Court in a similar case to this, *S. v. Brown,* 33 N. C., 141: "We entirely concur with his Honor who tried the case below. And while we confirm his judgment, must be permitted to express our own regret that the obligations into which our minis- (350) terial officers enter upon taking office are so insufficient to the

security of the public." The evil seems to call for legislative interference.

This view of the case upon the plaintiff's appeal renders it unnecessary to notice the defendant's appeal farther than to say that there was no manner of necessity for taking it; for, upon this Court affirming the judgment upon the plaintiff's appeal, the defendants are discharged, while if this court had reversed the judgment the defendants would have gained all they could ask, to wit: a *venire de novo*. There is

PER CURIAM. No error.

Cited: Moritz v. Ray, 75 N. C., 172; *Prince v. McNeill,* 77 N. C., 403; *Kivitt v. Young,* 106 N. C., 569; *Joyner v. Roberts,* 112 N. C., 114; *Daniel v. Grizzard,* 117 N. C., 108; *Hudson v. McArthur,* 152 N. C., 455.

Dist.: Wilmington v. Nutt, 78 N. C., 180.

THE BOARD OF COMMISSIONERS OF RANDOLPH COUNTY v. R. F. TROGDEN.

Sheriff—Commissions.

An outgoing sheriff is entitled to the commissions on the amount of taxes he pays to his successor in office, under the Act of 1868 (special session), chap. 1, sec. 7.

APPEAL at Spring Term, 1876, of RANDOLPH from judgment of *Kerr, J.*, upon the following case agreed:

I. In 1868 the gross amount of taxes levied for county purposes was $9,051.32, and that on the tax books, including both the State, which was $4,059.91, and county taxes for that year, were put into the hands of Z. T. Rush, then sheriff.

II. That of the State and county taxes Sheriff Rush collected the gross amount of $6,343.73; that this amount was made up of
(351) both State and county tax—he collecting both the State and county tax of each tax-payer from whom he made collection.

III. That after collecting the aforesaid amount he was required by law to turn over to the defendant R. F. Trogden, his successor as sheriff, and did turn over accordingly the tax books, with all the remainder of the taxes, both State and county, uncollected, and also the sum of $850 in money, being a part of the aforesaid collection of $6,343.73, failing and refusing to account to or settle with the said Trogden further.

IV. That the said Z. T. Rush accounted to and paid over, without the assent of Trogden, to the county treasurer the sum of $5,483.23, including the sum of $321.09, which he retainded, being the entire amount of commissions on the aggregate amount of $6,343.73 collected by him.

V. That the defendant R. F. Trogden collected and paid over to the State, out of the money collected by him, the entire State tax for that year.

VI. That there was, after deducting the entire amount of $6,343.73 collected by Sheriff Rush from the county taxes of that year, still due the county the sum of $2,707.59, of which by way of insolvents and otherwise he accounted for all except the aforesaid sum of $321.09, which Sheriff Rush had retained as commissions on the amount collected by him, Rush, which said sum the defendant retained, claiming that he was entitled to commissions of the said sum collected by said Rush.

Whereupon, his Honor delivered the following judgment:

In this action, upon the case agreed upon by consent of counsel upon both sides of the facts, and submitting the questions of law arising thereon to the judgment of the Court: It is adjudged that Reuben F. Trogden is entitled to retain commissions upon the entire amount of taxes assessed for the use of the county: It is therefore ordered that he recover of the plaintiff the costs of this action to be (352) taxed by the clerk.

From this judgment the plaintiff appeal, assigning as error:

Failure of the court to adjudge that plaintiff recover $321.09, as claimed and set out in statement of facts.

Scott & Caldwell for appellant.
Tourgee, contra.

BYNUM, J. Which of the two, the old or the new sheriff, is entitled to the commissions in controversy? Both are not, that is admitted. Before the act of 1868, Special session, ch. 1, sec. 7, it was the duty of the sheriff to pay over to the State Treasurer of the State taxes collected by him, and to the county trustee the county taxes, deducting his commissions as allowed by law. The statute thus cited was passed to meet the exigencies of a new and extraordinary state of things, growing out of the reorganization of our State government. Instead of requiring the taxes collected to be paid into the State and county treasury as heretofore, the act required them to be paid by the outgoing sheriff to his successor in office, he, however, retaining all commissions and fees accrued to the time of the transfer. Why are not the commissions as much accrued when he is directed to pay the taxes collected to A under the act of 1868 as when directed to pay them to B under the old law?

Rev. Code ch. 99, sec. 120. When paid under the old law the commissions were to be deducted, and when paid under the new they are to be deducted; and in both cases the commissions are accrued and due. It was a matter of indifference to the old sheriff whether he paid the moneys to the county treasurer or to the new sheriff. So, in regard to the commissioners, it was equally a matter of indifference to the incoming sheriff whether the taxes collected were paid to him or (353) the treasurer, as in either case the outgoing sheriff was authorized by the act to retain his accrued commissions and the new sheriff was not entitled to them. The service was performed by the outgoing sheriff and he was ready to pay over the amount collected, as he should be directed by law; and if the law directed the new sheriff to receive the money and the old to retain the commissions for his services, it may be a hardship on the new sheriff to be held responsible for this money without compensation, but it is a hardship imposed by the act, for which the outgoing sheriff is in nowise responsible. He only gets the compensation allowed him by law for services rendered. The successor must look to the State and county for *his* compensation, as he is their agent.

This is a case agreed, and the opinion of the Court is confined to that. Other allegations are made in the pleadings, and an argument by the counsel of the defendant is based upon them. We are precluded by the case agreed from a notice of anything outside of it, further than to observe that nothing stated even in the answer can affect the right of recovery by the plaintiff. The sum retained by the defendant and claimed as commissions is $321.09, this being the exact amount which was deducted as commissions on the taxes collected by Rush, the former sheriff, in his settlement with the county treasurer and commissioners. This sum, with interest from the time of demand made, the plaintiffs are entitled to recover. The demand seems to have been made a short time before the institution of the action. The action was begun 24 November, 1874, and interest will be calculated from that date.

There is error. Judgment reversed and judgment here in accordance with this opinion.

PER CURIAM. Judgment accordingly.

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BENJAMIN ROUSE v. GEORGE QUINN AND OTHERS.

Certiorari—Agreement of Counsel.

In a petition for a *certiorari*, where the counsel on opposing sides make sworn contradictory statements to each other, the Supreme Court will not decide between them; and taking no notice whatever of any pretending agreement between the counsel in the court below not appearing upon the record, this Court will hold the parties strictly to the provisions of the Code of Civil Procedure.

PETITION for a *certiorari*, filed at this term by the plaintiff, praying that an order issue to his Honor, *Kerr, J.*, before whom the case was tried at Spring Term, 1875, of DUPLIN, to settle the case and transmit it to this Court.

It is alleged in the petition that the reason the appeal was not perfected in the time prescribed was, on account of the exceptions to the case as made up by plaintiff's counsel and the absence of the judge from the district, more time was given than the ten days prescribed in the Code.

This is positively denied in the affidavit of the defendant's counsel, who states further that he never at any time, during the whole proceeding, waived any right belonging to his client.

The Supreme Court declining to pass upon the issues raised by the affidavits, refused the motion for a *certiorari*, and dismissed the original appeal for want of a case.

Kornegay for petitioner.
W. A. Allen, contra.

BYNUM, J. The proceedings for perfecting the appeal were regular up to the time when the defendant filed his exceptions to the case as stated by the plaintiff.

Instead, then, of calling upon the presiding judge to settle the case within the time and in the manner prescribed by law, C. C. (355) P., secs. 299 to 314, the plaintiff persisted in his attempt to agree on a case with the opposing counsel, until he lost his appeal by lapse of time. It does not appear from the record that the defendant waived the bar of the lapse of time, and that he did waive it is expressly denied by him.

The propriety of the rule governing appeals, as laid down in *Wade v. New Bern*, 72 N. C., 498, and approved in *Adams v. Reeves* 74 N. C., 106, is apparent in this case. We have the unseemly case of two counsel of this Court on opposing sides, making sworn statements, contradicting each other upon a matter which should have appeared of record, or

not been denied. We have said that in such cases this Court will not decide between them. Their opposing oaths leave the matter at large, and the provisions of the Code, as expounded in the cases cited, must prevail.

The motion is denied. The plaintiff must pay the cost of the motion. The appeal is dismissed for the want of a case.

PER CURIAM. Appeal dismissed.

Cited: Walton v. Pearson, 82 N. C., 646; *Hutchinson v. Rumfelt,* 83 N. C., 442; *Scroggs v. Alexander,* 88 N. C., 67; *Office v. Bland,* 91 N. C., 3; *S. v. Price,* 110 N. C., 602.

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(356)

JOHN S. PENNINGTON, TRUSTEE, ETC., v. MARY PENNINGTON.

Deed in Trust—Cloud Upon Title.

Where a trustee, under a deed conveying lands *in trust*, to secure the payment of certain debts, entered after the death of the trustor, and made sale of the lands so conveyed, a condition of said sale being that the purchaser thereat should be put into possession of said land by the trustee (the land at the time being in the possesion of the widow of said trustee): *It was held*, that putting the purchaser into possession will not meet the requirements of this condition, unless the cloud over the title be removed, by having the fact judicially established that there remained debts secured by the deed of trust unsatisfied, so as to support the sale made by the trustee.

EJECTMENT, tried before *Cloud, J.,* at DAVIE Spring Term, 1876.

The following are substantially the facts sent to this Court as a statement of the case by the presiding judge.

The action was originally commenced against Mary Pennington for the recovery of the possession of a certain tract, claimed by plaintiff under a mortgage executed and delivered by the then owner of said land, one Claiborne Pennington, to secure certain debts therein mentioned. Before the commencement of this action, the mortgagor, Claiborne Pennington, died.

Mary Pennington died in 1874, and at the Fall Term of Davie Superior Court in that year, and after the death of said Mary had been suggested, the plaintiff filed the following affidavit:

John S. Pennington maketh oath, that Claiborne Pennington, on 26 August, 1858, duly executed a deed of trust to affiant as trustee, to secure a large amount of indebtedness of the said Claiborne, some three thousand dollars or more, upon which affiant was security. That by

said deed of trust the tract of land in controversy in this action was conveyed to affiant, and that affiant was authorized thereby (357) to sell said land upon the default of said Claiborne to pay said debts.

That said Claiborne failed to pay a large part of said debts; and upon such default, and at the time, and in the manner specified in said deed, this affiant entered upon and made sale of said land, a condition of which sale was that the purchaser should be put into possession of said land by this affiant; and this suit was brought for that purpose.

That a large amount of said debts are still unpaid.

That on 15 October, 1859, said Claiborne executed another deed in trust, conveying the same land and some other articles, for the purpose above set forth, and both of said deeds of trust have been registered.

This action was originally brought against Mary Pennington, the widow of said Claiborne, who continued living on the land after the death of her said husband; and at the death of the said Mary, having been suggested at the last term of this court, notice was issued to her children, G. B. Pennington, D. S. Pennington and Sallie Crowell, to come in and make themselves parties, which notice has been returned "duly executed." That said G. B. Pennington, D. S. Pennington and Sallie Crowell are wholly insolvent and unable to pay any amount for rents and profits which may hereafter be recovered in this action.

That said tract contains one hundred and fifteen acres of land and is worth an annual rental of one hundred dollars at least.

J. S. PENNINGTON.

Sworn, etc.

At Fall Term, 1875, the notice having been served on the heirs-at-law of Claiborne Pennington, the plaintiffs moved for judgment against said heirs, which motion was adjourned by consent, to be heard at ROWAN, before *Cloud, J.* It was not then heard, and the (358) plaintiff renewed it at Spring Term, 1876, of DAVIE Court. At said term the heirs-at-law moved to be permitted to answer and file a bond, which motion the court refused as not being made in apt time, ruling that the said motion should have been made at the term preceding. From this ruling the heirs appealed.

Bailey, for appellants.
Clement, contra.

PEARSON, C. J. The plaintiff derives his title under a deed executed to him by Claiborne Pennington in trust to secure certain debts, with power of sale, etc. After the death of said Claiborne the plaintiff entered and made sale, "a condition of which sale was that the purchaser

should be put in possession of said land by this affiant, and this suit was brought for that purpose." See affidavit of plaintiff, Fall Term, 1874. It is clear that "putting the purchaser into possession" will not meet the requirements of this condition unless the cloud over the title be removed by having the fact judicially established that there remained debts secured by the deed of trust unsatisfied, so as to support the sale made by the trustee; and it is also clear that the judgment in this case does not remove the cloud from the title. Thus an action which has been pending some four or five years, in which there was an order of reference to state the account of the trust fund, which order, for some cause not explained, is set aside, results in a judgment that "plaintiff recover possession of the land," which possession the purchaser, if well advised, will decline to take, because the cloud is not removed from the title.

Mary Pennington, who was the widow of Claiborne Pennington, had no title to the land and could not contest the right of the plain-
(359) tiff to sell because of the alleged default of her husband in failing to satisfy the debt secured by the deed of trust. So the plaintiff made a wrong start in bringing the action against her. At her death "her heirs-at-law," whom the plaintiff sought to make defendants in her stead, could not contest the question of the right of the plaintiff to sell. So the plaintiff was at fault in making his second move in the proceeding.

When at last the plaintiff gets right in his proceeding, and the heirs of Claiborne Pennington, being notified, propose to give bond for the rents, etc., and make themselves parties defendants to contest the right of the plaintiff to make the sale, the case takes a strange turn; the plaintiff objects to having the very purpose for which the suit was brought effected by a trial between the proper parties (!) although the heirs of Claiborne Pennington offer a condition to their application to give bond for the rents, etc.

This offer is so much calculated to effect the purpose of justice and to carry into effect the condition upon which the purchaser bid off the land, that we are forced to believe his Honor would not have refused the motion of the defendants and give a presumptuous judgment that plaintiffs recover possession of the land unless he had felt himself constrained by what he considered to be the proper construction of the statute. Bat. Rev., ch. 17, sec. 64. In case of death, the court, 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.

We are of opinion that his Honor erred as a matter of law in the opinion that the case before him could be brought within the meaning of this statute, and that the defendants did not apply "in apt time."

At the death of Mary Pennington the plaintiff would have been out of court by the abatement of this action but for this (360) enactment. So it was for him to invoke its aid by proceeding "in apt time."

Supposing plaintiff to have kept himself in court by the proceedings against the defendants, first as the heirs of Mary Pennington and afterwards as the heirs of Claiborne Pennington, we are at a loss to see on what ground he was entitled to judgment for the possession of the land without showing title to it, both at law and in equity.

Under the old mode of procedure the plaintiff in an action of ejectment against Claiborne Pennington, or any one claiming under him, would have been entitled to judgment by force of the deed of trust simply, and the defendant would have been obliged to resort to equity to have the question in regard to unsatisfied debts settled, and in the meantime for an injunction, etc.

Under the new mode of procedure the plaintiff cannot rest upon the deed of trust alone, but must meet the equity of the defendants by proof that all or some part of the debts are unsatisfied. It may be that if plaintiff, in his action against Mary Pennington, had contented himself by treating her as a wrong-doer and demanding judgment for the land, this equitable element would not have come before the court.

But after her death he relies on it in order to conclude the defendants as heirs of Claiborne Pennington, and of course could not entitle himself to judgment without meeting this equity and proof that he had a right to sell under the power of the deed of trust. There is error.

PER CURIAM. Reversed.

(361)

WILLIAM MELVIN v. JOHN WADDELL AND ADALINE LITTLE.

Ejectment—Adverse Possession.

1. The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural presumptions as to facts, but upon a statutory or arbitrary rule established by the Legislature, or by the courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of all the circumstances in evidence.
2. If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that *in fact* no grant ever issued.

3. A plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them.

4. Where there was evidence tending to prove a possession of twenty years by the person, and those claiming under him, from whom the plaintiff derived his title, the charge of the judge that in such case, and the title being out of the State, the jury might presume a deed to him or them from any person having a title, was not erroneous.

5. Where a widow, without authority, puts a son-in-law in possession of a tract of land belonging to the estate of her deceased husband, and the son-in-law, without having a deed, sells the land, making a deed in fee for the same to the purchaser, in an action against one in possession, claiming under the said son-in-law: *Held*, that neither the possession of the son-in-law nor that of those claiming under him was adverse to the heirs of the deceased husband or of those claiming title under them.

EJECTMENT, tried before *Buxton, J.*, at January Term, 1876 of CUMBERLAND. The summons issued 8 November, 1871.

The land which is the subject of the action is a town lot in Fayetteville, three-quarters of an acre, on Munford street. The defendant Adaline Little admitted that she was in possession by the ten-
(362) ants, John Waddell & Co., but denies the right of the plaintiff to recover.

The plaintiff read in evidence a deed in fee from Robinson Mumford to Johnson, Hall & Co.; dated 10 April, 1816, which covers the land in dispute and several acres of the adjoining land. It was also in evidence that this lot, included in the enclosure of five acres, was in possession of and claimed by the firm of Hall & Johnson as far back as in 1830. It was cultivated as a meadow, being part of Mumford swamp. Johnson H. Hall and Constant Johnson composed the firm of Hall & Johnson. In 1840 this property was divided and Constant Johnson took separate possessions of the lot in dispute, claiming it as his own until his death.

The plaintiff then read in evidence the record of a petition for partition, instituted in the probate court of Cumberland County on 10 May, 1870, in the case of *Robert Johnson v. Heirs-at-law of Constant Johnson and Executor and Heirs of John H. Hall.*

In this proceeding it was in evidence that all the heirs-at-law were made parties. A decree of sale for the purpose of partition was ordered and C. W. Broadfoot was appointed commissioner to make the sale. The sale was made of the land in dispute and the plaintiff, William Melvin, became the purchaser; a report of the same was returned to Court and duly confirmed, and a deed dated 6 July, 1871, was made by the commissioner, Broadfoot, to the purchaser, Melvin, the plaintiff in this action.

The plaintiff then, for the purpose of estopping the defendant, read in evidence a deed from E. F. Moore to T. S. Lutterloh for the land in dispute, dated 27 October, 1858; also a deed from T. S. Lutterloh to George Holmes dated 25 September, 1863, and a deed from George Holmes to the defendant Adaline Little, dated 12 May, 1868, all for the same land.

The object of introducing these conveyances, the case states, was to show that Adaline Little, the defendant, claimed under (363) E. F. Moore, who was a son-in-law of Mrs. Constant Johnson. It was in evidence that after the death of Constant Johnson, his widow, now deceased, continued to occupy this land, claiming it as the property of her husband's estate. She let E. F. Moore into possession, and he, without obtaining a deed, sold the same to T. S. Lutterloh, who sold to George Holmes, who sold to the defendant as above stated.

There was evidence of the annual value of the property.

The defendant offered no evidence, but asked his Honor to charge the jury that the plaintiff could not recover, because:

1. That title to the property had not been shown out of the State.

2. That there was no evidence of any connection or identity of the firm of Hall & Johnson, under whom the plaintiff claims, with the firm of Johnson, Hall & Co., who took the deed from Robinson Mumford on 10 April, 1816.

3. That the series of deeds commencing with the one from E. F. Moore to T. S. Lutterloh on 27 October, 1858, down to the one under which the defendant claims, together with the possession under them, was adverse to the plaintiff.

The first instruction his Honor declined to give, and in relation thereto charged the jury: That the fact that the property was situated in an old incorporated town like Fayetteville; that it had been the subject of conveyance between private parties so far back as the date of the deed from Mumford to Johnson, Hall & Co., which was 10 April, 1816, and had been so long treated as private property, were circumstances from which they might presume a grant. Defendants excepted.

To the second instruction asked for, his Honor charged the jury: That it was true that no connection or identity of the firm of Hall & Johnson with that of Johnson, Hall & Co., had been (364) shown in evidence. Still there was evidence of possession by Hall & Johnson and those claiming under them since 1830; and from twenty years occupation, the title being out of the State, they might presume a deed. Defendants excepted.

To the third instruction asked for, his Honor charged: That if E. F. Moore acquired the possession from the widow of Constant Johnson, that neither his possession nor that of any one claiming under him was ad-

verse to the heirs-at-law of Constant Johnson or to any one claiming under them; and if it was adverse, still it had not continued long enough—that is, seven years (not counting the time of suspension of the statute from 1861 to 1870)—to ripen the color of title conveyed to defendant. Defendant excepted.

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

Merrimon, Fuller & Ashe and B. Fuller & Sutton for appellant.
Hinsdale, contra.

RODMAN, J. *The first exception of the defendant* is to the instructions of the judge to the jury, that from the facts that the *locus in quo* was in an old town and had been conveyed as early as 1816, they might presume that the title was out of the State. We do not know of any authority for this proposition, and it might often lead to false conclusions. There are several unoccupied lots in Raleigh which it is well known that the State has never granted. If the question was whether the State, *in fact,* had granted certain land, then in case no grant could be produced, it might be open to proof as questions of fact in general are, by the proof of any circumstances which might make the fact that a grant had or had not issued more or less probable.

But the question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural
(366) presumptions as to the fact, but upon a statutory or arbitrary rule established by the Legislature or by the courts to prevent the uncertainty of titles which would arise if the question in each case were to be determined by a jury on their belief of the fact derived from a consideration of all the circumstances in evidence. If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that *in fact* no grant ever issued. These views are fully sustained by *Reed v. Earnhart,* 32 N. C., 516; *Bullard v. Barksdale,* 33 N. C., 461, and the other cases cited by plaintiff's counsel and by sec. 18 of C. C. P.

This error of the judge, however, did not prejudice the defendant, for it sufficiently appears upon admitted facts that the title was out of the State at the commencement of the action. If the question is to be decided upon the law existing prior to the Code, it appears from *Reed v. Earnhart, ante,* and *Candler v. Lunsford,* 20 N. C., 542, that a plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them. The posses-

sion of the plaintiff, coupled with that of Moore, Lutterloh and others under whom defendant claims, which, while adverse to the plaintiff was also adverse to the State, exceeded thirty years, after deducting the time during which the presumption did not run.

Whether sec. 18 of the Code of Civil Procedure applies in this action, and whether it makes any change in the former law, we need not inquire, for it seems to have been conceded at the trial that the former law governed the case. The defendant did not except to the judge's ruling, on the ground that the law had been changed by the Code, (367) and he took no such ground in the argument here.

Second exception of defendant. The judge told the jury that there was evidence tending to prove a possession of twenty years by Constant Johnson and those claiming under him, and that the title being out of the State, they might presume a deed to him or them from any person having a title.

There is no error in this. We conceive it to be settled law. See C. C. P., sec. 23.

Third exception of defendant. The judge told the jury that if Moore acquired the possession from the widow of Constant Johnson, as her tenant, that neither his possession nor that of any one claiming under him was adverse to the heirs of Johnson or to any one claiming under them. And if the possession of Lutterloh and those claiming under him was adverse, their possession had not continued long enough to give them a good title—that is, it had not continued for seven years, not counting the time from 1860 to 1870, when the statute was suspended. There is no error in this of which the defendant can complain. Before the Code of Civil Procedure it might be said generally that if one who entered as a tenant remained in possession a *very long time* after the expiration of his tenancy, without paying rent or otherwise acknowledging the tenancy, his possession would or might be deemed adverse; and so of one who took a deed in fee from the tenant. But we do not know that it was anywhere settled before the Code what length of time, either by itself or in connection with other circumstances, would require or justify a jury in presuming a release from the landlord. In *Callender v. Sherman,* 27 N. C., 711, it was held that a possession for thirty-five years by a Masonic Lodge claiming the property as its own under a supposed will of the landlord which was invalid and was never proved as a will, would not be held adverse to his heirs, when it appeared that the lodge commenced its possession by an agreement with a tenant of the (368) supposed devisor whose term had not expired at the death of the devisor.

The time is now fixed by section 26 of the Code at twenty years after the expiration of the tenancy, etc. There is

PER CURIAM. No error.

Cited: *Kitchin v. Wilson,* 80 N. C., 198; *Cowles v. Hall,* 90 N. C., 334; *Phipps v. Pierce,* 94 N. C., 518; *Pearson v. Simmons,* 98 N. C., 283; *Springs v. Schenck,* 99 N. C., 558; *Mobley v. Griffin,* 104 N. C., 115; *Bryan v. Spivey,* 109 N. C., 67; *Asbury v. Fair,* 111 N. C., 257; *Ladd v. Byrd,* 113 N. C., 469; *Bernhardt v. Brown,* 122 N. C., 591.

STATE v. ALBERT COLBERT.

Indictment—Motions to Quash.

1. Quashing indictments is not favored. It releases recognizances and sets the defendant at large, where, it may be, he ought to be held to answer upon a better indictment:
2. *Hence,* it is a general rule that no inidctment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, and the like, will be thus summarily dealt with.

PERJURY, tried before *Kerr, J.,* at Spring Term, 1876, of GUILFORD.

The prisoner was held to answer on the following bill:

"The jurors for the State, upon their oath, present that heretofore, to wit, at an election opened and held in the city of Greensboro in the county of Guilford aforesaid, on 6 August, 1875, for the purpose of electing members of a Constitutional Convention in the State aforesaid, which was on the day and at the place prescribed by law, for the purpose aforesaid, which said election was opened and held according to law, when came one Milton Banks and offered to vote for members of the aforesaid Convention, and it then and there appearing that the name of the said Milton Banks was not registered as the law directs, he, the said Milton Banks, was not permitted to vote; upon which he, the said
(369) Milton Banks, made affidavit to the effect, among other things, that he, the said Milton Banks, voted in Gilmer Township in 1874; in support and confirmation of which statement one Albert Colbert of the county and State aforesaid produced and offered the following affidavit, to wit:

Albert Colbert, being duly sworn, deposes that he personally knows that Milton Banks voted in Gilmer Township last year.

His
ALBERT × COLBERT.
Mark

Sworn and subscribed before me, August 5th, 1875.

J. N. NELSON, *C. S. C.*
By ABRAM CLAPP, *D. C.*

"Which said affidavit is sworn and subscribed before J. N. Nelson, clerk of the Superior Court and judge of the probate court in and for the said county, by Abram Clapp, deputy clerk; he, the said J. N. Nelson, clerk and probate judge as aforesaid, through Abram Clapp, deputy as aforesaid, being fully and lawfully authorized and empowered to administer oaths on this behalf; the said affidavit falsely and corruptly stating that he, the said Albert Colbert, personally knew that the aforesaid Milton Banks voted in Gilmer Township, in the county and State aforesaid, last year, meaning 1874, when in truth and in fact the said Albert Colbert did not know that the said Milton Banks voted in said township in 1874, it appearing from a record of said election that the said Milton Banks did not vote in the said township in 1874.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that it became and was a material question, at the taking said oath by the said Albert Colbert, whether he, the said Albert (370) Colbert, knew that the said Milton Banks voted in Gilmer Township in 1874 or not.

"And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Albert Colbert, on the said 5 August, 1874, in the city of Greensboro in the county of Guilford aforesaid, before the said J. N. Nelson, clerk of the Superior Court and judge of the probate court in and for said county, by Abram Clapp, deputy clerk as aforesaid, then and there having full power and authority to administer oaths on this behalf, of his own most wicked, malicious and corrupt mind and disposition, and by his own act, in manner and form aforesaid, willfully and corruptly, did commit willful and corrupt perjury, to the great displeasure of Almighty God, in contempt of the laws, to the evil example of all other persons, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

F. N. STRUDWICK,
Solicitor."

After the jury was empaneled, the prisoner having pleaded *not guilty,* a juror was withdrawn, and on motion the indictment was quashed. From this judgment of the court the solicitor appealed.

Bledsoe, with Attorney-General Hargrove, for the State.
Tourgee for the prisoner.

READE, J. Quashing indictments is not favored. It releases recognizances, and sets the defendants at large, where, it may be, he (373) ought to be held to answer upon a better indictment. It is, however, allowable; and in cases where it puts an end to the prosecution altogether, it is advisable, as where it appears that the court has not jurisdiction, or where the matter charged is not indictable in any form. Mr.

Chitty, in his Criminal Law, page 300, says: "The courts usually refuse to quash on the application of the defendant where the indictment is for a serious offense, unless upon the plainest and clearest grounds; but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error."

It is, therefore, a general rule that no indictment which charges the higher offenses, as treason or felony, or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with.

Here the crime charged is perjury at an election—a matter of great importance to the public; and the example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form.

The indictment is very informal, and probably no judgment against the defendant could be pronounced; but still the court had juris-
(374) diction, and the matter intended to be charged is a crime which greatly concerns the public, and therefore the defendant ought to have been held and tried upon a sufficient indictment. The bad impression left upon the public from quashing the indictment must be that one may commit perjury in elections and not be punished.

The indictment charges that at a certain election, etc., one Milton Banks offered to vote, and because his name "was not registered as the law directs, he was not permitted to vote." How or by whom he was not permitted to vote, whether by those who were around the polls, or by the pollholders, is not charged. But suppose it to have been the pollholders, upon a regular challenge by themselves, or by the bystanders, and that the trial was in all things regular, and he was rejected because he was not registered, then the trial was at an end, and Banks was no longer before the pollholders for any purpose. Now, it is evident that, to have made any oath perjury, it must have been taken or used upon that trial by the pollholders. But it is not charged that any oath was taken or used before them, but that they rejected him *because* he was not *registered.* Surely it cannot be left to inference whether the oath was taken or used before the pollholders, and upon the trial, and before the rejection. If we are to look to inferences, they are strong that the oath was taken and used after the trial and rejection, and when there was nothing whatever on trial.

The indictment charges that Banks was rejected, and then as folows: Upon which—that is, upon and after his rejection—he, the said Milton Banks, made affidavit to the effect that he had voted, etc., in 1874. And in support of that statement the defendant produced and offered an affidavit, etc. It is not charged before whom Banks made his affidavit, or for what purpose, whether to satisfy the crowd or the pollholders, or that

there was any trial then pending, or that the application which had been once rejected had been renewed. It is not charged that the pollholders took any action upon the affidavit, and either received the (375) vote or rejected it the second time. From which it must be inferred that it was not before them for any official purpose, as they took no action upon it whatever.

It is not charged that the defendant took or offered any oath before the pollholders, on the trial or before the rejection, but after the rejection, as we must infer, he went before the clerk of the court and made oath that he knew that Banks had voted the year before, and this written oath he produced in support of Banks's statement that he had voted the year before. But before whom it was offered is left to inference. And what was expected to be accomplished by it is not charged, nor is it charged that the pollholders took any cognizance of it.

It is charged that the defendant took his oath before the clerk of the Superior Court, and that "it became and was a material question at the taking of said oath" whether the defendant did know that Banks had voted the year before. But it is not stated how it could have been material. There was no trial before the clerk of any sort, nor it is charged that it was taken to be used in some trial elsewhere, nor that it ever was so used.

We do not wish to be understood that, in charging the *materiality* of the testimony that it is necessary to state the *details,* but it must be charged at least that it was in some trial where it can be seen that it might have been material.

So it appears that there was abundant cause for his Honor's declaring the indictment informal and insufficient, but not for quashing it. There ought to be a trial. If the solicitor will prepare a sufficient bill, then, if convicted, the defendant may be punished. If the solictor will try upon an insufficient bill—which is not to be supposed—then, although convicted, the judgment would be arrested. There is error.

PER CURIAM. Reversed.

Cited: S. v. Knight, 84 N. C., 790; *S. v. Flowers,* 109 N. C., 844; *S. v. Skidmore, ib.,* 797; *S. v. Harwell,* 129 N. C., 552, 555; *S. v. Cline,* 146 N. C., 643; *S. v. Knotts,* 168 N. C., 180.

(376)

SABASTIAN MACON AND WIFE AND SALLIE T. MACON v. NATHANIEL H. MACON AND WIFE AND LUCY A. MACON.

Construction of Will.

1. The purpose of a testator as gathered from his will is always to be carried out by the court, and minor considerations when they come in the way must yield. Especially is this so when the purpose is in consonance with justice and natural affection.
2. *Hence*, where the manifest and leading purpose of the testator appeared from his will to be that his children, two married daughters, should share equally his estate, and where, after giving them severally the shares they had in possession (equal in value), the testator gave to one, after the death of his widow, all his lands, and to the other, after the same time, slaves equal in value to the lands, the valuation of lands and slaves to be concurrent acts and dependent one upon the other, and the residue of his property, after the death of the widow, he divides equally between them, his said two daughters, and before the death of his widow the slaves were freed and ceased to be property: *Held*, that in accordance with the general purpose of the testator, apparent from the will itself, the daughter to whom the slaves had been given, and who realized nothing from the bequest, had a right to share equally with her sister the lands devised to the latter.

ACTION, involving the construction of a will, submitted to and decided by *Watts*, J., at chambers in the county of FRANKLIN, 31 January, 1876, upon the following case agreed:

1. David Thomas died in the county of Franklin in October, 1864, leaving a last will and testament, in words and figures following,
(377) to wit:

In the name of God, amen!

I, David Thomas, of the county of Franklin and State of North Carolina, do make, publish and declare this to be my last will and testament, in manner following:

First. I give and bequeath to my daughter, Sallie T. Macon, wife of Sabastian Macon, the following slaves, now in her possession, to wit: Young Louisa and her child Louie, Frank, Jane and her three children, Hilliard, Louisa and Ella, with their increase from this time.

Secondly. I give and bequeath to Sabastian Macon the following slaves, now in possession of my daughter, Lucy Ann Macon, to wit: Tom, Harriet, Peggy, Peter, Sally, William, Adline and Henry, with their increase from this time, to have and to hold the same *in trust* for the sole, separate and exclusive use and benefit of my said daughter, Lucy Ann Macon, for and during the term of her natural life, free from the control of her present or any future husband; and at her death to be equally divided, *per stirpes*, amongst her surviving issue; and if she should die without leaving issue, then to be equally divided, *per stirpes*,

amongst the issue of my daughter, Sallie T. Macon, who may be living at the death of my said daughter, Lucy Ann Macon.

Thirdly. I lend to my beloved wife, Drusilla Thomas, for and during the term of her natural life, all my lands, and all my slaves not heretofore disposed of, and all other property of every description which I may own at the time of my death; and I give and devise the said land at my wife's death to Sabastian Macon, and his heirs, *in trust* for the sole and separate and exclusive use and benefit of my daughter, Lucy Ann Macon, for and during the term of her natural life, free from the control of her present or any future husband, with remainder at her death, in fee-simple, to her surviving issue, *per stirpes*. And at my said wife's death, I give and bequeath to my said daughter, Sallie T. Macon, as many of the slaves lent to my wife during her life as aforesaid as may be equal in value to the said lands at that time. The value of (378) said lands and slaves at my wife's death to be ascertained by three freeholders to be then appointed by Sabastian Macon; and the residue of the slaves lent to my wife, after the shares of Sallie T. Macon is so allotted to her, with any and all other property belonging to my estate, I give to my said daughters, Sallie T. Macon and Lucy Ann Macon, to be equally divided between them; the share of my daughter, Lucy Ann, to be held in trust by Sabastian Macon, for her sole, separate and exclusive use and benefit during her life, and at her death to be subject in all respects to the same remainders and limitations as are attached to the bequests of slaves in her favor in the second clause of this will.

Fourthly. My executors are not required to sell the perishable property left to my wife, unless she desires it; and if it shall be necessary to sell any portion of the estate for the payment of my debts, she is at liberty to select out of the personal property lent to her such property as she may keep for that purpose.

And lastly, I nominate and appoint my beloved wife, Drusilla Thomas, and Sabastian Macon, to be executrix and executor to this, my last will and testament.

In witness whereof, etc. DAVID THOMAS. [Seal]

Signed, sealed, published, etc.

2. That the said will was duly proved at the December Term, 1864, of Franklin County Court, and Drusilla Thomas qualified as executrix thereto, and Sabastian Macon did not.

3. The said Drusilla Thomas died in the month of May, 1875.

4. The slaves given to his widow, Drusilla Thomas, for life, numbering twenty-five, were emancipated by the results of the war; and the rest of the personal property given to her for life, and re- (379) maining at her death, amounted in value to no more than $.....

5. That the testator at the time of his death was seized of a tract of land lying in the county of Franklin, adjoining B. T. Ballard and others, containing eleven hundred and thirty-five (1,135) acres, which said land was in possession of the said Drusilla Thomas until her death, and at that time was worth nine thousand dollars.

Upon the foregoing state of facts, it is insisted by the plaintiff, Sallie T. Macon, that she is entitled to an equal division, that is, to one-half of the property, real and personal, left by said David Thomas to his widow, Drusilla Thomas, for life, and remaining at her death.

For the defendant Lucy Ann Macon, it is contended that she is entitled to all the lands so remaining, regardless of the emancipation of the slaves, and to half the personal property so remaining.

If the court shall be of opinion with the plaintiffs, then commissioners shall be appointed to divide the said property; but if of opinion with the defendants, then an account and division of the personal property only is to be had.

His Honor rendered the following judgment:

"Upon examination of the will of David Thomas, I am of opinion that the plaintiff is entitled to an equal division of the estate; and that commissioners should be appointed to divide the same, according to the true intent and desire of the testator. Let partition be had accordingly."

From this judgment the defendants appealed.

Green, Smith & Strong for appellants.
Davis & Cooke, contra.

BYNUM, J. The life tenant died after the emancipation of the slaves by the results of the war. It is clear that upon the death of the
(380) life tenant, the valuation of the land to one daughter, and an equal valuation in negroes to the other daughter, were to be concurrent acts; and that the paramount purpose of the testator was that these two and only children should have an equal share of his estate at the time of this valuation and division. When that time arrived, however, the slaves no longer existed as property, and this secondary and minor intent of the testator as to the mode of division could not be carried into effect. The only part of the estate or fund left, out of which the divison could be made, was the land. As to that, there was still the primary and controlling purpose of equality between the daughters. The testator does not declare that the daughter Lucy shall have the land anyhow and at all events; but the devise to her is coupled with the qualification that slaves of an equal valuation with the land shall vest in Sarah, the other daughter; one bounty was dependent upon another. If at the death of the widow the land had been lost by paramount title, and the slaves only had remained, the same controlling purpose of equality between the two chil-

dren would have required an equal division of the slaves. That equality was the controlling purpose of the testator is further apparent from all the provisons of the will. He had two daughters only, who were equal objects of his affection. Both were married. The husband of one, it seems, was improvident, and the only difference made by the testator between the daughters was that the estate given to this one was secured to her separate use. The testator first gives the daughters the slaves already in their possession, which were of apparent equal value. He next gives them the land and negroes after the life estate of his widow. We have already commented upon this clause of the will. Thirdly and last, he makes an equal division of the residue of his prop- (381) erty between them. Thus throughout the will equality between the daughters everywhere appears.

This case is so similar, in all its essential provisions, to *Lassiter v.* Woods, 63 N. C., 360, that the decision there is a decisive authority in this case. It was there held that equality is the controlling purpose and must be carried out by the court, and that all secondary and minor considerations, when they come in the way, must yield. "And especially is that so when the purpose is in consonance with justice and natural affection."

PER CURIAM. Affirmed.

Cited: *Holman v. Price,* 84 N. C., 88; *Hill v. Toms,* 87 N. C., 496; *Howerton v. Henderson,* 88 N. C., 601.

Dist.: *Whitehead v. Thompson,* 79 N. C., 454.

JOHN W. HINSDALE v. A. G. THORNTON.

Trust Estate—Sale under Execution.

1. When one buys land and the contract complies with the statute and is put in writing, he acquires an *estate* in equity, and the vendor holds the legal estate in trust for himself to secure the payment of the purchase money, and then in trust for the vendee. But, although the vendee acquires an *estate* in equity, his equitable estate *is not* a trust subject to sale under *fi. fa.* until the trust in favor of the vendor is satisfied by payment of the purchase money in full, when it becomes an *unmixed* trust estate.
2. A *right* in equity to convert the holder of the legal estate into a trustee and call for a conveyance is not such a *trust estate* as can be sold under a *fi. fa.*

PETITION to rehear, filed at this term by the plaintiff, the case between the same parties decided at January Term last of this Court, 74 N. C., 167, in which the facts are fully set out.

The errors assigned in the petition, alleged as a cause of rehearing, are stated in the opinion of Chief Justice PEARSON.

(382) *J. C. MacRae for petitioner.*
No counsel contra.

PEARSON, C. J. We have given to the cases relied on in the petition a *reconsideration,* for we had considered them in making the decision, and did not deem any one of them so relevant as to call for special notice in the opinion.

The petition sets out, as a matter of grievance, that *Phillips v. Thompson,* 73 N. C., 543, "though it conflicts with the opinion, *is not noticed.*" This count sets out as a matter of grievance, that the gentlemen of the bar, who certify, upon their professional honor, an opinion that there is error, did not advert to the fact that *the decision* in that case was that the deed conveyed a fee-simple and needed no reform. The remarks of Justice SETTLE, not necessary to the decision—or, rather, outside of the case—cannot with candor be called a *decision.* The petition to which they have given their certificate uses that word instead of the words *obiter dictum.* The same may be said of the other cases referred to. The decisions affirm that certain interests and rights in equity are not the subjects of sale under execution. The opinions go into long discussions and *dicta,* which surely this Court is not bound to notice by any special reference, or discussion in respect thereto, in its opinion.

I endeavored, by the opinion in this case, to point out the distinction between estate in equity and a mere *right* in equity. It seems I was not fortunate enough to make myself understood, or else the party interested was not open to conviction, and relied on general expressions dropped by judges in the discussion of cases, without having their attention called to the distinction adverted to.

Where one buys land and the contract complies with the statute, and is put in writing, he acquires an *estate* in equity, and the vendor
(383) holds the legal estate in trust for himself to secure payment of the purchase money, and then in trust for the vendee. But, although the vendee acquires an *estate* in equity, it is decided that his equitable estate is not a trust subject to sale under *fi. fa.* until the trust in favor of the vendor is satisfied by payment of the purchase money in full, when it becomes an *unmixed* trust estate, to use the words of the cases.

That a right in equity to convert one into a trustee, on the ground of "fraud, accident or mistake," is the subject of the sale *fi. fa.,* is a proposition which has no reason or authority to support it. Certainly the cases cited in the petition to rehear do not have that effect.

When one has estate in equity, viz., a *trust estate,* which enables him

to call for the legal title without further condition, save the proof of the facts which establish his estate, this trust estate is made the subject of sale under *fi. fa.* But where one has only a *right in equity* to convert the holder of the legal estate into a trustee, and call for a conveyance, the idea that this is a *trust estate,* subject to sale under *fi. fa.,* is new to us. True, his right to call for the legal estate is not subject to any further condition, save the proof of the facts alleged in support of his right; but there is no *trust estate* until the decree declares the facts and the Court declares its opinion to be that the one party shall be converted into a trustee for the other. It follows that the party has no estate subject to execution sale until the decree has vested an equitable estate in him.

One is entitled in equity to convert another into a trustee, on the ground of fraud, accident or mistake. Can such a right be sold under execution, on the ground that the one party will be decreed, without condition (other than the proof of the allegations necessary to make out his right), to convey the title? Surely not.

A is instructed by B to buy a tract of land for him, and is furnished with the money. A takes the deed for the land in his own (384) name. B is entitled to a decree, without conditions, positively and peremptorily, for a conveyance. Is this right of B subject to sale under execution?

A guardian buys land with the money of his ward—is the right of the ward to follow the fund, subject to execution sale, so that the purchaser at sheriff's sale acquires title to the land?

A avers that by a certain deed B intended to confer on him a fee-simple estate, but that, by reason of accident or mistake, or the ignorance of the draughtsman, only a life estate passed, is the right of A to have the deed reformed, subject to execution sale, so that the purchaser at sheriff's sale acquires, by the deed of the sheriff, title to the land? These questions give their own answers. The many inconveniences, frauds and impositions that may grow out of the sale of such rights under *fi. fa.* by a latitudinous construction of the act subjecting trusts to sale under execution, confirms us in the conclusion that the courts, in putting a strict construction upon the act subjecting trust estates and equities of redemption to sale under execution, because in derogation and in excess of the common law rights of debtors, are fully sustained by the principles of the law.

PER CURIAM. Petition dismissed.

Cited: Love v. Smathers, 82 N. C., 372; *Everett v. Raby,* 104 N. C., 480; *Barnes v. McCullers,* 108 N. C., 52; *Wilson v. Deweese,* 114 N. C., 656; *Gorrell v. Alspaugh,* 120 N. C., 367; *May v. Getty,* 140 N. C., 319.

STATE v. WILLIAM MESSIMER.

Homicide—Circumstantial Evidence.

The rule in regard to circumstances (offered as evidence on a criminal trial) is, that each circumstance must be as distinctly proved as if the whole case turned upon it; and each circumstance so proved must, taken in connection with other circumstances, *tend* to prove the defendant's guilt.

MURDER, tried at Spring Term, 1876, of IREDELL, before *Furches, J.*

The prisoner was charged with the willful murder of his mother-in-law, an old woman of seventy-two or three years of age, name Sarah Heilig, in the county of Rowan, in May, 1875. His trial was removed from Rowan to Cabarrus upon his own affidavit, and thence to Iredell, and there tried as above stated.

The evidence tending to connect the prisoner with the homicide was entirely circumstantial, the State introducing some forty witnesses. The prisoner introduced no witness; and although objecting on the trial below to much of the evidence introduced for the prosecution, on frivolous and untenable ground, the real and principal exceptions relied on by the prisoner are few and are fully stated in the opinion of Justice READE.

It is therefore deemed unnecessary to set out the evidence in this report, which necessarily, from the number of witnesses, fills many pages of his Honor's statement.

On the trial below the prisoner was found guilty. Rule for a new trial upon the exceptions stated in the opinion of the Court; rule discharged. Judgment, and appeal by the prisoner.

Clark for the prisoner.
Attorney-General Hargrove for the State.

READE, J. It is stated in the case that the evidence to connect (386) the defendant with the homicide was "entirely circumstantial," and that there were forty-odd witnesses for the prosecution. We have carefully examined the numerous exceptions taken by the defendant, to see if any incompetent testimony had been admitted against him, and we are obliged to say that we find none. The rule in regard to circumstances is, that each circumstance must be as distinctly proved as if the whole case turned upon it; and eaych circumstance so proved must, taken in connection with the other circumstances, *tend* to prove the defendant's guilt.

There is nothing which indicates that this rule was violated on the trial. The defendant sends up for our consideration the following exceptions:

1. To evidence that the deceased had money without fixing the defendant with knowledge of it.

The deceased was the mother of the defendant's wife, who a short time before the homicide was threatening to leave the defendant and go to her mother if he did not provide better for her. He replied that he would provide better in about a fortnight. He then had no money, and left home saying he was going to hunt work. He did not return home until the day of the homicide, when he brought with him some calico and a few other articles and a small sum of money, all of which he gave to his wife, saying it was all he had. A few days after the homicide he was seen with money. There was evidence tending to show that his tracks were seen near the house of the deceased, and there was other evidence tending to show that he had been about there the morning of the homicide. These circumstances were offered, not as of themselves proving the guilt of the defendant, but as links in the chain of evidence. And it is apparent that they were important.

2. The defendant was arrested away from home and tried; and while waiting for the railroad cars he said, "These men think I am guilty, but I think I can prove that I was at China Grove that (387) morning.."

This he excepts to as having been extorted from him by his situation. But the remark was voluntary. There was no threat or promise and no pain inflicted. It is true that confessions or declarations made under arrest ought to be received with caution, but still if they are *entirely voluntary,* there can be no objection to them.

3. In addressing the jury the solicitor alluded to the fact that the prisoner had not accounted for having money after the death of the deceased, when he had none just before. The defendant objected to the remark as improper. His Honor told the jury that the law drew no inference against the defendant for not introducing evidence of any fact, unless it was necessary for his defense and peculiarly within his knowledge. In the first place, the remarks of the solicitor were not objectionable; and in the next place his Honor's explanation gave to the defendant all the protection to which he was entiled. There is

PER CURIAM. No error.

WILLIAM H. FRENCH AND JOHN McRAE v. THE CITY OF WILMINGTON.

Injunction Bond—Appeal.

After an order of the Superior Court dissolving the injunction granted to plaintiffs upon their giving a bond in a specified sum, from which order the plaintiffs appeal, the judge of the Superior Court has no power, on the application of the defendant, to order the plaintiffs to increase the penalty of the original bond or to add thereto another bond.

MOTION by the defendant for the plaintiff to increase his in-
(388) junction bond, heard before *Henry, J.*, at December (Special) Term, 1875, of NEW HANOVER. All the facts of the case are fully stated in the opinion of Justice RODMAN.

His Honor orderd the plaintiffs to increase their injunction bond by adding to it $10,000, from which order the plaintiffs appealed.

M. London and A. T. & J. London for appellant.
Russell, Wright & Stedman, contra.

RODMAN, J. In the case between the present parties, reported at this term, the complaint was exhibited and application for an injunction made to *Seymour, J.*, at chambers on 24 September, 1875. He ordered that, on the plaintiffs entering into a bond in the penalty of $5,000, an injunction should issue, returnable before the judge of the Fourth District, at the next regular term of the Superior Court for New Hanover County. Bond was given, and the injunction issued accordingly.

Presumably at that term, for no date is given, *McKoy, J.*, dissolved the injunction, from which order the plaintiffs appealed to this Court. The term occurred in October. Afterwards, viz., on 19 October, 1875, the defendant applied to *McKoy, J.*, for an order requiring plaintiffs to give a further bond in a penalty of $10,000, conditioned to save the city from damage by reason of the injunction. The motion, by consent, was heard a few days afterwards before *Henry, J.*, holding the court in New Hanover, and he ordered accordingly. From this last order the plaintiffs appealed to this Court. The only question is as to the power of Judge Henry to make the order appealed from.

We are of opinion that he had no such power. By the appeal from the order of the judge of the Superior Court of New Hanover, at
(389) term, the case was taken from that court into the Supreme Court. Had Judge McKoy continued the injunction at Fall Term, 1875, he might undoubtedly have done so on condition that plaintiffs should give another bond. But when he dissolved the injunction it was not in his power to require an additional bond as a condition precedent (which an injunction bond is) to an injunction which had already issued and been dissolved. It has been commonly supposed that sec. 288 of the Code gives to either party the absolute right to appeal from an interlocutory order granting, refusing or dissolving an injunction. This Court has never been required, so far as I recollect, to decide whether that is a proper construction of that section or not, or to decide what is the effect of an appeal from such order. We are not inclined to decide either of these questions, especially as they were not made or argued in this case. As the case is before us, it is only a question of the costs of the order ap-

pealed from, and, as we think that was erroneous, the motion is dismissed, and the plaintiffs will recover their costs on this appeal in this Court.

PER CURIAM. Motion dismissed.

W. H. RICHARDSON v. WALTER DEBNAM AND OTHERS.

Appeal from J. P.—Notice of Appeal.

1. When both parties are present at a trial before a justice of the peace, a verbal notice of appeal then and there given is sufficient.
2. Where a defendant in a trial before a justice of the peace, after due notice of his appeal from the judgment therein rendered, offers to give the prescribed undertaking and is informed by the justice that his bond will be sufficient, the neglect so to do within the time required by the statute is excusable, and the defendant will be permitted to perfect his appeal in the Superior Court.

MOTION by the plaintiffs to dismiss an appeal from the judgment of a justice of the peace, and counter motion by defendant, to be allowed to file proper undertakings, heard before *Henry, J.*, at Spring Term, 1876, of WAKE.

The following is the return made by the trial justice to the Superior Court of Wake County: "An appeal having been taken in this action by the defendants, I, H. A. Rhodes, the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do certify and return that the following proceedings were heard by and before me. . . . After hearing the proof and allegations I rendered judgment in favor of the plaintiff and against the defendants, on 20 December, 1875, for $69.44 damages and for costs. I also certify that on 24 December, 1875, the defendant served the annexed notice of appeal on me," etc.

At Spring Term, 1876, the defendant Debnam filed the following petition, which was duly verified: "The petition of Walter Debnam respectfully shows that W. H. Richardson obtained a judgment against him and William Pearce before H. A. Rhodes and Josiah Richardson, justice of the peace on 20 December, 1875, for the sum of $.... and costs. That he is a practicing physician and that on said day, (391) and after the parties were assembled for trial, he informed one of said justice that he was very busy on that day in the practice of his profession and had not time to attend through the trial, and that he craved an appeal in case judgment should be rendered against him, and left the place of trial. That on or about 24 December, 1875, he went to the house of said Rhodes and learning that judgment had been rendered against him, he gave to said justice a written notice of appeal and offered to exe-

cute an undertaking (or bond) upon appeal with sufficient sureties. That said Rhodes informed him that a bond signed by himself was sufficient, and he executed thereupon such bond, and supposed under the advice of said justice, he had done all the law required of him to perfect his appeal, and that he does not think he owes the plaintiff one cent. Your petitioner prays your Honor that he be permitted to give the proper undertaking."

In support of the motion the defendant filed the following affidavit:

Henry A. Rhodes makes oath that as justice of the peace he tried the above entitled action, on 20 December, 1875, J. A. Richardson, Esq., sitting with and advising him. That just before the trial began the defendant, Debnam, informed him that he was too busy in his profession as a physician to attend the trial, and that he craved an appeal in case judgment should be rendered against him, and this he informed the plaintiff on that day. That four days thereafter the said Debnam came to affiant's house and being informed that said judgment had been rendered against him, he gave affiant a written notice of appeal and offered to execute appeal bond with security, but did not do so in consequence of affiant telling him that it was unnecessary—affiant having but re-

(392) cently become a justice of the peace, and being unisformed at the time of his duties in that particular. That subsequently he became aware of the mistake and the defendant executed the bond returned with the papers. . . .

Upon the hearing his Honor dismissed the appeal, and the defendant appealed.

Battle, Battle & Mordecai for appellant.
Busbee & Busbee, contra.

BYNUM, J. This case is clearly distinguishable from *Green v. Hobgood,* 74 N. C., 234. There it did not appear that notice of appeal was communicated to the plaintiff either before or at the trial. Here the notice was given to the plaintiff at or immediately before the trial, by the trial magistrate, who was instructed by the defendant to enter the appeal in case the judgment was against him. When the parties are present at the trial a verbal notice of appeal is sufficient. For the purpose of notice the magistrate was the agent of the defendant, made such by the instructions of the defendant as to the appeal. In all other respects the appeal was perfected as the statute prescribes, except as to the undertaking and in not filing that in due time the defendant has made out a case of excusable neglect. He was misled by the magistrate, who informed him when he proposed to give the undertaking that it was unnecessary.

It is not inexcusable on his part to be thus misled by the judge who

tried the case, and who, in effect, declined to receive the offered undertaking.

Judgment reversed and cause remanded.

PER CURIAM. Reversed.

Cited: *S. v. Crouse,* 86 N. C., 620; *S. v. Johnson,* 109 N. C., 854; *S. v. Griffis,* 117 N. C., 714.

JOHN McCAMPBELL v. CHARLES McCLUNG AND OTHERS.

Report of Referee.

A report of a referee that does not state all the items of the account between the parties will be set aside for vagueness.

ACTION, tried before *Cannon, J.,* at Fall Term, 1875, of HAYWOOD County, upon exceptions by the plaintiff to the report of referees.

The plaintiffs brought the action for an account and settlement of the partnership matters of the firm composed of plaintiff and the defendants McClung and J. C. Deaderick, and further alleging that the defendant R. V. Deaderick was indebted to the firm.

It is unnecessary, for the understanding of the opinion of the Court, to set out all the facts in full.

The referees reported that: . . . "We find that the firm of John McCampbell & Co. received from the sale of mica, and from merchants, and from J. C. Deaderick, the sum of $5,648.09; we find that the company has paid out, by way of disbursements, the sum of $5,608.41; amount of receipts over disbursements, $39.48. We find that at the date of the deed of trust, which was 1 July, 1874, the company owed a large sum of money to different parties; of said amount $1,397.16 is due J. C. Deaderick for money loaned. We also find that, up to the date of the execution of the deed of trust, John McCampbell had drawn out of the company $1,031.34, and that he paid the company $103.25. That Chas. McClung had drawn $891.93, and J. C. Deaderick, by R. V. Deaderick, $228, making in all drawn out $2,151.27. We find that of this amount John McCampbell was entiled to three-eighths, which is $806.73; McClung to three-eighths, which is $806.73; J. C. Deaderick to two-eights, which is $537.82. All of which is respectfully submit- (394) ted," etc.

To this report plaintiff excepted:

I. That, in item 2 in said account, the referees find the amount of receipts from sales of mica, from merchants, and from J. C. Deaderick, to

be the sum of $5,648.09, which the plaintiff says should be: From sales of mica, $3,641.13; from merchants, $3,653.52; from J. C. Deaderick, $1,753; from Tennant & Bros., $250, and from profits on merchandise, $44.96, making a total of $9,342.61.

II. That the account shows a total of disbursements of $5,608.41, leaving the amount of receipts over disbursements of $39.48, when the evidence shows an excess of $3,734. 20.

III. That, while the account states 1 July, 1874, the company owed large sums, and especially to J. C. Deaderick—$1,397.16—it fails to show the amount of such indebtedness, and how provided for, when the evidence shows the indebtedness of the company, including the $1,397.16, was secured by a deed of trust, etc.

IV. That the referees have failed to declare the law upon the facts found by them, and have failed to render a decision upon the whole case of the affairs between the parties.

The court overruled all the exceptions of the plaintiff, and gave judgment for the defendants according to the report.

From which judgment plaintiff appealed.

G. S. Ferguson for appellant.
J. H. Merrimon, contra.

RODMAN, J. The exceptions to the report for vagueness and uncertainty must be sustained. The parties are entitled, from the referee, to a statement of all the items of the account between them, in order that either may, if he thinks proper, except to any particular item.

Exception to the report for vagueness sustained. Case re-
(395) manded to be proceeded in.

PER CURIAM. Reversed.

Cited: Comrs. v. Maguire, 85 N. C., 117; *Gore v. Lewis,* 109 N. C., 541; *Sharpe v. Eliason,* 116 N. C., 667.

FINDLEY, ROBERTS & CO. v. J. W. GIDNEY, ADMINISTRATOR.

Settlement of Estate.

All the creditors of an intestate dying in this State, whether resident or nonresident, are entitled to prove their debts and share in the assets. Nor does it make any difference that there are not more assets in the hands of the administrator here than will pay the debts of the domestic creditors, and there are assets in another State where the other creditors reside, upon which they might administer and pay their debts.

FINDLEY *v.* GIDNEY.

APPEAL from *Schenck, J.*, at chambers in CLEVELAND, 10 May, 1875.

The complaint alleges: That the plaintiffs are citizens of Maryland, and are wholesale merchants in Baltimore; that during 1873 they sold and delivered to John L. Moore, the intestate of the defendant, goods, wares and merchandise to the amount of $267.51, which amount, with interest, is still due and owing to them, and which said Moore promised to pay.

Said Moore is dead, and was at the time of his death a resident of the State of North Carolina, and the defendant is his administrator. The estate of the intestate is insolvent and will not pay the debts due from it to creditors residing in the State of North Carolina. A large amount of assets have come into the hands of the defendant as administrator, and the plaintiffs have demanded their *pro rata* share of (396) the same to be applied to their said debt, which has been refused.

The complaint prays: "That the said J. W. Gidney, administrator, be required to render an account of the administration of said estate and that an account be stated under the direction of the court, and for judgment, etc."

The defendant demurred to the complaint, and for cause of demurrer alleged: That the facts set forth do not entitle the plaintiff to the relief claimed, because the domestic or home assets should be first applied to the domestic or home debts, and the complaint admits that such debts will exhaust the assets under the control of the defendant.

Upon the hearing the demurrer was overruled, and the defendant appealed.

Battle, Battle & Mordecai for appellant.
No counsel contra.

READE, J. When letters of administration or letters testamentary are sued out in this State, all of the creditors of the deceased, whether resident in this State or not, are entitled to prove their debts and share in the assets; and resident creditors have no preference over the non-residents. Nor does it make any difference that there are not more assets here than will pay the creditors here, and that there are assets in another State where the other creditors reside, upon which they might administer and pay their debts. All the creditors can prove their debts and share the assets here, and then, when letters are sued out in the other State, all the creditors can prove and share there, as we suppose.

PER CURIAM. Affirmed.

Cited: Holshouser v. Copper Co., 138 N. C., 258.

(397)

J. D. BIGGS & CO. v. J. V. PERKINS.

Caveat Emptor—Contract.

The rule *caveat emptor* does not apply where the vendor uses any device to put the purchaser off his guard or resorts to artifice or trick to take advantage of him, although "mere silence" will not make the vendor liable.

APPEAL from *Moore, J.*, at Spring Term, 1876, of EDGECOMBE.

The action was begun in the Superior Court of MARTIN and removed to the Superior Court of EDGECOMBE, upon affidavit by defendant.

The following evidence was offered on the trial in behalf of the plaintiffs, as appears from the record in the case:

On 14 December, 1875, one Dennis Daniel, a negro laborer, offered for sale to plaintiffs, who were merchants in the town of Williamston, two bales of cotton. Plaintiffs examined it, cutting open the bagging and taking out some of the cotton and inspecting it in the ordinary way. Plaintiffs purchased the two bales at 11½ cents per pound.

On 16 December said Daniel brought to plaintiffs for sale two additional bales. They examined it in the same way and bought it at 12 cents per pound. Daniel made no representation in regard to either of the two lots. On 20 December, he brought to plaintiffs four bales and inquired of them what they were paying for "good cotton." Plaintiffs replied 11½ cents for good cotton. Daniel then said that he knew this was good cotton, for he had raised it. Plaintiffs examined the cotton in the ordinary way and found all the cotton more or less stained, one bale being very badly stained. They called Daniel's attention to that bale and he said he believed the ginner had substituted another bale of cotton for his. Plaintiffs bought the cotton, paying 11 cents for two bales, 11¼ cents for another, and 9 for the remaining one. In Janu-
(398) ary plaintiffs discovered that the eight bales of cotton were ginned through a "linter" from cotton seed after they had passed through a gin and were called "second ginning" or "short staple cotton." For the first two lots of cotton plaintiffs gave their due bill to Daniel in part payment, and upon the purchase of the last lot they gave them a draft on Norfolk in payment of the balance due.

Upon discovery of the quality of the cotton, plaintiffs ascertained that defendant had sold it through Daniel, and they demanded of him a return of the purchase money, offering to return the cotton to him. This offer defendant refused to accept.

J. D. Biggs, one of the plaintiffs, testified that he purchased the cotton; that he did not examine it to test its staple; that one of the chief tests of cotton was its staple, but that the staple through all that section

of country was so uniform that neither he nor other buyers in the Williamston market ever examined cotton to try the staple unless attention was called to it; that he had never seen any cotton which had been ginned through a "linter," and that none had ever been brought to Williamston for sale before; that this cotton had all the appearance of ordinary cotton.

D. D. Simmons, another of the plaintiffs, testified that he was present when cotton was purchased; that he judged cotton by appearance of lint and not of the staple, and that "linter" cotton looks like ordinary cotton; that he never saw any before.

C. B. Hassell, witness for plaintiff, testified that he had seen a sample of the cotton and that he could not have discovered by looking at it that it was "linter" cotton; that he tested the value of cotton by its color and cleanliness only, because the staple of all cotton in that market was uniform and it was not usual for buyers to examine it. He further testified that Williamston was twenty-two miles from Pactolus, where defendant resided, and Pactolus was only three-quarters of a mile (399) from a landing on Tar River by which steamers passed daily, making connection with the northern markets; that he had never known or heard of defendant sending any other cotton to Williamston for sale; that Williamston was a better cotton market than either Greenville or Washington, but not better than Tarboro, which is thirty-eight miles by the river above Pactolus.

Two other witnesses for the plaintiff testified that they had never known defendant to send cotton to Williamston for sale before.

It was in evidence that the eight bales of cotton sold for 6¼ cents per pound in Norfolk in the following March, but inferior cotton had declined two cents from December to March. It was also in evidence that defendant, in a conversation with J. E. Moore, who made the demand upon him for plaintiffs for a return of the purchase money, said that he had done plaintiffs no wrong; that he had employed Daniel to sell the cotton for him and had instructed him to show a fair sample, and if he could not get ten cents for it, to carry it to Hassell and get him to ship it.

There was some other evidence of the same tenor as the foregoing. It was admitted on the trial that the cotton had been made by defendant with his "linter," and the price paid by plaintiffs was full price for ordinary cotton.

His Honor being of opinion that the plaintiffs, upon the foregoing evidence, were in no view of the case entitled to recover anything of the defendants, plaintiffs submitted to a nonsuit and appealed.

Howard & Perry for appellants.
W. H. Johnston, contra.

PEARSON, C. J. His Honor intimated the opinion that, taking (400) the evidence in the view most favorable for the plaintiffs, they were not entitled to recover.

This assumes that the article sold was not cotton, in the sense understood by dealers in cotton; that the defendant was fixed with "the *scienter*," and that the plaintiffs bought the article and paid full price for it, as if it was cotton, under the belief that in point of fact it was cotton. His Honor intimated this opinion on the force of the rule *"caveat emptor,"* and the case turns upon the application of that rule. The rule of the civil law is, "a sound price implies sound property, and if the article sold is not sound, and if bought and paid for as if it was, the vendor is bound to make compensation whether he knew of the unsoundness or not," on the ground that the vendor cannot honestly keep the full price after he has notice that the article, by reason of its unsoundness, was not worth the money which he had received for it.

The rule of the common law is *"caveat emptor"*—if the article sold is not sound, and if the vendee is fixed with "the *scienter*." Still, if the vendee could have discovered the unsoundness by the exercise of ordinary diligence, he must submit to the loss as a result of his own folly, and the vendor is allowed to retain his ill-gotten gain.

The one rule favors good morals; the other rule favors free traffic. Which is the wiser of the two it is not ours to say, for it is settled that *"caveat emptor"* has been adopted as the law of this State. *Brown v. Gray*, 51 N. C., 103.

All we have to do is to fix the limits of the rule and to decide whether his Honor erred in his opinion that it defeated the plaintiffs' cause of action.

The rule is limited to this extent: It does not apply when the vendor has used any device to put the purchaser off of his guard, although *mere silence* will not make him liable. In our case there was not *mere silence,* but there was evidence tending to show that the defendant resorted (401) to artifice and trick in order to cheat the plaintiffs and to take advantage of the fact that it was not the custom of buyers in the town of Williamston, owing to the uniformity of the staple of cotton raised in that locality, to examine cotton offered for sale or to test its staple, but only to see that it was free of dirt and trash and was not stained. The article sold was packed and baled in like manner and form as if it was cotton; it was sent to a distant town, at which place the invention used by the defendant had not been heard of. These and the other circumstances tend to show that it was the purpose of the defendant to take advantage of the fact that the plaintiffs were off of their guard in respect to the *new article* which he was putting upon the market as cotton.

PER CURIAM. Reversed.

N. T. FARMER v. W. H. WILLARD.

Appeal—Statement of Case—Interest.

1. When the "statement of the case," or any part thereof, on an appeal to this Court conflicts with the record proper, the latter must prevail, because it imports absolute verity. The "statement of the case" is not a part of the record proper.
2. Where, in an action to recover the value of a tract of land from the purchaser, an issue was submitted to the jury as to its value, and the jury responded "We find all issues in favor of the plaintiff and assess his damage at $2,000": *Held,* that said amount bears interest from the time it fell due by the contract of sale.

MOTION by defendant to set aside a judgment of this Court made at the January Term, 1876.

The grounds upon which the motion was based are sufficiently set forth in the opinion of the Court.

Merrimon, Fuller & Ashe for defendant.
Smith & Strong contra. (402)

BYNUM, J. This case was decided by this Court at the June Term, 1874 (71 N. C., 284), and final judgment was entered up at the January Term, 1876, *nunc pro tunc,* for $3,085, of which $2,000 is principal money and bears interest from 20 April, 1874, being the same judgment which was rendered at that time in the court below, and from which judgment the case was brought to this Court by appeal.

The motion now is to set aside the judgment rendered in this Court, upon the ground, first, that it is not the judgment given in the court below, and, second, that it is not warranted by the verdict of the jury.

The first ground is not supported by the record, as appears by the transcript sent with the appeal to this Court. The judgment is rendered in the court below "for $3,085, of which $2,000 is principal and $1,085 is interest and cost of action to be taxed by the clerk, with interest on said principal until paid"; and this judgment is signed by the judge presiding. It is true that in the "statement of the case" on appeal to this Court it is stated that the interest was afterwards stricken out by the court, as it was not allowed by the jury. But this statement is not a part of the record proper, and where it conflicts with the record proper the latter must prevail because it imports absolute verity. The record does not show that any part of the judgment was stricken out or that any motion or order was made to that effect. *Judge v. Houston,* 34 N. C., 108.

The second ground is that the jury found the issue "in favor of the plaintiff and assessed his damage at $2,000," and that upon this verdict

the court was not warranted in computing interest backward from April, 1865, the date of the sale of the land. We think otherwise.

(403) The plaintiff declared for the value of the land sold by him to the defendant on 1 April, 1865. The material question was, What was the value of the land at that date? To fix that this issue was submitted to the jury, "What was the value of the land?" The jury responded, "We find all issues in favor of the plaintiff, and assess his damage at $2,000."

The jury evidently meant, "We find the value of the land to be $2,000"; otherwise the verdict would not be responsive to the issue submitted, or to the prayer of the complaint, or in consonance with the statement of the case. No issue submitted involved the question of "damage," and we must construe the finding by reference to the issue, for by doing so the verdict is made certain and can be upheld.

The verdict having found the value of the land sold, the statute gave interest upon that sum from the time it fell due by the contract, to wit, 1 April, 1865. By law, the principal also bears interest from the rendition of the judgment. Rev. Code, ch. 31, sec. 90. It was not necessary for the jury to give interest. The law gives it, and the court was authorized to give judgment accordingly. Justice certainly requires that the debt for the land should bear interest from the time the plaintiff parted with it and the defendant went into possession.

PER CURIAM. Motion disallowed.

Cited: S. v. Keeter, 80 N. C., 473; *Wall v. Covington,* 83 N. C., 147; *McNeil v. Lawton,* 97 N. C., 19; *McCanless v. Flinchum,* 98 N. C., 362; *Cook v. Moore,* 100 N. C., 295; *Brem v. Covington,* 104 N. C., 594; *S. v. Carlton,* 107 N. C., 957; *S. v. Ramsour,* 113 N. C., 643; *S. v. Truesdale,* 125 N. C., 701; *McNeill v. R. R.,* 138 N. C., 4; *Lumber Co. v. R. R.,* 141 N. C., 192.

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(404)

RUFUS EDMONDSON AND JOHN R. SMITH v. WILEY B. FORT.

Verdict—Measure of Damages—Contract.

1. Where a jury, in response to certain issues submitted to them, find that "there was a contract by the plaintiffs to sell the mill to the defendant at the price of $779.42, and a time and place for completing said contract was designated by the parties" : *Held,* that the proper construction of this finding is that the contract was incomplete and that the time and place was fixed upon to close the trade and agree upon what was then left open, in order to fix the terms of the contract; and that either party, until the day so designated, might either close the trade or abandon it, just as they had a mind to do.

2. In such case, if the jury had found that the contract was executed and that there was nothing else to do but to receive the price and deliver the property, the measure of damages would be merely nominal and not the full sum agreed to be paid as the price of the mill. Plaintiffs still owning the property, the plaintiffs could recover damages from the breach of contract in not paying for and accepting the delivery of the same.

ACTION for the recovery of the price of a steam sawmill, according to contract, tried before *Kerr, J.*, at Spring Term, 1876, of WAYNE.

On the trial in the court below the following issues were submitted to the jury, whose finding thereon embraced all the facts necessary to be stated for understanding the points raised and decided in this Court:

1. Did the plaintiff sell and deliver to the defendant or to the defendant and one Thomas Yelverton, on or about 1 September, 1871, a steam sawmill and fixtures, at the price of $779.40?

Answer: The plaintiff did not sell and deliver to the defendant, nor to the defendant and Thomas Yelverton, the sawmill mentioned in the pleadings.

2. Did said plaintiffs, on or about said 1 September, contract (405) to sell to said defendant or to said defendant and said Yelverton, a steam sawmill and fixtures at the price of $779.40, and fix a time and place for completing said contract by writing and delivering said mill?

Answer: Said plaintiffs did, on or about 1 September, 1871, contract to sell to said defendant and one Thomas Yelverton one steam sawmill and fixtures at the price of $779.40, and that a time and place for completing said contract were designated by the parties.

3. Were the plaintiffs ready and able and willing at the time and place designated to perform their part of the contract?

Answer: The plaintiffs were ready, able, and willing, at the time and place designated, to perform their part of the contract.

4. Did the defendant or said Yelverton attend at the time and place designated for completing said contract?

Answer: Neither the defendant nor Yelverton attended at the time and place designated for completing said contract.

5. Was said mill destroyed by fire after the time so designated for executing said contract?

Answer: Said mill was destroyed by fire after the time so designated for executing said contract.

6. What damage have the plaintiffs sustained by the breach of the contract?

Answer: The jury assess plaintiffs' damage sustained by breach of said contract at $779.42, with interest from 1 October, 1871.

Upon the foregoing verdict the court rendered judgment in favor of the plaintiffs for the said sum of $779.42, with interest from said 1

October, 1871, until paid, and for costs. From this judgment the defendant appealed.

(406) *Isler for appellant.*
Smith, Strong and Smedes contra.

PEARSON, C. J. In reviewing the decision of his Honor we are confined to the finding of the jury on the issues submitted to them, and are to assume that the jury acted under proper instructions, no exceptions being taken thereto.

The jury find that "the steam sawmill" was not "sold and delivered" by the plaintiffs to defendant; in other words, there was no executed contract and no delivery, either actual or constructive, by which the ownership of the mill passed to defendant. But they find that there was a contract by the plaintiffs to sell the mill to defendant at the price of $779.42, *and a time and place* for *completing* said contract was designated by the parties.

The case turns upon the construction of this finding. Does it mean the parties came to a positive and definite agreement and "the bargain was struck," which we are told by Blackstone was in old time signified by shaking hands, a deed or solemn act about which there could be no mistake, which relieved the matter from all doubt, so that a time and place was designated for the mere purpose of carrying the bargain into effect; or does it mean by the word *completing* the contract the parties chaffered about the sale of the mill for $779.42, in other words, talked about making a trade and fixed a time and place for meeting in order to complete, that is, close the trade?

If the former was the meaning, then the apt and proper finding would have been: the parties designated a time and place for meeting in order *to execute the contract,* and his Honor would have had the verdict so expressed; but the finding is, a time and place was designated for the parties to meet and *complete the contract,* that is, to close the trade and agree upon what was then left open in order to fix the terms of the contract. If the latter is the true construction, and we think it is,
(407) then both of the parties had *locus penitentiæ* until the day fixed upon, and might elect either to close the trade or to abandon it.

In this view of the matter it is clear that had the defendant attended at the time and place designated and announced his election not to close the trade—that is, not to complete the contract—the plaintiffs would have had no cause of action and no cause to complain, except that the defendant ought to have saved them the trouble of coming to the place designated by giving them notice beforehand of his election not to complete the contract.

The fact that the defendant did not attend at the time and place designated was just as distinct notice of his election to abandon the incomplete contract as if he had kept his appointment and made such announcement, and only exposed him to the charge of not being a man of his word and a want of punctuality; but it was no breach of contract, for, as we have seen, the contemplated contract had not been completed and the ownership of the property was still in the plaintiffs, and the risk of loss by fire or otherwise was on them.

In *Willard v. Perkins,* 44 N. C., 253, "the bargain was struck," the contract was completed, "the price was paid down," and the loss is put on the vendee because he was in default in not taking away the rosin in the time agreed on, which distinguishes it from *Waldo v. Belcher,* 33 N. C., 609, where the purchaser of the corn was in no default for not taking it away before it was burnt.

In the view we have taken of the case there is error. The judgment will be reversed and judgment entered for defendant on the finding of the jury that he go without day and recover his costs.

In the other view of the case, and supposing the finding to mean that "the bargain was struck," the contract of sale was complete, and the defendant, as a part of the contract, agreed to attend at the (408) time and place designated, pay the price or make satisfactory arrangements in respect thereto, and accept delivery of the property.

There is error in respect to the measure of damages, and the plaintiffs would only be entitled to nominal damages and not to the full sum agreed to be paid as the price of the property.

By the finding of the jury the property was "not sold and delivered," and the ownership remained in the plaintiffs. He certainly could not keep the property and recover its price also; that would be rather strong.

At law he recovered damages for breach of contract in not paying for and accepting delivery of the property, which, of course, would be nominal, as he still owned the property. In equity he could ask for a specific performance of the executory contract by offering to convey the property on being paid the price. So it is manifest that this action never would have been brought but for the accident that the property was burnt up.

At law, as the ownership was in plaintiffs, the loss by the destruction of the property was on him, unless the defendant had taken on himself the risk of a loss by fire for all time to come by violating his agreement to attend, pay the price, and accept delivery at the time and place.

This proposition is so absurd that it cannot be entertained for a moment. It did not concern the liability of the defendant whether the property was burnt in a month or a year or at any time within the statute of limitations, after the defendant failed to attend at the time and

place. So the plaintiffs could go on and use the property at the risk of the defendant for three years.

(409) The case comes within the principle held in *Ashe v. Derosset,* 50 N. C., 297. The loss by fire was not in the contemplation of the parties, and the damage was not proximate, but too remote. Error.

PER CURIAM. Judgment reversed, and judgment for defendant.

Cited: S. v. Wernwag, 116 N. C., 1062; *Extinguisher Co. v. R. R.,* 137 N. C., 282.

L. C. EDWARDS v. ARCHIBALD KEARSEY.

Homestead.

1. There is no belligerency between our former and present exemptions, but they are in peaceful conformity.
2. *Hence,* our homestead laws do not impair the obligation of contracts and are not unconstitutional.

ACTION for the possession of a tract of land sold by the sheriff under a *ven. ex.,* tried before *Henry, J.,* at Spring Term, 1876, of GRANVILLE.

The following facts were agreed, and his Honor determined the case upon a due consideration thereof, after argument:

On 16 December, 1868, judgment was given in a justice's court in favor of B. L. and D. A. Hunt, assignees, etc., against the defendant Kearsey for $29.70, with interest, etc., which said judgment was docketed in the Superior Court of Granville 16 December, 1868. In January, 1868, one Avery Taborn obtained a judgment against the defendant for $165, and this was docketed in said court on 18 January, 1869; and that on 10 October, 1868, one Philpot (William A.) recovered a judgment in a justice's court against said defendant Kearsey for $23.65 and interest, which was also duly docketed in said Superior Court of

(410) Granville 16 December, 1868; and that on said day, to wit, 16 December, 1868, a writ of *fieri facias* was issued on the judgment in favor of R. L. and D. A. Hunt, assignees, etc., and on the same day was levied upon the land now in controversy as belonging to the defendant Archibald Kearsey. On 18 January, 1869, another *fi. fa,* issued from said court on the judgment in favor of Taborn and levied on the next day (the 19th) on the same land; and on 16 December, 1868, a *fi. fa.* issued from said court, which was duly levied on the same day in favor of the said William A. Philpot on the same tract of land as belonging to the defendant Kearsey as aforesaid. These levies were returned without sale, and writs of *venditioni exponas* afterwards issued

from said court, under which, after due advertisement, the sheriff publicly sold said land as the property of defendant Kearsey at the courthouse door in said county, when and where the plaintiff L. C. Edwards became the last and highest bidder at the price of $150, which was duly paid to said sheriff, from whom he received a deed in fee for said lands of date 6 March, 1869, and which was duly proved and registered.

The whole of said tract of land was thus levied on and sold by said sheriff absolutely without laying off or alloting any homestead therein to the said defendant Kearsey, the defendant in the executions aforesaid, and without reservation or exception of any homestead or right of homestead in the same. The said tract of land did not then, nor does it now, exceed the value of $1,000. The defendant Kearsey was and still is a citizen of North Carolina and in possession of said tract of land. He has minor children, and had not at the time of sale nor since title to any other real estate.

On 22 January, 1869, in pursuance of chapter 43 of the Laws of the Special Session, 1868, entitled "An act to provide for laying off the homestead and setting apart the personal property exemption (411) in favor of residents of this State under Article X of the Constitution," the defendant Kearsey applied to a justice of the peace for the benefit of the homestead exemption, as guaranteed by said Article X, whereupon said justice appointed three disinterested freeholders of said county not connected with said Kearsey, who, in accordance with said act, on notice, by order of said justice, met at the residence of said Kearsey on 22 January, 1869, aforesaid and, after taking the prescribed oath, laid off and allotted to said Kearsey as a homestead the whole of said tract of land by metes and bounds, making their report to the office of register of deeds. The said register, although said report came into his hands, failed to record it.

Therefore, the defendant insists that at the time of said levies and sale he was and still is entitled to a homestead in said tract of land under and by virtue of the said Article X of the Constitution, as against said judgments and executions. And the said sheriff having sold said land absolutely, without allotting to the defendant his homestead and without any reservation or exception of a homestead or right to the same, said sale was void, and his (the sheriff's) deed to the plaintiff passed no title; and notwithstanding said sale and conveyance the defendant is entitled to a homestead in said land and the plaintiff is not entitled to recover in this action.

On the other hand, it is insisted by the plaintiff that said judgments being for debts contracted by the defendant before our present Constitution went into effect said Article X thereof does not apply to them; or if intended to be so applied would be void as impairing the obliga-

tion of contracts contrary to sec. 10, Art. I of the Constitution of the United States, and that the plaintiffs acquired a good title to
(412) said land by virtue of said sheriff's sale and deed and is entitled to recover in the action.

The court, upon consideration, being of opinion with the defendant that so much of Article X of our Constitution as exempts from sale under execution or other final process obtained on any debt land of the debtor of the value of $1,000, and the statutes enacted in pursuance thereof, embrace within their operation executions for debt which were contracted before the adoption of said Constitution; and that said article and statutes, when so interpreted and enforced, are not repugnant to Art. I, sec. 10, clause 1 of the Constitution of the United States:

Therefore, it is considered and adjudged by the court that the plaintiff is not entitled to recover, and that he take nothing by his said action, and that the defendant recover his costs. From this judgment the plaintiff appealed.

Batchelor and Haywood for appellant.
Hargrove and Bledsoe contra.

READE, J. *Hill v. Kesler,* 63 N. C., 437, governs this case and sustains his Honor's ruling.

Gunn v. Barry, 82 U. S., 610, relates to the exemption laws of Georgia, where the disparity between former and present exemptions is "striking," and affords self-evidence of conflict with the Constitution of the United States, which forbids laws which impair the obligation of contracts. Whereas there is no belligerency between our former and present exemptions, but they are in peaceful conformity. *Garrett v. Cheshire,* 69 N. C., 396.

PER CURIAM. Affirmed.

Cited: Lowdermilk v. Corpening, 92 N. C., 336; *Hughes v. Hodges,* 102 N. C., 242.

NOTE.—The above ruling was reversed on writ of error to U. S. Supreme Court. *Hill v. Kessler,* 96 U. S., 595. See 79 N. C., 664.

(413)

BENJAMIN S. WARD AND WIFE, MARY A. N. WARD, v. SHADE WOOTEN.

Construction of Deed—Deed in Trust—Deed of Gift.

1. A makes a deed of gift to B, and afterwards conveys the land to C in trust to secure creditors. C sells under the deed in trust, and the purchaser goes into immediate possession; B, the donee in the deed

of gift, never having been in possession of the land: *Held*, that the deed in trust is valid against the deed of gift under the statute 27 Elizabeth as being a subsequent sale to a purchaser for valuable consideration, and the purchaser at the trustee's sale gets a good title.

2. A limitation over to A in a deed of gift to B is valid as a covenant to stand seized to the use of A, under the rule *et res magis valeat quam pereat.*

ACTION, for the recovery of the possession of a tract of land, tried before *Seymour, J.*, at Fall Term, 1874, of GREENE, upon the following statement of facts agreed:

I. Joseph Rasberry, by deed bearing date 25 June, 1847 (a copy of which is attached), conveyed the lands in controversy to his son, Joseph J. A. Rasberry; that the latter died intestate and without issue on 10 April, 1858.

II. That the plaintiff, Mary A. N. Ward, is the person mentioned in said deed to be heir of said land in the event therein named.

III. That the said Joseph Rasberry, by deed on 16 November, 1849, conveyed said land in fee to Alfred Moye, in trust for the payment of his debts.

IV. That said Moye, in performance of said deed to him, sold and conveyed said lands in fee to Benjamin Streeter and William Turnage on 5 December, 1854.

V. That said Benjamin Streeter and William Turnage went into the immediate possession of said lands after the deed to them.

VI. That the title to said lands in fee has, by successive conveyance, come to the defendant.

VII. That the said Benjamin Streeter and William Turnage (414) and the persons claiming under them, including the defendant, have been in the adverse possession of said lands since 5 November, 1854.

VIII. That the said Joseph Rasberry died in July, 1854.

IX. That the said Joseph J. A. Rasberry left as his heirs five brothers and five sisters, the plaintiff Mary A. N. Ward being one of his sisters.

X. That the plaintiff Mary A. N. Ward was born 17 December, 1845, and married first one Cummins before she was 21 years of age; that her husband Cummins died in 1867, and she married the plaintiff Ward on 3 November, 1870.

If the court shall be of opinion that the plaintiff Mary A. N. Ward is entitled to possesion of the whole of said lands judgment shall be given accordingly. If the court shall be of opinion that she is entitled to one undivided tenth judgment shall be given accordingly; and if the court shall be of opinion that she is not entitled to possession of any part of said lands judgment shall be given against the plaintiff for costs.

The deed from Joseph Rasberry to Joseph J. A. Rasberry was as follows:

This indenture made this 25 June, 1874: I, Joseph Rasberry, of Greene and State of North Carolina, for and in consideration of the natural affection and love which I have unto my well beloved son, Joseph John Allen Rasberry, as also for divers other good causes and considerations, now at this time especially moving, have given, granted, and by these presents do give, grant and confirm unto said Joseph John Allen Rasberry, all and singular, 257 acres of land, bounded as follows: [here follows a description of the land], except my life estate in the land, also my wife Priscilla's life or widowhood to the same. It is my desire, if the said Joseph John Allen Rasberry should die without a lawful (415) heir, that my daughter Mary Ann Nancy should be heir of the said land I, Joseph Rasberry, do freely give to my son Joseph John Allen Rasberry, his heirs and assigns forever. I, the said Joseph Rasberry, do covenant to and with said Joseph John Allen Rasberry in warranting and defending the right and the title of the aforesaid tract of land free and clear from the lawful claim or claims of any and all persons whatever unto him, his heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal the day and year above written. JOSEPH RASBERRY. (Seal.)

The deed of trust from Joseph Rasberry to Moye, dated 16 November, 1849, was an ordinary trust for securing certain debts.

Upon the above statement of facts agreed his Honor gave judgment that plaintiffs were entitled to recover the whole tract of land. From which judgment the defendant appealed.

Moore & Gatling for appellants.
Kenan & Murray and F. A. Woodard contra.

PEARSON, C. J. We concur with his Honor in the conclusion that although the limitation over to his daughter cannot be supported as a contingent remainder, and would be void, treating the deed of Joseph Rasberry as a common-law conveyance, still under the *ut res magis valeat, etc.*, the Court will give effect to it as a *covenant to stand seized to the use of his daughter* by way of a conditional limitation. We also concur with him in the conclusion that the clause of the deed "excepting my life estate, also my wife Priscilla's life or widowhood" can only have the effect of saving her right to have dower in case she survived him, in like manner as if the deed had not been made, and that this saving in favor of his wife did not prevent the estate from pass- (416) ing to the son and then to the daughter, subject to the right of dower, which the wife may even now, as against the plaintiffs, have assigned to her in case the plaintiffs recover, as she is still living and there is no statute of limitations to bar dower.

But upon the facts set out in the case agreed we are of opinion that the plaintiffs were not entitled to recover upon a point not called to the attention of his Honor and not adverted to in the argument before us.

It is this: After making this covenant to stand seized to the use of his son and daughter, the donor made a deed to Moye in trust to secure certain creditors. Under this deed Moye sold to Streeter and Turnage for valuable consideration, who went into immediate possession, the donees not then being in possession or having had possession at any time before so as to affect the trustee or the purchasers with notice. Battle's Rev., ch. 50, sec. 2.

It is settled in this State that a deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against creditors notwithstanding the statute 13 Elizabeth, for the like reason we hold such a deed is valid against a prior deed of gift as being a subsequent sale to a purchaser for valuable consideration under 27 Elizabeth. If this be not so, the sale by Moye to Streeter and Turnage in 1854 was beyond all room for doubt a sale for valuable consideration, and there is nothing to affect them with notice.

There is error. Judgment reversed, and judgment on the case agreed that the defendant go without day and recover his costs.

PER CURIAM. Reversed.

(417)

POOLE & HUNT v. W. G. LEWIS.

Partnership—Contract.

Where one member of a firm buys goods for the firm on his own credit, *without disclosing the fact that he is a member of the firm*, which goods are received and used by the firm: *Held*, that the firm is liable to the vendor for the price of the goods.

APPEAL from *Moore, J.*, at Spring Term, 1876, of EDGECOMBE.

This action was brought to recover the price of a turbine water wheel and fixtures, the transaction in regard to the purchase of which will appear in the following letter:

PETERSBURG, VA., 3 July, 1873.

Messrs. Poole & Hunt, Baltimore, Md.:

GENTS:—Please ship to Plummer, Lewis & Co., Tarboro, N. C., one Leffel turbine water wheel, 20 inch. You will please send *to us here* the coupling that connects the water wheel to the shaft, that we may have the gearing here fitted to it. We enclose directions about manufacture of buckets, which you will please observe. Make bill of all to us and give us your best price. Yours very truly,

PLUMMER, YOUNG & Co.

The firm of Plummer, Young & Co. and the defendant were both members of the firm of Plummer, Lewis & Co.

It was admitted on the trial that Plummer, Lewis & Co. received the goods 18 August, 1873, and that their value was $536.50, and that if they were liable to plaintiffs they were entitled to judgment for that sum.

(421) Defendant contended that the articles were purchased by Plummer, Lewis & Co. from Plummer, Young & Co., who bought them from plaintiffs on their own exclusive credit. Defendant denied that Plummer, Lewis & Co. purchased from plaintiffs, or that plaintiffs gave credit to them. Defendant also alleged that Plummer, Young & Co. purchased the goods at a discount of 10 per cent and sold to Plummer, Lewis & Co. at a net advance of 2½ per cent, and that defendant had paid Plummer, Young & Co. in full.

On the trial counsel for plaintiffs, after reading complaint, to which correspondence was attached as part thereof, insisted that there was no question of fact to go to the jury; and if there was any issue, the only one was, "Did plaintiffs sell the goods to Plummer, Lewis & Co.?" Counsel for defendant insisted that the issue to be submitted should be, "Whom did Poole & Hunt trust for the goods?" His Honor said the only issue was, "Did plaintiffs give credit to Plummer, Young & Co., or Plummer, Lewis & Co?" To this plaintiffs excepted.

Defendant offered in evidence the depositions of W. T. Plummer and N. M. Young, members of the firm of Plummer, Young & Co., to which were attached the original invoices made out by plaintiffs and sent to Plummer, Young & Co. Counsel for plaintiffs admitted the invoices, but objected to any evidence outside of correspondence and invoices unless brought to the knowledge of plaintiffs. His Honor ruled out the evidence except that part which stated that plaintiffs allowed Plummer, Young & Co. 10 per cent discount and that they charged Plummer, Lewis & Co. 2½ per cent on the net price, and admitted that as evidence tending to show that the goods were purchased on the sole credit of Plummer, Young & Co. Plaintiffs excepted. His Honor also permitted defendant to testify that neither Plummer, Lewis & Co. nor defendant ever bought any goods from the plaintiffs nor had any dealings with them except his letter, which was considered a mere letter of in-

(422) quiry; that he settled with Plummer, Young & Co. after demand made by plaintiffs of him for payment of the goods because he had given his note and was compelled to pay it to the purchaser of the assignee in bankruptcy of Plummer, Young & Co.; that no demand was made on him until after the adjudication in bankruptcy of Plummer, Young & Co. Plaintiffs excepted to the evidence. Counsel for plaintiffs insisted: (1) That it was a question of legal construction for the

court, without the intervention of the jury. His Honor declined to so consider it, and plaintiffs excepted. (2) That the assent of one partner was the assent of all, and that the question was one depending upon the law of copartnership, as applied to the correspondence and papers by the court. His Honor submitted to the jury the question, "Did the plaintiffs give credit to Plummer, Young & Co. or to Plummer, Lewis & Co.?" in the following charge: "To make a contract or agreement binding in law requires the concurrence of two minds—the assent of both parties. You have heard the evidence, take the case." Plaintiffs excepted.

The jury returned a verdict that the plaintiffs gave credit to Plummer, Young & Co. and not to Plummer, Lewis & Co. Plaintiffs moved for judgment *non obstante veredicto.* Motion overruled, and judgment for defendant. Appeal by plaintiffs.

Howard & Perry for appellants.
Phillips and Battle & Mordecai contra.

PEARSON, C. J. When one member of a firm buys goods for the firm on his own credit, which goods are received and used by the firm without *disclosing the fact that he is a member of the firm,* the vendor has a right to hold the firm liable on the ground that he who gets and uses goods ought to pay for them. This proposition is sustained by the cases, and is so consonant to every principle of fair play (423) and common honesty as not to require the authority of cases to support it. If a vender sells goods to a firm and chooses to take the obligation of the purchasing parties, and waives his right to hold the firm liable, he may do so. But in such a case it is necessary for the firm to prove that the vendor knew that the party was a member of the firm and elected to give credit to the purchasing parties alone, in other words, to take less instead of the greater security to which he was entitled.

In our case the true question was, Did the plaintiffs know that the goods were bought for the firm of Plummer, Lewis & Co.? This is agreed. In the second place, in giving credit to Plummer, Young & Co., did the plaintiffs know that Plummer, Young & Co. was a member of the firm of Plummer, Lewis & Co., and with this knowledge elect to give the credit to Plummer, Young & Co. and waive the right to hold the firm of Plummer, Lewis & Co. responsible for the goods which were bought for its use, and of which it had the benefit? There is error in not submitting the case to the jury in this point of view.

As the case goes back for another trial, it may be well to observe the fact that Plummer, Lewis & Co. had agreed to allow one of the firm, to wit, Plummer, Young & Co., 2½ cents commissions for making the purchase was not made known to the plaintiff, and it is not seen upon

what principle they could be affected by it. So it is not seen how the fact that after Plummer, Young & Co. went into bankruptcy Lewis settled the price of the goods with the purchase of a note from the assignee in bankruptcy, given for the price (it is not stated at what time the note was given) could in any way affect the plaintiffs' cause of action.

PER CURIAM. *Venire de novo.*

Cited: Pepper v. Harris, 78 N. C., 75; *Thornton v. Lambeth,* 103 N. C., 90; *Webb v. Hicks,* 123 N. C., 248.

(424)

JOHN TULL v. THE TRUSTEES OF THE M. E. CHURCH, SOUTH, KINSTON, N. C.

Trustees—Contract.

Upon the application of A, one of their number, B furnished the trustees of a church, who were at the time engaged in erecting a church building, a quantity of brick and lumber, which were received by said trustees and used by them in said building. In an action to recover the price of said materials, *It was held*, that the trustees were liable for the same, notwithstanding A had no authority from them to purchase the materials and have them charged to the church, but on the contrary had promised to make a gift of the same to the church, which the trustees believed he was doing when the same were being furnished; and further, notwithstanding said trustees, as a board, never purchased or ordered from B any materials whatever.

ACTION, on an open account, tried before *Seymour, J.*, and a jury, at Spring Term, 1876, of LENOIR.

The action was brought to recover of the defendants $388.53, the price of certain bricks and lumber sold and delivered by plaintiff.

The plaintiff, on his own behalf, testified that in the latter part of the year 1860 one Dr. Lewis Miller came to his house to purchase brick for the church. He wanted to buy about 40,000. Plaintiff told him that if he would become personally responsible for the brick he would let him have them on his individual account.

Miller stated to plaintiff that he was one of the trustees of the church, and had been authorized to purchase the brick for the church, refusing to become personally responsible. Afterwards the plaintiff agreed to furnish the brick to said church on account of the church solely, and thereupon he delivered to the church in Kinston during the years 1860-'61 45,000 brick at $8.25 per thousand.

Plaintiff further stated that he furnished said church $13.98 worth of lumber, by order from the church; that neither the brick nor the lumber

has been paid for, and that both were subsequently used in building said church.

One Sympkins testified that he delivered some of the brick in (425) question for the plaintiff at the said church; the plaintiff's team hauled them; that witness was employed as a mason to work in said church, and that he contracted to work with Miller, and was paid partly by note signed by said Miller, Mr. Griffen, and Mr. Hay, who all signed as trustees, and partly by an order on Mr. Griffen signed by the same parties. Witness further stated that he carried out a bill for lumber to plaintiff's sawmill, and that the lumber came to the church in the plaintiff's wagon.

One Rouse, for the plaintiff, testified that he was employed by the plaintiff in the year 1860 at his sawmill, and received a bill for lumber made out for said church. He sawed 923 feet of lumber and it was delivered to the church. Witness charged the same to the church on the mill book, which he exhibited and the charge found.

On the part of the defense, one Webb stated that in 1860 the trustees of said church were Dr. Lewis Miller, R. C. Hay, F. G. Griffen and himself; that the building committee of the church were Miller, Griffen, and Hay.

To this witness the defendants' counsel proposed to ask the following question: "State a conversation between yourself and the other trustees in regard to the brick which were to be used in building said church?" To this question plaintiff objected, on the ground that there was some evidence of an agency, either actual or implied, vested in Miller by the church, and the private instruction, not intended to be communicated to the plaintiff, should be excluded as not affecting the plaintiff's right to recover, the counsel at the same time stating that by this question he proposed to prove from this conversation that Miller had no authority from the trustees to purchase said brick to be charged to (426) the church, but that he agreed to furnish them himself.

Objection sustained, and the question excluded; defendants excepted.

The counsel then proposed to ask the same question, stating that the defendants expected to show thereby that in said conversation the trustees refused to buy the brick, and that Miller then and there stated that he would buy the brick himself and give them to the church.

Objected to on the same grounds as the preceding; question again excluded, and the defendants excepted.

The defendants then introduced as witnesses on their behalf the said Hay, Griffen, and Webb. Each testified that neither collectively nor individually had they or either of them authorized Miller to purchase the brick and lumber sued for. They each further stated that they have had no notice or knowledge that said brick or lumber were charged

to the church until within the last two or three years—shortly before the bringing of this suit. They further testified that said building committee was authorized to contract for the woodwork only.

In his charge his Honor stated that if the jury believed the evidence Dr. Miller was one of the four trustees and one of the members of this building committee of the church; that Miller ordered certain material for the church of the plaintiff, who delivered the same as ordered, and they were received and used in the church building; that the materials were charged by the plaintiff to the church—all of which facts are evidence tending to show agency on the part of Miller to the plaintiff.

That it was not necessary to render the defendants liable for Miller's acts that he should have had any authority by a vote of the trustees, or that he should have had any authority as one of the building committee, or that the committee itself should have had authority to contract for brick work, and that the facts that none of the other trustees
(247) or members of the building committee joined in the order; that they had not authorized the purchase and were not aware that the materials ordered had been charged to the church were not sufficient to overcome the apparent agency of Miller.

Upon this intimation of his Honor's opinion the defendants submitted to a verdict for the amount claimed by plaintiff. Judgment in accordance therewith, from which judgment the defendants appealed.

READE, J. The plaintiff furnished the defendants with brick and lumber, which they received and used in building their church. This clearly entitles the plaintiff to recover the value of the articles.

The defense set up is that Miller, one of the trustees of the church and one of the building committee, promised the trustees that he would furnish the brick and lumber as a gift without charge, and when the plaintiff delivered the articles and the trustees received and used them they, the trustees, supposed that Miller was furnishing them, as he had agreed to do. Now that this was a gross imposition by Miller upon the trustees is plain enough; but how the plaintiff, who knew nothing of Miller's undertaking, is to be affected by it we do not see.

We have thus far considered the case as if there had been no express contract with the plaintiff for the articles and as if he had delivered them to the defendants and they had received and used them without any express contract. In that case the *law implies* that the defendants were to pay their value.

But the defendants insist that the case does not stand upon an implied contract, for that Miller made an express contract with the plaintiff to deliver the articles to the defendants at the defendants'
(428) charge, when he had no authority to make the contract. Very

well; if Miller had no authority to make the express contract, then it was void as if there had been no contract, and so the case would still stand upon the implied contract or upon the confirmation of the express contract made by Miller by the defendants receiving and using the goods.

But again, the defendants insist that there was no contract, either express or implied, between them and the plaintiff, for that, by reason of what passed between them and Miller, they thought that they were receiving the articles as a gift from Miller, whereas the plaintiff supposed that he was delivering them on his own account, and that they were to pay him for them. So that their minds never met, and there was a mutual mistake. Not at all. The plaintiff never was under any mistake of law or fact. He knew that he was delivering his goods to the defendants, and that they were receiving and using them, and he supposed that they were bound to pay for them. There was no mistake here. The defendants were mistaken in supposing that Miller was giving them the articles. That was the only mistake. It was their misfortune, which they might easily have prevented by inquiring of the plaintiff whether he was delivering the articles at their charge, or by telling him of their understanding with Miller. But they did nothing of the sort, although they were receiving the articles for a considerable time, covering a portion of two years. The plaintiff was in no fault. It was reasonable for him to suppose that Miller, one of the trustees, had authority to make the contract with him for the trustees. If he had had any doubt about it it would have been removed when he carried the articles according to the contract and they received and used them. It would have been different if the plaintiff had known of the understanding between Miller and the defendants, or if Miller had told the plaintiff when he made the contract with him that *he* was to be responsible, and that he was to give the goods to the church; but, on (429) the contrary, the plaintiff wanted Miller to be personally responsible, and he refused and insisted upon the plaintiff's furnishing them at the charge of the church, which the plaintiff finally agreed to do.

The case most relied on and nearest in point for the defendant was this: A, a shopkeeper, was indebted to B, and B, in order to save his debt, ordered a bill of goods of A; but before A received the order he had sold out to C, who filled the order. C did not send to B any bill of the goods nor in any other way inform B that he had filled the order, and B received the goods, supposing that they had been furnished by A.

Now there is this manifest difference between that case and this: there B did not know, and had no reason to believe, that C was furnishing the goods; here the defendants did know that the plaintiff was furnishing the goods. There C knew that he was furnishing goods which

had not been ordered from him, but had been ordered from A, and he did not inform B of it. Here the plaintiff did not know that he was furnishing goods which had not been ordered from him, but had been ordered from Miller, and the defendants did know that he was furnishing them. See *Baulton v. Jones* and other cases cited and commented on in Benjamin on Sales, 47 and 324.

The conclusion is that if Miller was authorized to make the contract which he did make with the plaintiff to deliver the articles to the church at the charge of the church, then the church is liable upon the special contract if Miller was not authorized to make the contract, and, therefore, the articles were delivered, received and used without any special contract, then the defendants are liable upon the implied contract. And the fact that something passed between them and Miller to which
(430) the plaintiff was no party and of which he had no knowledge, by which they were imposed upon by Miller, cannot avail them. The evidence, therefore, was properly rejected.

PER CURIAM. No error.

Cited: Pepper v. Harris, 78 N. C., 75; *Brown v. Morris,* 83 N. C., 255.

JOHN W. HINSDALE, ADMINISTRATOR, v. G. F. WILLIAMS AND WIFE AND OTHERS.

Homestead—Reversionary Interest.

The reversionary interest in a homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate.

PETITION by an administrator to make real estate assets, filed before the probate judge of CUMBERLAND, and thence carried by the appeal of the plaintiff to the Superior Court, and there heard before *Buxton, J.,* at chambers, 12 June, 1876.

The only point involved in the appeal was the right of the administrator to sell the reversion in a homestead, one of the distributees being a minor. The probate judge decided that the same could not be sold, which judgment was affirmed by his Honor, from whose judgment the plaintiff appealed.

MacRae and Broadfoot for appellant.
Sutton and Graham and T. A. McNeill contra.

READE, J. It is conceded that a reversionary interest in a homestead is not subject to sale for any debt under *execution*. Bat. Rev., ch. 55, sec. 26. *Poe v. Hardie,* 65 N. C., 447.

The question presented now is whether such reversionary interest is subject to sale by an administrator under an order of court, in a proceeding to make real estate assets, to pay the debs of the in- (431) testate homesteader during the minority of one of his children, who is in the enjoyment of the homestead.

The reason given why the reversionary interest of the original homesteader should not be sold in his lifetime is that the interest is an uncertain one, being for his life, and therefore the sale and purchase must be a mere speculation, and furthermore that it is against the policy of the homestead law to have the homestead disturbed by an adverse interest.

It is insisted that the first reason does not obtain here because the defendant's interest is not for life nor for any uncertain period, but until he shall arrive at the age of 21 years, which is eight years. But the plaintiff overlooks the fact that while the defendant's term cannot go *beyond* eight years, yet it may fall very far *short* of it in the event of the defendant's death. So that the interest is uncertain. It may be one year or eight years.

There are two reasons urged why an administrator ought to be allowed to sell which do not apply to a sale under execution. In the first place, it is important that the estate of deceased persons should be settled up speedily. That is undoubtedly true, and we have to choose between that evil and the evils of selling uncertain interests and of disturbing the homestead. And our determination is against the sale.

In the second place, it is urged that the statute *supra* against the sale of reversionary interests in homesteads is only against sales under *"executions";* and such is the *letter* of the statute, but the purpose of the statute was to prevent *forced* sales of the reversionary interest under any circumstances. What difference can it make whether the sale is under an order of the court called an execution or under an order of the court called an "order of sale," or by some other name?

There is no error. (432)

An order may be taken below for the sale of the excess over the homestead, if there be any excess.

PER CURIAM. Affirmed.

Cited: Shields v. Allen, 77 N. C., 376; *Jenkins v. Bobbitt, ib.,* 387; *Gamble v. Watterson,* 83 N. C., 574; *Windley v. Tankard,* 88 N. C., 226; *Mebane v. Layton,* 89 N. C., 401; *Joyner v. Sugg,* 131 N. C., 339, 340; *S. c.,* 132 N. C., 589.

STATE *ex rel.* J. C. L. HARRIS, SOLICITOR, v. C. B. HARRISON AND OTHERS.

Payment into Court Pendente Lite—Allowance to Infant.

1. During the pendency of an action against a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in possession of the court, the Superior Court has no power to order the guardian and his sureties to pay a certain sum into court for the ward's maintenance and support *pendente lite*, and a further sum for her attorney.
2. If it is made to appear to the court, pending the action, that a fund belonging to the ward is in possession of the guardian, removed, the judge may, by process of contempt, compel its payment into court, where it will be subject to such orders and disposition as the necessities of the ward may require. But until it is so paid into court, it is not subject to the protection and control of the court.
3. In order to obtain an allowance for maintenance, it must be shown that there is a present income belonging absolutely to the infant, and that the allowance will be for his benefit.

MOTION in the cause heard by *Watts, J.*, at Spring Term, 1876, of WAKE.

The real plaintiff, Lee A. Jeffreys, a minor, brought this action against her guardian and the sureties on his bond, to Fall Term,
(433) 1875, for an account and settlement. After complaint and answer, it was referred to T. M. Argo, Esq., to state an account, and before he made a final report, and before any of the exceptions taken to the report were disposed of, a motion was made after due notice, in behalf of said ward, that the guardian and his sureties be ordered to pay a certain sum into court for the ward's support and maintenance *pendente lite*, and a further sum for the use of her attorney.

The power of the court to allow this motion is the only point argued in this Court, and all the facts relating thereto are sufficiently stated in the opinion of Justice BYNUM.

On the hearing of the court below, the judge granted the motion, and the defendants appealed

Haywood and Busbee & Busbee, for appellants.
Fowle, contra.

BYNUM, J. Whenever any guardian is removed and no person is appointed to succeed in the guardianship, the judge of probate shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian, in the Superior Court, for securing the estate of the

ward. The judge before whom the action is brought shall have power to appoint a receiver until a guardian is appointed to take possession of the ward's estate, to collect all moneys due to him, to secure, loan, invest or apply the same for the benefit and advantage of the ward, subject to such rules and orders as the judge may from time to time make in regard thereto. Bat. Rev., ch. 103, sec. 21, 22. Under this statute the action is brought; and, pending the action, and while it is under reference to take an account—and before the account is completed and finally acted on, so as to see whether anything, and, if anything, what may be due and owing to the ward—a motion is made by the plaintiff, and (434) upon it an order is made by the court, that the sureties in the guardian bond shall within five days pay into court $300 for the present maintenance of the ward, and also $300 for the use of her counsel; and that if these sums are not so paid that execution shall issue therefor.

The defendants in their answer deny any liability on their bond, or that they are in any way indebted to the ward. The reference is still pending, and there has been no final adjudication ascertaining any such indebtedness. Has the court jurisdiction to make such an order?

Under the statute before cited it is apparent that the fund, whether consisting of money or securities, must first be reduced into the possession of the court or the receiver before it can be made the subject either of investment or application to the wants of the ward *pendente lite*. As soon as another person is appointed guardian in place of the one removed, the duty of making orders for the maintenance or education of the ward is remitted again to the appropriate jurisdiction of the court of probate. Bat. Rev., ch. 103, sec. 20, subsec. 4.

If it is made to appear to the court, pending this action, that a fund belonging to the ward is in possession of the guardian removed, the judge may, by process of contempt, compel its payment into court, where it will be subject to such orders and disposition as necessities of the ward may require. But until it is so paid into court it is not subject to the protection and control of the court. "In order," says Adams, "to obtain an allowance for maintenance, it must be shown that there is a present income, belonging absolutely to the infant, and that the allowance will be for his benefit." Eq., 287. Such and such only is the jurisdiction and power of the chancellor under the old equity system, in all cases where there is the relation of trustee and *cestui que trust*, and the fund is, in the contemplation of a court of equity, the property of the (435) plaintiff. *Daniel v. Owen*, 72 N. C., 340. The statute confers no greater powers upon the Court.

The action here is instituted against the guardian and his sureties for the possession of the estate of the ward. The defendants deny any liability and any indebtedness, and a reference is made to take the account,

and pending that reference and before a final adjudication ascertaining whether there is any, and if any, what indebtedness, this motion and order are made against the sureties for the payment by them of $300 to meet the pressing necessities of the ward, and $300 for her attorney.

We are not referred to any precedent or authority for such an order, and we have been unable to find any. It would be as reasonable to ask and make such an order upon the sureties, in an action upon an administration bond, in behalf of infant distributees, before it is ascertained that there is a breach or that anything is due them.

It is unnecessary to decide whether the order in this case is a judgment upon which an execution can be issued; or the disobedience to which can be punished by process of contempt. The court had no power to make the order. There is error.

Judgment reversed, and cause remanded to be further proceeded with according to law.

PER CURIAM. Reversed.

(436)

JACOB BLEVINS v. JAMES M. BARKER.

Note for Purchase Money for Land.

1. A sold to B a tract of land, executing and delivering therefor a deed in fee simple and taking from B a note for value received, and in which it is stated "the land I have sold to B is bound for this note"; afterwards B sold the land to the defendant, and in the meantime A transferred the note to the plaintiff, who obtained judgment thereon and caused said land to be levied on and sold as the land of B, the obligor in the note; he, the plaintiff, purchasing the same at the sheriff's sale and taking the sheriff's deed therefor: *Held*, in an action to enforce said lien and recover possession of said land, that had the terms of the note been incorporated in the deed and been duly registered, it might have constituted a lien or trust attached to the land and accompanying its transfer to the defendant, who would have taken it *cum onere*.
2. If such note, in connection with the deed, could have had the force of a mortgage, on registration, it can have no validity whatever until so registered, and then it could take effect only from and after registration. Under the act of 1829, Bat. Rev., chap. 35, sec. 12, no notice to the purchaser (the defendant), however full and formal, will supply the place of registration.

ACTION, to enforce a lien on a certain tract of land and to recover possession thereof, tried at Spring Term, 1876, of ASHE, before *Furches, J.*

All the facts necessary to an understanding of the points decided in this Court are stated in the opinion of Justice BYNUM.

On the trial in the Superior Court the defendant had judgment, and the plaintiff appealed.

Folk for appellant.
Armfield and M. L. McCorkle, contra.

BYNUM, J. Jane Senter, being seized in fee of a tract of land lying in the county of Ashe, in November, 1869, sold and con- (437) veyed the same by deed in fee absolute to W. E. Senter, who at the same time executed and delivered to Jane Senter a note of the following tenor: "Six months after date, I promised to pay to Jane Senter two hundred dollars for value received of her; the land I have sold to W. E. Senter is bound for this note." In January, 1871, W. E. Senter sold and conveyed the land, by deed in fee, to the defendant, James M. Barker.

Afterwards Jane Senter sold and transferred the said note on W. E. Senter to the plaintiff. Blevins, who brought suit and recovered judgment thereon against W. E. Senter, and caused the said tract of land to be levied on and sold under execution, as the land of the obligor in the note, purchased the same, took the sheriff's deed and brought this action against the defendant, seeking to set up and enforce a lien on the land for the debt, by virtue of the provisions of the before recited note.

Had the terms of the note been incorporated in the deed made by Jane to W. E. Senter, and the deed duly registered, it might have constituted a lien or trust attached to the land and accompanying its transfer to the defendant, who would have taken it *cum onere*. *Latham v. Skinner,* 62 N. C., 292.

But the deed from Jane is an absolute one, containing no such declaration of a trust in favor of the grantor, to secure the purchase money so as to constitute an express as distinguish from an implied lien. The grantor, Jane Sentor, no doubt supposed that the condition of the note bound the land for the purchase money, and had the note been registered at the same time with and as a part of the deed, such a construction might have been given to the whole transaction. It is a matter of regret that such an effect cannot be given to it, but the note was not registered and as a part of the deed.

As a mortgage, trust or encumbrance upon the land for the payment of the purchase money, it must therefore fail. No such (438) encumbrance, by whatever name called, can be created so as to operate against creditors, and subsequent purchasers for value, until registered. If the note in connection with the deed could have had the force and effect of a mortgage, on registration, it can have no validity whatever until so registered, and then it could take effect only from and after registration. Under the act of 1829, Bat. Rev., ch. 35, sec. 12, no notice to the purchaser—here the defendant—however full and formal, will supply the place of registration. *Robinson v. Willoughby,* 70

N. C., 358; *Fleming v. Burgin,* 37 N. C., 584; *Leggett v. Bullock,* 44 N. C., 283; *Miller v. Miller,* 62 N. C., 85.

It is altogether too late to contend that the vendor of real estate, who has conveyed it by deed, has a lien upon the land for the purchase money. Nor can the vendor reserve a lien unless he take his security in writing and have it registered. All secret trusts, latent liens and hidden incumbrances are and were intended to be cut up by the roots by force of our registration laws. And since the decision of this Court in *Womble v. Battle,* 38 N. C., 182, the law as here announced has been considered as well settled in North Carolina. There is

PER CURIAM. No error.

Cited: White v. Jones, 92 N. C., 389; *Quinnerly v. Quinnerly,* 114 N. C., 148; *Gorrell v. Alspaugh,* 120 N. C., 373; *Blalock v. Strain,* 122 N. C., 285; *Wood v. Tinsley,* 138 N. C., 510; *Carpenter v. Duke,* 144 N. C., 295; *Piano Co. v. Spruill,* 150 N. C., 169; *Shingle Mills v. Sanderson,* 161 N. C., 454; *Moore v. Johnson,* 162 N. C., 272; *Buchanan v. Clark,* 164 N. C., 71.

(439)

STATE v. AARON WRIGHT.

Impeaching Witness—Practice.

Before a witness can be examined to impeach another witness by proving inconsistent statements made by such witness, the impeached witness must be asked as to such statements, in order that he may have an opportunity to explain them.

ASSAULT with intent to commit rape, tried at Spring Term, 1876, of CHOWAN, before *Eure, J.,* and a jury.

The material question arising on the trial in the Superior Court, and the only point decided in this Court was as to the exclusion of certain evidence.

The defendant introduced one Robinson, an acting justice of the peace in said county at the time of the offense was alleged to have been committed, and proved that the prosecutrix, Penny Taylor, made application to him for a warrant against the defendant, for the crime for the commission of which he is indicted.

The counsel for the defendant asked this witness: "Did the prosecutrix, at the time she made application to you for the warrant, make various and contradictory statements?"

The solicitor for the State objected to this question, on the ground that it was leading; and that the witness should be asked to state the contra-

dictory or repugnant statements, or the substance of them wherein they were repugnant. The witness stated that he could not recollect a single statement that she made, but that she made many contradictory statements about the matter; and that he (the witness) told her she was telling a pack of lies, and refused to issue a warrant.

The objection to the question and answer was sustained by the court, and the evidence ruled out.

The jury returned a verdict of guilty. Judgment thereupon, (440) and appeal by the defendant.

Attorney-General Hargrove for the State.
A. M. Moore for defendant.

BYNUM, J. The prosecutrix had been examined as a witness in behalf of the State. It was competent for the defendant to impeach her credit in three ways: First, by disproving the facts stated by her, by the testimony of other witnesses. Second, by evidence of her general character affecting her credit. Third, by proof that she had made statements out of the court contrary to what she had testified at the trial. It was for the latter purpose that Robinson was introduced by the defendant. But before he could be examined to impeach another witness by proving inconsistent statements made by her, the impeached witness must be asked as to such statements, in order that she may have an opportunity to explain them. This is the rule adopted in England, the United States courts and in this State. *The Queen's case,* 2 Brod. & Bing., 313; *Conrad v. Griffey,* 16 How., 38; 1 Greenl. Ev., sec. 460-3; *Hooper v. Moore,* 48 N. C., 428.

Counsel for the defendant put this question to his witness: "Did the prosecutrix, at the time she made application for the warrant, make various and contradictory statements?

The question was objected to by the solicitor for the State, who suggested that the witness should be asked to repeat the alleged contradictory or repugnant statements or the substance of them. And upon the witness saying "that he could not recollect a single statement that she made, but that she made many contradictory statements about the matter, and that he told her she was telling a pack of lies, and that he refused the warrant," the objection was sustained and the question and answer were ruled out.

There is no error in this ruling of his Honor.

The impeaching witness could not recollect any statement or (441) the substance of any made by the prosecutrix. If her statements had been inconsistent with her evidence, whether they were material to the issue, on which ground only could they be held to be admissible,

could not be seen by the court. The witness failing to recollect or specify any previous statement of the prosecutrix, inconsistent or otherwise, his general inference that her statements were contradictory and false were not competent evidence. Such conclusions could be drawn only by the jury from specified statements, admitted or proved to have been made by her, which were material to the issue, and were inconsistent with her evidence on the trial. Such inconsistent statements, had they been in evidence before the jury, would have been competent to affect her credit for veracity. There is

PER CURIAM. No error.

Cited: *S. v. Williams,* 81 N. C., 602; *S. v. Brabham,* 108 N. C., 796; *Johnson v. R. R.,* 140 N. C., 588; *S. v. Hooper,* 151 N. C., 647.

(442)

STATE v. G. W. CANSLER.

Misconduct in Office—Indictment.

1. If one elected to an office takes possession of the same and engages in the exercise of its duties and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehavior, and may be indicted therefor, notwithstanding the fact he had failed to take the oath of office.
2. In an indictment against a justice of the peace for taking unlawful and extortionate fees, it was charged that he "unlawfully, corruptly, deceitfully, extorsively, and by color of his office, did extort and receive from," etc.: *Held,* that the offense was well charged, and that no advantage could be taken thereof, especially after verdict.

INDICTMENT for extortion, tried at Spring Term, 1876, of CATAWBA, before *Furches, J.*

The defendant was charged in the bill of indictment with the taking unlawful fees in his office of justice of the peace from one Joshua Hefner.

On the trial below, Hefner himself, introduced by the State, testified that he and his wife had a little difficulty, and that he slapped her in the face; this was in the summer of 1874; that not long thereafter he was at Catawba Station, and the defendant mentioned the difficulty he had with his wife to him, and told him he had better "submit and fix it up"; that it would not cost him much, and for him to bring his wife down; witness and his wife, a few days after this conversation, went down to the station as requested, and saw defendant; that he took them into a counting-room and had a little chat, and then told witness it would

cost him three dollars; the defendant then made a memorandum on a piece of paper, and wrote a receipt for three dollars; that he (the witness Hefner) had only two dollars, which he paid to the defendant, who gave the witness the receipt for three dollars, telling him that he (the defendant) would advance the other dollar, and that the witness could hand it to him some other time. (443)

The receipt, which was for three dollars, "in full of costs in a matter of Joshua Hefner and wife," dated 4 September, 1874, was introduced as evidence and read.

The solicitor then asked the witness if the defendant was a justice of the peace? To this question it was objected, on the ground that, if the defendant was a justice of the peace, it was a matter of record, and as such must be proved. The record of the board of county commissioners was then introduced, whereby it was shown that the defendant had been elected as a justice of the peace of Catawba County, at the August election in 1874, and that he had qualified as such before the board of commissioners. There was no evidence of the defendant's ever having taken the oath of office before the Superior Court clerk.

There was no evidence offered for the defense. The defendant, however asked his Honor to charge the jury that he was entitled to acquittal at their hands for the following reasons: (1 That the bill of indictment was defective in this, that it did not charge the act to have been done *willfully*. (2) That to make the defendant a justice of the peace, he must have qualified before the clerk of the Superior Court, and as there was no evidence that he had done so, they should acquit on that account. (3) That the jury must be satisfied beyond a reasonable doubt of the defendant's guilt before they could convict.

His Honor declined to give the first and second instructions asked for, and charged the jury that to make the defendant guilty, they must not only find that he took fees that did not belong to him, but they must also find that he knew at the time he took them that they did not belong to him; that if he took the fees that did not belong to him through ignorance, thinking that such fees rightly pertained to his office that would not make him guilty. One of the rules of evidence governing criminal trials was that the jury must be satisfied beyond a rea- (444) sonable doubt; that was a rule they should try themselves by, and say whether the defendant was guilty or not, applying the facts as proved to the law as given by the court.

The jury returned a verdict of guilty. Rule for a new trial; rule discharged; judgment, and appeal by defendant.

Attorney-General Hargrove for the State.
Armfield & Folk and M. L. McCorkle for defendant.

READE, J. There can be no doubt that if one elected to an office takes possession of it, and engages in the exercise of its duties, and misbehaves as in this case—take unlawful and extortionate fees—he will be liable for such misbehavior, notwithstanding the fact that he failed to take the oath of office. The Legislature evidently so understood it, because for going into the office before taking the oath the statute subjects him "to a penalty of $500, and ejection from office by proper proceedings for that purpose." Bat. Rev., ch. 79, sec. 4. But how can he be ejected *from* unless he is already *in* the office? And again: "Any person presuming to execute the office of justice of the peace without qualifying as herein directed shall be guilty of a misdemeanor." Bat. Rev., ch. 63, sec. 1.

Here it is contemplated that he may be in office and executing the duties without having qualified; and that is made a misdemeanor. And it would be strange if one who is in office and exercising the duties thereof, could excuse himself for committing a crime in the manner of exercising the duties by showing that he had committed another crime *in getting into* the office.

In *Wiley v. Worth,* 61 N. C., 171, Wiley claimed his salary of the rightful government after the war, upon the ground that although he had been in the office of Superintendent of Public Instruction un-
(445) der the Confederacy, yet he had not taken the oaths, and was entitled to hold under his old election before the war. But we held that his taking or not taking the oaths, under the Confederacy, made no difference, that he was in office under the Confederacy, and that his neglect of duty in not taking the oaths, did not avail him; and that he was not entitled to his salary out of the rightful government.

There was a motion in arrest of judgment, for that the indictment did not charge the act to be done "willfully."

The charge is that he "unlawfully, corruptly, deceitfully, extorsively, and by color of his office," etc. We think that sufficient, at least, after verdict. It is entirely inconsistent with his having done it by mistake or ignorance or in any other manner indicating innocence. There is

PER CURIAM. No error.

Cited: S. v. Long, 76 N. C., 255; *S. v. Pritchard,* 107 N. C., 926; *Midgett v. Gray,* 159 N. C., 445.

JAMES KYLE v. THE MAYOR AND COMMISSIONERS OF FAYETTEVILLE AND J. W. MALLETT, TAX COLLECTOR.

Assessment for Taxation—Shares of Stock.

1. Shares of stock in a national bank are proper subjects of State, county and municipal taxation. Such shares owned by nonresidents are to be taxed in the city or town where the bank is located, and not elsewhere.
2. All assessments of property for taxation, under the Constitution, must be made by the township board of trustees.

ACTION for injunction and other relief, heard before *Buxton, J.*, at chambers, in CUMBERLAND, on 20 November, 1875.

Plaintiff alleged in his complaint that he is a nonresident of the State; that he was the owner of 108 shares of stock in the (446) People's National Bank of Fayetteville, on 1 April, 1875; that the same had been placed by the tax list takers for the town of Fayetteville upon the tax list, and that plaintiff had been assessed the sum of $182.50 as taxes thereon; that the tax list had been placed in the hands of the defendant Mallett for collection, and that he had levied upon certain real estate of the plaintiff, and advertised the same for sale, to satisfy said tax assessment. Plaintiff asked that defendants be restrained from selling said property, etc.

Upon this complaint his Honor granted a restraining order, and an order to defendants to show cause on 20 November, why an injunction should not be granted as prayed for.

Defendants in their answer admitted the main allegations of the complaint, but they insisted that the tax assessed on plaintiff's shares of stock was uniform and at the same rate as was levied upon all other property subject to taxation in the town of Fayetteville, and that the same was valid and according to law.

Upon the hearing, his Honor held that the assessment for taxation of plaintiff's shares of stock by the authorities of the town of Fayetteville, and all proceedings thereunder, were without authority of law, and granted the injunction.

From which order defendants appealed.

Ray for appellant.
MacRae & Broadfoot, contra.

BYNUM, J. It is admitted that the town of Fayetteville possesses the power of taxation for corporate purposes, by virtue of its charter and the general laws of the State.

This concession, we think, is decisive of the case before us. For whenever the power is exercised, all taxes, whether State, (447)

county or town, by force of the Constitution, must be imposed upon all the real and personal property, money, credits, investments in bonds, stock, joint stock companies, or otherwise, situate in the State, county or town, except property exempted by the Constitution. Art. V, secs. 3 and 7; Art. VII, sec. 9.

It is the provision, and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person or interest, but that everything, real and personal, possessing value as property, and the subject of ownership, shall be taxed equally and by a uniform rule.

In this respect the present Constitution shows no favors and allows no discretion. If, then, the town of Fayetteville has the power to tax, the Constitution steps forward and commands that *all* property shall be taxed and by a uniform rule. Shares in a national bank are investments in stocks, and comprise the largest portion of the moneyed wealth of the country. They are not only a proper subject of taxation in themselves, but are made taxable expressly both by the Constitution of the State and the National Banking Act which brought them into existence and stamped them upon their character *Bank v. Commonwealth*, 9 Wall., 353; 4 Wall., 244. The Banking Act, ratified 3 June, 1864, and amended by an act ratified 10 February, 1868, confers upon the *States in which they are located* the power of taxing the shares in national banks. There are two restrictions upon the power. The first is that the tax shall be no greater than is imposed upon other moneyed capital in the hands of individual citizens of such State. The second is that shares owned by nonresidents of any State shall be taxed *in the city or town where the bank is located and not elsewhere.* Therefore,

(448) if nonresident shareholders are not taxed in the State, county and town where the bank is, they escape taxation altogether. Taxation is prohibited in the State of the nonresident. Such gross inequality and injustice was never intended and is expressly provided against. By the Banking Act it is wholly immaterial where the shareholder lives. The taxing power looks not for the individual, but for the bank. Where that is found the shares are taxed by the State, county or city of its locality.

In our view it was unnecessary for the Revenue Act of the State, or the charter of the town of Fayetteville to tax specifically the national bank shares of either residents or nonresidents.

Whenever and wherever these institutions spring into existence, and become the heads of moneyed investment and the representatives of wealth, the Constitution seizes them and exacts from them their proportional share of the public burdens. Neither the Legislature or the town corporation can exempt them from taxation without doing violence to the Constitution.

In the view we have taken of this case, it is unnecessary to examine the several revenue and other acts of the Legislature, cited and commented upon in the argument. It is enough to know, first, that Congress has impressed these bank shares with the character of taxable property in the States where located; second, that the Constitution of the State requires that all the property of the plaintiff in the State, including these investments, is to be taxed equally; and third, that the town of Fayetteville possesses the power to tax, and has levied the tax upon the bank shares, *ad valorem,* and uniform, as upon other property.

It is not alleged that the town tax is not uniform with the tax upon similar property, or that the assessment is in excess of that made by the township trustees. No point is made upon that. But it is proper to say that all assessments of property for taxation under the Constitution, must be made by the township board of trustees. Art. VII, sec. 6.

We have heretofore decided that this board must assess the value of property for State and county taxation, and we think, (449) for the same reasons of convenience and uniformity, that city and town taxation should be based upon the same valuation as that for the State and county. *R. R. v. Comrs.,* 72 N. C., 15.

There is error. Judgment reversed, injunction dissolved and Action dismissed.

PER CURIAM.

Dist.: Buie v. Comrs., 79 N. C., 269; *R. R. v. Comrs.,* 91 N. C., 463; *Covington v. Rockingham,* 93 N. C., 138; *Puitt v. Comrs.,* 94 N. C., 713; *Redmond v. Comrs.,* 106 N. C., 128, 139, 150; *Wiley v. Comrs.,* 111 N. C., 400; *Pickens v. Comrs.,* 112 N. C., 702; *Lumber Co. v. Smith,* 146 N. C., 201.

JAMES KYLE v. THE MAYOR AND COMMISSIONERS OF THE TOWN OF FAYETTEVILLE AND OTHERS.

Taxation—Nonresident Shareholders.

No distinction can be made between resident and nonresident shareholders of the stock of national banks; and the Constitution and our revenue laws require the tax to be levied on all such shares, whether owned by residents or nonresidents, and whether the latter be named or not.

MOTION for an injunction, before *Buxton, J.,* at Chambers, in CUMBERLAND, on 13 November, 1875.

The pleadings and facts of this case are the same as those in the preceding case, between the same parties, with this exception: In this case, the tax complained of was levied under the Revenue Act of 1874,

in which the shares of stock in the national banks in this State are not in express terms required to be listed. In all other respects the facts are the same.

His Honor, upon the hearing, granted the injunction upon the plaintiff's giving the bond required by law. From this order the defendants appealed.

(450) *Ray for appellants.*
MacRae & Broadfoot, contra.

BYNUM, J. The only distinction between this case and the other between the same parties, decided at this Term, *ante,* 445, is, that the tax here was levied for the year 1874, and the Revenue Act of that year does not in express terms tax the shares of nonresidents in national banks located in this State.

We have decided in the other case that no distinction can be made between resident and nonresident shareholders, and that the Constitution and revenue laws require the tax to be levied upon all shares in national banks, and that the laws equally apply to nonresidents, whether named or not.

For the reasons stated in that opinion, the judgment below is reversed, and

PER CURIAM. Action dismissed.

JOSEPH D. POWELL v. MARY M. ALLEN, RICHARD S. TERRELL AND OTHERS,

Joint Tenants—Construction of Will.

The act of 1784 abolishing the *jus accrescendi* in joint estates, for the benefit of the heir, etc., of the deceased joint tenants, does not appply to joint tenants for life. *Therefore,* where a testator, after giving land to his daughter for life, devised in respect to it as follows: "At her death my executor is to put in possession of my three grandsons, Joseph, Richard and David, for them to use it during their natural lives, for it is not to be subject to be parted with under no consideration, and at their death, give it to their children in fee": *Held,* that, Joseph, and David having died without issue, Richard had a life estate in the whole of the land; and that at his death, without children, it will revert to the heirs-at-law of the testator.

PARTITION of land, in WAKE, commenced by summons, return-
(451) able out of term, and heard upon demurrer to the complaint, by *Watts, J.,* at June Term, 1876.

The complaint filed at the opening of the summons alleges, that Joseph Fowler died in said county in February, 1859, leaving a will by which he devised the land, of which partition is sought, as follows:

"Item 3. To my beloved daughter, Martha E. Terrell (widow), I lend, during her lifetime, my tract of land on which she now resides, in Wake County, containing 500 acres more or less, together with all improvements thereon, and the following negro slaves. . . .

"Item 8. My negroes and all the land that I have loaned my daughter, Martha E. Terrell, at my death, my executor is to put in possession of my three grandsons, to wit: Joseph E. Terrell, Richard Terrell and David S. Terrell, for them to use during their natural lives, for it is not to be subject to be parted with under no consideration; at their death I give all the above property to their children."

That the only heirs-at-law of Joseph Fowler, at his death, were the plaintiff, a son and only child of Eliza Powell, a daughter of said Joseph, who died before him, and the said Martha E. Terrell, another daughter; that Martha E. Terrell died in the year 1863; that Joseph, David and Richard Terrell were the children of Martha, and all alive at their grandfather's death, but that Joseph and David died before their mother, unmarried and without issue; that the defendant, Richard, is an idiot and unmarried; that the plaintiff has an estate of inheritance in said land, in possession of one undivided third part, the defendants, who are the issue of Martha E. Terrell, have a like one-third interest, and the defendant, Richard Terrell, has an estate for life of one undivided third interest, of which, upon his death without children, the reversion belongs equally to the plaintiff, one undivided half, and to the defendants, the issue of Martha E. Powell, the other undivided half.

The complaint asks judgment for an accounting and partition of the land according to the rights of the parties, or if a partition (452) cannot be had without injury to their rights, for a sale, etc.

The defendants demurred to the complaint on the ground that it appeared on its face that the defendant, Richard Terrell, is seized of a vested estate in possession in the whole of the land, etc.

Other points were raised by the pleadings, but the above statement contains all that is necessary to understand the point upon which the case was decided by this Court. Upon argument, his Honor overruled the demurrer, and the defendants appealed.

Moore & Gatling and Haywood for plaintiffs.
Battle & Mordecai and Pace for defendants.

PEARSON, C. J. When two or more acquire land by purchase, as distinguished from descent, and the four unities exist, to wit: "time, title,

estate and possession," they take as joint tenants unless there be an express provision that they shall take as tenants in common, and not as joint tenants. In *devises,* the rule has been further released by allowing such words, "to take share and share alike," or "to be equally divided between them," to have the effect of making the devisees take as tenants in common and not as joint tenants, because of an inference from the use of these words that the devisor so intended. 2 Black. Com.

In our case, so far from the words used showing an intention to make the devisees take as tenants in common, and to take it out of the general rule, the words tend to show an intention that they should take as joint tenants; at all events the words do not in the slightest degree
(453) tend to show an intention to make the devisees tenants in common and not joint tenants, as they would be according to the general rule.

We declare our opinion to be, that Richard Terrell, Joseph Terrell and David Terrell took an estate for life as *joint tenants,* under the will of Joseph Fowler. It follows that Richard Terrell, the survivor of the three devisees, is entitled to the whole tract of land for his life, unless "estates for life" come within the operation of the act of 1784. That is the question. The act is in these words: "In all estates, real or personal, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators or assigns of the tenant so dying, in the same manner as estates by tenancy in common."

It is obvious that these words cannot be made to apply to joint tenants for life. In regard to real estate, on the death of one of the tenants for life his part *cannot descend to his heirs,* but must go either to the survivor or some third person entitled to take, not by descent but by purchase, under the limitation law. In regard to personal estate, on the death of one of the tenants for life his part cannot pass to his executors, administrators or assigns, but must go either to the survivor or some third person entitled to take, not under the tenant dying, but by force of the limitation over. The word "assigns" has no signification, but evidently is a mere expletive thrown in by force of habit to accompany the words "executors and administrators"; for if the tenant dying had in his lifetime made an assignment of his part, the effect was to sever the joint tenancy, and there was no occasion for a statute to prevent his share from being acquired by the *"jus accrescendi."*

It is also obvious that the case of tenants for life does not come within the mischief which called for the enactment of the statute. The
(454) evil was that when an estate of inheritance was held in joint tenancy on the death of one, his part passed absolutely to the sur-

vivor, and *the heirs* of the tenant dying were wholly excluded; the object was to legislate in favor of *the heirs* of the dying tenant, but as far as the statute indicates, the rights of third persons taking by purchase under the limitation, and the rights of the survivor claiming under the common law rule, were not intended to be interfered with, for as between them the doctrine of survivorship works no crying hardship.

The learned and very studious counsel for the plaintiff, Mr. Haywood, when asked by the court, stated that he had not been able to find any case in which the act of 1784 was extended to estates for life, or where the point was presented. This shows that there was no mischief in respect thereto calling for a remedy; besides, if the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the *"jus accrescendi"* in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personal property.

There are several cases in which the court holds that an estate of inheritance given to husband and wife, although falling within the words, does not come within the operation of the act; which shows that the act ought not to be extended beyond the apparent mischief, especially if, as in our case, the words do not cover it.

We declare our opinion to be that Richard Terrell takes, by the survivorship, the entire tract for his life, and in default of children of the three devisees, on the death of said Richard the land will revert to the heirs of the devisor, and that the plaintiff representing his mother will be entitled to one-half and the other half will devolve upon those who represent the other daughter of the devisor.

Demurer sustained. Proceedings dismissed without prejudice. No cost allowed, as all parties were concerned in having their (455) rights declared.

PER CURIAM. Demurrer sustained.

Cited: Blair v. Osborne, 84 N. C., 419; *Powell v. Morrisey, ib.,* 423; *Rowland v. Rowland,* 93 N. C., 217.

JOHN W. LANCASHIRE, WILLIAM H. MOREHEAD AND MELVIN LOWERY v. ALEXANDER MASON.

Lease—Estoppel—Evidence.

1. Rent and fealty are incident to the reversion, and the assignee of the reversion is entitled to the rent accruing after the assignment: *Therefore,* where A made a lease to B of certain lands, and afterwards, before

the rent was due, the land was bought by C at a sheriff's sale under execution against A, and after the sale to C, A brought an action against B to eject him from the land and also for the rent; *Held*, that B was not estopped from setting up the title of C in defense of such action.

2. And that upon issue joined in such action it was error to exclude evidence of such sale to C by the sheriff, and sheriff's deed to him for the land.

3. When a lessor assigns his reversion he has no more interest or concern in the lease than the payee of a promissory note, after he has endorsed it to another.

SUMMARY proceedings in ejectment, commenced in magistrate's court; taken by appeal to Superior Court by defendant, and tried by *Buxton, J.*, at Spring Term, 1874, of CUMBERLAND.

The following statement of the case is sufficient to present the points decided by the court. There were other points raised in the case, but as a *venire de novo* was ordered for error in the court below in excluding evidence, they are not touched upon in the opinion.

John W. Lancashire, stating that he sued for himself and his co-plaintiffs, made affidavit before a magistrate 14 September, 1870,
(456) that the defendant entered upon the lands in dispute under a lease from plaintiffs, and that his term expired on 1 January, 1869; that plaintiffs' estate in the land was still subsisting; that defendant held over after expiration of his term, although possession had been demanded by plaintiffs. The plaintiffs demanded judgment for a possession and $60 as rent from 1 January, 1868, to 1 January, 1869, and also $200 damages for the occupation of the premises from 1 January, 1869, to the commencement of this proceeding.

The defendant filed an answer in the magistrate's court, denying that plaintiffs' estate was still subsisting, but alleged that at the time the rent for which the plaintiffs sued fell due, the land described in plaintiffs' affidavit was, and at the time of his answering still continued to be, the land and freehold of J. W. Hinsdale, Hinsdale having bought it at a sale by the sheriff under executions issued against the plaintiff Lancashire and others, and stating further that the title to the land would come in question in the proceeding. There was a trial before the magistrate, who gave judgment that defendant be removed from and plaintiff put in possession of the land, and that Phillips recover $113.83 for rent, with costs, from which defendant appealed to the Superior Court.

On the trial in the Superior Court, J. W. Lancashire, one of the plaintiffs, testified that he leased the land to defendant at $60 for the year, commencing 1 January, 1868, and ending 1 January, 1869; that he put the defendant in possession 1 January, 1867, but the rent was to commence in 1868; that defendant remained in possession three or four years, and that the land had been conveyed to plaintiffs for partnership purposes.

The defendant testified that he entered on the land in August, 1868, under a lease from plaintiff Lancashire, the terms being that he was to pay $60 as rent for 1869; that he paid part of the rent for the year 1869, and remained in possession of the land until Janu- (457) ary, 1870, or 1871.

Defendant's counsel then proposed to offer in evidence the record of a judgment and execution in the Superior Court of Cumberland, in the case of *Dibble, Worth & Co. v. J. W. Lancashire;* also a sheriff's sale to J. W. Hinsdale, of the land in question, 17 May, 1869, and sheriff's deed to J. W. Hinsdale, dated 30 April, 1871. Upon objection by plaintiffs, the evidence was excluded by his Honor, and defendant excepted. Defendant's counsel then proposed to offer in evidence a record of a judgment and execution in same court in case of *R. & J. C. McCaskill v. J. W. Lancashire,* surviving partner of J. W. Lancashire & Co., the firm of J. W. L. & Co. having been composed of same persons as the firm of Lancashire, Morehead & Lowery; also a sale under the execution issued in said case on 3 April, 1871, and sheriff's deed to the purchaser, J. W. Hinsdale, dated 20 April, 1871.

This was also rejected by his Honor, and defendant excepted.

There was more evidence introduced by both sides, tending to show the value of the rent of the land and amount of damage done by defendant to the land during his occupation.

It was admitted of record by both sides that Morehead & Lowery, plaintiffs, died before this suit was commenced.

After the close of the evidence defendant's counsel objected to the count that the plaintiff could not recover possession of the land because of a defect of parties, insisting that plaintiff Lancashire could not recover as surviving partner alone, but the heirs-at-law of the deceased copartners should be joined as plaintiffs.

His Honor was of opinion that inasmuch as defendant had obtained possession for a stipulated period from plaintiff Lancashire, he was estopped from objecting to restitution of the possession after (458) his term had expired. Defendant excepted.

The jury returned a verdict in favor of plaintiff for $110 as damages. Judgment was rendered accordingly. Defendant appealed.

C. W. Broadfoot for plaintiff.
J. W. Hinsdale for defendant.

PEARSON, C. J. In rejecting the evidence of a sheriff's sale of the plaintiff's estate and deed to Hinsdale, the learned judge made a wrong application of the principle by which a lessee is not allowed to deny the title of the lessor as long as the relation of lessor and lessee continues, and as long as the lessee holds the possession which he acquired by means of the lease.

This principle is based on the necessity of enforcing honesty and fair dealing, and is one of many instances of the doctrine of estoppel by which a "man's mouth is shut" and he is not allowed to deny a matter he has in a solemn manner admitted. By accepting the lease and taking possession under it, the defendant in a solemn manner admitted that the plaintiff had title to the land at the time, and is estopped from denying that to be a fact.

Suppose, however, the lessor assigns his reversion. It is familiar learning that fealty and rent are incident to the reversion and pass with it, and by a grant of the reversion the assignee is substituted in place of the lessor, and the rent accruing thereafter is to be paid to him; after the assignment the lessor has no more interest or concern in the matter than the payee of a promissory note after he has endorsed it. This is so clear on the reason of the thing, that I have not taken the (459) trouble to read over the many cases cited in the brief of the defendant's counsel, especially as plaintiff's counsel cited no case *contra.*

Our case is narrowed to this: Has a sale by the sheriff under execution, and his deed, the same legal effect in passing the reversion as the deed of the lessor would have had?

No reason for making a distinction was suggested on the argument by the plaintiff's counsel, and we are unable to imagine one. The assignee of the reversion is entitled to the rent which had not accrued at the date of the assignment. Hinsdale was the assignee before the rent fell due, and was entitled to it at the end of the year, it being a yearly rent. If the plaintiff can exclude this evidence by force of the doctrine of estoppel, and make the defendant pay the rent to him, and if Hinsdale as assignee can make the defendant pay the rent to him, then the defendant is under a legal liabilty to pay a double rent; *"reductio ad absurdum."*

PER CURIAM. *Venire de novo.*

Cited: Thomas v. Hunsucker, 108 N. C., 723.

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(460)

W. D. GASTER v. R. W. HARDIE, SHERIFF, AND M. A. BAKER.

Personal Property Exemption—Parties—Mortgage.

1. As between debtor and creditor, the debtor is entitled to his exemptions, whether he has made no conveyance of his property, or has made one fraudulent as to creditors.

2. A debtor is entitled to his personal property exemptions in an equity of redemption in personal property subject to mortgage.

3. In an action by a debtor for injunction against a judgment creditor about to sell property under execution upon which there are mortgages, which the judgment creditor claims to be fraudulent: *Held*, that the mortgagees should be made parties to the action in order that the rights of all concerned may be determined in one action.

ACTION for injunction and other relief, brought to Spring Term, 1876, of CUMBERLAND, and heard before *Buxton, J.*, at chambers, 23 May, 1876.

The plaintiff alleged in his complaint that in December, 1875, he purchased from one W. C. Troy a lot of horses and buggies, and borrowed from him at the same time $200, and to secure the payment of the purchase money and the loan, executed to Troy a mortgage of certain personal property, including the said horse and buggies. That afterwards plaintiff borrowed other money and executed two additional chattel mortgages to secure its payment upon the same property.

That on 1 May, 1876, the defendant Baker obtained certain judgments against the plaintiff in a justice's court, amounting in all to $471.51, and caused executions to be issued thereon and placed in the hands of the defendant Hardie, sheriff of Cumberland County. That Hardie thereupon proceeded to have plaintiff's personal property exemption set apart to him, and to that end summoned ap- (461) praisers who allotted to the plaintiff his exemption as follows: "We viewed and appraised the following articles of personal property of said W. D. Gaster, as by schedule annexed, amounting to $964.50. We find mortgages on said property of $1,013.50 duly recorded, and more than sufficient to cover the valuation of the property, and find no excess over said mortgages to allot except the equity of redemption of said property, which we lay off to him."

That defendant Hardie, at the instance of Baker, had levied upon the said personal property and advertised it for sale.

Plaintiff asked that defendants be restrained from selling, and that Hardie be required to return the property levied on to plaintiff, and for such other relief as he might be entitled to.

Upon the complaint *Schenck, J.*, on 11 May, granted a temporary restraining order and required defendants to show cause, on 23 May, why an injunction should not be granted as prayed for.

To this complaint the defendants demurred. The defendant Hardie demurred upon the ground that an injunction could not be granted against him in his official capacity to prevent the execution of process in his hands. The defendant Baker demurred upon the ground that there was a defect of parties, the mortgagees being interested parties, and not made parties to the action, and upon the further grounds that fraud in fact on the part of the plaintiff was apparent upon the face of the complaint and the mortgages, which were made part of the pleadings.

The cause being heard upon complaint and demurrer before *Buxton, J.*, on 23 May, he made the following order:

"Fraud or no fraud, the right of the plaintiff to $500 personal exemption is paramount to the right of the defendant Baker as creditor.

The right of the plaintiff has been disregarded by the defend-
(462) ants under color of process of law. So far as the defendant Hardie is concerned, as he was acting as agent of Baker (under a bond of indemnity) and in his capacity of sheriff, the proceedings may be dismissed with costs; but he must notice the order of the court herein made. Upon the defendant Baker paying into court $500 for the benefit of the plaintiff, these proceedings will be dismissed as to him also at his costs. If, however, he fails to make this payment in five days from notice of the order, then the injunction prayed for is hereby granted and continued to the hearing; and in the meanwhile the plaintiff is directed to amend his summons and complaint by making the alleged mortgagees parties defendant. Upon doing which the demurrer will be overruled, and the parties required to answer."

His Honor also directed that plaintiff be required to give bond in the sum of $500, to indemnify Baker, before the issuing of the injunction.

From this order the defendant Baker appealed.

W. A. Guthrie for appellant.
G. M. Rose, contra.

BYNUM, J. The defendant obtained judgment and caused executions to issue against the property of the plaintiff. The sheriff caused the personal property exemption to be laid off, and the appraisers made the following return: "We viewed and appraised the following articles of personal property of said W. D. Gaster as by annexed schedule, amounting to $964.50. We find mortgages on said property of $1,013.50, duly recorded, and more than sufficient to cover the valuation of the property; and find no excess over said mortgages to allot off, except the equity of redemption in said property, which we lay off to him."

Notwithstanding this allotment the defendant caused the said
(463) property to be levied upon and advertised for sale under the executions.

The plaintiff then filed his complaint setting forth these facts, and obtained an injunction against the sales unless the defendant should pay into court $500 for the use of the plaintiff as his personal property exemption. The defendant demurred to the complaint, which being overruled, and the injunction and order above recited having been given, he appealed to this Court. Had the defendant submitted to the terms of the court and paid the $500 in lieu of the exemptioner's claim in the property, the contest for the property levied on would have been nar-

rowed down between the mortgagees and the execution creditor, where it should properly be. For it is well settled that as between the debtor and the creditor the debtor is entitled to his exemption, whether he has made no conveyance of his property at all, or has made one fraudulent as to his creditors. *Crummen v. Bennett,* 68 N. C., 494; *Duval v. Rollins,* 71 N. C., 218. It is equally well settled that the debtor is entitled to the homestead in an equity of redemption in lands, subject to the mortgage debt; and to the personal property redemption in judgments, notes and other choses in action. *Cheatham v. Jones,* 68 N. C., 153; *Curlee v. Thomas,* 74 N. C., 51.

It follows that the debtor has the exemption right in an equity of redemption in personal property, which is a valuable interest. As the defendant assumed that the mortgages were fraudulent and void as to him, and that the title to the property was still in the debtor, he certainly had no right to do less than have his exemption in $500 worth of the property itself allotted and set apart to the debtor, and then levy upon the excess. But even in that case the plaintiff would still be entitled to his injunction against the sale of the excess upon the allegations of his complaint that the mortgages were *bona fide* and not fraudulent.

For suppose the mortgage debt to be $500 and the property mortgaged to be, as here, $964.50 in value. The mortgagee (464) would be first entitled to his debt, and the excess of $464 would go, not to the execution creditor, but to the debtor as his personal property exemption. But suppose the mortgaged property exceeds in value both the personal exemption and the mortgage debt, or that the mortgage is fraudulent and void against creditors, and in both cases the entire equity of redemption is allotted to the exemptioner. Here three parties are concerned, the creditor, debtor and mortgagee, each claiming adversely to the other. Evidently the rights of the parties cannot be ascertained and administered in an action by the creditor against one only of the other parties, or by a levy and sale of the property as belonging to one only of two adverse claimants. It would be the duty of the creditor in such cases to institute an action against all the adverse claimants, in the nature of a bill in equity. The prayer of the complaint would be to foreclose the mortgage if it is not impeached for fraud; to sell the property, pay the mortgage debt first; next, allot the exemption to the debtor; and lastly, so much of the residue to the execution creditor as would satisfy his judgment. If the mortgage is impeached for fraud, the prayer would be to set aside the mortgage deed, sell the property, and out of the proceeds first allot the exemption; next, pay the execution creditor; and lastly, pay the residue to the fraudulent mortgagee or the debtor, as their rights might be adjusted between them.

This course avoids a multiplicity of suits by bringing all the parties before the court and settling their respective rights in one action.

In the present action, the demurrer admits the allegations of the complaint, and assigns as cause of demurrer that the mortgages set out in the complaint are fraudulent or void as to creditors, upon their
(465) face. We think otherwise. They are executed to secure debts not alleged to be fraudulent, and they run an unusually short time before they may be foreclosed, and they secure to the debtor no unusual benefit before forfeiture. Certainly no personal advantage is secured to him which will authorize this Court to declare the mortgages void in law upon their face.

We are to assume, then, that the mortgages are valid; and it appears therefrom that the debt is greater than the value of the property conveyed. If the defendant believed that more was conveyed than would be sufficient to discharge the mortgage debt and the debtor's exemption it was competent for him to compel a foreclosure and sale, and thus ascertain how the matter was and secure the excess, if any, to be applied to his debt. Failing in that, the possession of the property by the debtor, no matter what its value, was a matter in which no one had any concern except the mortgagor and the mortgagees.

If the defendant intended to contest the validity of the mortgages he should have accepted the terms imposed by the court below as conditions precedent to the dissolution of the injunction.

As it is, the injunction will be continued until the hearing, with leave to make the mortgagees parties to this action, and to amend the pleadings so as to ascertain, declare and enforce the respective rights of the parties in this one action.

With this modification the judgment is

PER CURIAM. Affirmed.

Cited: Stamps v. Ins. Co., 77 N. C., 212; *Albright v. Albright,* 88 N. C., 243; *Arnold v. Estis,* 92 N. C., 167; *McCanless v. Flinchum,* 98 N. C., 368; *Thurber v. LaRoque,* 105 N. C., 314.

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(466)

B. M. ISLER v. HARRIET M. DEWEY, GUARDIAN, AND OTHERS.

Witness—Deed in Trust.

1. It is legitimate, for the purpose of impeaching the testimony of a witness, to offer evidence that he is a person of weak memory.
2. The proviso contained in the Act of 10 March, Laws 1866, ch. 17, does not prevent the repeal of sec. 12, ch. 10, Laws 1861.

ACTION for the recovery of the possession of a tract of land, tried before *Seymour, J.,* at Spring Term, 1875, of WILSON.

ISLER *v.* DEWEY.

At June Term, 1874, of this Court a new trial was granted in the case on appeal by plaintiff. The case was also before the Court at June Term, 1872. It will be found reported in 67 N. C., 93, and in 71 N. C., 14.

This action was originally brought in WAYNE, and upon affidavit of the plaintiff made at Fall Term, 1874, of that Court it was moved for trial to WILSON. There was a verdict in favor of the defendant. Judgment, and appeal by the plaintiff.

The facts necessary to an understanding of the points decided are fully set out in the opinion of the Court.

J. W. Isler for appellant.
Smith & Strong contra.

RODMAN, J. But two questions are made in this case:

1. Samuel Smith, the grantor in a deed of trust, was introduced and testified on behalf of plaintiff. The defendant then called a witness, who, after objection by plaintiff, was allowed to testify that the memory of the witness Smith was below medium. We think the evidence was competent.

Ever since *Clary v. Clary,* 24 N. C., 78, it has been consid- (467) ered that all persons, and not experts alone, can give their opinion as to the mental capacity of the maker of a will or deed, and on the same reasoning they may do so as to a person who has been introduced as a witness in the cause on the trial. *Bailey v. Pool,* 35 N. C., 404. A person entirely without memory is incompetent as a witness, and if his memory is weak naturally or has been impaired by disease or age his testimony will naturally have less weight with a jury than if his memory was sound and unimpaired. To prove of a witness that his memory is weak is a legitimate way of impeaching his testimony, and the opinions of those who know him may be resorted to for that purpose.

2. It is contended in this Court, though the point does not appear to have been made below, that the deed in trust of February, 1867, is void by the force of the act ratified 11 September, 1861 (Laws 1861, 1862, 1863, 1864, republished, p. 8, sec. 12), which says that all deeds in trust thereafter made shall be void as to creditors unless they provide for an equal distribution of the proceeds of the property conveyed among all the creditors of the grantor. This act, however, was repealed by sec. 14, ch. 17, Laws 1866, and the proviso, which says that *none of the provisions* of the act except the first section should apply to suits on debts contracted since 1 May, 1865, does not prevent the repeal. The concluding words of the section, "but the remedy in such cases shall remain as existed in the year 1860," show clearly that the intent of the proviso

was not to keep alive the act of 1861 for any purpose, but to exclude debts since May, 1865, from the delays provided by the act for prior debts. There is no error.

PER CURIAM. Affirmed.

(468)

L. N. WILSON AND OTHERS v. A. M. POWELL, EXECUTOR OF MAHALA SHERRILL, AND OTHERS.

Confederate Money—Executor.

Where an insolvent firm owed an estate, of which one of the members of said firm was the executor, an ante-war debt of $1,400, which amount said member of the firm paid to himself, as executor, in Confederate currency, in December, 1863, when he knew it could not avail to pay a certain debt against the estate of nearly like amount, and the money became worthless on his hands: *Held*, that the executor was chargeable to the legatees with the amount of said debt.

PETITION for account and settlement, commenced in the probate court of CATAWBA, and thence transferred to the Superior Court, and there heard on exceptions to the report of the referee, before *Furches, J.*, at Spring Term, 1876.

The plaintiffs are the next of kin of the testatrix of the defendant. In their petition they allege, among other things, that Mahala Sherrill died in 1863, leaving a large amount of property, both real and personal, which under her will, came into the hands of the defendant as her executor; that he has retained the same in his hands ever since his qualification, refusing to settle, etc., and praying for an account.

The defendant denied the chief allegations of the petition, which seek to charge him with certain amounts, and for which he is not liable.

It was referred to the clerk, who made a report, to which the plaintiffs filed numerous exceptions, and which with all the case was transferred to the Superior Court. *Furches, J.*, sustained the first and second exceptions (fully set out in the opinion of Justice READE) so far as to charge the defendant with a note due the estate by Powell & Long. Upon these exceptions, the principal and only ones considered on the argument in this court, his Honor found the following facts:

That George F. Davidson, as trustee, held a note against the estate of the defendant's testatrix for $1,400 due before the war; that the
(469) note of Powell & Long was given in renewal of a note due before the war; that Davidson, in August, 1863, informed Powell, the executor, that he "held a note of $1,400 against the estate of his testatrix, and that it must be arranged"; that some time after that, and before the month of December, 1863, he saw the defendant, who offered to pay him

the $1,400 note, Confederate currency, and he, Davidson, declined to receive the same and told the executor that he could not take Confederate money unless those to whom the same was going would receive it from him; that after this conversation, and in the month of December, 1863, Powell, the executor, sent him, Davidson, $1,400 in Confederate currency, to be applied to the payment of said note; that he declined to receive it and it was returned to the defendant, who has the same now, having kept it separate from his other money.

The executor and defendant in this petition is the same person as that composing the firm of Powell & Long, and was then, and is now, perfectly solvent.

His Honor also found from the evidence that Confederate currency was generally received by prudent business men in the neighborhood of the defendant in December, 1863, in payment of well secured ante-war debts.

To the above ruling and finding the defendant Powell excepted. There was no objection to the ruling of his Honor on any of the other exceptions; and the report being reformed according to the exceptions allowed, the plaintiffs had judgment according to the report as reformed.

From this judgment defendant appealed.

Folk & Armfield and M. L. McCorkle for appellant.
Cobb and Hoke, contra.

READE, J. In order to show that he was not to blame for receiving Confederate currency in December, 1863, in payment of an ante-war note which he and his partner owed this testatrix, the de- (470) fendant alleges that at that time Confederate money was current among business men in valuable transactions and in payment of ante-war debts, and therefore he says he received the money and filed it away and has it now—worthless. In avoiding Scylla he has fallen on Charybdis; for it was current money, why did he file it away? Why not pay debts with it? Why not pay legacies? If he had received gold, would he have been justified in hiding it where it could never be found? Take it either way: It was bad money when he received it; then he is liable for receiving it. It was good money when he received it; then he is liable for hiding it.

There is another ground upon which the defendant is liable: He owed his testatrix $1,400, and his testatrix owed Davidson about the same amount; both were ante-war debts. In August, 1863, Davidson asked him for payment. Now, why did he not pay Davidson then? Why did he not make his note pay Davidson's note? Whatever currency Davidson demanded, why did he not pay off his note in that currency and then pay Davidson? In August Davidson told him he would not receive Con-

federate money unless his *cestuis que trust* would take it from him. Afterwards, and before December, 1863, Davidson told him he would not receive it at all. And yet, after that, in December, the defendant pretends that he paid off his own note to himself, as excutor, in Confederate currency to get money to pay off Davidson. And so he paid off his own note with trash and left Davidson's to stand against the testator's estate. This is not just and will not be allowed. The defendant will be charged with the full amount of his note, with interest.

PER CURIAM. Affirmed.

CICERO J. LAWRENCE, BY HIS NEXT FRIEND, v. WILLIAM M. WILLIS AND OTHERS.

Pleadings—Issue.

Where it is alleged in a complaint filed in an action brought for the purpose of canceling a deed, "that at the time the paper writing was signed and delivered, the said Cicero [the grantor] was in the weak condition set forth in the first allegation," and the answer denies these charges: *Held*, that the complaint did not warrant the issue submitted to the jury, to wit: "Was the grantor, Cicero J. Lawrence, at the time of the execution of the deed, capable of making a deed?"

ACTION, demanding the cancellation of a deed and other relief, tried before *McKoy, J.*, at Fall Term, 1875, of CARTERET.

The complaint states that Cicero J. Lawrence, in whose behalf his next friend, John W. Davis, brings this suit, is a brother of Abigail Davis, wife of said John, and that the said Cicero is now, and has been for several years, an inmate of his house; that he, the said Cicero, is a person of exceeding weak and feeble intellect, and incapable of taking care of himself or providing at all for his necessary wants, and the greatest portion of his time unable to do any work; that in addition to this, that he is subject to violent attacks of a strange and dangerous disease, which renders him perfectly mad, and when in this condition he requires the attention and constant care of some friend.

That the said Cicero was entitled to considerable real and personal property, and that on 24 February, 1866, he signed a paper writing purporting to be a deed, whereby he conveyed to his sister, Bathsheba Jane Simpson, who afterwards married the defendant, William M. Willis, all his estate, real and personal, "for the purpose of securing the care and assistance of some one, which was so necessary to one thus situated," in trust to permit the said Cicero to enjoy and receive
(472) the rents and profits during his natural life, etc. There were other

allegations in the complaint not necessary to state, as the case was decided upon the one of the ability of the said Cicero to execute the deed in question.

The answers of the defendants admitted the execution of the deed and the state of the said Cicero's mental and bodily weakness, but denied that the deed was procured through undue influence and fraud, as was charged, and also denied other allegations which, for the purposes of this suit, it is unnecessary to state.

On the trial below the following issue was submited to the jury, viz:

Was the grantor, Cicero J. Lawrence, at the time of the execution of the deed, capable of making a deed?

The counsel for the defendants objected to this issue, "that it was not authorized by the complaint." The court allowed the issue to be submitted, and the defendants excepted.

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

No counsel for appellants.
Hubbard and Bryan, contra.

BYNUM. J. The complaint alleges that the plaintiff "is a person of exceeding weak and feeble intellect and incapable of taking care of himself"; and "that at the time the paper writing was signed and delivered, the said Cicero was in the weak condition set forth in the first allegation." The answer denies these charges. The issue framed and submitted to the jury upon these allegations is this: "Was the grantor, Cicero J. Lawrence, at the time of the execution of the deed, capable of making a deed?"

We do not think the complaint warranted this issue. A person may be of exceeding weak and feeble intellect, and incapable of taking care of himself, and at the same time be capable of making a deed.

As Cicero had bodily as well as mental infirmities, it does not appear and is not charged whether his incapacity to take care of (473) himself resulted from the one cause or the other. So, also, the issue as framed is uncertain, in that it does not specifically involve an inquiry into the mental capacity of the plaintiff to make the deed in question. He might, from other causes, as duress, bodily infirmity, or undue influence, have been incapable of executing the deed. If the complaint had been definite and certain in charging mental incapacity, the issue might have been helped out by reference to the allegations of the complaint.

Weakness of intellect, short of non-sane mind and memory, may not of itself be insufficient to invalidate a deed, but in a court of equity that, in connection with the fact that the deed is made in favor of a near rela-

tion, who stood in peculiarly intimate relations with the bargainor, and is prejudiced and unfair to the bargainor, or other suspicious circumstances going to show that the weakness, such as it is, has been taken advantage of, may be sufficient to set aside the deed. Adams' Eq., 182, and notes.

Case remanded, with leave to the parties to amend the complaint and answer, if they desire, and submit issues such as may arise upon the pleadings.

PER CURIAM. Error.

(474)

THE ATLANTIC AND N. C. R. R. CO. v. THE BOARD OF COMMISSIONERS OF CARTERET COUNTY.

Railroads—Taxation—Constitutional Law.

1. So much of section 11, subsec. 3, chap. 184, Laws 1874-'75, as provides that railroad beds listed for taxation, "shall not be valued at less than $8,000 per mile," without regard to its real value, is in conflict with the Constitution, and therefore void.
2. The provision contained in sec. 6, Art. V. of the Constitution, exempting property belonging to the State from taxation, does not embrace the interest of the State in business enterprises, such as railroads and the like, but applies to the property of the State held for State purposes."

APPLICATION for an injunction, heard before *Seymour, J.*, at February Term, 1876, of CARTERET.

Application was made to his Honor, on 12 November, 1875, for a restraining order against the collection of certain taxes; which order his Honor granted, upon the plaintiff's giving bond, etc., at the same time giving notice to the defendant to appear at the next Superior Court of Carteret, and show cause why the injunction should not be continued until the hearing.

The defendant at the said term (February Term, 1876), by way of showing cause, urged that the tax levied on plaintiff's property was not exorbitant or excessive, and that the State of North Carolina, although a stockholder to the amount of two-thirds of the stock of the plaintiff company, stood on a footing with the private stockholders in said company, and that being so, that State's interest in the company's road and other property was not exempt from taxation. The company plaintiff, on the other hand, contended that the interest of the State in said road was exempt from taxation, under sec. 6, Art. VII of the Constitution, and that the tax levied and sought to be collected by the defendant was unconstitutional and void.

At the same term the plaintiff moved for a perpetual injunction

against the defendant's collecting said tax, which motion the (475) court, being of opinion with the defendant, overruled.

From the judgment of the court, refusing to grant an injunction, the plaintiff appealed.

The grounds of the plaintiff's application for a restraining order, and other facts pertinent to the points decided in this Court, are stated in the opinion of Justice READE.

Hubbard and Clark & Son for appellant.
Smith & Strong, contra.

READE, J. 1. The Constitution, Art. V, sec. 3, provides that all property, real and personal, shall be taxed by a "uniform rule," according to its "true value in money."

The statute (1874-'75, chap. 184, sec. 11, subsec. 3) provides that railroad beds shall be given in in the counties where they lie, and that they shall not be valued at less than $8,000 per mile.

Now, if the Legislature were to enact that every man's land shall be valued at eight dollars per acre, without regard to its *real,* value, *its* conflict with the Constitution would be manifest. And so, if it provided that no man's land should be valued at less than eight dollars per acre, although it be worth much less.

We have to declare, therefore, that the aforesaid statute under which the defendants made the valuation of the road bed, as we infer from their letter to the plaintiff, is unconstitutional.

2. The State owns two-thirds of the capital stock of the road, and yet the defendants valued the road as if the State had no property in it.

The plaintiff complains of this because the Constitution, Art. V, sec. 6, provides that "property belonging to the State shall (476) be exempt from taxation."

Although this language is general, yet we do not think it was intended to embrace this case. The Capitol is not taxed because the State would be paying out money just to receive it back again, less the expenses of handling it. And if taxed for local purposes it would to that extent embarrass the State government.

Nor is it any hardship upon the locality to have the property exempt, as the advantages from it are supposed to compensate for the exemption. And, as with the Capitol, so with other State property.

But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail. The State does not engage in such enterprises for the benefit of the State as a State, but for the benefit of individuals or communities—at least this is generally so—and if the State gets no taxes she may get nothing. Suppose, for illustration, that the plaintiff should declare

no dividends and consume the whole earnings in current expenses; in that case the State as a State would never derive anything from the road except the taxes.

At any rate, we do not think the exemption in the Constitution embraces the interest of the State in business enterprises, but applies to the property of the State held for State purposes.

The property may be valued upon the basis of this opinion, and that such valuation may be collected, and the excess, if any, restrained.

PER CURIAM. Error.

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(477)

WILLIAM H. FRENCH AND JOHN McRAE v. THE CITY OF WILMINGTON.

Municipal Corporations—Taxation—Constitutional Law.

1. The Act of 1872-'73, chap. 144, limiting the power of cities and towns to tax *to one and one-half per cent* on the value of the real and personal property within their limits, applies to the city of Wilmington, the power of taxing not being limited in its charter; subject, however, to the qualification, that it does not operate to limit the power to tax for the payment of any *valid* debt contracted before the passage of the Act, 3 March, 1873.
2. The Constitution, while it requires taxation to be uniform on all property within the city, and requires the observance of a certain proportion between the tax on the polls and on property, contains no limitation on the amount of tax which cities and towns may impose.
3. Under the Act of 1871-72, chap. 27, p. 32, the corporate authorities may levy a tax over and above the limits of *one and one-half per cent* for the purpose of raising a sinking fund, to be applied to the payment of any *valid* indebtedness incurred before the 3d day of March, 1873.

APPLICATION for an injunction, heard before *McKoy, J.*, at the October Term, 1875, of NEW HANOVER.

The plaintiffs, on behalf of themselves and of the other taxpayers of the city of Wilmington had, on 27 September, 1875, obtained an order from Judge Seymour, restraining the defendant from levying and collecting certain taxes, which the plaintiffs alleged to be unconstitutional, until the matter, after due notice to the defendant, could be heard before Judge McKoy, before whom the papers were returnable, at the regular October Term of NEW HANOVER.

On Friday, of said term, 29 October, the defendant moved to dissolve the temporary restraining order, granted as above stated by
(478) Judge Seymour, basing such motion upon the complaint and answer, and the affidavits filed for and on behalf of both parties.

After argument, his Honor dissolved the restraining order granted

as aforesaid by Judge Seymour, and ordered the costs to be paid by plaintiffs. From this judgment the plaintiffs appealed.

The material allegations of the complaint and answer, and the facts necessary to an understanding of the points decided, are stated in the opinion of the Court.

M. London and A. T. & J. London for appellants.
Wright & Stedman and Russell, contra.

RODMAN, J. The plaintiffs, who are taxpayers of the city, complain that on 18 January, 1875, the corporate authorities levied a tax of *two* per cent on all the real and personal property in the city, which they are proceeding to collect. They allege that the power of the corporation to tax is limited by ch. 144, Laws 1872-'73, Schedule B, sec. 1, p. 229, to *one and a half per cent,* and pray for an injunction against the excess. We are of opinion that as the power to tax is not limited by the city charter, the act cited applies, subject, however, to the qualification that it does not operate to limit the power to tax for the payment of any *valid* debt contracted before its passage on 3 March, 1873.

The Constitution, while it requires taxation to be uniform on all property within the city, and requires the observance of a cer- (482) tain proportion between the tax on polls and on property, contains no limitation on the amount of tax which cities and towns may impose.

The omission was of purpose. It was unwise to establish in a law, which was expected to be comparatively permanent, the same maximum rate of taxation for all the cities and towns in the State, with population and other conditions so different. These two are subject to constant change, and a maximum proper in 1868, might be otherwise a few years later. The Constitution, therefore, almost necessarily left this duty to the Legislature, which could both perform it better originally, and could change the maximum from time to time as the conditions might change. By Art. III, sec. 4, it imposed on the Legislature a moral obligation to restrict the power of municipal corporations to tax and to contract debts. This obligation it has as yet imperfectly discharged. The act cited was in obedience to this command of the Constitution, and it did enact a limitation on the power of cities and towns to tax, which is impliedly subject to the qualifications above stated.

The Constitution imposed a limitation on the power of counties to tax by Art. IV, sec. 1. And it has been settled by numerous cases that the limitation did not apply as to debts contracted before the adoption of the Constitution. *Trull v. Comrs.,* 72 N. C., 388; *French v. Comrs.,* 74 N. C., 692.

The ground of these decisions is that such limitation, if applied to prior valid debts, would tend to impair the obligation of the contract,

which the Constitution could not rightfully do. And it will be presumed it did not intend what in any instance might have that effect. The same principle applies to the limitation created by the act cited.

To apply it to prior debts would evidently weaken the security
(483) of the creditor, and might in some cases impair the obligation of the contract, which will not be presumed to have been intended.

It was, therefore, prospective in its application. The corporate authority may levy any tax it may think proper, with the qualifications of uniformity and proportion above stated for the *bona fide* purpose of discharging the interest and principal of any valid debt contracted before the passage of the act. For any and all other purposes they cannot exceed the limit of one and a half per cent.

We are also of opinion that under Laws 1871-'72, chap. 27, p. 32, the corporate authorities may levy a tax over and above the limit of one and a half per cent for the purpose of raising a sinking fund to be applied to the payment of any valid indebtedness incurred before 3 March, 1873. To raise a sinking fund to pay a debt is only to raise and lay by every year in anticipation of the maturity of the debt a sum to be applied to its payment at maturity. It is only distributing over several years a burden which would otherwise fall on one. *French v. Comrs.*, 74 N. C., 692. The sums so raised may be applied to buying in the city bonds before their maturity; and this would be the way of applying them, least liable to loss by neglect or fraud. We are not called on to say that this is the only way in which the authorities are permitted to dispose of any sums raised for that purpose, and we express no opinion on that point.

If the money collected for the purpose of paying the interest and principal of the valid debt of the city shall be embezzled or fraudulently misapplied, the citizens who are injured have a remedy in the criminal as well as in the civil law. No such case is presented here. Nor are we called on to decide whether any part of the city debt which the defendants propose to pay is valid or not. That question must be distinctly

presented upon a definite statement of facts in respect to one or
(484) more particular debts before it can be passed on in a court, and that is not done in this case.

Whether a tax of one and a half per cent will raise more money than is needed for the current necessary expenses of the city, and whether an additional tax of one-half of one per cent is needed to pay the interest of the valid city debt, and to raise a reasonable sinking fund in anticipation of the maturity of the principal, are questions which were not decided in the Superior Court, and which, therefore, are not now before us on this appeal. Certainly if a tax of one and a half per cent will over-

pay the necessary current expenses, the excess should be applied towards the interest of the bonded debt. And if by that means or otherwise the tax of half of one per cent be in excess of the purposes to which it can be lawfully applied, the collection of such excess should be restrained. These questions may come under the consideration of the judge of the Superior Court at the hearing. We are not required to pass on them or in a condition to do so properly. We cannot say that even probably an injury will result from dissolving the injunction.

PER CURIAM. Affirmed.

Cited: Young v. Henderson, 76 N. C., 423; *Barksdale v. Comrs.,* 93 N. C., 482; *Redmond v. Comrs.,* 106 N. C., 137; *Collie v. Comrs.,* 145 N. C., 181; *Swinson v. Mount Olive,* 147 N. C., 612.

(485)

AARON CLAFLIN & CO. v. D. J. UNDERWOOD.

Arrest and Bail—Judgment—Discharge.

Where a defendant in an action for a debt is arrested and held to bail upon an affidavit charging fraud in concealment of property, which allegation of fraud is denied by the answer; and when judgment is entered, it is in these words: "By consent, judgment for the debt only; issue of fraud not tried": *Held,* that being in custody under a *capias ad satisfaciendum,* the defendant is entitled to his discharge.

HABEAS CORPUS, heard by *Buxton, J.,* at chambers, in CUMBERLAND, on 13 August, 1875.

This case was originally brought to the Superior Court of Cumberland, to recover the amount of a promissory note, for which judgment was rendered at January Term, 1875, for the sum of $423.80, with interest on $382.54 from 25 January, 1875.

There had been an order of arrest in the case, granted by the clerk on 15 November, 1873, upon the ground of fraudulent concealment, suggested by the affidavit of the plaintiff, based upon information derived from one M. N. Taylor.

The suit commenced 29 October, 1873, and the complaint contained specific allegations of fraud of the same character as that upon which the order of arrest was founded, and which was denied in the defendant's answer. At the term at which judgment was rendered the following entry appears of record: "By consent, judgment for the debt only; issue of fraud not tried."

Execution issued on this judgment, returnable to May Term, 1875, endorsed, "Nothing to be found"; and then an execution issued against

the body of the defendant, and he was taken in custody, and files this petition for a *habeas corpus,* praying to be released, etc.

Upon the return of the writ, his Honor being of opinion that the liberty of the defendant ought not to be affected by anything (486) which transpired in this suit, as the entry above stated appeared to be a waiver of the charge of fraud, adjudged that the defendant be discharged from imprisonment. From this judgment, the plaintiffs appealed.

Other questions were considered, as to the right of appeal, etc., which, it will be seen from the opinion of the Chief Justice, were waived upon the argument in this Court.

Hinsdale for the petitioner.
Guthrie, contra.

PEARSON, C. J. The question as to the right of a party in a writ of *habeas corpus* to appeal to this Court, or whether he be not put to a writ of *certiorari,* is expressly waived in this case, as is the question of the right of the plaintiff in execution to appeal or have a writ of *certiorari* when the debtor is discharged under *habeas corpus.*

We have the naked point: A defendant in action for a debt is arrested and held to bail upon an affidavit charging fraud in concealment of property; the allegation of fraud is denied by the answer, and when judgment is entered, it is in these words: "By consent, judgment for the debt only; issue of fraud not tried."

We concur with his Honor in the conclusion that the defendant could not lawfully be arrested and imprisoned under a writ of *capias ad satisfaciendum,* for the reason that the issue of fraud had not been tried. By the Constitution, no person can be imprisoned for debt except in cases of fraud. No case of fraud had been proved against the petitioner. On the contrary, that question was by consent left open. So there was no authority for the writ of *ca. sa.*

PER CURIAM. Affirmed.

Cited: Wingo v. Hooper, 98 N. C., 484; *Patton v. Gash,* 99 N. C., 285; *Preiss v. Cohen,* 117 N. C., 59; *Stewart v. Bryan,* 121 N. C., 50; *Ledford v. Emerson,* 143 N .C., 533.

(487)

JOHN G. CHAMBERS, ADMINISTRATOR, v. ISAAC BRIGMAN AND HENRY DEWEESE.

Plaintiff Purchaser under Execution.

A plaintiff can claim no benefit by a purchase which is made under a decree in an action to which he knows that the person against whom it was made, and who is in possession of the land, claiming it as his own, was not truly a party. Had any one other than the plaintiff been the purchaser, the case might have presented more difficulty. (See *Jennings v. Stafford*, 23 N. C., 404).

MOTION for a writ of possession, heard before *Henry, J.*, at chambers, in MADISON, 10 May, 1875.

The facts necessary to an understanding of the case are fully stated in the opinion of the Court.

There was judgment in favor of the plaintiff, and the defendant appealed.

Smith & Strong and C. A. Moore for appellants.
J. H. Merrimon, contra.

RODMAN, J. This case comes before us on an appeal from an order granting a writ of assistance to put the plaintiff in possession of certain lands possessed by one Deweese. To make our opinion intelligible, it is necessary to state the previous proceedings on which the order appealed from was made.

On 12 April, 1873, the plaintiff, as administrator of John Brigman, issued a summons against Isaac Brigman. At the return term, the following entry appears on the record: "Henry Deweese makes himself a party defendant, etc. The plaintiff then filed his complaint, in which he sets forth: That on 11 December, 1858, the defendant Isaac Brigman made his note to May H. Brigman, by which he promised to pay to said May $500 on 25 December, 1860. May Brigman assigned said note to plaintiff's intestate, who endorsed it to one Neilson, (488) who at Spring Term, 1871, of Buncombe Superior Court, recovered judgment upon it against Isaac Brigman and plaintiff as administrator, which judgment plaintiff paid. The consideration of said note was an agreement by May Brigman to procure plaintiff's intestate, John Brigman, to agree to convey certain lands to Isaac Brigman. And John Brigman did shortly thereafter deliver to Isaac his (John's) covenant to convey said lands to Isaac. The complaint further states that Isaac had never paid said note or judgment, and that the plaintiff and the heirs of John Brigman were ready and willing to make him a title to said lands on his paying said judgment, and prayed that in default of his making such payment within a time to be stated, the said lands might be sold by a commissioner appointed by the court, and the pro-

ceeds applied to pay what was due the plaintiff by reason of the premises, and the residue paid to said Isaac. There being no answer filed to the complaint, the judge (on 14 October, 1873) gave judgment to the effect, that if, upon plaintiff's tendering to defendants or filing in the office of the clerk of the court a conveyance for the lands, defendants should refuse or fail to pay the sum adjudged to be due to the plaintiff, the clerk should sell said lands and from the proceeds pay said sum, etc. The clerk afterwards sold under this judgment, and the plaintiff became the purchaser. Finding Deweese in possession of part of the land, which he refused to give up, the plaintiff moved for a writ to evict Deweese and put him, the plaintiff, in possession. Notice of this motion was served on Deweese, who, in answer thereto, stated the following facts: That on 20 January, 1870, Isaac Brigman assigned to him and to Matilda Brigman for value, his interest in said land under the said covenant of John Brigman, and that at the time of such assignment he had no notice of any lien of said John upon the land. That upon said assignment, he took possession of one part of the land, and Matilda of another part, where they have since continued to reside. That (489) no process in said action of the plaintiff against Isaac Brigman was ever served on him; that he never appeared therein, or authorized any one to appear for him, and that he had no notice that he had been made a party, or that an appearance had been entered for him until after the sale made by the clerk.

McElroy swears that he was attorney for Isaac Brigman in the action. That he was never employed or authorized by Deweese to represent him. That he was applied to by the attorney of the plaintiff to consent that Deweese should be made a party defendant, when he told the attorney that he had no authority to do so. But upon being informed by Isaac Brigman that he thought it would be all right, he did consent, and the entry making Deweese a party was thereupon made.

Deweese moves that the entry by which he was made a party be stricken out, and all the subsequent proceedings be declared void as to him. The judge does not find as a fact whether Deweese authorized the entry making him a party defendant or not. Considering that the whole defense of Deweese rested upon the fact that he was not duly or knowingly a party to the proceedings, but had been made so without his knowledge or consent, and that the only ground upon which an order to evict Deweese could rest was that he was a party to the previous proceedings, we think the judge should have plainly and distinctly found whether Deweese had authorized the entry making his a party, or had not.

This analysis of the record enables us to say that several of the questions discussed by counsel may be passed over, as not at present ready for decision.

We are not in a condition to say:

1. Whether the plaintiff had a lien on the land for the purchase money which followed it into the hands of Deweese and Matilda Brigman. Clearly this cannot be determined in the absence of (490) those parties.

2. When land is sold by a commissioner appointed by a court, it may be a reasonable and convenient practice for the court to issue its writ to put the purchaser in possession, and evict *all persons who were parties to the action,* instead of leaving the purchaser to his action of ejectment. It seems to be the course in several states, but if it has never been done in this State, it has not been usual, and as the question is not necessarily presented, we express no opinion on it. The only question which we are called on to decide is this:

Assuming for the present, and subject to the finding of the proper tribunal, that Deweese never authorized or consented to the entry by which he was made a party defendant to the action of the plaintiff, is he bound by the proceedings therein? To this there can be but one answer, he is not. No one can contend that a plaintiff can take any benefit by a purchase which is made under a decree in an action to which he knows that the person against whom it was made, and who was in possession of the land, claiming it as his own, was not truly a party. Had any one other than the plaintiff have been the purchaser, the case might have presented more difficulty. But see *Jennings v. Stafford,* 23 N. C., 404.

According to the affidavit of McElroy, the plaintiff knew that McElroy had no authority to represent Deweese, and that Deweese was irregularly made a party. The plaintiff may not have been guilty of an intentional wrong in suggesting to McElroy to consent that Deweese be made a party when he had no authority to consent, but he is guilty of a wrong if he seeks to take advantage of such an unauthorized appearance.

The question on which the case turns at present is thus seen to be a very simple one, and one of fact which can only be determined, in the first instance, by the judge of the Superior Court. If he finds that the entry making Deweese a party was without his authority (491) or consent, and that such want of authority was known to the plaintiff's attorney, as McElroy says it was, he will order the record to be amended by striking out and vacating such entry, which will, of course, have the effect of vacating all subsequent proceedings as to Deweese.

The judgment below cannot be supported in the absence of a distinct finding on the fact in question. It is, therefore, reversed, and the case is remanded to the end that the judge may find the fact one way or the

other, and may act on Deweese's motion to amend the record, according as he may find the fact to be.

Deweese will recover costs in this Court.

PER CURIAM. Reversed.

Cited: *Sutton v. Schonwald,* 86 N. C., 202; *Harrison v. Hargrove,* 120 N. C., 103; *Swift v. Dixon,* 131 N. C., 46.

JOHN WENTZ AND WIFE v. W. J. BLACK.

Evidence—Practice.

Where both plaintiff and defendant on a trial resort to incompetent evidence, neither party objecting at the time of its introduction, objection to the same evidence will not be allowed when offered again upon the examination of another witness in a subsequent part of the trial.

APPEAL from *Schenck, J.,* at Spring Term, 1876, of MECKLENBURG.

The action was instituted to recover upon a promissory note, alleged to have been executed by W. H. H. Houston & Co. as principal and W. J. Black as surety.

The defendant filed a sworn answer, denying the execution of the note. The defendant Black was sworn as a witness in his own (492) behalf, and testified that he did not execute the note nor authorize any one else to do so in his behalf, that the letter "k" was different in this signature from that in his genuine signature.

Upon cross-examination, counsel for the plaintiff exhibited to the defendant his signature to the verification of his answer, and signatures to other notes admitted to be genuine, and asked him to point out the difference between the signatures. This the witness did. The notes and signatures were not put in evidence before the jury.

The defendant's counsel in reply exhibited to the defendant two other notes admitted to be genuine and asked him if they did not correspond with his description of the genuine signature, and he replied that they did. This evidence was admitted without objection on the part of the defendant.

Albert Elliott was introduced by the defendant, and testified that he had been bookkeeper for the defendant, and did not think the signature of Black was genuine, on account of a difference in the making of the letter "k." The defendant's counsel also exhibited to the witness the same two genuine signatures on other notes which had been exhibited to Black, and asked him if they did correspond. The witness re-

plied that they did not. Upon cross-examination, the plaintiffs' counsel, in reply to the evidence as to the signatures exhibited on the two notes shown to the witness by the defendant's counsel, offered to exhibit the witness the signature to the answer, and the notes exhibited to Black upon his examination, and to ask the witness if they did not correspond with the signature to the note in controversy.

The counsel for the defendant objected. The objection was overruled upon the ground that both parties had resorted to the same kind of testimony before without objection, and this was in reply to (493) the defendant's examination. The defendant excepted.

The witness then testified, that he did not think they corresponded with the one in controversy, and pointed to the difference in the letter "k." The counsel for the defendant then asked the witness if Houston, the principal, was not an expert in forging Black's signature. After objection by the plaintiff, the witness replied that he did not know. Defendant's counsel then proposed to ask the witness if Houston was not an expert in forging other people's names generally. The plaintiff objected; the objection was sustained, and the defendant excepted.

There was a verdict for the plaintiff. Rule for a new trial. Rule discharged. Defendant appealed.

Shipp & Bailey, Dowd and Montgomery for appellants.
Vance, Burwell, Battle & Mordecai contra.

PEARSON, C. J. We see no error in the ruling of his Honor, and affirm the judgment for the reasons given by him. The witness Elliott had his opinion, not on the general character of Black's handwriting, but on a difference in the letter "k" from his usual signature. After the defendant's counsel had fortified his witness by exhibiting to him two signatures it surely was only fair play to permit the plaintiff's counsel to attack him by exhibiting to the witness other signatures of Black, admitted to be genuine, either to make him change his opinion or to weaken his confidence in it, so that from his manner the jury could see that his opinion was not to be relied on. This was fair, and there is no rule of evidence to the contrary.

PER CURIAM. No error.

(494)

JAMES VANN AND WIFE v. THE FAYETTEVILLE BUILDING AND LOAN ASSOCIATION.

For the syllabus in this case see that in *Mills and wife and others v. The Salisbury Building and Loan Association, ante*, page 292.

SWAIN *v.* MCCULLOCK.

MOTION for an injunction, heard before *Buxton, J.*, at chambers, in CUMBERLAND, 15 July, 1875.

The leading facts in this case are almost identically the same as those in *Mills v. Salisbury Building and Loan Association, ante,* 292, and therefore need not be stated.

On the hearing by his Honor below he continued the restraining order theretofore granted, from which order the defendant appealed.

MacRae, Broadfoot and Hinsdale for appellant.
W. McL. McKay and Guthrie contra.

READE, J. The questions involved in this case are the same as in *Mills v. B. and L. Association, ante,* 292, and the decision is the same, and the opinion in that case will be certified in this. In this case the amount of interest stated is 8 per cent, which would govern in this case.

PER CURIAM. Affirmed.

Cited: Overby v. B. and L. Asso., 81 N. C., 58.

(495)

M. K. SWAIN v. JOHN MCCULLOCK.

Prosecution Bond—Allowance to Referee.

1. The prosecution bond given in an action is intended to indemnify the defendant against such costs as he may be required to pay during the progress of the action, but not the plaintiff's costs.
2. *Therefore,* a judgment taxing the defendant with an allowance to a referee as his costs, and adjudging that the defendant recover against the plaintiff and the surety on his bond, the defendant's costs, *including said allowance,* is erroneous.

APPEAL from *Kerr, J.*, at December Term, 1874, of GUILFORD.

The action was brought against the defendant as trustee under a deed in trust executed by the plaintiff in 1858 for an account and settlement, etc. It was referred to Ralph Gorrell, Esq., and heard upon exceptions by both parties to a report and supplemental report filed by him. His Honor overruled the plaintiff's exceptions and sustained one of the defendant's exceptions and ordered the confirmation of the report after being modified accordingly. The report thus modified established a balance as unpaid by defendant as trustee. He further adjudged that an allowance of $125 to referee be taxed against the defendant as his costs, and that he recover of the plaintiff and the surety on his prosecu-

tion bond "all the costs of the defendant in the action, including $125 allowed to the referee." The prosecution bond was in the usual form.

The plaintiff appealed.

Mendenhall & Staples, Walter Clark and Gray & Stamps for appellant.

Scott & Caldwell contra.

READE, J. The prosecution bond is conditioned to secure to defendant "all such costs as he shall recover of the plaintiff in the action." In theory, and probably in many cases in fact, the defendant pays his costs as he goes; and if the suit ends in his favor he is enti- (496) tled to have them taxed and to have judgment against the plaintiff for them, and for such recovery the sureties on the prosecution bond are liable, the object being to reimburse the defendant and to save him harmless just as if he had not been sued. All the other costs in the case the defendant stands aloof from and has nothing to do with, and neither pays nor recovers. For such of the costs as the plaintiff has paid the defendant does not recover, of course, because he has not paid them and is in no way liable for them. For such other costs as may arise—as in this case the allowance to the referee—they are taxed, not against the defendant, but against the plaintiff, and there is judgment against him therefor.

From this it will be seen that inasmuch as the allowance to the referee is not a part of the defendant's cost which he has paid or is liable to pay, he cannot *recover* it of the plaintiff. And so the sureties upon the prosecution bond are not liable, but only the plaintiff himself is liable. But this ingenious and novel devise is invented to reach innocent sureties whose liabilities ought never to be stretched beyond what is nominated in the bond. First give judgment against the defendant for the referee's allowance, which he has neither paid nor is liable for, and then give judgment against the plaintiff and his sureties for the same as a part of his cost, and thus reach the sureties on the prosecution bond. That lacks the quality of truthfulness, which ought to characterize all judicial proceedings, and has the character of indirection, which should always be avoided.

We approve the rulings of his Honor with the modification suggested.

The defendant will pay the costs of this Court. Judgment here as modified.

PER CURIAM. Modified.

(497)

EDMUND L. PEMBERTON v. JOHN MCRAE.

Levy—Sale Under Execution—Constitutional Law.

1. A levy expressed to be "on, as the property of J. M., 3,000 acres of land, lying on the west side of R. Creek, joining M. D. and others—pine lands," is sufficient, and would cover a tract of 5,000 acres otherwise answering the description.
2. But where, under such levy, the sheriff sold, and the plaintiff bought, *by the acre*, without further designation, 3,000 acres of the tract, the sale is void for uncertainty, and the land thus exposed to sale could not afterwards be identified by any action of the court.
3. The purchaser at such sale is subrogated to the rights of the execution creditor to the extent such creditor was benefited, and the execution debtor was exonerated, by the sale.
4. The Constitution of 1868 went into operation at least for all purposes of domestic policy, from and after its ratification, by the vote of the people, on 24 April, 1868: *Therefore*, where a levy on land was made between that day and 25 June, 1868, a sale under such levy could not deprive the defendant of his right of *homestead*, under the Constitution.
5. RODMAN, J., *dissentiente* as to the time when the Constitution went into effect.

ACTION for recovery of land, tried at Spring Term, 1876, of CUMBERLAND, before *Buxton, J.*

The complaint describes the land as lying "on the waters of Big Rockfish, Buffalo, and Juniper creeks. Beginning a stake (with courses, etc.), including 2,000 acres known as the Gilchrist lands and the lands formerly owned by Neill, McCraney and all the lands formerly owned by the said McRae within said boundaries, being about 3,000 acres." The plaintiff claimed under sheriff's deed as purchaser at sale under execution against the defendant; said this deed was dated 9 August,
(498) 1870, and recites a judgment in favor of *Alex. Johnson* to use of *T. S. Lutterloh v. Neill McFadyen, Dugald McFadyen* and *John McRae*. An execution issued and levied on the lands of said McRae and returned to court. A *ven. ex.* issued on 4 September, 1869, directing a sale of said lands to satisfy the sum of $840.54, amount of debt, together with costs. A sale under said *ven. ex.*, 1 November, 1869, to E. L. Pemberton as purchaser, at 30 cents per acre, being $900 for the whole.

The defendant denied the plaintiff's title on the following grounds, among others: That the levy was void for uncertainty; that the lands embraced in the description in the complaint contained about 5,000 acres, instead of 3,000; and the sheriff, selling by the acre, should have laid off 3,000 acres by survey, and that no homestead was allotted to him.

Evidence was offered showing that the defendant's lands at the time of the alleged levy and sale consisted of two tracts—the Gilchrist tract, within the boundaries of which defendant levied, containing 4,951 acres, lying on the north side of Big Rockfish Creek, and the McCraney tract, lying on the other side of the creek, and containing about 400 acres. The boundaries in the sheriff's deed included both tracts.

The plaintiff offered the executions recited in the sheriff's deed in evidence, with the endorsements thereon. The original *fi. fa.* was issued 22 December, 1867, returnable to Spring Term, 1868. A deputy sheriff who had the *fi. fa.* in hand testified that on 12 January, 1868, he made the following entry in his memorandum book: "12 January, 1868. This day I have levied on the property of John McRae; 3,000 acres of land lying on the west side of Big Rockfish; joins McDiarmid and others; pine lands, to satisfy execution in my hands for collection. Signed R. W. Hardie, sheriff, by D. McKennon, deputy sheriff."

He further testified that he kept the levy back "until orders (499) from headquarters to return the paper with levies on them, without sale," and returned the execution after the general election held on 21, 22, and 23 April, 1868, and the endorsement for levy from the memorandum book was then made on the execution.

The jury found a verdict "in favor of the plaintiffs in accordance with the levy made by R. W. Hardie, sheriff, by the deputy, Daniel McKennon, for 3,000 acres lying on the west side of Big Rockfish, joining McDiarmid and others—pine land—excluding the home place of John McRae, the 3,000 acres to be taken from the Gilchrist land." Therefore the defendant moved for a judgment *non obstante veredicto.* Motion overruled. Rule for a new trial was discharged and his Honor rendered a judgment in favor of plaintiff and appointed two surveyors commissioners to survey and allot to the plaintiff 3,000 acres of the lands described in the pleadings and in the verdict and report their proceedings to the next term of the court, to the end that upon confirmation of their report a writ of possession might issue.

Defendant thereupon appealed.

Guthrie and Wright & Ray for appellant.
B. Fuller and Merrimon, Fuller & Ashe contra.

BYNUM, J. 1. The levy is in these words: "This day I have levied on, as the property of John McRae, 3,000 acres of land lying on the west side of Big Rockfish, joining McDiarmid and others, pine lands, to satisfy an execution in my hands." Upon the authority of *Wilson v. Twitty,* 10 N. C., 44, and *Shaver v. Shoemaker,* 62 N. C., 327, we think this is a sufficient levy, and that it covers the Gilchrist land purchased by John McRae, exclusive of his homeplace. And such was the finding

of the jury upon the evidence. Designating the lands as "3,000
(500) acres" was merely descriptive and no more than saying "said tract of land supposed to contain 3,000 acres."

2. But the Gilchrist tract of land levied on contains near 5,000 acres, whereas the sheriff purported to sell and the plaintiff to buy only 3,000 acres, *by the acre.* In no view of the case, therefore, can the plaintiff recover more acres than were thus *in numero* sold by the sheriff and purchased and paid for by the acre. What 3,000 acres was bought? The bidders did not and could know only that it was to be taken out of the Gilchrist tract. But that contained 5,000 acres. Was the 3,000 acres to be carved out of the north, south, east, west, or middle part of the tract? *Id certum est quod certum reddi potest.* But here it was impossible for the sheriff to point out the land and say, "Here is the land I sold, enter upon it." The sheriff did not know what 3,000 acres he was selling, nor could the purchaser know what he was buying.

Execution sales are ministerial acts. The sheriff is the officer of the law and not of the court. The functions of the court cease with the rendition of the judgment. The court cannot direct what lands shall be levied on or sold or how the sale shall be made. Nor can the court, by any action subsequent to sale, make that act of the sheriff valid which was void when done. The 3,000 acres of land exposed to sale were not identified at the time of sale and were incapable of being located by any mere ministerial act of the sheriff. There was no rule of law that it should be cut off of this or that end of the tract, or that it lay here or lay there. The sale was, therefore, void for the uncertainty, and no action of the court could impart to it any vitality. To uphold it would be to open the door of fraud. As the sale was void the sheriff's deed could convey no title. *Owen v. Barksdale,* 30 N. C., 81.

No greater effect can be given to an execution sale than to one between private parties. But it is clear that the purchaser could not have
(501) had a specific performance owing to the uncertainty of description of the thing sold. In *Grier v. Rhyne,* 69 N. C., 346, the contract was to convey to Rhyne and his heirs "a certain piece of land adjoining the lands of S. G. Sugg, M. H. Rhyne and others, being a part of the Alexander tract of land, suppposed to contain 30 or 35 acres." The Alexander tract contained 70 acres. It was held by the Court that a contract of purchase of 30 or 35 acres to be taken off of a tract of 70 acres without saying *where* it was to be taken off was so vague and indefinite that it could not be specifically performed, and the sale of the tract under an execution junior to the bond for title for the 30 acres passed the title of the whole tract to the purchaser. So in *Blakely v. Patrick,* 67 N. C., 40, there was a mortgage by a buggy-maker of ten new buggies, without delivery of possession, he having more than

ten on hand at the time. The mortgage was held ineffectual to pass title to any particular buggies or to any interest in the buggies on hand; and it was also held that the mortgagee could not maintain an action for the recovery of ten new buggies in the possession of the mortgagor.

3. By the Constitution every homestead of a resident of this State shall be exempt from sale under an execution for debt. It is decided that no levy of an execution subsequent to the adoption of the Constitution can divest the defendant in the execution of his right of homestead, but that executions levied prior thereto do divest the right. *McKethan v. Terry,* 64 N. C., 25; *Edwards v. Kearsey,* 74 N. C., 241; *Lambert v. Kinnery,* 74 N. C., 348.

The levy here was made shortly after 24 April, 1868, the day when the Constitution was ratified by the vote of the people, but before 25 June, 1868, when the Constitution so adopted by the people of the State was approved by the act of Congress. It is affirmed by the plaintiff that the Constitution went into effect only from and after its approval by Congress, which approval was subsequent to the levy, and it (502) is insisted by the defendant that it took effect from and after its ratification by the people, which was on 24 April, 1868, and that no levy posterior to that time could divest him of his homestead.

We do not propose to enter into a critical examination of the question. The times and occasion which produced our present Constitution were anomalous. As they were without precedent in American history, so there are no preëxisting, unerring guides by which the political actions of that era are to be determined. It might not be necessary to decide at what particular moment of time the Constitution of 1868 went into effect *for all purposes.* For the purpose, however, of giving effect to the benignant provision in behalf of poor debtors we are of opinion that it took effect from and after the day of its adoption and ratification by the vote of the people of the State. The homestead provision is a subject of domestic policy only, and it in no wise affects our relations with the Union or a republican form of government, for which purpose alone was the power of approving the Constitution revised and exercised by Congress in the rehabilitation of the Southern State governments. The act of Congress providing for the reorganization of the State governments nowhere countenances the idea that the State Constitutions for State purposes do not derive their existence, their beginning and functions from the action of the people alone. It would be political heresy to hold otherwise. Accordingly, Congress, far from denying the right of the people to frame and put into operation their State Constitutions by the act in question, only required the performance of certain conditions before the States should be entitled to representation in the Federal Congress.

It was competent for the convention which framed the Constitution of 1868 to have said at what time it should go into effect, but it was not competent for Congress to say so, except as to its provisions affect-
(503) ing the relations of the State to the general government as a member of the Union. We must, then, look to our own Constitution and the ordinance submitting it to the vote of the people to ascertain when it went into operation. If nothing then appears to the contrary—and nothing does so appear—according to every principle of popular sovereignty, it took effect from and after its ratification by the people. It may be that after the Constitution was adopted by the people, and prior to its approval by Congress, acts were done, both judicial and legislative, inconsistent with the idea that it took effect before its approval by Congress. If such is the fact it only goes to show, what all must admit, that these departments of the State government may and do commit errors, but it does show, or tend to show, that the Constitution did not *per se* of its own inherent force take effect potentially from the date of its ratification by the people. We may not view with severe eyes all the judicial and legislative acts done in that dark and perplexing transition from a provisional government to the approval of the new Constitution by the Congress of the United States. In the general anxiety for the full restoration of our federal relation to the Union we sometimes overlooked the ancient landmarks which separated the rights of the State from the powers of Congress. But a clear distinction is to be drawn between rights conferred and established by the Constitution and the machinery, officers and agents by which these rights are to be administered. The right of homestead, for instance, did not the less exist, upon the adoption of the Constitution, because at that moment the officers of the law by whom the right was to be enforced had not been inducted into office. And so with regard to other officers of the State, who are directed by the Constitution not to assume their functions until the approval of the Constitution by Congress, or in some cases ten,
(504) and in others fifteen days, thereafter. Art. III, sec. 1; Art. VII, sec. 10; Art. II, sec. 29. That the Constitution took effect from and after its ratification by the vote of the people and not from its approval by Congress is expressly decided in *Campbell v. Fields,* 35 Texas, 751.

4. The plaintiff, however, has paid out his money for the land exposed to sale in the manner described, and this money has been applied in satisfaction of the execution. He is therefore substituted to the rights of the execution creditor, as upon a failure of title in the defendant to the thing sold, to the extent that the execution creditor has been benefited, and the execution debtor has been exonerated, by the sale. The

case would seem to fall clearly within the equity if not the words of the statute. Rev. Code, ch. 45, sec. 27; Adams Eq., 269, and notes.

The sum of $900 thus paid for the land by the purchaser constitutes a lien or incumbrance upon the land levied on by the sheriff and must be reimbursed to the plaintiff with interest by a sale of the land levied on remaining to the defendant after the allotment of his homestead thereout. In the allotment of the homestead the defendant is first entitled to his home place, next to the McCraney tract, and, lastly, if any more is required to make up the homstead it will be taken out of the Gilchrist land which has been levived on. The remainder of the Gilchrist land, by an order of the Court below, will be sold and the purchase money will be applied, first, to the payment of $900 and interest to the plaintiff, and the residue, if any, will be paid to the defendant. If the land so to be sold will not realize enough to reimburse the plaintiff the deficiency must be his loss.

The judgment is reversed and the case remanded, to be proceeded in in accordance with this opinion.

PER CURIAM. Error.

Cited: Jones v. Robinson, 78 N. C., 400; *Lash v. Thomas,* 86 N. C., 315.

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(505)

B. F. HAVENS v. LATHENE AND OTHERS.

Official Bond—Clerk Superior Court—Liability.

1. The terms of the bond executed by a clerk of the Superior Court oblige him to "account for and pay over all money received by virtue of his office, and he is liable as an insurer at all events, or debtor in respect to such money, and can only be relieved by payment.
2. When the clerk of a court was appointed a commissioner to sell land, and his report of sale was confirmed, it was ordered that "the clerk collect the purchase money when due," etc., he is liable on his bond for such money when collected, though he deposited it in good faith to his credit as clerk in a bank, and it was lost by the failure of the bank.

MOTION for summary judgment, after notice, against the clerk of the Superior Court of BEAUFORT, and the sureties on his official bond, heard before *Moore, J.,* at Spring Term, 1876.

At Fall Term, 1872, a decree was made in the above entitled cause ordering the sale of certain property in the town of Washington for partition, and George L. Windley was appointed commissioner to sell and report to the following term. At Spring Term, 1873, the report was made and confirmed, and it was "ordered that the clerk collect the

purchase money when due and make title." The case as made up by the counsel of the parties for this Court sets forth that "said Windley, commissioner as aforesaid, was ordered to collect," etc.

The purchase money was collected by Windley and deposited with Burbank & Gallagher, bankers in Washington, then and for several years previous, and in good standing as such. There had been no order at that time authorizing Windley to pay over the money. It was in evidence that he instructed Burbank & Gallagher to deposit the money to his credit as clerk, but as entered on their books it was in his
(506) own name simply; also that he neither received nor demanded interest. Before Fall Term, 1873, Burbank & Gallagher failed with this money in their hands.

His Honor left it to the jury to say, from the evidence, whether the deposit by Windley was general or special, charging them that if he carried the money to Burbank & Gallagher and instructed them to place it to his credit as clerk that it was a special deposit, and if Burbank & Gallagher, without Windley's instructions or consent, mixed it with other money and used it Windley was not liable for its loss; but that if Windley consented for them to use it and agreed to receive interest, alleged by the plaintiff, and gave no instructions that the money should be placed to his special use as clerk, then he was liable.

Verdict for the defendants. Rule for new trial discharged, and appeal by plaintiffs.

Warren & Carter for appellant.
Moore & Mullen contra.

PEARSON, C. J. His Honor took a wrong view of the case and made it turn upon an immaterial circumstance without reaching the merits. Whether Windley deposited the money in bank to his own credit or to his credit as clerk made no substantial difference, for in either case the money was equally exposed to be lost by the failure of the bank and could as readily be drawn out by him. In the latter case all he had to do was to add the word "clerk" to his name on the check. True, this fact made it easier to trace the fund and might have become important had Windley failed, but it could make no sort of difference in the event of the failure of the bank.

The point on which the case ought to have been made to turn was this: Is the clerk of the Superior Court liable only as custodian of the
(507) money in his office, so as to fall under the principle announced in *R. R. v. Cowles,* 69 N. C., 59, or is he liable as an insurer of the money under the principle announced in *Comrs. v. Clark,* 73 N. C., 255?

We are of opinion that public policy induced the Legislature to re-

quire bonds to be entered into by sheriffs, clerks, and, under the old law, clerks of the county Superior Courts and masters, so liable as insurers of the money. In other words, to impose on them the relation of debtors who are bound to pay in any event.

The words of his bond oblige an officer to "account for and pay over" all money received by virtue of his office, thus making him accountable as a debtor who can only relieve himself by payment.

Our case ought to have been made to turn on the question of payment, of which there was no proof.

Suppose A owes B $500, and in order to pay it deposits in a bank $500 to the credit of B. The bank fails. This is no payment unless A made the deposit with the assent of B or it was recognized by him afterwards. A must pay the debt. Suppose an officer deposits money in bank to his credit as such officer, it is no payment.

This is a hard rule upon public officers. It imposes on them an obligation greater than that of common carriers and innkeepers, who are insurers except as against the acts of God and the public enemies, and does not allow these officers to use money, while it makes them insurers at all events—in other words, debtors.

In the case of common carriers and innkeepers the obligation arises out of a general contract and considerations of public policy. In the case of public officers the obligation arises out of considerations of public policy, and is expressed by the words of their official bonds. Such officers and their sureties are presumed to know the law and to have executed the bond with full knowledge of the extent of the (508) liability which they incur.

As the case goes back for another trial it is proper to notice an objection which, according to the view taken by his Honor, he was not called on to decide, to wit, the sureties insist that they are not liable, for that the money was collected by Windley as commissioner and not as clerk.

It is set out in the statement of the case: "Said Windley, commissioner as aforesaid, was ordered by the court to collect the purchase money and make title to the purchaser," but it appears by the record the order was: "Spring Term, 1873. It appearing to the court that George L. Windley, clerk, has, in obedience to the order made in this case at the last term of the court, sold the property named in the pleadings, which sale was in all respects confirmed. It is further ordered that the *clerk* collect the purchase money from the several purchasers when due and make title."

The statement of the case must give place to the record, so Windley received the money *virtute officii,* and the sureties are liable.

PER CURIAM. *Venire de novo.*

Cited: *Cox v. Blair,* 76 N. C., 81; *Wilmington v. Nutt,* 78 N. C., 179; *McLean v. Patterson,* 84 N. C., 429; *Smith v. Patton,* 131 N. C., 397.

Dist.: *Moore v. Eure,* 101 N. C., 16.

(509)

A. G. GAMBLE v. WILLIAM MCCRADY AND OTHERS.

Appraisement—Appeal—Constitutional Law.

1. Every one is entitled to notice in any judicial or *quasi* judicial proceeding by which his interest may be affected: *Hence,* an order by county commissioners appointing appraisers to assess the value of the benefits and damages which would accrue to the owner of land on account of a certain canal sought to be cut through his land, upon the petition of other parties, filed under the provisions of the 39th chapter Battle's Revisal, *is void,* unless said land owner be made a party to the petition.
2. Sections 9 and 12, chap. 39, Battle's Revisal, are unconstitutional.
3. While the general provisions of an act may be unconstitutional, one or more clauses may be good, *provided,* they can be separated from the others, so as not to depend upon the existence of the others for their own:
4. *Hence,* under said act, chap. 39, Bat. Rev., a petition may be filed, appraisers appointed and appraisement made, which, if done according to law, may have a certain weight; but it may be appealed from when the whole matter is open in the Superior Court. And before the petitioner can obtain any judgment, he *must,* as the defendant *may,* at any time, take the whole case into the Superior Court for review upon the law and the facts.

APPEAL from *Schenck, J.,* at Fall Term, 1875, of GASTON.

The facts necessary to an understanding of the case are stated in the opinion of the Court.

There was judgment in favor of the plaintiff, and the defendants appealed.

Vance, Sandifer and Jones & Johnston for appellants.
Wilson & Son and M. A. Moore contra.

RODMAN, J. On 1 February, 1875, the defendant McCrady and several others presented their petition to the commissioners of Gaston County, in which they set forth that they owned lands in said (510) county, on Crowder's Creek; that on account of the lowness of the banks and the sluggishness of said stream their lands were sobbed and frequently overflowed with water, and that to drain their

lands properly it was necessary to cut a ditch through their own lands and also through certain lands of the plaintiff Gamble and of one Carson, who were unwilling to allow it to be done and refused also to contribute towards the expense of it. They described the ditch which they desired to cut as beginning at a certain point on the creek, and thence running, sometimes on one side of the present channel and sometimes on the other, to another point on the creek, and to be about three miles long, ten feet wide, six feet deep, and with a fall of ten feet to the mile. They prayed the commissioners to appoint three appraisers to view the land and assess the benefits and damages to the owners of the lands to be affected by means of the proposed work.

The commissioners, thereupon, without any notice to Gamble or Carson, appointed appraisers, who, after having notified Gamble of the time and place, etc., assessed the benefit of the proposed work to fifteen acres of land owned by him seventy-five dollars. They also assessed the benefit to the lands of the other owners. The assessment was reported to the county commissioners, who affirmed the same. Gamble then filed his petition in the Superior Court, reciting the foregoing proceedings, and alleging that the proposed canal would be an injury to him, and praying for a *recordari* to bring the proceedings of the commissioners before the court, to the end that they might be reviewed and quashed as illegal. A *recordari* was accordingly issued, and upon its return the judge quashed the proceedings as being without the jurisdiction of the commissioners, and enjoined any proceeding under them, from which order the defendants, McCrady and others, appealed to this Court.

In any view of the case, the assessment is void for want of notice of the petition to Gamble and Carson, before the appointment of appraisers. It is true that this is not directed to be given by ch. 39 of Bat. Rev., under which the proceedings were had. But it is an (511) inviolable principle of the common law that every one is entitled to notice in any judicial or *quasi*-judicial proceedings by which his interest may be affected.

Our opinion on this point will not quite decide the case, because it still leaves open the question what the judgment of the Superior Court should be—whether it must quash the *whole* proceedings before the commissioners as being unauthorized and void from the beginning and in every part, as they were if the act is wholly and in all its parts unconstitutional, or must only quash the appointment of the appraisers and their proceedings, retaining the petition as in the nature of a complaint and as the ground for further legitimate action by the court.

We think it cannot be denied that certain provisions of the act, which are essential parts of its general scheme and policy, are unconstitutional, and opposed to common principles of right and justice.

Section 9 enacts that when the work is completed according to the specifications, the applicant may recover from each landowner *the amount of the benefits assessed against his lands, without any regard to the cost of the work.*

The estimate of benefit is made before the work is done, and it may fail to be fulfilled. But if fulfilled, it may be that *the cost of the whole work* is less than the benefit estimated to all the landowners.

Certainly the only just rule in such cases is that *the cost should* be proportioned on each according to the benefit to him, and that the cost on no one shall exceed the benefit to him. This is the rule universally recognized, and it will be sufficient at present to refer in support
(512) of it to the cases cited in *Brown v. Keener,* 74 N. C., 710; and especially to *Caster v. Tidewater Co.,* 18 N. J., 54, and *State v. Blake,* 38 N. J., 442.

But by the act under consideration the applicant is entitled to recover from each beneficiary the full amount of estimated benefits, notwithstanding they greatly exceed the cost, and to retain the excess. Clearly, this is to take the property of one man for the profit of another, and violates a constitutional maxim.

This same violation of right and justice is found in section 12, and seems to have been—no doubt unconsciously to the Legislature—the main end and object of the act.

We are obliged to declare these provisions void. But it does not follow that every provision of the act is so. It is settled that while the general provisions of an act may be unconstitutional, one or more clauses may be good, provided they can be separated from the others so as not to depend upon the existence of the others for their own. A notable instance of this construction may be found in the decisions of this Court respecting the stay laws of 1861, as to which, while the various provisions for delaying the collection of debts were held void, the clause suspending the statute of limitations was supported. *Johnson v. Winslow,* 63 N. C., 552.

The question, then, is whether so much of the act aforesaid as authorizes the filing of a petition before the county commissioners, the appointment of appraisers and their appraisement, is void as being unconstitutional. The question is not as to whether the defendants in such petition must have notice of it, for that is clear; nor as to the effect of the appraisement as *evidence,* for that it can have none as a *judgment* is equally clear; but whether the filing of the petition and the appointment of appraisers thereon are void as being judicial acts before and by a body which cannot possess judicial power.

Thus definitely stated and cleared of extrinsic questions, the question presented on this appeal is seen to be a very narrow one. If

we concede the power of the Legislature in the particular mat- (513) ter, its effect amounts only to this: A party wishing to drain lands *may* file his petition in the register's office instead of the clerk's office; the register, instead of the clerk, certifies the copy to be served on the defendant, and on its return, if the defendant either does not answer or raises by his answer no question of fact (which of course the commissioners would be incompetent to try), the commissioners may appoint appraisers, whose report, if made according to law, may have a certain weight, but it may be appealed from when the whole matter is open in the Superior Court; and before the petitioner can obtain any judgment he *must,* as the defendant *may* at any time, take the whole case into the Superior Court for review upon the facts and the law. That this was the whole effect that could be allowed to the act was said at last term in *Canal Co. v. McAllister,* 74 N. C., 159.

Allowing to the act this slight force, and no more, it is said that it is unnecessary, circuitous, inconvenient and expensive. We agree to this. We may conceive that it was enacted inconsiderately. We are ignorant upon what principle the learned reviser omitted from his collection of statutes in force ch. 40, Rev. Code, which has long been on the statute book, and received the benefit of several judicial expositions, and also ch. 164 Laws 1868-'69, which appears to have been carefully drawn, and inserted the act under consideration as the only act on the subject now in force. The misconception of the reviser, as we respectfully think it was, has been naturally the cause of much expensive and fruitless litigation, of which the present action and those on like questions decided at last term are witnesses. But these arguments against the expediency of the act do not establish that it is unconstitutional in the part that we are considering. To receive and file a petition and to appoint appraisers are not necessarily judicial (514) powers, as was said in *Canal Co. v. McAllister, supra.*

These acts are ministerial rather than judicial. They involve no discretion and determine no rights except by the acquiescence of the parties. We know of nothing in the Constitution which forbids the Legislature to grant such powers to county commissioners if it thinks proper to do so. Hence, the petition of McCrady and others was not a *nullity.* It has been removed into the Superior Court, where the parties can proceed on it as on a complaint and the judge can give them such relief as he legally may. The appraisement, for the reasons stated, is a nullity. We think the order enjoining the plaintiffs was erroneous. There was no pretence of a judgment by the commissioners authorizing the plaintiffs to cut the proposed canal, and no allegation in the application for a *recordari* that the plaintiffs threatened or were about to do so. Such an act would have been a trespass, and courts will not, in general, enjoin a bare trespass.

Judgment below reversed and case remanded, to be proceeded in according to this opinion. Neither party will recover costs in this Court.

PER CURIAM. Error.

Cited: *Rodman v. Washington,* 122 N. C., 42; *Greene v. Owens,* 125 N. C., 222; *Jones v. Comrs.,* 130 N. C., 462; *Porter v. Armstrong,* 134 N. C., 451; *In re Wittkowsky,* 143 N. C., 249.

(515)

DAVID BRASWELL v. BENNETT GAY.

Deed in Trust—Declarations of Grantor—Evidence.

1. Where plaintiff claimed title to land under a deed bearing date 15 May, 1857, and the defendant, under a deed from same person, dated 20 April, 1862, and the defendant alleged that the proper date of the deed to plaintiff was 1856: *Held,* that in the absence of any charge or proof of fraud in the alleged change of date, testimony showing the good character of deceased subscribing witness who had proved the deed to plaintiff was immaterial, and an exception based upon instructions to the jury on such testimony cannot be sustained.
2. Where one had executed two deeds of trust at different times to different persons, his declaration, made subsequent to both of them, that he had not paid the debt set out in the first deed, is admissible against one claiming under the second deed, because such declarations were against his interest.
3. A purchaser under the *second* of such deeds of trust having testified that the trustor had said at the sale that nothing was due under the first deed, and that the trustee under the first deed was present and did not contradict the statement: *It was held,* that evidence might be offered to contradict such purchaser, showing that subsequently he had said that the debt secured in the first deed had never been paid.

ACTION for recovery of land, tried before *Moore, J.,* at May Term, 1876, of EDGECOMBE.

The plaintiff claimed under a deed from one Elizabeth Anderson to him, dated 22 March, 1873, and expressed to be made in execution of a power of sale vested in her by a deed of trust executed to her by one Bennett Melton, 15 May, 1857, to indemnify her as surety on a note to one Griffin for $100, dated 15 October 1853. The defendant claimed title under a deed from one Joshua Killebrew and one William Worsley, under a sale made by one Jesse Bullock on 20 April, 1862. Bullock sold under a deed in trust executed to him by said Melton to secure certain creditors, and dated 4 March, 1861. Melton was in possession of the

land at the date of the deed to Mrs. Anderson, and remained in possession until 1 January, 1863, when it was surrendered to defendant.

The date of the deed to Elizabeth Anderson was somewhat blurred and indicated a change in the month and year as first (516) written. A certificate of probate in proper form was appended to the deed, showing that it was duly proved by one Robert Ricks, the subscribing witness, 26 May, 1857.

Elizabeth Anderson, introduced as a witness by plaintiff, testified that she paid the note to Griffin and sold to reimburse herself for the principal and interest. Plaintiff offered to show by her the circumstances under which the deed to her was executed, but upon objection this evidence was not admitted. Evidence was offered by the defendant tending to show that Melton paid the note. The plaintiff introduced one Elizabeth Williams, a daughter of Melton, who testified that within two or three months of his death, in July, 1864, Melton told her he had never paid anything on the deed in trust to Mrs. Anderson; and another witness testified that he heard Melton make similar declarations within two or three weeks of his death. Defendant objected to these declarations of Melton, but they were admitted.

It was in evidence on the part of the plaintiff that at the sale by Bullock, Elizabeth Anderson was present and forbade the sale unless she was first paid the $100 and interest. Defendant offered evidence that Melton was also present and denied owing her anything, though witness stated he could not say that she heard it, she being some twenty feet distant from Melton and part of the crowd being between them, she being also quite old and somewhat deaf.

It was in evidence that the mortgage was read over to Elizabeth Anderson at one Harry Anderson's sale in the fall of 1856. It appeared that the note for $100 was signed by Elizabeth Anderson with a cross mark, and that in signing the deed in trust, to which her name was affixed with that of Melton, she had written her own name. She was recalled and asked by defendant's counsel why this was. She replied that she did not have her "specs" when the note was (517) signed, and could not see to write her name. She also stated that the mortgage was not signed when it was read to her at H. Anderson's sale; that it was delivered to and signed by her after that sale, and Ricks witnessed her signature. This evidence was admitted after objection by defendant. Plaintiff also offered evidence to show that Robert Ricks, who was dead, was a man of excellent character. This was admitted after objection by defendant.

Plaintiff, as a witness for himself, testified that Worsley, one of the purchasers from Bullock, told him on the day of sale by Elizabeth Anderson, and on the way to the sale, that Melton had never paid Mrs.

Anderson the money she had paid Griffin as Melton's surety. Worsley had been put on the stand to show that at Bullock's sale Melton had denied in Mrs. Anderson's presence that he owed anything on account of the Griffin debt, and had been asked by plaintiff's counsel as to the conversation with plaintiff, which conversation plaintiff now offered to prove, and which Worsley denied.

Defendant objected to plaintiff's testifying to Worsley's declarations to him, as above set forth, on the ground that they were collateral and the plaintiff was bound by Worsley's answer, but it was admitted by his Honor.

In response to appropriate issues submitted to them, the jury found that the deed in trust from Melton to Mrs. Anderson was delivered in 1857; that there was no alteration in the date of the deed without the consent of Melton after its delivery, and that the debt specified in that deed was not paid by Melton to Mrs. Anderson before her sale to plaintiff.

There were several exceptions on the part of the defendant to the rulings of his Honor and his instructions to the jury, but those relied on, and the character of the instructions, sufficiently appear in the opinion of the Court.

Defendant moved for judgment *non obstante veredicto*. Mo- (518) tion refused. Judgment for plaintiff, and appeal by defendant.

Fred. Philips for plaintiff.
Howard & Perry and W. H. Johnston for defendant.

PEARSON, C. J. The finding of the jury disposes of the case upon the merits, except so far as it may be affected by the many exceptions taken to the ruling of his Honor.

Counsel of the defendant, with commendable candor on the argument before us, relied upon only three of the exceptions:

1. The charge as to Rick's evidence touching the execution of the deed to Elizabeth Anderson and the admission of testimony of the good character of Ricks. In the absence of any allegation or proof of fraud in the erasure and change of the date of the deed, this ruling and testimony was immaterial and did not in the slightest degree affect the merits of the case. Whether the deed, when executed, was dated 15 May, 1857, or had some prior date which was written over and erased by the words "15th May, 1857," in the absence of fraud, which is negatived by the jury, in either case it had precedence of the deed to Bullock, 20 April, 1863, under which the defendant claims, and the matter is fully explained by the supposition that the deed had been drafted and *dated* at some time before its execution, and the true day, 15 May, 1857, was written over so as to erase the other date.

2. The declarations of Melton, made a short time before his death, to the effect that he was indebted to Elizabeth Anderson for the debt set out in the mortgage, was admissible because it was against his interest at that time to admit the debt. True, he had made a deed of trust to her, and he had also made a deed of trust to Bullock, but it was against his interest to admit a debt that would necessarily affect his resulting trust. This may have been of slight importance, still it was for the jury to estimate its weight and say whether he (519) was in an earnest manner telling a lie to his daughter against his own interest for the sake of helping Elizabeth Anderson to set up a false debt against him.

3. His Honor did not err in permitting the plaintiff to give evidence which tended to contradict Worsley, who had sworn that at the sale by Bullock Mrs. Anderson did not contradict Melton when he stated in her presence that he did not owe her anything. This was not a collateral fact, but was the very point on which the case turned.

PER CURIAM. No error.

Cited: Shields v. Whitaker, 82 N. C., 518; *Croom v. Sugg,* 110 N. C., 261; *Shaffer v. Gaynor,* 117 N. C., 24; *Smith v. Moore,* 142 N. C., 290; *Byrd v. Spruce Co.,* 170 N. C., 435.

C. C. VEST v. J. W. COOPER AND OTHERS.

Report of Referee—Burden of Proof.

1. In an action by a sheriff against one of his deputies and the sureties on his bond for not collecting and paying over the taxes as he was required by the condition of said bond, *it was not error* to charge such deputy with the whole of the tax lists, leaving the burden of a discharge therefrom upon himself.
2. When an accountant sets out in his account that the defendant is entitled to a discharge for certain amounts, he is to be taken as finding the facts necessary to support the particular item of discharge.
3. When an accountant reports that a certain sum was paid to the public treasurer as State tax by a person other than the deputy, who took the treasurer's receipt in the usual form as paid by the sheriff, but such accountant does not find and report what part of said State tax was paid by the deputy, in the absence of such finding, either directly or by giving the deputy credit by way of discharge for the amount of State tax collected and paid over by him, this Court cannot dispose of the case by finally passing upon the account reported, but will remand the same in order that that and similar facts may be found and reported.

ACTION on a bond given by a deputy to his principal, tried before *Cannon, J.*, upon exceptions to the report of a referee, at Spring
(520) Term, 1875, of CHEROKEE.

The plaintiff was sheriff of Cherokee County in 1868, and in August of that year appointed one J. W. C. Piercy his deputy, taking from him a bond in the penal sum of $8,000, with the defendants as sureties. The condition of the bond was: "That the said J. W. C. Piercy collect the tax, both State and county, for 1868, and pay the same to the said C. C. Vest, sheriff as aforesaid, and well and truly perform his said duties as deputy sheriff," etc. It was for an alleged breach of this condition by Piercy, who is dead, and was at the bringing of the suit, that this action is brought against his sureties.

The plaintiff alleges that he placed the tax lists, State and county, in the hands of Piercy, who failed to collect and pay over the taxes therein levied, and that he also collected an account placed in his hands for collection, and failed to pay the money to the person entitled, thereby rendering the plaintiff liable, as sheriff, therefor. Other breaches were assigned, not necessary to be set out in this connection. Plaintiff, alleging that he had made a demand on the defendants, demanded judgment, etc.

The defendants denied all the allegations of the complaint, urging particularly that no demand had been made on them before suit was brought.

At Spring Term, 1873, the case was referred to S. W. Davidson, Esq., "to report the account and the evidence to the next term of the court." At a subsequent term the referee reported in substance that the defendants were properly chargeable with the tax lists of 1868, aggregating to $4,746.25; and was further responsible for $17, the amount of the account placed in his hands for collection; that they were entitled to sundry credits for the amount paid by Piercy to the county treas-
(521) urer before his death, the amount of insolvents and the taxes collected by Vest himself, amounting in all to the sum of $4,583.96, leaving a balance due the plaintiff of $179.29, for which he is entitled to judgment.

The defendants filed exceptions to the report, the material of which are fully noted in the opinion of the Chief Justice and need not be here stated. Upon the hearing, his Honor overruled the exceptions and gave judgment against the defendants according to report.

From this judgment defendants appealed.

Merrimon, Fuller & Ashe and Smith & Strong for appellants.
Battle & Mordecai, contra.

PEARSON, C. J. 1. We concur in the view taken by the accountant and sustained by his Honor—that as Piercy was in default by reason of

not collecting and paying over the taxes as prescribed by law, he was to be charged with the tax list, and that the burden of discharge was on him. The defendants' exception respecting this question is overruled.

2. We are of opinion that when an accountant sets out in his account that the defendant is entitled to discharge for certain amounts, he is to be taken as finding the facts necessary to support the item of discharge. For illustration, when the accountant enters an item of discharge, "Amount paid J. W. C. Piercy, $2,817.77," he finds the fact that Piercy had discharged his liability to that amount. So the item, "Insolvents for 1868, $285," is a finding of the fact that the tax list was to be credited with that sum on the ground that in point of fact it had been proven that the insolvent took off that amount from the tax list. So, as to the other items the exceptions in these respects are overruled.

But the account is imperfect and unsatisfactory in respect to the State tax. Hundsa paid the State tax, $988, to the public treasurer and took his receipt in the usual form for that sum paid by (522) the sheriff. This is the exhibit Marked B, which is not among the papers, but that seems to be immaterial, for the question was, What part of this sum was paid by Piercy? This fact ought to have been found by the accountant, and in the absence of such finding, either directly or by giving credit by way of discharge for "amount paid by Piercy in part of State tax," we are not able to dispose of the case.

So we see from the statement of the accountant that he gives credit for commissions on collections, $545.72, $27.28, but he does not give any credit for commissions on the amount, $2,817.77, paid by Piercy to the county treasurer. The reason for failing to allow these commissions and the facts on which the accountant acted are not found.

The case will be remanded, to the end that the accountant find the facts in these particulars and that his Honor may then proceed with the case agreeable to law.

PER CURIAM. Remanded.

Cited: Comrs. v. Wall, 117 N. C., 381.

(523)

R. H. AUSTIN v. JAMES DAWSON.

Contract—Statute of Limitations.

1. A purchases and pays for a $1,000 bond of the city of Wilmington, and instructs the vendor to keep it until he calls for it; the vendor at once sets apart a particular bond of the city of Wilmington of that denomination. Afterwards A calls for his bond and accepts, without any objection, the one set apart for him: *Held,* that this acceptance

the bond, being made in reference to the sale in its legal effect, related back to the sale, and amounted to a waiver of any objection to the particular bond so delivered to him.

2. *Held further*, that in an action brought by A to recover the purchase money for the bond from its vendor, the cause of action accrued and the statute of limitations began to run on the day of the sale and not on the day of the delivery of the bond.

ACTION to recover the price paid for a bond of the city of Wilmington, tried by *Moore, J.*, at May Term, 1876, of EDGECOMBE.

This suit was commenced 22 May, 1871. Plaintiff set up as a first cause of action deceit practiced by defendant in the sale of the bond which he alleged was issued by the city of Wilmington for an illegal consideration—to aid the late rebellion; that defendant knew this at the time of the sale and did not inform plaintiff of it, and that nothing appeared on the bond itself to indicate that the consideration was illegal; that by reason of illegality the bond was void and a loss to plaintiff.

For a second cause of action, he sets out the sale of the bond, its illegal consideration; alleged that it was void, and relied upon the utter failure of consideration to him as grounds for recovery of the price paid to defendant.

In both counts the sale was alleged to have been made on or about 15 May, 1868, and the bond was described as No. 172, issued by the
(524) city of Wilmington to defendant or bearer for $1,000, payable 1 July, 1887.

Defendant's answer admitted the sale of the bond described in the complaint at the time alleged, and that defendant did not notify plaintiff of the illegal consideration of the bond, but denied that defendant was aware the consideration of the bond was illegal at the time of the sale to the plaintiff. The answer also set up the statute of limitations as a bar to plaintiff's recovery.

Upon the trial, John Norfleet testified that in May, 1868, at the request of plaintiff, who resided in Tarboro, he called at the banking house of defendant in Wilmington and asked if he could buy two city of Wilmington bonds of $500 each, and at what price. Defendant replied that he had no $500 bonds, but offered one of a $1,000 for a certain price. Norfleet told defendant that he would see plaintiff about it and let defendant hear from him. Afterwards plaintiff decided to take the bond and gave Norfleet the money to pay for it. Norfleet sent the money to defendant, with instructions to retain the bond until he should call for it. On his next visit to Wilmington, in June, 1868, he called at defendant's banking house and received a bond from the cashier. The bond described in the complaint was admitted by defendant to be the one delivered to Norfleet.

I. B. Grainger, cashier of defendant's bank, testified that he negotiated the sale of the bond with Norfleet. Shortly after their first conversation about the matter, Norfleet sent the price of the bond to the bank by mail; that witness made the entry of the sale and placed the bond aside, to be kept according to directions of Norfleet; that shortly afterwards Norfleet called for the bond and witness handed it to him. It was also in evidence that the entry on books of defendant of the sale of the bond was made 18 May, 1868, in Grainger's handwriting, and witness was satisfied that the entry was correct.

His Honor submitted this issue to the jury: "Did defendant know at the time of the sale of the bond to plaintiff that it (525) was void?"

Verdict for defendant.

Plaintiff insisted that he was entitled to recover on the ground of failure of consideration. Defendant met this by contending that the statute of limitations was a bar, and the court so held. Motion for a new trial overruled. Judgment for defendant, and appeal by plaintiff.

There were numerous exceptions by plaintiff to the rulings of his Honor at the trial, but the above statement of the case presents the points on which the case was decided in this Court.

W. H. Johnston for plaintiff.
Howard & Perry for defendant.

PEARSON, C. J. Assuming that the defendant is fixed with the *scienter* in regard to the illegality of the bond, and assuming also that the bond was void, and that the plaintiff had a cause of action because of a total failure of consideration, as well as because of the deceit, in either point of view the cause of action grew out of the contract for sale of the bond. The contract, in its legal effect, was executed on 18 May, 1868, and the plaintiff's cause of action accrued on that day. The summons issued 22 May, 1871, so the action is barred by the statute.

The position of the plaintiff's counsel, that the contract of sale was not executed, and the plaintiff's cause of action did not accrue until June, when Mr. Norfleet, the agent of plaintiff, applied to the defendant for the bond, and accepted it as the bond which was the subject of the sale, *for that,* up to that time, he had a right to object to the particular bond, which the cashier at his request had set aside for plaintiff has no force. Admit he had a right to object to a particular bond—he made no objection, and accepted the bond as the very bond which (526) was the subject of the contract. This taking of the bond being made in reference to the contract of sale in its legal effect, related back to the contract of sale at which date the cause of action accrued. *Wil-*

liams v. Perkins, 44 N. C., 253. The rosin was not called for within the time stipulated. *Waldo v. Belcher,* 33 N. C., 609. The corn had not been measured and set apart. Here the very bond, No. 172 (see complaint), was set apart, and afterwards accepted.

PER CURIAM. No error.

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(527)

JAMES C. COOPER v. AUGUSTIN LANDIS AND OTHERS.

Contract—Surety—Deed in Trust.

1. A gave his note with security to B as trustee for C in the sum of $500, and afterwards sold to B a lot of land for $300, executing therefor a deed to B in his individual right in fee simple, with the understanding and promise on B's part that the $300 should be credited as part payment of the trust note of $500: *Held,* in an action against A and his sureties to recover the trust note of $500, that he was not entitled to have the price of the land sold to B, to wit, $300, credited on the said note, but was liable for the whole of said note, subject to the legitimate credits paid in cash.
2. *Held further,* that one of the sureties on said note having an account against the *cestui que trust* for goods, etc., sold, which she promised to pay out of her separate estate, such surety was not entitled in such action to which the *cestui que trust* was not a party to a judgment or decree directing the trustee to pay said account out of the rents, profits and interest of the trust fund, after making the *cestui que trust* a yearly allowance.
3. When a party alleges that a *cestui que trust* has assigned or charged a part of the trust fund by her contract, that is a matter in regard to which she has a right to be heard, and she will not be excluded by a decree in a case to which she is not a party. In such case notice to the trustee is not sufficient to bind her.
4. When a trust fund is improperly converted, the *cestui que trust* has her election either to call for the original fund or to follow the fund in its converted form.

ACTION to recover the amount due on a bond, tried before *Moore, J.,* at June Term, 1875, of GRANVILLE.

The bond upon which the suit is brought is as follows:

$500.00.

With interest from the date, we, Augustin Landis, principal, and William A. Philpot, and A. Landis, Jr., sureties, promise to pay to R. H. Kingsbury, trustee for Mrs. S. J. Kingsbury, five hundred dollars for value received.

Witness, our hands and seals, this 6 September, 1860.

Signed, etc.

Upon this bond several credits were endorsed as being received by the payee before he was removed from the trusteeship of Sallie J. Kingsbury, by order of the Superior Court in July, 1873, since which time he has been a citizen and resident of the State of Texas.

The plaintiff James C. Cooper was appointed trustee in the place of Kingsbury at the date of the latter's removal.

A trial by jury being waived, his Honor, Judge Moore, after hearing the evidence, found the facts of the case substantially as follows:

1. On 7 September, 1868, the defendant Augustin Landis, the principal obligor in the bond sued on, sold to Russell H. Kingsbury, who was at that time the trustee of Mrs. Sallie J. Kingsbury and held the bond sued on in trust for the said Mrs. Sallie J. Kingsbury, a certain lot of land situate in the town of Oxford for $300, and on said day executed and delivered to said Russell H. Kingsbury a deed in fee; that at and before said sale it was expressly agreed between said Landis and Russell H. Kingsbury that said Kingsbury would accept the said (528) deed as a payment to the extent of the price of said lot, to wit, the sum of $300 upon the said bond; and that the said Kingsbury would endorse a credit of said sum on said bond; that the bond was not present at the time when said agreement was entered into, and when the deed was delivered, Kingsbury having forgotten, as he told Landis, to bring said bond with him, assuring Landis, however, that he would immediately upon his return home endorse the said $300 as a credit upon the bond; and Kingsbury on the next day informed Landis that he had credited the bond as agreed upon.

Kingsbury was, on 7 September, 1868, generally believed to be, and was reported, entirely solvent, and that Landis participated in this general belief.

2. The plaintiff's *cestui que trust,* Mrs. Sallie J. Kingsbury, is justly indebted to Augustin Landis, one of the defendants, and a joint obligor in the bond sued upon, in the sum of $237.59 for goods, wares and merchandise, by said Augustin sold and delivered to Mrs. Kingsbury during 1874, which goods, etc., were suitable and necessary to the fortune and condition in life of said *cestui que trust and her family.*

3. That after deducting the said sum of $300, paid by Augustin Landis to said Russell H. Kingsbury, and the several other payments endorsed on said bond, there will remain due and owing by said Augustin Landis to said Cooper, trustee and plaintiff, on said bond, the sum of $65.83, as of 5 July, 1875, the first day of the present term of this Court.

4. That at the time of the sale and delivery of the goods, etc., by said Augustin Landis and Mrs. Kingsbury, it was arranged and understood by and between the said Augustin Landis and Mrs. Kingsbury that the

amount due said Landis for the goods, etc., should be paid out of
(529) the separate estate of Mrs. Kingsbury, in the hands of J. C. Cooper, her trustee.

Upon due consideration of the foregoing facts, and after argument, it is ordered and adjudged:

1. That the said Augustin Landis is entitled to have a payment of $300, as of date 7 September, 1868, entered on said bond and deducted therefrom.

2. That said Augustin Landis pay over to said J. C. Cooper, trustee, the sum of $65.83, balance due on said bond, with interest thereon from 5 July, 1875, till paid.

3. That the said J. C. Cooper, trustee as aforesaid, pay to Augustin Landis, out of the rents and profits of the real estate and the interest on the funds held by him in trust for the said Mrs. Sallie J. Kingsbury, the sum of $237.59, and interest thereon from 5 July, 1875, until paid; first deducting from said rents, profits and interest, the sum of $500 for the use of Mrs. Kingsbury. And if the yearly rents, profits and interest, after deducting the $500, shall not be sufficient to pay off and discharge the said sum of $237.59, then and in that case, the said Cooper, trustee as aforesaid, shall year by year pay over to the said Augustin Landis whatever amount there may remain of the said rents, profits and interest, after deducting therefrom the said sum of $500, till the said sum of $237.59 and interest shall be paid.

From this judgment the plaintiff appealed.

Hays & Peace and Busbee & Busbee for appellant.
Batchelor and Haywood, contra.

PEARSON, C. J. 1. His Honor erred in ruling that the $300 should be deducted from the amount of the note sued on. Russell Kingsbury held a fund for the separate use of Mrs. Sallie Kingsbury during her life, and then for the use of her children with limitations over.

The note sued on is a part of this fund. It is payable on its
(530) face to Russell Kingsbury, trustee for Mrs. Sallie Kingsbury. So the defendant, Augustin Landis, is fixed with express notice at the time he executed the deed to Kingsbury for the price of $300, which Kingsbury was to pay, by allowing it in part payment of the note, and agreeing to enter a credit for that amount on the note.

If the deed had declared a trust for the separate use of Mrs. Kingsbury during her life, and then to the use of the children, etc., Landis might have supposed that Kingsbury was merely converting the fund from a note into land, but the deed conveys the land to Kingsbury absolutely and without mention of the trust. It follows that Landis was

obliged to know that Kingsbury was committing a breach of trust, and this knowledge makes him *particeps criminis.*

When a trust fund is improperly converted, the *cestius que trust* has his election, either to call for the original fund or to follow the fund in its converted form. In this case the election is to demand the original fund. Russell Kingsbury is bound to account for the full amount of the note, and Augustin Landis is bound to do the same thing because of his guilty participation in an attempt to commit a breach of trust.

This is familiar learning. We can only account for the error of the learned judge on the supposition that he gave too much weight to the agreement of Kingsbury *to enter* the $300 on the note as a credit and to his assurance that the credit was entered, and acted on the maxim, "equity considers that as done which ought to have been done."

Whether the credit of $300 was entered on the note or not, did not affect the question of the right of Landis to have the benefit of the price of the lot as a payment. We have seen that by his participation in the breach of trust, he was subject to the equity of the *cestuis que trust* to claim the fund in its original shape. If Kingsbury had (531) entered a credit of $300 *cash received* on the note, that entry would have been open to explanation, and upon its being proved that cash was not paid, but a lot of land was conveyed to Kingsbury, *for his own use and behoof,* the court would have treated the entry as nothing more than the fact that the defendant Landis had conveyed to Russell a lot of land in fraud of the trust, and was not entitled to a credit on the note for the stipulated price. Admit that Kingsbury committed a fraud on Landis by not entering a credit for the price of the lot on the note, that does not purge the fraud upon the *cestuis que trust* in which the defendant Landis knowingly participated, for the sake of selling the lot.

2. We also think his Honor erred in making a decree that the plaintiff pay the account of Augustin Landis out of the profits of the trust fund. This, in effect, is a decree against Mrs. Kingsbury, who is not a party to the action, and had no opportunity of being heard. She was treated with as one capable of making a contract, notwithstanding her coverture. This of course assumes that she was one who had a right to be heard before a decree could be made against her separate estate. But it is said she was represented by the plaintiff, who was her trustee. This fallacy misled his Honor. It is a fallacy, and a misapplication of a familiar rule. In an action by or against a trustee for the recovery of the fund, or a part thereof, the *cestuis que trust* need not be made a party. So, in an action by or against an executor or administrator for property which he claims to belong to the estate, the creditors or legatees or distributees should not be made parties. In such actions the trustee represents the *cestuis que trust,* and the executor or administrator

represents the creditors, etc. But the question under consideration does not involve title to the trust fund, but a collateral claim set up by a supposed creditor of *cestuis que trust,* to be paid out of the fund
(532) by reason of a contract made with the *cestuis que trust,* charging or assigning the fund *pro tanto.*

In respect to this contract, the trustee does not represent the *cestuis que trust,* and has no concern with it. Suppose one brings an action against an administrator, alleging that he is the assignee of a distributee for valuable consideration, and demanding that the share be paid to him; would it enter into the head of any one to conceive that the action could be maintained without making the distributee a party, so as to give him a hearing in respect to the assignment, and to protect the administrator by concluding the question of assignment? Could it be said the administrator represents the distributee, and will defend his right?

The truth is, that is a matter about which the administrator knows nothing and with which he has no concern. So in our case whether Mrs. Kingsbury had made a contract by which she assigned her interest in the fund by charging it *pro tanto,* was a matter about which the trustee had no concern; his duty is to collect and keep the fund, and to that extent he represents Mrs. Kingsbury; but when a party alleges that she has assigned or charged a part of the fund by her contract, that is a matter in regard to which she has a right to be heard, and she will not be excluded by a decree in a case to which she is not a party. We do not mean to say that the decree could have been sustained had Mrs. Kingsbury been a party, but we do say that to allow one of these defendants to recover against the plaintiff, and to have judgment to be paid out of a fund in his hands as trustee because of an alleged indebtedness of the *cestuis que trust,* is extending the idea of "affirmative relief" to a defendant and going beyond what the framers of C. C. P. ever dreamed of.

Apart from all this, we have a fund in the hands of a trustee for the separate use of a married woman for life, and then to her children. The plaintiff is a trustee, put in the place of a first trustee. It
(533) was the legal duty of Mr. Kingsbury, as husband, to support his wife and her children without drawing on the separate fund, provided he was able to do so. How this was, does not appear, but it is settled law in this State that a *feme covert* cannot make a contract by which to charge her separate estate, without the concurrence of her trustee. *Knox v. Jordan,* 58 N. C., 175.

The Marriage Act (ch. 59, Battle's Rev.) does not apply to cases where the property is secured to the wife by marriage settlement, or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the act (Battle's Rev., ch. 59, sec. 17) is to

secure the property to the wife by act of law when it has not been done by act of the parties; who may make restrictions and limitations over? At any rate, Mrs. Kingsbury was not a free trader, and the defendant had no right to contract with her without the concurrence of the trustee, who was at hand and ought to have been consulted. Error. Reversed, and judgment for plaintiff, on the facts found, for the balance of the note, without deducting the $300.

The clerk of this Court will ascertain the amount of such balance, *minus* the endorsed credits. So much of the judgment as makes a charge on the fund for the amount of goods "sold and delivered" to Mrs. Kingsbury is

PER CURIAM. Reversed.

Cited: Bank v. Simonton, 86 N. C., 189; *S. v. Bevers, ib.,* 594.

(534)

THE PLANTERS AND FARMERS NATIONAL BANK OF BALTIMORE v. THE FIRST NATIONAL BANK OF WILMINGTON, N. C.

Agency—Sub-agent.

If a principal constitutes an agent to do a business which obviously or reasonably cannot be done by the agent except through a sub-agent, or if there is, in relation to that business, a known and established usage of substitution, in either case the principal would be held to have expected and authorized such substitution.

ACTION, commenced before a magistrate and tried on appeal by *McKoy, J.,* at Spring Term, 1876, of NEW HANOVER.

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

On or about 20 September, 1873, the plaintiff sent to defendant for collection a draft in plaintiff's favor on one Adams, then residing in Washington, N. C., for $87.58. The defendant transmitted it to the banking house of Burbank & Gallagher, in Washington, N. C., for collection, who collected the draft and failed before turning the money over to defendant. At the time the draft was sent to Burbank & Gallagher they were in good standing and credit, and regarded as entirely solvent.

The defendant was to receive no compensation for collecting the draft.

Upon these facts his Honor gave judgment for the defendant. Appeal by plaintiff.

No counsel for plaintiff.
Strange for defendant.

BYNUM, J. The right of the plaintiff to recover depends upon the right of the defendant to delegate his authority. The general
(535) principle is that *delegatus non potest delegans*. But it is certain that the principal may, if he chooses, give this power of substitution to his agent by express grant. It is equally certain that the principal may confer this power otherwise; not only by other language, but without any express words to that effect. If a principal constitutes an agent to do a business which obviously or reasonably cannot be done by an agent otherwise than through a sub-agent; or if there is, in relation to that business, a known and established usage of substitution, in either case the principal would be held to have expected and have authorized such substitution. 1 Parsons on Contracts, 83.

Here, from the very nature of the agency, a sub-agent must necessarily be employed. In such case the assent of the principal is implied. The draft was transmitted for collection to the defendant, a corporation located and doing business in Wilmington. The debtor resided in the town of Washington, over two hundred miles distant. The defendant could not send one of its officers to Washington to present and collect the draft; and that must have been well known to the plaintiff. The defendant forwarded the draft for collection to Burbank & Gallagher, a firm in Washington, reliable and in good credit. Prudence and good faith were exercised in the selection of the sub-agent. The true principle is well stated in *Fabens v. Mercantile Bank,* 23 Rik., 330: "It is well settled that when a note is deposited with a bank for collection which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill or promissor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promissor." This decision is consonant with notions of justice.
(536) If the bank acted in good faith in selecting a proper agent where the draft was payable, there is no principle of public policy or justice by which the defendant, who was to receive no compensation, should be made liable for the default of the sub-agent. There are some decisions opposed to this, but the reason of the thing and the weight of authority supports the conclusion we have reached. *Bank v. Bank,* 1 Cush., 177; Morse on Banking, 344-50; *Wilson v. Smith,* 3 How., 763.

PER CURIAM. Affirmed.

Cited: Huntley v. Mathias, 90 N. C., 104; *Bank v. Davis,* 114 N. C., 345; *Copple v. Comrs.,* 138 N. C., 134; *Bank v. Floyd,* 142 N. C., 190.

ADRIAN & VOLLERS v. JOHN D. JACKSON.

Frivolous Demurrer—Judgment.

1. Where a complaint in an action to recover for goods sold and delivered alleges that there is a sum certain due the plaintiff, which the defendant promised to pay within thirty days, and the complaint is sworn to, and where the defendant filed a demurrer for delay merely, which was treated as frivolous, the defendant making no other defense, the plaintiff is entitled at the return day term to a judgment by default final for the sum claimed in the complaint.
2. Where a claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only when the claim is uncertain.

MOTION, by defendants, to set aside a judgment obtained at Fall Term, 1870, of CUMBERLAND, heard by *Buxton, J.*, at January Term, 1876.

The summons in this case was issued 13 April, 1870, returnable to Spring (May) Term, 1870, notifying the defendant to appear (537) "and answer the complaint which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of the next term thereof; and let the said defendant take notice that if he fail to answer the said complaint within that time, the plaintiff will take judgment against him for the sum of $308.37, with interest on the same from 11 September to the day of judgment, together with costs and disbursements."

At the appearance term, the plaintiffs filed a sworn complaint, alleging that on 11 August, 1869, at Wilmington, N. C., they sold and delivered to the defendant sundry goods, for which the defendant promised to pay $308.37, thirty days from date, which he had failed to pay, wherefore they demand judgment for the sum of $308.37 and interest from 11 September, 1869, and costs and disbursements of this action.

The defendant filed a demurrer at Spring Term, 1870, in these words:

"The defendant demurs to the complaint because it does not upon its face state facts sufficient to constitute a cause of action. At Fall (November) Term, 1870, the demurrer was disregarded as frivolous, and judgment was entered for the plaintiff, 'according to complaint filed.'"

The object of the present motion, made after notice, to set aside this judgment on the ground that it was erroneously entered, "according to complaint filed," when it should have been by default and inquiry, and the inquiry should have been executed before entry of judgment.

Upon the hearing of the motion, the counsel who filed the demurrer for the defendant stated to the court that it was filed for delay, and that not being furnished with any defense, he had filed no answer.

His Honor was of opinion that as the complaint, duly sworn to,

(538) alleged a special contract at a specified price, this case was to be distinguished from a case where goods were sold upon a *quantum valebat,* in which the price had to be ascertained before judgment could be entered; and he refused to set aside the judgment.

From this refusal defendant appealed.

MacRae, Broadfoot and Guthrie for appellant.
Hinsdale, contra.

BYNUM, J. The demurrer was treated as being frivolous, and is not denied to have been so. By the demurrer the complaint was admitted to be true, and by the provisions of the Code judgment is to be given as if no defense had been made. To what judgment, then, are the plaintiffs entitled?

The complaint alleges that at a given time and place the plaintiffs sold and delivered to the defendants sundry goods, and that the defendant promised to pay therefor $308.37 at thirty days from date, and they demand judgment for that sum and interest. Prior to the Code, the action might have been debt, because the claim is for a sum certain, due by contract. So the complaint here is substantially an action of debt upon a promise to pay a certain sum. That an action of debt would have lain, is clear from the authorities. 1 Chit. Pl., 109; 2 Term, 28. The promise to pay an agreed sum for "sundry goods," in no case differs from a promise to pay a fixed and agreed price for a horse, a dozen horses, or "sundry horses." The complaint does not sound in damages, but is for a money demand. Therefore, the cases cited, *Gatling v. Smith,* 64 N. C., 291; *Oates v. Gray,* 66 N. C., 442; *Mervin v. Ballard,* 66 N. C., 398, and similar cases, have no application. None of these were for a sum certain, but the damages claimed were unascertained and uncertain, and therefore required an inquiry by a jury to ascertain and fix the amount.

(539) But there is nothing here for the jury to find. The sum claimed is fixed by the contract of the parties themselves and so stated in the complaint. In such cases, upon default, the judgment is final. 1 Tidd's Pr., 568.

Gatling v. Smith, supra, and Garrard v. Dollar, 49 N. C., 175, illustrate the distinction between actions sounding in damages, and actions for a sum certain. In the former case it is held that in actions sounding in damages, as in assumpsit, covenant and trespass, a judgment by default is only interlocutory, and the amount of damages must be ascertained by a jury. But in the latter it is held, that if the plaintiff's claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment, by default, admits the claim. An inquiry is necessary only where the claim is uncertain.

The judgment rendered in this case is likewise authorized by C. C. P., sec. 217. It is there provided that in all actions on contract for the recovery of money only, if the defendant fail to answer and the complaint is sworn to and served, the clerk shall enter judgment for the amount mentioned in the summons and complaint. Such is the action here, and such the judgment rendered. *Dunn v. Barnes,* 73 N. C., 273.

The decision of this part of the case makes it unnecessary to pass upon the sufficiency of the affidavit for the arrest. The affidavit here is clearly distinguishable, however, from that in *Hathaway v. Harrell,* 74 N. C., 338. It was there held that the affidavit was insufficient, because it did not set forth the *grounds* of the plaintiff's belief that the defendant was about to remove from the State. Here the grounds of belief are set forth, to wit: that the affiant heard the defendant say on several occasions that he intended shortly to leave the State and remove with his family to the mountains of Georgia, as he was doing nothing here, etc.

Such an affidavit, it would seem, meets the requirements of the statute. (540)

PER CURIAM. Affirmed.

Cited: Williams v. Lumber Co., 118 N. C., 936.

J. F. BEAM & D. A. BEAM v. D. FRONEBERGER, THE FIRST NATIONAL BANK OF CHARLOTTE, WILLIAM TIDDY AND RICHARD TIDDY.

Guardian—Ward—Election.

1. Where a guardian took a conveyance of land to himself from a former guardian in discharge of the indebtedness of the latter, the wards have an election to take the land *in specie* in satisfaction of their debt, or to sue on the guardian bond and look to the land as a security for the amount due them.
2. There being five wards, and the second guardian having settled with three of them, the two others have the right, notwithstanding they had sued on the guardian bond, to have the land subjected in the hands of a purchaser at execution sale, without actual notice of their claim, and sold for the payment of their debt.
3. A surety on the guardian bond having paid his proportionate part of the judgment rendered on the bond and taken a receipt expressed to be in full discharge of his liability: *Held,* that thereby the principal was not discharged, and the wards might still look to said land for the payment of the balance due them.
4. The two wards, *under such circumstances as above,* are entitled to have the land sold and the balance due them *first* paid out of the proceeds, but, having made their election, they are not entitled to the land itself, and the surety on the bond who paid part of the recovery has the right to be reimbursed if the proceeds be sufficient, and the purchaser at the sale under execution is entitled to the residue.

BEAM *v.* FRONEBERGER.

APPEAL from *Buxton, J.*, at Spring Term, 1876, of LINCOLN.

The defendant Froneberger was duly appointed guardian of the plaintiffs and three other wards, and gave bond as such, with one E. B.
(541) Jennings and others as sureties. One Joshua Beam had been the guardian of said wards, and, in settlement of his guardianship with the defendant Froneberger, conveyed to him a tract of land, whereupon Froneberger gave him a receipt in full of his indebtedness to said wards. Defendant Froneberger settled with three of his wards, and this action was brought by the other two to subject said land to the payment of the amount due them.

The plaintiff J. F. Beam had sued Froneberger and the sureties on his guardian bond, and recovered judgment against them. An execution was issued and returned by the sheriff, with the plaintiff's receipt for $300, expressed to be in full of Jennings's liability under the execution, and discharging him therefrom.

The solicitor for the district had prosecuted another action on said bond, for the benefit of the other plaintiff, D. A. Beam, to judgment; execution was issued, and the sheriff returned it with receipt of D. A. Beam, also expressed to be in discharge of Jennings, one of the sureties on the bond as aforesaid.

Before the recovery of these judgments the land in controversy had been sold under execution against Froneberger and purchased by the First National Bank of Charlotte, one of his creditors, without actual notice of the plaintiff's claim upon the land. The bank executed a bond for title to the other defendants, Wm. Tiddy and Richard Tiddy, before the commencement of this action, and they had no actual notice of the plaintiff's claim, but they had paid no part of the purchase money.

The plaintiffs, in their complaint, demanded judgment: (1) That the bank be declared trustee of said land for their use. (2) That the bank and W. & R. Tiddy deliver possession to them, and account for use and occupation of the land. (3) That the land be sold and the pro-
(542) ceeds applied to payment of the plaintiff's debt, and the surplus, if any, paid to the bank. (4) For other relief.

The jury found a verdict on the issues, under instructions from the court, establishing the facts as above, and the plaintiffs thereupon asked for a sale of the land. This was refused, and a judgment rendered, ordering the sale of two-fifths of the land, and the application of the proceeds to the payment of plaintiffs' debt and costs; the surplus, if any, to be paid to the bank.

Both parties thereupon appealed.

Hoke and Battle & Mordecai for plaintiffs.
Shipp & Bailey for defendants.

BEAM *v.* FRONEBERGER.

RODMAN, J. One Joshua Beam, having been guardian of the plaintiffs and of three others, the brothers and sisters of the plaintiffs, was discharged or resigned, and the defendant Froneberger was appointed guardian in his place, and gave bond, with Jennings and others as his sureties. Froneberger then had an account with the former guardian, who was found indebted to his five wards in a certain sum. In payment of this sum he (Froneberger) took from Beam, the former guardian, a conveyance to himself (Froneberger) of the land mentioned in the pleadings to his own use, and released Beam.

1. The question presented by these facts is in all material particulars identical with that in *Younce v. McBride,* 68 N. C., 532.

The land so bought with the money of the wards was subject to a trust in their favor. On arriving at age they had an election to take the land itself, with the profits since the purchase, or to call on the guardian to make good the sum in which the formed guardian had been found indebted.

It is no answer to the claim to a trust in the land that the defendant gave a guardian bond, which was a security to the wards for the sum which he ought to have received. There is no reason why (543) the land and the bond should not be collateral securties to the wards.

By suing on the guardian bond of the defendant, the wards made their election not to take the land *in specie* in satisfaction of the sum owing them by the first guardian. But they did not thereby give up their right to look to the land as a security for what might be due them, on a failure to procure satisfaction out of the bond.

The land, like the bond, was a security to each one of the wards for his share in the fund. When the defendant paid off and satisfied three of his wards, he relieved the land from the trust in their favor, but not from that in favor of the other two, who are the present plaintiffs. In the absence of anything done by them to release their rights, the whole land is liable to the satisfaction of their demands, and to be sold for that purpose.

2. It is contended, however, by the defendants that the discharges given to Jennings operated to release the principal debtor, as well as all the sureties. How it might be as to the co-sureties of Jennings, it is unnecessary to inquire. But we know of no authority for holding that a release to *one or all of the sureties* of a guardian, without full satisfaction, will operate by implication, or by an inference of law, to release the principal. The cases which hold that a release of the principal discharges the sureties, or that a release of one surety discharges the others, are plainly distinguishable. We are of opinion that the liability of the guardian was not discharged by the release of Jennings.

3. It is too well settled to require a reference to any authority, that a purchaser of land, at execution sale, takes it subject to all equities affecting the land, whether he had notice of them or not. The bank stands in the shoes of Froneberger, and the lessees of the bank in its shoes.

The plaintiffs asked a judgment that the bank be declared a (544) trustee of *the land* for them. There are several reasons why this judgment was improper.

First. The land was held by the guardian defendant, in trust for all his wards, three of whom have been satisfied by the guardian, and the land discharged from their claims. It would be inequitable to give two the land which belonged to the five, without substituting to their rights the guardian, and also Jennings, to the extent of his payments to the plaintiffs. Before the plaintiff could take the whole fund received by the guardian (which, for aught we can know, may have greatly advanced in value), they would be required to refund these sums paid in exoneration of the land. At the utmost, they would be entitled to but two-fifths of the land if they had elected to take the land in specie.

Second. By suing on the guardian bond, and receiving partial payments from Jennings, the plaintiffs have elected not to take the land in specie, but to look to it as a collateral security for their debt. The judge properly refused the judgment demanded by plaintiffs.

We think, for the reasons above, that the judge erred in the judgment which he rendered.

Judgment below modified to read as follows:

It is ordered that the lands mentioned in the pleadings be sold on such terms, by such person and at such time and place as may be ordered by the judge of the Superior Court of Lincoln. That the proceeds, after paying the expenses of the sale, be applied:

First. To pay the sums adjudged to be owing to the plaintiffs by defendant Froneberger, their late guardian.

Second. To repay Jennings such sums as he has paid to the plaintiffs as surety for their said guardian, provided he shall make himself a party to this action in such time as shall be allowed by said Superior Court.

Third. To pay the residue to the First National Bank of Charlotte.

As the plaintiffs demanded a judgment to which they were not (545) entitled, and the judgment rendered is modified, neither party will recover costs in this Court.

This opinion is given in both appeal by plaintiffs and that by defendants, and the judgment is rendered in both.

PER CURIAM. Error.

Cited: *Coble v. Coble,* 82 N. C., 341; *S. v. Bevers,* 86 N. C., 594.

JOSEPH P. PRAIRIE AND THOS. G. JENKINS v. D. A. JENKINS, PUBLIC TREASURER.

Sheriff—Judgment—Release of Surety.

1. It is no valid objection to a judgment obtained on a sheriff's bond for his failure to collect and pay over the public taxes, that the judgment was obtained before the clerk of the Superior Court, and that the same was also taken without notice to the sureties. Sec. 38, chap. 102, Battle's Revisal, expressly authorizes such summary proceeding, "without other notice than is given by the delinquency of the officer."
2. The principle that if a creditor by any binding contract gives time to a principal debtor, the sureties are thereby discharged, applies when a State is a creditor, as well as when an individual is.
3. When by an act of the General Assembly, sheriffs were allowed until the first Monday in January, 1874, to settle for the taxes due the first Monday in December, 1873, *provided* said sheriffs pay to the public treasurer within the time prescribed by law, three-fourths of the taxes, and as much more as they have by that time collected, and afterwards, by a resolution of 16 February, 1874, a sheriff is allowed until 1 April, 1874, to settle the remaining fourth of the taxes, provided he has performed the conditions therein, and by said act required, which the complaint alleges has been done: An injunction obtained by the sureties of said sheriff, staying the collection of a judgment for said taxes, on the ground of their discharge because of such extension of time, will be continued until the final hearing, in order that the facts may be found, whether said sheriff had performed the supposed condition as to bring himself within the act, and did thereafter perform the conditions which he was required thereafter to perform.

INJUNCTION against the public treasurer, heard before *Watts, J.*, at chambers, in WAKE, 29 March, 1875. (546)

Upon hearing the preliminary restraining order and the complaint and affidavit, no answer having been filed, his Honor continued the injunction until the final hearing. From this judgment the defendant appealed.

All the facts relating to the points decided in this Court are fully stated in the opinion of Justice RODMAN.

Attorney-General Hargrove and Smith & Strong for appellant.
Badger & Devereux and Batchelor & Son, contra.

RODMAN, J. 1. The first ground on which the plaintiffs put their claim to relief is, that the judgment was taken before the clerk of the Superior Court and not before the judge in term time. This objection to the judgment is answered by Laws 1872-'73 (Bat. Rev., ch. 102, sec. 38), which expressly directs the proceeding complained of.

2. That the judgment was taken without notice to them. This also is directed by the act cited.

3. That the amount of the bond was too large. This, if it be a defect, is cured by Bat. Rev., ch. 80, sec. 10.

4. That the penalties for the sheriff's default were included in the judgment against the sureties. This objection is first made in this Court and does not appear in the complaint. At all events, it would only go to reduce the judgment. We express no opinion on it.

5. That the Legislature, by giving time to the principal, discharged the sureties. The facts appearing in the complaint in reference to this point are these: The bond was given in September, 1873; it contained the usual condition for the collection and payment of the public taxes.

The taxes for that year were by law payable to the Treasurer on
(547) the first Monday in December, 1873. On 1 December, 1873, the Legislature enacted, in substance, as follows:

"Section 1. The sheriffs of this State shall be allowed until the first Monday in January, 1874, to settle their State tax accounts for the year 1873 with the Auditor and pay the amount for which they are liable to the Treasurer of the State: *Provided,* that said sheriffs pay in and settle three-fourths of the said taxes as now required by law and further amount of taxes actually collected.

"Sec. 3. This act shall be in force from 17 November, 1873."

Afterwards, by a resolution ratified on 16 February, 1874, the sheriff, Lee, was allowed until 1 April, 1874, to settle the remaining one-fourth of the taxes payable by him for 1873, and on such payment was relieved from any penalties incurred by his prior failure to pay.

The complaint says that the sheriff, prior to the first act, had paid three-fourths of all the taxes which he was liable to pay and all that he had collected up to the date of that act, but it does not say with precision when he did so.

The principle that if a creditor, by any binding contract, gives time to a principal debtor the sureties are thereby discharged cannot be questioned. It applies when a State is the creditor as well as when an individual is. A State may, by an act of Assembly, incur an effective obligation to give time, although there was no consideration for the act, for although it may be repealed, yet while it stands it binds the officers of the State and puts it out of the power of the sureties to use the name of the State in enforcing the obligations of the principal. These conclusions are supported by *Johnson v. Hacker,* 55 Tenn., 88.

(548) The reasoning of the court in that case is so clear and satisfactory that we content ourselves with referring to it without attempting to abridge it. We have then only to inquire whether by the terms of the act and the resolution time was given to the principal debtor. The act gives time as to one-fourth of the taxes to the first Monday in January, 1874, *on condition* that the sheriff (*shall*) pay

three-fourths of the taxes and any further sum that he has (on 1 December, 1873) actually collected by the first Monday in December, 1873. It *may* also include those who before that date had paid the three-fourths, etc.

The complaint says that the sheriff in this case *had* paid; and as there is no answer, we must take it to be true for the purpose of the application to enjoin until the hearing. But the contrary may appear on the hearing. We do not conceive ourselves required, on an appeal from an interlocutory order of this sort, to decide important and doubtful questions upon what is in fact a mere hypothetical state of facts. We disapprove the taking of such appeals without some necessity and where the question of law upon the complaint is not clear. The sure result is increased delay and expense. Without undertaking, therefore, to decide positively on the construction or effect of the act at this time, we are of opinion that the question presented upon this act is sufficiently doubtful to entitle the plaintiff to a continuation of the injunction until the facts are ascertained upon the hearing.

The resolution of 16 February, 1874, supposes, but does not conclusively admit, that Lee had paid the three-fourths of the taxes, and upon that supposition, which is in effect a condition, and upon other conditions precedent not material at present, gives him time as to the remaining one-fourth until 1 April, 1874. The effect of this, as of the act of 1 December, will depend upon whether Lee had performed the supposed condition, so as to bring himself within the act, and did thereafter perform the conditions which he was required thereafter to perform.

There is nothing in it which will enable us to decide upon the (549) discharge of the sureties in the imperfect and hypothetical state of the facts at present presented to us.

There is no error in the judgment below. Injunction continued until the hearing. Case remanded.

PER CURIAM. Affirmed.

Cited: Prairie v. Worth, 78 N. C., 170; *Worth v. Cox,* 89 N. C., 49, 51.

JOSEPH P. PRAIRIE AND THOS. G. JENKINS v. DAVID A. JENKINS, PUBLIC TREASURER.

(For the syllabus, see the next preceding case, page 545.)

INJUNCTION against the public treasurer, restraining the collection of a certain judgment theretofore obtained, heard before *Watts, J.,* at chambers in WAKE, 15 April, 1875.

Upon the hearing of the complaint and affidavit, no answer being filed, his Honor continued the injunction until the final hearing.

The facts of the case are stated in the opinion of the Court and also in the report of the next preceding case between the same parties.

From the order of his Honor in the court below continuing the injunction the defendant appealed.

Attorney-General Hargrove and Smith & Strong for appellant.
Badger & Devereux and Batchelor & Son contra.

RODMAN, J. On 16 December, 1874, the State obtained a further judgment on the same bond on which a judgment had been taken in the January previous, which was considered and decided on in a case (550) between nearly the same plaintiffs and the same defendant at this term. See *ante,* 545. The only grounds alleged in this complaint are that the judgment was taken before the clerk and without notice. These points were considered and decided adversely to the plaintiff. No objection to the judgment in the case mentioned is set forth in this case, founded on the act of the General Assembly giving time to the principal.

Probably as that is a public act, we are required to take judicial notice of it. But we cannot take notice that the sheriff had brought himself within the conditions of that act by paying three-fourths of the taxes and all that had been collected by him when it is not alleged in the pleadings in this case. Herein this case differs from the one above cited.

There is error. Injunction dissolved. Case remanded.

PER CURIAM. Injunction dissolved.

(551)

W. T. FAIRCLOTH v. BARBARA M. ISLER AND STEPHEN W. ISLER.

Issues—Sale Under Mortgage—Vendor and Vendee.

1. Where the issues tendered by a party relate to the evidence rather than the merits of the controversy, the judge should not allow them to be submitted to the jury. He should explain the issues made by the pleadings.
2. Where a mortgagee sold land at public auction under the mortgage without any stipulation as to the character of the deed to be made to the purchaser, and mortgagee tendered deed warranting "such title as was conveyed by the mortgage deed, and no more," and purchaser offered to pay his bid upon delivery of a "proper deed" with further warranty, and thereupon mortgagee sold the land again: *Held*, that instructions

that plaintiff (purchaser at first sale) was entitled to a verdict were not improper, but in effect that there was no abandonment by the purchaser at first sale, and that the second sale was void.

3 Where vendor and vendee differ as to covenant acts, the former claiming that the latter should pay the money before delivery of the deed, and the vendee insisting that deed should be first delivered, specific performance would be decreed, and the only question would be as to costs.

4. When vendor makes contract of sale for his own benefit, his deed made in pursuance should contain a general warranty. A mortgagee offers generally to sell under the mortgage, or a trustee under a deed of trust, he can be required to covenant that he has done no act to affect or impair the title as it was at the time of the conveyance to him.

SPECIFIC PERFORMANCE of a contract to convey land, tried before *Seymour, J.,* and a jury, at January (special) Term, 1876, of WAYNE.

The action was brought to Fall Term, 1874, and was before this Court at its June Term, 1875.

The following is a statement of the case as settled by his Honor:

On 27 January, 1869, one Murphy mortgaged a certain tract of land to B. M. Isler, it being the same for which plaintiff demands deed from defendants. B. M. Isler, by virtue of a power of sale in said mortgage, advertised the land for sale for cash on 10 July, 1874.

On the said day the land was put up for sale in accordance (552) with the terms of the advertisement at public auction by an auctioneer, who announced that the sale would be for cash. S. W. Isler admitted that he was the general agent of defendant, B. M. Isler, in Goldsboro.

The following evidence was given on the part of the plaintiff:

W. T. Faircloth testified: The land was advertised to be sold at public auction 10 July, 1874. Colonel Baker was auctioneer. I bid it off at $2,605. As soon as it was knocked off Mr. Isler said, "I want my money." I said, "I want my deed." He asked me if I had the money ready. I said, "Yes, in my office." I went to my office, waited a while without seeing Isler, then went to dinner. Met Isler as I was going. He insisted upon my returning at once, so I came back to my office. I had the money in my safe, and was about to pull it out, but first asked him for his deed. He took one out of his pocket and proposed to read it to me. I wanted to take it and read it myself. He declined to hand it to me, but said he would hold it and I could read it while in his hands. I declined to read it in that way, and he then said he would sell the land again. The money was in my office, and I told him so. He walked off. Colonel Baker was still at the place of sale. Isler told Baker to sell again. I gave notice that I had got the land and forbid the sale. Isler bid $1,000. No other bidder. It was knocked down to him. I then, on the same day, wrote a deed, now among the papers, and

took the money, the amount of my bid, put it in Colonel Baker's hands, and with the deed I had written went to see Mrs. Isler (B. M. Isler). Mrs. Isler wouldn't see us. We saw S. W. Isler. He said his mother couldn't make me a deed as she had already made him a deed. I said that I had prepared a proper deed. Isler offered to receipt for the money, but declined to give me any deed except the one he had offered me in my office. Am ready now, and always have been since I
(553) made the bid, to pay the money upon the execution of a proper deed. The sale was an absolute one.

Colonel Baker introduced the advertisement. Said the terms of sale were cash. No conditions. It was put up as land belonging to Mr. Murphy and to be sold for cash.

The defendants offered in evidence a statement of Mr. Smith (appended as part of the case), which, by agreement of counsel, was to be received if competent. The court excluded the proposed testimony. No other evidence was offered. The defendants' counsel tendered certain issues in writing (appended to the case).

The court then charged the jury that upon the evidence the plaintiff was entitled to a verdict. Verdict for plaintiff.

The defendant assigned the following errors:

1. His Honor erred in refusing to allow the jury to pass upon the issues tendered.

2. In excluding the statement of Mr. Smith.

3. His Honor erred in directing the jury to return a verdict for plaintiff.

The deeds prepared by defendants and plaintiff respectively and referred to above are both set out as part of the case. They both recite the mortgage from Murphy to B. M. Isler and advertisement and sale thereunder. The deed prepared by defendants contains the following clause of warranty: "And the said B. M. Isler doth warrant and defend such title as was conveyed to her by mortgage deed aforesaid from J. T. H. Murphy to B. M. Isler and no more to the said W. T. Faircloth," etc. The deed prepared by plaintiff for Mrs. Isler to execute contains no warranty, but the *habendum* is in these words: "To have and to hold the said tract of land to the said W. T. Faircloth and his heirs and assigns, together with all the rights and privileges and appurtenances thereto belonging free from all demands, claims and incumbrances of the said B. M. Isler or her heirs."

The demand for judgment for the complaint was that defend-
(554) ant should execute to plaintiff "a proper fee-simple deed."

It was set up in the answers of the defendants that B. M. Isler had recovered judgment in 1857 against said Murphy for about $5,000, for which said land was bound, and that she did not propose by the

sale under the mortgage (executed in 1869) to affect her rights under said judgment.

The statement of Mr. Smith, referred to in the case, was signed by George Green, Esq., attorney for defendants, and Smith & Strong, attorneys for plaintiff, and is as follows:

It is agreed that at June Term, 1875, of the Supreme Court the Chief Justice of said Court, in open court, offered to direct that a deed, without warranty, against incumbrances prior to defendants' mortgage, and with special warranty against incumbrances created by or in favor of defendants since that date be made by the defendants to the plaintiff upon plaintiff paying into court $2,605, which offer, after deliberation, the said plaintiff refused. If the above facts are incompetent or irrelevant they are to be disposed of as the court may think proper.

The issues tendered by the defendants for submission to the jury, set out as part of the case, were thirteen in number, as follows:

1. Did Stephen W. Isler, for Bell Isler, offer to deliver a certain deed, mentioned in the pleadings, marked X, upon the payment of $2,605 to W. T. Faircloth, the plaintiff?

2. Did W. T. Faircloth accept of said deed?

3. Did W. T. Faircloth, the plaintiff, refuse to pay the said $2,605 to Stephen W. Isler for the defendant B. M. Isler and accept the said deed?

4. After the refusal of the said W. T. Faircloth to pay the said $2,605 was he duly notified that there would be a second sale?

5. Were the written notices filed in the pleadings of the sale (555) to said S. W. Isler?

6. Has there any money been paid into court for Bell Isler; if so, when and how much?

7. Did the plaintiff W. T. Faircloth have an opportunity in June, 1875, to pay the money into court and accept a deed of qualified warranty?

8. Did plaintiff W. T. Faircloth, in June 1875, refuse to accept a deed of qualified warranty?

9. Did the plaintiff W. T. Faircloth refuse to pay the money and accept deed of qualified warranty in June, 1875?

10. Were the terms of said sale for cash?

11. When W. T. Faircloth offered to pay $2,605, was it upon condition that Bell Isler sign a certain deed which contained covenants against all incumbrances that she had on the said land?

12. Is there an unsatisfied judgment against J. T. H. Murphy rendered on 25 January, 1867?

13. When was the deed offered by Bell Isler to W. T. Faircloth deposited in the clerk's office of Wayne County.

Upon the verdict of the jury his Honor rendered judgment that the clerk prepare a deed in fee simple for execution by defendants to plaintiff conveying the land to plaintiff from all incumbrances of the defendants; that the same be signed and sealed by defendants, and that the clerk deliver it to the plaintiff upon payment into his office of $2,605, with interest from 10 July, 1874, for defendant B. M. Isler, and that plaintiff recover costs. Defendants appealed.

Smith, Strong & Smedes for plaintiff.
Green for defendants.

PEARSON, C. J. The parties not only on the day of sale, but in the proceedings to bring the case up for judicial determination, allowed themselves to become and continue to be so much excited as to
(556) lose sight of the merits of the case and pass off into immaterial details.

His Honor refused to allow the many detailed and immaterial issues tendered by the defendants relevant to the evidence and not to the merits of the case to be submitted to the jury. In this there is no error. The issues tendered were calculated to confuse.

His Honor thereupon, as we suppose, being satisfied by the evidence and argument of counsel that "the merits of the case" were with the plaintiff directed the jury to find a verdict, "all of the issues in favor of the plaintiff."

After his Honor had rejected the many issues presented by the defendants he ought to have explained to the jury what is the issue between the parties. He would then have "struck the nail on the head" by telling them "Faircloth says he is entitled to a deed with *general warranty*. The defendants say the terms of sale do not stipulate for *any warranty*. Faircloth then brings this action in order to get a judgment that the defendants execute to him a *proper deed* on his paying his bid, so as to make specific performance of the contract of sale according to its legal effect. To this the defendants say, Faircloth having refused to accept the deed which was tendered to him, is to be taken in law to have abandoned the contract and Isler had a right to sell the land and was discharged from the obligation of the first contract. I instruct you that, taking the evidence in the most favorable point of view for the defendants, there is nothing to show that the plaintiff had abandoned the right acquired by his having bought the land at the first sale, and that the second sale was of no legal effect as a matter of law."

This, in substance, is the charge of the judge, and presents,
(557) so far as can be seen by the very defective "statement of the case" and the argument at our bar, the merits of the controversy.

Suppose vendor and vendee differ as to which should trust the other in concurrent acts—"pay the money and here's your deed," or "here is the deed, provided you hand me the money," and the Court is satisfied there is no other ground of contestation. Upon a case, after it had been regularly constituted, the decree would be for a specific performance, and the question, Who is to blame for giving rise to the litigation? would merely affect the cost.

In our case there was a further difficulty. The plaintiff insisted upon a deed with *general warranty*. Mrs. Isler was only willing to execute a deed without *any warranty*. Both parties were mistaken as to the legal effect of the contract of sale.

When one makes a contract of sale for his own benefit there is an implication, from the nature of the transaction, that he will make a deed with general warranty. When a trustee makes a contract of sale, inasmuch as he is not acting for his own benefit, there is no implication that he will bind himself by a general warranty, but the implication from the nature of the transaction is that he is to give a special warranty that "he has done no act since the title vested in him to impair or affect it."

When a mortgagee with power of sale makes a contract of sale without any stipulation as to a warranty of title, or that there is no prior incumbrance, he is not professing, when he advertises the property for sale, to be doing an act for his own exclusive benefit, but he says, "I hold the title to this land with a power of sale to secure a debt. I now offer to sell for the purpose of getting my money." So the idea that the title of the mortgagor was to be warranted to be free of incumbrance could not have been entertained by the plaintiff when he bid at the auction. If he had such a notion, as soon as he saw from the advertisement that Mrs. Isler had not offered the land for sale "free of incumbrance," he would have become satisfied that he was under (558) a mistake.

The case is narrowed to this: "Does the proposal of sale, to wit, the advertisement, exempt the vendor from a covenant that she had done no act to affect or impair the title as it was at the time it passed to her?"

Classing the case of a sale by a mortgagee under a power of sale, with a sale by a trustee, Mrs. Isler was bound to execute a deed with covenants that she had done no act to affect or impair the title as it was at the time of the execution of the mortgage.

The judgment is affirmed with this modification: S. W. Isler will execute a deed to B. M. Isler reconveying the legal title, and B. M. Isler will then execute a deed to plaintiff in fee, to be approved by the clerk, with a covenant that she has done no act to impair or affect the title as

it was at the date of the mortgage, and with the further modification: "each party to pay his own cost."

PER CURIAM. Modified and affirmed.

Cited: *West v. West,* 76 N. C., 47; *Faircloth v. Isler, ib.,* 49.

(559)

MALCOLM J. BUIE v. JOHN CARVER.

Deed to Slave—Ejectment—Evidence.

1. The act of 9 March, 1870 (Bat. Rev., chap. 35, sec. 37), concerning conveyances to persons while slaves, does not apply to a case where one having himself no title made a parol conveyance of land to a slave, and put the slave in possession more than ten years before the passage of the act. That act extends only to cases where the alleged donor or vendor had title himself.
2. As the act of 22 March, 1875 (Laws 1874-'75, chap. 2, sec. 6), affects the remedy of parties only, it does not interfere with vested rights, and is not unconstitutional or void.
3. In an action to recover real estate it is not error to allow a deed for other land than that in controversy to be read in evidence to corroborate statements of witnesses.

ACTION to recover real estate, tried before *Buxton, J.,* at January Term, 1876, of CUMBERLAND. The case was before this Court at June Term, 1875, on a question of evidence only.

Plaintiff claimed under a regular line of deeds, connecting his title with the original grant from the State in 1810, his immediate title being under deed from Joseph L. Haughton, dated February, 1859, which claim of title it was admitted covered the land in dispute. It was also admitted that at the time this action was commenced defendant was in possession of the disputed land. All the deeds of this claim of title plaintiff introduced as evidence at the trial.

Defendant offered in evidence a deed of gift of the land from plaintiff to his son Daniel Buie, dated 15 June, 1865, which, however, was probated and registered on 1 October, 1875, and argued that plaintiff having parted with his title could not bring this action. Plaintiff objected to the reading of this deed in evidence because it had not been registered within two years after its date, as required by law (Bat. Rev., ch. 35, sec. 1), and the Legislature of 1874-'75 had not passed the
(560) usual extension act; and further, because at the date thereof, as was admitted, the defendant was in actual possession of the land,

claiming adversely to plaintiff, so that by the provisions of section 55, C. C. P., no title passed to the said Daniel Buie.

While the matter was in discussion *sub judice* the defendant, as he said, by way of estopping plaintiff from denying that he had conveyed the land to his son, offered in evidence a deed from his son, said Daniel, to plaintiff conveying a life estate to plaintiff in the land. This deed was dated 16 June, 1865, and was probated and registered 2 October, 1875. Plaintiff urged the same objection to this deed as to the former as regards its registration, and argued further that if admitted by the court its effect was to pass a life estate to plaintiff, and thus place him *rectus in curiam*. His Honor excluded both deeds as not affecting the case, and defendant excepted.

It was in evidence that defendant had formerly been a slave, but his owner had permitted him to buy himself, and that Jonathan Evans, now dead, had acted as his trustee or agent.

Defendant testified that on 16 December, 1852, he bargained with one Daniel Cornbow for 100 acres of land, 50 acres of which constituted the land in dispute; the other 50 constituted a tract which was admitted he now owned in fee, and that he paid the price through his agent, Evans. That Cornbow lived in a house on the disputed tract at the time of the sale, and moved out, and defendant moved into it, immediately after the sale, and defendant had continued in possession without disturbance from plaintiff until after the late war. Defendant introduced no deed to himself for any of the land, but introduced corroborating evidence as to the extent and adverse character of his possession of the disputed land, and that plaintiff's overseer had heeded defendant's orders forbidding his crossing a chopped line around the land made by defendant. Plaintiff introduced Thomas Cornbow, a son of Daniel (561) Cornbow, under whom defendant claimed, who testified that his father, who was a witness at the former trial of this case, in which there was a mistrial, and who has since died, stated at the former trial that he never owned any land adjacent to that in dispute except 50 acres, which he purchased from William Wright, and this was what he sold to defendant. This witness gave further statements of his father's as to the nature of his possession of the disputed land; that he had put the house on it because not objected to by the owners, etc.

Plaintiff then offered in evidence a deed in fee from Daniel Cornbow to defendant's agent Evans for the 50 acres admitted to belong to defendant which recited that it was the land conveyed to Cornbow by William Wright and bore date 17 January, 1853. Defendant objected upon the ground that the deed so offered was for a tract of land not in controversy, which objection his Honor overruled.

Plaintiff then offered in evidence a deed in fee for the same 50 acres

from one Bolin to said William Wright, dated 24 January, 1843, to which evidence defendant raised same objection as to deed from Cornbow to Evans.

Plaintiff contended that both deeds should be admitted because they tended to corroborate plaintiff's evidence as to what land Cornbow, under whom defendant claimed, did himself claim. His Honor overruled defendant's objection, and defendant excepted. The evidence having closed here, the following special instructions were asked for by defendant:

1. To charge that the defendant having been formerly a slave, his case came within the provision of the statute of 9 March, 1870, relating to donations to persons while in slavery. Bat. Rev., ch. 35, sec. 37. That if they should find that defendant went into possession in December, 1852, under a purchase from Daniel Cornbow, and had re-
(562) mained there ever since, a period of more than ten years prior to the date of said statute, that this purchase, though by parol, accompanied by such possession transferred to him the legal title by virtue of the statute, and the plaintiff could not recover.

His Honor refused to give the charge and, on the contrary, charged the jury that the act of 9 March, 1870, had no application to this case; that the act in question presupposed that the bargainor or donor himself had the legal title and merely validated the transfer to a slave, though by parol, when followed by ten years possession prior to the act, whereas Daniel Cornbow, the alleged verbal donor in this case, had no title himself; besides, the plaintiff did not claim under Cornbow, so as to be estopped to deny Cornbow's title, but was at liberty to assert his own title against any one claiming under Cornbow, whether bond or free. * * * Defendant excepted.

2. Defendant then asked his Honor to charge that if from the evidence the jury believed that at the time the plaintiff Malcolm J. Buie received his deed from John H. Haughton in February 1859, that the defendant was in adverse possession of the disputed land, then the plaintiff had acquired no title to such disputed land by such deed and could not recover in this action; that Laws 1874-'75, ch. 256, ratified 22 March, 1875, did not apply to this action, and that section 2 of said act was nugatory. His Honor refused so to do, but charged the jury that the act of 22 March, 1875, did apply to this case, as it merely affected the remedy against the defendant and not his right, and the court itself could effect the same thing by allowing plaintiff to amend his complaint by making John H. Haughton plaintiff in the action to the use of the plaintiff.

Defendant excepted. Verdict and judgment for plaintiff. Appeal by defendant.

Wright & Ray for plaintiff (563)
Guthrie and W. McL. McKay for defendant.

READE, J. There were a number of objections to the introduction of evidence on the trial below which were not of importance and which it is unnecessary to notice further than to say that we approve of his Honor's rulings thereon.

1. The statute 9 March, 1870, Bat. Rev., ch. 35, sec. 37, provides that where there had been a conveyance of land to a slave, whether by deed or by parol, which he could not hold because he was a slave and which he had had the possession of for ten years before the passage of the statute, such conveyance should have the force and effect to vest the legal title in such person.

And the defendant, who was a slave in 1852, alleges that at that time one Cornbow gave him, by parol, the land in dispute, and that he has been in possession of the same ever since, and that his title is now perfect by force of that statute, and asked his Honor so to charge the jury, which his Honor declined to do for the reason that Cornbow himself had no title at the time he made the conveyance, and for the further reason that the plaintiff did not claim under Cornbow and could not be affected by what Cornbow did.

We agree with his Honor in this ruling, and for the reasons stated by him.

2. We agree also with his Honor that the statute 1874-'75, ch. 256, which allows actions for the recovery of real estate to be prosecuted by the real owner, notwithstanding adverse possession by a third person at the time of the conveyance, embraces this case, although the action was commenced before the passage of the statute, for the reason that the statute affects the *remedy* only.

There is no error.

PER CURIAM. Affirmed.

(564)

A. R. HOMESLEY v. ELIAS & COHEN.

Construction of Contract.

1. By a written contract, 25 January, 1865, A agreed to sell and deliver to B, at the Charlotte depot, 200 bales of cotton to weigh from 300 to 400 pounds at $1.50 per pound, in payment of which B agrees to deliver, at the Cherryville depot, cotton yarns at $45 per bunch of 5 pounds, both cotton and yarns to be delivered in lots as called for, and the whole in six months. A delivered 116 bales of the 200, and refused to deliver any more; and at the time of such refusal, 23 July, 1865, B

had delivered 2,000 bunches of yarn, which overpaid for the 116 bales of cotton by 13,600 pounds of cotton. In an action against A for not delivering the balance of the 200 bales, to wit, 84 bales:

2. *It was held,* 1, that B was entitled to recover the value of the 13,600 pounds of cotton, at the place agreed on for delivery, at the time of refusal, 23 July, 1865, to be estimated in the legal tender of the United States.

3. *Held further,* that B was further entitled to recover the value, at the place of delivery, of such a number of pounds of cotton as would make 84 bales of 300 pounds each, to wit, 25,284 pounds, from which is to be deducted the 13,600 already charged, leaving remaining to be accounted for 11,684 pounds.

4. *Held further,* that A was entitled to recoup from the above damages the value on the said 25 July, at the Cherryville depot, of the quantity of yarn, which by the terms of the contract B was to pay for the 11,684 pounds of cotton, to wit: 1,947 pounds of yarn; A is also entitled to deduct the cost of hauling the 84 bales of cotton to the depot from his warehouse.

5 *Held further,* that if, after deducting the value of the 1,147 pounds of yarn and the cost of hauling from the damages the jury may assess in respect to the 11,684 pounds of cotton, any excess shall remain, it will be added to the damages assessed in respect to the 13,600 pounds of cotton. If the value of the yarn shall exceed the damages assessed in respect to the 11,684 pounds of cotton, the excess will be deducted from the damages in respect to the 13,600 pounds of cotton.

ACTION, for breach of contract, tried before *Buxton, J.,* at Spring Term, 1876, of UNION.

The summons in this suit issued 5 March, 1870, returnable to the Superior Court of Cleveland County, from whence it was removed, on affidavit, to the county of Gaston, and there tried, Fall Term,
(565) 1871, when the jury rendered a verdict in favor of the plaintiff, and he had judgment, from which judgment defendants appealed. See 66 N. C., 330. A new trial was awarded and, by consent, the cause was removed to Union County.

The contract (written) upon which the suit was brought was entered into 25 January, 1865, and contained, substantially, the following stipulations: That the defendants agreed to sell the plaintiff 200 bales of cotton of middling quality weighing from 300 to 400 pounds per bale, to be delivered as called for at the depot in Charlotte within six months from date of contract.

The plaintiff agreed to pay for the cotton at the rate of $1.50 per pound in cotton yarn at $45 per bunch of 5 pounds, to be delivered at Cherryville depot in lots, the whole of said yarn to be delivered within six months.

The plaintiff contended, and proved by his own and the testimony of others, that he had received only 116 bales of cotton, leaving a balance

of 84 bales to make up the 200 which the defendants agreed to deliver, and that he had delivered to them 2,000 bunches of yarn, running from Nos. 7 to 10. He (the plaintiff) further stated that he had the stipulated amount of yarn in his factory, but did not deliver more because he could not get more cotton from the defendants; that he called upon the defendants in Charlotte repeatedly for the balance of the cotton and for a settlement of the whole matter; that defendants refused to deliver any more cotton, saying that they had made a bad trade, had paid cotton enough, and that they thought that plaintiff ought to let them off. Plaintiff also sent one Durham with the written contract to defendants to demand a settlement. Durham had no better success than the plaintiff had before had.

There was other evidence offered by plaintiff tending to prove same facts as likewise those stated in the former report of this case, 66 N. C., 330, and those set out in the opinion of Justice RODMAN, at this term, and which it is deemed unnecessary again to state here.

There was a verdict for the plaintiff for $736.25. Rule by plaintiff for a new trial. Rule discharged. Judgment in accordance with the verdict, and appeal by plaintiff.

Battle & Mordecai and Hinsdale for appellant.
Wilson & Son contra.

RODMAN, J. The stipulations of the parties to the contract of 25 January, 1865, although not concurrent, that is, to be performed at the same time and place, were dependent in the sense that if the defendants refused when called on to deliver cotton the plaintiff might have rescinded the contract and refused to deliver yarn. But it does not follow that plaintiff, who has not rescinded the contract, is not entitled to have damages by reason of the breach of it by defendants. That defendants have broken their contract is clear, and seems to be admitted. The plaintiff is entitled to some damages, and the only question is by what rule they are to be measured.

We think the judge below was mistaken in holding that the (573) damages were in any way affected by the fact that the contract was made during the war, and that the prices of the articles to be exchanged were stated in Confederate currency. The prices of the cotton and yarn were fixed on solely as a way of stating how many pounds of cotton should be paid for by one pound of yarn. The rule of damages is the ordinary one where a vendor of goods by executing contract fails to deliver them. It is found that before 23 July, 1865, the defendants had received yarn enough to pay for all the 116 bales of cotton and delivered by them and for 13,600 pounds more.

The plaintiff is therefore entitled to recover:

1. The value of this quantity of cotton at the place agreed on for delivery at the time of the refusal, fixed by the witness Durham as 23 July, the value to be estimated in legal tender of the United States. The sum thus found is subject to no deduction, except a possible one hereinafter mentioned.

2. The value at the place of delivery on the day stated of such a number of pounds of cotton as would make the 84 bales which were not delivered, this number of 84 bales being the difference between the number delivered (116) and the number agreed to be delivered (200). The value to be estimated as aforesaid, subject, however, to a deduction to be presently stated.

As a *bale,* as used in this contract, is an uncertain quantity, it must be ascertained how many *pounds* the defendants were bound to deliver. The contract says that the 200 bales shall weigh "from 300 to 400 each."

It is settled that when a contract is in the alternative, that is, that the obligor is bound to do one of two things, the option is with him, until a breach, which of the two he shall do, and he may discharge himself by doing either. 2 Chit. Con., 11 Am. Ed., 1061; *McNilt v.* (574) *Clark,* 7 Johns., 465; *Smith v. Sanborn,* 11 Johns., 59; *Choice v. Moseley,* 1 Bailey, 136.

In *Small v. Quincy,* 4 Greenl. (Me.), 479, where the contract was to deliver "from one to three thousand bushels of potatoes," it was held that the obligor might deliver any quantity he chose between those limits.

It is said, however, that *after* breach the obligee may select the alternative which is the most advantageous to him, and claim damages for the nonperformance of that. We conceive that rule to apply only to cases in which the promise was to do some act, or to pay a certain sum in money; or where it was to pay a certain sum on one day, or a larger sum on a subsequent day. In those cases the money, or the larger sum, is regarded as in the nature of stipulated damages. The rule cannot apply to a case like the present, where the defendants, by refusing to deliver any part of the cotton, have exercised their option of refusing to deliver the larger quantity, and elected to be liable for the nondelivery of the smaller quantity. Their obligation is to pay damages for not having done at the due time what they were then bound to do, in order to discharge themselves, and as they could have discharged themselves then by a delivery of the less quantity, they can now discharge by paying damages for the nondelivery of that quantity only.

Taking the obligation of defendants in its legal effect to be to deliver bales of 300 pounds each, they are liable for the nondelivery of 84 bales of 300 pounds—that is, 25,284 pounds. From this must be deducted the

13,600 pounds the value of which has been already charged against them. When they pay the damages in respect to that quantity, it will be the same thing as if they had delivered it; and if they had done so, it would manifestly have reduced by that much the quantity in arrear. After this deduction there remains 11,684 pounds, for the value of which defendants are liable, as aforesaid, of the 13,600 pounds.

3. Defendants, however, are entitled to recoup from the above damages the value on 25 July, 1865, at the Cherryville depot, (575) of the quantity of yarn, which by the terms of the contract plaintiff was to pay for said 11,684 pounds of cotton, that is to say, 1,947 pounds of yarn. For, of course, the plaintiff cannot recover the cotton, or its value, without paying, by deducting it, the price, which he agreed to pay for it. The defendants are also entitled to deduct the cost of hauling 84 bales of cotton from their warehouse to the Charlotte depot. If, after deducting these two items, viz., the value of 1,947 pounds of yarn and the cost of hauling, from the damages, which the jury may assess in respect of the 11,684 pounds of cotton, any excess shall remain, it will be added to the damages assessed in respect to the 13,600 pounds of cotton. If the value of the yarn shall exceed the damages assessed in respect to the 11,684 pounds of cotton, the excess will be deducted from the damages assessed in respect to the 13,600 pounds of cotton. We think the discharge of the plaintiff, in bankruptcy, will not prevent the defendants from recouping the plaintiff's damages by the amount of damages accruing to them by reason of his nondelivery of the yarn. The debt of the plaintiff is only what remains after such deduction.

Judgment below reserved, and

PER CURIAM. *Venire de novo.*

Cited: Coal Co. v. Ice Co., 134 N. C., 588; *Horner v. Electric Co.*, 153 N. C., 539; *Berbarry v. Tombacher*, 162 N. C., 500; *Lumber Co. v. Furniture Co.*, 167 N. C., 567.

(576)

BENJAMIN BYNUM v. G. W. BAREFOOT, EXECUTOR OF A. J. BAREFOOT.

Payment on Judgment.

A debtor may pay money (on a judgment) to the clerk of the court before an execution issues or after the execution has been returned. He has no right to pay the same to the clerk when the execution is in the hands of the sheriff.

APPEAL from *Seymour, J.*, at Fall Term, 1875, of WILSON.

The plaintiff sued upon a judgment obtained at Fall Term, 1862, of

WILSON, in the name of T. H. Mallison, to the use of Benjamin Bynum, against A. J. Barefoot. The defendant admitted the rendition of the judgment, but alleged that the same had been paid and satisfied, and pleaded no assets. Upon the question of payment, the case was submitted to the jury.

In the course of the trial the defendant offered in evidence the following receipt, to wit: "Received from J. W. Davis, for Thomas H. Mallison, one hundred and twenty-nine dollars and ninety-six cents, payment of bill of cost in the court of equity in the case of *James R. Barnes, etc., v. Thomas H. Mallison.* 25 March, 1864. Geo. W. Blount C. M. E." The defendant offered to show by the clerk of the court that this receipt was found among the court papers (*i. e.,* the judgment roll) in the original cause of T. H. Mallison, to the use of *Bynum v. Barefoot,* in order to show that Mallison was the agent of Bynum, and that he had received a part of the money paid upon an execution issued upon said judgment and used it in another suit; and to show that Mallison, who was the legal plaintiff of record, had used a part of this money.

(577) This evidence was offered after it was in proof that an execution had issued on said judgment and had been paid in Confederate money, and after evidence had been given showing that neither Bynum nor Mallison had had any communication with the officers of the court, or access to its papers during the war.

His Honor excluded said receipt and all evidence relating thereto. Defendant excepted.

It was also in evidence, and not denied, that in 1860 the plaintiff, who resided in Craven County, being the owner of a note given to him by the defendant's testator for the purchase money of a slave, gave the same to his son-in-law, Mallison, to take to Wilson, and put in a train of collection. Mallison gave the note to a lawyer in Wilson who brought suit on it, in the name of Mallison to the use of Benjamin Bynum against the defendant's testator. The attorney originally employed having entered the Confederate service, turned over the case to another member of the bar, Mr. Lancaster, who obtained judgment thereon in December, 1862. His name appeared on the docket as the attorney of record, and he receipted upon the execution docket for the tax fee.

At the time the judgment was rendered, and thereafter, until the end of the war, both Mallison and Bynum resided within the lines occupied by the U. S. forces, and they never had any communication with their attorney, agents or the officers of the court with reference to this judgment until the fall of 1865.

Within six weeks after obtaining said judgment, the clerk, in accordance with the provisions of an act of the General Assembly, issued an execution to the sheriff of Wilson County, and in consequence of pres-

sure from the sheriff, and to prevent his property from being seized, the testator of defendant, then defendant in execution, paid the amount thereof into the office of the Superior Court clerk in Confederate money. At the time of such payment, January, 1863, business men in said county transacted their ordinary affairs by means of such currency, and debts before the war and otherwise were paid in it. There (578) was no evidence that the money in question was ever paid to the plaintiff or to Mallison, but still remains in the office.

In the fall of 1865 plaintiff came to Wilson to see after his debt, and finding that it had been collected in Confederate money, refused to receive the same. The original defendant, A. J. Barefoot, died in September, 1873, and the plaintiff sues his executor to Fall Term, 1874. The testator, the said A. J. Barefoot, had in possession a large amount of real and personal property at his death, but was notoriously financially embarrassed. No demand was made on Barefoot before his death for this debt. This Bynum explained by stating that he consulted counsel, who advised him not to sue, in consequence of the stay laws, and afterwards in consequence of the alleged fact that Barefoot was insolvent; and that after his death he was advised that his, Barefoot's, estate would turn out to be solvent.

There was no evidence that the plaintiff or Mallison had ever forbidden the issuing of an execution, and there was no evidence that the defendant in the execution, had ever been informed that the plaintiff or Mallison had refused the Confederate money paid into office as aforesaid.

His Honor being of opinion that the question involved were matters of law, and that the parties did not materially differ as to the facts, prepared a statement of the facts, which was agreed to, with one or two suggestions by defendant, who insisted on submitting the case to the jury. This was done on the question of payment or nonpayment.

As the question in this Court was confined to the simple one: Had the clerk of the Superior Court authority to receive the money in payment of the judgment whilst an execution for the same was in the hands of the sheriff? It is unnecessary to set out the defendant's prayer for special instructions, as also his Honor's full and elaborate charge to the jury upon all the points that arose for decision in (579) the court below. The jury, under the instructions of his Honor, having found a verdict for the plaintiff, judgment was accordingly rendered thereon. From this judgment the defendant appealed.

Smith & Strong and Kenan & Murray for appellant.
Green, Justice and Woodward, contra.

PEARSON, C. J. When this case was heard at the last term it occurred to us to be so strange that the clerk, after issuing an execution, would

receive the amount of the judgment in Confederate notes, which the plaintiff, being within the lines of the United States forces, could not get out of his office, and could not use, even if he got them, that we held the case over, and directed a *certiorari* to send up the execution.

It is in the usual form, issued 12 January, 1863, returnable the tenth Monday after the fourth Monday in September next, and is indorsed *fi. fa.* to Fall Term, 1863. The sheriff makes no return.

So the fact is that Barefoot paid the Confederate notes into office in *January,* 1863, soon after the *fi. fa.* issued, whereas the *fi. fa.* was not returnable until *Fall* Term, 1863. We can only account for this haste to pay a debt upon the idea of a fraudulent *certiorari,* to "spoil the Egyptians," and extinguish a debt to parties who had taken sides with the Yankees.

1. Had the clerk a right to receive the money in satisfaction of the judgment while an execution was in the hands of the sheriff?

At common law a debtor was obliged to seek his creditor "whereso-
ever he may be within the four seas." This doctrine bore hard
(580) on debtors, and to relieve them it is enacted by statute (Rev.
Code, ch. 31, sec. 127,) that after the creditor reduces his debt to judgment, the debtor may pay the money to the clerk, "although no execution may have issued, and such payment of money shall be good and available to the party making the same."

We construe this statute to mean that the debtor may pay the money to the clerk before any execution issues or after an execution is returned, but it cannot be strained to cover a case where an excution has issued and is in the hands of the sheriff. It is not within the mischief, the debtor can make payment to the sheriff and need not seek for the creditor. If the clerk can receive the money, the debtor may slip to the office and satify the judgment, and thus cheat the sheriff out of his commissions, or else the sheriff may exact commissions when he has not collected the money.

A decision in favor of the plaintiff might have been put on the ground that the clerk had no authority to receive the money in satisfaction of the judgment while the execution was in the hands of the sheriff.

2. Suppose the debtor had a right to pay the *money* to the clerk while an execution was in the hands of the sheriff; payment in Confederate notes was not a payment in money, as required by the statute. *Purvis v. Jackson,* 69 N. C., 474. A decision for the plaintiff might have been put on this ground.

3. Suppose the defendant was authorized to pay the money to the clerk, notwithstanding there was an execution in the hands of the sheriff, and suppose the defendant had actually paid the money to the clerk. So that under ordinary circumstances it would have satisfied

the judgment, yet as in this case there was the extraordinary circumstance that a war broke out, and all communication with the plaintiff was cut off, such payment in money would not have had the effect to extinguish the judgment unless the plaintiff had actually received the money.

The war put an end to all agencies, whether that created by the statute, or that created by the relation of the client and attorney, (581) and the idea that a payment in Confederate money to the clerk, pending an execution in the hands of the sheriff, is out of the question. *Fritz v. Storn,* 22 Wallace, 198.

PER CURIAM. No error.

BENJAMIN JUSTICE v. HULDA EDDINGS.

Ejectment—Parties—Constitutional Law.

1. Title to land cannot be passed when a third person is in the actual adverse possession. Sec. 55, C. C. P., provides that an action may be maintained by a grantee of land in the name of a grantor, when the grant is void by reason of the actual possession of a person claiming adversely, etc.
2. A defendant who is allowed to defend an action for the recovery of land, without giving bond to the plaintiff, is entitled to recover costs.
3. A description of "two acres," excepted out of a deed by plaintiff to one S. E. for eighteen acres of land (which is sufficiently described), the said two acres being allotted to the common schoolhouse by metes and bounds, is sufficiently definite to give effect to the exception.
4. The Act of 1874-'75, which allows a purchaser who has obtained a deed to sue for the land in his own name, concerns only the mode of procedure, and does not affect the merits of the case. The act is not unconstitutional.

ACTION for the recovery of two acres of land, tried before *Schenck, J.,* at Spring Term, 1875, of CLEVELAND.

A jury trial was waived, and the whole matter was tried by the court.

The plaintiff introduced a deed, properly registered from one Beam to himself, dated 12 September, 1863, for forty acres of land, including the *locus in quo.* Also a deed from the plaintiff to Spencer Eddings, the husband of the defendant, now dead, dated 14 Sep- (582) tember, 1863, for 18 acres of the same land, which also included the *locus in quo.* In this last deed was a reservation, to wit, "excepting two acres allotted to the common schoolhouse, by metes and bounds." Also, a deed, dated 28 March, 1874, from the school committee of Township No. 6, to plaintiff, for two acres of land, which embraces the lands claimed by him in this action.

Plaintiff further introduced one L. A. Bolls, who proved that Bean had possession of the land contained in the deed for the 40 acres, for 30 or 40 years, and others before him and going back 50 or 60 years.

The defendant introduced a deed from the clerk of the board of commissioners to defendant, dated 7 May, 1870, which was *locus in quo;* no official seal attached.

Defendant also introduced one Bridgers, clerk of the board, who executed and delivered the deed, and he testified that the board of commissioners of Cleveland County had no official seal at that time, and also showed the order of the board to him to make the deed to the defendant.

It was also proved that the defendant had been in possession of the *locus in quo* ever since her deed in 1870, using it as her property, and a part of which she had enclosed and cultivated.

The court thereupon found as facts:

1. That defendant was in the adverse possession of the lands under color of title when the school commissioners conveyed to the plaintiff March, 1874.

2. And his Honor was also of opinion, as a question of law, that the reservation in the deed from the plaintiff to the defendant of the 18 acres was void for uncertainty, and that there was no evidence which cured this defect in said deed so as to make it certain.

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

(583) *Battle & Mordecai for appellant.*
No counsel contra.

PEARSON, C. J. Title to land cannot be passed where a third person is in the actual adverse possession; hence, in the action of ejectment under the old mode of procedure, it was the practice to lay a demise in the name of the grantor, and demises in the name of any one of the persons in the chain of mesne conveyances under whom the lessor claimed, as the pleader was advised.

C. C. P. excludes this convenient mode of having several counts, and as a substitute therefor provides (section 55): "An action may be maintained by a grantee of land in the name of a grantor when the grant is void by reason of the actual possession of a person claiming adversely," etc.

The attention of the plaintiff was called to this objection in the court below, but he was not advised to amend, and the objection is fatal to the action. The defendant was entitled to judgment upon this point, and it is not necessary to consider the others set out in the case.

It is insisted, as the defendant was allowed to defend without giving bond for costs and damages under section 382, Bat. Rev., title "Code of Civil Procedure," although entitled to judgment "to go without day," she was not entitled to judgment for costs. This is put on the idea that she is allowed to defend *in forma pauperis.*

The statute is silent on the subject of costs; the proviso relieves the defendant from giving the bond under certain circumstances, and the matter is left to stand upon the general law in respect to costs. There is no error.

After the opinion in this case was filed the attention of the Court was called to Laws 1874-'75, ch. 256, which allows a purchaser who has obtained a deed to sue for the land in his own name. The act takes effect from and after its ratification and extends to existing (584) suits. It is the duty of counsel to aid the Court in regard to the law, and particularly in regard to the many new statutes which were enacted during the transition state.

The statute concerns only the mode of procedure and does not affect the merits of the case, therefore nothing can be said as to impairing the obligation of contracts.

The act of the General Assembly cited is not in violation of the Constitution, and controls the case, so far as this point is concerned, upon the question as to the description of the two acres in dispute. We differ with his Honor, and are of opinion that the description is sufficiently definite to give effect to the exception, although it would have been relieved from all ground of objection had the metes and bounds been set out.

The description is "two acres excepted out of a deed by Benjamin Justice to Spencer Eddings for eighteen acres of land (which is sufficiently described), the said two acres being allotted to the common schoolhouse by metes and bounds."

The two acres is not left at large, but is pointed at as a part of the eighteen-acre tract. It is further pointed at as being the two acres allotted to the schoolhouse. Of course, this means the school committee of the district. See the case of the Lunatic Asylum.

It is further pointed at, and we think sufficiently identifying, as being the two acres allotted by metes and bounds; all that is left to be done is to "fit the description to the thing," and if the two acres sued for fit the description in all the particulars, being a part of the eighteen acres being allotted to the school committee as being embraced in metes and bounds, so as to put it off to itself, then it is sufficiently identified under the rule, *Id certum est quod certum reddi potest.*"

"My house and lot in the town of Jefferson" is held to be a sufficient description when the grantor owned but one in the town. "The tract

(585) of land on which A. B. now lives," and other instances too numerous to mention, all show that the description is not so indefinite as to make the exception void, but may be helped out by rules of law based on the policy, *"Ut res magis valeat, quam pereat."* The deed on its face purports to convey eighteen acres, with an exception of two acres; in other words, the deed only intends to convey sixteen acres, and it is with an ill grain that the purchaser, or one claiming under him, can claim the whole eighteen acres.

For this error in the ruling of his Honor there will be a

PER CURIAM. *Venire de novo.*

Cited: Dempsey v. Rhodes, 93 N. C., 128; *Robbins v. Harris,* 96 N. C., 560; *Bailey v. Brown,* 105 N. C., 129.

FREDERICK J. SWANN AND OTHERS v. GEORGE MYERS.

Construction of Will.

A testatrix devised to her executors, and to the survivor and the executor of such survivor, certain real estate, "In trust and confidence, for the several interests and purposes, provisions and limitations hereinafter expressed and declared, that is to say, to the separate use and behoof of the said F. S., for and during her life, and after her death, *in trust* as aforesaid, to the use of such child or children as may be alive at her death"; and the said testatrix, in a former clause of her said will, having given to her executors and the survivor of such executors, and the executors of such survivor, power to sell said real estate in certain events, which was done to one B, in 1836, only one of the executors of the original signing the conveyance, and signing as agent for his co-executors; and which was also conveyed to B by the life tenant F. S., and her husband; and which was also conveyed to said B by the life tenant F. S., and her husband: *Held*, that this was the limitation of an "use upon an use," and that B took the trust estate during the life of F. S., and that until her death his possession, and those claiming under him, was not adverse to the children of F. S., who were claiming the same under an executory, contingent bequest.

(586) ACTION for the proper construction of a will, commenced on 9 April, 1873, in NEW HANOVER, and thence removed to COLUMBUS upon the affidavit of plaintiffs, and there tried before *McKoy, J.*, at Spring Term, 1876.

The suit was instituted to recover a certain storehouse and lot on Front Street, in the city of Wilmington, claimed by plaintiffs as tenants in common, and damages for its detention. Plaintiffs claim under the

will of Alice Heron, deceased, which was duly proved at May Term, 1813, of the Court of Pleas and Quarter Sessions of New Hanover County, to which said will John Waddell and John R. London were named as executors. In her will the testatrix devised as follows:

"I give and devise to my executors hereinafter appointed all that tract of land lying between the southern boundary of Wilmington and the Greenfield plantation; also all my land lying on or near Long Creek in New Hanover County, to be sold by my executors or the survivor or the executor of such survivor and the money arising from the sale of said tract or tracts, first deducting legacies to William and Mary McKenzie, to be loaned upon interest until it shall amount to $1,500, and then such sum to be expended by my executors or the survivor or the executor of such survivor in the improvement of my lots hereinafter devised *in trust* to the use and benefit of my granddaughter, Frances Swann. I give and devise all the residue of my real estate of whatsoever value and kind to John Waddell and John R. London, the survivor and executor of such survivor *in trust* and confidence for the several interests and purposes, provisions and limitations hereinafter expressed and declared; that is to say, to the separate use and behoof of the said Frances Swann, for and during her life, and after her death *in trust* as aforesaid to the use of such child or children as may be alive at her death; or in case or my granddaughter Frances' demise without children or a child, but leaving the issue of such child or children (587) last mentioned—provided, however, that if at the death of my granddaughter Frances neither has issue, or the child or children of such issue shall be at the age of 21 years or after the death of my granddaughter none of her issue or the children of her issue shall arrive to the years of 21—then, and then only, to the use of those who would have inherited my estate had Frances died without issue or children of such issue in my lifetime."

That the said testatrix, in a subsequent clause of her said will, devised as follows: "And it is my will that the trustees aforesaid and the survivor and the executor of the survivor, in the soundness of their discretion, may join with the *cestui que use* or guardian of the *cestui que use* in making any conveyance of the above property settled in trust as aforesaid as may to them seem proper."

Upon the trial in the court below the following matters and facts were admitted to be true, to wit: That the premises in dispute are a part of the real estate devised by the residuary clause of real estate above cited; that the same are a part of the premises and professed to be conveyed in the deed to Erastus Buck hereinafter referred to, and that the defendant claims the same under a title derived from said Buck; that the same, are, and have been in the possession of the defendant since 27

July, 1853; that John Waddell did not qualify as one of the executors of said Alice Heron, the testatrix, but that John R. London, the other of the said executors, duly qualified as such when the will was proved; that said London survived the said Waddell, but afterwards died, leaving a will in which Marsden Campbell and William C. Lord were named as executors, who duly qualified as such in the said Court of Pleas and Quarter Sessions of New Hanover County.

It was also admitted that the said Frances Swann, wife of John Swann, survived her husband, dying in July, 1871; that her hus-
(588) band, the said John died in 1836, and that the children of the said Frances living at the time of her death are the plaintiffs Fred. J. Swann, born 15 October, 1823; Lucy, wife of Alexander Waddell, born 25 January, 1831; Rebecca, wife of Frederick W. Swann, born 20 September, 1829; Anne Swann, born 10 September, 1818, and Mary, wife of Arthur J. Hill, born 7 January, 1811; and that these are the only children of the said Frances Swann, the granddaughter of the testatrix, Alice Heron, living at the death of her mother.

The defendant George Myers claimed title to the premises in dispute under a deed to said Erastus Buck, executed 12 February, 1836, and duly proved and registered, from said John Swann and wife, Frances. It, the deed, was also executed under the hand and seal of William C. Lord, one of the executors of John R. London, trustee, and purported to be executed under the hands and seals of Marsden Campbell as executor of John R. London, trustee, by the said William C. Lord, attorney; but defendant offered no evidence of any power of attorney or any other authority whatever from the said Campbell to said Lord to sell said premises or to execute said deeds for and in his (the said Campbell's) name.

Defendant Myers also put in evidence a connected chain of title covering the premises from said Buck down to himself and relied on his possession and that of those under whom he claimed, with color of title, as a bar to a recovery by the plaintiff.

Several witnesses were introduced by defendant to show that Erastus Buck and persons claiming under him had been in the actual possession and use of the premises all the time from the date of said deed to said Buck to the trial of this action, claiming the same as their own. The defendant also proved that there was no actual notice to him of
(589) the trusts declared in the will of Alice Heron until after the acceptance of his deed and the payment of the purchase money, which evidence was objected to by the plaintiff, but admitted by the court, his Honor holding that the defendant had constructive notice from the deed reciting the trusts being registered at the time of purchase in the county of New Hanover. It was also proved that the con-

sideration, $2,000, set forth in the deed to Erastus Buck was a full and fair price at the date of the deed for the lands described in said deed.

The judge presiding submitted the following issues to the jury:

1. Has the defendant and those under whom he claims had continuous adverse possession of the premises in dispute under successive and connected deeds from the execution of the said deed to Erastus Buck, viz., 12 February, 1836, to the commencement of this action?

2. What damages are the plaintiffs entitled to for use and occupation of said lands?

To the first of said issues the jury responded: The defendant and those under whom he claims have been in continuous possession under successive and connected deeds, and including the deed to Erastus Buck, from the date of said deed, to wit, 12 February, 1836, to the commencement of this action, and claiming under said deeds.

In response to the second issue the jury found the value of the premises from July, 1871, the date of the death of said Frances Swann, to the time of the trial of this suit, to be $5,650, that being at the rate of $1,200 a year.

The plaintiffs contend that the estate of the plaintiffs in the premises has not been divested, and that they are entitled to recover for the reasons, among others, that the said deed to Erastus Buck not having been executed by Marsden Campbell, one of the executors of John R. London, trustee, nor by the parties entitled to the remainder in (590) fee in the trust after the death of Frances Swann was void, and therefore passed no estate, legal or equitable, in the premises to said Buck. And even if that position is not correct no right to the use of the premises passed for a longer period than the life of Frances Swann.

That if the legal title was vested in Erastus Buck by said deed, yet the conveyance was a breach of trust; and as the defendant claims the premises under a title derived from said Buck he was fixed with constructive notice of the breach of trust by the will of Alice Heron, which was recorded in the clerk's office, and the deed to Buck registered in the register's office of New Hanover County, when he purchased, and therefore the plaintiffs are entitled to recover.

That the possession of the premises by the defendant and those under whom he claims, as found by the jury, does not bar or affect the title of the plaintiffs; that said possession was not adverse as to the plaintiffs prior to the death of their mother, Frances Swann, the plaintiffs, by the provisions of the will of Alice Heron, not being entitled to the use and the provision of the premises until her death.

It was contended by defendant's counsel:

1. That the legal and equitable title passed by the deed to Erastus Buck.

2. If not, that deed was a defective execution of the power contained in the will of Alice Heron which will be aided by the court.

3. That from a long possession under a chain of title, as found by the jury, the law presumes the execution by all necessary parties of a proper conveyance in execution of said power.

4. If not, that from the facts as found the law presumes everything necessary to protect the possession, and therefore presumes that
(591) Marsden Campbell joined in the sale and then made a proper power of attorney to Lord to execute the deed in his name.

5. That the legal estate of the trustee being barred by the long possession under color of title, the equitable estate of the plaintiff is also barred.

His Honor being of opinion that the plaintiffs were not entitled to recover gave judgment in favor of the defendant, from which judgment the plaintiffs appealed.

Smith & Strong, Battle & Mordecai, and W. McL. McKay for appellants.

M. London and A. T. & J. London contra.

PEARSON, C. J. The will of Mrs. Heron shows on its face that it was written by one who had just enough "law learning" to confuse him and to confound the judges and lawyers who are called on to say what it means.

Why the draftsman declares a use to the executors for the use of Frances Heron for life, and then for the use of her children, so as to make it a use upon a use and take it out of the operation of 27 Hen. VIII; and why he limits the legal estate to the executors of the surviving executor instead of to the surviving executor and his heirs, which is the technical word to make a fee simple, we are not able to conjecture. The intention of the testatrix would have been carried out by giving Mrs. Sneade a life estate in the land, with a limitation to such child or children (and the issue of such as died in her lifetime) who were living at her death and should have arrived at the age of 21 years, with a power in the executors to join with Mrs. Swann in selling the whole or any part of the land if in their judgment it was advisable to convert the land into money, then it would have been plain sailing.

We do not concur with his Honor in the opinion that the plaintiffs were not entitled to recover, meaning that the defendant had acquired the title by adverse possession; and taking that view only, as is
(592) done by the pleading and the argument before us, we think that Mrs. Swann took under the will an estate for life in the trust, as distinguished from the use; in other words, the "use upon the use," and

that her trust estate was a general trust and not a special trust; in other words, she was entitled to the possession and the permanency of the profits and not merely a right to receive the profits from the hands of the trustees for her separate use and maintenance. We also think that the limitation over of this trust to the children of Mrs. Swann who answered the description was valid, whether as a contingent remainder or an executory contingent trust it is not necessary to decide, although we incline to the opinion that it could not be upheld as "a contingent remainder," because there is a "possibility upon a possibility," and because the remainder does not depend on the particular estate and await its determination, for there might be twenty-one years between them. But the limitation will be upheld as an executory devise, as it complies with the rule of perpetuity" and must take effect, if at all, in a life in being and twenty-one years and a few months for gestation."

We also think that the plaintiffs fill the description and are entitled to the estate, unless the land has been transferred under the power or has been lost by reason of adverse possession.

2. The land did not pass in fee simple by the deed executed by W. C. Lord for himself and as agent of Marsden Campbell and by Mrs. Swann and her husband in 1836.

In the absence of a power of attorney from Campbell to Lord as a part of "the paper title," the power of sale was not executed. "When a power of sale is given to two it is necessary for both to join in the deed." *Wasson v. King,* 19 N. C., 262, it is treated as settled law. Mrs. Swann and her husband also executed this deed with all of the formalities required by law, and as things have turned out it becomes a (593) very important matter to ascertain whether her life estate passed to Buck, the purchaser. In 1836 Buck, if he could not get the fee simple under the power, would not have objected to taking the life estate under the common-law right of Mrs. Swann to sell it; but now, after a long adverse possession, it suits the purpose of the defendant better to say "that deed was wholly inoperative." Buck was a disseizor, and the title has ripened under the statute, so as to give me the true title. The question in the case is, Did the life estate of Mrs. Swann pass to Buck by her deed of 1836? For if it did, then Buck and those claiming under him were not in adverse possession and were not exposed to the action of the trustee as long as Mrs. Swann lived.

That a married woman owning an estate for life in a trust estate has *jus disponendi* is laid down in all of the books unless there be a restraint upon the power of alienation. In our case the defendant's counsel took the ground that the power of sale given to the executors created such a restraint. We do not think that can be inferred by the true construction of the provisions of the will; the power has no inference to the

jus disponendi of the *life estate,* and leaves that intact, but authorizes a sale of the fee simple, provided the trustees deem it to be advisable as supplemental to the right to sell the life estate vested in Mrs. Swann by force of her ownership of such estate. Again, it was said Mrs. Swann owned a life estate in a trust, and her deed passed only the trust, leaving the legal estate in the trustees, whose duty it was to enforce their legal estate by action. So Buck's possession was adverse to them, and their right of action is barred, *ergo,* the trust estate expectant upon the life estate is defeated under the familiar doctrine that when the legal estate is lost the trusts dependent on it, whether vested or contingent, go with it.

Whether by the deed of Swann and wife in 1836 the legal estate for her life passed to the purchaser by power of the statute (1 Rich. (594) III), together with the trust, is a question which we are not called on to decide. Mr. Saunders, in his learned treatise on the doctrine of uses and trusts (see pages 36-42), expresses the opinion that a use upon a use does not come within the operation of that statute, for the reason that at the date of the statute this subtle idea had not been conceived, and was only started to evade the statute. 27 Hen. VIII, page 43. This reason, in respect to a trust in fee simple, is not satisfactory, as it seems to me. The mischief which 1 Rich. III was intended to remedy, to wit, a fraud on the purchaser of a use by a transfer of the legal title to some third person before making a deed to the purchaser, extends equally to the purchaser of a "use upon a use"; and as the statute in general words provides, "the purchaser of a use shall have the legal estate without a conveyance by the trustee," it would seem to follow that the purchaser of "a use upon a use" should also have the legal estate by this "parliamentary magic"; and it will be noted that the exception of "a use upon a use," out of the operation of 27 Henry VIII, is put on the ground that as the statute carries the legal estate to the taker of the first use it would involve an absurdity if the statute, *"uno flatu,"* took the legal estate from the taker of the first use and carried it to the taker of the second use. This reasoning has no application to the purchaser of "a use upon a use" under 1 Richard III and no attempt was made to evade it by any such subtlety. However this may be, it is clear from all the authorities and from principle that the purchaser of a trust estate for life does not acquire the legal estate under 1 Richard III; there is no provision for *dividing* the legal estate, as is done by 27 Henry VIII; and if the entire legal estate passes to the purchaser of a particular estate in the trust the other parts of the trust would have nothing to support them. See *Battle v. Petway,* 27 N. C., 576; *Badham*

v. Cox, 33 N. C., 456, in regard to sales of trusts under execution. Assuming that Buck, being the purchaser of "a use upon a use" (595) for the life of Mrs. Swann, did not acquire the legal estate, but that it remained in the trustee, it is certain that if the trustees had brought an action against Buck or those claiming under him during the lifetime of Mrs. Swann their action would have been enjoined in equity on the ground that Buck was the assignee of the trust estate to which Mrs. Swann was entitled for her life. So the trustees could not have maintained an action and recovered possession of the land until after the death of Mrs. Swann in 1871; and, granting to its full extent the rule that when the action of the trustee is barred by the statute of limitations, the equitable estate of the *cestui que use* is gone also, except so far as there may be a remedy against the trustees for compensation for negligence in permitting the adverse possession to be uninterrupted until it ripened into a good title. In our case the trustees could not have interrupted the possession of Buck during the lifetime of Mrs. Swann; so, whether the legal title passed to Buck for the life of Mrs. Swann, or whether the legal title continued in the trustees fettered by the fact that Buck was the assignee of the trust for the life of Mrs. Swann, the possession of Buck and those claiming under him did not become adverse until the death of Mrs. Swann.

For the error of his Honor in ruling that the possession under Buck was adverse there must be a *venire de novo*. We are not at liberty to give judgment for the plaintiffs on the issues found, for the facts are not set out as on a special verdict or a case agreed. Perhaps it is well, as the value of the property is large, as shown by the affidavit for removal, that the case should assume in some measure the nature of the old action of ejectment, which did not conclude the title. We think proper to call the attention of the counsel of plaintiffs to the fact that the complaint has no averments as to the executors of J. R. London. Are they living or dead? Did they die testate or intestate? These are (596) matters about which the court must be satisfied by the pleadings before a judgment can be rendered in favor of the plaintiffs "to have possession of the land and recover damages." They "own a use upon a use"; how are they to get the legal title? Can a *cestui que trust* maintain an action for land without joining the trustees?

What was the quantity of estate given to the executor of the surviving executor? If only a particular estate, where is the legal estate? Who are the heirs at law of Mrs. Heron and of the executors of the living executor? These questions are not presented by the pleadings and were not noticed on the argument, but there must be an adjudication in respect to them before the case can be disposed of by final judgment. If

Mrs. Swann was the heir or one of the heirs of Mrs. Heron, how does that fact affect the operation of her deed to Buck?

These necessary amendments may be allowed in the court below.

PER CURIAM. Error.

Cited: *S. c.*, 79 N. C., 101, 103; *King v. Rhew,* 108 N. C., 699, 701, 704; *Cameron v. Hicks,* 141 N. C., 24.

STATE v. POOL.

(597)

(See 74 N. C., 402).

Justices READE and RODMAN dissenting from the opinion of the majority of the Court in this case, which was reported, 74 N. C., 402, and before the dissenting opinion of Judge RODMAN was received, it is now published as part of that case, 74 N. C., 402.

RODMAN, J., dissenting: It is, and, as I am informed, has been for many years, understood among the justices of this Court that every dissenting opinion must be filed at the same term at which the judgment is rendered. The custom is a good one, and I would not depart from it without the consent of the associates from whom I differ, nor then except when by reason that the opinion of the majority was ascertained and delivered very shortly before the adjournment no time was left for the dissenting justices to put their views in writing.

The present case derives its chief importance, in my opininon, by reason of its belonging to a class of cases respecting the rights of persons dwelling or owning lands on or near streams not technically navigable as being within the ebb and flow of the tide, or navigable in the sense of permitting the access of sea-going vessels, or even available at all seasons for navigation by canoes or for the floating of logs, etc., by which at the seasons of the usual rains are so available, and are at all times available and necessary for the proper drainage of the country whose surface water naturally flows into them. This species of rights has acquired new importance recently by reason of the enterprise which in several parts of the State is being directed to the improvement

(598) of lands which lie on the banks or at the heads of such navigable water-courses. To a person proposing to himself the improvement of a piece of land so situated it is an indispensable inquiry what facilities or what obstructions does the law of the State present. The law as applicable to the many cases which may arise cannot be consid-

ered settled, and its final settlement on just principles requires a full discussion.

A case decided by this Court is settled between the parties, but it can never be deemed satisfactorily decided until it is brought under some general and acknowledged rule of equity. When this is once done with reasonable certainty the case is settled forever; it becomes an authority and passes into the text-books as a valuable illustration or gratification of the rule.

To come to the case in hand:

I cannot believe that the Legislature, in the act under consideration, inadvertently used the word "or" instead of "and." Doubtless in construing a statute you may suppose such an error sometimes; but this is legitimate only when the act, being read as it is written, has no meaning or an unreasonable and absurd one. A court has no right to alter a word in an act of Assembly which, as it stands, gives to the sentence a sensible meaning, because the court may think that the act with that meaning would be unnecessary or inexpedient. To do that is to legislate.

In the act the words forming the first clause of the sentence are these: "If any person shall willfully fell any tree, or willfully put any obstruction except, etc., in any branch, creek or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, *or,* etc., the person so offending shall be guilty of a misdemeanor," etc.

The meaning is sensible and clear without any change in the words. And it is neither unreasonable or absurd. The act merely generalizes, and applies to all the creeks, etc., in the State, a provision which had been previously enacted by special acts as to very many (599) creeks, etc. These acts begin at an early period and continue to the date of the act in question. At the single session of 1868-'69 six acts were passed to forbid obstructing certain named watercourses, none of which are navigable, and five of these acts made the obstructing a misdemeanor (chaps. 24, 44, 60, 68, 106, 206). Nor are these acts confined to watercourses in the lower part of the State. They relate to the Catawba, Mitchell, Yadkin, Uwharrie rivers, as well as to Rockfish Creek, Little River and Contentnea creeks.

A search through our statutes, I am confident, would show several hundred acts of a similar character since 1715. The very long acquiescence in such acts forbids the belief that their constitutionality was ever questioned or suspected either in the Legislature or in the courts until recently. I refer to the great number of these acts to show that the provision in the act of 1872-'73 was not such a novelty as to require us to read the act otherwise than it is printed in order to give it a sensible

meaning, and also to show that in the opinion of many respectable men such a provision was not absurd or inexpedient.

In my opinion, it is no argument against the power of the Legislature to pass the act that it would be inexpedient or absurd if applied to a certain class of mountain streams which are properly torrents. The meaning of the act does not include such streams as my learned brother refers to in the opinion of the Court. The construction made penal is one whereby the natural flow of the water is lessened or retarded. By any fair construction this means *sensibly and permanently* lessened or retarded—so lessened or retarded as sensibly to damage the public or individuals by reason of it. Any other construction would be obnoxious to the maxim, *"de minimis lex non curat."* These mountain streams which are utilized to wash gold deposits, etc., are incapable of be-
(600) ing sensibly and permanently retarded to the damage of any one. They burst away or rise over or rush around the obstruction and do not stagnate behind it. It is otherwise with the watercourses to which the act does apply. Few of these below the falls of the rivers have a fall of more than a foot to the mile in times of low water. A slight obstruction catches and detains the leaves and branches and trunks of trees as they float slowly down. These catch the earth, and soon a compact dam is formed, which stagnates the water when it is low, so as to produce disease, and retards it when it is high, so as to forbid drainage. An obstruction, or a series of obstructions, which raises the water one foot damages more or less of the land above for miles, depending upon the amount of fall and other circumstances. The navigation by canoes and floating timber, of which nearly all these watercourses in their natural condition are susceptible, is prevented.

To obstruct the natural flow of water so as to injure the public health is a nuisance at common law.

To obstruct a watercourse so that the public cannot travel it in canoes is as much a public nuisance at common law as the obstruction of a highway on land, for a watercourse is a highway *jure naturæ*. 13 Rep., 33; Noy. Rep., 103; 3 Kent Com. (11 ed.), 412, 428, 439; *Hendricks v. Johnson,* 6 Port. (Ala.), 472; *Davis v. Fuller,* 12 Vt., 178. To obstruct a natural watercourse so as to render impossible or more difficult the drainage of the adjoining lands, though the obstruction does not certainly or sensibly injure the public health, and although the watercourse in its natural condition was not susceptible of any sort of navigation, may or may not be an indictable offense at common law. In my opinion, on common-law maxims it is, but I have found no direct authority to that effect, unless it be the cases cited from the Year-books and
(601) other old authorities in Woolryck on Waters, 177. But it seems to be everywhere assumed. 3 Kent Com. (11 ed.), 439.

But that the Legislature may declare any and every obstruction to the natural flow of water, whereby an injury of either of these classes is caused, a criminal offense without proof that the public health was injured by it—about which doctors will always dispute in any given case—and without proof that any particular traveler was prevented from passing in his canoe, and without proof that any particular land was rendered more difficult of drainage, I cannot doubt. From an act which is always, or generally, accompanied by drainage the statute may make a presumption that drainage followed, and dispense with proof of it, just as on an indictment for obstructing a highway on land it is unnecessary to prove that any particular traveler was impeded. The police power of a State, as is said by Cooley (Const. Lim., ch. 16), includes the power to make all regulations necessary to promote the public health, welfare, and convenience. If this power does not include a power to make penal the obstruction of a watercourse, which is, at the least, likely seriously to injure public and private interests, then the State is denied the most beneficial power of sovereignty, and must sink into insignificance and contempt.

Neither is it any fair argument against the constitutionality of this act to say that under it persons could be punished for *diverting* watercourses on their own lands for domestic or other useful purposes. The diversion of a stream is a different thing from sensibly and permanently retarding its course. The law respecting such an use of it by riparian proprietors is well understood, and may be found in the text-books. The present act has no bearing whatever on such rights.

But it is said the bed of Swift Creek is private property, and the Legislature cannot appropriate it to public use without compensation. Admit that the bed of the creek at the point where the obstruction was placed was the private property of the defendant, as *in a* (602) *qualified sense* it was. He did not thereby have the right to erect on it either what was a nuisance at common law or what the Legislature had declared to be one. The ownership of all property is subject to the maxim, *"sic utere tuo ut alienum non lædas."* The act does not attempt to appropriate the land of the defendant to a public or private use. It prohibits him from no legitimate use of it. It is not a law special to him. It embraces the whole people, and says of all owners of the beds of such streams, you shall not so use your property as to injure the public or your neighbors.

It seems to be supposed that because the grant to the predecessor of the defendant by its calls passed across the creek and included its bed the defendant thereby acquired a title to the bed, if not quite superior to the maxim I have cited is at least superior to and free from the right of the public and of other riparian proprietors to have the water flow without

obstruction in its natural course, and superior even to the police power of the State.

For this proposition *S. v. Glenn,* 52 N. C., 321, and *Cornelius v. Glenn, id.,* 512, are cited. Whether those cases can be sustained on any grounds I do not propose to inquire, but in my opinion they cannot be sustained on the grounds stated by the learned judge who delivered the opinion of the Court in the first of those cases, and which are repeated in the second. The learned judge admits that if the State grants land bounded on one side by a non-navigable stream the grantee, by construction of law, acquires a title to the bed of the stream to its middle thread, subject to a public easement and to certain private rights. So if by another grant on the opposite side of the stream he acquires a title from that side to the middle thread he thus, by construction of law, acquires a title to the whole bed, subject as aforesaid.

(603) Of such proprietor he says, on page 326): "As the riparian proprietor of the land on both sides of the stream he is clearly entitled to the soil entirely across the river, subject to an easement in the public," etc.

This just and admitted doctrine is derived from Lord Hale, whose treatise is the foundation of the law of waters. It is affirmed in very numerous cases.

The opinion then proceeds: "But he (the defendant Glenn) is much more than a riparian owner. He claims under a direct grant from the State for the bed of the river, in which the State, for what she deemed a fair equivalent, conferred on those from whom he derives title the full ownership of the soil *without any reservation whatever, except* the right to impose such imposts and taxes as may be necessary for the support of the government."

The only authority cited for this distinction is *People v. Platt,* 17 Johns., 195. On an examination of that case it will be found to give no support. The defendant was indicted for a nuisance, in that he kept up a dam across the mouth of Saranac River, which empties into Lake Champlain, and thereby obstructed the passage of salmon from the lake to the river. And a second count charged that he kept up said dam without having constructed a slope for the upward passage of salmon, as required by two statutes passed in 1801. The defendants acquired title to the land at the mouth of the river on both sides and for seven miles up the river by a grant dated in 1784.

The grantee created a dam across the mouth of the river in 1780, and had continually maintained it up to the date of the indictment, a period of over thirty years. The river was not navigable for any sort of boats, and salmon could not ascend the stream much, if any, higher than the defendant's upper boundary, below which he had the exclusive right of

fishing. Thus it will be seen that Platt's right to maintain his dam and obstruct the river did not depend, and was not put by the Court, although some expressions in the opinion may seem to (604) have that meaning, solely or mainly on the ground that his grant covered the bed of the river, but on the perfectly tenable ground that from such long enjoyment a special grant would be presumed to erect and maintain the dam, after which it would clearly be beyond the power of the State to compel its destruction without compensation. This doctrine no one will dispute. It was competent to the State of New York to grant to Platt the right to erect a dam across a river unnavigable in any sense, and by presumption of law it did so. It was equally competent to this State to have granted to Glenn, by a special grant authorized by act of Assembly, a similar right. But the difference between the two cases is that there was no evidence that this State had ever made such a grant. There was no law to authorize a special grant, and if the Secretary of State had undertaken to sign one it would have been void. After some search I have not found in any text-book or decision an approval of the distinction taken by the learned judge in *S. v. Glenn;* nor have I found anywhere else such an interpretation put on *People v. Platt,* and it is incredible that if Kent had thought that such a doctrine had been held in that case he would have omitted all notice of it when treating of the rights over water at the places referred to. The distinction is not attempted to be supported by any reason except that the State had received from Glenn *what she deemed a fair equivalent.* I will deal with this question presently.

In my opinion, the distinction is not sustained by reason, and is opposed to common right and to the received principles of the common law. Whether the bed of a stream be embraced in a grant by construction of law or passes to the grantee because it is included by the calls of the grant, is immaterial. The land passes in either case, subject to the public easement and to the rights of other riparian proprietors, and subject, as all property in the State must be, to its un- (605) alienable police power. *Lewis v. Stein,* 16 Ala.

Now let us consider whether the distinction has any foundation in reason, and is consistent with admitted principles of law.

It is a familiar rule that grants from the State—differing in this respect from grants from individuals—are construed most favorably for the State. Nothing passes by implication or except by express words.

The form and words of all grants for lands by the State are the same. When by its calls a grant includes land over which a stream flows there need be nothing in the grant to show that it is for land so situated, and there are no words in the grant different from those ordinarily used or professing to convey any peculiar rights or privileges.

The Secretary of State has no discretion in issuing grants if the legal conditions, which are the same for all grants, are complied with. The price per acre is the same for all lands, whether covered by flowing water or not. The State is paid only for the land granted and receives no consideration for its supposed grant of a most valuable public easement and for its destruction of the rights of all upper riparian proprietors. In fact, it may be doubted whether the State could rightfully make a grant in derogation of their rights as such proprietors under previous grants.

The proposition that the State made a special grant to Glenn of special rights is unsupported by anything in his case, and the like supposition is unsupported in the present case.

It is not stated how far above or below the obstruction the ownership of the soil by the defendant extends. It may be for a very short distance only. If it be beyond the power of the Legislature to make the obstruction of such a stream as this an offense it follows that no action can be maintained by reason of it. Being a rightful act and a legitimate exercise of the right of ownership of the soil it is *damnum absque injuria.* (606) All others similarly situated above and *below* the defendant may erect like obstructions. The result would be to prevent entirely the flow of the stream in ordinary seasons, and thus reduce a very large quantity of the most fertile land in the State to the condition of a morass, which the law says shall never be reclaimed as long as the trivial and selfish interests of one man forbid it.

I think the judgment should be affirmed.

Cited: *S. v. Sutton,* 139 N. C., 579, 582.

NOTE.—Two other cases, owing to not receiving the necessary diagrams, are transferred to Volume 76.

APPENDIX

RULE ADOPTED JUNE TERM, 1876.

In all civil actions in which an appeal to this Court shall be taken from a judgment of the Superior Court, if the appellant shall fail to bring up a transcript of the record and to cause the case to be docketed according to the rule of this Court of June Term, 1869, before the end of the week assigned to the district, the appellee may file a transcript of the record and cause the case to be docketed, and may thereupon move to dismiss the appeal at the costs of the appellant, which will be allowed unless cause be shown to the contrary.

In such case no order will be made setting aside the dismissal or allowing the appeal, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid the costs of the appellee in procuring the transcript of the record and in causing the same to be docketed.

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