ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 77

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1877

REPORTED BY
THOMAS S. KENAN

ANNOTATED BY
WALTER CLARK
3 ANNO. ED.

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JUNE TERM, 1877

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1877

A. P. HOLLAND ET ALS. v. S. W. ISLER ET ALS.

Taxation—Municipal Power.

The commissioners of Goldsboro have the right, under the power granted in the town charter, to impose and collect a monthly tax on resident physicians and lawyers.

CONTROVERSY, submitted without action under C. C. P., sec. 315, and heard at Fall Term, 1876, of WAYNE, before *Seymour, J.*

The plaintiffs are the mayor, commissioners, and tax collectors of the town of Goldsboro.

The defendants are lawyers and physicians residing in said town, who resist the payment of a monthly tax assessed by the plaintiffs under the power granted in the charter of said town.

His Honor held that plaintiffs had a right to impose and collect the said tax. Judgment. Appeal by defendants.

W. N. H. Smith for plaintiffs.
S. W. Isler for defendants. (2)

READE, J. The Constitution provides that "the General Assembly may tax trades, professions," etc. Art. V, sec. 3. The General Assembly has authorized the town of Goldsboro "to lay and collect a monthly tax on lawyers, physicians," etc. Pr. Laws 1866.

The defendants are lawyers and physicians in the town of Goldsboro, and the town has laid a tax upon them which they refuse to pay. This would seem to make a clear case against the defendants.

PER CURIAM. Affirmed.

Cited:. Wilmington v. Macks, 86 N. C., 90; *Winston v. Taylor,* 99 N. C., 213; *S. v. Danenberg,* 151 N. C. 720; *Guano Co. v. New Bern,* 158 N. C., 356.

S. COHEN & CO. v. THE COMMISSIONERS OF GOLDSBORO.

Towns and Cities—Unlawful Ordinance—Practice—Injunction.

The remedy for an injury resulting from the operation of an unlawful town ordinance is not by injunction. The party injured has complete redress in an action for damages.

APPEAL from an order granting an injunction, 13 June, 1877, by *Moore, J.*

The application of the plaintiffs for an injunction was based upon an affidavit stating that they were merchants in the town of Goldsboro, and were dealing in a general variety of groceries, including fresh beef; that the defendant commissioners had adopted a town ordinance forbidding the sale of fresh meat except under certain restrictions, to the injury of plaintiffs; that they were arrested and fined for a violation of
(3) said ordinance, and were compelled to suspend their business.

Thereupon his Honor adjudged that the clerk of the court issue an injunction restraining the defendants from interfering with the business of the plaintiffs, upon their giving bond for such costs and damages as may be awarded against them upon the final hearing, if the court should decide that they were not entitled to the relief demanded. From this judgment the defendants appealed.

Busbee & Busbee and Badger & Devereux for plaintiffs.
W. N. H. Smith for defendants.

READE, J. If the defendants have an unlawful ordinance, and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages; and as often as the arrest may be repeated, they have the like rdress. But we are aware of no principle or precedent for the interposition of a court of equity in such cases.

The injunction is dissolved and the case dismissed.

PER CURIAM. Reversed.

Cited: Wardens v. Washington, 109 N. C., 22; *Scott v. Comrs.,* 121 N. C., 95; *Vickers v. Durham,* 132 N. C., 890; *Paul v. Washington,* 134 N. C., 368, 385; *Hargett v. Bell, ib.,* 395; *S. v. R. R.,* 145 N. C., 521; *Crawford v. Marion,* 154 N. C., 74.

(4)

THE NORTH CAROLINA RAILROAD COMPANY AND THE RICHMOND AND DANVILLE RAILROAD COMPANY v. THE COMMISSIONERS OF ALAMANCE.*

Taxation—Assessment—Refunding Tax Illegally Collected.

1. Where taxes illegally assessed have been paid under protest, the taxpayer is entitled to recover back the same.
2. In such case it is the duty of the Commissioners of the county to refund the county tax illegally collected, and to certify to the auditor of the State the amount of State tax illegally paid into the treasury, and it is his duty to draw his warrant upon the Treasurer for the amount due the taxpayer.
3. No taxes are due or recoverable on property which has not been assessed for taxation.
4. Property can be listed for taxation only in the year, and for the year, in which taxes are due.

(The method of refunding taxes illegally assessed and collected discussed and explained by MR. JUSTICE BYNUM.)

APPEAL from Fall Term, 1876, of ALAMANCE, *Kerr, J.*

The facts in this case are substantially the same as stated in *R. R. v. Comrs.,* 76 N. C., 212: the plaintiffs demanding that certain taxes, illegally paid, be refunded, and the defendants refusing to comply therewith.

The judgment given by his Honor in the court below was in favor of the plaintiffs, and the defendants appealed.

J. E. Boyd for plaintiffs.

E. S. Parker and Merrimon, Fuller & Ashe for defendants. (5)

BYNUM, J. It has been decided by this Court that the real estate held by the North Carolina Railroad Company for right of way, station places and workshop location is exempt from taxation until the dividends or profits of the company shall exceed 6 per cent per annum; and it has also been decided that the dividends or profits have not yet exceeded that amount. *R. R. v. Comrs.,* 74 N. C., 506; *R. R. v. Brogden, ibid.,* 707.

*The opinion in this case was filed at the last term.

It has also been decided that the exemption from taxation under the act of 1854-55, sec. 5, for completing the North Carolina Railroad, extends only to that portion of the workshop location which is actually occupied and used by the company for workshops, and that the residue of said real estate is not exempt from taxation. *R. R. v. Comrs.*, 76 N. C., 212. It follows that so much of the tax as has been assessed and collected on the exempted part of the workshop location has been illegally collected, and that having been paid under protest by the company, and in order to release the engines levied on, and thus keep the road in operation, the plaintiff is entitled to recover it back in any appropriate action. *Briggs v. Lewiston,* 29 Me., 472; *Erskine v. Van Arsdale,* 15 Wall., 75; Cooley on Taxation, 568.

The application here is not under Bat. Rev., ch. 102, sec. 16, for a revision or correction of the valuation put upon the property, but is under sections 17, 18 of the same chapter, for refunding a tax illegally assessed and collected under protest. The application is therefore in apt time, and would be until barred by the statute of limitations.

By the provisions of section 18, above cited, upon the application of the party aggrieved it is made the duty of the board of commissioners "to carefully examine the case, and if in their opinion the applicant is entitled to relief, they shall direct the clerk to record on the record book the cause of complaint and the amount which, in their opinion,
(6) should be refunded to the applicant." A copy of this record is then certified to the Auditor of the State, who makes out his warrant on the Treasurer, who, on its presentation, is required to pay the holder the amount to be refunded by the State.

Such is the method prescribed by the act for ascertaining and recovering that part of the illegal tax which has been paid into the Treasury of the State. The other part of the tax paid into the treasury of the county is to be ascertained and recorded in the same way upon the books of the commissioners.

It then becomes the duty of the board of commissioners to direct its payment as other county indebtedness. In default of payment, the creditor is entitled to his appropriate action to enforce the payment of the sum due.

The prayer of the plaintiffs in that the board of commissioners shall thus certify to the Auditor of State the amount illegally paid into the Treasury, and that they shall ascertain and record the amount due by the county and refund it to them. They are entitled to the relief, but not to the extent demanded; for the tax levied upon so much of the workshop location as is not actually occupied and used for workshops is legal. What part of the real estate upon that location is the subject of taxation is fully explained in the other branch of the case before referred to,

(See 76 N. C., 212.) With that exception, all the real estate held by the company for right of way, workshop location, and station places is exempt from taxation.

The rules of taxation applicable to the real estate of this company seem so plain now that there can hardly be a mistake again.

The counterclaim set up against the recovery of the illegal tax is untenable. Where property has not been assessed for taxation, no taxes are due or recoverable; and it has been decided that lands listed for taxation cannot be reassessed after the tax becomes due, either for depreciation or increase of value. *Sudderth v. Brittain,* 76 N. C., 458; (7) Bat. Rev., ch. 102, secs. 24, 25. It would seem equally clear from sections 12, 19 of the same chapter that land can be listed for taxation by the owner, or for double tax by the county commissioners where the owner fails to list it, only in the year and for the year in which taxes are due. Lands cannot be listed or taxed under the revenue law for a year preceding the current year. So that if any real estate liable to taxation thus escapes being listed, no tax is due or collectible; and of course there is nothing upon which the pretense of a counterclaim or set-off can be founded by the defendants here.

It is the duty of the commissioners to deduct from the whole amount of taxes assessed and collected on the real estatte of the company, before described, the sum received on that portion which is liable to taxation as decided in this and the other branch of this case. All in excess of this deduction is illegal tax, and must be refunded. The case must be remanded, to the end that the commissioners may deduct the legal tax proportionally from the amount paid into the State Treasury and the county treasury, and make the necessary orders for refunding the amount in excess of the legal tax.

PER CURIAM. Judgment accordingly.

Cited: R. R. v. Comrs., 82 N. C., 262, 267; *Belo v. Comrs., ib.,* 417; *Johnston v. Royster,* 88 N. C., 195, 196, 197; *Chemical Co. v. Board of Agriculture,* 111 N. C., 137.

(8)

HENRY BAUMGARTEN v. J. S. BROADAWAY.

Injunction—Preponderance of Proof—Sale of Good-will.

1. Where in an action for injunction the plaintiff alleged that he had purchased the business and good-will of the defendant, and that defendant had agreed, as part of the consideration, not to engage in the same business for a specified time, but subsequently did so, and defendant denied that his promise not to engage in business constituted a part of the consideration, and plaintiff sustained his allegation by the affidavit of a witness: *Held*, that upon the preponderance of proof in plaintiff's favor the injunction was properly continued until the hearing.
2. Such a contract is not obnoxious to the rule forbidding contracts in restraint of trade.

MOTION for an injunction, heard at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

On 19 July, 1872, the plaintiff bought of the defendant a photographic gallery and fixtures, and an unexpired lease on certain rooms in the city of Charlotte, and the custom and good-will of the defendant in his business of photography, for the sum of $1,500. The contract was in writing, and as apart of the consideration of the purchase it was agreed that the defendant would not open another gallery or work in the capacity of photographer in Charlotte for a period of ten years from said date.

It was alleged that the defendant, in violation of said contract, had rented rooms in said city and caused the same to be fitted up with the necessary appliances for a photographic gallery, and that he notified the plaintiff of his intention to open a gallery, and that he had actually opened the same and commenced work as a photographer.

The defendant admitted the sale and payment of said sum to him, but denied that the good-will entered into or formed any part of the consideration of said purchase. He alleged that he signed the contract after the sale and payment of the money, and that the statements contained in the contract did not constitute an inducement to the bargain, and that
(9) the property sold to plaintiff, aside from other considerations, was worth the purchase money, according to its market value. The establishment of a gallery for the purpose of operating as a photographer was also admitted by the defendant, but he denied that in so doing any valid contract between him and the plaintiff had been violated.

The affidavit of Isaiah Simpson, the subscribing witness to the agreement between the parties, substantially corroborates that of the plaintiff, viz., that the sale and the contract were parts of the same transaction, and that the inducement which prompted the plaintiff to buy the gallery,

good-will, etc., was to prevent the defendant from opening another gallery or working in said city as a photographer.

Upon the hearing of the case, his Honor allowed the motion and ordered that an injunction issue restraining the defendant, his agents, servants, or employees, from opening or carrying on a photographic gallery in Charlotte, etc., as prayed for by the plaintiff, and the defendant appealed.

J. W. Hinsdale for plaintiff.
Shipp & Bailey for defendant.

FAIRCLOTH, J. The plaintiff alleges that the consideration for his money was defendant's apparatus, his good-will, and his agreement not to engage in photography in Charlotte for the next ten years. The defendant denies the latter part, and says that his written promise not to engage in said business in ten years, dated 19 July, 1872, was made after the sale of the apparatus was completed, and was without consideration. The subscribing witness to said written promise, one Simpson, in his affidavit sustains the plaintiff's allegation that the agreement not to engage in the same business again in ten years in that place was a part of the consideration for which the plaintiff paid his money. If this be true, it is immaterial whether the papers were signed and delivered at the same time or not, or whether they were delivered at the time (10) the money was paid. If done separately and at different times, they constitiute one contract, if so intended by the parties, which is a question for a jury. We think upon this preponderance of testimony the injunction was properly continued until the hearing. There is nothing in the contract according to the affidavits of either party, obnoxious to the rule forbidding contracts in restraint of trade. Benjamin on Sales, 419.

PER CURIAM. Affirmed.

(11)

E. B. PAXTON, EXECUTRIX, ET ALS. v. C. M. WOOD AND W. C. WOOD, EXECUTORS.

Bond—Surrender and Cancellation—Joinder of Actions—Joinder of Parties—Fraud.

1. The legal effect of the surrender of a bond to an obligor and the cancellation thereof is the same as a release of the cause of action on the bond, and may be pleaded in bar of an action to recover the amount of the same. Such surrender and cancellation is a "deed," and is valid without consideration.

2. An action by legatees to follow a fund on account of alleged fraud which the personal representative (also a legatee) failed to collect, cannot be joined with an action brought by such personal representative to collect the assets of the estate.

3. The Code of Civil Procedure does not warrant the joinder of the principal in an alleged breach of trust as coplaintiff with the person alleged to have been thereby injured, in an action against the parties alleged to have participated in the fraud.

4. Where a debtor accepts from the personal representative of his creditor, by way of compromise, a release of his bond in a settlement between them, paying no consideration therefor, and there is no proof or imposition, undue influence, accident, or mistake: *Held*, that the court will not impute fraud to such debtor.

APPEAL at Fall Term, 1876, of CHOWAN, from *Eure, J.*.

Richard Paxton died in 1863, in said county, leaving a last will and testament, to which the plaintiff, Mrs. E. B. Paxton, qualified as executrix. She is the widow of Richard Paxton and equally interested with her children, the other plaintiffs, as legatee under said will.

Among the articles of personal property left by her testator were two joint bonds against the defendant W. C. Wood and his testator, Edward Wood, amounting in July, 1876, to $6,841.49. Prior to that time one of these bonds was credited with $1,000, paid by W. C. Wood; and Edward Wood at various times had paid to the plaintiff executrix the sum
(12) of $2,125, which was not credited on the bonds in question, but Mrs. Paxton gave her individual notes to said Edward for said sum. She stated, however, in a letter to W. C. Wood, in July, 1867, that said sum was to be credited on said bonds.

The two bonds at that date (exclusive of $2,125 covered by her individual notes) amounted to the said sum of $6,841.49. Mrs. Paxton proposed to W. C. Wood to compromise the matter, agreeing to lose $895.60 and to credit said bonds with the amount of her individual notes. This proposition was accepted, and Edward Wood paid to Mrs. Paxton the amount agreed on, and she surrendered to him the said bonds.

In a subsequent settlement between Edward and his brother W. C., said bonds were surrendered to W. C. and canceled by him, he giving his note to Edward.

Mrs. Paxton was adjudicated a bankrupt in April, 1871, being before that time, then, and now indebted to her children, the other legatees, several thousand dollars.

On the trial below the defendants relied on the plea of satisfaction, payment, release, and the statute of limitations, and, after argument, his Honor being of opinion with defendants, adjudged that they go without day, and the plaintiffs appealed.

A. M. Moore and Mullen & Moore for plaintiffs.
Gilliam & Pruden for defendants.

PEARSON, C. J. The case was heard upon the pleadings and the facts set out in the statement of the case, and we concur with his Honor in the opinion that the plaintiffs did not make out a cause of action.

1. Judgment is demanded on the ground that there is a balance due to the plaintiff E. B. Paxton, as executrix of Richard Paxton, on the two bonds mentioned in the pleadings. It is clear that the sev- (13) eral amounts advanced to Mrs. Paxton, were intended as payments, and are to be so taken. It is not, however, so clear that the $895.60 which Mrs. Paxton says in her letter "she was willing to take by way of compromise" should not be considered as a balance still due upon the bonds.

We have come to the conclusion that the executrix cannot maintain an action for the $895.60 as a balance due on the bonds, for the reason that the bonds were surrendered by her to the obligors to be canceled, and were canceled; by which *deed* their existence was extinguished to all intents and purposes, such voluntary surrender and cancellation having a legal effect entirely different from an accidental loss or destruction of the instruments.

Suppose Mrs. Paxton had executed to the obligors a formal release, that is, "an instrument of writing, sealed and delivered," of her cause of action on the bonds; there can be no question that the release could have been pleaded in bar of her action. The surrender and cancellation of the bonds have the same legal effect; both are *deeds,* the one in the restricted sense of "an instrument of writing, sealed and delivered," the other in the general sense of "a solemn *act done* by the party"; and both are valid without a consideration, by reason of the solemnity of the act done. A deed of gift for a chattel passes the title; so a gift accompanied by an actual delivery passes the title. No consideration is necessary in either instance, for both are *"deeds,"* and no consideration is necessary to make them valid. A feoffment of land passes the title, although there be no consideration, for the act of "livery of seizin" is a *deed,* and although there be an instrument of writing, sealed and delivered, setting out the limitations, conditions, etc., accompanying the livery of seizin, the title passes by the act of making livery, and no writing or consideration is necessary. In conveyances operating under the doctrine of uses a consideration is necessary to raise the use. This, however, (14) is exceptional, as is the necessity for a valuable consideration to make conveyances valid as against creditors under 13 Eliz., and purchasers under 27 Eliz.; but voluntary conveyances and voluntary bonds and all deeds are binding between the parties. It follows that the deed

in fact to wit, the surrender of the bonds to the obligors and the cancellation thereof, has the same legal effect as a deed in writing, to wit, a release of the cause of action on the bonds, would have had.

The doctrine that payment of a part of a debt does not support an agreement to forego the collection of the residue has no application to this case. That rests on the necessity for a consideration to support an *executory* agreement; otherwise, it is not valid, being *nudum pactum.* Whereas we have seen that agreements executed and evidenced by a deed in writing or a deed in fact are valid without any consideration.

2. A decree is prayed for declaring the defendants to be trustees for the plaintiffs as legatees, of the sum of $895.60 not collected by the executrix when she surrendered the bonds (the other claim has been disposed of), on the ground that the obligors committed a fraud in procuring a surrender of the bonds without making payment in full. The two causes of action are misjoined, and are inconsistent, the one being an action by Mrs. Paxton as executrix to collect the assets of her testator, the other being an action by Mrs. Paxton and the plaintiffs as legatees, to follow the fund which she failed to collect. Although the pleader has with much ingenuity confused the matter by the use of generalities, we can hardly suppose even the liberality of C. C. P. will warrant the joinder of inconsistent causes of action. But pass that by.

There is a mijoinder of parties by making Mrs. Paxton the plaintiff in the second action, when she is manifestly a necessary party
(15) defendant; for she was the principal actress in the breach of her trust and fraud alleged, and must be joined with the other defendants, who are alleged to have concurred with her as coadjutors; otherwise we have this singular state of things presented by the pleadings: The plaintiffs allege that they are legatees under the will of Richard Paxton, and that one of them being executrix as well as legatee, committed a breach of her trust as executrix, with the knowledge and privity of the defendants; and the principal in the breach of trust is made a plaintiff in an action to hold her accessory responsible in the first instance; and she not only escapes being called to account for her delinquency, but seeks to charge the defendants by avowing her own turpitude, and avers, as one of the *plaintiffs in the action,* that at the time of the surrender of the bonds she was insolvent, and the obligors in the bonds had notice. She also avers that "she has committed a *devasavit* and is largely indebted to the legatees, and was, in 1871, adjudicated a bankrupt"!

Here we have proof that a mother to serve a child will "sacrifice herself."

After full consideration, we are satisfied that C. C. P. does not warrant the joinder of the principal in an alleged breach of trust with the

persons alleged to have been injured thereby, in an action against the parties alleged to have been accessory to the fraud.

Apart from this objection, we are of opinion that the facts set forth in the statement of the case do not show a cause of action, that is, a sufficient ground on which the court can declare the obligors to have committed a fraud in accepting the surrender of the bonds, and can make a decree by which they are to be converted into trustees for the plaintiffs.

After the introduction of uses into England it became a settled principle that when a feoffment was made without consideration, and without declaration of the uses or a power of appointment, the feoffee holds to the use of the feoffor. This was put on the presumed in- (16) tention of the parties. But the idea that the obligors in our case accepted the surrender of the bonds with an understanding that they were to hold the funds for the use of the legatees is so ridiculous that it would not have been alluded to but for the fact that, as the case is before us, that is the only ground on which the plaintiffs can put their case.

The testator was a man of large estate. His widow was executrix, and under the will was entitled to a part of his estate. The obligors, who owed a large debt to the testator, due by two bonds upon which there had been many and divers payments, both before and after his death, on *the written proposal of the executrix by way of compromise,* paid to her the full amount of the bonds and interest, deducting credits, and including as credits the notes of the executrix, *minus* the sum of $895.60, and she surrendered the bonds to be canceled. This was in 1867. It does not appear what was the condition of the estate at that time, or what was the amount of the legacy to which she was entitled. Afterwards, in 1871, she went into bankruptcy. "She was then, before, and is now indebted to her children, who were the other legatees, several thousand dollars."

It does not appear that she was insolvent, or had so wasted the estate in 1867 as not to have in hand assets amply sufficient to pay the legacies to her children; and from anything that appears, she was in a condition to be able to release or surrender $895.60 without consideration, and let it stand as an abatement of her legacy, without in any way impairing the rights of the other legatees or subjecting herself to the imputation of *fraud.* So the question is, If a debtor accepts from the executrix of his creditor a release or surrender of his bonds, the executrix being a legatee to an amount equal to the balance due on the bonds, does the mere fact that he paid no consideration for the release, in the absence of any proof or suggestion of imposition or undue influence, or of (17) accident or mistake, furnish a ground upon which the court can impute fraud to the debtor and convert him into a trustee for the other legatees of the whole sum thus released, or of a ratable part thereof, deducting the portion of the executrix, upon its being proved that the

executrix afterwards became insolvent and went into bankruptcy, indebted to the other legatees several thousand dollars? No case was cited on the argument bearing directly upon the point. *Wilson v. Doster,* 42 N. C., 231, and that class of cases, establishes the doctrine that one who concurs with an executor in a breach of trust, or in a fraudulent misapplication of the assets, will be converted into a trustee, and be held responsible to the legatees, in aid of their remedy against the executor.

Let us analyze this question: An executor is a trustee for the legatees. The executrix in our case is one of the legatees. For reasons not disclosed to the Court, the executrix proposes to accept payment of the amount due according to her figures, *minus* $895.60, and thereupon to surrender the bonds, which is done.

The state of facts now before us does not authorize a declaration by the Court that the plaintiff, Mrs. Paxton, in this transaction committed a fraud upon her children, or that the defendants had complicity therein.

It may be that in a case properly constituted, and with the necessary averments to show fraud on the part of the executrix and complicity on the part of the obligors, the plaintiffs other than E. B. Paxton may be able to make out a case. All that we now say is, we concur with his Honor.

PER CURIAM. Affirmed.

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(18)

THE PEOPLE OF NORTH CAROLINA ON RELATION OF THE ATTORNEY-GENERAL v. JAMES HEATON.

Judge of Probate—Forfeiture of Office.

1. A judge of probate is not subject to impeachment under Battle's Revisal, ch. 58, sec. 16.
2. By the express terms of the statute (Bat. Rev., ch. 90, secs. 15, 16), a single failure on the part of a clerk of a Superior Court and probate judge to keep his office open on Monday from 9 a. m. to 4 p. m., for the transaction of probate business (unless such failure is caused by sickness), is a distinct and complete cause of forfeiture of his office.
3. Under C. C. P., sec. 366, an action against a judge of probate to vacate his office is properly brought by the Attorney-General in the name of the people of the State.

QUO WARRANTO, tried at Spring Term, 1877, of NEW HANOVER, before *Seymour, J.*

The jury found a special verdict as follows: "That said James Heaton, clerk of the Superior Court and judge of probate for the county of New

Hanover, was, on Monday, 12 March, 1877, as specified in the complaint in this action, absent from his office in the city of Wilmington, and was not present therein at any time between the hours of 9 a. m. and 4 p. m. of that day, the same being the regular office of said clerk and probate judge; that his failure to attend at said office was not caused by sickness; that during said hours said James Heaton was present in a different part of the city at an election there held; that during said hours the doors of said office were open, and one William H. Gerken, his deputy, was present therein, excepting one hour, from about 1 to 2 p. m.; that instructions were left at said office with said deputy to the effect following, to wit, that if any person desired Mr. Heaton to attend to any probate business, he, the deputy, should send for him, or, if such per- (19) son preferred, he, the person desiring to transact business, should be directed to the place where said Heaton, the clerk, etc., then was; that said Heaton made arrangements for the use of a room during the day for the transaction of probate business, and that various persons who had gone to his office were directed to said room, and that said Heaton there took the acknowledgment of divers deeds, and transacted such probate business as was brought before him; that such persons were informed that, if they desired it, said Heaton should be sent for, but preferred them to go to the place where he was. Whether the said Heaton has forfeited his office as averred in the plaintiff's complaint, the jury are ignorant, and pray the advice of the court," etc.

Upon this special verdict, his Honor gave judgment for the defendant, and the plaintiff appealed.

D. L. Russell for plaintiff.
A. T. and J. London for defendant.

BYNUM, J. This action is brought under the following clauses of section 366 of the Code of Civil Procedure: "An action may be brought by the Attorney-General in the name of the people of this State upon his own information, or upon the complaint of any private party against the parties offending in the following cases: . . . (2) When any public officer, civil or military, shall have done or suffered an act which by the provisions of law shall make a forfeiture of his office."

The defendant is is the clerk of the Superior Court of New Hanover County, and the particular duty for the nonperformance of which this action is brought is enjoined in Laws 18171-72, ch. 136, secs. 1, 2 (Bat. Rev., ch. 90, secs. 15, 16), as follows:

"15. The clerks of the Superior Courts of this State shall upon (20) their offices every Monday from 9 a. m. to 4 p. m., for the transaction of probate business, and each succeeding day till such matter is disposed of.

"16. Any clerk of the Superior Court failing to comply with the last section (unless such failure is caused by sickness) shall forfeit his office."

The complaint charges that on 12 March, 1877, being Monday, the defendant did fail to keep open his said office during the prescribed hours for the transaction of probate business, and that the failure was not caused by sickness.

There is another count in the complaint alleging the repeated and habitual failure so to open his office on Mondays for twelve months or more.

The court below refused to hear evidence upon this second count, and ordered to be stricken out because of its vagueness, the plaintiff not offering to amend the complaint. We incline to concur with his Honor, but as we are with the plaintiff on the first cause of action set forth, it is unnecessary to decide this point. For the same reason we do not decide the objection of the plaintiff, that the answer was without verification, although the complaint was verified.

The defendant, in his answer and in this Court, objects, first, to the form of the action, and, second, to the jurisdiction of the Court

1. To the form of the action. Because, he says, being for a public offense highly penal, it is a criminal charge, which, by Art. I, sec. 12, of the Constitution, can only be instituted by indictment, presentment, or impeachment. The answer to this is, that the action is not brought to punish the defendant criminally, but to vacate an office which he has forfeited by a failure to discharge its duties. He is still liable to indictment and punishment for the same or similar offense, both of misfeasance and nonfeasance.

2. The jurisdiction. The defendant insists that a judge of probate is a judicial officer, and, under the Constitution, can be deprived of
(21) his office only by impeachment. The answer is that the Constitution nowhere declares what persons are liable to impeachment. On the contrary, it does provide (Art. IV, secs 31, 32) that for certain cause therein named both the judges of all the courts and the clerks of the Superior Courts may be in other ways removed from office. We are to look not to the Constitution, but to the statute law, to ascertain what persons are liable to impeachment.

The first act under the new Constitution was passed by the Legislature of 1868-69, Bat. Rev., ch. 58, sec. 16 of which enacts that "Every officer in this State shall be liable for impeachment for (1) corruption or other misconduct in his official capacity," etc., enumerating many other causes of impeachment.

The act literally construed, would include not only judges of probate, but justices of the peace, sheriffs, and constables. This was certainly not the intention of the act. Although there is nothing in the act ex-

planatory of section 16 above recited, it probably has reference to "all officers in this State" holding "State" offices in contradistinction to "county" and local offices. But however that may be, we are relieved of all difficulty in our case by the express provisions of the act under which this action is prosecuted. It specifies the officer and the offense, and having been enacted subsequent to the act of 1868-69, operates as a repeal of any conflicting provisions of that act.

The action is properly brought as provided in section 366, C. C. P. *Patterson v. Hubbs,* 65 N. C., 119. The main question is, Does a single failure of the judge of probate to keep open his office on Monday, as prescribed, forfeit his office? The act is precise as well as peremptory: "they shall open their offices *every* Monday from 9 a. m. to 4 p. m., for the transaction of probate business"; "any clerk," etc., *"failing* to comply," etc., *"shall* forfeit his office." By the express terms of the act every failure is a distinct and complete cause of forfeiture; (22) and such we believe is the intent of the act.

The office of judge of probate was created by the Constitution of 1868, and the officer is clothed with a very extensive and responsible jurisdiction over the business affairs of society. He has jurisdiction to take proof of deeds, official bonds and wills; to grant and revoke letters testamentary and of administration; to appoint and remove guardians of lunatics and infants; to bind out apprentices and cancel the indentures; to audit the accounts of executors, administrators, and guardians; and to exercise jurisdiction in many matters prescribed by law. Bat. Rev., ch. 90.

The office of this important officer is a place of constant resort by the citizens of the county, and frequently of more distant parts of the State, in the discharge of business requiring the action and often the speedy and prompt action of that officer. In many counties the courthouse is distant and not very accessible to those having official business with the judge of probate. After some years of experience, the frequent remissness of these officers in their attendance at their offices became a serious evil and a public detriment in an agricultural population, and particularly to those living at a distance, who oftentimes made long journeys to reach the county-seat, and failing to find the clerk, returned home "with their labor for their pains." To remedy this public inconvenience and loss the act in question was passed in 1871-72.

The services of every one who seeks or accepts a public office are due and pledged to the public to the extent and in the manner prescribed by law. If the public exacts a strict performance of these duties the officer has no right to complain. It is the contract. The many are injured by its breach, while one only can be benefited.

The act in question is not unreasonable, in this, that the penalty of the forfeiture of office is annexed to the delinquency of the officer
(23) on one particular day of the week only, relieving him from the penalty for his neglect during all the other days of the week. The reasonable purpose of the law is that there shall be at least one known and designated day in the week when the public having probate business with the clerk may know they will find the proper officer at his post attending to his duties.

It is unnecessary to discuss whether in reason and even in common humanity there should not be other exceptions besides sickness which would relieve the defendant of the penalty. We might suggest many examples which ought to be added to the exception of sickness, and which the courts might accept as excuses falling within the same principle with sickness; as, for instance, a fatal contagion, fire, sickness and death of wife or child, etc. But no such question arises here, for no such excuse is offered. On the contrary, the defendant was voluntarily absent during the office hours of Monday, 12 March, in another part of the city in attendance upon some public election. He had no business there, except it might be as a voter, and he had ample time both before and after his prescribed office hours in which to cast his vote. He did not go to the polls, vote, and return to his office. He did not intend to return that day, for he procured a room at the election precinct and left directions at his office in the courthouse (the place fixed by law) where he might be found or sent for by those having probate business with him. So he might have gone hunting or fishing, leaving behind him similar directions.

The excuse offered is wholly inadmissible, and is a plain breach both of the letter and spirit of the law.

The deputy of the defendant, who himself did not keep the office open during the day as prescribed by law, was not competent to discharge the duties of the defendant as judge of probate, so that the defendant was not actually or potentially present that day in his office in the
(24) courthouse, the place designated by law and used by him as the office of the judge of probate.

It is insisted upon in behalf of the defendant that a single act of omission does not bring his case within the operation of the act making the offense a forfeiture of office. The contrary is the only reasonable construction of the statute. "He shall open his office every Monday," and "a failure to comply with the last section shall forfeit his office," is the language of the act. If a single act is insufficient, how many are necessary to work a forfeiture, and by whom and how is the number of acts necessary to be ascertained?

The rule in civil is the same as in criminal cases, and in the latter it is this: "Whenever the law, statutory or common, casts on one a duty of a public nature, *any* neglect of the duty, or *act* done in violation of it, is indictable." 1 Bish. Cr. Law, sec. 557. Also see *S. v. McEntire,* 25 N. C., 171; *London v. Headen,* 76 N. C., 72.

A single act of neglect or failure is as much a violation of the law as twenty. See 1 Bish. Cr. Law, sec. 913.

Judgment reversed, and judgment for plaintiff here upon the special verdict.

PER CURIAM. Reversed.

Cited: *S. v. Norman,* 82 N. C., 689; *Caldwell v. Wilson,* 121 N. C., 478.

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(25)

JOHN G. KING v. ISAAC PORTIS ET ALS.

Mortgage—Judgment—Execution Sale.

1. Under the statute (Bat. Rev., ch. 35, sec. 12), a mortgage deed conveying land which is not registered in the county where the land lies is not valid as against creditors or purchasers for value.
2. A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. (C. C. P., sec. 254.)
3. Where a purchaser at a sale under a decree of foreclosure, or a purchaser at execution sale, obtains a deed for a tract of land lying in two counties, and the mortgage was registered or the judgment docketed only in one county: *Held,* that such deed conveys no title, as against creditors or purchasers for value, to that part of the land in the other county.

ACTION to recover land, tried at Spring Term, 1877, of FRANKLIN, before *Buxton, J.*

On 16 April, 1866, one Thomas K. Thomas executed a fee-simple deed to a corporation known as the Portis Gold Mining Company, conveying a tract of land and describing it by metes and bounds, and as situated in the county of Franklin. The defendants loaned to said company a considerable sum, and to secure the payment thereof the company executed a mortgage conveying said land to the defendants. In an action to foreclose this mortgage a commissioner was appointed to sell the land, and on 7 November, 1870, did sell the same, at Louisburg, and L. G. Sturgis, one of the defendants, became the purchaser. The purchase money was paid and a deed made to the purchaser, describing the land as aforesaid. The defendants also claimed title as purchasers at execution sale. At the same term of the court, when the above proceeding was had, the

plaintiff obtained judgment against said company, and Thomas K. Thomas, who was director of the company, and its manager. He
(26) (Thomas), knowing that a part of said tract was situated in Nash County, and acting for and under the authority of the plaintiff, procured a transcript of the plaintiff's judgment to be docketed in Nash County, without any notice to the defendants. Execution issued thereon, and the sheriff of Nash sold that part of the land lying in his county, and said Thomas became the purchaser, and assigned his bid to the plaintiff, who obtained a deed from the sheriff. By a survey it was found that 775 acres of this tract were in Franklin and 125 acres in Nash. This action was brought to recover the portion lying in Nash, but his Honor being of opinion with the defendants, gave judgment accordingly, and the plaintiff appealed.

J. J. Davis for plaintiff.
C. M. Cooke for defendants.

FAIRCLOTH, J. Both parties claim the land in controversy under the Portis Gold Mining Company, and it is conceded that the plaintiff has a good title unless the defendant acquired title by prior purchases.

The first question is whether a mortgage of one tract of land described by metes and bounds and registered in one county only—both mortgagor and mortgagee believed the whole tract to be situated in such county—is valid against creditors and purchasers, when in fact a part of said tract is situated in an adjoining county, about which the controversy arises. And this question turns upon the construction of our registration act, Bat. Rev., ch. 35.

At common law the most ancient and public mode of conveying land was by feoffment, and this was effectual to pass freehold estates only by livery of seizin. The object of this ceremony was to give notice of the transfer to the neighboring freeholders of the county, and the feoffment and livery of one parcel in the name of all the other parcels in the *same* county of which the feoffor was possessed were sufficient, because
(27) the freeholders who might be summoned on the jury in the event of a dispute about title had the same notice in regard to the several parcels. If, however, the lands be in different counties, it was necessary to make as many liveries as there was counties, for the season that if controversies should arise, there must be as many trials as there were counties, and a jury in one county were no judges of the notoriety of a fact in another. Co. Litt., 50a.

And so it was in the case of a disseizin. If the disseizee should resort to his writ and the lands lie in different counties, there must be several actions, and consequently several entries, which would not be necessary if the several parcels were in the same county. Co. Litt., 252b.

At a later period the enrollment and registration acts were passed as a more convenient method of giving notoriety to transfers of real property. Deeds and mortgages are valid *inter partes* without registration. But our act, section 12, expressly declares that no mortgage deed shall be valid to pass any property as against creditors or purchasers for a valuable consideration, but from the registration thereof "in the county where the land lieth." It is plain, therefore, that the mortgage was inoperative beyond the limits of the county in which it was registered as against the plaintiff.

The defendant also claims title as purchaser at a sheriff's sale, made in the same county in which the mortgage was registered, under a *fi. fa.* issued upon a judgment docketed in the same county. We do not see how this gave him title to land in the adjoining county. Under our former system, he could not have obtained title or a lien upon such land without an actual levy, and a docketed judgment "shall be a lien on real property *in* the county where the same is docketed." C. C. P., sec. 254.

We are, therefore, of opinion that neither the mortgage nor the judgment was of any affect as against the plaintiff beyond the county in which they were recorded, and we do not see how the sheriff of (28) one county can sell land in another except in special cases provided for by statute. The fact that the land in dispute is a part of the same tract as that purchased by the defendant and described by the same instrument by metes and bounds can make no difference. The lien acquired is limited as above stated.

We are unable to enter judgment for the plaintiff in this Court, because we have no description of the land sued for, nor any means of identifying the same, which probably results from the fact that there is no copy of the complaint filed with the record.

PER CURIAM. Reversed.

Cited: *Allen v. R. R.*, 171 N. C., 341.

*C. C. BARNES ET ALS. v. W. B. FORT ET ALS.

Practice—Evidence—New Trial.

Where the court below is requested to charge the jury that there is no evidence to support a certain allegation, and "the case" does not set out all the evidence so as to enable this Court to decide the question, a new trial will be ordered.

APPEAL at January Term, 1877, of WAYNE, from *Seymour, J.*

This action was instituted to establish a parol trust and to recover the rents and profits of certain lands mentioned in the pleadings, but as a new trial has been ordered upon the ground that the case does not set out all the evidence touching the controversy, a statement of the facts (29) is unnecessary.

W. N. H. Smith for plaintiffs.

H. F. Grainger, S. W. Isler, and F. A. Woodard for defendants.

PEARSON, C. J. Upon a demurrer to evidence, "the case," as a matter of course, sets out all of the evidence, because otherwise the court cannot decide the question.

So when counsel move the court to instruct the jury that there is no evidence to support a certain allegation, which is refused and appeal is taken, we had supposed it to be a matter of course that the case would set out all of the evidence which the judge thought tended to prove the allegation, so as to put it in the power of this Court to decide the question.

Here the statement of the case shows that the counsel of the defendants moved the court to instruct the jury that there was no evidence to support the allegation of a parol trust, or of any consideration to support it, (and he might have added) or of any inducement to make it.

The statement of the case, *which is settled by the judge,* curtly cuts off the motion by setting out, "There was evidence of the parol trust," etc.; so the counsel for defendants say, "There is no evidence"; and the judge says, "There is evidence." How is this Court to decide? *Reductio ad absurdum.*

Upon consultation, it was a question, Shall we require the judge, by *certiorari* or other writ, to amend "the case settled by him," or shall we order a new trial? We decided on the latter course, and were influenced in some measure by the fact that the judge and the jury, in a mere matter of account of rents and profits, differ from $6,800 to $3,000,

*FAIRCLOTH, J., having been of counsel in the court below, did not sit on the hearing of this case.

and for the further reason that because of the vagueness of the (30) complaint in respect to the alleged parol trust, we are not able to see what was the consideration or the inducement for Coley and Sauls to pay $4,200, and let Mrs. Barnes and her children live on the land until after supporting the whole family, the products of the land should be equal to $4,200, with interest, which amount these charitable gentlemen have paid out in cash, plus $6,800 as the jury find, $3,000 as the judge says.

The allegation is disputable, and as the case cannot be disposed of without a statement of the evidence, a new trial is ordered.

PER CURIAM. *Venire de novo.*

GEORGE W. CANSLER, ADMINISTRATOR, ET ALS. v. WILLIAM W. COBB AND WIFE.

Deed—Fraud—Practice—New Trial.

1. Where A. made a deed to his daughter, in consideration of services rendered and to be rendered in attending upon him in his old age, with intent to defraud his creditors, the deed is void, even although the daughter had no knowledge of such fraudulent intent.
2. If there is a discrepancy between the "record" and "the statement of the case" sent by appeal to this Court, the record must govern; and if the discrepancy is a material one, a new trial will be ordered.

(Observations of the CHIEF JUSTICE upon actual and constructive intent to defraud creditors.)

SPECIAL PROCEEDING, commenced in the probate court of LINCOLN and removed to and tried at Fall Term, 1876, of CATAWBA, before *Buxton, J.*

The plaintiffs, creditors, filed a petition to sell the land of (31) Henry Cansler, the intestate, for assets to pay debts. The defendants, who were in possession of the land, filed an answer claiming title under a deed from Henry Cansler to his daughter, the *feme* defendant, dated 19 March, 1869, the consideration expressed therein being $3,000, and the quantity of land conveyed being estimated at 236 acres. The intestate was greatly involved, and had caused his homestead to be laid off upon this tract of land, and in said deed the homestead was excepted. It was alleged that he was not only largely indebted, but totally insolvent when he made the deed. The defendants alleged that he owned considerable property, and that if his other lands which had been sold under execution after the date of said deed had brought a fair price the proceeds would have been amply sufficient to pay his debts; that the consid-

eration of said deed was services rendered by his daughter, the *feme* defendant, and fully equal to the value of the land conveyed, and that the deed itself was a *bona fide* conveyance, without any fraudulent knowledge or purpose on the part of the defendants; that previous to the death of his wife in 1866 intestate became so seriously affected with paralysis as to render his condition helpless, and that constant attention was rendered him by his daughter before and after her marriage, and that she nursed him until he died on 20 February, 1875, at the age of 75 years.

The plaintiff, George W., son of Henry Cansler, was examined by the defendants, and testified as to the helpless condition of his father, and the services rendered by his sister, as alleged by defendants; and also that the intestate informed him, in 1866, that he had made an agreement with his daughter that if she would attend to him the balance of his life he would give her his home plantation for her services. The deed was drawn up by a confidential friend, and the $3,000 inserted by the direction of Henry Cansler on the idea that a money consideration must be stated in a deed. Various estimates were placed by the witnesses
(32) upon the services rendered by the daughter, and upon the value of the land encumbered with the homestead.

Under the instructions of his Honor, which are sufficiently set out by the *Chief Justice* in delivering the opinion, the jury found "that the *feme* defendant had paid a fair price for the land, and did not intend to defraud her father's creditors, although he did." Judgment for defendants. Appeal by plaintiffs.

W. N. H. Smith and G. N. Folk for plaintiffs.
W. L. McCorkle for defendants.

PEARSON, C. J. Hard cases are the quicksands of the law."

If the grantor had died soon after the execution of the deed, the price would have been inadequate; but as he happened to live several years after the execution of the deed, the price paid by the grantee was a full one, and it seems hard that she should lose the land, as she had paid a full price for it. Considerations of this nature ought not to be allowed to affect the rights of the parties. So the case must be determined upon legal principles.

The grantor being greatly in debt after having his homestead and personal property exemptions assigned, was minded to make further provision for his own ease and comfort at the expense of his creditors by conveying to the grantee the residue of his real estate in consideration of her services in waiting upon and attending to him. Beyond all question, the grantor made this deed with an intent to defraud his creditors, and the jury so find.

When the grantor executes the deed with an intent to defraud his creditors, the grantee can only protect his title by averring that he is a purchaser for valuable consideration, without notice of the fradulent intent on the part of the grantor. Bat. Rev., ch. 50, sec. 4.

The case as settled by his Honor sets out that his Honor charged (33) "that if the services rendered by the daughter after she arrived at age were fully adequate to the value of the land, then in respect to these services she was to be regarded in the light of both creditor and purchaser, and the deed would be valid in the absence of any actual intent (on the part of the daughter) to defraud his creditors." His Honor added: "If a fair price was paid, it would require a fraudulent intent in both the grantor and the grantee to avoid the deed."

The case also sets out: "Upon these instructions the jury found, in response to the issue submitted, that the *feme* defendant had paid a fair price for the land, and did not intend to defraud her father's creditors, although he did."

These instructions and the finding of the jury show that the case was not made to turn upon its merits, but upon a point very favorable to the *feme* defendant. No one could suppose that she intended to defraud her father's creditors. Her purpose was to acquire title to the land in consideration of the services she had rendered, and was bound afterwards to render, in waiting on and attending to him until his death. But the fact that she did not intend to defraud her father's creditors is not enough to support the deed in spite of the fraudulent intent on the part of her father. If she had notice of his fraudulent intent, that avoids the deed, for it makes her *particeps criminis;* and "the deed would be valid in the absence of *any actual intent* (on the part of the daughter) to defraud his creditors"; the word *actual* being used to exclude constructive intent implied from the fact of notice, and whether used with that intent or not, it certainly was calculated to mislead the jury.

A. Says to B.: "I find I owe more than I can pay. My object is to get money and go to Texas. You can have my land for a fair price in cash." B. agrees to buy the land and pays the money. (34) The creditors can take the land from B. on the ground that although he purchased at a fair price, yet he had notice. True, B. had no *actual intent* to defraud the creditors of A. His purpose was to buy the land. Still, he had notice that the intent of A. was to defraud creditors, and such notice fixes on him a *constructive* intent. But for his aid A. would not have been able to dispose of his land and leave the country. This is familiar doctrine, and is applicable to our case, although such instances are of rare occurrence.

The proposition that a man who owes more than he can pay can provide a support for himself for the balance of his life by conveying his

land in consideration that the grantee will furnish such support, and thus defy his creditors, will not bear a statement. The peculiar circumstances of this case—the grantor a helpless old man, the grantee his daughter, who alone can nurse him, and that she performed the services with faithfulness—do not take the case out of the operation of the principle, although it makes the application more difficult in practice by reason of the sympathy which it is calculated to excite.

Upon looking over the record we are embarrassed by a discrepancy between the issue there set out and the issue set out in the statement of the case.

The Record: Issue No. 5.—"If his purpose was to delay, hinder, and defraud his creditors, did his daughter know of that purpose? Ans.: She did not."

Statement of case: "Upon these instructions, the jury found, in response to the issue submitted, that the *feme* defendant had paid a fair price for the land, and did not intend to defraud her father's creditors, although he did."

The rule in such cases is that the record governs, but when the discrepancy is a material one, it results in a new trial, because it shows that either the judge or the jury, or both, did not understand the case. If his Honor thought that an *actual intent* on the part of the daugh-
(35) ter to defraud her father's creditors, and notice merely that such was his intent, are identical propositions, he was under a grave mistake, as we have seen, and his charge was calculated to mislead.

It will be noted that the *feme* defendant does not, in her answer, deny that she had notice that her father was greatly in debt, and that his object was to take care of himself at the expense of his creditors. It is set out in the deed that her father had his homestead assigned; so she knew that much, and she also knew that $3,000 was certainly set out as the consideration paid by her, when in truth it was her services rendered and to be rendered.

Upon the next trial, all these facts and surroundings will be duly considered.

PER CURIAM. *Venire de novo.*

Cited: *Tredwell v. Graham,* 88 N. C., 214; *Savage v. Knight,* 92 N. C., 498; *Cox v. Wall,* 132 N. C., 736.

THOMAS W. SPARROW v. THE TRUSTEES OF DAVIDSON COLLEGE.

Service of Summons—Notice—Appeal.

1. Service of a summons is notice of an action, and the defendant is bound to take notice of the judgment therein if one be taken against him.
2. Where a defendant appeals from the judgment of a justice of the peace upon the ground that the only notice he had of the action was the service of the summons: *Held*, that the appeal was properly dismissed.
3. The word "or" in Bat. Rev., ch. 63, sec. 54, should be read "and."

MOTION to dismiss an appeal from a justice's court, heard at (36) Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

In 1876 the plaintiff brought an action against the defendant before a justice of the peace. The summons was returned "executed," and judgment rendered in favor of plaintiff. No execution was issued upon the judgment. The defendant failed to appeal for a considerable time after the ten days which elapsed after the rendition of judgment. The defendant did not appear at the trial, and had no notice of the judgment, except in so far as the service of the summons may be treated as notice. The defendant craved an appeal within fifteen days after receiving notice, and in less than ten days thereafter gave the proper notice of appeal and an undertaking. The motion of the plaintiff to dismiss the appeal was allowed by his Honor, and the defendant appealed.

Shipp & Bailey for plaintiff.
A. Burwell for defendant.

RODMAN, J. The word "or" in chapter 63, section 54, of Bat. Rev., evidently should be read "and." It is probably a mere misprint. If a defendant be personally served with a justice's warrant, he has notice of the action, and is bound to take notice of the judgment if one be taken against him. *McDaniel v. Watkins,* 76 N. C., 399, is therefore in point.

PER CURIAM. Affirmed.

Cited: University v. Lassiter, 83 N. C. 41; *Spaugh v. Boner,* 85 N. C., 209; *Guano Co. v. Bridgers,* 93 N. C., 441; *Hemphill v. Moore,* 104 N. C., 380; *S. v. Johnson,* 109 N. C., 853; *Ferrell v. Hales,* 119 N. C., 213; *Stith v. Jones, ib.,* 430; *Bullard v. Edwards,* 140 N. C., 648; *Barger v. Alley,* 167 N. C., 364; *Tedder v. Deaton,* 167 N. C., 480.

(37)

DREWRY MORGAN v. W. E. SMITH.

Master and Servant—Seduction from Service—Action for Damages—Evidence.

1. To furnish persons with the means of leaving the premises of another is not a seduction, nothing further appearing.
2. The employment by A. of the servant of B., A. being ignorant that the servant is in the employment of B., is not an unlawful seduction.
3. To enable the plaintiff to recover in an action for damages for enticing a servant from his employment, he must show that the defendant acted maliciously, not in the sense of actual ill-will to the plaintiff, but in the sense of an act done to the apparent damage of another without legal excuse.
4. On the trial of an action, if either party desires fuller or more specific instructions than the court has given, it is his duty to ask for them.

ACTION for damages, tried at Spring Term, 1877, of STANLY, before *McKoy, J.*

It was alleged that James, John, and Henry Baker (minors) were in the employment of the plaintiff by virtue of a contract with their mother, and that the defendant had seduced them from the service of the plaintiff. Issues were submitted upon the evidence, and the jury found:

1. That the plaintiff did contract for the service of said minors.
2. They were not seduced from the service of the plaintiff while the plaintiff was entitled to their services.
3. The plaintiff is not entitled to damages.

The instructions asked for by the plaintiff and refused by his Honor are stated by *Mr. Justice Rodman* in delivering the opinion of this Court. Verdict and judgment for defendant. Appeal by plaintiff.

(38) *Battle & Mordecai for plaintiff*
J. W. Hinsdale and S. J. Pemberton for defendant.

RODMAN, J. The plaintiff requested his Honor to charge the jury:

"1. If they were satisfied from the proof that the defendant assisted Jane Baker and her sons to leave the premises of plaintiff by furnishing them with his wagon and horses, and going with it, it was a seduction of the two boys, James and Heury, from his service.

"2. That the employment of John Baker while in the service of plaintiff in virtue of the contract with his mother was equivalent to the seduction of said John from his service."

The first instruction prayed for was evidently incorrect. To furnish persons with the means of leaving the premises of another is not, *with-*

out more, a seduction from service. For aught that appears, they may have been tenants whose terms had expired, or whose removal was otherwise lawful. Neither will the employment by one person of the servant of another be an unlawful seduction, unless the second employer knows that the servant is in the service of the first.

For the last reason the second instruction prayed for was also incorrect. Both were rightly refused.

To enable a plaintiff to recover in an action like the present, he must show that the defendant acted maliciously, not in the sense of actual ill-will to the plaintiff, but in the sense of an act done to the apparent damage of another without legal excuse. There can be no malice and no apparent damage unless defendant knows of the existence of the relation of service. *Haskins v. Royster,* 70 N. C., 601.

The charge which the judge gave to the jury is admitted to be unexceptionable so far as it goes. The plaintiff, however, in this Court excepts to it in that it did not go far enough, and that the judge omitted to tell the jury that the fact that the defendant took the boys from the plaintiff's plantation was some evidence that he knew that they were in the service of the plaintiff. It was not in evidence that (39) the boys were at work *for plaintiff* when defendant aided them to remove, or that they ever had been, but merely that they were at work on plaintiff's plantation. Whether upon this the judge could properly have instructed the jury as it is now said that he ought to have done, we will not inquire. At the utmost, he could only have said that there was some evidence of the *scienter,* and that he substantially did by leaving that question to the jury. In addition to this, it was the duty of the plaintiff, if he desired fuller or more specific instructions, to have asked for them. It has been repeatedly held that it is not error in a judge to omit to charge upon a point on which he is not requested to charge. If a contrary rule should prevail, and a party could get a new trial whenever upon a critical subsequent examination of a judge's charge he could detect some point omitted or not fully treated, charges must be unnecessarily long, and even then few verdicts would stand.

PER CURIAM. No error.

Cited: Harrison v. Chappell, 84 N. C., 263; *Horah v. Knox,* 87 N. C., 487; *Brown v. Calloway,* 90 N. C., 119; *Boon v. Murphy,* 108 N. C., 192; *Nelson v. Ins. Co.,* 120 N. C., 306; *Holder v. Mfg. Co.,* 135 N. C., 395.

(40)

DEMPSEY BROWN v. VALENTINE HOOVER.

Practice—Mortgage—Foreclosure—Jurisdiction.

1. Where in an action to foreclose a mortgage executed by the defendant in 1861 it appeared that the defendant had obtained a discharge in bankruptcy in 1873, and that the mortgaged premises had been alloted to him as a homestead by proceedings in the bankrupt court: *Held*, that the plaintiff was entitled to a decree of foreclosure.
2. In such case the action was properly instituted in the State court.

APPEAL at Spring Term, 1877, of DAVIDSON, from *Kerr, J.*

At the request of the defendant, the plaintiff and one Charles Hoover became sureties on a bond given by the defendant to one Mendenhall on 19 December, 1860, for the sum of $700, and to indemnify his sureties from all loss the defendant executed to them a mortgage on a tract of land dated 15 February, 1861. Shortly after the war, Mendenhall brought suit on the bond against the principal and sureties, and recovered judgment. Execution issued and the plaintiff was compelled to pay, and did pay, $452.45 of said judgment. On 22 April, 1873, the defendant filed his petition in bankruptcy, but did not mention the name of this plaintiff in the list of his creditors, except as one of the parties defendant in the said judgment recovered by Mendenhall, not having had notice of any payment by plaintiff on said judgment. His discharge in bankruptcy was obtained on 5 July, 1873. The plaintiff's claim was not proved in the bankrupt court, and the land conveyed in the mortgage was assigned to the defendant as a homestead, under the proceedings in bankruptcy. By this action, which was commenced on 5 October, 1875, the plaintiff seeks to have the land subjected to the payment of his debt in accordance with the terms of said mortgage deed. During the
(41) pendency of this action, and after the pleadings were filed, the plaintiff, upon petition to the District Court of the United States, obtained leave to proceed in the State court. Upon these facts, his Honor was of opinion with the plaintiff, and gave judgment that the mortgaged premises be sold and the proceeds applied to the debt of plaintiff. From which judgment the defendant appealed.

John A. Gilmer for plaintiff.
M. H. Pinnix and F. C. Robbins for defendant.

READE, J. Upon the facts agreed, the judgment of the court below was clearly right.

The lien created by the mortgage of 1861 was valid as against the defendant's claim of homestead; and it was also valid as against the creditors of the defendant and his assignee in bankruptcy.

Whether the plaintiff should have sought his rights through the United States or State courts is of small moment to the defendant. We are of the opinion, however, that this procedure in the State court was right.

PER CURIAM. Affirmed.

Cited: Cheek v. Nall, 112 N. C., 374.

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(42)

JOHN G. JONES, ADMINISTRATOR, v. JOHN B. HEMPHILL, ET ALS.

Special Proceeding—Practice—Issues.

1. Where in a special proceeding to make real estate assets, instituted before a Superior Court clerk, there was a demurrer filed to the complaint: *Held*, that the issue of law thereby raised should be certified to the judge at chambers. *Held further*, that it was error in the judge, after overruling the demurrer, to direct that an order issue to the plaintiff to sell the land.
2. In such case the decision of the judge should be transmitted to the clerk, with leave for the defendant to answer before the clerk, if so advised.
3. In a special proceeding, if the answer of the defendant raises an issue of fact, the clerk should transfer a copy of the pleadings to the civil-issue docket for trial at term-time; if it raises issues of law and fact, a similar transfer should be made, the issues of fact to be tried before a jury and the issues of law to be eliminated by the judge and decided by him at the same time.
4. Upon the determination of the issues, if the result makes it necessary, a *procedendo* should issue to the probate court.

SPECIAL PROCEEDING, commenced in the probate court and, upon issues of law raised by the pleadings, transferred to and heard at Spring Term, 1877, of PERSON, before *Cox, J.*

The purpose of the proceeding was to subject the land of the plaintiff's intestate to the payment of his debts. The defendants filed a demurrer, which his Honor overruled, and gave judgment that an order issue to the plaintiff to sell the land. From which the defendants appealed.

No counsel for plaintiff. (43)
W. N. H. Smith for defendants.

FAIRCLOTH, J. When an executor or administrator applies to the clerk of the Superior Court for license to sell land for assets, and an issue of law or fact is joined between the parties, the course of procedure shall be as prescribed in other special proceedings. Bat. Rev., ch. 45, sec. 65.

When an issue of law shall be joined on the pleadings before the clerk, he shall send a copy of the record to the judge of the court, by mail or otherwise, for hearing and decision by him, who shall transmit his decision in writing to the clerk of the court, and the parties, on notice, may proceed thereafter according to law. C. C. P., secs. 111, 113.

These provisions govern this case. The case was not properly transferred to the docket for trial at term-time, but was before the judge at chambers. The demurrer was properly overruled, but his Honor had no authority to grant the plaintiff license to sell the land for assets. He should have transmitted his decision to the clerk, with leave to the defendant to answer before the clerk if he chose to do so. Nothing was before the judge for decision except the issues of law raised by the pleadings, and this did not give him jurisdiction of the action for any other purpose. If the defendant declines to answer before the clerk, then the plaintiff may proceed according to law. If he does answer, and thereby raises an issue of fact, the clerk will transfer a copy of the pleadings to the civil issue docket for trial at term-time; and if the answer shall raise an issue of fact and an issue of law also, the clerk will transfer a similar copy to the trial docket, and the issues of fact will be tried before a jury, and the judge will eliminate the questions of law and decide them at the same time. When the issues are thus disposed of, the Superior Court will, if the result of the proceedings make it necessary to sell the land, issue an order of *procedendo* to the judge of the probate court. *McBryde v. Patterson,* 73 N. C., 478.

We have no express statutory direction in these several particulars, but the mode here prescribed will answer a better purpose than
(44) to split the case when both issues of fact and law are presented by the pleadings, and in this way a complete record of the proceedings will in the end be retained in the probate court, which has original jurisdiction of the subject.

When the answer is filed, the various questions discussed before us concerning the disposition of the personalty by the administrator, the insufficiency of the complaint, etc., will probably be in order. They are not so now.

There is no error in overruling the demurrer. Each party will pay his own costs in this Court.

PER CURIAM. Affirmed.

Cited: Brandon v. Phelps, post, 46; *Cheatham v. Crews,* 81 N. C., 345; *Capps v. Capps,* 85 N. C., 409; *Thompson v. Shamwell,* 89 N. C., 286; *Spencer v. Credle,* 102 N. C., 74.

H. F. BRANDON, ADMINISTRATOR, v. R. C. PHELPS ET ALS.

Special Proceeding—Settlement of Estate—Purchase from Heir—Practice.

1. An estate upon which original letters of administration were issued prior to 1 July, 1869, and administration *d. b. n.* granted after that date, is to be dealt with and settled according to the law as it existed prior to that date.
2. In such case, where the heir at law conveyed to A. the land of the intestate more than two years after the original letters of administration were issued: *Held*, that the purchaser obtained a good title, whether or not he had notice of unpaid debts.
3. In a special proceeding where no issue of fact is raised by the pleadings, it is improper to transfer the case to the trial docket. A copy of the pleadings should be sent to the judge at chambers for his hearing and decision.

SPECIAL PROCEEDING, heard at Spring Term, 1877, of CASWELL, (45) before *Cox, J.*

The plaintiff's intestate, Thomas L. Gatewood, died in 1855, and Wiley Jones was appointed his administrator, and, upon his death, the defendant was appointed administrator *d. b. n.*, and qualified as such in 1876. He then filed a petition in the probate court of said county to sell the real estate of his intestate for assets to pay his debts, and upon the issues raised in the answer of defendants the case was transferred to the Superior Court for trial. Mary C. Ball, one of the heirs at law of the said intestate, upon whom his real estate had descended, sold a portion thereof to her codefendant, Phelps, in 1871, and the deed conveying the land to Phelps was admitted in evidence. The defendants' counsel insisted that there was no issue of fact to be tried by a jury, but that the case was governed by Rev. Code, ch. 46, sec. 61. His Honor, reserving the question of law, submitted the case to the jury, who found that Phelps, at the time of his purchase from Mrs. Ball, had notice of the outstanding debts against the estate of plaintiff's intestate. Upon the question reserved it was insisted by the defendants' counsel that, it being admitted two years had expired after the letters of administration issued upon said estate, the said sale was not void, even if the purchaser, Phelps, had notice of the outstanding debts. His Honor being of a contrary opinion, gave judgment that the administrator have license to sell the land, to the end that the debts of his intestate may be paid. From which judgment the defendant Phelps appealed.

W. N. H. Smith for plaintiff.
Graham & Graham and Walter Clark for defendant.

FAIRCLOTH, J. Original letters of administration were granted in January, 1855. Letters of administration *de bonis non* on the
(46) same estate were granted to the plaintiff in 1876, and the heir at law, in 1871, sold and conveyed to the defendant some of the real estate of which plaintiff's intestate died seized.

The plaintiff now applies for a license to sell said real estate for assets to pay debts of his intestate still outstanding. It is properly conceded that if the sale had been made more than two years after the original letters were granted, and before the act of 1868-69, ch. 113, the purchaser, the defendant, would have acquired an absolute title as against creditors; but the plaintiff insists that, by virtue of said act, sec. 105, he has the right to sell, inasmuch as defendant Phelps purchased with notice that said debts were still unpaid.

His Honor sustained this view, and in doing so we think he committed error. If said act had made it a doubtful question, the subsequent acts (Bat. Rev., ch. 45, secs. 58, 101, and the act of 1872-73, ch. 179) removed every shadow of doubt by expressly declaring that cases like the present shall be dealt with, administered, closed up, and settled according to law as it existed just prior to 1 July, 1869, according to which the purchaser acquired a good title with or without notice of unpaid debts, provided his purchase was more than two years after original letters were issued.

As notice was immaterial, it was unnecessary to submit such an issue to the jury, and as no issue of fact was raised by the pleadings, the case was improperly transferred to the trial docket. A copy of the record should have been sent to the judge at chambers for his hearing and decision, and thereafter be transmitted by him to the probate court for further proceedings. See *Jones v. Hemphill, ante,* 42.

PER CURIAM. Reversed.

Cited: Dobson v. Chambers, 78 N. C., 338; *Renan v. Banks,* 83 N. C., 485; *Capps v. Capps,* 85 N. C., 409.

Dist.: Orrender v. Call, 101 N. C., 403.

(47)

WILSON & SHOBER v. THE BANK OF LEXINGTON ET ALS.

Practice—Motion—Parties to Action.

1. Where a controversy between parties to an action has been determined, and the same is evidenced by appropriate entries on the docket, a motion of a third party to be made a party plaintiff is not in apt time and should not be alowed.
2. This rule applies to an action against a bank, brought by a holder of its bills, in behalf of himself and all others who should make themselves parties plaintiff.

MOTION in the cause, heard at Fall Term, 1876, of GUILFORD, before *Kerr, J.*

The plaintiffs brought this action in behalf or themselves and all other bill-holders of the Bank of Lexington (bills payable at the Bank of Graham) who would come in and contribute to the expenses of the suit. The complaint was filed at Spring Term, 1873, and the defendants demurred. Upon hearing the demurrer, the court ruled in favor of defendants, and, upon appeal to the Supreme Court, the judgment was reversed and cause remanded. No answer was ever filed by defendants, and the plaintiffs having been satisfied for their cause of action, on 9 February, 1876, paid the cost to the clerk, who entered on the civil-issue docket, as an entry in this action, "Costs paid."

The case still appeared on the docket at Spring Term, 1876, and Fall Term, 1876. On 21 June, 1876, the plaintiffs, knowing at that time that the counsel of W. A. Williams, cashier of Bank of Charlotte, and Cyrus P. Mendenhall, were preparing to present their petition to be made parties plaintiff, filed a retraxit in this action in the clerk's office, submitting to nonsuit and dismissing the action; and in about thirty minutes thereafter said Williams and Mendenhall, through their counsel, did present their petitions to his Honor at chambers, asking to be made parties plaintiff; and it appearing that they were creditors of defend- (48) ant, the court allowed the motion. Upon call of the case at Fall Term, 1876, the defendants insisted that the action had been ended, and was improperly on the docket. His Honor refused to dismiss the case, but held that said Williams and Mendenhall, as parties plaintiff, might take further proceedings in the action as creditors of the defendants, from which ruling the defendants appealed.

J. T. Morehead for plaintiffs.
Dillard & Gilmer and Gray & Stamps for defendants.

PEARSON, C. J. The plaintiffs having been satisfied for their cause of action, on 9 February, 1876, paid the costs of this action into the clerk's

office, who entered on the civil-issue docket as an entry in this action, "Costs paid." The case was then at an end, for there was no longer any matter of controversy between the parties, and it was the duty of the plaintiffs to have directed the clerk to enter on his docket, "Action compromised," "Dismissed," "Retraxit." "Nonsuit," or any other appropriate entry to put the case off the docket.

This entry could have been made without any order of the court and as a mere matter of course, to show that the action was at an end. The plaintiffs having neglected to have the entry made on 9 February, had the same right to have it done on 21 June, 1876.

The counsel of Williams and Mendenhall concede that this would be so in an ordinary action, but they insist that this action stands on a different footing, because it was brought as much in behalf of the other "bill-holders" as of Wilson & Shober; and they take the ground that

(49) Wilson & Shober had no right to compromise and dismiss the action, and, at all events, they had no right to do so after notice that Williams and Mendenhall were taking steps to make themselves parties plaintiff. Wilson & Shober, at the commencement of the action, invited the other bill-holders to join them and come in for a share of the money and contribute to the expenses of the suit. Williams and Mendenhall and the other bill-holders stood aloof and allowed Wilson & Shober alone to carry a doubtful and expensive action through the Superior and Supreme Courts. If, after obtaining an expression of opinion favorable to their rights, they saw proper to compromise, and agree to pay the costs and dismiss the action on being paid what they claimed, it is not perceived on what grounds Williams and Mendenhall could object to it. They had not accepted the proposal of Wilson & Shober to make it a common cause, nor were they out of pocket one cent. So Wilson & Shober were under no obligation to them, and it would have been with an ill grace and "looked mean" for them to have attempted to put any difficulties in the way of Wilson & Shober's right to end the case and make such arrangement for that purpose as they saw proper. The counsel feeling the pressure of these considerations, fell back on the position that Wilson & Shober, after notice that Williams and Mendenhall were hurrying up to hasty proceedings in order to join them in the fight, were not warranted in having a formal "retraxit" or dismission of the case entered on the docket. The reply is, the fight was over, the defendants had surrendered, terms of surrender agreed on and carried into execution, with the exception that "a matter of course entry" had not been made on the docket.

The question is, Did the fact that Wilson & Shober had notice that Williams and Mendenhall intended and were taking the necessary steps

to make themselves plaintiffs have the legal effect of impairing the right of Wilson & Shober to carry out the arrangement which they had made with the defendants, by directing the clerk to make an entry which was a mere matter of course? We think his Honor erred in the (50) view that he took of the matter, and that the petition of Williams and Mendenhall ought to have been dismissed, so as to give effect to the arrangement of Wilson & Shober made with the defendants in the action.

PER CURIAM. Reversed.

H. C. AVERY v. DAVID MCNEILL.

Note—Rent of Land—Crops Raised Thereon—Application Thereof.

1. Where a defendant is indebted on a note (which comes to plaintiff by assignment) for the rent of land, and cotton raised thereon by the defendant is taken by the plaintiff into his possession upon whatsoever pretext, the law applies the same to the satisfaction of the rent note.
2. The fact that defendant told the plaintiff, "You moved it (the cotton) without my consent, and you may do what you please with it," does not constitute a waiver of such application, so as to enable plaintiff to apply the proceeds to other indebtedness of the defendant.

APPEAL at Spring Term, 1877, of HARNETT, from *McKoy, J.*

This was an appeal from a justice's judgment, and the action was founded upon a note of which the following is a copy:

On or before 15 February, 1876, we, or either of us, promise to pay K. Murchison, guardian of M. V. McNeill, $183 for rent of the land on the east side of Cape Fear River, with the exception of the piece bid off by Miss G. DAVID MCNEILL. [SEAL]

This note was assigned, by indorsement of the payee to the (51) plaintiff.

The defendant set up a counterclaim for work and labor in clearing a portion of the rented land, and for cotton of which the plaintiff had received the benefit, and the plaintiff replied with an account against the defendant.

The plaintiff testified that he informed the defendant that he had bought the said note, and that thereafter the defendant borrowed his wagon to haul the cotton to a gin; after the cotton was ginned and baled, the plaintiff hauled it (two bales) to his storehouse, without the consent or direction of defendant. That he informed the defendant where it was, and requested him to sell the cotton and pay the note; that subsequently

he asked the defendant what he should do with the cotton, and the defendant, in an angry manner, replied, "You moved it without my consent, and you may do what you please with it"; that plaintiff sold the cotton and applied the proceeds to the payment of an account against the defendant, and credited the balance on said note, to wit, "Cr. by balance in cotton, $18.89."

It was in evidence that said cotton was raised on the rented land.

The testimony of the defendant was not in conflict with that of the plaintiff in regard to that part of the tranaction upon which the decision turns.

His Honor charged the jury, in substance, that where a creditor holds two or more claims against a party who pays a part of the indebtedness without directions as to what claim the payment shall be applied, the creditor would have the right to apply it to the debt for which he held the least security; and that in making up their verdict, they should allow the defendant the value of his labor in clearing the land. Verdict for plaintiff. Judgment. Appeal by defendant.

(52) *Guthrie & Carr for plaintiff.*
Neill McKay for defendant.

PEARSON, C. J. By force of the landlord and tenant act (Bat. Rev., ch. 64, sec. 13), as amended by Laws 1874-75, ch. 209, the cotton, which is the subject of the controversy, was bound for the payment of the "rent note," as it is aptly termed in the statement of the case.

When the plaintiff, no matter under what pretext, took the two bales of cotton, it was an application thereof in payment of the "rent note," and his Honor erred in allowing the jury to give to the remarks of the defendant, evidently made in passion, the effect of a waiver of this application. The fact of making it, the application, is the only justification that the plaintiff can offer for taking the cotton; so the most favorable point of view in which it can be put for him is that he had the two bales of cotton hauled to his storehouse in payment of the "rent note." And we are of opinion that the legal effect of this act was not waived by the words afterwards used by the defendant.

PER CURIAM. *Venire de novo.*

Cited: Pate v. Oliver, 104 N. C., 467.

JEMIMA MASON v. JEREMIAH J. PELLETIER.

Evidence—Fraud—Cancellation of Deed.

Where in an action brought for the cancellation of a deed on the ground of fraud, the plaintiff offered to read in evidence a case decided at a former term of this Court, for the purpose of showing that the representations of the defendant which induced the plaintiff to execute the deed were false, and the court below excluded it, to which the defendant excepted: *Held* to be error.

APPEAL at Fall Term, 1876, of CARTERET, from *McKoy, J.* (53)

This action was brought for the cancellation of a deed made by plaintiff to defendant, upon the ground of the fradulent misrepresentation of a fact by the defendant to induce the plaintiff to execute the deed; and this was the issue submitted to the jury.

It appeared in evidence that certain lands, of which the tract conveyed in said deed was a part, had long been the subject of litigation between one Edward Hill (now dead) and one Matthew Mason (also dead), the husband and devisor of the plaintiff, and that an action of ejectment had been brought for the possession of the same, which was taken by appeal to the Supreme Court and decided in favor of said Mason. See 52 N. C., 551.

The plaintiff's counsel read a portion of this case in the hearing of the jury, his Honor saying that this was not evidence in the case on trial, and asking how it was relevant, the defendant excepting. The decision in this Court is based upon the exclusion of this evidence.

Verdict for plaintiff. Judgment. Appeal by defendant.

No counsel for plaintiff.

A. G. Hubbard and H. R. Bryan for defendant.

FAIRCLOTH, J. The distinction between those cases in which there is some evidence and those in which there is none, touching a material matter, is familiar.

In the former case the court submits the evidence to the jury, with an explanation of the law applicable to the case; but in the later the court tells the jury that there is no evidence for them to consider, and at once withdraws it from their consideration.

This rule, applied to the present case, entitles the defendant to (54) a new trial.

The object of the action is to have the plaintiff's deed to the defendant surrendered and canceled, on the ground that it has been obtained by the fradulent misrepresentation of a fact by the defendant in regard to the final determination of a suit by *Edward Hill v. Matthew Mason,* in the Supreme Court at some former period (52 N. C., 551).

After some evidence tending to show the defendant's representations, the plaintiff attempted to show their falsity by reading from said case of *Hill v. Mason,* when his Honor excluded the evidence as not being relevant to the case on trial, and in this way left the case with the jury on a material point with evidence of what the defendant said, and without any evidence from which they could know whether his representations were true or false. No better evidence of the finality of *Hill v. Mason* could be had than the record itself, and it does not appear that any other was introduced or offered on the question by either party.

PER CURIAM. Error.

Cited: *Mason v. Pelletier,* 82 N. C., 41; *s. c.,* 80 N. C., 66.

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(55)

MARGARET L. HUFFMAN v. JAMES A. CLICK ET ALS.

Evidence—Books on Inductive Sciences.

1. Medical works are not admissible in evidence "to show that the symptoms testified to by a witness were common in hysteria, which is one of the exciting causes of paralysis." Nor is such evidence admissible to corroborate the professional opinion of a physician.
2. Where counsel proposed to read an extract from such work and adopt it as a part of his argument, and the court refused: *Held,* not to be error.

The law of evidence excluding books upon "inductive sciences" and admitting those upon "exact sciences" discussed and explained by BYNUM, J.

ACTION for damages, tried at Spring Term, 1877, of ROWAN, before *Kerr, J.*

It appeared that there was a difficulty between the plaintiff and the defendant Click in regard to an injury to a valuable hog of the defendant, alleged to have been received while the hog was in a field cultivated by plaintiff. Click and the other defendants went to the plaintiff's house and demanded pay for the hog. Upon that occasion it was alleged that their manner and conduct so greatly frightened the plaintiff as to cause paralysis, from which she suffered for three months. There was much evidence as to the cause of the disease, which is sufficiently stated by *Mr. Justice Bynum* in delivering the opinion of this Court.

Under the ruling of his Honor in the court below, the jury rendered a verdict for plaintiff. Judgment. Appeal by defendants.

W. H. Bailey for plaintiff.
J. M. McCorkle for defendants.

BYNUM J. The defendants say that the plaintiff was subject (56) to hysteria, which is an exciting cause of paralysis, and in this case produced it without any fault of theirs. To show this, they introduced a witness who testified to certain "mad fits" and crying spells of the plaintiff several years prior to the attack of paralysis. They then introduced a physician, who testified that he had heard all the evidence, and from it was of opinion that the plaintiff was subject to hysteria, and that this disease was an exciting cause of paralysis. He also testified that "Hammond's Work on the Diseases of the Nervous System" was a standard work with the medical profession.

In addressing the jury, the counsel for the defendants insisted that the paralysis was caused by hysteria to which the plaintiff was subject. He then proposed to read to the jury extracts from Hammond's Work, "to show that the symptoms testified to by one of the witnesses were common in hysteria, and also for the purpose of showing that this disease was one of the exciting causes of paralysis." The case also states that "the counsel did not propose to read the book as evidence, but as a part of his argument." His Honor refused to allow it to be read, stating that it was not admissible for any purpose. The question is not whether the book was inadmissible for any purpose, as stated by his Honor within the latter part of his ruling, but whether it was admissible for the purpose indicated by the defendants' counsel, to wit, "to show that the symptoms testified to by one of the witnesses were common in hysteria and that this latter disease was one of the exciting causes of paralysis." How this could be done without making the book evidence of the truth of the facts contained in it, and also evidence to corroborate the professional opinion of the physician, it is hard to conceive. In such works the argument is based upon the facts stated, and the argument and the facts are so blended that the counsel cannot well get the benefit of the one without the benefit of the other.

The physician, on examination in this case, had the right to (57) refresh his knowledge by referring to standard works in his possession, but his evidence must be his own, independent of the works. He cannot read a work to the jury; how, then, can the counsel do it? If this practice were allowed, many of our cases would soon come to be tried, not upon the sworn testimony of living witnesses, but upon publications not written under oath. But whether read as evidence or argument, the work was inadmissible. The distinction between books that can and cannot be read is now pretty well defined and established.

It is only necessary now to draw so much of the line of distinction as is applicable in this case and excludes the book proposed to be read. If the work is read, it must be to prove the truth of the facts contained in

it, and the justness of the conclusions which the author draws from those facts. But if medicine is a science (and it claims to be such), it belongs to that class called "inductive sciences." Such treatises are based on data constantly shifting with new discoveries and more accurate observation, so that what is considered a sound induction today becomes an unsound one tomorrow. The medical work which was "a standard" last year becomes obsolete this year. Even a second edition of the work of the same author is so changed by the subsequent discovery and grouping together of new facts that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another. The authors of such works do not write under oath; the books themselves are therefore often speculative, sometimes mere compilations, the lowest form of secondary evidence; and as the authors cannot be examined under oath, the authorities on which they rely cannot be investigated nor their process of reasoning be tested by cross-examination. Such writings are nothing more or less than hearsay proof of that which living
(58) witnesses could be produced to prove. Wharton Law of Evidence, sec. 665.

The reasons, however, for rejecting medical works and others of the inductive class do not apply to books of what are known as the "exact sciences," where the conclusions are reached from fixed, certain, and unvarying data partaking of the character of mathematical demonstration, and by process too abstruse to be explained or even understood in many cases by the witnesses. It is unnecessary to say more of this class of books, as the book in question does not belong to it.

We have seen that Hammond's Work could not be read as substantive testimony, and it was so held in *Melvin v. Easley*, 46 N. C., 386. Nor could it, or any part of it, be read as a part of the argument of counsel. It sounds plausible to say, you do not read it as evidence, but that you read and adopt it as a part of your argument. But in so doing the counsel really obtains from it all the benefits of substantive evidence fortified by its "standard" character. He first proves by the medical expert that the work is one of high character and authority in the profession, and then he says to the jury, "Here is a book of high standard, written by one who has devoted his talents to the study and explanation of this special subject of nervous diseases; he expresses my views with so much more force than I can, that I will read an extract from his work and adopt it as a part of my argument." It is evident that the effect of this maneuver is to corroborate the testimony of the medical expert or other witnesses by the authority of a great name testifying, but not under oath, to the same thing as the expert, but with this difference; that the author has not heard the evidence upon which the expert based his opinion.

The medical expert himself may cite standard authorities in his profession as sustaining his views, and then they may be put in evidence by the opposing side to discredit him, but he cannot read them either as evidence or argument, nor can the counsel offering them. 1 (59) Wharton on Ev., 438 and secs. 665, 6, 7; *Commonwealth v. Wilson,* 1 Gray, 337; *Ripon v. Bittle,* 30 Wis., 614; 12 Cush., 193; 1 Greenl. Ev., sec. 498, note.

PER CURIAM. No error.

Cited: *Horah v. Knox,* 87 N. C., 487; *S. v. Rogers,* 112 N. C., 878; *Butler v. R. R.,* 130 N. C., 18; *Lynch v. Mfg. Co.,* 167 N. C., 102; *Tilghman v. R. R.,* 171 N. C., 656,657.

EDWIN R. BRINK v. ARCHIBALD R. BLACK.

Evidence—Fradulent Conveyance—Judge's Charge.

1. Upon an issue as to the fraudulency of a mortgage deed executed in 1873, it is admissible to show that in the previous year a fraudulent instrument of like character was executed between the same parties. Such proof is not only some evidence, but very strong evidence, that the mortgage deed of 1873 is likewise fraudulent.
2. Where a party prays for an instruction to which he is entitled, it is error to refuse it. The court, however, is not required to adopt the words of the instruction prayed for; but it is error to change its sense or to so qualify it as to weaken its force.

ACTION removed from NEW HANOVER and tried at Spring Term, 1877, of BRUNSWICK, before *Seymour, J.*

The plaintiff claimed title to a certain kiln of brick conveyed to him by mortgage from one Stacy Van Amringe in November, 1873. The dedendant, as sheriff of New Hanover County, alleging that said mortgage was fradulent and void as against creditors, sold said brick to satisfy executions in his hands against Van Amringe. Thereupon the plaintiff brought this action to recover damages.

There was much evidence tending to show that Van Amringe (60) was indebted to the plaintiff and many other persons; that plaintiff had taken a mortgage on a kiln of brick in July, 1872; that Van Amringe had acted as his agent in the sale of the brick, and had remained in posession of the mortgaged property after the execution of the mortgage deed; that only a part of the proceeds of said sale was applied to the mortgage debt, and no account of the sales had been rendered to plaintiff.

The point decided in this Court is involved in the following:

Instructions prayed for: "5th. That the fact that Van Amringe was permitted to remain in posession of the property conveyed by the mortgage of July, 1872, being of the same character, and dealing with it and treating it as his own, was some evidence of the fradulent intent on the part of Van Amringe in the mortgage of November, 1873."

His Honor refused to charge as requested, but told the jury:

Instructions given: "That the mortgage of 1872 was admitted for the purpose of showing there had been previous dealings, and the nature of those dealings, between the parties, but not otherwise as evidence of fraud in the mortgage of November, 1873; that it was much more likely that a fraud would be committed by parties who had considerable dealings than where there was only one transaction." Defendant excepted.

There was a verdict for plaintiff. Judgment. Appeal by defendant.

D. L. Russell and W. S. & D. J. Devane for plaintiff.

A. T. & J. London for defendant.

(61) PEARSON, C. J. When a party pays for an instruction to which he is entitled, it is error to refuse it. The judge is not required to adopt the words of the instruction; he may, as a matter of taste, change the phraseology, but it is error to change its sense, or so to qualify it as to weaken its force. C. C. P., secs. 238, 239, 301.

We put our decision on the *fifth* instruction prayed for, and the response thereto, as that entitles the defendant to a new trial. Evidently the instruction given is not a legitimate substitute for the instruction prayed for.

So the only question before us is, Was the defendant entitled to the instruction?

If a conveyance is made with an intent to enable the debtor to hold his other creditors "at arm's length," and to enjoy and dispose of his property just as if he did not owe one cent, the conveyance is fraudulent, although the gratee had a true debt, for the reason that there is an intent to "hinder and delay creditors."

Van Amringe was indebted to many persons $6,000 or $7,000. The mortgage of 1872 had the effect of keeping all of them off, for fear of a lawsuit, and he disposed of the kiln of brick and other articles to the value of, say, $3,500, for his own use, without intereference on the part of the plaintiff; and in 1873 he owed the plaintiff, by reason of "accommodation acceptances," a larger amount than he owed in 1872. These facts and circumstances, in connection with the kiln of brick in 1872, constituted not only "some evidence," but very strong evidence, of an intention that the kiln of 1873 was to go in the same way as the kiln of

1872; that is, for the enjoyment of Van Amringe in spite of his creditors, the plaintiff standing by with his arms folded and being confident that he was secured in regard to all of his accommodation acceptances.

PER CURIAM. *Venire de novo.*

Cited: *Gilmer v. Hanks,* 84 N. C., 319; *Kinney v. Laughanour,* 89 N. C., 368; *Patterson v. McIver,* 90 N. C., 497; *S. v. Hargrave,* 103 N. C., 335; *Edwards v. Phifer,* 121 N. C., 391; *Norton v. R. R.,* 122 N. C., 934; *Coble v. Huffines,,* 133 N. C., 426; *Baker v. R. R.,* 144 N. C., 41; *Robertson v. Halton,* 156 N. C., 219; *Eddleman v. Lentz,* 158 N. C., 74; *Ins. Co. v. Knight,* 160 N. C., 594; *Marcom v. R. R.,* 165 N. C., 260; *Smith v. Tel. Co.,* 167 N. C., 256; *Lloyd v. Bowen,* 170 N. C., 220.

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(62)

CONSIDER BUSHEE ET ALS. v. LEWIS M. SURLES ET ALS.

Evidence—Impeachment of Judgment—Witness—Competency of Party Interested—Statute of Limitations—Actions by Next of Kin Against Administrator.

1. It is not competent to impeach a regular judgment of a court collaterally; therefore, when in an action by distributees against an administrator to recover their share of the decedent's estate the record of a judgment in favor of the administrator was put in evidence: *Held,* that evidence offered to show that a part of such judgment consisted of funds derived from the sale of property belonging to the remaindermen and not to the administrator was properly rejected.
2. A defendant having an interest in the event of an action is not permitted under C. C. P., sec. 343, to testify in his own behalf for the purpose of contradicting a former witness whose evidence tended to show that the defendant fraudulently procured an assignment from a person deceased.
3. The statute of limitations does not run in favor of an administrator against an action by the next of kin for their distributive shares.

APPEAL at Spring Term, 1877, of HARNETT, from *McKoy, J.*

This action was commenced in the probate court of said county by the plaintiffs, as heirs at law of Patience Bushee, against the defendant Lewis M. Surles, administrator of said Patience, and James C. Surles, executor of Consider Bushee, her husband, for an account and settlement and for their distributive shares. Upon issues joined it was transferred to the Superior Court for trial, and under the instructions of his Honor the jury rendered a verdict for the plaintiffs, and the defendants appealed.

The facts which constitute the basis of the decision of this Court are sufficiently stated by *Mr. Justice Bynum* in delivering the opinion.

MacRae & Broadfoot, T. H. Sutton, and J. W. Hinsdale for plaintiff.
Neil McKay and Guthrie & Carr for defendants.

(63) BYNUM, J. It was left to the jury as an issue of fact whether James C. Surles obtained the assignments of the distributive shares of three of the plaintiffs in the estate of Patience Bushee fraudulently. The case is before us upon questions of evidence which arose on the trial of that issue.

The case is this: The defendants Lewis and James Surles are brothers; Consider and Patience Bushee were husband and wife. On the death of Consider, James Surles became his executor; on the death of Patience, Lewis Surles became her administrator. Consider Bushee, by his will, gave his wife a life estate in his property, and then over.

The widow became a lunatic, and one Stewart was appointed her guardian, and out of the life estate accumulated a considerable sum of money from its rents and profits.

The widow dying, and Lewis Surles having become her administrator, a suit was instituted between the guardian and administrator of Patience and the executor of Consider Bushee for the settlement of the guardianship and the adjustment of the rights of the parties in said fund. Such proceedings were taken that a decree of the court was rendered, and $1,600 was adjudged to Lewis M. Surles as administrator of Patience, and the balance of $1,439 to James C. Surles as executor of Consider Bushee, who claimed that a part of the fund was derived from sales of property which belonged to the remaindermen. These sums were paid over by the guardian to the administrator and the executor respectively.

The plaintiffs are some of the distributees of Patience Bushee, and are suing the administrator for the recovery of their shares. The administrator resists the payment on the ground that he has already paid these shares to their assignee, James C. Surles, who purchased them.

The plaintiffs reply that the assignments were fradulently obtained and are void.

1. The plaintiffs put the record of the judgment in favor of the administrator in evidence. The defendants offered evidence to show
(64) that the largest part of the judgment consisted of funds derived from the sale of property which belonged to the remaindermen, and not to the administrator. The court rejected the evidence properly.

It is not competent to impeach a regular judgment of the court collaterally. The judgment established the character of the fund, and he received it as administrator and as part of the estate of the intestate.

2. For the purpose of establishing fraud in procuring the assignment, the plaintiffs introduced one Edward Messenger, not a party in interest, who testified to a conversation he heard between James C. Surles and Willie Messenger and wife, Harriet, at the time he, Surles, procured the assignment from them. To contradict this evidence, the defendant James C. Surles offered himself as a witness in his own behalf. But it appearing that Willie Messenger and wife were dead, upon objection, this evidence was not admitted. In that there is no error. The parties deceased had an interest in this controversy, and the defendant is excluded by C. C. P., sec. 343, from testifying to a transaction between himself and a party now deceased.

3. The defendants relied on the statute of limitations in the court below, but do not press the point here. The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares.

The instructions of the judge to the jury were fair, and favored the defendants fully as much as the evidence warranted. Admitting that there was no such direct fiduciary relation between the plaintiffs as raised a presumption of fraud in the transaction, yet it is almost certain that at the time the assignments were procured James C. Surles knew the value of the distributive shares, and that Lewis M. Surles, at the time he paid over these distributive shares to the assignee, knew they were obtained for far less than their value, and that the plaintiffs had no knowledge of their value, were ignorant, and had no (65) means of ascertaining their value, save the knowledge of the administrator, which was not communicated to them. The defendants were brothers. James, as executor of Consider Bushee, knew the value of that portion of it which he had delivered to Patience, from which the fund in question arose; and Lewis, as administrator of Patience, also knew its value. They had peculiar means of knowing, not according to the plaintiffs, and they were both also joint distributees with the plaintiffs in the estate of Patience Bushee, and therefore had an additional reason for knowing, separate from the opportunity of knowledge conferred upon them by law, as representing the estates.

Collusion between the brother defendants is not positively established, but clearly the evidence was sufficient to establish fraud, as found by the jury, as to James C. Surles.

PER CURIAM. No error.

Cited: Vaughan v. Hines, 87 N. C., 448; *Woody v. Brooks,* 102 N. C., 337, 344; *Thompson v. Nations,* 112 N. C., 510; *Edwards v. Lemmond,* 136 N. C., 331.

Dist.: *Nunnery v. Averitt,* 111 N. C., 396.

WILLIAM A. MOORE v. MOSES HOBBS AND ABRAM T. BUSH.

Pleading—Demurrer—Answer.

If the cause assigned for demurrer does not appear in the complaint, it can be taken advantage of only by answer.

APPEAL at Spring Term, 1877, of CHOWAN, from *Cannon, J.*

The defendants demurrer to the complaint. His Honor overruled the demurrer and gave judgment for plaintiff, and the defendants appealed.

(66) *Mullen & Moore for plaintiff.*
Gilliam & Pruden for defendants.

READE, J. The causes assigned for demurrer do not appear in the complaint, and therefore can be taken advantage of only by answer.

The case will be remanded, to the end that the defendants may answer, and on failure to do which there should be judgment for plaintiff.

We call attention to the fact that C. C. P., sec. 91, requires that the "complaint" should contain "a plain and concise statement of the facts constituting the cause of action." It may be that the complaint in this case is at fault in that particular. If so, it may be amended by leave.

There was no error in overruling the demurrer, but there was error in giving judgment for the demand without allowing an answer. Bat. Rev., ch. 17, sec. 131.

Case remanded. Each party will pay his own costs in this Court.

PER CURIAM. Remanded.

Cited: *S. c.*, 79 N. C., 535; *Womble v. Leach,* 83 N. C., 86; *Dills v. Hampton,* 92 N. C., 569; *Kiff v. Weaver,* 94 N. C., 278; *Hornthal v. Burwell,* 109 N. C., 18; *Burton v. Mfg. Co.,* 132 N. C., 19; *Allred v. Smith,* 135 N. C., 457.

(67)

WILLIAM B. PENDLETON ET ALS. v. JOHN H. DALTON.

Pleading—Evidence—Devisee—Heir at law.

1. It is sufficient if a good cause of action is stated in a complaint in such a manner as not to mislead the defendant; *e. g.*, the right to have land conveyed under a contract of purchase to the plaintiff as devisee and heir at law.
2. In such case, if the plaintiff claims as devisee and not as heir at law, proof of heirship should not be allowed.

3. But where the plaintiff claims as devisee and heir at law, and fails to prove that he is devisee: *Held*, to be error to exclusive evidence of heirship.

ACTION for specific performance of a contract, tried at Spring Term, 1877, of ROWAN, before *Kerr, J.*

The plaintiffs offered in evidence a paper-writing purporting to be the last will and testament of William J. Pendleton, deceased. This evidence was objected to by the defendant, and excluded by the court, upon the ground that it had not been proved in the probate court pursuant to the law of this State, as a devise of real estate. (The deceased lived in Louisa County, Virginia, and the will was duly proved according to the law of that State.) To this ruling the plaintiffs excepted.

Thereupon F. H. Pedleton, one of the plaintiffs, was introduced as a witness, and after testifying that William J. Pendleton was dead, was asked if the plaintiffs were the only heirs at law of said deceased. This was objected to by the defendant, because of its irrelevancy, for that the plaintiffs' cause of action, as stated in the complaint, was alleged to be derived by them as devisees under said will, and not as heirs at law, and was excluded by the court. And upon intimation of his Honor that the plaintiffs could not recover, they submitted to a nonsuit and appealed.

W. H. Bailey and J. M. McCorkle for plaintiffs. (68)
J. M. Clement and Scott & Caldwell for defendant.

READE, J. The plaintiffs allege that their ancestor, W. J. Pendleton, had his cause of action against the defendants for specific performance of a contract for the conveyance of the land in controversy, and that the plaintiffs are the devisees and heirs at law of said W. J. Pendleton, and have the same right which he had in his lifetime.

Upon the trial the plaintiffs failed to prove that they were the devisees of W. J. Pendleton, and then they offered to prove that they were his heirs at law; and the evidence was excluded, "for that plaintiffs' cause of action as stated in their complaint was alleged to be derived by them as devisees of the last will and testament of W. J. Pendleton, deceased, and not as heirs at law."

If the plaintiffs stated a good cause of action—the right to have the land conveyed to them—it may be that the particular manner of acquiring the right, as whether as devisees or heirs at law, would be immaterial, unless stated in such way as to mislead the defendants and take them by surprise on the trial.

If the complaint had stated, as is alleged, that plaintiffs claimed as devisees and not as heirs at law, it might have been a surprise to the defendants (which ought not to have been allowed) to admit proof of heirship.

But there is sufficient in both complaint and answer to allow the plaintiffs to claim as heirs, and to show that there was no surprise upon the defendants.

The complaint states that the plaintiffs are "the only heirs at law and devisees of the said W. J. Pendleton, deceased"; and the answer says "that the plaintiffs should not be allowed to reopen the controversy (alluding to the controversy in W. J. Pendleton's lifetime) by substituting their names as the heirs at law and legatees and devisees
(69) of said W. J. Pendleton."

And again, the answer says "that this action is improperly brought by the plaintiffs as the heirs at law and legatees and devisees of W. J. Pendleton." And again, the answer says, "whether the legatees, devisees, and heirs at law . . . are true as alleged, this defendant is ignorant, . . . and demands that all of these allegations be required to be strictly proved."

Notwithstanding all this, the defendant objects that the plaintiffs ought not to be permitted to prove their heirship and to recover upon their title as heirs at law, because they had alleged but could not prove that they were devisees; and his Honor sustained the objection.

PER CURIAM. *Venire de novo.*

Cited: Pendleton v. Dalton, 92 N. C., 190.

J. J. HASTY AND WIFE v. ROBERT SIMPSON.

Practice—Supplemental Proceedings—Place Where Defendant Shall Appear and Answer.

Supplemental proceedings should be instituted in the county where the judgment was rendered, but the place designated where the defendant shall appear and answer should be within the county where the defendant resides.

SUPPLEMENTAL PROCEEDINGS, heard at chambers on 28 October, 1875, before *Buxton, J.*

The facts are sufficiently stated by *Mr. Justice Faircloth.*

The defendant appealed from the judgment of the court below.

(70) *Platt D. Walker and Merrimon, Fuller & Ashe for plaintiffs.*
W. J. Montgomery and C. Dowd for defendant.

FAIRCLOTH, J. The plaintiffs obtained a judgment in Union County against the defendant, and caused an execution to issue to the sheriff of

Mecklenburg County, where the defendant resides, which was returned to Union County "unsatisfied." They then instituted supplemental proceedings before the clerk of Union County, and obtained an order requiring the defendant to appear before said clerk and answer. The defendant denies the jurisdiction of said clerk of Union County, and insists that, by virtue of C. C. P., sec. 264 (1), he has a *right* to be examined in Mecklenburg County, "to which the execution was issued."

On appeal, his Honor affirmed the order of the clerk, and the (71) defendant appealed to this Court.

No copy of the affidavit is found in the transcript, but we assume from the statement made for this Court that the affidavit was made in pursurance of the remedy given in division (1) of said section. The object of supplemental proceedings is to afford the creditor an equitable remedy for the enforcement of his judgment, without the trouble, expense, and delay which attended a bill in the equity under the old system, and is designed to do so with every convenience to the debtor consistent with the rights of the creditor.

Under the original Code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-72, ch. 74, sec. 1, executions shall issue *only* from the court in which the judgment was rendered.

In *Hutchinson v. Symons,* 67 N. C., 156, it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered; and we are now to say where the defendant shall appear and answer when residing in a different county. The inconvenience of the "court or judge" going to such county to which execution had been issued is quite manifest, and possibly on the ground the latter part of said section (1) might be disregarded, but the difficulty is removed by C. C. P., sec. 272, which authorizes the judge to appoint a referee "to report the evidence or the facts"; and section 268 is authority for requiring a party or witness to appear before the referee, etc. Thus, without inconvenience to the court, the rights of the creditor and the debtor are preserved in the manner designed by this chapter of the Code.

PER CURIAM. Reversed.

Cited: Coates v. Wilkes, 92 N. C., 379.

(72)

J. STRIKER BRADFORD v. WILLIAM A. COIT.

Practice—Parties—Negligence of Counsel—Vacation of Judgment—Excusable Neglect.

1. Although no one can be made a party to an action otherwise than by his consent or upon proper notice, yet if after an order of court making one a party without his consent and without notice, he appears by counsel and obtains time to file pleadings: *Held*, that the irregularity is thereby waived, and he stands in court a party confessed.

2. Where one employs counsel to enter his defense to an action and, counsel failing to do so, judgment is given against him, it is excusable neglect, and the judgment should be vacated. But other negligence of counsel or his mismanagement of the case, or his unfaithfulness, are matters to be settled between client and counsel, and no harm must be allowed to befall the other side on account thereof.

3. Where a case was set for trial by consent on a certain day, and it appeared that a party had not determined to attend court until after the term began, and not then unless advised by counsel that it was absolutely necessary, and after correspondence with his counsel concerning the trial of the case, failed to leave home in time to reach court before the trial, and judgment was taken against him: *Held*, not to be execusable, but gross neglect, and the court below erred in vacating the judgment.

MOTION to set aside a judgment in favor of the defendant upon a counterclaim set up in his answer in an action by the plaintiff, heard at Spring Term, 1877, of ROWAN, before *Kerr, J.*

At Spring Term, 1876, of said court one Mauney brought an action against the defendant and one Howes, upon certain drafts of Howes, alleging that Coit was a secret partner of Howes, and that Howes was the agent of Coit. At the same term Coit filed his separate answer, denying the allegation, and upon information and behalf alleged that the plaintiff Bradford had become one of the real owners of said supposed cause of action, and moved the court to make Bradford a party
(73) plaintiff. The court allowed the motion, no notice of which was ever served upon Bradford. Thereupon Coit filed a supplemental answer, in which he alleged that Bradford was indebted to him in a considerable sum, and at the next term of the court obtained judgment by default against Bradford upon his counterclaim in the sum of $21,766.25. At this term Bradford's attorney notified Coit that he would move the court, then in session, and in the event the motion was not heard, then at the next term, to set aside and vacate said judgment. Mauney was permitted to take a nonsuit, and no further action was taken against Howes.

When Coit filed his answer setting up said counterclaim, Bradford, by his attorney, obtained leave for further time to file his reply; so the entry, "Leave until 1 July, 1876, to file replication" was made upon the docket. This entry escaped the notice of Bradford's attorney, and he failed to notify Bradford, who was a nonresident. On 1 November, 1876, being Wednesday of first week of Fall Term, 1876, Bradford wrote to his attorney at Salisbury, notifying him of his intention to be present at Fall Term, 1876, if his presence should be deemed absolutely necessary, stating in said letter that he was indisposed and scarcely able to start. Bradford received no reply to this letter, but on Monday, 6 November, he received a telegram from his attorney, stating that Coit was pressing for a judgment on his counterclaim, and that the motion would be heard on the next Wednesday. The telegram was sent on the 4th, but not delivered until the 6th, in consequence of Bradford having changed his office and having failed to call for a telegram, and on the following morning Bradford started from his place of residence in Washington City for Salisbury. Having learned that the steamer from Washington made direct connection south, he took passage for Richmond in time to reach Salisbury on Wednesday morning; but on arriving and finding that there was no train for Salisbury until the next morning, he sent the following telegram to his attorney: "Expect me tomorrow (Wednesday) (74) evening. Keep motion over until Thursday."

He accordingly did arrive in Salisbury on Wednesday evening, but after the judgment on said counterclaim had been rendered against him.

That besides the irregularity of the proceedings by which Bradford was made a party plaintiff, without notice and against his will, and the original plaintiff permitted to take a nonsuit, the said Bradford had a meritorious defense to the counterclaim set up by Coit.

His Honor, after finding the facts as above, held that the judgment obtained by Coit was irregular, and a surprise upon Bradford, whose neglect was excusable, and ordered that the same be set aside and vacated. Appeal by defendant.

Kerr Craige and Armistead Jones for plaintiff.
W. H. Bailey and J. M. McCorkle for defendant.

READE, J. No one can be made a party to a suit except by his own consent, or by service of process, or, in some cases, by public advertisement; and therefore the plaintiff insists that the order of the court making him a party without his consent, and against his protest, and without service of process, was irregular and void.

That is clearly so, if the plaintiff had stood upon it; but after the order was made he came into the court by counsel and asked for time to make

his answer to the counterclaim of the defendant, which was filed against him; and time was given him until 1 July, which was some time before the next term of the court. This was a wavier of the irregularity of making him a party, and he then and there thenceforth stood in court a party confessed.

(75) The plaintiff did not file an answer to the defendant's counterclaim on 1 July, as he had obtained leave to do, nor at any other time. At the next term of the court, and during the first week thereof, the following order was made: "By agreement of counsel, this cause is to be called and tried peremptorily on Wednesday, 8 November, 1876," which was the second Wednesday of the term, and on that day it was tried, and the defendant had a verdict and judgment upon his counterclaim against the plaintiff under The Code. This is a motion to vacate the judgment under C. C. P., sec. 133, for "excusable neglect" on the part of the plaintiff.

1. In the first place, as an excuse for not filing his answer by 1 July, he says that his counsel overlooked the entry on the record limiting the time to 1 July, and therefore did not inform him of it.

We have said that where a party employs counsel to enter his plea, and the counsel neglects it, in consequence of which judgment is given against the party, it is excusable neglect in the party, and the judgment may be vacated. *Griel v. Vernon,* 65 N. C., 76. In which case it could scarcely be said that there was any neglect at all of the party, for he could not enter the plea himself. It was the peculiar duty of counsel, and for which he had been specially employed. The party had done all he could do, and he had no reason to suppose that the counsel would neglect so plain a duty. The party was really in no fault at all. But other negligence of counsel, or mismanagement of the case, or unfaithfulness, are matters which may be settled between client and counsel. No harm, however, must be allowed to befall the other side on account of it. We do not know that it was the duty of plaintiff's counsel to inform him that he was limited to 1 July to file his answer. That would depend upon the terms of his employment and upon circumstances of which we may not be informed. It may be that the plaintiff knew the fact; and

(76) it does not appear that the plaintiff suffered any harm by it. It does not appear that he would have filed an answer if he had known it. It rather appears that he would not; for, taking it upon his own allegation that he thought he had until the next term to file it, it does not appear that he offered to file it at the next term and was refused, or that he would have been refused. In the correspondence between him and his counsel before the court there is no mention by either of filing an answer at court. None was filed, and he was not even present to file it,

and a day was fixed for trial by his counsel without reference to it. So far from his failing to file an answer being excusable neglect, it is the merest pretext.

2. In the second place the plaintiff says that his failure to attend the trial was excusable neglect; and yet it appears from his affidavit that he had not made up his mind to attend the court at all until after the term commenced, and not then unless his counsel should advise him that it was "absolutely necessary." He says that on 1 November, two days after the court commenced, he being in Washington City, "addressed a letter from his office in Washington to his said attorney, asking if it is absolutely necessary that this affiant should be here at the present term of the court, and requesting his said attorney to telegraph him immediately of such necessity." *Note,* he did not *telegraph* his attorney as he ought to have done. His attorney did telegraph him on the 4th that the case was set for the 8th, which telegram he says he did not receive until the 6th; and yet there is nothing to show that he might not have received it on the 4th if he had called for it, as he would have done if he had felt any interest in it. Even then there was time enough for him to reach court before the trial; but he did not start until the 7th, and then instead of taking a route, as he might have done, which would have enabled him to reach court on the morning before the trial, he took a route which, running upon its regular time, did not reach court until after the (77) trial.

This is not excusable, but it is gross neglect; and the presumption is reasonable that he was maneuvering for delay. He pretends that he wanted to answer. Why, then, did he not appear at the beginning of the court, if not on 1 July, and answer? Did he or his counsel suppose that even if he had been present at the trial that he could have put in his answer and tried the case all at once? What did he mean in his aforesaid letter to his counsel on 1 November, by "unless it is *absolutely necessary* that I shall be there at this term of the court," if he was not looking to delay?

PER CURIAM. Reversed.

Cited: Mebane v. Mebane, 80 N. C., 41; *Mauney v. Coit, ib.,* 300; *Hodgin v. Matthews,* 81 N. C., 292; *Stump v. Long,* 84 N. C., 620; *Henry v. Clayton,* 85 N. C., 374; *Depriest v. Patterson, ib.,* 378; *Wynne v. Prairie,* 86 N. C., 75; *Boing v. R. R.,* 88 N. C., 64; *Churchill v. Ins. Co., ib.,* 208; *Wiley v. Logan,* 94 N. C., 566; *Taylor v. Pope,* 106 N. C., 271; *Williams v. R. R.,* 110 N. C., 479; *Hairston v. Garwood,* 123 N. C., 348; *Mfg. Co. v. R. R.,* 125 N. C., 24; *Pepper v. Clegg,* 132 N. C., 315.

P. J. WRAY v. JAMES H. HARRIS.

Practice—Mechanic's Lien—Sufficiency of Claim.

A claim of lien, filed under the provisions of Bat. Rev., ch. 65, sec. 4, must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and labor performed, or the time when the material was furnished and the labor performed: *Held*, to be irregular and void.

APPEAL at January Special Term, 1877, of WAKE, before *Schenck, J.*

The plaintiff instituted this action to recover a balance due from the defendant on a contract for building a cotton gin, etc., and claimed a lien upon the same and the land whereon it was situated by virtue of the following notice of lien:

(78) *P. J. Wray against James H. Harris.—Mechanic's Lien.*

The above named P. J. Wray files his notice and claim of lien in the office of the Superior Court clerk for Wake County. Said claim is for work and labor done and materials furnished for the said J. H. Harris upon the plantation of said Harris in Cary Township, in said county, to the amount of $508, upon which amount there is a balance now unpaid of $255. Said work and labor and materials were performed and furnished in the construction of a cotton gin upon said plantation, and upon the said cotton gin and land upon which the same is situated, the said Wray claims his lien. This 17 December, 1875.

P. J. WRAY.

Sworn and subscribed before me, this 17 December, 1875.

J. N. BUNTING, C. S. C.

The defendant answered, admitting the debt, but denying that the above notice created any lien on his property as claimed by the plaintiff, by reason of its failure to comply with the requirements of the statute.

His Honor held that the notice was insufficient, and the plaintiff appealed.

Merrimon, Fuller & Ashe for plaintiff.
Busbee & Busbee for defendant.

RODMAN, J. It is very clear that the claim of lien filed in the office of the clerk of the Superior Court does not come up to the requirements of the act. Bat. Rev., ch. 65, sec. 4. It does not specify in detail the materials furnished or labor performed, or give the dates at which the materials were furnished or the labor was performed. The date given in the claim was evidently intended only as the date when it was put in writing

for the purpose of being filed. Such liens are the creatures of the (79) statute, and its requirements must be substantially observed.

PER CURIAM. Affirmed.

Cited: Cook v. Cobb, 101 N. C., 71; *Moore v. R. R.,* 112 N. C., 241; *Jefferson v. Bryant,* 161 N. C., 407; *Lumber Co. v. Trading Co.,* 163 N. C., 317.

T. J. MAGRUDER & CO. v. W. H. RANDOLPH & CO.

Practice—Jurisdiction—Splitting Accounts.

1. A creditor cannot "split up' his account so as to give a justice of the peace jurisdiction, when the dealing between himself and the debtor was continuous, and nothing appears on the face of it, or in the account rendered, indicating that either party intended that each item should constitute a separate transaction.
2. An account for a bill of goods purchased on one day is to be taken as one entire transaction, in the absence of evidence of a contrary intention between the parties.

APPEAL from a justice's court, heard at Spring Term, 1877, of HALIFAX, before *Buxton, J.*

The plaintiffs are wholesale dealers and manufacturers of boots and shoes in the city of Baltimore. The defendants are merchants in Halifax County, and bought a bill of goods of plaintiffs amounting to $526.25 on four months time, said bill as rendered being composed of twenty items. Upon default of payment, the plaintiff "split up" the account (but not the items thereof), and instituted actions before a justice of the peace for the recovery of the various amounts. The defendants admitted the debt, but insisted that the justice had no jurisdiction because the account was one continuous transaction, and made at one time. The plaintiffs replied that each item was a separate (80) transaction, and although on the same day, the dealings did not take place at the same time. His Honor being of opinion with the defendant, dismissed the case, and plaintiffs appealed.

Conigland & Burton for plaintiffs.
Mullen & Moore for defendants.

FAIRCLOTH, J. One of the defendants went into the plaintiffs' store and purchased goods, going through the building from floor to floor, selecting and agreeing on the price of each item as he went, for example, "26 pairs of men's brogans, $1.75 per pair, $45.50," and so on through the whole purchase.

He went through the building continuously, not leaving it until his purchases were completed, and not until the bill was made and furnished to him, consisting of twenty items similar to the one above given, aggregating $526.25. The bill was marked: "Terms, 4 months; interest charged after maturity."

After maturity and nonpayment, the plaintiffs divided said account into three parts, taking the first ten items aggregating $196.80 as one part, on which the present action was commenced before a justice of the peace, and the defendants deny the jurisdiction of the justice.

When an account consists of divers and separate dealings, and at different times, or is a running account from year to year, either for goods sold, work done, or materials furnished, it is well settled that the creditors may "split it up" and proceed on each separate item before a justice. This was the class of cases considered in *Waldo v. Jolly,* 49 N. C., 173; *Caldwell v. Beatty,* 69 N. C., 365, and other similar cases. But we think the case before us is not embraced by the principle of those cases.

Here the dealing was *continuous,* and nothing appears on the face of it, or in the account rendered, indicating that either party
(81) *intended* that each item should constitute a separate transaction and cause of action, which could have been easily done, and, we are to presume, would have been done if so intended. Suppose the parties, at the time of purchase, had divided the account as the plaintiffs have now done, and promissory notes had been given for each part, maturing at two, four, and six months respectively: no one would doubt that they intended three separate causes of action, and that it would be so decided. And suppose, on the contrary, that one promissory note had been given for the aggregate sum, $526.25, on four months time, with interest after maturity: would this differ from the account rendered with an express oral promise to pay it, except in the kind of evidence of the *debt* and of the promise to pay? Again, suppose the time occupied in making the purchase was one hour, and the defendants relied upon the statute of limitations, and upon a minute examination the fact should be discovered that three years immediately proceding the precise moment when the summons issued would include the latter part of the account and exclude the first part; or suppose the plaintiffs had brought suit for the aggregate amount in the Superior Court, and had insisted that the first item became due one hour before the last, and claimed interest on it accordingly, and so on with the other items. It is very clear that the court would not entertain such propositions; and yet we do not see how it could avoid doing so, if each item is a distinct cause of action contracted at different times, on the well understood principle that one portion of an open account may be barred by the statute, whilst the other is not.

The law does not allow fractions of a day, except to guard against injustice, and for the purpose of determining the actual priority of conflicting rights which have accrued on the same day. In controversies among creditors, it will regard the particular time when a (82) sheriff levies on personal property, and when a mortgage deed is registered; also when, under our present system, a judgment is docketed, and the like.

Our conclusion, therefore, is that, in the absence of evidence of a contrary intention between the parties, the purchase was on entire transaction.

PER CURIAM. Affirmed.

Cited: *Jarrett v. Self*, 90 N. C., 479, 482; *Kearns v. Haitman*, 104 N. C., 334; *Copland v. Telegraph Co.*, 136 N. C., 12.

(83)

*MAYER & MORGAN ET ALS. v. ADRIAN & VOLLERS ET ALS.

Statute of Frauds—Contract for the Sale of Land—Evidence—Mortgage Sale.

1. Where a signed memorandum of sale was not attached to the printed advertisement of sale nor otherwise referred to it, parol testimony is not admissible for the purpose of connecting them.
2. A memorandum of a contract of sale upon which the plaintiff relies in an action for specific performance must show not only who is the person to be charged, but also who is the bargainor.
3. If this is done by description, parol evidence is admissible to apply the description, *i. e.*, to show who is the person described.
4. While parol evidence is not admissible to vary or add to the terms of a written contract, in behalf of a party seeking specific performance, it is always admissible in behalf of a defendant resisting it.
5. Where at a mortgage sale the auctioneer offered the property free of encumbrances and the defendant purchased with that understanding at the full value of the property: *Held*, that the defendant could not be compelled to accept the title when the property was encumbered with prior mortgages.
6. Where the auctioneer in such case told the defendant (who had notice of the prior encumbrances), before the bidding commenced, that the purchase money would be applied in extinguishment of such encumbrances, and thereupon offered the property for sale without any announcement to that effect: *Held*, that the jury were warranted in finding that the property was sold free of encumbrances, and that defendant purchased with that understanding.

*FAIRCLOTH, J., being a stockholder in defendant bank, did not sit on the hearing of this case.

7. Where the defendant in such case refused to comply with the terms of sale, and thereafter entered into possession of the property under a mortgage executed to him by the owner: *Held*, not to be an affirmance and ratification of his previous purchase.

(84) ACTION for specific performance, tried at Spring Term, 1877, of NEW HANOVER, before *Seymour, J.*

The plaintiffs are Mayer & Morgan and Feist Mayer. The defendants are Adrian & Vollers and the Bank of New Hanover.

It was alleged in the complaint that on 13 October, 1871, Feist Mayer bought of one Charles R. Mayer a certain lot in the city of Wilmington for a valuable consideration, upon which said lot there were two prior mortgages, executed respectively to H. A. London for $14,400 and to Richard Dosher for $2,000. On 7 March, 1872, Feist Mayer executed a mortgage on the same lot to defendant bank for $2,000, with power of sale, and on 23 February, 1874, he executed another mortgage on the same lot to the defendants Adrian & Vollers for $2,917.86, and expressed on its face that there were three prior mortgages, viz., to London, Dosher, and the bank. On 25 February, 1874, Feist Mayer executed another mortgage on the same lot to Mayer & Morgan for $4,000. The bank advertised and sold the property under its mortgage, and Adrian & Vollers bought at $14,600 upon the terms announced by Mr. Cronly (of the firm of Cronly & Morris, auctioneers), who was the authorized agent of the bank to make the sale. It was further alleged that Adrian & Vollers purchased the interest of Feist Mayer with notice of the prior mortgages, and took possession of the premises. The plaintiffs notified Isaac B. Grainger, the president of said bank, that unless he would agree to become a party plaintiff in an action to compel Adrian & Vollers to comply with the terms of purchase, he would be made a party defendant. No reply was made by Grainger to the letter communicating the intention of the plaintiffs to make the bank a party. And it was further alleged that the bank was the trustee of plaintiffs, and had failed
(85) to inform them whether said purchasers had complied with the contract or terms of purchase.

Thereupon the plaintiff demanded judgment (1) that said purchasers perform the said contract of purchase according to the terms thereof; (2) that the bank account for the proceeds of said sale; and (3) for an account to ascertain the amounts due respectively to the bank, Adrian & Vollers, and Mayer & Morgan.

The defendants Adrian & Vollers denied that only the interest of Feist Mayer in said property was sold as aforesaid, and averred that the bank sold the property absolutely, and not merely the interest of Mayer, and that their bid was a full and fair price for the same, clear of all

encumbrances; that the amount due and unpaid on the London and Dosher mortgages was about $9,840, and that it would have been unreasonable to suppose that they bought the property subject to such heavy liens, and agreed to pay a sum which is its full value without encumbrances; and that they had no notice of the prior mortgages, and cannot be held responsible beyond the amount of their bid. They admit that they have received rents for one of the stores, and say that Feist Mayer leased the other store to them in trust to apply the rents to debts due them and secured by the mortgage mentioned in the complaint. They have not complied with said terms, for the reason that soon after the sale they discovered that the bank could not, on its part, comply with the same by making them a clear title, and have considered themselves released from all obligations in respect thereto.

The defendant bank, in the material part of its answer, says that it was its purpose and design to convey to the purchaser or purchasers at said sale only such an interest in the property mentioned as it could legally convey by virtue of the power contained in the said mortgage to this defendant; that Adrian & Vollers understood that they bought the property absolutely, and would obtain a clear title upon payment of said prior encumbrances, which were to be satisfied out of the amount paid by them, and that they have made no payment to this defend- (86) ant on account of said purchase, either in cash or otherwise.

The terms of sale and description of the property are set out in the opinion of the Court. Upon issues submitted, the jury found the following facts:

1. Adrian & Vollers bought the property mentioned in the complaint and sold by the auctioneer on 9 September, 1875, free from all encumbrances.

2. The jury unanimously believe that they bid for the property at the time of the sale under the idea that it was sold out and out, clear of encumbrances.

3. They were led to that understanding by the auctioneer while conducting the sale and changing the terms of the sale.

4. The price bid was a fair price for the premises, clear of encumbrances.

The plaintiffs' counsel then moved for judgment *non obstante veredicto,* which his Honor overruled, and rendered judgment in favor of the defendants, and dismissed the action. Appeal by plaintiffs.

E. G. Haywood for plaintiffs.
George Davis and W. N. H. Smith for defendants Adrian & Vollers.
Wright & Stedman for defendant Bank of New Hanover.

BYNUM, J. Before the plaintiffs can recover in an action for specific performance, they must establish that the contract declared on, or some note or memorandum thereof, was put in writing and signed by the party to be charged thereunto, or by some other person by him
(87) thereto duly authorized within the statute of frauds. It is admitted that the contract itself was not reduced to writing, but it is alleged that a "memorandum" of the contract of purchase was reduced to writing at the time of sale and signed by the defendants Adrian & Vollers, through their agent, the auctioneer who cried the sale. This is denied by them, and they rely on the statute of frauds. Bat. Rev., ch. 50, sec. 10. It is therefore necessary to inquire whether this "memorandum" of the contract was such as is required by the statute to bind the defendants.

There were five mortgages at the same time upon the same lot, the Bank of New Hanover holding the third. The bank, under a power of sale in its mortgage, undertook to sell the lot for the payment of its debt, and to that end duly advertised the sale, giving a sufficient description of the property, stating also the time, place, and terms, which were cash. Of this the defendants had notice, and attended the sale.

At the time of sale the auctioneer first read the printed advertisement before alluded to, and then read the terms of sale as written in his auction book, which were as follows: "The purchaser pays for all papers and $6,000 cash, the balance in six, twelve, and eighteen months, with 8 per cent interest, the purchaser to have posession on 1 October, 1875, and his notes to draw interest from that time." It does not appear that the "printed advertisement" was pasted in the auction book with the "terms of sale" there written, or was in any way attached to or physically connected with the written terms of sale; and they in no way refer the one to the other on their face.

Adrian & Vollers bid off the property at the sum of $14,600. Morris, the auction partner of Cronly, who cried the sale, then and there, in the presence of Vollers, who was announced as the purchaser, immediately made in his auction book the following entry:

(88) Sale at the courthouse, 9 September, 1875.

MAYER PROPERTY.

Adrian & Vollers. 34 ft. on Market St., 58 ft. on alley, and 132 back. Line on Shrier Bros. Lease until 1 October, 1876. $6,000 cash. Bal. six, twelve, and eighteen months, at 8 per cent. Possession 1 October, 1875. Notes bear interest from date. Purchaser to pay for all papers by the 15th inst. $14,600.

The "memorandum" of the contract is set forth *verbatim* because upon its construction the plaintiffs' right of action depends. For it will be observed that this agreement cannot be helped out by a reference either to the printed "advertisement" or the "terms of sale"; and that, for the reason that they are not attached or connected together, or by mutual reference connected so as to make one whole, from which the contract is to be ascertained. The agreement must adequately express the intent and obligation of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely. It may consist of one or many pieces of paper, provided the several pieces are so connected physically or by internal reference that there can be no uncertainty as to the meaning and effect when taken together. But this connection cannot be shown by extrinsic evidence. "If there is an agreement on one paper, and something additional on another, and signature on another paper, that is not a written and signed agreement, unless these several parts require by their own statement the union of the others; for if they may be read apart, or in other connections, evidence is not admissible to prove that they were actually intended to be read together." 3 Pars. on Contracts, 17. "But if it be necessary to adduce parol evidence in order to connect a signed paper with others unsigned, by reason of the (89) absence of any internal evidence in the contents of the signed paper to show a reference to or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute." Benjamin on Sales, 160-1.

These general principles are well settled by the authorities cited in the learned brief of Mr. Davis. 1 Sugden Vend., 200; 2 Schouler Pers. Prop., 519.

The signed memorandum not having been attached to the printed advertisement, nor otherwise referred to it, and parol testimony being inadmissible to connect them, the advertisement is to be put out of view as though it had never been, and we are to consider the signed memorandum as the only evidence of the contract of sale. Does it contain all the essential requisites of a contract which can be specifically enforced?

1. Who are the parties in this memorandum of sale? It is settled to be indispensable that it should show not only who is the person to be charged, but also who is the bargainor. The name of the purchaser is required by statute to be signed. So no question can be made of the necessity of his name in the writing. But it is equally well established that the name, or a sufficient description, of the other party is indispensable. "How," said *Mansfield, C. J.*, "can that be said to be a con-

tract or memorandum of a contract which does not state who are the contracting parties?" *Champion v. Plummer,* 4 B. and P., 253; 3 Pars. on Contr., 13 and note; Benjamin on Sales, 169. In *Williams v. Lake,* 29 L. J. Q. B., 1, the defendant wrote a note binding himself as a guarantor and gave it to a third person for delivery, but the name of the person to whom the note was addressed was not written in the note. It was held by all the judges insufficient to satisfy the statute, and this decision was approved and followed in 1 Morse, 154. Benjamin on Sales, 170.

(90) But while all the authorities are clear that the memorandum should show who are the parties to the contract, if this is done by description the statute is satisfied, and parol evidence is admissible to apply the description, that is, to show who is the person described, so as to enable the court to understand the description. In our case the memorandum neither names nor describes the bargainor. Neither does it state that Adrian & Vollers are the purchasers. On one side of the memorandum are the words "Adrian & Vollers," and on the other the figures "$14,600." But the first are not described as purchasers, or the latter as the price bid.

We may *infer* therefrom that Adrian & Vollers were the purchasers, and at that price, but it is not so declared in the writing, and we cannot certainly know it without recourse to parol testimony, which the statute forbids. Looking at the memorandum alone, why should it be more reasonably inferred that the name "Adrian & Vollers" indicated who were the purchasers rather than who were the vendors? Certainly the implication that they were the purchasers is not a necessary one from this meager entry, and beyond all question nothing whatever in the memorandum contained does or purports to declare that the Bank of New Hanover, or any other party, was the vendor and a party to the contract of sale.

2. But the defendants insisted that the signed memorandum does not contain all the material terms of the agreement, and is not therefore the contract in writing which is required by the statute. Issues were thereupon submitted to a jury, who, by its verdict, found (1) that the auctioneer sold and the defendants purchased the property free of all encumbrance; (2) that Adrian & Vollers had reason to believe, and were led to that belief by the representations of the auctioneer made to them at the sale, that the property was sold out and out, and that they bid

(91) for it with that understanding and belief; (3) that the price bid was a fair price for the land, clear of encumbrances.

The plaintiffs objected to the parol testimony by which the issues were established, as incompetent to vary or add to the terms of the written memorandum. But it is well established that while such testimony is in-

admissible for the party seeking specific performance, it is always admissible for a defendant resisting it. It is a principle of equity jurisprudence that parol testimony is admissible to rebut, but not to raise, an equity. If the written document does not fully represent the contract between the parties, it will defeat the action, or the plaintiff will be compelled to accept a performance according to the actual contract. 3 Pars. on Contr., 389; *Townsend v. Stugrom,* 6 Ves., 328; *Garrard v. Grenling,* 2 Swanson, 244; *Martin v. Pycroft,* 2 DeG., M. and G., 785; 15 Eng. L. and E., 376, reversing same case; 11 Eng. L. and E., 110; Story Eq., 769-70; 1 Sugd. Vend. and Pur., ch. 3, sec. 8, pl. 27; Benjamin on Sales 154-5.

If we put out of view the mortgage held on the property by Adrian & Vollers, which recited that there were two other mortgages prior to that of the bank under which the lot was sold, the verdict of the jury was a conclusion of law rather than a finding of facts; for both the memorandum of the contract and the bank mortgage and power of sale contained in it impose on the seller the legal duty of making a clean title to the purchaser, because they all import a good title in the mortgagee making the sale. A purchaser not under a decree of sale by the court cannot be compelled to take an equitable title or a doubtful one. I Sugd. Vend. and Pur., 297. But it was owing to the very fact that the mortgage to Adrian & Vollers gave them notice of the prior encumbances that they, before bidding, inquired of the auctioneer how the purchase money would be applied, and the kind of title that would be made. It was upon his assurance, both before and at the sale, that the purchase money would be applied in extinguishment of the prior encumbrances, that the (92) purchase was made. He even assisted Vollers in calculating the amount due upon the prior encumbrances, and on the day of sale did not offer for sale the interest of Feist Mayer, but offered the property without proclaiming, as in good faith he was bound to do, that it was subject to prior mortgages. Everybody present except the mortgagees must have understood from the advertisement, the proclamation of the terms, and from the conduct and representations of the auctioneer, that the sale was of the entire property, free of encumbrances. Adrian & Vollers were made to believe that by arrangement between the bank and the prior mortgagees, the sum bid would be used in removing the encumbrances, and that they were to receive a good title. It was in that expectation thus induced that the defendants bid the full value of the land. The jury, therefore, were well warranted in finding that the auctioneer exposed the lot for sale free from encumbrances, and that the defendants bid for it with that understanding. The plaintiffs admit that they cannot make such a conveyance, and the defendants, the purchasers, refuse

to accept any other. As the signed memorandum, then, does not contain the true contract, it is not a compliance with the statute, and there can be no specific performance of it decreed.

It is found by the jury that the defendants bid the full value of the lot, yet it is admitted that they must pay $9,840 more before they can get a good title by removing the encumbrances. The vendor, the bank making the sale, admits that Adrian & Vollers did purchase under a misapprehension, and for that reason did not consider them bound, or attempt to enforce a compliance; and the jury find that this misapprehension of the purchasers was induced by the conduct of the bank itself, through its authorized agent, the auctioneer. With what face could the bank come into this Court and call upon the purchasers for a spe-
(93) cific performance, and how can these plaintiffs, who can and do seek a specific performance only through or by virtue of this questionable conduct of the bank, place themselves upon other and higher grounds? They must take the shade as well as the light of this singular conduct of the bank. They claim that the bank by this sale acquired rights which it holds as a trustee for them, and which they can enforce by this action; but it is too plain for argument that the equity of Adrian & Vollers against the enforcement of specific performance applies equally to the plaintiffs and the bank. A vendor of property who makes statements respecting the property is bound to make them free from all ambiguity, and the purchaser is not bound, upon the spur of the moment of sale, to take upon himself the peril of ascertaining the truth or true meaning of his statements. A definite representation upon a fact affecting the value of the subject of sale, if it be untrue, will entitle the purchaser to resist specific performance. Kerr on Fraud and Mistake, 360; *Lord Brooke v. Roundthwaite*, 5 Ha., 304; *Stewart v. Alliston*, 1 Mer., 26.

3. It is, however, insisted that the purchasers after they became fully apprised of the true character of their purchase and their defenses to specific performance affirmed and ratified it by entering into possession and receiving and collecting the rents and profits. The purchasers deny that they subsequently ratified the purchase, and affirm that they always treated the sale as not binding upon them, but void. They admit that they did take possession of part of the premises by receiving and contracting to receive rents. So far from affirming the sale, the purchasers expressly refused to comply with its terms, and repudiated it, and in that the bank acquiesced. But Adrian & Vollers did not stand in the relation of strangers to this property. If they had been strangers, there might have been some force in the argument. But they were mortgagees, and as against these plaintiffs had a right to the possession and the rents and profits until their debt was satisfied. This right they
(94) had independent of any acquired under their alleged purchase.

Such a possession, rightful in itself, cannot be held to be an affirmance and ratification of the contract of purchase. *Crawley v. Timberlake,* 37 N. C., 460.

The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court; and an agreement to be carried into execution must be certain, fair, and just in all its parts. *Leigh v. Crump,* 36 N. C., 299. If its strict performance under the circumstances would be harsh, inequitable, and oppressive, a court of equity will not decree such performance. The party calling for specific performance in every part of the transaction must be free from every imputation of fraud or deceit, and if the agreement is affected by misrepresentation or tainted by deceit, it is incapable of being made the subject of interference by a court of equity in order to compel its specific performance. The party who calls for specific performance must show that his conduct has been clear, honorable, and fair. Kerr on Fraud and Mistake, 388; *Cannaday v. Shepard,* 55 N. C., 224; *Lloyd v. Wheatley, ibid.,* 267; *Cox v. Middleton,* 2 Drew., 220; 1 Story's Eq., secs. 736-70. Perhaps no more appropriate case for the refusal of the Court to compel specific performance could be presented than this, where the vendor, by duplicity and misapprehension, has induced the vendees to bid off a property to which no good title can be made, and to give a price approaching double the value of the interest he was authorized to sell.

The equity against specific performance in the view we are now taking of the case is altogether independent of any question of the validity of the contract of sale, as not being in compliance with the statute of frauds.

In conclusion, attention is called to what was said by the Court in *Kornegay v. Spicer,* 76 N. C., 95, and *Mosby v. Hodge,* 76 N. C., 387. Here was a complication arising out of five mortgages, piled one upon another. To ascertain the debts, adjust the equities, and de- (95) clare the rights of the several parties were matters addressed peculiarly to the jurisdiction of a court of equity. All the parties being brought before the court, a decree of foreclosure and sale of the entire property would have been made, a clean title executed to the purchaser, and the proceeds of the sale disbursed by the direction of the court according to the rights of the several mortgagees. Such a course is generally advisable, and in this case would have saved expensive and disagreeable litigation.

PER CURIAM. No error.

Cited: *Albright v. Albright,* 88 N. C., 242; *Breaid v. Munger, ib.,* 299; *Gordon v. Collett,* 102 N. C., 537; *Fortescue v. Crawford,* 105 N. C., 32; *Mfg. Co. v. Hendricks,* 106 N. C., 493; *Turnstall v. Cobb,* 109 N. C.,

326; *Proctor v. Finley,* 119 N. C., 539, 540; *Hall v. Misenheimer,* 137 N. C., 186; *Dickerson v. Simmons,* 141 N. C., 327; *Brett v. Davenport,* 151 N. C., 59; *Brown v. Hobbs,* 154 N. C., 549; *Love v. Harris,* 156 N. C., 91.

C. J. GREEN v. THE NORTH CAROLINA RAILROAD COMPANY.

Statute of Frauds—Parol Contract for the Sale of Land.

The requirements of the statute of frauds that a contract for the sale of land shall be in writing, etc., applies only to "the party to be charged therewith." Therefore, where the plaintiff and defendant entered into a parol contract whereby the plaintiff agreed that defendant might cut from his land a certain quantity of wood, for which the defendant was to execute to plaintiff a deed for a certain tract of land: *Held,* that the plaintiff could not recover in an action of *assumpsit* for the value of the wood taken by defendant, but was bound by the terms of the original contract, the defendant not seeking to avoid the same.

APPEAL at January Special Term, 1877, of WAKE, from *Schenck, J.*

This action was brought to recover the value of a certain num-
(96) ber of cords of wood alleged to have been delivered to defendant company under a verbal contract, in which the plaintiff agreed that the defendant might cut off of his land, along and near the defendant's road, as many cords of wood as the defendant had cut off of a certain tract of its own. The defendant agreed to take the wood and to convey to the plaintiff a tract of land in payment therefor. During the years of 1863-64, and before May, 1865, the defendant cut and hauled from the plaintiff's land about 2,200 cords, and in the fall of 1866 about 200 cords more. The defendant promised to execute a deed upon the demand of plaintiff, but no deed had been executed at the time this action was commenced. After verdict, and before judgment, however, the defendant filed in a court a deed conveying the land to the plaintiff in fee, and tendered a release to plaintiff from all further execution of the contract on his, plaintiff's part. The following facts were found by the jury upon the issues submitted.

1. The defendant took 2,200 cords of wood from the plaintiff's land in 1863-64, and up to 1 May, 1865.

2. The value of each cord was 50 cents.

3. The plaintiff has received no pay for the wood.

4. After 1 May, 1865, the defendant took 200 cords, valued at 50 cents per cord.

5. The defendant verbally agreed to sell to plaintiff the land in payment of the wood, and to give him a deed for the same.

6. The defendant neglected to execute the deed when demanded by plaintiff in 1872.

On this verdict, the court held that the plaintiff was entitled to recover the value of the wood, and gave judgment accordingly. Appeal by defendant. (See same case, 73 N. C., 524.) (97)

Battle & Mordecai for plaintiff.
J. B. Batchelor and W. N. H. Smith for defendant.

PEARSON, C. J. The plaintiff claims the value of 2,200 cords of wood, standing on the land, which he estimates at 50 cents per cord, making $1,100, cut and carried away by the defendant, as upon a common count in assumpsit *"quantum valebat."*

The defendant admits the taking of the 2,200 cords of wood, and avers that it was done under a contract that the wood was to be paid for by the deed of defendant to plaintiff for a certain other tract of land particularly described, and avers that it has always been "ready, able, and willing" to make the deed upon a compliance by the plaintiff with his part of the agreement. To this the plaintiff makes replication as provided for by C. C. P., sec. 127.

The answer sets up a special contract, and it is settled that so long as it exists neither party can resort to the common counts in assumpsit. The question then is, What had put an end to this contract at the time the action was commenced? The defendant says he has received all or the greater part of the wood, and is ready to make a deed for the land if the plaintiff has complied with his part of the contract, and whenever the plaintiff executes the contract on his part, he is ready to make the deed.

This alternative mode of pleading (which should never be allowed) made it necessary to leave the issue to a jury. There is no distinct issue presenting the point. The nearest to it is "Issue V," by which it is found that the defendant did agree verbally to sell the land described in payment for the wood, and to give him a deed therefor, to which the jury respond *"Yes, by consent."*

The section (C. C. P., 127) relied on by plaintiff's counsel (98) allows the plaintiff to be considered as putting in "a direct denial," or a replication by confession and avoidance, *"as the case may require"* him. The case did not require a "direct denial," for the parol contract to pay for the wood by a tract of land is proved, and in fact is admitted.

As to the matter in avoidance, the plaintiff, by way of replication, says: "The contract being for land, is void under the statute." That is

true. The contract is void unless "signed by the party to be charged therewith." There is no attempt here to charge the plaintiff. He is the actor in the matter, and as the defendant agrees and offers to comply with the contract, and does not seek to avoid it under the statute, the plaintiff cannot take shelter under it for the purpose of getting rid of the contract and holding the defendant liable for the value of the wood, as if there had been no agreement on his part to take the tract of land in full payment.

The parol contract was to exchange land for wood. The defendant admits the contract, and is ready and willing to perform it. The plaintiff says he has performed his part of the contract, and seeks to repudiate it and recover the value of the wood, as if there had been no contract by which he was to be paid in land and not in money, on the ground:

1. That, so far as he is concerned, the contract being to sell land, was void. Reply: the statute applies only to "the party to be charged therewith." See *Mizell v. Burnett,* 49 N. C., 249. So, he cannot repudiate the contract, the defendant being willing to perform it.

2. That the defendant had delayed for an unreasonable time to execute the deed. There was delay on both sides, but here is no doubt of the truth of the averment in the answer that defendant was ready and willing to make the deed when the plaintiff complied with his part of the contract, which was supplemented by an agreement that plaintiff
(99) was to cut and haul the balance of the wood that had not been received by defendant.

Without going into details, the merits of the case depend upon this: How has the plaintiff freed himself from the agreement to take the tract of land in payment for the wood? *Denial* of the contract will not do, for the parol contract is proved and admitted. Plea of the statute of frauds will not do, for he is not the "party to be charged thereby." So the case is that of one who repudiates his contract, the validity of which is not disputed, and seeks to recover upon the common count. Unreasonable delay will not answer the plaintiff's purpose to get rid of the special contract, for he might at any time, by complying with his part of the contract, have compelled the defendant to comply with his part. So there is no ground on which the plaintiff can "cut loose" from the special contract and sue for the value of the cords of wood.

Foust v. Shoffner, 62 N. C., 242, settles the question, unless, as Mr. Battle contends, the adroit mode of pleading, by which no reference whatever is made to the verbal contract to take land in payment for the wood can distinguish the cases. That contract is relied upon by the defendant, and is still subsisting. His Honor ought to have ruled that the plaintiff was not entitled to recover upon the common count, *"quan-*

tum valebat," as it was held in *Foust v. Shoffner* that he could not recover upon the common count for "money had and received," or on a bill in equity filed in its stead.

PER CURIAM. *Venire de novo.*

Cited: Evans v. Williamson, 79 N. C., 90; *Davis v. Inscoe,* 84 N. C., 401; *Parker v. Allen, ib.,* 472; *Welborn v. Sechrist,* 88 N. C., 290; *Wilkie v. Womble,* 90 N. C., 255; *Neaves v. Mining Co., ib.,* 413; *Magee v. Womble,* 95 N. C., 570; *Lane v. Welch,* 97 N. C., 204; *Thigpen v. Staton,* 104 N. C., 42; *Loughran v. Giles,* 110 N. C., 426; *Imp. Co. v. Guthrie,* 116 N. C., 384; *Taylor v. Russell,* 119 N. C., 32; *Hall v. Misenheimer,* 137 N. C., 187; *Lumber Co. v. Corey,* 140 N. C., 469; *Rogers v. Lumber Co.,* 154 N. C., 111; *Brown v. Hobbs, ib.,* 549, 551, 552; *Henry v. Hilliard,* 155 N. C., 378; *Plaster Co. v. Plaster Co.,* 156 N. C., 456.

(100)

H. T. CLAWSON v. W. O. WOLFE.

Practice—Misnomer—Amendment of Process—Waiver of Irregularity.

1. A defect in the name of a defendant in the summons is cured by the judgment by default rendered against him, under the provision of Rev. Code, ch. 3, sec. 5.
2. Where such judgment is taken before a justice of the peace and carried by appeal to the Superior Court, it is the duty of the court to make the proper amendment and proceed with the trial upon the merits.
3. Where the defendant in such case took an appeal from the justice and failed for seven terms to make any motion to dismiss, he thereby waived the irregularity complained of.

APPEAL from a justice's court, tried at January Special Term, 1877, of WAKE, before *Schenck, J.*

The title of the action in the justice's court was "H. T. Clawson against W. O. Wolfe and J. W. Watson," and on the face of the summons was, "You are hereby commanded to summon J. O. Wolfe," etc. When the case was called for trial (the first time after it was docketed), the defendant moved upon the face of the papers to set aside the judgment rendered by the justice of the peace against him, and to dismiss the action, for the reason that it appeared affirmatively that no summons issued to or was served on W. O. Wolfe, the defendant, and that the return of the constable was defective.

The plaintiff resisted the motion, and offered to prove by the constable that it was served on this defendant, and asked that the return be

amended; and, further, that the defendant had waived all irregularity in the proceeding by giving the justice notice of appeal, after judgment upon the alleged defective summons had been rendered and execution issued thereon. His Honor being of opinion with the defendant,
(101) gave judgment accordingly, and the plaintiff appealed.

E. G. Haywood and George H. Snow for plaintiff.
Busbee & Busbee for defendant.

BYNUM, J. There is error. It is provided in Rev. Code, ch. 3, secs. 5, 6, that where a judgment shall have been rendered in any case upon default, *nil dicit,* etc., it shall not be reversed, impaired, or in any manner affected for any defects in the process or pleadings, to wit, for any mistake in the name of any party or person etc., where the correct name shall have been once rightly alleged in any part of the pleadings or proceedings; and that such omissions, defects, and variances, not being against the right and justice of the matter of the suit, and not altering the issue between the parties on the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court in which the judgment shall be removed by appeal. This statute covers this case. The name of the defendant was correctly set forth in the title of the summons, and in the declaration, which was upon a note signed by the defendant, and which he does not deny. The only defect is contained in the body of the summons, where he is named J. O. Wolfe, when it should have been W. O. Wolfe. We think it sufficiently appears, without the aid of the proposed affidavit, that W. O. Wolfe was actually served with process, and was not in the slightest degree misled. The officer returns upon the process that it was "served," and the defendant does not deny that it was served upon *him,* but, we think, by fair inference, admits it when, in his notice of appeal and as one of the grounds of it, he says "that judgment was rendered without any service of *proper* summons upon the defendant W. O. Wolfe." If no summons had been
(102) served upon him, it was incorrect to insert the word "proper," which, having been inserted, must have its proper effect.

The title of the summons was against the defendant by his proper name, the declaration of the cause of action was against him by his proper name, the judgment also correctly set forth his name, and finally the summons was served upon him, containing such a description of the cause of action that he could not have been reasonably misled by what he must have known was a clerical mistake as to a single letter. It was, therefore, the duty of the court, under the provisions of the Rev. Code before cited, and C. C. P., secs. 128, 135, to make the amendment and proceed with the trial. *Gibbs v. Fuller,* 66 N. C., 116. We place our

decision upon the proper construction of our statutes, and therefore we do not consider the English authorities cited by the defendant's counsel as applicable.

We are also of opinion that W. O. Wolfe, having admitted himself to be the defendant of praying an appeal and defending the action for seven terms of the court, without having specified the grounds of his motion to set aside the judgment and dismiss the action, or moved in the matter, thereby waived the irregularity complained of.

PER CURIAM. *Venire de novo.*

Cited: *Patterson v. Walton,* 119 N. C., 501.

W. R. PERRY v. J. D. WHITAKER.

Practice—Appeal—Writ of Recordari.

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for writ of *recordari.* An appeal lies from the order of the court either granting or refusing to grant such writ.

PETITION for a writ of *recordari,* heard at Spring Term, 1877, (103) of WAKE, before *Buxton, J.*

In an action heretofore had before a justice of the peace, in which J. D. Whitaker was plaintiff and G. W. Perry and W. R. Perry were defendants, a judgment was rendered for plaintiff on 21 December, 1875. The plaintiff says in his petition that he has a good defense to the notes upon which said judgment was rendered. The defendant moved to dismiss the petition. His Honor overruled the motion, and ordered the defendant to answer. The defendant accordingly filed an answer, and also appealed from the judgment of the court in refusing to dismiss the petition.

A. M. Lewis and J. H. Fleming for plaintiff.
Walter Clark for defendant.

BYNUM, J. This is a petition for a writ of *certiorari.* An appeal lies from an order of the judge either granting or refusing to grant the writ, but no appeal lies where the judge has done neither the one nor the other, which is our case. When the plaintiff filed his petition, the defendant moved to dismiss it, and upon the refusal of the judge to dismiss, he appealed to this Court. A refusal to dismiss at that stage of the case was by no means the same as or equivalent to granting the writ.

Before final action, the judge desired, and it was his duty, to ascertain the facts; hence he ordered the defendant to answer the allegations of the petition. The defendant did answer, notwithstanding his appeal, denying many of the allegations of the petition, and thus raising questions of fact for the decision of the court. But without awaiting the finding of the judge upon these issues, or any judgment granting or refusing the writ, and without predicating any motion upon the petition and answer, the defendant prosecuted and relied upon his previous appeal. The appeal was precipitate and from no appealable
(104) order or judgment. Whether a writ of *recordari* ought to have been issued depends upon the facts. No facts are found by his Honor, and we cannot, therefore, see whether he ought or ought not to have issued the writ. But owing to the hasty appeal, his Honor was prevented from either finding the facts or giving a judgment granting or refusing the *recordari*. *Collins v. Collins,* 65 N. C., 135; *Cardwell v. Cardwell,* 64 N. C., 621.

If the case was properly before us, and it were allowable to us to ascertain the facts from the pleadings as now presented, we should say without hesitation that there is no case made out entitling the plaintiff to the writ. But for the reasons we have given, there is nothing before us to act on, and the appeal must be dismissed and the case

PER CURIAM. Remanded.

Cited: Merrell v. McHone, 126 N. C., 529; *Hunter v. R. R.,* 161 N. C., 505.

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(105)

HENRY C. WALL AND THOMAS C. LEAK, EXECUTORS, ET ALS. *v.* HENRY FAIRLEY ET ALS.

Parties—Practice—Purchaser at Execution Sale—Bankruptcy—Real Property.

1. The personal representative of a deceased person is a necessary party to an action by creditors against the heirs at law to subject land to the payment of a debt, when the alleged debt is denied.
2. Where the plaintiffs obtained a judgment against the ancestor of defendants and purchased land at execution sale in which he had no legal or equitable estate (which land such ancestor had procured to be conveyed to his children before said judgment was obtained, he then being insolvent and paying the purchase money): *Held*, that the purchasers acquired no estate in the land and that the judgment was satisfied to the amount of their bid: *Held further*, that the plaintiffs, under Bat. Rev., ch. 44, sec. 26, had a cause of action against the ancestor for a failure of

his title: *Held further*, that the subsequent discharge in bankruptcy of the ancestor extinguished such cause of action as well as the original judgment.

3. In such case the failure of the assignee in bankruptcy to institute proceedings to subject the land to the payment of the judgment debt does not entitle the plaintiffs to relief in this Court.

4. Although the words "real property" include equitable as well as legal estates, they cannot be construed to cover land in which the defendant never had any estate or right, and as to which his creditors had only a right in equity to follow a personal fund which had been converted into the land as a gift to his children and in fraud of his creditors.

APPEAL at Spring Term, 1877, of RICHMOND, from *McKoy, J.*

The plaintiffs are John C. Gay and the executors of Mial Wall, deceased.

The defendants are the heirs at law of John Fairley, deceased. His administrator was not made a party defendant.

The plaintiffs ask that the defendants be declared trustees, (106) and that certain lands be sold under the direction of the court and the proceeds be applied to the satisfaction of the debts of John Fairley, deceased.

The facts stated by *Mr. Justice Rodman* are deemed sufficient. See also same case 73 N. C., 464.

Upon issues submitted, and under the instructions of the court below, the jury rendered a verdict in favor of the defendants. Judgment. Appeal by plaintiffs.

No counsel for plaintiffs.
John D. Shaw and F. McNeill for defendants.

RODMAN, J. 1. The defendants object to any recovery by the plaintiffs because the debts which they allege against John Fairley are denied, and his administrator is not a party.

When this case was last before us on a demurrer to the amended complaint (73 N. C., 464), the fact that the administrator was not a party was assigned as one cause of demurrer. We thought then that, inasmuch as the debts to plaintiffs were admitted by demurrers, there was no necessity that the administrator should be a party, as the only object of making him a party was to establish the debts. The opinion of the Court was delivered by me, and it did not then occur to me, as has been pointed out in the argument on the present trial, that although the admission was conclusive upon the defendants for the purposes of that trial, it would not bind the administrator if the defendants should sue him for an account in the probate court. Whether our opinion on that point was right or wrong, as the case was then presented, it not now mate-

rial to consider. It was confined to the particular circumstances of the case as it was then presented to us, and we never meant to say that the administrator would not be a necessary party if the alleged debts
(107) to the plaintiff were denied.

As the case is now presented, we think that the administrator of John Fairley is a necessary party to any determination that the intestate owed the debts alleged in the complaint.

2. A decision confined to this point would merely remand the case to be tried over again, and as we think the other grounds of defense are with the defendants, it would be mere procrastination to put our judgment on the former point alone. In November, 1869, Wall and Leak, executors, recovered judgment against John Fairley for $357, with interest and costs, and at the same term Gay recovered judgment for $863.78, etc.

Executions on these judgments were levied on a piece of land which one Shortridge, for a consideration paid to him by John Fairley, who was then insolvent, had, before the recovery of the judgments, conveyed to Margaret McEachin and Henry Fairley, children of said John. The land, or rather the estate of John Fairley in the land, was bought by the plaintiffs for $1,000, which, being applied *pro rata* to the judgments, left a residue unpaid on each.

As John Fairley never had any estate, legal or equitable, in the land, the levy and sale were wholly void, in that the purchasers acquired no estate in the land purchased, and no lien upon it for their debts. *Rhem v. Tull,* 35 N. C., 57; *Frost v. Reynolds,* 39 N. C., 494. Their judgments were satisfied to the amount of their respective shares of the money bid. *Halcombe v. Loudermilk,* 48 N. C., 491; *Murrell v. Roberts,* 33 N. C., 424; *Frost v. Reynolds,* 39 N. C., 494. And although, by virtue of Bat. Rev., ch. 44, sec. 26, the purchasers were entitled to recover of John Fairley by reason of the failure of his title to the property, the sums paid by them on the purchase, yet the debt to them was in the nature of a debt by assumpsit, and was barred by the stat-
(108) ute of limitations after three years from the accural of the right of action. *Laws v. Thompson,* 49 N. C., 104.

We do not propose, however, to consider the effect of the statute of limitations as a defense in this case.

On 17 November, 1870, John Fairley was adjudicated a bankrupt. On 3 February, 1871, he formally assigned all his property to an assignee. On 24 March, 1871, he received his final discharge. At that date, among the debts which he owed were the $1,000 to plaintiffs as aforesaid and the unpaid residue of their several judgments.

No reason is given to us why all these debts were not discharged, and we think they were. In that case the plaintiffs were not creditors of

John Fairley in 1873, when the amended complaint was filed, and their whole case falls to the ground. The debts to plaintiffs were provable in the bankrupt court. Their right to subject the land described in the complaint was not destroyed when John Fairley went into bankruptcy, and they, as creditors, might have exercised that right through his assignee, and, if necessary, might, by application to the court, have compelled him to assert it. That they did not do so, and that the assignee has permitted the statute of limitations to bar his claim (if he has done so, as we assume that he has), is no argument why this Court can aid the plaintiffs. If the debt were a fiduciary one, or if the plaintiffs had acquired any estate in the land which gave them a lien, the case might be different. But we have seen that they have not. The debts to them stand on no different footing from the other debts of the bankrupt, and were extinguished by his discharge. In fact, it cannot be material whether the judgments were extinguished in part by the sale of the supposed estate of John Fairley or not. Because, even if equity would keep them alive for the benefit of the purchasers, and would substitute them to the rights of the judgment plaintiffs, as it might perhaps be contended under *Scott v. Dunn,* 21 N. C., 425, that it would, still by the discharge of the defendant as a bankrupt, the judgment debts (109) have been discharged.

Such we consider to be the law without reference to the Code of Procedure. And we think that has made no change. By section 254, docketed judgments are a lien on the real property of the defendant which he had at the time of the docketing, etc.

It has been held that the words "real property" include equitable as well as legal estates of the defendant, although they are such as cannot be sold under execution or without a resort to the extraordinary remedies of the courts. *McKeithan v. Walker,* 66 N. C., 95.

But these words cannot be construed to cover land in which the defendant never had any estate or right, and as to which his creditors have only a right in equity to follow a personal fund, which has been converted into the land as a gift to his children and in fraud of them.

PER CURIAM. No error.

Cited: Crews v. Bank, post, 113; *Dixon v. Dixon,* 81 N. C., 327; *Greer v. Cagle,* 84 N. C., 398; *S. c.,* 87 N. C., 379; *Thurber v. LaRoque,* 105 N. C., 320; *Guthrie v. Bacon,* 107 N. C., 339; *Johnson v. Gooch,* 114 N. C., 69;; *Wilmington v. Cronly,* 122 N. C., 388; *Clifton v. Owens,* 170 N. C., 613.

(110)

*A. J. CREWS v. THE FIRST NATIONAL BANK OF CHARLOTTE.

Sheriff's Deed—Execution Sale—Fraud—Practice.

1. A sheriff's deed is not rendered void at law by the fraudulent combination of the plaintiff and defendant in the execution, by which bidding was surpressed at the execution sale and the former enabled to purchase the land at an undervalue. Therefore, when in such case a purchaser of the land at a sale under a subsequent execution brought an action to have the first purchase declared void and to recover the possession of the land: *Held*, that he was not entitled to recover.
2. In such case the subsequent purchaser must seek relief in the equitable jurisdiction of the court.
3. In such case it is suggested by the court that a proper settlement of the controversy would be for the land to be sold with a clear title so as to bring a full price and the proceeds divided among the judgment creditors according to their legal priorities.

ACTION to recover possession of land, tried at Spring Term, 1877, of BURKE, before *Furches, J.*

This action was commenced in Cleveland County, and removed to Lincoln, thence to Burke. A sufficient statement of the case is set out by *Mr. Justice Rodman* in delivering the opinion of this Court. There was judgment for the defendant, and the plaintiff appealed.

(111) *J. F. Hoke for plaintiff.*

Battle & Mordecai, Shipp & Bailey, and G. N. Folk for defendant.

RODMAN, J. The general facts of this case may be briefly stated:

1. On 7 December, 1869, the plaintiff purchased the land sued for at a sale by the sheriff of Cleveland, under executions upon judgments against D. & C. Froneberger, partners, docketed in that county on 2 November, 1869. The plaintiff also purchased the same land at a sale made by the United States marshal under an execution issued upon a judgment recovered against D. Froneberger, one of the partners of the firm of D. & C. Froneberger, for a partnership debt. The judgment was recovered on 30 November, 1868.

The purchase under this judgment need not be further noticed, as besides being liable to the objection that it was against one of the partners, it stands upon the same footing in other respects with the purchase at the sheriff's sale.

*BYNUM, J., having been of counsel in the court below, did not sit on the hearing of this case.

It is not disputed that as against the defendants in the execution, the plaintiff acquired a title to the land; and in the absence of any defense, he is entitled to recover. For this purpose, the purchase at the sheriff's sale will suffice.

2. The defense is that the defendant purchased at a sale made by the sheriff on 6 September, 1869, on judgments against the firm, docketed in Cleveland before the date of the judgment in the Circuit Court of the United States (30 November, 1868), which was also before the docketing of any of the judgments under which the plaintiff purchased. If the case stopped here, the defense would be complete.

3. The reply, however, is that at the sale of 6 September, 1869, at which the defendant purchased it, by its agent, in combination with the defendant in the execution, D. Froneberger fraudulently suppressed competition; and the jury find that it did, and that by reason of such suppression of biddings it bought the land, worth $40,000, for $12,500.

4. Upon this finding, the plaintiff contends that the purchase by the defendant was absolutely void, at least as to the creditors (112) of D. & C. Froneberger, and that he (the plaintiff) acquired by his purchase on 7 December, 1869, all the estate of the defendants in the execution, and that he is consequently entitled to judgment for the land claimed in this action.

The judge refused to give that judgment, and on the plaintiff declining to ask for any other, gave judgment against him, from which he appealed.

The only question before us at present is, Was the sale at which the defendant purchased void? or did the deed of the sheriff pass the legal estate, subject to any equities which may exist between the parties? If the deed is void and may be collaterally impeached, the plaintiff is entitled to the judgment he demands; otherwise, he is not entitled to recover in this action in its present form, although he may be entitled to have the sale vacated. *Hill v. Whitfield,* 48 N. C., 120, decides that the sheriff's deed to defendant conveyed the legal estate; and such seems to have been assumed as the law in *Rich v. Marsh,* 39 N. C., 396, and in several other cases of a similar character. The reason is plain. If the sale has been made by the officer with the forms prescribed by law, the title passes by more force of law, and only a court of equity or a court of law exercising its equitable jurisdiction can avoid it. At the utmost, the sale was only voidable at the instance of a party injured. *Spencer v. Champion,* 13 Conn., 11; *Estill v. Miller,* 3 Bibb., 177; 4 Cowen, 717. In many cases it would work an obvious injustice to declare the sale void because the purchaser had stifled competition and obtained the property for less than its value. What he paid has gone to the payment of the debts of the defendant, the executions on which

were a lien upon the land, and if the sale is set aside at all, it should be set aside altogether, and the purchaser put in the condition in (113) which he was before or be subrogated to the place of the creditors *pro tanto.*

In the present case the purchaser was the execution creditor to a larger amount than the price at which he purchased, and his judgments had a priority of lien over all others. If the sale to him was made *void,* he could still take out execution *at least* for the excess of his judgments over his bid, and sell the land again (*Halyburton v. Greenlee,* 72 N. C., 316); and perhaps he might for the whole original amount disregarding the supposed payment. I know of no authority to the contrary. The cases which hold that the price at which an execution creditor bids off land to which the debtor has no title, nevertheless pays off his judgment, do not apply and do not seem to rest on the same principle. *Wall v. Fairley, ante,* 105. We are not called on, however, to decide this, as in our opinion the sale was not void.

It is argued, however, that the defendant has been guilty of a fraud, and that he ought to be punished by denying him any title to the land, and at the same time holding his judgments satisfied to the amount of his bid, or perhaps altogether forfeited. The effect of this would be to impose a heavy penalty on the defendant for an act which is not made penal or criminal by any law, and for which he has not been directly tried, and to give it to the plaintiff by removing the sum as an encumbrance from the land. We do not see by what authority a court can impose the penalty, or on what principle of equity the plaintiff can claim it. He acquired the estate which the defendant in execution had in the land at the time of the sale, subject to all equities and to all prior liens. The price which he gave may have been merely nominal, as upon the sale of a doubtful title, but whatever it was, the amount is not material. It cannot, in any case, entitle him to the land except subject to prior liens.

The argument mistakes altogether the functions of courts in civil actions. Courts of law sometimes hold transactions void, but (114) that is only because the law says they shall be void; and there is no idea of punishing any party. Courts of equity do not undertake to punish fraud, but only to prevent or correct it. They will not take from one party what is justly his, because he has attempted to take by fraud what is not his. Much less will they take from him what is justly his, to give it to another who has no equitable claim to it, and who has lost nothing by the fraud.

On this principle, an example is found in cases of usury where a party comes into a court of equity to be relieved against it. At law, the usurious security was void because the statute positively said so. But

a court of equity does not say to the usurious creditor, You have violated the law; you have oppressed the needy, and we will punish you by forfeiting your real loan; but it says to him, You shall receive what is lawfully yours, and no more. On the same principle it relieves against penalties. It has no feeling of sympathy or hostility with any one, but it distributes equity with an even hand to all, and leaves punishment to the criminal courts. Similar views are expressed in *McCredie v. Buxton,* 31 Mich., 383. The plaintiff claims as a purchaser merely, not as a creditor. How has he been injured by the fraud? If there had been no fraud at the sale, the defendant's title would have been good and the plaintiff's nothing. The fraud was upon the creditors who had rights to the excess of the value of the property over the prior liens which might exist after a fair sale, and for their benefit the sale will be vacated on application. The plaintiff is not seeking to avoid a damage to him by the fraud, but to gain something by reason of the fraud.

In the present condition of the case, we have no right to decide what judgment the plaintiff might be entitled to in an action for equitable relief as a creditor.

We may, however, without impropriety, suggest to the parties, as a plan of compromise apparently fair, that the land he sold with a clear title so as to bring a full price, and the proceeds divided (115) among the judgment creditors according to their legal priorities.

PER CURIAM. Affirmed.

Cited: Skinner v. Warren, 81 N. C., 376; *Young v Greenlee,* 82 N. C., 347; *S. c.,* 85 N. C., 594; *Black v. Justice,* 86 N. C., 513; *Albright v. Albright,* 88 N. C., 243; *Currie v. Clark,* 90 N. C., 362; *Woodley v. Hassell,* 94 N. C., 161; *Wilmington v. Cronly,* 122 N. C., 388.

W. H. SHIELDS, ADMINISTRATOR, v. MEDORA B. HARRISON ET ALS.

Practice—Sale Under Decree of Court—Purchase—Notice.

1. Where a sale of land was made pursuant to a regular decree of a court directing a sale subject to the widow's dower, and at the time of the sale the auctioneer announced the terms of the sale in conformity to such decree: *Held,* that a purchaser is affected with notice and cannot be heard to deny his knowledge that the land was sold subject to dower.

2. In such case, where the auctioneer also announced that certain back taxes due on the land were to be paid by the purchaser, it is a part of the contract betwen vendor and vendee, and the land is sold subject to the encumbrances if any there be.

3. An allegation on the part of the vendee in such case that the boundaries of the land cannot be furnished with any accuracy, may be ground for ordering a survey to locate and identify the land, but not for setting aside the sale.

MOTION to set aside a sale under a judgment, heard at Fall Term, 1876, of HALIFAX, before *Watts, J.*

The plaintiff, as administrator *d. b. n.* of John H. Harrison, sold certain lands of his intestate for assets to pay debts, and the defendant B. F. Moore, Esq., became the purchaser, who afterwards moved the court of probate for an order relieving him from his bid and to set aside the sale, for the reason, as stated in his affidavit, that he labored under the belief that the widow's dower in the land was sold with
(116) it by her consent, and was not aware that the land was encumbered by any lien for taxes.

The plaintiff's counter-affidavit was to the effect that public proclamation was made at the courthouse door on the day of sale, after said land was offered, and before it was bid off, that it was subject to a portion of the widow's dower and certain unpaid taxes.

The motion was refused by the probate court, nd on appeal the Superior Court affirmed the judgment, and the defendant Moore appealed.

Thomas N. Hill for plaintiff.
John Gatling for defendant.

BYNUM, J. Where a sale of land has been made under and pursuant to a decree of a court of record, regularly made, directing that it shall be sold subject to the widow's dower, which had been theretofore duly allotted by metes and bounds, and where at the sale, and after the property had been put up for sale, but before the bidding had commenced the terms of sale were publicly announced in comformity with the decree, and that the land would be sold subject to the dower, the purchaser at such sale stands affected with notice, and cannot be heard to deny his knowledge that the lands were sold subject to the dower of the widow. Public policy requires a strict adherence to this rule of constructive notice. It could not be otherwise without the greatest embarrassment and uncertainty in the results of all public sales and dispositions of property. The sale was made on 8 November, 1875, and by its terms the last and highest bidder became the purchaser. Mr. Moore became the last and highest bidder, and it is not denied by him that the land was knocked down to him by the auctioneer. He therefore became

the purchaser, and evidently considered himself such; for on 11 January following, and before any steps had been taken by the vendor to force a compliance with the terms of sale, he filed an affidavit (117) before the court which made the decree of sale, asking that he be relieved from his bid and the sale be set aside, upon the ground of his not knowing that the land had been sold subject to the dower. The administrator making the sale in like manner considered and accepted Mr. Moore as the purchaser, for he so swears in his counter-affidavit, and that he delayed filing his report of the sale sooner only because the purchaser had failed to comply with the terms of sale, and that when it became evident that Mr. Moore had declined to comply, he made his report and demanded a compliance with the terms of purchase.

After the court of probate had refused to set aside the sale and the case had gone up to the Superior Court by appeal, Mr. Moore there alleged other additional grounds for setting aside the bid, to wit, that he believed, upon inquiry made by him, that the boundaries of neither the dower interest nor the tract purchased could be furnished with any accuracy, general or special, and also that the plaintiff had no power to sell the premises subject to any other claims except the dower of the widow.

We think that the counter-affidavit of the plaintiff sufficiently repels these allegations, if they were serious enough to affect the validity of the sale, for he avers therein that the dower was assigned by metes and bounds ascertained by actual survey, and, as to the other land, that the tract has natural boundariees on several of its sides, and that the other lines are easily ascertainable. Such allegations might be ground for ordering a survey, but not for setting aside the sale without thus attempting to locate and identify the lands sold. Nor do we see any sufficient reason for abating the price bid by deducting the amount of the back taxes due upon the land purchased. It was announced as a part of the terms of sale that these taxes should be paid by the purchaser, and therefore it was part of the contract between the vendor and (118) vendee that the latter should pay them, and the lands were sold subject to that encumbrance. There seems to have been no personal estate out of which these taxes could have been paid. They constituted a lien upon the land, and could be realized out of it only. It was, therefore, fit and proper to sell with that stipulation, and the purchaser having been notified of the existence of the unpaid taxes, and that he was to pay them in order that he might regulate his bidding according to that fact, has no just cause of complaint when he is now called upon to comply with his contract in respect to the purchase of the land and the payment of the taxes due thereon. Whether these arrears of taxes are now a lien upon the land, or can be collected out of the purchaser, are

questions between the tax collector and the purchaser. The contract of sale only relieves the vendor by interposing the vendee between him and the sheriff. No sufficient foundation has been laid to warrant a reference as to the title.

PER CURIAM. Affirmed.

J. W. BAXTER v. T. F. BAXTER.

Practice—Injunction—Personal Property Exemption.

The title to personal property cannot be tried by injunction. Therefore, where a sheriff levied upon certain personal property, which had been allotted to the defendant in the execution as his personal property exemption and remained in his possession, and was restrained by injunction from selling the same: *Held*, to be error.

(119) INJUNCTION, heard at Fall Term, 1875, of CURRITUCK, before *Eure, J.*

The defendant, as sheriff of Currituck County, levied on certain articles of personal property belonging to the plaintiff. Thereupon the plaintiff applied for and obtained an order restraining the sheriff from selling the same, on the ground that said articles had already been assigned to him as his personal property exemption, and that they were not present or in view of the sheriff at the time of the alleged levy.

From said order the defendant appealed.

Gilliam & Pruden for plaintiff.
W. N. H. Smith for defendant.

FAIRCLOTH, J. This action was brought to restrain the defendant, T. F. Baxter, sheriff, from selling under an execution certain personal property which had been assigned to the plaintiff, J. W. Baxter, as his personal property exemption which is still in his possession. The argument before us referred to the sufficiency of certain levies made by the sheriff, and to the effect of an order made in the bankrupt court. We do not enter into these questions, as we are of opinion that the plaintiff has no cause of action, and therefore cannot maintain it on the ground that his possession of said property has not been disturbed by the defendants.

Should they seize it, as it is alleged they threatened to do, the plaintiffs may continue their possession under C. C. P., sec. 177 (subsec. 4), and try the title regularly, and not by injunction.

The practice of trying title to *personal* property by injunction has not been adopted in this State.

PER CURIAM. Reversed and action dismissed.

Cited: Holder v. Mfg. Co., 135 N. C., 391; *Yount v. Setzer,* 155 N. C., 217.

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(120)

SUSAN W. GRAHAM ET ALS. v. JAMES T. TATE, EXECUTOR.

Practice—Nonsuit—Estates of Deceased Persons—Proceeding by Creditors.

1. The entry of a *verdict* against a plaintiff who is not present either in person or by attorney is irregular and contrary to the course of the court.
2. A plaintiff at any time before verdict is entitled to submit to a nonsuit. Therefore, when a plaintiff institutes an action and absents himself at the trial term, the proper course is for the court to direct a nonsuit to be entered against him.
3. In a proceeding by creditors against a decedent's estate under Battle's Revisal, ch. 45, secs. 73 *et seq.*, each complaint of the several creditors constitutes a distinct proceeding, to be proceeded in separately.

Observations by PEARSON, C. J., upon the statute.

MOTION to set aside and vacate a verdict and judgment, heard at Spring Term, 1877, of ROWAN, before *Kerr, J.*

This was a special proceeding, commenced in the probate court of Gaston County by the plaintiffs as executors of William A. Graham, deceased, and Mildred C. Cameron, in behalf of themselves and all other creditors, against the defendant, as executor of Thomas R. Tate, deceased, to compel an account of his administration and payment of the debts alleged to be due to plaintiffs. The debts were disputed; and upon issue joined, the case was transferred to Gaston Superior Court; and upon affidavit of the defendant, it was removed to Rowan, and tried at Fall Term, 1876, before *Cloud, J.* The defendant's testator, Thomas R. Tate, and Thomas W. Dewey (now deceased) were partners in a general banking business, known as the Bank of Mecklenburg. E. A. Osborne, the assignee in bankruptcy of said bank, was permitted to be made a party plaintiff, and filed his complaint demanding of defendant the payment of a large sum of money; and the defendant also (121) denied this debt. Upon issues submitted at Fall Term, 1876, of said court, the jury found that the testator of defendant was indebted

to the executors of William A. Graham $5,000, and to Mildred C. Cameron $14,000, and that he was not indebted to said Osborne, and *Cloud, J.*, directed the same to be certified to the Superior Court of Gaston, and adjudged that the defendant recover costs of the plaintiff Osborne.

Subsequently, Osborne filed an affidavit setting forth that he had abandoned the prosecution of this action, and had instituted an action in the Federal court against the defendant; that he never authorized the names of his attorneys to be entered of record in this or any other case in said Superior Court; that he attended said Superior Court only as a witness in the case of *Graham v. Tate,* and in obedience to a summons as such; that he was not informed of the verdict and judgment against him until two or three months after said term, and that the same was an utter surprise to him. He further swore that his name did not appear as a plaintiff of record by himself or by attorney, but only in the issues which were submitted to the jury. Upon this affidavit, he moved the court to set aside and vacate said verdict and judgment upon the grounds—

1. That said verdict and judgment were taken in surprise of said assignee, and by his mistake and excusable neglect.

2. That they were rendered irregularly and against the course and practice of the court.

Counter-affidavits were filed by the defendant, controverting some of the statements made by Osborne. Thereupon, his Honor, after argument of counsel, found the following facts:

1. That the certified transcript from Gaston Superior Court, and the entries upon the dockets of this court, are the only proper records in this case.

2. That the action in which Osborne, assignee, etc., is plaintiff, and Tate, executor, defendant, has never been regularly removed to (122) this court, and no such action is here.

3. That Osborne had no notice of the pendency of such action, or that issues had been submitted; nor did he appear in person or by attorney; nor did he have notice that said verdict and judgment had been rendered until some two months afterwards.

4. That no separate action in which said Osborne and Tate were parties was ever docketed in Gaston Superior Court or in this court.

5. That only jury was impaneled in the special proceeding or action in which Graham or Cameron were plaintiffs and Tate defendant.

6. That no evidence was submitted to the jury upon the issues in the alleged trial of the case of Osborne and Tate.

7. That in the answer filed in the Federal court by the defendant to the bill in equity of Osborne the pendency of this action in Rowan was relied upon as a defense.

Whereupon, his Honor held that said verdict and judgment were not rendered according to the course and practice of the court, so far as they relate to the case of Osborne and Tate, and that if Osborne was guilty of neglect, it was excusable. Motion to set aside and vacate verdict and judgment allowed, and the defendant appealed.

Jones & Johnston, Dowd & Walker, J. E. Brown, and Walter (123) *Clark for plaintiffs.*

Shipp & Bailey, J. M. McCorkle, Dillard & Gilmer, and J. W. Hinsdale for defendant.

PEARSON, C. J. It is irregular and against the course of the court to enter a verdict unless the plaintiff be present either in person or by his attorney. This proposition is fully established by the authorities cited by Mr. Jones, and is recognized in all the books as a general rule to which very few exceptions are made. So that a plaintiff can at any time before verdict withdraw his suit, or, as it is termed, "take a nonsuit," by absenting himself at the trial term. If he does so, and fails to answer when called, by himself or by his attorney, the court directs a nonsuit to be entered; the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Supreme Court be against him, he can commence another action; whereas, if he allows a verdict to be entered, it is conclusive unless set aside. Nay, according to the course of the court, the plaintiff is at liberty to take a nonsuit by announcing his purpose to absent himself even after the judge has charged the jury and their verdict is made up, provided he does so before the verdict is made known.

In our case the plaintiff having commenced an action in the Federal court, and voluntarily absented himself at the trial term, had a right to suppose that a nonsuit would be entered. The verdict and judgment entered in his absence are irregular and void. We must say that the conduct of the defendant in taking a verdict and judgment which, if not set aside and vacated, would conclude the plaintiff's right (124) of action, in the absence of the plaintiff and his counsel, has much the appearance of "sharp practice." Mr. Bailey, admitting the general rule in an ordinary action at law, attempted to take this case out of its operation by assuming the position that the statute (Bat. Rev., ch. 45),

"Executors and Administrators," provides a special proceeding similar to the old practice of issues sent by the chancellor to be tried by a jury in a court of law, for "the enlightenment of the chancellor's conscience," in which case the plaintiff was not allowed to disappoint the purpose of the chancellor by absenting himself from the trial. This involves the construction of the statute.

The proceeding is under section 73, by two of the creditors, named, and all other creditors of the deceased, to compel the personal representative to an account of his administration and to pay the creditors what may be payable to them respectively. Osborne's debt was denied, and he filed a complaint under section 82: "The creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases." An issue of fact being raised, the clerk sent it up to the Superior Court for trial, under section 83. The debts of Mrs. Graham and Miss Cameron, the two creditors who instituted the proceeding, being also disputed, they severally filed complaints, and the issues of fact were in like manner sent up to the Superior Court for trial.

The question is, Are the issues sent up to the Superior Court to be tried for the enlightenment of the conscience of the judge of probate? Or does the complaint of the several creditors constitute a distinct proceeding for the purpose of ascertaining their respective debts, to be proceeded in separately, so as to "let each tub stand on its own bottom"?

We think it clear the latter is the proper construction of the statute.

(125) And although when issues are sent up, the title should be in the name of the creditors who instituted the special proceeding against the personal representative, in order to show the original proceeding, of which the complaint of the particular creditor is a branch, it is proper to make a further title, setting out the name of the creditor upon whose complaint and the answer thereto the issues are raised. For instance, in this case the title should be, "Graham and Cameron v. Tate, executor. Issues on the complaint of Osborne." "Graham and Cameron v. Tate, executor. Issues on the complaint of Graham." "Graham and Cameron v. Tate, executor. Issues on the complaint of Cameron." In this mode the complaints of the several creditors will be kept separate and confusion avoided.

The purpose of the statute was to unite all the creditors in one special proceeding, in order to bring the personal representative to an account after two years, and to compel an application of the assets by payment to the creditors whose debts have been ascertained.

The debts may be ascertained before the special proceeding is commenced in one of three modes: (1) By admission of the personal representative; (2) by reference, under section 50; and (3) by action for the

recovery thereof, under section 51. But the action merely ascertains the debt, and no execution can issue on the judgment (section 133). Where a debt has not been ascertained before the special proceeding is commenced by a creditor for an account and distribution of the assets, provision is made for its ascertainment by sections 82, 83, which, in effect, give an action of debt to be proceeded in as therein prescribed, pending the special proceeding by all the creditors.

The statute is very long—168 sections, 25 pages—and contains many details, but we have given an exposition of its main provisions. The result is that the verdict and judgment entered by *Judge Cloud* was irregular. The verdict was properly set aside and the judg- (126) ment vacated.

PER CURIAM. Affirmed.

Cited: Tate v. Phillips, post, 127; *Wharton v. Comrs.,* 82 N. C., 15; *Oates v. Lilly,* 84 N. C., 644; *Dobson v. Simonton,* 86 N. C., 497; *Bank v. Stewart,* 93 N. C., 403; *Hedrick v. Pratt,* 94 N. C., 103; *Bynum v. Powe,* 97 N. C., 377; *Mobley v. Watts,* 98 N. C., 291; *Brown v. King,* 107 N. C., 316; *Merrick v. Bedford,* 141 N. C., 506; *Oil Co. v. Shore,* 171 N. C., 55.

M. E. TATE v. J. S. PHILLIPS ET ALS.

Practice—Nonsuit.

A plaintiff at any time before verdict may take a nonsuit, except in a case where the defendant has acquired a right to affirmative relief.

APPEAL at Spring Term, 1877, of MECKLENBURG, from *Cloud, J.*

The defendant J. S. Phillips executed a promissory note for $1,400 to the other defendant, S. B. Alexander, said note being negotiable and payable at the Bank of Mecklenburg.

Alexander subsequently indorsed and transferred the same to said bank, and the bank assigned to plaintiff. This note is the subject of this action, and payment is demanded of the defendants for the reason that the bank refused to pay it.

The defendant Alexander alleged that he indorsed the note for the accommodation of his codefendant, and that it was delivered to the bank in renewal of a preëxisting indebtedness of Phillips, and that it was the property of the bank, and past due at the time of its transfer to plaintiff, and assigned as collateral security for a debt which the bank owed to plaintiff.

The defendant Phillips alleged that before this action was commenced the bank was indebted to him in the sum of $1,500, due upon a
(127) certificate of deposit given to one Palmer, and that this defendant is the owner and holder of the same for value, and demands that this counterclaim shall be applied in discharge of said indebtedness to plaintiff to the extent of same.

When the case was called the plaintiff asked leave to suffer a nonsuit, which was objected to by defendants, but allowed by the court, and the defendants appealed.

Wilson & Son for plaintiff.
Shipp & Bailey and W. W. Fleming for defendants.

PEARSON, C. J. This case is governed by *Graham v. Tate, ante,* 120. The plaintiff may at any time before verdict pay the cost and take a nonsuit, except in a case where the defendant has acquired a right to affirmative relief.

The defendant in our case, under the statute, had no more than a defensive right against Tate, *i. e.,* to bar the action by a set-off of the notes of the bank, but he could not claim of the plaintiff judgment for the excess.

So, according to the course of the court, the plaintiff had a right to pay up the cost and walk out of court.

The suggestion that he intends to take proceedings in the Federal court, under the act of bankruptcy, is a matter about which we have no concern.

PER CURIAM. Affirmed.

Cited: Purnell v. Vaughan, 80 N. C., 49; *Wharton v. Comrs.,* 82 N. C., 16; *Bank v. Stewart,* 93 N. C., 403; *Bynum v. Powe,* 97 N. C., 377; *Brown v. King,* 107 N. C., 316; *Campbell v. Power Co.,* 166 N. C., 490.

(128)

HENRY BRUNHILD & BRO v. WILLIAM E. FREEMAN ET AL.

Practice—Contract, Construction of—Judge's Charge.

1. Where there is a contract admitted and the parties thereto cannot agree upon its meaning, it is for the jury or the court to determine the same.
2. The construction of a contract does not depend upon what either party *thought,* but upon what both agreed.

3. In an action upon notes executed by defendant to plaintiff, which action defendant seeks to defeat by proving another contract the terms of which are in doubt, it is not error for the court to charge that if there was no agreement (outside of or inconsistent with the notes) the plaintiff is entitled to recover.

APPEAL at January Special Term, 1877, of NEW HANOVER, from *McKoy, J.*

The case is sufficiently stated by *Mr. Justice Reade* in delivering the opinion of this Court. Verdict and judgment for plaintiffs. Appeal by defendants.

A. T. & J. London for plaintiffs.
D. L. Russell for defendants.

READE, J. The plaintiff sold goods to one Mayer to the amount of $415, and took from Mayer as collateral security therefor eight notes for $125 each, which Mayer held upon the defendant. The defendant subsequently gave to the plaintiff on account of the transaction four notes for $100 each, and this action is upon one of these four new notes. And the plaintiff had a verdict and judgment. This is all plain enough, but the defendant says that at the time when he gave the plaintiff the four new notes it was upon the understanding that the eight old notes were to be delivered up to him by the plaintiff, and that the plaintiff refused to deliver them up. And the plaintiff having refused to comply with his part of the contract to deliver up the old notes, he, the defendant, was not obliged to comply with his part of the con- (129) tract to pay the new notes.

By what sort of financial legerdemain the defendant supposed that he could fairly get clear of the $1,000 which he owed Mayer, by giving his notes to the plaintiff for $400, he seems not to have made plain to the court below, nor is it plain to us. He did get credit upon the old notes for the amount of the new; and that was all he was fairly entitled to. Indeed, he got credit for $15 more than the new notes. The justice of the case is therefore administered by the verdict and judgment below, and they must be sustained unless some general principle has been violated.

The facts are not sent up as they ought to have been, but the testimony on both sides is stated, and the verdict of the jury finding all the issues in favor of the plaintiff. So that we are to take the facts as stated by the plaintiff to be true, and the verdict must be sustained, unless it appears that his Honor committed some error.

The testimony for the plaintiff was that he held the eight notes for $125 each upon the defendant only as collateral to secure him $415, which Mayer owed him, and that he agreed with the defendant to take his four notes for $100 each and enter a credit of $415 on the old notes,

informing the defendant that he would then have to redeliver the old notes to Mayer, and that this was done. The testimony on the part of the defendant was that it was agreed between him and the plaintiff that upon his giving the four new notes the plaintiff was to give him up the whole of the old notes.

The defendant asked his Honor to charge that if the new notes were given upon the agreement that all of the old notes were to be surrendered,
and they had not been surrendered, then the plaintiff was not
(130) entitled to recover. His Honor gave the charge, and therefore
the defendant cannot complain, although it may be that the plaintiff could recover, leaving the defendant to his cross-action for damages, or to his counterclaim.

The defendant also asked his Honor to charge that if there was a misunderstanding, one party understanding that there was only to be a credit for the $415 upon the old bonds, and the other that they were all to be surrendered, then the plaintiff could not recover.

His Honor could not give this instruction, because it is admitted on both sides that there was a contract of some sort, and where there is a contract, if the parties cannot agree upon the meaning of it, as is frequently the case, and as in this case, then it is for the jury or for the court to say what is the meaning.

The defendant chiefly relied upon his Honor's refusal to give the following charge: "That the question was not what the plaintiff thought, but what the defendant thought; and if the defendant did not intend to assume the payment of the $400, save upon a delivery to him of the eight notes, the plaintiff could not recover."

His Honor very properly refused to so charge, but did charge that it was not what either thought, but what both agreed.

His Honor further charged that if there was no agreement, then the plaintiff was entitled to a verdict. And to this the defendant objects that his Honor charged that the plaintiff could recover without any contract whatever. But that was not the meaning. The note sued on was the contract upon which the plaintiff was to recover, and the defendant sought to defeat the action by proving another contract, the terms of which were in doubt; and his Honor, after having explained what would be the bearing of the contract under one hypothesis and another, charged
that if there was no agreement at all outside of or inconsistent
(131) with the note sued on, then the plaintiff was entitled to recover
upon the note.

PER CURIAM. No error.

Cited: S. c., 80 N. C., 213; *Pendleton v. Jones,* 82 N. C., 251; *Prince v. McRae,* 84 N. C., 675; *Pegram v. R. R., ib.,* 702; *Bailey v. Rutjes,*

86 N. C., 520; *McRae v. R. R.*, 88 N. C., 534; *King v. Phillips*, 94 N. C., 558; *Gregory v. Bullock*, 120 N. C., 262; *Thomas v. Shooting Club*, 121 N. C., 239; *Burton v. Mfg. Co.*, 132 N. C., 21; *Lumber Co. v. Lumber Co.*, 137 N. C., 436; *Knitting Mills v. Guaranty Co., ib.*, 570; *Sprunt v. May*, 156 N. C., 400; *Mfg. Co. v. Assurance Co.*, 161 N. C., 96; *Wilson v. Scarboro*, 163 N. C., 388; *Leffel v. Hall*, 168 N. C., 409.

THE BANK OF STATESVILLE v. JAMES H. FOOTE ET AL.

Practice—Vacation of Judgment—Discretionary Power.

The action of the court below, upon an application for relief under C. C. P., sec. 133, is not reviewable, unless it plainly appears that the legal discretion vested in the court has been abused.

MOTION to set aside a judgment, heard at chambers in Statesville, on 10 July, 1876, before *Furches, J.*

The judgment which the defendants seek to vacate was rendered against James H. Foote and his codefendant, C. L. Cook, at Fall Term, 1875, of Iredell Superior Court, upon a note made by Cook as principal and Foote as surety.

The material facts are as follows: The sheriff went to Foote's house to serve the summons in the original action, and Foote being absent, he left a written notice to be delivered to him on his return. This notice was not a copy of the summons issued by the clerk, but the sheriff afterwards delivered a copy of the summons to Foote, and remarked that he should have left the summons instead of the notice at his house. Foote replied that he had the notice, and said if there was anything wrong in his (sheriff's) return, he would waive it. After this service upon Foote, he wrote to his codefendant, Cook, reminding him of his promises, that he should not be troubled about the debt, and informing him that he would not go to court, but for him (Cook) to attend to the matter, and not let judgment be taken against him. Thereupon Cook (132) employed an attorney, who prepared a joint answer for the defendants. After the answer was written, Cook agreed with the plaintiff bank not to file it, and let judgment be taken, the bank agreeing that no execution should issue until Spring Term, 1876, and giving defendants the opportunity of paying the debt by installments.

Upon these facts, his Honor refused to set aside the judgment, but reformed the same by reducing the interest to 8 per cent per annum (see *Simonton v. Lanier*, 71 N. C., 498), and the defendants appealed.

No counsel for plaintiff.
R. F. Armfield for defendants.

BYNUM, J. The application for relief under the provisions of C. C. P., sec. 133, is addressed to the discretion of the judge presiding below. His action is not the subject of review here unless it plainly appears that he has abused the legal discretion vested in him. Nothing of the kind is shown in this case. The affidavit of the defendant Foote is not sustained by the facts as found by the court. On the contrary, it appears that Foote accepted the service of the summons, and waived all irregularities in the service, and acted accordingly. It is true he did not appear and defend at the return term, but he knew and acted upon the fact that it was necessary and required, for he had an interview with his codefendant in which he left the management of the case to Cook. It does not appear that either Cook or Foote had a meritorious defense to the action; therefore, Cook made the best terms he could with the plaintiff, and allowed judgment to be taken upon certain terms of indulgence in enforcing its collection. He doubtless deemed that the most prudent and beneficial course in the interest of himself and his codefendants. The only
(133) defense Foote now alleges to a recovery is usury. But that is certainly not a meritorious defense, and is deprived of all significance by the action of the judge, who reformed the judgment by striking from it all the interest which was alleged to be usurious. That the principal money was borrowed of the plaintiff is not denied, and all that the judgment has been rendered for is the debt with legal interest. Foote had the right to appear at the return term and put in the plea of usury, and make the plaintiff take the consequence of his making the plea good upon the trial. Instead of this, he intrusted the case to an agent, his codefendant, without any instructions as to the defense. The agent acted within the scope of his powers; and even had he not done so, the defendant Foote must have shown some injury he has received or some meritorious defense of which he has been deprived. He has not alleged either.

PER CURIAM. Affirmed.

Cited: Kerchner v. Baker, 82 N. C., 171; *Geer v. Reams,* 88 N. C., 199; *Warren v. Harvey,* 92 N. C., 141; *Brown v. Hale,* 93 N. C., 190; *Williams v. R. R.,* 110 N. C., 483; *Battle v. Baird,* 118 N. C., 863; *Wyche v. Ross,* 119 N. C., 176; *Marsh v. Griffin,* 123 N. C., 667.

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J. B. STEADMAN v. M. E. TAYLOR.

Purchaser at Assignee's Sale—Agreement to Convey Land—Uncertainty of Description—Parol Evidence—Estoppel.

1. A purchaser at a sale by an assignee in bankruptcy takes the estate of the bankrupt subject to all equities against it, and it is immaterial whether he knows of them or not.
2. Parol evidence is admissible to explain a *latent* ambiguity in the description of land contained in an agreement to convey the same. Therefore, where in such agreement the land was described as "100 acres of land, commencing at the corner I sold B. and round near W.'s, including the head of the branch that runs near W.'s house": *Held*, that parol evidence was admissible to make the description certain.
3. In such case, where the bargainor received the purchase money and acquiesced for five years in the possession of the bargainee, he is estopped in equity from setting up any claim to the land.

ACTION to recover land, tried at Spring Term, 1877, of RUTHERFORD, before *Cloud, J.*

Both parties claimed under one John S. Ford, the grantee of the State of 73 acres of land, which is the subject of this controversy. Ford went into bankruptcy in 1869, and his assignee sold said land at public auction to one Carpenter, who sold to the plaintiff. The defendant relied on the following paper-writing, executed by said Ford on 28 November, 1863, before he was adjudicated a bankrupt: "Received of Miller Taylor (defendant), $200, in part payment for 100 acres of land, commencing at the corner I sold Fayette Briscoe, and round near William Splawn's." And also the following, dated 29 September, 1864: "Received of Miller Taylor, $200, in payment of land on the north side of Broad River." The evidence of Ford in regard to the description of the land conveyed is sufficiently stated in the opinion. Under the instructions of his Honor, the jury rendered a verdict in favor of (135) the defendant. Judgment. Appeal by plaintiff.

John W. Hinsdale for plaintiff.
No counsel for defendant.

RODMAN, J. A purchaser at a sale by an assignee in bankruptcy stands on the same footing with a purchaser at execution sale. *Carr v. Fearington*, 63 N. C., 560.

He takes the estate of the bankrupt subject to all equities against it, and it is settled in this State that it is immaterial whether he knows of them or not. In this case, however, the plaintiff had notice of the equity

of the defendant. He knew that he was living on the land, and that he claimed to have bought it of Ford before his bankruptcy.

Before a plaintiff can recover in what, for brevity and convenience, we may still call an action of ejectment, he must show a good title in himself—at least a good legal title. This it is conceded that the plaintiff has shown in this case.

The defendant sets up in his defense an equitable title under a contract by Ford to convey to him the land in controversy, and a payment in full to him some years before his bankruptcy.

The writings by which the contract is proved are imperfect and obscure in the description of the land agreed to be conveyed. In the receipt of 28 November, 1863, it is described as "100 acres of land, commencing at the corner I sold Fayette Briscoe, and round near William Splawn's, including the head of the branch that runs near Splawn's house."

The plaintiff contends that this description is so uncertain that the agreement to convey—for the receipt is by necessary intendment an agreement to convey—is void and cannot be made certain by parol evidence. The judge below held that the agreement was not void,
(136) and that the description might be made certain by evidence outside of the writing. In this we concur with the judge. Evidence to vary or add to the words of the writing was clearly inadmissible, and this was not proposed. Clearly parol evidence is admissible to show that a particular object fits the description in a writing. It may be shown where Briscoe's corner is, and where his lines, and Splawn's house, and the head of the branch that runs by his house, all are. One who, like myself, has no knowledge of the relative situation of these objects, is unable to form any idea of the shape of a piece of land which might be described by and upon them. If, however, I had a map on which these points were laid down as they exist on the face of the earth, it may be that I could discern with certainty the boundaries of the land which Ford agreed to convey to the defendant. Never except where the ambiguity is patent will the law declare a deed void for uncertainty of description until every means have been used to find some object which the description fits. The parties certainly had some certain piece of land in their minds, which one intended to buy and the other to sell, and it can rarely happen that they have not given some indication by which the individuality of the piece may be ascertained. The evidence which the judge allowed, and the jury though sufficient for that purpose, consisted of the testimony of Ford and the circumstances of the case. Ford testified that the land he sold to Taylor embraced the 73 acres in controversy, and that "by commencing at Briscoe's corner and running round near William Splawn's, so as to include the head of the branch that runs by William Splawn's house, 100 acres could be laid off, includ-

ing the 73-acre grant, and that this was what Taylor purchased." The circumstances tending to show that this 73-acre grant was a part of the land were that it was described by definite boundaries in the grant to Ford, and that shortly after his purchase of land from Ford the defendant went upon this place and built on and otherwise im- (137) proved it, and remained there, without any complaint from Ford, for five or six years before his bankruptcy. Ford would not have been competent to state what he *intended* to convey, and he does not appear to have been allowed to state that. It seems to us that the evidence which he gave was competent. It would have been more satisfactory if he had shown on a map how lines, run from the points and in the manner described in the receipt, would have included the land as he says they would have done. But we cannot say that his evidence was not such as would fairly justify a jury in finding that the receipt covered the land. And if there was, in a legal sense, *any* evidence to support the verdict, this Court cannot grant a new trial merely upon the ground that it did not put the question beyond a reasonable doubt. We have so far considered the case as if it were in a court of law, except that we have given to a contract to convey the effect which a court of law would have given to an executed conveyance of the land by the same description. But this is not all that the defendant would have been entitled to, if by proper pleading he had set up his executory title against the plaintiff as the assignee of Ford with notice, and demanded a specific performance.

It cannot be doubted that he would have been entitled to such a decree against Ford, for Ford testifies that the land in dispute was the land which he agreed to convey. It is true that Ford's statements would not have been competent against the plaintiff merely as an *admission* by Ford, because it was made after Ford had parted with his estate. But as testimony, it is competent, and when it appears by any competent testimony that Ford received pay for this land and thought he sufficiently described it in his agreement to convey, and saw the defendant go into possession of it in the belief that he had a title, and improved it for five years, during all which time he was silent and acquiescent, it cannot be doubted that Ford would be estopped in equity from (138) setting up any claim to the piece of land, although by accident it was not described in the contract so as to be identified by the description. And if Ford would be so estopped, the plaintiff, who stands in Ford's shoes, is equally estopped.

PER CURIAM. No error.

Cited: Scott v. Timberlake, 83 N. C., 385; *Motz v. Stowe, ib.,* 440; *Lynch v. Johnson,* 171 N. C., 630.

C. C. AND G. W. KING, EXECUTORS, v. WILLIAM P. LITTLE.

Ejectment—Mesne Profits—Husband and Wife—Executors and Administrators —Statute of Limitations.

1. Where pending an action of ejectment brought by husband and wife to recover possession of land to which they were entitled in right of the wife, the husband dies: *Held*, that the action survives to the wife, and upon her death to her heirs and devisees.
2. In such case the right to the rent current and in arrear, and also to damages for waste, survives to the wife.
3. Upon the death of the wife her executor is entitled to recover the rents which accrued between the date of the demise and her death. Those which accrued after her death belong to her heirs and devisees.
4. Such action is not barred by the statute of limitations.

APPEAL at August Special Term, 1877, of MECKLENBURG, from *Schenck, J.*

This was an action brought by the plaintiffs as executors of Cinthia D. King against the defendant for mesne profits. The plaintiffs alleged that the defendant took possession of a tract of land belonging to their testatrix, whose right thereto had been determined in an action of ejectment (see *King v. Little*, 61 N. C., 484), which was prosecuted by C. C. King, Sr., and wife, Cinthia, jointly, until the death of the hus-
(139) band in December, 1865, when it was prosecuted by Cinthia as administratrix and in her own right. Upon her death in 1869, her executors were made parties plaintiff, and took out a writ of possession. Little then obtained an injunction, which was dissolved in 1870. (See *Little v. King*, 64 N. C., 361.) And thereupon he surrendered the possession to the present plaintiffs.

It was further alleged that the wrongful possession of Little continued from January, 1861, until March, 1870, during which time he committed waste upon the premises by cutting down trees, etc.

The defendant admitted the material allegations of the complaint, but insisted that the plaintiffs could not recover the profits which accrued during the coverture. Upon issues submitted, the jury found that the annual rent of the land from January, 1861, to March, 1870, was $50, and that no damage resulted from the waste alleged to have been committed.

His Honor held that the plaintiffs were only entitled to recover the mense profits which were received by the defendant from the date of the death of C. C. King, Sr. (25 December, 1865), to that of the plaintiff's testatrix (28 January, 1868). Judgment. Appeal by plaintiffs.

R. Barringer and J. E. Brown for plaintiffs.
Shipp & Bailey and W. W. Fleming for defendant.

BYNUM, J. All chattels personal which the wife has in possession in her own right are vested in the husband by the marriage, although he does not survive her. But with respect to her choses in action, they survive to her on the death of the husband, unless he shall have interfered by doing some act reducing them into possession.

At the date of the demise in the action of ejectment the land belonged to the wife, and the demise was laid in the name of the husband and wife. Upon the death of the husband, the action survived to (140) the wife, and, upon her death, to her heirs and devisees, by whom a recovery of the possession was ultimately had. If the husband and wife were entitled to the possession of the land in right of the wife during their coverture, in the same right and for the same time they were entitled to the profits of and the damages done to it, and as upon the death of the husband the land and the action to recover the possession survived to the wife, in the same way the right to the mesne profits and damages for waste which pertained to the realty also survived to the wife.

No question is made but that the executors of the wife are entitled to recover the mesne profits which accrued between the death of the husband and the death of the wife, but it is insisted that they cannot recover those which accrued during the coverture; that is, between the date of the demise and the husband's death. But as the right to these profits was a chose in action of the wife not reduced into possession by the husband in his lifetime, no reason is given why, upon his death, these mesne profits and the right to recover them do not survive to the wife.

The general principle is that arrears of rent accrued in the lifetime of the husband belong to the wife in preference to the husband's executors. Thus, if the husband die before the wife, and rent is in arrear which was reserved to them jointly on an underlease of the wife's leasehold estate, she will not only be entitled to the accruing rent, but also to the arrears, because they, remaining in action and being due in respect of the joint interest of the husband and wife in the term, would, with their principal, the term, survive to the wife. 1 Roper, Husband and Wife, 175; 1 Williams on Executors, 761, 762. So if a husband be seized of a rent service, rent charge, or rent seck in right of his wife, and the rent be in arrear during coverture, and then the husband dies, the wife shall have the arrearage, and not the executors of the husband, (141) because the principals which survived to her carried also all that was due in respect of them. Co. Litt., 351b; *Temple v. Temple,* Cro. Eliz., 701; 1 Williams on Exrs., 762, 763.

When the husband was seized or possessed of tithes in right of his wife or jointly with his wife, and the husband died, it was held that the wife, and not the executors of the husband, should have an action for the subtraction of such tithes. So if an estray comes into the manor of the wife, and the husband dies before seizure, the wife shall have it, for that the property was not in him before seizure. Co. Litt., 351b; Williams on Exrs., 763; Bac. Ab., title, *Tithes F.*

These examples are sufficient to show that in the cases of rents, tithes, etc., not only that which was current at the husband's death, but also that which was in arrear, survived to the wife; and as in our case the mesne profits are of the nature and stand in lieu of the rents, no practical distinction can be drawn between the rights of the wife in the latter case and the former.

The wife, therefore, at her death was entitled to all the mesne profits and damages for waste, and her executors are entitled to recover all which accrued between the date of the demise and the death of the wife; those which accrued after her death, and until the premises were vacated by the defendant, belong to the devisees and heirs, and cannot be recovered in this action.

It is admitted in the answer that the husband, C. C. King, died 25 December, 1865, and that the action of ejectment was begun 15 January, 1861. From the latter date to the death of Mrs. King, to wit, 28 January, 1868, the plaintiffs are entitled to recover against the defendant
(142) at the rate of $50 per annum, the assessed value of the mesne profits as fixed by the verdict of the jury.

The statute of limitations does not bar the action. Judgment reversed, and judgment here for the plaintiffs in accordance with this opinion.

PER CURIAM. Reversed.

Cited: Matthews v. Copeland, 79 N. C., 494.

MICHAEL CLEMENTS v. THE STATE OF NORTH CAROLINA.

Claim Against the State—Breach of Contract—Measure of Damages—Practice.

1. Upon the decision of this Court in favor of the plaintiff upon a claim preferred against the State, the proper course is for the clerk to transmit the proceedings in the cause, together with the judgment of the Court, to the Governor, to be communicated by him to the General Assembly.

2. The measure of damages for breach of an executory contract for the manufacture and delivery of goods is the difference between the market value of the same at the time of the breach and the contract price.

3. It is not improper for counsel for plaintiffs on a trial before a jury to comment upon the fact that defendant introduced no testimony, and that consequently the evidence for plaintiff is to be taken as true.

CLAIM against the State, heard at June Term, 1877, of the Supreme Court, under Const., Art. IV, sec. 9.

Issues were sent down by order of the Supreme Court and tried at June Term, 1877, of WAKE, before *Buxton, J.* The facts are stated in same case, 76 N. C., 199. The plaintiff claimed $30,000 damages for breach of contract, entered into between the State and himself for the manufacture of cell doors for the penitentiary. The plaintiff testified in his own behalf to the effect that in consequence of the great reduction of materials, labor, etc., which took place between the (143) time of executing the contract and the breach thereof, he would have made about $27,000. No actual loss or damage was shown, and no claim made for one lot of doors made under this contract, but disposed of under another.

The counsel for the plaintiff, in his argument before the jury, commented upon the fact that the State had introduced no evidence, and that therefore the jury, under the circumstances, must accept the plaintiff's evidence as true. Whereupon the Attorney-General interposed an objection to the comments of counsel, but the court overruled the objection, and the defendant excepted. For the State, it was insisted that there was no evidence that the plaintiff was actually damaged by the breach of contract on the part of the State, if the jury should find that there was such breach; and his Honor was requested to charge the jury that the plaintiff could recover nothing if they believed from the evidence that he had sustained no actual damage. The court refused so to charge, and the defendant excepted.

His Honor then charged the jury in response to the instructions asked by the plaintiff: (1) That the measure of damages for breach of executory contracts of this character is, that the contractor is entitled to recover the profits which he lost by the default of the other party to the contract. (2) That these profits are to be arrived at by taking the market value at the time of the breach, and if no market value, then by a minute inquiry into the costs of materials, etc. (3) That the jury must assess the value of the doors at the time of the breach, and the damages would be the difference between the contract price and such value.

Under these instructions, the jury found the issues in favor of the plaintiff, and assessed his damage at $20,000, and the clerk was ordered to certify the proceedings had to the Supreme Court.

(144) *Merrimon, Fuller & Ashe for plaintiff.*
Attorney-General for the State.

PEARSON, C. J. There is no error in the proceedings had before his Honor, *Judge Buxton.*

It is therefore considered by the Court here that the State of North Carolina doth owe to the plaintiff, Michael Clements, the sum of $20,000, being the amount of damages assessed by the jury for breach of contract.

The clerk will make copies of the complaint and answer, the opinion of the Court delivered by *Reade, J.*, the proceedings before his Honor, *Judge Buxton,* and the judgment of this Court, now rendered, and transmit the same, under the seal of the Court, to the Governor of the State, to be communicated to the General Assembly. See *Bledsoe v. State,* 64 N. C., 392.

PER CURIAM. No error.

Cited: Oldham v. Kerchner, 79 N. C., 112, 121; *Jones v. Call,* 96 N. C., 345; *Garner v. Worth,* 122 N. C., 256; *Printing Co. v. Hoey,* 124 N. C., 795; *Hosiery Co. v. Cotton Mills,* 140 N. C., 455; *Flour Mills v. Distributing Co.,* 171 N. C., 714.

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A. C. LATHAM AND WIFE v. THE WASHINGTON BUILDING AND LOAN ASSOCIATION.

Building and Loan Association—Usury.

The law will not aid a plaintiff when plaintiff and defendant are *in pari delicto.* Therefore, where the plaintiff, who was a member of a building association and had paid usurious interest upon money borrowed therefrom, sought to recover it back: *Held,* that he was not entitled to relief.

APPEAL at Spring Term, 1877, of BEAUFORT, from *Eure, J.*

Elizabeth J. Latham, the wife of plaintiff, was a member of the defendant association, and transacted her business with the same through her husband. She continued to pay dues of $1 per month on each share of stock owned by her, until the first Monday in October, 1872, as required by the by-laws of the association. At that date she borrowed of the association $204, for which she executed a bond for $400 with the written assent of her husband, conditioned that she should pay $4 per month on two shares until the regular dues paid thereon and the dividends arising therefrom shall have paid to the association $400. This bond was secured by mortgage on a house and lot in the town of Washington, with a power to sell the same in default of payment as aforesaid.

On 3 December, 1872, she received $312 more, and executed a bond for $700 similar to the above for the payment of $6 per month on each share, and this was secured by a second mortgage with like condition as above on the said house and lot. It was the custom of the association to put up its money for sale in lots of $200, and the bidding was restricted to its members. The highest bidder received $200, less the percentage bid. The said sum of $312 was $600 (the amount of the (146) stock sold), less the percentage bid by the plaintiffs. There were two other sums received by the plaintiffs at subsequent times, and in the manner aforesaid, for which bonds were given and mortgages executed on the property to secure the payment of the same.

In August, 1876, the association adopted the following resolution: "That the secretary be instructed to state the account of each member of the association who has stock redeemed, charging interest at the rate of 6 per cent per annum on the sum of money received in redeeming, giving credit for all dues paid in, either as dues, interest, or fines, and charging to each share of stock its quota of expenses and losses." Upon stating the accounts, it was ascertained that the plaintiffs had overpaid to the amount of $92.06. The association was winding up its business under said resolution, and the plaintiffs brought an action for the recovery of said amount alleged to be due them, insisting that the contract was usurious and that said payment had been made under a mistake of fact.

A jury trial being waived, his Honor found that the payment was not made under a mistake of fact, and that the assets of the association would not be sufficient to pay the present stockholders the amounts they had paid in, and held that the facts did not disclose a usurious contract. There was judgment that the action be dismissed, from which the plaintiffs appealed.

D. M. Carter for plaintiffs.
James E. Shepherd and Gilliam & Pruden for defendant.

READE, J. In *Mills v. B. and L. Assn.*, 75 N. C., 292, it was decided that the association, which was substantially like the association in this case, was not such as was contemplated by the statute (147) under which it and this were organized; and that its contracts with those who dealt with it under its by-laws and regulations could not be supported by the courts; and because such associations were numerous and embraced a large amount of capital and business transactions, it was suggested that their existing contracts should be settled upon a liberal and just basis, and that the future transactions should conform to law. And it is to the credit of the defendant association that it immediately adopted a resolution in conformity to that suggestion.

There is no doubt that the by-laws and course of dealings of the defendant were unlawful, and its dealings with the plaintiffs were unlawful and usurious; and if at any time the plaintiffs had repudiated the association, and the association had sought the aid of the court to enforce the contract, the court would have refused its aid. But whatever the defendant association was, these plaintiffs were; for they were parts and parcels of it, and the Court will no more aid them against the defendant than it would have aided the defendant against them. They are *in pari delicto*. Whatever hardship the association has practiced upon them, it has probably with their aid and for their advantage practiced upon others of its members. Whatever has been *executed* must therefore stand; the Court will not undo it.

It was found as a fact in the case that the plaintiffs paid under no mistake of fact. They might have repented of their connection with the unauthorized association and refused compliance with their undertaking; and if the association had attempted to coerce them, the courts would have enjoined it, as in *Mills v. B. and L. Assn., supra.* But having engaged in the adventure and voluntarily paid the loss, they cannot ask the courts to afford them the luxury of recovering it back. A. gambles with B. and loses money. The courts will not compel him to pay.
(148) But if he pay his losses, the courts will not enable him to recover them back. *King v. Winants,* 71 N. C., 469.

PER CURIAM. Affirmed.

Cited: Dickerson v. Building Assn., 89 N. C., 39; *Heggie v. B. and L. Assn.,* 107 N. C., 593; *Hollowell v. B. and L. Assn.,* 120 N. C., 288.

E. P. COVINGTON ET ALS. v. ALEXANDER STEWART AND WIFE ET ALS.

Tenant in Common—Adverse Possession.

1. The possession of one tenant in common is, in law, the possession of all; but if one have the sole possession for twenty years without any acknowledgment of title in his cotenant and without any claim on the part of such cotenant to rents, etc., he being under no disability (before the adoption of The Code), the law raises a presumption that such sole possession is rightful, and will protect it.
2. Adverse possession by one tenant in common for a less period than twenty years will not raise the presumption of *ouster* and sole seizin.
3. Under C. C. P., sec. 23, possession for twenty years, which formerly raised a presumption of title, now has the force and effect of an actual title in fee against all persons not under disability.

4. The provisions of C. C. P., sec. 23, however, do not extend to actions commenced or rights of action accrued at the date of the ratification of The Code.

APPEAL at Spring Term, 1877, of RICHMOND, from *McKoy, J.*

E. P. Covington, the guardian of the heirs of John P. Covington, deceased, filed a petition in the nature of a special proceeding in the probate court of Richmond County against Eliza J. Covington, widow of said deceased, praying for an order to sell the land (149) (house and lot) in controversy, for partition between the parties to said proceeding. The order was obtained, sale made and confirmed, and a deed executed to the purchaser. Subsequently, said guardian and said purchaser filed an affidavit setting forth, among other things, that since said sale they had discovered that one undivided half of the land sold belonged to the heirs at law of W. L. Covington, deceased, and that the heirs of John P. Covington, deceased, owned only one-half, notwithstanding the whole of it had been sold as belonging to them, and that the purchaser was mistaken and deceived in regard to the interest of the last named heirs, and asked that the heirs of W. L. Covington be made parties, and that defendants show cause why the purchase money shall not be refunded.

The defendants, in answer to said affidavit, denied the tenancy in common, and alleged the sole seizin of the land by the heirs of John P. Covington. The case was then transferred to the Superior Court to try the issue raised by the answer, which also involved the right of the heirs of John P. Covington to the whole of the purchase money.

The plaintiff E. P. Covington was one of the heirs of and executor to the will of W. L. Covington, and also guardian of the heirs of John P. Covington.

The heirs of W. L. Covington are the plaintiffs in this action, and the heirs of John P. Covington the defendants.

There was much evidence in regard to the length of time the respective parties, and those under whom they claim, had possession of the property in controversy, the statement of which is not necessary to an understanding of the opinion.

Under the instructions of his Honor, the jury found that the defendants, as heirs at law of John P. Covington, were sole seized of the premises described in the pleadings. Judgment. Appeal by plaintiffs.

John D. Shaw for plaintiffs. (150)
Platt D. Walker for defendants.

BYNUM, J. The possession of one tenant in common is the possession in law of all; but if one have the sole possession for twenty years without any acknowledgment on his part of title in his cotenant, and without

any demand or claim on the part of such cotenant to rents, profits, or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful, and will protect it. In such cases where the tenant who has been out of possession brings ejectment, it has been held that his entry is tolled, and that he cannot recover. *Black v. Lindsay,* 44 N. C., 467; *Thomas v. Garvan,* 15 N. C., 223; *Cloud v. Webb,* 15 N. C., 290.

This legal effect is given to the lapse of time from public policy, to prevent stale demands, and to protect the tenant in possession from the loss of evidence from length of time. Such, in substance, was the purport of the charge of the judge below in the first part of his instructions to the jury, and if he had stopped there, there would have been no error in his instructions. But he afterwards proceeded to charge that if John P. Covington had possession of the house and lot, claiming them as his own, and exercising exclusive rights of ownership, so that W. L. Covington was advised of it and prevented from making an entry thereon for seven years, he being under no disability, and the heirs of John P. Covington continued the possession for three years more after the death of their father and W. L. Covington, then the jury must find that the defendants were sole seized at the beginning of the action. This was error.

It has never been held in North Carolina that a less period than twenty years adverse possession by one tenant in common will raise the presumption of ouster and sole seizin; and this, whether the possession was held by the tenant in common himself or by him a part of the time and until his death and then continued by his heirs for the resi-
(151) due of the twenty years. See the cases above cited and those therein referred to; also *Day v. Howard,* 73 N. C., 1.

His Honor was probably thrown from his guard by a suggestion made by the *Chief Justice* in delivering the opinion in the latter case, that when the tenant in common conveys to a third person, an adverse possession of ten years by the purchaser would probably give him a good title by the presumption of an actual ouster. The point did not arise in that case, and was left an open question, and it does not arise here, because there is no conveyance to a third party by the tenant in possession. But the possession of twenty years which raises a presumption of title, as the law has been heretofore administered, has now the force and effect of an actual title in fee by the provisions of C. C. P., sec. 23, of Title IV, "Limitation of Actions," viz.: No action for the recovery of real property, or the possession thereof, or the issues and profits thereof, shall be maintained when the person in possession thereof, or the defendant in the action, or those under whom he claims, shall have possession of such real property, under known and visible lines and boundaries, adversely to all other persons for twenty years; and such possession so

held shall give a title in fee in such property against all persons not under disability; and by C. C. P., sec. 22, no action for the recovery of such real property can be maintained unless it appears that the plaintiff, etc., was seized or possessed of the premises in question within twenty years before commencing this action. These salutary provisions, however, do not affect the present action, as by C. C. P., sec. 16, they do not extend to actions already commenced or rights of actions already accrued at the ratification of The Code.

As there must be a new trial for the error in his Honor's instructions to the jury, it is unnecessary to examine the questions of evidence raised on the trial, but we do not now see any error in his Honor's (152) ruling upon them.

PER CURIAM. *Venire de novo.*

Cited: *Neely v. Neely,* 79 N. C., 480; *Caldwell v. Neely,* 81 N. C., 117; *Bell v. Adams, ib.,* 121; *Withrow v. Biggerstaff,* 82 N. C., 84; *Pope v. Matthis,* 83 N. C., 171; *Ward v. Farmer,* 92 N. C., 98; *Gaylord v. Respass, ib.,* 558; *Page v. Branch,* 97 N. C., 102; *Roscoe v. Lumber Co.,* 124 N. C., 47; *Shannon v. Lamb,* 126 N. C., 46; *Woodlief v. Woodlief,* 136 N. C., 137; *Bullin v. Hancock,* 138 N. C., 202; *Whitaker v. Jenkins, ib.,* 479; *Dobbins v. Dobbins,* 141 N. C., 217; *Rhea v. Craig, ib.,* 611; *Mott v. Land Co.,* 146 N. C., 526.

N. G. AND G. D. RAND, ADMINISTRATORS, v. THE STATE NATIONAL BANK.

Practice—Complaint and Answer—Deposit in Bank—Parties.

1. A plaintiff cannot abandon the averments of his complaint and fall back upon a collateral statement of facts set out in the answer. The proper course is to ask leave to amend the complaint and thereby present the point of the law desired.
2. Where plaintiffs, as administrators, and one P. deposited certain money and valuable papers with a bank, with the agreement that the same should be drawn out only upon the joint order of plaintiffs and P.: *Held,* in an action by the administrators against the bank for the recovery of the deposits, to which action P. was not made a party, the plaintiffs were not entitled to recover.

APPEAL at Spring Term, 1877, of WAKE, from *Buxton, J.*

The case is sufficiently stated by the *Chief Justice.* Upon the pleadings, his Honor gave judgment for the plaintiffs, and the defendant appealed.

Merrimon, Fuller &Ashe, and George H. Snow for plaintiffs.
D. G. Fowle and Walter Clark for defendant.

PEARSON, C. J. The complaint alleges that the plaintiffs, as administrator of one Parker Rand, deposited with the defendant a large amount of money, and a tin box containing papers of great value, to be (153) kept by the bank and delivered to plaintiffs on demand.

The answer denies that the deposits were made by the plaintiffs and were to be delivered to the plaintiffs on demand, and avers that the deposits were made by the plaintiffs and W. H. Pace jointly, and that it was agreed that said deposits should only be drawn out upon the joint order of the plaintiffs and Pace, and that defendants undertook to abide and perform that agreement. It also avers that the reason that the deposits were not handed to the plaintiffs on demand was that Pace refused to concur in allowing the deposits to be withdrawn.

The want of proper frankness and the reticence of the complaint *per se* puts the plaintiffs out of court, for their averment is denied, and is admitted by them not to be true. The plaintiffs cannot abandon the averments of the complaint and fall back upon a collateral statement of the facts set out in the answer. Their course was to ask leave to amend the complaint so as to make it correspond with the answer, which they admit to be true, by putting in a demurrer. In this way the point of law could have been presented.

Passing by this objection upon the pleadings, which is fatal, we think it clear that the point of law is against the plaintiffs, and we should have supposed that it did not admit of any question, except for the fact that his Honor takes a different view of it.

Pace had acquired an interest in this fund, and a right in a great measure to the control of it, and the defendant had expressly agreed not to deliver it to the plaintiffs without his consent. Upon what principle can a court of justice force him to violate this undertaking?

The legal title of the personal estate vests in the executor or administrator. They have much more ample power to dispose of it than an ordinary trustee, and if they do so to a purchaser with notice, it (154) is presumed to be in order to meet the exigencies of the estate, in the absence of gross fraud. Suppose the administrators, for some purpose or other, had transferred to Mr. Pace an interest in these assets and conferred upon him the right in a great measure to control such assets; they had the power to do so, and it could only be set aside upon the ground of fraud. The plaintiffs would not be the proper parties to complain of a fraud in which they participated. That would be a matter for the creditors or distributees, except the plaintiffs could aver and prove that Pace was acting as their attorney, which fact is nowhere

averred, and that by means of undue influence he took an unfair advantage, of which fact there is no averment, and upon that ground ask to have the contract with him and the subsequent contract with the defendant set aside. If these averments had been made, surely Pace could not be convicted of fraud without an opportunity of being heard.

It cannot be tolerated that plaintiffs should file a skeleton of a complaint and seek to eke out a cause of action from matter set out in the answer of a defendant, who is a mere stakeholder, and against whom there is no charge of fraud.

Judgment reversed, and judgment that defendant "go without day" and recover his costs.

PER CURIAM. Reversed.

Cited: Grant v. Burwyn, 88 N. C., 101; *McLaurin v. Conly,* 90 N. C., 53; *Johnson v. Finch,* 93 N. C., 209; *Willis v. Branch,* 94 N. C., 147; *Wright v. Ins. Co.,* 138 N. C., 499; *Alley v. Howell,* 141 N. C., 115.

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(155)

EDWARD SIMMONS v. CLEMENT DOWD, ADMINISTRATOR.

Practice—Excusable Neglect—Erroneous and Irregular Judgments.

1. The statute (C. C. P., sec. 133) was intended to relieve a party from a judgment taken against him though *his* excusable neglect. Therefore, a motion to correct an erroneous judgment rendered at a former term of the court will not be allowed, if it appears that the error committed was that of the *court* and not that of the *party*.
2. In such case the remedy is by appeal, *certiorari*, or petition to rehear.
3. Where there has been no excusable default of the party and no appeal, etc., an erroneous judgment stands and has all the force of a right judgment.
4. An irregular judgment, *i. e.*, a judgment contrary to the course of practice of the court, may be set aside at any time.

MOTION to correct a judgment, heard at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

The action was originally brought against Samuel A. Harris, the intestate of defendant. The allegation was that, in 1862, Harris agreed, in consideration of reasonable commissions as agent of plaintiff, to hire out certain slaves of plaintiff, and that he did not comply with the contract. This case was referred to referees, who reported, among other things, that Harris had hired out the slaves for a certain period, in Confederate currency, but had not paid the same to plaintiff. They further found that the value of the services of said slaves, in the present cur-

rency, was $6 per month for each slave. Upon this report, a judgment was rendered at a former term of said court, and the defendant, by this motion, seeks to have the same corrected, upon the ground that the judgment as drawn and signed was not warranted by the report of the referees. This motion was resisted by the plaintiff because (1) it was not made within one year after notice of the judgment; (2) no excusable neglect or surprise is shown, and (3) that the judgment was warranted by said report, and the court has no power to decide that it was
(156) not. His Honor granted the motion and modified the judgment, and the plaintiff appealed.

W. H. Bailey for plaintiff.
Wilson & Son for defendant.

READE, J. The motion of the defendant and the action of the court below were evidently based upon the idea that C. C. P., sec. 133, applied to the case; but that was a mistake.

That section provides that where a party (not where the court, but where a party) has been at some default, in consequence of which a wrong judgment has been rendered against him, he may be relieved against it at any time within a year if he will move, and if the court shall be of the opinion that his default was exusable. The words of the section are, "may relieve a party from a judgment," etc., "taken against him through *his* mistake, inadvertence, surprise, or excusable neglect."

Now it is not alleged or pretended that the *party* was in any default in this case. The only cause assigned for vacating the judgment is that it was "not warranted by the report of the referee"; that it was for too much; that it ought to have been for $261 instead of $432. The motion, therefore, is to correct an erroneous judgment rendered at a former term of the court; the error being not that of the party under C. C. P., sec. 133, but the error of the court.

It is common learning that all the judgments and proceedings of the court are "in the breast of the court" *during the term,* and may be vacated or amended in any way; but *after the term closes* they are sealed forever. This applies to all proceedings of the court which are *regular* and *according to the course and practice of the court,* however erroneous the same may be. And *note,* that an erroneous judgment may be just as regular as one which is free from error. If I sue a man and
(157) recover $100, my judgment is regular. If I ought to have recovered $200, or ought only to have recovered $50, my judgment for $100 is erroneous, but still it is regular; and after the term of the court when it is rendered, I cannot have it increased, and the defendant cannot have it diminished. If this were not so, there would be no end to litigation.

An irregular judgment, *i. e.,* a judgment contrary to the course of practice of the court, as, for instance, against one who is not a party, may be set aside at any time. So where the record does not speak the truth, *i. e.,* does not show what was actually done, it may be made to speak the truth at any time. But it cannot be made to speak what is not the truth. And here the record did speak the truth, for the court did in fact give judgment for $432; and it is proposed to amend it by making it speak what is not the truth, that the court gave judgment for $261. A record is the memorial of what was *done,* and not of what *ought to have been done.*

Is there no remedy for an erroneous judgment where the court and not the party has been at fault? Yes; there is an appeal at the time, or, if that is lost, a *certiorari* under proper circumstances; and in this Court, from which there is neither appeal nor *certiorari,* we allow a petition to rehear. But where there has been no excusable default of the party before judgment so as to come under C. C. P., sec. 133, and no appeal or *certiorari* after judgment from the court below, or petition to rehear in this Court, an erroneous judgment stands, and has all the force and effect of a right judgment.

But then it is insisted that where a court renders an erroneous judgment which, at the time, is supposed both by the court and the parties to be right, but which is subsequently discovered to be wrong, it is excusable neglect not to appeal. So it may be; and it may be that the party would for that reason be entitled to a *certiorari,* or to an injunction; but it does not come under C. C. P., sec. 133, which allows relief for the excusable default of the party which was *before* judgment. (158)

The error in this case was that the court gave judgment for the value of the services of the slaves, instead of for the value of the Confederate currency which the defendant had received for them. But all this was known to the defendant at the time, and was acquiesced in; and the error complained of was either an afterthought or else the defendant was inexcusably negligent in not having corrected it.

PER CURIAM. Reversed.

Cited: May v. Lumber Co., 119 N. C., 98; *Scott v. Life Assn.,* 137 N. C., 525; *Mann v. Hall,* 163 N. C., 61.

W. B. WRIGHT AND WIFE v. R. M. MCCORMICK ET ALS.

Practice—Action to Recover Land—Partition.

Where in an action for the recovery of land the plaintiff showed title under proper proceedings in partition, and the defendant admitted possession: *Held*, that plaintiff was entitled to recover.

ACTION to recover possession of land, tried at Spring Term, 1877, of CUMBERLAND, before *McKoy, J.*

The plaintiffs read in evidence a petition, order of partition, appointment of commissioners, and an order confirming their report in the case of the present plaintiffs against Duncan McCormick, the devisor of the present defendants, and under whom the defendants claim the land in dispute. See 69 N. C., 14. The description of the land in the complaint was the same as in said petition, decree, and report of commissioners.

The defendants admitted that they were in possession of the (159) land at the time the action was brought, and the plaintiffs demanded possession of the same upon the ground that it was allotted to them in the said proceeding for partition. His Honor gave judgment for the plaintiffs, and the defendants appealed.

MacRae & Broadfoot and N. W. Ray for plaintiffs.
Guthrie & Carr, B. Fuller, and McKay for defendants.

READE, J. The *feme* plaintiff and the devisor of the defendants were tenants in common of a tract of land; and, under proper proceedings had in court, partition of the land was made between them, allotting to each a share in severalty. An appeal was taken to this Court upon the objection by the defendants that the commissioners had divided the wrong tract of land, but the description in the complaint and in the report were identical, and the objection was held to be "captious and frivolous." *Wright v. McCormick*, 69 N. C., 14.

The devisor of the defendants died before the final confirmation of the report of the commissioners, and the defendants were made parties defendant, and the report of partition was confirmed and a proper decree made.

The complaint states that since that time the defendants have taken possession of the land allotted to plaintiffs. The answer denies everything, and claims title and admits possession, "sole seizin." Seizin in deed, as this must be taken to be, is possession. The plaintiffs' proof of title—the record of partition before stated—was complete, and the defendants' possession was admitted. The plaintiffs were clearly entitled to recover.

PER CURIAM. Affirmed.

(160)

ALBERT FOSTER v. THOMAS S. PENRY.

Landlord and Tenant Act—Practice—Appeal.

1. In a proceeding before a justice of the peace under the landlord and tenant act (Bat. Rev., ch. 64, sec. 19), where the defendant denies the alleged tenancy, it is the duty of the justice to proceed and *try* the issue of tenancy. If it is determined in favor of the plaintiff, such judgment as he may be entitled to must be given. If it is determined in favor of the defendant, the action must be dismissed.
2. In such case, where there is an appeal to the Superior Court, the action must be tried and such judgment rendered as should have been given in the justice's court.

MOTION to dismiss an action for want of jurisdiction, heard at Spring Term, 1877, of DAVIE, before *Kerr, J.*

On 9 January, 1875, the plaintiff made oath before a justice of the peace, in substance, that the defendant occupied a certain piece of land as tenant of the plaintiff from 1 January, 1874, to 1 January, 1875, when his term expired; that the estate of the plaintiff was still subsisting, and that defendant refused to surrender the possession, and the plaintiff claimed $160 as rent. Upon this a warrant issued, which was executed. The defendant appeared and answered, in substance, that in 1868 he owned the land described in the affidavit, and by a deed absolute in form conveyed it to one Berry Foster, who afterwards assigned his interest to the plaintiff; but that at the time of such conveyance it was agreed between him and said Berry Foster that the conveyance should be void whenever the grantor paid off a certain debt to Barbara, wife of Wiley Bailey, to which said Berry was surety, and that he is now ready to pay off said debt, and he denies that he ever occupied the land as the tenant of said Berry Foster or of the plaintiff. At a trial before (161) the justice, on 6 February, 1875, it was agreed that a judgment might be given for plaintiff, and that defendant might appeal in two weeks, for which time execution should be suspended. On 24 February execution issued and the defendant was ejected. The defendant in due time appealed to the Superior Court, and at Spring Term, 1877, moved to dismiss the proceedings for want of jurisdiction in the justice, and for an order of restitution, which was refused by his Honor, and the defendant appealed.

J. M. Clement and Shipp & Bailey for plaintiff.
Watson & Glenn and J. M. McCorkle for defendant.

RODMAN, J., after stating the facts as above: The question thus presented is this: A plaintiff, by oath, brings his case within the jurisdic-

tion of a justice under the landlord and tenant act (Bat. Rev., ch. 64, sec. 19), and the defendant, by answer, denies the tenancy, and alleges a title in himself. Shall the justice proceed to inquire whether the defendant did enter as tenant of the plaintiff, and whether his term has expired, or shall he, *upon the answer merely,* dismiss the proceedings?

We are not aware that this precise question has been heretofore decided, although expressions bearing on it more or less directly may be found in several cases: *Forsythe v. Bullock,* 74 N. C., 135; *Heyer v. Beatty,* 76 N. C., 28. The Constitution (Art. IV, sec. 27) gives to justices jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed $200 and wherein the title to *real estate* shall not be in controversy. The act (Bat. Rev., ch. 63, sec. 17) prescribing the practice before justices says: "If it appears *on the trial* that the title to real estate is in controversy, the justice shall dismiss the action," etc. The words "real estate" of course have the same meaning in
(162) the Constitution and in the act. It is not always proper, in construing a constitution, to give to such a term as "real estate" any strict technical meaning, but it is reasonable to give to such term the meaning which it ordinarily bears among professional men speaking on legal subjects, provided there be nothing in the context to forbid such a meaning. It is well known that a term for years is not classed as real estate in the law books. It is called a chattel real; it does not descend to the heir, but goes to the executor with the personalty. Tomlyn's Law Dict., *Real Estate.* The words "real estate," in this clause of the Constitution, mean freehold estate. This definition has no immediate bearing on the question before us, and we proceed now to that. We think it presents no difficulty. If the defendant entered as tenant of the plaintiff, he is estopped from denying the plaintiff's title. The rule has its exceptions, but they need not be noted here. If he did not enter or occupy as tenant, the justice has no jurisdiction. Obviously, it would be unreasonable to allow the defendant to determine the jurisdiction of the justice; yet that is the effect if the justice must dismiss the action on the denial of the tenancy by the defendant and his claim of a freehold title. If such an answer were required to be on oath, it would hardly ever support an indictment for perjury, although it might be false. It is easy to see that the jurisdiction of justices under the landlord and tenant act would be entirely destroyed. This cannot be the proper practice; the justice must try the issue of tenancy, and dismiss the action only when he finds it against the plaintiff. If he finds it for the plaintiff, he must proceed and give a judgment in his favor as he may be entitled to. This is evidently the practice prescribed by the act above cited (Bat. Rev., ch. 63, sec. 17): "If it *appears on the trial* that the title to real estate is in controversy, the justice shall dismiss the action," etc.

The fact of tenancy or nontenancy must appear *on the trial,* and (163) not merely in the answer; for the pleadings of the parties are properly not part of a trial, which can only be had after the issues have been made by the pleadings.

It is a necessary function of every court to pass in the first instance on its own jurisdiction, and if the jurisdiction depends on a fact, it must necessarily determine the existence of the fact. Many examples might be given where it is evident that any other practice would be absurd. A case affecting an ambassador can be tried only in the Supreme Court of the United States; but if every defendant in any other court can dismiss the action by alleging that he is an ambassador, it would appear that foreign courts were represented in this country to an alarming extent. A probate judge has no jurisdiction to grant administration except on the estate of a person deceased, and in every case he tries and determines the fact of death. Pleas to the jurisdiction must be pleaded and determined before any other plea can be put in. Chit. Pl. In the present case the plea is a denial of the tenancy, and the plaintiff must prove his allegation, and the justice must decide on it upon the evidence. If he finds that the defendant was a tenant, he must proceed to try any other matters in issue, and give such judgment as may be proper. No claim of a freehold title in the defendant can be allowed to be made. It is impertinent; for if the defendant is not a tenant, it is immaterial, as on the failure of proof that he is, the jurisdiction fails; and if he is a tenant, the plea of title cannot avail him, as he is estopped to allege it.

The judge of the Superior Court properly refused to dismiss the proceedings. He should have proceeded to try the case and to give such judgment as the justice might and ought to have given. It is by no means admitted that the defendant could appeal from the refusal of the judge to dismiss the action. It does not appear to have affected any substantial right of the defendant, and appeals from interlocutory judgments are not to be favored beyond the letter of the law, as (164) they unnecessarily and uselessly lengthen litigation.

PER CURIAM. Affirmed.

Cited: *Crawley v. Woodfin,* 78 N. C., 6; *Davis v. Davis,* 83 N. C., 74; *Nesbitt v. Turrentine, ib.,* 537; *Hahn v. Guilford,* 87 N. C., 174; *Dunn v. Bagley,* 88 N. C., 93; *Durant v. Taylor,* 89 N. C., 353; *Edwards v. Cowper,* 99 N. C., 423; *Plemmons v. Impr. Co.,* 108 N. C., 616; *Paine v. Cureton,* 114 N. C., 608; *Alexander v. Gibbon,* 118 N. C., 806; *Isler v. Hart,* 161 N. C., 500.

C. J. AND A. GREEN v. CASTLEBERRY.

Practice in Supreme Court—Exceptions—Action for Partnership Account.

1. In cases on appeal to this Court, wherein the findings of fact in the court below are subject to review, the errors must be *specially* assigned or the exceptions will not be considered, and the evidence bearing upon the question and showing the error below must be singled out and referred to, either in the exception or in the brief of counsel; otherwise, the ruling below will be affirmed as of course.
2. In an action for an account of a partnership, where the referee failed to find (1) by whom the same was dissolved; (2) that the defendant refused to account; (3) who was managing partner; (4) facts admitted by the pleadings; (5) as to the cost: *Held*, to be immaterial.

ACTION for an account of a partnership, heard upon exceptions to a report of a referee, at Spring Term, 1876, of ORANGE, before *Seymour, J.*

The case was referred to Thomas Ruffin, Esq., and upon the return of his report the plaintiff filed the following exceptions:

"1. That he has not found the issues raised by the pleadings, both of law and fact.

"2. That his finding the fact that the parties dissolved the partnership is contrary to the evidence, which was that the plaintiff dissolved (165) the partnership.

"3. That he should have found that Castleberry refused to account to plaintiffs for the stock, profits, etc.

"4. The complaint alleges that the defendant was the sole managing partner, but the referee has not found this fact, nor decided the law arising thereon, although the answer admits it.

"5. The complaint alleges that the defendant fradulently wasted and now holds the assets of the partnership, and this is admitted by the answer; but the referee does not find the fact, nor the law arising thereon.

"6. The plaintiffs are entitled to an account of the stock, profits, etc., made, or which could have been made; and the referee has stated no such account.

"7. That according to the evidence the defendant was fixed with partnership assets in October, 1872, instead of January, 1873, as found by the referee. (This exception contains a detailed statement of sundry sums amounting to $950.27, which went into the defendant's possession, and which was alleged to have been sufficient to pay all claims on account of building a storehouse and kitchen, and says the defendant should not have been allowed credit for advancements for building, etc.)

"8. That the referee should have found the value of the kitchen to be $100, and the storehouse $500, and should have allowed the defendant

$100 on the kitchen, *minus* the payment of the plaintiffs, and should have allowed the defendant nothing on the storehouse, as there were firm assets in his hands sufficient to pay the amount after deducting the advancements made by the plaintiffs.

"9. That he has not allowed the judgment of the Supreme Court in this case against the defendant for $27 as a set-off.

"10. That he has not charged the defendant with anything as received from the firm, whereas he should have charged him with $72.

"11. That he should have charged the defendant with profits (166) at 100 per cent upon the stock of goods.

"12. That in paragraph 8 of the report he should have found in favor of C. J. Green as to the $150.

"13. That paragraph 10 of said report is not in accordance with the facts as supported by the evidence and the law arising thereon.

"14. That paragraphs 11, 12, 13 of said report is not such an account as the law requires to be stated from the facts and evidence.

"15. That paragraph 15 of said report is excepted to upon the same ground as stated in the foregoing exception.

"16. There is no evidence to support the finding in paragraph 16 of said report.

"17. The decisions of the referee are not in accordance with the law and facts, and are excepted to on the ground as stated in this bill of exceptions.

"18. The plaintiff excepts to Schedule 'A,' Item 'C,' as not being in accordance with the evidence and law.

"19. The plaintiff excepts to all items in Schedule 'B,' except James Barbee's barrel of brandy, $93. He claims that the defendant should have been allowed only $70 and one-third purchase money of lot, being $56.33⅓, and that $32 paid Page and Andrews' bill of lumber has been allowed twice.

"20. That he has not found the facts nor decided the law arising thereon relative to the defendant's purchase of the Lewis Platt lot, and carrying partnership funds into 'First and Last Chance.'

"21. That he should have charged defendant with profits at 100 per cent, but charged him with none.

"22. No. 35, in Schedule 'C,' $50, for retail license in Durham for twelve months from 3 February, 1873. The defendant should account for the license, as it was used by him personally in 'First and Last Chance' for the remainder of the year after the dissolution (167) of the partnership.

"23. That $187.96 was paid by the receiver on the Bevan bill of goods, and no notice is taken thereof by the receiver in his account.

"24. The plaintiffs are entitled to judgment for costs of this suit against the defendant."

See same case, 70 N. C., 20.

His Honor overruled all the exceptions, except No. 20, and ordered that defendant be charged with $40 on account of said retail license for the time he used it. The referee was directed to proceed to collect the debts due the firm from the receiver, and settle the affairs of the partnership. From which ruling the plaintiffs appealed.

R. W. York for plaintiffs.
Walter Clark for defendant.

RODMAN, J. This action is for an account of a partnership in a drinking-saloon, called the "Side-Pocket," in the village of Durham. The partnership lasted from September, 1872, to about April, 1873. The principal expenditures seem to have consisted in buying a lot and building a house. For these purposes, and for obtaining goods from time to time, the several partners advanced different sums. No regular accounts were kept, and no means exist for stating an account, except memoranda occasionally kept on loose pieces of paper, and the recollections of partners and others, which naturally differ considerably. It was referred to a respectable member of the bar to take an account of the partnership dealings, which he did, and made a report, to which the plaintiffs filed twenty-four exceptions. The evidence fills thirty-nine pages of manuscript, closely written, and the report of the referee, with the schedules, nine pages. The judge, after a deliberate examination, overruled all the exceptions but one, amounting to $40, with (168) which he thought the defendant ought to be charged, because he continued to use the retail license of the firm after the dissolution, in an individual enterprise in a saloon called "the First and Last Chance."

It is our duty to consider the exceptions when they are in such definite and intelligible form as is required by the practice of the Court, and we have done so; but it certainly cannot be our duty to go into any detailed examination of them. Many of them are evidently frivolous, and it would be a sheer waste of time upon them to do more than say so. Some of them (for example, the 7th and 8th) are obscure, and they seem to be because the referee drew wrong inferences of fact from the evidence; but they do not refer to the particular evidence which required contrary inferences, and apparently expect us to master the whole evidence to determine whether, after the storehouse was partially completed, the defendant received, or might and ought to have received, profits enough to pay for the completion, or, in effect, to state the whole account over again. As to exceptions in such shape as these, it may perhaps be proper,

though it ought not to be necessary, to state the rule which this Court will apply. It is not a new rule that we propose to establish, or one peculiar to this Court. It is a rule acted on by every court which reviews findings of fact on final appeal, and is intended to prevent the time of the court, which belongs to all its suitors, from being occupied in the tedious reëxamination of minute facts for which it is not adapted. It is within the jurisdiction, and therefore it is the duty, of this Court, in a certain class of cases, to review on appeal the findings of the Superior Courts in matters of fact. But it does this as a court of appeal, and not as a court of original jurisdiction. The Court presumes the finding of the judge of the Superior Court to be right until it is shown to be wrong, and therefore the error must be *specially assigned,* or the exception will not be considered, and the evidence bearing upon (169) the question and showing the error of the judge must be singled out and referred to, either in the exception itself or in a brief of counsel filed in the case. This I remember was said in *Whitford v. Foy,* 71 N. C., 527, when it was before this Court for the third time; but I do not find it in the case reported.

We proceed now to consider the several exceptions:

1. The referee has found on all material issues.

2. It is quite immaterial who dissolved the partnership.

3. The referee did find that there had been no settlement of accounts, and nothing more was material.

4. This was immaterial, except as matter of evidence.

5. It is not necessary that a referee shall find what is admitted by the pleadings, and it is not seen how the fact is material in this case.

6. The referee has stated an account. This exception is too general.

7, 8. These have been already considered. No evidence is referred to in support of them. They are unintelligible without a study of the whole evidence.

9 to 21, inclusive, and 23 are open to the same objection.

22. Was allowed by the judge.

24. Is not the fit subject of an exception, as the costs form no part of a referee's report.

The defendant will recover costs in this Court.

PER CURIAM. Affirmed.

Cited: Green v. Jones, 78 N. C., 268; *Paschall v. Bullock,* 80 N. C., 9; *Morrison v. Baker,* 81 N. C., 82.

(170)

WILLIAM C. ROSS ET ALS. v. WILLIAM F. HENDERSON ET ALS.

Partnership—Sale of One Partner's Interest—Partnership Creditors—Statute of Limitations.

1. Where land is purchased with partnership funds and conveyed to the partners by name, although in law they are considered as tenants in common and no notice is taken of the equitable relations arising out of the partnership, yet in equity the partnership property is devoted to partnership purposes and a trust is created for the security of the partnership debts. Therefore, when a partnership becomes insolvent, its property is primarily liable to the payment of the partnership debts, to the postponement of the creditors of the several partners.
2. An attempt by one partner to sell his interest in partnership property in payment of his individual debt is a breach of the partnership agreement for which the other partner or creditors of the partnership have a remedy.
3. If the vendee in such case knows that the property conveyed is partnership property, he is deemed to have had notice of the trust and is held to have purchased only what his vendor could equitably convey, *i. e.*, the legal estate of the vendor subject to the state of the partnership accounts.
4. *Semble*, that this is also the case where the interest of one partner in partnership property is sold under execution issued on a judgment against him upon an individual debt.
5. If a creditor of a partnership obtains judgment against the partnership and levies upon and sells under execution the interest of *one partner* in partnership property, either the sale is void or the purchaser takes only the moiety subject to the equities of the other partner or the other creditors of the partnership.
6. An action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the security of their debts is not barred by C. C. P., sec. 34 (9). *Quere*, as to the application of C. C. P., sec. 37.

(171) ACTION to subject partnership property to the payment of firm debts, tried at Spring Term, 1877, of DAVIDSON, before *Kerr, J.*

The case is sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court. Judgment for defendants. Appeal by plaintiffs.

Scott & Caldwell for plaintiffs.
J. M. McCorkle for defendants.

RODMAN, J. A very brief summary of the general facts of the case is necessary to make this opinion intelligible.

In 1858 Henderson Adams and James Smith, who were partners in selling goods, took a deed to themselves for a certain lot in Lexington.

They paid for it and put improvements on it from the partnership funds, and used it for the partnership business. They continued in business until 1868, when the firm became insolvent, and each of the partners was individually indebted in large sums.

The plaintiffs are several creditors of the firm, who recovered their several judgments in 1869, and sue in behalf of all the other partnership creditors, if any.

On 21 November, 1867, Smith, being individually indebted to the defendant Dusenberry, conveyed to him, in satisfaction of the debt one-half of said lot. Certain of the plaintiffs issued executions upon their judgments recovered as aforesaid in 1869, and levied on Smith's estate in said lot. This was sold, and bought by Dusenberry, in May, 1870.

Certain individual creditors of Adams recovered judgments against him in 1868, under which his estate in said lot was sold in August, 1868, and the defendant J. H. Adams became the purchaser. J. H. Adams conveyed his estate to the defendant Henderson.

In July, 1875, Smith, on his own petition, was adjudged a bankrupt, and in [date not stated] received his final discharge. His assignee, Pickett, is a defendant in this action. (172)

This action was begun on 20 September, 1876. The plaintiffs demand judgment that the said lot be sold and the proceeds be divided ratably among the partnership creditors of the firm of Adams & Smith. The judge below was of opinion that the demand of the plaintiffs was barred by the statute of limitations, and dismissed the action, from which judgment plaintiffs appealed.

When land is purchased with the money of a partnership, and conveyed to partners by name, the law considers the grantees as tenants in common, and takes no notice of the equitable relations arising out of the partnership.

In equity, however, it is held that the partnership agreement devotes the partnership property to partnership purposes, and creates a trust in it for the security of the partnership debts. On the insolvency of the partnership, it is primarily applicable to the payment of the debts of the partnership, to the postponement of the creditors of the several partners.

When, therefore, one of the partners undertakes to sell his interest in the whole, or any part of the partnership property, in payment of his individual debt, it is a breach of the partnership agreement, for which the other partner and, as subrogated to his rights, the partnership creditors may have a remedy.

And if the vendee of such interest knows that the property so conveyed is the property of the partnership, he is deemed to have had notice of the trust, and is held to have purchased only what his vendor might equitably convey; that is, the legal estate of his vendor in a half (or other

share) of the property, subject in equity to the state of the partnership accounts. That was all that Dusenberry acquired on his purchase from Smith. We assume, although it is not distinctly stated, that he knew, or had reason to know, that the lot was partnership property, and was used in the partnership business. He knew, of course, that the
(173) consideration which he paid was a release of the individual debt of Smith, and he must be presumed to have known, as a matter of law, that he was acquiring only Smith's estate, subject to all equities.

The authorities in support of these principles are too numerous to be cited in detail. We cite only a few from this Court, and refer to the text-books for the doctrines in general. *Donaldson v. Bank,* 16 N. C., 103; *Baird v. Baird,* 18 N. C., 524; Coll. Part., secs. 135-822; *Williams v. Moore,* 62 N. C., 211; 1 American L. C., 329; *Dyer v. Clark,* 5 Metc. (Mass.), 561; Herman on Ex., 547, sec. 359; *Roberts v. Oldham,* 63 N. C., 297; *Broaddus v. Evans,* 63 N. C., 633; *Phillips v. Trezevant,* 67 N. C., 370; *Wells v. Mitchell,* 23 N. C., 484.

On the same principle, if a creditor of one of the partners only obtains a judgment against that partner, and levies execution on the whole or any particular part of the partnership property, the purchaser gets merely the legal estate of the defendant in the execution, subject to the equities of the other partner and of the partnership creditors. Coll. Part, secs. 166-822; 1 Am. L. C.; Herman on Ex., 538, sec. 355; *Tredwell v. Roscoe,* 14 N. C., 50; *Price v. Hunt,* 33 N. C., 42; *Latham v. Simmons,* 48 N. C., 27. And this would be true, at least in this State, whether the purchaser knew that the property was partnership property or not, as such purchaser takes subject to all equities, whether he knows of them or not. *Polk v. Gallant,* 22 N. C., 395.

J. H. Adams, by his purchase under execution against Henderson Adams, acquired the legal estate of the defendant in execution, subject to the equities aforesaid. As Henderson, to whom J. H. Adams conveyed, does not plead that he was a *bona fide* purchaser for value and without notice, he acquired the rights of his vendor, and no more. For Dusenberry, however, it is said that after the conveyance to him by Smith, certain of the present plaintiffs having recovered judg-
(174) ment against both the partners for partnership debts, levied on and sold the estate of Smith in one moiety of the lot, when he (Dusenberry) became the purchaser; so that by this purchase he acquired both a legal and equitable estate in a moiety of the lot.

If a creditor of a partnership gets judgment against the partners, and levies upon and sells any piece of the partnership property, the purchaser gets a title thereto clear of any equities arising out of the partnership relation. Coll. Part., sec. 822. But to have this effect the levy must be on the estate of both partners in the particular property, and

not on the estate of one alone. If the levy is on the estate of one only, it is either void or the purchaser gets only the moiety, subject to the equities of the other partner. Coll. Part., sec. 822; *Johnson v. Evans,* 7 Man. and Granger, 240-50 (E. C. L.).

Independently of this, Smith had parted with *his* estate as far as he could by the previous deed, which was good as between him and Dusenberry, and not *void* as to the partnership creditors in the sense in which a deed made to defraud the creditors of the grantor is.

There was, therefore, at the time of the sale, no estate in Smith which could be sold under execution at law, and the purchaser acquired nothing.

These general principles lead to the conclusion that the plaintiffs are entitled to the relief sought, unless it be prevented by some defense not yet considered. The judge below seems to have been of this opinion, as he dismisses the action upon the sole ground that it is barred by the statute of limitations. In this we consider that his Honor was in error. We suppose that he came to this conclusion upon C. C. P., sec. 34 (9), which is in these words: "Within three years." "An action for relief on the ground of fraud in cases which heretofore were solely cognizable in a court of equity, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the (175) facts constituting fraud."

We are not aware of any authority on this precise question. We are of opinion, however, that this statute does not apply to the cause of action of plaintiffs. Their right to hold the owners of the legal estate trustees for the security of their debts does not arise out of the fraud of those owners, but out of the trust created by the partnership agreement, and because those owners bought the land subject to the trust.

It may sometimes be said that one who takes from a partner a conveyance of partnership property in payment of the individual debt of the partner commits a fraud on the other partner, and in a particular case or in a general sense of the word it may be true. But the act is not necessarily a fraud, and requires the addition of other particulars to make it so. The conveyance may be authorized by the state of the partnership accounts, and thus valid. The ground of the plaintiffs' action is a trust arising by contract, and it is not barred by any statute as long as their debts exist in contemplation of law—that is to say, are unpaid, and not barred by the statute of limitations, unless it be by C. C. P., sec. 37, which bars all actions for relief not otherwise provided for unless commenced within ten years after the cause of action accrued. The plaintiffs' cause of, or right to, this action accrued when they respectively recovered judgments. We do not consider ourselves at liberty to consider the defense set up by reason of the discharge of Smith in bankruptcy.

This question does not appear to have been considered or passed upon in the court below; neither are the facts respecting it fully stated. We are unable, therefore, to give a final judgment in the action.

Cause remanded to be proceeded in according to this opinion.

PER CURIAM. Remanded.

Cited: Mendenhall v. Benbow, 84 N. C., 650; *Bank v. Blossom,* 92 N. C., 702; *Hartness v. Wallace,* 106 N. C., 432; *Barnes v. McCullers,* 108 N. C., 56; *Norton v. McDevit,* 122 N. C., 759; *Sherrod v. Mayo,* 156 N. C., 150.

Doubted: Allen v. Grissom, 90 N. C., 95.

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(176)

SANDFORD A. LONG v. DICKERSON SWINDELL, CORNELIUS SWINDELL, SOLOMON F. SWINDELL, RICHARD C. WINDLEY, AND GEORGE CREDLE.

Easement—Condition Precedent—Parties—Verdict—Damages—Supreme Court Practice.

1. Where the grant of an easement is upon a condition precedent, it cannot be enjoyed by the grantee until the condition is performed.
2. In such a case a deed from the original grantee conveys only a right to the easement upon performance of the prescribed condition precedent.
3. The word "if" is an apt one to express a condition precedent to the creation of an easement.
4. When an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper (under C. C. P., sec. 61 and 248, subsec. 3) to join them as defendants in an action for damages.
5. But where there is no unity of design or concert of action, and the *separate* action of each defendant causes the single injury, the share of each in causing it is separable and may be accurately measured. In such case the jury can properly assess several damages.
6. This Court gives such judgment as the court below should have given.

ACTION for damages for breach of covenant, tried at Spring Term, 1877, of HYDE, before *Eure, J.*

The case made by the pleadings and verdict of the jury was this:

On 30 April, 1855, the plaintiff owned a certain piece of land, through which a ditch ran from Mattamuskeet Lake to a canal, which ran through a piece of land then the property of one Stanley, called the McCauley land, to the head of Wysocking Creek.

The plaintiff had acquired a right to drain his land into this canal. Jones Boomer was seized in fee of a piece of land adjoining the plaintiff's on the west, and John W. Litchfield of another piece west of and adjoining the Boomer land. On the said day the plaintiff made and delivered to Boomer and Litchfield a deed as follows: (177)

This indenture, made and entered into this 30 April, 1855, between Sanford A. Long, of the one part, and Jones Boomer and John W. Litchfield, of the other part, all of the county of Hyde and State of North Carolina, witnesseth: Whereas the said Long, Boomer, and Litchfield, at the time of sealing and delivery of these presents, are respectively seized in fee of adjoining tracts of land; and whereas the said Boomer and Litchfield having no convenient and effective drain to their lands without crossing over and through the lands of the said Long, *and the said Long being willing in the spirit of good neighborhood to grant a privilege therefor on certain conditions, reservations, and limitations;* and whereas the said Long has a personal privilege of a canal or drain through the lands of Edward Stanly to the head of Wysocking Creek, not granted to others: *now, if the said Boomer and Litchfield shall procure from the owners of the said land a right of drain or ditch from the southern terminus of my lake canal,* then through the head of Wysocking Creek, of sufficient width and compass to discharge and carry off all the water which may be forced down the drains hereinafter granted them through my own land, and shall, in conjunction with myself, cut out and keep open said canal leading into Wysocking Creek—the said Boomer performing three-sevenths of the labor necessary thereto, the said Long three-sevenths, and the said Litchfield one-seventh—and shall at all times, when necessary, perform their share of said work, *and in default thereof pay to the other parties performing it the value of their share of the labor, which value is to be adjudged and assessed by three disinterested parties chosen for that purpose.*

Then this indenture witnesseth, that the said Long, for divers good and sufficient considerations, and more especially for the consideration of $5 to me in hand paid by the said Boomer, and the further sum of $5 to me in hand paid by the said Litchfield at and before the (178) sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said *Sanford A. Long* hath bargained, granted, sold, released, and confirmed, and by these presents doth bargain, grant, sell, release, and confirm unto the said *Jones Boomer,* his heirs and assigns, the right to cut and keep open a drainway or ditch of 6 feet in width, through that tract of land now owned by me under the purchase from Francis A. McCauley, known as the McCauley land, said drain or ditch to commence where said Boomer's land (whereon he now lives)

intersects and corners at its southern point with my line, and where he has now a ditch, and running with the old ditch to where it intersects with my leading canal from the lake, thence with the tract of said leading canal so as to leave a space of 21 feet in width on the east side thereof between said ditch and the line of George A. Selby, to my south and back line.

And the said Sanford A. Long hath bargained, granted, sold, released, and confirmed, and doth hereby grant, bargain, sell, release, and confirm to the said *John W. Litchfield,* his heirs and assigns, the right to cut or keep open a ditch or draining-way of 6 feet in width from the point where the land (whereon he now lives) intersects with the back line of my McCauley land, and running thence with said back line to where it will empty into the ditch or privilege granted to Jones Boomer, saving and reserving to myself, my heirs and assigns, the right and privilege of draining any and every portion of my said lands into either one or both of said ditches, whether that under the grant to Jones Boomer or to John W. Litchfield. To have and to hold the privilege of drain herein granted to the said Boomer and Litchfield, their heirs and assigns, *as an appendage each to the tracts of land on which they now live, and no other.*

(179) And the said Boomer, for himself, his heirs and assigns, doth covenant to and with said Long, his heirs and assigns, that he will keep open the said ditch at his own proper costs and charges, and that he will at all times perform such work thereon as may be necessary to keep said ditch in proper repair.

And the said Litchfield, for himself, his heirs and assigns, doth covenant to and with said Long, his heirs and assigns, that he will in cutting said ditch throw up a bank on the northwest side thereof of sufficient height and width to operate as a permanent barrier or dam against the backwater, and that he will at all times keep such dam in permanent and sufficient repair at his own proper costs and charges.

And the said Long doth hereby covenant to and with the said Boomer and Litchfield, their heirs and assigns, that they shall and lawfully may at any and all times peaceably and quietly use, occupy, and enjoy the rights of drain hereby granted, and that they shall for that purpose have a right to pass over my said lands free and unmolested by me, my heirs and assigns.

In testimony whereof I have hereunto set my hand and seal, day and date above written. S. A. LONG. [SEAL]

Signed, sealed, and delivered in the presence of Robert Jennett and N. Beckwith.

This deed was not executed by either Boomer or Litchfield.

Afterwards, viz., in 1859, Litchfield conveyed his piece of land to Marcus Swindell, who devised it to Dixon Swindell, one of the original defendants, and died in 1864. In May, 1855, Boomer conveyed his piece of land to Marcus Swindell, who devised the same to Cornelius Swindell and Solomon Swindell, two other of the defendants, and to David Swindell.

Solomon conveyed two-thirds of his estate to R. C. Windley, a (180) defendant.

The estate of David Swindell was sold under execution, and purchased by the defendant George Credle, and was afterwards conveyed to Cornelius Swindell, a defendant.

Neither Boomer nor Litchfield, nor any of their assignees, ever procured a right to drain their respective lands into the Stanly (or McCauley) canal. Nor have any of them ever enlarged the said Stanly canal.

Nevertheless the said Marcus Swindell, while he owned the Boomer land, cut a ditch on the route on which a right to cut a ditch *six* feet wide had been granted to said Boomer, by the deed of 30 April, 1855, which ditch either was originally cut by him or soon after his death was enlarged by some of his assignees to the width of *ten feet,* and was continued of that width to the commencement of the action.

Litchfield, or Marcus Swindell, his assignee, while owning the Litchfield land, cut a ditch from the western boundary of that land through the same, to meet the ditch aforesaid through the Boomer land; and thus the water from both the Boomer and Litchfield lands was poured into the ditch of the plaintiff; and the outlet being insufficient to discharge the waters so brought down, the plaintiff's land was overflowed and injured.

The defendants' assignees as aforesaid, continued, up to the time of the bringing of the action, to use and enjoy the ditches cut as aforesaid through the Boomer and Litchfield lands.

The plaintiff claimed damages for the injury, and also moved for an injunction to restrain the defendants from flowing water from their lands into plaintiff's ditch.

Several issues were submitted to a jury, and the substance of their findings is incorporated in the preceding statement.

They found separate damages against the defendant R. C. Windley and Cornelius Swindell, and the heirs of Dixon Swindell, who had died during the pendency of the action. His heirs, to wit, Sally (181) J. Swindell, Joel Swindell, and D. Swindell, had been duly made parties, and appeared by a guardian *ad litem* appointed by the court. The administrator of Dixon Swindell was also made a party.

His Honor dismissed the action, and the plaintiff appealed.

J. E. Shepherd and D. M. Carter for plaintiff.
George H. Brown, Jr., for defendants.

RODMAN, J., after stating the facts as above: Three points are made by the defendants:

1. That inasmuch as Boomer and Litchfield never executed or formally became parties to the deed of 30 April, 1855, they were not bound by the conditions and covenants on their part therein contained. It is not denied in the answer, and it is expressly found by the jury, that they accepted the deed, and that their assignees accepted and used the easement granted in it.

We had occasion to consider this question in *Maynard v. Moore,* 76 N. C., 158, and it is there said that a party who accepts a deed containing covenants on his part is bound to perform them, although he does not execute the deed as a party. For that the case of *Finley v. Wilson,* 4 Zab. (N. J.), 311, is cited. The true reference is 2 Zab., 311. See also, on this point, *Earle v. Mayor of New Brunswick,* 38 N. J., 47; 13 Pick., 323; 9 Metc., 396.

In the present case, however, there is no necessity for resorting to that doctrine.

In the deed under which the defendants claim the grant of the easement is expressly made conditional upon the acquisition by the grantees of a right to drain through the Stanly canal, and provision is made for their enlarging that canal in conjunction with the plaintiff. The deed, after reciting that Boomer and Litchfield owned adjoining lands which they could not conveniently drain except through the land of the
(182) plaintiff, and that plaintiff had a right to drain his own land only through the Stanly canal, and that said plaintiff was willing "to grant a privilege therefor on certain conditions," etc., says: "Now, *if* said Boomer and Litchfield shall procure from the owner of said (Stanly) land a right to drain or ditch," etc., "of sufficient width and compass to discharge and carry off all the water which may be forced down the drains hereinafter granted them through my land, and shall, in conjunction with myself, cut out and keep open said canal leading to Wysocking" (the Stanly canal), etc., "then this indenture witnesseth," that said Long grants to Boomer and his heirs and assigns an easement to cut into Long's ditch; and also grants to Litchfield and his heirs and assigns a similar easement; the said easements to be held as appendages to the several pieces of land then owned by Boomer and Litchfield respectively.

Then the said Boomer and Litchfield severally convenant for themselves and their respective heirs and assigns to keep open and in good order "the said ditch" (meaning, as we assume, the ditch or ditches

authorized to be cut through the land of the plaintiff. The precise meaning of the words is not material in the present action).

The word "if" is an apt one to express a condition precedent to the creation of an easement; and the whole language and frame of the deed show that it was the intention of the grantor that the grant should not go into effect, at least, until the grantees had acquired an easement in the Stanly canal. In fact, as the grantor had no right to flow into the Stanly canal water from any land other than his own, he could not make the grant to Boomer and Litchfield except on that condition precedent, without subjecting himself to an action for damages by the owner of that canal.

2. The second point made by the defendants is that if the (183) original grantees, Boomer and Litchfield, were bound by the covenants on their part contained in the deed of April, 1855, their assignees, the present defendants, are not.

The view which we take of the intent and effect of that deed renders it unnecessary for us to consider this question; for if the grant of the easement was upon a condition precedent which has never been performed, then the original grantees were never seized of it, and of course it never passed to their assignees. Nothing passed to the assignees beyond what their assignors had, which was a right to the easement upon the performance of the prescribed condition precedent.

3. The third point is that if the defendants have no right to flow water from their respective lands into the ditch of the plaintiff, to his injury, still the tort is that of the several defendants respectively, for which several actions would lie, and not a single tort committed by all of them jointly, for which a joint action would lie; and if a joint action will lie, the present verdict is bad in assessing several damages. We regret that we were not furnished with any argument on this point by the counsel on either side, or with a reference to any authorities respecting the practice proper in such case. Before our Code of Civil Procedure, the rule seems to have been that in an action against joint trespassers the jury were required to find a joint damage, and if they found several damages against the several defendants, the plaintiff was entitled to judgment against all of the defendants for the highest sum found against any of them, or the verdict would be quashed. *Heydon's case,* 11 Coke, 5a, secs. 4, 5 (p. 8, vol. 6), and *Miles v. Prat,* there cited. In *Eliot v. Allen,* 1 Mon., Gran. Scott, 18 (50 E. C. L.), it was said that were the acts of the several defendants made but one trespass, the damages must be joint. No doubt this rule is reasonable when all the trespassers act upon a common design and in aid of each other, (184) although the parts taken by each differ in importance; and it applies also in criminal cases. But it was early seen that there might be

cases in which its application would be unjust. In *Austen v. Willward,* Cro. Eliz., 860, it was said: "If in trespass against divers persons, the one is found guilty in part and the others in all, then the damages shall be severed." And this view was acted on in *Rodney v. Strode,* 3 Mod., 101; and in *Player v. Warn,* Cro. Car., 54. For a collection of the English cases, see Mayne on Damages, pages 329, 330.

It is unnecessary more particularly to examine the former law, or to decide what the rule would have been before our Code of Procedure. Section 61 of the Code says: "Any person may be made a defendant who has or claims an interest in the controversy advise to the plaintiff," etc.; and section 248, subsection 3, says: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." We will now consider the facts of the present case with a view to the application of the above sections.

All the defendants have an interest in the controversy adverse to the plaintiff. They all claim the easement in controversy, under the same grant; and the injury to the plaintiff is caused by the separate action of each of them. They are, therefore, all properly made defendants under section 61. But there is no unity of design, and no concert of action among them. The most western of the defendants pours his water on his eastern neighbor, and he, in turn, upon the one east of him; and thus, through a common channel the water of all of them passes into the ditch of the plaintiff and causes the injury. While the separate action of each defendant causes the single injury, the share of each in causing it is separable, and may be accurately measured. It is, *cæteris paribus,* as they seem to have been here, proportionate to the area which he
(185) drains upon the plaintiff. Under these circumstances, it would be unjust and unreasonable to assess joint damages, by which the possessor of 10 acres drained would pay as much as the possessor of 50 acres, and might, perhaps, be compelled to pay the whole without a right to recover contribution. *Merriweather v. Nixon,* 8 Term, 186.

We think that, under the peculiar circumstances of this case, the jury were justified in assessing several damages. The judge erred in dismissin the action.

4. We are bound to give here such judgment as the judge below should have given. It has been seen that Dixon Swindell, one of the defendants, died during the pendency of the action, and that both his administrator and his heirs were made parties defendant, and the jury find damages against the heirs. Clearly, there was no cause of action against them. The personal estate is liable for damages done by the intestate.

Judgment below reversed, and the plaintiff will have judgment here against E. L. Mann, administrator of Dixon Swindell, for $71.42; against Carnelius Swindell for $142.84; against R. C. Windley for $35.71. He will also have judgment against these defendants, jointly, for costs.

T. F. Swindell and George Credle will go without day, and each will have judgment against the plaintiff for his costs.

The motion for an injunction is refused. The plaintiff has an adequate remedy without it.

PER CURIAM. Judgment accordingly.

Cited: *England v Garner,* 86 N. C., 370; *Fort v. Allen,* 110 N. C., 191; *Solomon v. Bates,* 118 N. C., 316; *Bank v. Loughran,* 122 N. C., 673; *Herring v. Lumber Co.,* 163 N. C., 485.

(186)

WILLIAM B. BANKS v. MELISSA BANKS ET ALS.

Abandonment of Claim to Land—Evidence.

To constitute an abandonment or renunciation of a claim to property there must be acts and conduct, positive, unequivocal, and inconsistent with the claim of title. Therefore, where the land of plaintiff was sold at execution sale during his absence in the army and purchased by his mother, who represented that she was bidding for him, and afterwards plaintiff declined an offer from her that he should repay the purchase money and take a conveyance of the land, alleging that it was his; and afterwards she sold the land, the grantee having notice of plaintiff's claim: *Held,* in an action for the land, that plaintiff's refusal to pay the purchase money and take the title did not operate as a renunciation of his claim, and that he was entitled to recover.

ACTION for the possession of land, tried at Spring Term, 1877, of YANCEY, before *Furches, J.*

While the plaintiff was absent in the army, his land was sold by the sheriff at execution sale, and his mother, the defendant Rachael Banks, became the purchaser. She conveyed to Ezekiel Banks, another son, who subsequently died, and the defendant Melissa Banks is guardian of his heirs at law, and defends this action for herself and as such guardian. The other facts necessary to an understanding of the points decided are stated by *Mr. Justice Bynum* in delivering the opinion of this Court. Upon issues submitted and under the instructions given, the jury rendered a verdict for the plaintiff. Judgment. Appeal by defendants.

A. T. & T. F. Davidson for plaintiff.

Busbee & Busbee and W. H. Malone for defendant.

BYNUM, J. The defendant Rachel Banks, at the execution sale of her son's land, he being then absent in the army, represented to the bidders that she was biding for her said son's benefit, whereby she sup-
(187) pressed the biddings and purchased the land at an undervalue, and took the sheriff's deed to herself. This constituted her a trustee of the land for the son. *Rich v. Marsh,* 39 N. C., 396; *Hill v. Whitfield,* 48 N. C., 120.

Upon the return of the son after the sale, to wit, in the early part of 1863, the mother offered to convey the land to him on the repayment of the purchase money. This he declined to do, alleging that the land was still his, because it was not properly sold. Whereupon the mother, in August of the same year, sold and conveyed the land to Ezekiel Banks, another son who purchased with notice of all the facts. Soon after this latter sale, and during the same year, the plaintiff tendered to his mother the money and interest paid by her for the land, and demanded a conveyance, which was declined. He is entitled to relief unless his first refusal to take the conveyance on the repayment of the purchase money operated as a renunciation and abandonment of his equity. But clearly it did not have that effect. So far from renouncing his claim, he insisted to his mother that the land was still his, and he claimed it because it had been, as he alleged, improperly sold. To constitute an abandonment or renunciation of claim there must be acts and conduct positive, unequivocal, and inconsistent with his claim of title. Nor will mere lapse of time or other delay in asserting his claim, unaccompanied by acts clearly inconsistent with his rights, amount to a waiver or abandonment. *Faw v. Whittington,* 72 N. C., 321, were the subject is discussed and the decisions in this State are reviewed and commented on. No such unequivocal renunciation appears in this case. There was no error in declaring that the defendants, the heirs of Ezekiel Banks, are trustees for the plaintiff, and that they shall, by their guardian, Melissa Banks, reconvey the said lands by proper deed to the plaintiff. It will be observed that the decree of the court below does not give the plaintiff
(188) a judgment for the excess of the rents over and above the purchase money and interest, and from this judgment the plaintiff does not appeal. From this we infer that the rents were balanced against the purchase money and interest, and that all excess of rents over the purchase money was remitted. This was proper, for it would have been hard measure to have demanded judgment for what appears to us as excessive damages in the way of rents as found by the jury.

PER CURIAM. No error.

Cited: Skinner v. Warren, 81 N. C., 376; *Gorrell v. Alspaugh,* 120 N. C., 368; *McCurry v. Purgason,* 170 N. C., 467; *R. R. v. McGuire,* 171 N. C., 181.

SAMUEL R. MOORE v. M. B. VALLENTINE ET ALS.*

Fixtures, Permanent, Temporary—Vendor and Vendee—Mortgagor and Mortgagee.

1. Where an unconditional contract of purchase is made, the relation of vendor and vendee is established.
2. A mortgagor who is allowed to retain possession, or if a vendee under a bond for title is let into possession, makes improvements, and erects fixtures, he is not at liberty to remove the same, on the ground that by his own default he is not able to get the title.
3. An exception is made in favor of a tenant for years who erects buildings for a temporary purpose and for the encouragement of trade, manufacturing, etc., and he is permitted to remove what had apparently become a part of the land.

The law of fixtures discussed by the CHIEF JUSTICE.

APPEAL at January Term, 1877, of MECKLENBURG, from *Schenck, J.*

This action was brought to recover a fund arising from the sale of a steam engine and its appurtenances, which were sold by consent of the parties to prevent injury from exposure. (189)

The main question, however, presented by the pleadings, and decided by this Court, was whether said engine, etc., was a fixture to the freehold.

The facts found by his Honor are substantially as follows: In October, 1867, one Davis sold to the defendant Valentine a tract of land in said county, contracting in writing to make title to the same upon payment of a certain sum of money. The land was purchased as mining property, and said defendant went into possession and put up machinery, that he might be able to carry on the mining operations more successfully. The machinery was placed in a house made for the purpose and firmly screwed down on wooden frames, and connected with the boilers outside the house by a steam pipe, and could not be gotten out without removing a portion of the house. The boilers could not be removed without tearing down the brickwork encasing them.

The said defendant failed to comply with his part of the contract in the payment of a large amount of balance due for the purchase of said property.

In 1868 said Davis, the vendor, was declared a bankrupt, and his interest in balance of said purchase money, together with other effects as exhibited by his schedule, were regularly and legally sold by his assignee, and the plaintiff became the purchaser and obtained a deed conveying all the estate of said bankrupt.

*BYNUM, J., did not sit.

The said defendant continued in possession under his contract of purchase, and claimed the engine and machinery as his property. The plaintiff also claimed them under his purchase from said Davis's assignee, insisting that they were fixtures to the freehold and constituted a part of the land, and averring his readiness to make title to the same upon payment of balance of purchase money.

(190) The engine and machinery were severed from the land, while said defendant was in possession under said contract of purchase, by his order and direction, as well as the plaintiff's.

The opinion of his Honor, which is set out in the case, concludes: "That as the defendant was a tenant in possession under a written contract of purchase, and had erected these fixtures for the 'purpose of manufacturing,'" and severed them from the realty while in possession under the contract, that they thereby lost their character as fixtures, and again vested in the defendant as chattels."

Judgment was accordingly rendered for defendant, and the plaintiff appealed.

Wilson & Son for plaintiff.
Shipp & Bailey for defendant.

PEARSON, C. J. If Vallentine had made a conditional contract of purchase, as alleged in his answer, that is, if he had annexed a condition that if upon testing the mine the result was not satisfactory, he should have the right to abandon the contract, his right to remove the engine and appurtenances would have been beyond any question. But upon the facts he did not annex this condition, and made an unconditional contract of purchase, *i. e.*, he bound himself absolutely to pay the price, and was to have a deed when he made payment in full.

(191) So the relation of vendor and vendee was established, and the fact that his purpose in buying was to "mine for gold" does not affect the question in the slightest degree. He took the mine, as parties do in marriage, "for better or for worse"—no backing out about it.

Or, if he had taken a lease, say for five years, his right to remove the engine and appurtenances would have been beyond any question.

In both of these cases the nature of the estate proves that the erection of the fixtures was for a temporary purpose, and not for the purpose of making it a part of the freehold. In such cases the fixture may be severed, and does not in contemplation of law become a part of the land.

When a mortgagor who is allowed to retain possession, or a vendee under a bond for title who is let into posession, makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, and having made this *addition to the land,* he is not at liberty to subtract it on the ground that by his own default he is not able

to get the title. If such was the law, a mortgagor in possession or a vendee in possession who has erected a house, considering himself the absolute owner of the land, when he finds he cannot comply with the condition, may move the house, or may dig up the trees that he has planted, and let the mortgagee and vendor take care of themselves. Such is not the law.

When a tree is planted, or a house is built, or a steam engine is annexed to the soil, and is used as a part of the freehold, it becomes a part of the land and cannot be severed except in special cases. His Honor concurs in this doctrine seemingly, but he excepts the case of a vendee who is let into possession and builds a house or makes other fixtures on the idea that he is a tenant at will. It is true, he is like unto a tenant at will in one particular—he may be turned out of possession at the will of the vendor if he fails to make the payments; but he is not like unto a tenant at will in other particulars: he owes no fealty as tenant; (192) he is not liable for rent as for use and occupation; and, above all, he cannot quit *at his own will,* but is bound by his contract of purchase and the notes given for the purchase money.

Our question is, Does the one particular bring him within the exception made in favor of persons having a temporary estate, or do the three particulars exclude him from that class of persons? A bare statement answers the question. The vendee is the potential owner of the fee simple, and the addition made to the land was with the purpose to enhance its value, and that it should be permanent. Whereas, if a tenant for years or at will erects buildings, etc., it is not for the purpose of enhancing the value of the land, for he does not expect to become the owner, and his erections are for a temporary purpose and not with a view of making them a part of the land. Hence, for the encouragement of trade, manufacturing, etc., an exception is made in his favor, and he is permitted to remove what had apparently become a part of the land.

His Honor also erred in the effect which he allows to the agreement by which the engine and its appurtenances were severed and sold. This did not in any way affect the rights of the parties; otherwise, the plaintiff would not have consented to the severance, nor would his consent have been necessary. It is manifest that the sole purpose was to convert the engine and its appurentances into money, to prevent spoliation, and let the money stand in the stead of the engine, etc., as it was when annexed to the land, without affecting the rights of the parties in one way or another.

The effect given to this arrangement of the parties, made for the sole purpose of preserving the property, so as to make it impair the rights of the plaintiff and put the defendant in a better condition than he would have been in had the engine, etc., been allowed to remain *in statu quo,*

(193) or had the plaintiff refused to give his consent to the conversion into money, will strike any one as a sequence by which Vallentine gets benefit by a breach of good faith and by giving to the argeement an effect beyond what was in the contemplation of the parties.

I have cited no authority, because the principles are clear, and his Honor has *ex gratia* taken that labor upon himself.

Judgment that plaintiff have the fund and recover his costs of the defendant Valentine.

PER CURIAM. Judgment accordingly.

Cited: *R. R. v. Comrs.*, 84 N. C., 507; *R. R. v. Deal*, 90 N. C., 112; *Foote v. Gooch*, 96 N. C., 270; *Horne v. Smith*, 105 N. C., 326; *Overman v. Sasser*, 107 N. C., 435; *Woodworking Co. v. Southwick*, 119 N. C., 616; *Belvin v. Paper Co.*, 123 N. C., 143, 153; *Best v. Hardy, ib.*, 227; *S. v. Martin*, 141 N. C., 838.

JOHN C. BLAKE v. ISAIAH RESPASS, SR., AND J. T. RESPASS.

Lunatic, Action by Creditor Against—Supplemental Proceedings—Jurisdiction.

1. The statute (Bat. Rev., ch. 57) confers no power upon the courts of probate to provide for the payment of the debts of a lunatic contracted prior to the lunacy.
2. The Superior Courts have jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy.
3. In such case, where the judge in the court below dismissed proceedings supplementary to execution: *Held*, to be error.

Suggestions by BYNUM, J., as to the manner of ascertaining a sufficiency for the support of the lunatic and applying excess to the judgment.

MOTION to dismiss supplemental proceedings, heard at chambers in Washington, BEAUFORT County, on 16 May, 1877, before *Eure, J.*

(194) The plaintiff is the owner of a judgment for $1,500, obtained in 1870 against the defendant Isaiah Respass, who has since become a lunatic, and the other defendant, J. T. Respass, has been duly appointed his guardian. Executions were issued upon this judgment, upon one of which a small part of the judgment was made; but upon the last execution the return was made, "Nothing to be found in excess of homestead and personal property exemption."

Under the provisions of the C. C. P., sec. 264, supplementary proceedings were instituted against the said lunatic and his guardian, based upon the affidavit of the plaintiff alleging that the defendant Isaiah was the owner of a judgment against the county of Hyde for $1,000, or thereabouts, which said judgment the guardian was about to sell upon an order of the court of probate made upon his application. These supplementary proceedings were instituted in the Superior Court of Beaufort County, in which the judgment of the plaintiff was obtained, before *Judge Eure.*

Upon the hearing of the said affidavit of the plaintiff, the court ordered J. T. Respass, the guardian, and certain other persons who are charged with having property of the lunatic in their possession or under their control, to appear before a referee appointed for that purpose, to be examined and make discovery, on oath, touching the property of the said lunatic, and in the meantime restraining the sale of the Respass judgment.

Thereafter the defendants served upon the plaintiff notice of a motion to dismiss these supplementary proceedings, which motion was made before the judge on 16 May, 1877, and the proceedings were dismissed.

From that judgment plaintiff appealed.

D. M. Carter and Merrimon, Fuller & Ashe for plaintiff. (195)
James E. Shepherd for defendants.

BYNUM, J., after stating the facts as above: The ground of the motion is that supplementary proceedings do not lie against a lunatic in aid of an execution. That is the question before us.

The argument of the defendants is that original jurisdiction over lunatic and their estates is conferred by our law upon the courts of probate, and it was not competent, therefore, for the Superior Court to take jurisdiction. See Bat. Rev., ch. 57.

By the common law, as well as by statute 17 Edward II., ch. 10, which was only declaratory of the common law, the king as *parens patriæ* took charge of the effects of a lunatic and held them, *first,* for the maintenance of him and his family, and, *second,* for the benefit of his creditors, as the court of chancery might order from time to time. Shelford on Lunatics, pages 12, 356, 498; Bac. Abr., title, *Lunatics, c.*

Thus, in England, by the grant of the king, the court of chancery acquired exclusive, original, and final jurisdiction over the person and property of lunatics. Our courts of equity in this State succeed to these chancery powers, and still retain them, except in so far, and to the extent only, they have been given to other courts by statute. Prior to the Code of Civil Procedure, a part of this jurisdiction over lunatics was conferred upon the county courts (Rev. Code, ch. 57, secs. 1-5), and the

residue was still retained by the court of equity. Same chapter, section 5 *et seq.* By the C. C. P., and acts subsequent thereto, the former county court jurisdiction and a further part of the equity jurisdiction are conferred upon the court of probate established by the new Constitution of 1868, Bat. Rev., ch. 57. But the court of probate being a court of special and limited jurisdiction, all powers not specially conferred upon it are retained by the Superior Courts, which are courts of general jurisdiction. While very extensive powers over lunatics and their estates as to the sale of their personal effects for their support and for the
(196) payment of *debts necessarily incurred for their maintenance* (Bat. Rev., ch. 57 sec. 7) are vested in the court of probate, the power is nowhere conferred upon it to provide for the payment of debts incurred prior to the lunacy, nor is any jurisdiction given to entertain an action, original or supplementary, by such creditor. Yet it is too plain for question that the fact of lunacy of itself does not discharge the debts incurred prior therto, it makes no difference how contracted. The only effect that the lunacy of the party has upon his then existing debts is that his estate and no part of it can be applied to their discharge until a sufficiency for his present and future support, and that of his family, if minors, etc., shall be ascertained and set apart for that purpose and there is a residue left. *In re Latham,* 39 N. C., 231. There being no power vested in the court of probate to sell property for, or order the payment of debts contracted antecedent to the lunacy, or to entertain a suit at the instance of such creditor, the jurisdiction necessarily remains in the Superior Courts, where it was always lodged, on the equity side at least.

The present action was originally begun in this Court, which acquired jurisdiction; the judgment was obtained there, and it is fit and proper that the action should be prosecuted there, by these equitable proceedings, until the judgment is satisfied or the estate ascertained to be insolvent.

The allegation of the plaintiff in these supplementary proceedings is that the debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, and the prayer is that the judgment debtor shall appear at a specified time and place and answer the same. This is in conformity to C. C. P., secs. 264-274, and there seems no valid objection to granting the order. If upon such examination it turns out that the lunatic has no estate or effects, that will be an end of the matter.

But if he has property which cannot be reached by execution,
(197) the court will ascertain its character and value, and then proceed in one of two ways:

It may direct the guardian to apply to the court of probate to ascertain and set apart a sufficiency for the support of the lunatic, out of the

fund, and, in the meantime, stay further preceedings; or it may, perhaps, ascertain and set apart an adequate support for the lunatic, according to law, by a reference to its own clerk, who is also the judge of probate, and then apply the excess, if any, in satisfaction of the judgment.

Whether both, or which, of these two ways may be in conformity to law, we are not now called upon to decide. Neither course seems open to serious objection.

We are now to decide only the question whether these supplementary proceedings have been instituted in the court having jurisdiction. We hold that the Superior Court has the jurisdiction to hear and determine the case. See *McAden v. Hooker,* 74 N. C., 24.

PER CURIAM. Reserved.

Cited: Smith v. Pipkin, 79 N. C., 570; *Adams v. Thomas,* 81 N. C., 297; *s. c.,* 83 N. C., 524; *McIlhenny v. Trust Co.,* 108 N. C., 313.

(198)

JORDAN WOMBLE, ADMINISTRATOR, v. A. W. FRAPS.

Pleading—Frivolous Answer.

1. Where an answer is put in in good faith and is not clearly impertinent, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury.
2. Where in an action by an administrator against the defendant on a note upon which he was surety, he answered that the principal obligor had been discharged in bankruptcy and that his assignee had received a considerable sum as assets of his estate; and further, that since his bankruptcy the obligee (plaintiff's intestate) had become indebted to him, which indebtedness it had been considered should go to the satisfaction of said note, and asked for an account, etc: *Held,* that the court below erred in adjudging the answer frivolous and giving judgment for plaintiff.

APPEAL at Spring Term, 1877, of WAKE, from *Buxton, J.*

The plaintiff, as administrator (with the will annexed) of Henry Hesselbach, alleged that on 2 June, 1873, the defendant and one Phil Thiem executed a joint note to Hesselbach for $800, and that no part thereof had been paid except the interest up to 1 March, 1875, and demanded judgment for the amount due thereon. The defendant admitted the execution of the note on his part as surety to Thiem, but has received no benefit therefrom. He further alleged that Thiem filed his petition in bankruptcy in 1874, and that his effects, amounting to a considerable sum, went into the hands of his assignee for the benefit of his creditors, and he is not informed as to the sum received to be applied to said note; that since the bankruptcy of Thiem, the plaintiff's testator (Hesselbach)

became largely indebted to Thiem; that Hesselbach, before his death, considered that said sum should go to the satisfaction of the note sued on, and said that the note had as well be destroyed; that an ac-
(199) count might be taken to ascertain the amount due, if any, upon said note. When the case was called for trial the plaintiff moved for judgment on the pleadings upon the ground that the answer was frivolous. His Honor allowed the motion, and the defendant appealed.

A. M. Lewis for plaintiff.
Armistead Jones for defendant.

BYNUM, J. When the answer is put in in good faith, and is not clearly impertinent, the defendant is entitled to have the facts alleged in it either admitted by a demurrer or passed on by a jury. The courts do not encourage the practice of moving for judgment upon the answer as being frivolous. *Erwin v. Lowery,* 64 N. C., 321; *Swepson v. Harvey,* 66 N. C., 436.

The defendant here is placed at a disadvantage. He is a surety only, the principal being a bankrupt and the obligee being dead. He cannot, therefore, speak with precision or certainty in his defense. But he is entitled to all the defenses of his principal; and he alleges (1) that the assignee of his bankrupt principal received a considerable sum of money by the sale of his effects, which has been received and is applicable to this debt; and (2) that since the bankruptcy of Thiem, Hesselbach, the creditor, became indebted to Thiem, the principal debtor, in a large sum, which should go as a credit on the note, and that Hesselbach considered the note as discharged in this way, and so declared a short time before his death; and the defendant prays that an account may be taken as to these payments and credits, to which he is entitled, so that the true balance may be ascertained.

We do not think these defenses are manifestly frivolous, but that they do raise questions worthy of consideration; and, if true, they will entitle the defendant either to an account or a trial by jury as to these
(200) alleged credits or payments. These defenses are vaguely stated, but it does not seem intentional, but in good faith; and it is true that Thiem, having been discharged in bankruptcy from the payment of the Hesselbach debt, was not compellable in law to pay it; and Hesselbach, having since become indebted to Thiem, could not, without the consent of Thiem, credit his note with this indebtedness so as to discharge it; yet it might be a question whether the parties had not agreed between themselves that the note should be discharged. It is not probable that Hesselbach, holding this note on Thiem, would become indebted to him without some arrangement for discharging the new debt, by applying it in discharge of his own note on Thiem. Hence it probably was that Hes-

selbach considered his note as discharged, and said he had as well destroy it. The declarations of a creditor that his debt is discharged is *prima facie* evidence of payment. *Bank v. Wilson,* 12 N. C., 484. We think the answer is not clearly frivolous, but the plaintiff has the right to require it to be made more specific and certain in its allegations of defense.

Error.

PER CURIAM. Reversed and remanded.

Cited: Hull v. Carter, 83 N. C., 250; *Campbell v. Patton,* 113 N. C., 484; *Bank v. Duffy,* 156 N. C., 87, 88.

(201)

COWAN, McCLUNG & CO. v. W. R. BAIRD ET ALS.

Demurrer—Pleading—Surety and Principal.

1. A demurrer to a complaint upon the ground that the same fails to state affirmatively that the plaintiffs constitute a firm, and also fails to set out the names of the individuals composing the firm, is frivolous and entitles the plaintiffs to judgment.
2. If one sign a note as surety, in the presence of an agent of the obligee, with the *mutual* understanding that he is not to be thereby bound unless one W. shall also sign the same as surety, he is not liable thereon unless the note is so signed by W.

APPEAL at Spring Term, 1877, of BUNCOMBE, from *Furches, J.*

This was an action on a note executed to the plaintiffs by the defendants. The plaintiffs moved for judgment on the ground that neither the answer of Baird nor the demurrer of the other defendants raised any issue of law or fact material to the case. The court overruled the motion, and held that said answer and demurrer did raise an issue of fact and law, and were not frivolous. From which ruling the plaintiffs appealed.

J. H. Merrimon for plaintiffs.

Busbee & Busbee and W. H. Malone for defendants.

FAIRCLOTH, J. The complaint alleges that defendants made their promissory note payable to plaintiffs, and that no part thereof has been paid. The defendants admit these allegations.

All the defendants, except Baird, demur to the complaint on the ground that it does not state affirmatively that the plaintiffs constitue a firm, nor who compose the firm of Cowan, McClung & Co. On reading the complaint it is plain that the demurrer is frivolous, and the plaintiffs were entitled to judgment against these defendants. (202)

The defendant Baird filed an answer, and for his defense says: That he signed the note in the presence of plaintiff's agent, as surety, with the understanding on his (Baird's) part that he would not be bound unless one Weaver should also sign the note as surety, and that he signed it with the express understanding that Weaver would sign it; that the note was then handed to said agent, and that it was never signed by Weaver.

The plaintiffs say the agent did not accept the note with such understanding. This presents a question of fact to be determined by a jury, and we can express no opinion about it, except to say that if such understanding was mutual the defendant Baird is not liable, because the condition precedent has not been performed; but if it was not mutual, he is liable. The bond was signed and delivered, and the intention of one party, not participated in by the other, cannot avoid it.

Let judgment be entered here against all the defendants, except Baird, and the case be remanded for further proceedings.

PER CURIAM. Judgment accordingly.

Cited: Heath v. Morgan, 117 N. C., 507; *Morgan v. Harris,* 141 N. C., 360; *Bank v. Burch,* 145 N. C., 318; *Bank v. Jones,* 147 N. C., 421.

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(203)

JACKSON B. HARE v. JAMES W. GRANT, ADMINSTRATOR.

Surety and Principal—Action by Surety—Measure of Damages.

Where a surety is sued with his principal, or where he is sued alone and notifies his principal, the recovery against the surety is the measure of damages in an action by a surety against principal for money paid to his use, and the record of such recovery is conclusive against the principal in such action.

APPEAL at Spring Term, 1877, of NORTHAMPTON, from *Buxton, J.*

James Clark, the intestate of defendant, was the guardian of one James P. Harrell and the plaintiff was surety on his guardian bond. The plaintiff alleged that in an action brought on his bond by Harrell he was compelled to pay the amount demanded as due to the ward, as appeared by a return of said guardian made in 1851. At the trial term of said action a *nolle prosequi* was entered as to the administrator of the deceased guardian, and judgment rendered against this plaintiff. This action was brought to recover back the money paid by the surety for his principal, and when the case was called for trial the defendant's counsel moved for a continuance on the ground that the defendant was absent,

and that he, the counsel, was informed that defendant had in his possession vouchers showing payments made by said guardian to his ward after the guardian's last return, which was made on 23 May, 1859. The court refused the motion to continue, and the defendant excepted. The plaintiff introduced the transcript of certain court records, execution, etc., showing that he had paid the debt, and, under the instructions of his Honor, the jury rendered a verdict for plaintiff. Judgment. Appeal by defendant.

D. A. Barnes and W. N. H. Smith for plaintiff. (204)
R. B. Peebles and W. W. Peebles for defendant.

READE, J. Where a surety is sued with his principal, or where he is sued alone and notifies his principal, so as to enable him to defend, or to furnish the surety with a defense, the recovery against the surety is the measure of his damages against his principal. And in an action, as this is, to recover of his principal money paid to his use, the record of the recovery against the surety is conclusive evidence.

It would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him.

Of course, this principle would not apply where there was fraud or collusion between the surety and the creditor; and probably it would not apply where there had been *negligence* on the part of the surety in using the defenses within his power, or which were furnished him by the principal. In this case no fault attaches to the surety. *Lewis v. Fort,* 75 N. C., 251.

PER CURIAM. No error.

Cited: Leak v. Covington, 99 N. C., 563; *Pegram v. Tel. Co.,* 100 N. C., 37; *Moore v. Smith,* 116 N. C., 669.

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(205)

M. H. DIXON v. OCTAVIUS COKE, TRUSTEE, ET ALS.

Mortgage Construction of—Particular Expressions.

It is a settled rule of construction that an enumeration of particulars following a general expression controls it, and limits it to the particulars enumerated. Therefore, where S. executed a mortgage conveying "1,800 bushels of salt, his entire fishing material, with all the additions to be made to it," etc., "*consisting of* seine, rope, 3 bateaux, 11 capstans, 86 stands, and all the vats at Long Beach," and afterwards executed another mortgage conveying "all the fishing materials at Long Beach, consisting

of one seine, three boats, windlasses, fish stands, *barrels*, 1,600 bushels of salt and *kegs*, subject to prior liens," the 1,600 bushels of salt having been purchased since the first mortgage and kept separately from the salt mentioned therein: *Held*, (1) That the first mortgage was no lien upon the 1,600 bushels of salt conveyed in the second. (2) That the words "entire fishing material" in the first mortgage did not include the barrels and kegs. (3) That the words "subject to prior liens" in the second mortgage did not add to the scope of the previous grant and include in it anything not included by its own terms.

CONTROVERSY submitted without action under C. C. P., sec. 315, and heard at Spring Term, 1876, of CHOWAN, before *Eure, J.*

Facts agreed upon:

1. Charles W. Skinner being indebted to Whedbee & Dickinson, executed to the defendant Coke, for their benefit, a deed of trust, dated 26 June, 1875, conveying certain property, as follows: "1,800 bushels of Turk's Island salt, his entire fishing material, with all the additions to be made to it for use during the spring of 1876, consisting of seine, rope, 3 bateaux, 11 capstands, 86 stands, and all the vats, all of the said described material being at the fishery (of Skinner) on Albemarle Sound, known as Long Beach."

(206) 2. On 15 May, 1876, said Skinner being indebted to the plaintiff, conveyed to him in trust to secure the same "all the fishing material at Long Beach fishery, consisting of one seine, 3 boats, windlasses, fish stands, barrels, about 1,600 bushels of salt, and kegs, subject to the prior lien, terms and conditions of two trust deeds made respectively to John A. Moore and Octavius Coke."

3. On 15 August, 1876, Skinner, for like consideration, made a trust deed to W. D. Pruden, to secure indebtedness to C. W. Carson, in which he conveyed as follows: "All his barrels (about 500), all his kegs (about 275), also all the salt (about 800 bushels), bought by said Skinner during 1876, now at Long Beach fishery in said county."

4. That Skinner, during the year 1876, bought other salt and deposited it at Long Beach fishery, in the same house with that conveyed to Coke, and the line of demarcation between the two lots was plain and distinct.

Coke insisted that he was entitled under the deed to him to everything on hand, including the barrels, kegs, and the salt bought in 1876, to which Dixon and Pruden also set up a claim under their respective deeds. Thereupon his Honor adjudged that Dixon recover the barrels and kegs and the sale purchased subsequent to 26 June, 1875, and on hand on 15 May, 1876; and after satisfying his claim, the residue thereof, or the proceeds of sale of same, shall be paid to Pruden, trustee, for the benefit of Carson. From which judgment the defendant Coke appealed.

Gilliam & Pruden for plaintiff.
No counsel for defendant.

RODMAN, J. 1. The deed to Coke on 26 June, 1875, does not profess to convey any salt beyond what the grantor, Skinner, had at Long Beach at that date, which he says was 1,800 bushels. The plaintiff does not claim that. After this deed to Coke, the grantor bought about 1,600 bushels of salt, which he stored in the same warehouse with (207) what he had conveyed to Coke, but in such a way that the two lots were distinguishable. We have no occasion, therefore, to consider any questions which might have arisen if the two lots had been mingled indistinguishably. On 15 May, 1876, Skinner conveyed to plaintiff (among other things) 1,600 bushels of salt, all subject to the prior liens, etc., to Moore and Coke. On this salt Coke had no prior lien, and it passed to the plaintiff. The plaintiff was clearly entitled to recover all the salt of Skinner at Long Beach, bought and carried there after 26 June, 1875, and being there on 15 May, 1876.

2. As to the fishing materials, not including the salt, Skinner, by his deed to Coke of 26 June, 1875, conveys "his entire fishing material, with all the additions to be made *to it* for use during the Spring of 1876, *consisting of* seine, rope, 3 bateaux, 11 capstans, 86 stands, and all the vats, all the said described materials being at Long Beach."

By the deed of 15 May, 1876, above mentioned, Skinner conveyed to the plaintiff "all the fishing material at Long Beach fishery, consisting of one seine, three boats, windlasses, fish stands, *barrels,* about 1,600 bushels of salt, and *kegs,* subject to the prior liens," etc. The plaintiff claims all the barrels and kegs which were at Long Beach at the date of the deed to him. As to the other matters conveyed, excepting the salt, which has been before considered, the plaintiff makes no claim. The defendant contends that, under the general description, "entire fishing material," the barrels and kegs at Long Beach at the date of the deed to him (June, 1875) were included and were conveyed to him. The term would certainly include the barrels and kegs, if the grantor had not defined and limited it by saying "consisting of" things in which they are not enumerated. It is a settled rule of construction that an enumeration of particulars following a general expression controls it, and limits it to the particulars enumerated. *Expressio unius ex-* (208) *clusio alterius.*

The phrase "consisting of" particulars, from which the barrels and kegs are omitted, leaves the meaning too clear for doubt.

3. The addition in deed to plaintiff of the words "subject to the prior lien," etc., does not add to the scope of the previous grant to the defendant, or include in it anything not included by its own terms.

Certain of the articles conveyed to the plaintiff had been previously conveyed to defendant, and the words "subject to prior liens," etc., must be understood to refer only to the articles which had been before conveyed, to which the expression is adapted, and not to those which had not been before conveyed, to which it is not applicable.

4. The construction which we put on the grant to Coke makes it unnecessary to consider what might be the effect of a grant of property not then owned by the grantor, but which he contemplated buying, and did afterwards buy. The words in the grant to Coke, "with all additions to be made to it," etc., are evidently confined to the fishing material as defined by the grantor. They did not relate to the salt, nor to any articles which were not fishing material as defined by the grantor. There was an additional quantity of salt bought, and also of barrels and kegs, but it does not appear that there was any addition to the articles which the grantor enumerates as fishing materials. If there had been, the question would have been presented as to that.

No question is presented between the plaintiff and Pruden.

PER CURIAM. Affirmed.

Cited: Latta v. Williams, 87 N. C., 129.

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(209)

E. R. STAMPS, RECEIVER, v. THE COMMERCIAL FIRE INSURANCE COMPANY.

Contract of Fire Insurance—Election to Rebuild—Judgment. Creditor—Mortgage.

1. A provision in a policy of fire insurance by which in case of loss it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured. Neither a judgment creditor nor a mortgagee can interpose to prevent its performance.
2. Where the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead.

CONTROVERSY submitted without action under C. C. P., sec. 315, and heard on 3 July, 1877, before *Cox, J.*

On 16 September, 1876, Simon G. Hayes insured his cotton gin, etc., upon his land in Wake County, in the Commercial Fire Insurance Company for $2,300, and in the Albemarle Fire Insurance Company for $1,150. He had previously mortgaged the property by executing two

deeds—one in February and the other in August, 1875—to secure the payment of debts. The Raleigh National Bank, a creditor of Hayes, obtained a judgment against him in June, 1876, and before the policies of insurance were obtained. Upon this judgment an execution issued and was returned unsatisfied, and under supplemental proceedings the plaintiff was appointed receiver of Hayes. On 9 March, 1876, a homestead in the equity of redemption in the land conveyed by said deed was assigned to Hayes, the mortgagor. During the continuance of said policies the property insured was destroyed by fire. One of the provisions of said policies is: "It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with (210) other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs of loss; and in case the company shall elect to rebuild, the assured shall, if required, furnish plans and specifications of the building destroyed." The companies gave no notice of an intention to rebuild, in consequence of their apprehension of being involved in a lawsuit between the parties having an interest in the property. They, however, at the request of Hayes, who waived said notice, said they would rebuild, to which the plaintiff objected, and demanded payment of the insurance money to himself as receiver. The companies admitted their liability to the party who shall be declared entitled to receive the insurance money. His Honor held that the companies had a right to elect whether they would rebuild the property destroyed, and if they should choose not to do so, Hayes had a right to receive the money and use it in rebuilding. From this ruling the plaintiff appealed.

Merrimon, Fuller & Ashe for plaintiff.
D. G. Fowle and George H. Snow for defendants.

BYNUM, J. As the case is stated, some of the property insured and destroyed was not embraced in the mortgages; but we are called upon to determine only the rights of the parties in respect to that which was included in the mortgages. Their rights depend altogether upon the proper construction of the contract of insurance. The mortgagee was not a party or privy to this contract of insurance by the mortgagor, and as a matter of right can claim no benefit under it. It was for the exclusive benefit of the insured, the mortgagor. *Carpenter v. Ins. Co.,* 16 Pet., 495; *Callahan v. Linthicum,* 43 Md., 97. If the mortgagee can derive any benefit from the policy, it will be incidental merely, as will be hereafter shown, and not because he has any right to a (211) benefit which he can enforce in a court of justice. He may, therefore, be put out of the case, and we are confined then to the contest between the judgment creditor and the debtor.

Before the plaintiff had obtained his judgment the defendant Hayes had executed two mortgages upon the same property, to secure the payment of two debts, aggregating $3,000. He had also his homestead assigned to him in the equity of redemption in the property mortgaged. As the property was valued by the appraisers at $1,500 only, it is evident that the homestead assigned in it was of no appreciable value. In this condition of things the mortgagor insured the property against loss by fire.

By the contract of insurance, and as a constituent part of it, it is provided that "It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time," etc. It is thus seen that by the express terms of the policy the insurer can replace the loss by repairs or other property of like quality. This contract is exclusively between the parties to it, and neither the creditor nor mortgagee can interpose and prevent its performance, as they now seek to do in this action. If the insurer has not notified the insured of his intention to repair within the time specified in the policy, no one but the insured can take advantage of that breach and require the payment of the insurance money instead of the repairment of the property damaged. The insured does elect to waive this notice of intention, and the insurer, as we understand the case, is willing and elects to make the repairs and replace the property destroyed. When this shall have been done, the mortgagor, mortgagee, and judgment creditor will be just where they were before the fire, in respect of the property, and their rights and their remedies against it. No one (212) is in a worse condition, and no one has a just cause of complaint.

The contract of insurance is a contract of indemnity; its purpose is not speculative, but the preservation of the property or its value, and this inures to the mutual benefit of all: of the judgment creditor, because it secures unimpaired the estate or fund to which only he can look for his debt; of the mortgagee, because it preserves from loss his security; and of the mortgagor, because the indemnity reinstates him and gives the debtor a hope and chance of redeeming his property, securing his homestead, and discharging his debts. The plaintiff admits that all the property of his debtor is covered by mortgages and the homestead, and is insufficient to pay his debt or any part of it. Why, then, should he be placed in a better condition by the misfortune of the debtor resulting from the destruction of his property by fire? The insurance money is only a compensation for loss which would fall upon the mortgagor otherwise, and is not an additional estate or increase of assets exempt from prior liens and impressed with new liabilities. As the contract of insurance is one of indemnity only, when the insurer has replaced the property destroyed it will stand in the same plight and con-

dition as it did before the fire, and subject to the same liens. If the property mortgaged had been of greater value than the debts secured thereby, and the homestead assigned therein, it was both competent and proper for the plaintiff creditor to compel a foreclosure and sale by the proper action, and thus secure the excess over the homestead and mortgage debt to be applied in discharge of his debt. *Gaster v. Hardie,* 75 N. C., 460. As the insurer has elected to rebuild and replace the property secured in the mortgage, which was destroyed, the question is not presented as to the rights of the several parties to this action in case the insurer had not elected to rebuild, and the insurance money itself had been paid and was in controversy. That question is not devoid of difficulty in its solution, and we do not enter into it. The (213) insurance companies will pay into office the sum due on the contract of insurance, and the clerk of the court is appointed commissioner to see to its application in payment for rebuilding, etc., according to the terms of the policies of insurance.

The cause is retained for further directions, subject to this modification. The judgment of the Superior Court is affirmed at the cost of the plaintiff.

PER CURIAM. Affirmed.

Cited: Fertilizer Co. v. Reams, 105 N. C., 295.

RICHARD W. YORK v. WILLIAM H. MERRITT.

Contract Voidable for Illegality—Practice.

1. Where both parties to an action have united in a transaction to defraud another, or others, or the public, or the due administration of justice, or which is against public policy or *contra bonos mores*, the courts will not enforce the contract against either party.
2. In an action for the recovery of land it appeared from the testimony of defendant that the deed to the plaintiff, absolute on its face, was executed by defendant on the eve of his going into bankruptcy, to secure plaintiff's fee as attorney, and that plaintiff agreed to recovery to him upon payment thereof: *Held*, that the court below erred (there being no express issue submitted to the jury involving the fraud) in adjudging that upon payment of the amount due from defendant, the plaintiff to reconvey to him.

ACTION to recover possession of land, tried at Spring Term, 1877, of CHATHAM, before *Cox, J.*

The facts are sufficiently stated by *Mr. Justice Reade* in delivering the opinion of this Court. Verdict and judgment for the defendant. Appeal by plaintiff.

(214) *J. H. Headen and J. B. Batchelor for plaintiff.*
John Manning and John M. Moring for defendant.

READE, J. The plaintiff sues for a tract of land, and shows a deed from the defendant to him therefor. The defendant answers that although the deed is absolute on its face, yet in fact it was made under the supposition that it was only a security to the plaintiff for $100, and that upon the payment of that sum the plaintiff would reconvey; and he says he has paid $47 and tendered the balance; and upon payment of the balance, he prays that the plaintiff may be compelled to reconvey.

The findings of the jury sustain the allegations of the defendant, and his Honor gives judgment for the plaintiff for $53 and interest, and upon payment thereof to him directs that he shall reconvey the title to the defendant.

Upon the supposition that the facts are as found, and nothing more appearing, the judgment would seem to do justice to all parties; and it may be that the parties will yet find their interest in settling upon that basis. But the plaintiff appeals, and objects that the judgment is not according to law, and that he is entitled to a new trial. The findings of the jury seem to have been based upon the evidence of the defendant himself. He states that, being very much embarrassed, he consulted the plaintiff as an attorney at law; and the plaintiff advised him to go into bankruptcy, and offered to procure his discharge for $100, and advised him that he could convey the land to him to secure the sum, and that he executed the deed "upon the express agreement with the plaintiff that upon the payment of said sum of $100 he (the plaintiff) would reconvey the said land to the defendant." And he states that the land was
(215) worth $750; that the deed was executed on 25 December, and on the next day he filed his petition and schedules in bankruptcy, the plaintiff preparing all the papers without disclosing the transaction. So that it appears that the plaintiff was to cover up the land for the defendant until he got his discharge in bankruptcy and then reconvey it to him.

This testimony discloses a transaction *contra bonos mores,* in which both parties participated. But then it was not alleged in the complaint, nor in the answer, nor was there any issue submitted to the jury which, in express terms, involved it. It may, therefore, do the plaintiff injustice to assume its truth as to him; but we may assume its truth as to the turpitude of the defendant, because it is his own testimony; and, being

true as to him, it shows that he is not entitled to the judgment which he obtained, and therefore there must be a new trial. *Ex turpi causa non oritur actio.*

The alleged turpitude of the transaction, although so plainly stated in the testimony, seems to have been allowed no effect whatever in the trial. If this was because such things are so common that honesty is benumbed, it ought to be the oftener declared that the courts will not aid one party to enforce a fraud against the other; and that where both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores,* the courts will not enforce the agreement in favor of either party. *King v. Winants,* 71 N. C., 469, and cases there cited. We say nothing as to the validity of executed contracts where the aid of the court is not sought.

We forbear to say more upon the case presented, lest we might do injustice to the parties. A new trial, if the parties will venture upon it, will develop the facts on both sides.

PER CURIAM. *Venire de novo.*

Cited: York v. Meritt, 80 N. C., 285; *Sparks v. Sparks,* 94 N. C., 532; *Pitman v. Pitman,* 107 N. C., 162; *Basket v. Moss,* 115 N. C., 462; *Bank v. Adrian,* 116 N. C., 540, 543; *Taylor v. McMillan,* 123 N. C., 393; *LeRoy v. Jacobosky,* 136 N. C., 457; *Edwards v. Goldsboro,* 141 N. C., 72; *Smathers v. Ins. Co.,* 151 N. C., 105; *Pearce v. Cobb,* 161 N. C., 302.

(216)

STEPHEN HENLEY v. J. C. WILSON ET ALS.

Deed—Mistake—Action of Trespass—Adverse Possession—Evidence—Pleading.

1. Where A. made a deed to B., conveying a life estate, but intending it to be a deed in fee simple: *Held,* that the plaintiff claiming under B. (after B.'s death) cannot maintain an action for a trespass on the land, as equitable owner in possession, under C. C. P., sec. 55.
2. In such case the plaintiff has only a right in equity to have A. converted into a trustee and decreed to execute a deed in fee.
3. The case is not varied by the fact that, pending the action, A. executed a deed to plaintiff in fee; such deed takes effect only from its delivery, and A. has not the power, nor has a court of equity the power, to make such deed relate back to the time of the execution of the original deed to B.

4. Where one having a life estate in land executes a deed in fee for the same, the adverse possession of the grantee under such deed begins from the death of the life tenant.

5. A plaintiff claiming title under an adverse possession for seven years under color of title cannot recover in an action for damages for trespass on the land, where the complaint fails to set out precise dates.

6. Where a complaint is general in its allegations, loose in its statements, and omits to give precise dates, no intendment can be made in favor of the pleader.

7. Where A. made a deed to B. in 1867 (but dated it 1848), in lieu of a deed made to B. in 1848, which had been burned: *Held*, in an action against B. for trespass, that the testimony of A. as to the dates and the boundaries set out in the burnt deed was competent.

8. The remedy under the "Mildam" Act (Bat. Rev., ch. 72, secs. 13 *et seq.)* does not apply to an action for damages for a trespass committed on the plaintiff's land.

ACTION for damages, tried at Spring Term, 1877, of CHATHAM, before *Cox, J.*

The plaintiff was the owner of valuable mills on the west bank of Haw River, erected for a gristmill and wool-carding machine, etc. The defendants were the owners of a sawmill situated on the east bank
(217) of the river, above the plaintiff's mills, which were run by water power, the water being conducted by a race formed by two dams. The defendants increased the height of the dams and cut a race across plaintiff's line, thereby interfering with the water power of plaintiff, and for the trespass and the damage resulting therefrom this action was brought.

The plaintiff's title to the land upon which his mills were situated and the trespasses were alleged to have been committed was denied by the defendants. Both parties claimed under one H. J. Stone, who conveyed the land on 9 November, 1848, to one McClennahan for life. The plaintiff then offered in evidence mesne conveyances from McClennahan to himself, which were admitted to be regular; one of these conveyances being a fee-simple deed from McClennahan to Mary Taylor, dated 24 May, 1852; and it was proved that McClennahan died in 1859. After the commencement of this action, and in furtherance of an understanding between Stone and McClennahan to cure a mistake in the first deed, Stone executed a deed to the plaintiff, conveying said land in fee and reciting in the deed that he intended to convey a like quantity of interest to McClennahan in the first instance. The plaintiff and those under whom he claimed were in possesion of the land from 9 November, 1848, to the present time, claiming to be fee-simple owners thereof. Stone executed a deed for land adjoining the plaintiff's tract to one Temple,

which deed was burnt in Temple's house; and thereupon, at the request of Temple, and before he (Stone) went into bankruptcy in 1867, he executed another deed in lieu of the one burnt, and dated it 25 August, 1848. It was alleged that this was not the date of the original deed, nor was the land described by the same boundaries. Stone testified, among other things, this deed was made without reference to the McClennahan deed, and was intended to convey the same land that was embraced in the original deed to Temple, which deed did not call for the (218) river, but for McClennahan's line. But the deed of 1867, which was offered in evidence, called for the river. Temple conveyed to the defendants in 1876, and he testified that the deed of 1867 was the same as that of 1848 in regard to boundaries and date.

The defendants objected to the testimony of Stone, and also to the evidence in regard to the damages sustained, upon the ground that damages, by reason of the erection of the defendants' sawmill, could only be recovered in a special proceeding, and should be assessed by commissioners. The objections were overruled, and under the instructions of his Honor the jury rendered a verdict in favor of the plaintiff. Judgment. Appeal by defendants.

John Manning and J. B. Batchelor for plaintiff.
John M. Moring for defendants.

PEARSON, C. J. The pleadings show a degree of caution and secretiveness by resorting to general expressions and the ommission of dates that is not to be commended. We are aware that many gentlemen of the profession adopt this mode of pleading, relying upon the very full power of allowing amendments under C. C. P. We enter our protest against it as calculated to defeat the object of pleading, which is to give notice of what is expected will be proved at the trial, so as to prevent surprise. This vicious practice would be corrected if the judges of the Superior Courts, in the exercise of their discretion, would refuse to allow the pleadings to be amended after verdict, so as to make the allegations conform to the facts proved, whenever there is reason to suppose that the vicious mode of pleading was adopted on purpose to embarrass the opposite party. In such cases the court should refuse to give judgment, and let the party have the benefit of the verdict and bring (219) another action.

There is no allegation in the complaint of any mistake in the deed of Stone to McClennahan, by which a life estate is conveyed instead of the fee simple; and unless the plaintiff has made out a case on the legal title, he will be obliged to pay the costs in this Court and have the case re-

manded, to the end that the pleadings may be amended, if the judge should deem it to be a proper case in which to allow an amendment after verdict.

The plaintiff's counsel, on the argument, took the ground that he could maintain the action as equitable owner in possession under the provissions of C. C. P., sec. 55. That provision does not apply; for the plaintiff has no *equitable estate* as a purchaser in possession, or other *cestui que trust,* but has only a *right* in *equity* to have Stone converted into a trustee and decreed to execute a deed in fee simple; and the fact that Stone, pending the action, executed the very deed that he would have been required to execute does not vary the case; for the deed took effect only from the time of its delivery, and Stone had no power to make it relate back to the time of the execution of the deed to McClennahan. Indeed, the court of equity has no such power, and could only have required Stone to do what he has done, namely, execute a deed in conformity to the intention of the parties, and then have "enforced the right in equity" by a perpetual injunction that Stone and those claiming under him should not disturb the title under the deed to McClennahan, on the principle that "equity considers that to be done which ought to have been done."

As to the plaintiff's right to recover upon the legal title, we have seen that the deed of Stone executed pending the action does not relate back to the execution of his deed to McClennahan. But the counsel of the plaintiff insists that he had acquired the legal title by seven years adverse possession under color of title. The question is, When did
(220) the adverse possession begin? Not at the date of the deed of McClannahan to Mrs. Taylor in 1852, for although the conveyance to her was in fee, she was not exposed to an action during the life of McClennahan, for she had the true title during his lifetime and was not liable to an action by Stone or those claiming under him until the death of McClennahan, which, as stated in the case, was in 1859. It is not set out at what time in 1859; so plaintiff's counsel takes a starting point—1 January, 1860, to 20 May, 1861, when the statute of limitations was stopped—one year, four months and twenty days; from 1 January, 1870, to 22 July, 1876, when the action was brought—six years, six months and twenty-two days; total, seven years eleven months and twelve days.

This calculation which the plaintiff's counsel makes in his brief would do very well, provided the defendant had not entered into possession under the deed of Stone to him, executed in 1867. But the defendant had entered and taken possession some time before the commencement of the action. How long before is not set out in the case. It may have been more than one year, eleven months and twelve days. If so,

that interrupted the running of the statute of limitations. Here the plaintiff fails because of the generality of his allegations and the omission to give precise dates; and in such loose statements no intendment can be made in favor of the pleader.

The complaint (paragraph 6) sets out "that defendants, against the will of plaintiff, entered and added 3 feet to the height of plaintiff's upper dam." etc. No date is given.

And in paragraph 8, "In addition to the injury caused by the increased height of the dam, defendants entered upon said land and cut a race," etc. No date is given.

In the absence of any allegation or proof to the contrary, we must assume that these trespassess were committed before the plaintiff's title had ripened by seven years adverse possession; and the only question is, Were these acts mere temporary trespasses, or were they (221) of a continuing nature, so as to permanently interrupt the plainaiff's adverse uossession? As to that, there can be no doubt; for the defendants continued to use the dam so increased in height, and the race so cut, for purposes of their own up to the bringing of this action.

As the case goes back, we think it proper to declare our opinion to be that the reception of the testimony of Stone as to the fact that the deed to Temple was executed in 1867, and not in *August,* 1848 (as it was dated falsely to overreach the deed to McClennahan in November, 1848, which fact could have been proved by the subscribing witnesses), was admissible. His testimony that the boundaries in the deed made by him to Temple in 1867 differed from the boundaries in the deed alleged to have been burnt—executed after the deed to McClennahan—was also competent for the purpose of having the deed obtained in 1867 reformed. But there is no allegation in the complaint to set up this equity, and, indeed, the evidence was immaterial. We also declare our opinion to be that the trespasses complained of being done on the plaintiff's land, as he alleges, do not come under the operation of the milldam act, which applies only to "trespass on the case" for acts done on the defendant's own land to the injury of the plaintiff, by ponding backwater, or other like injuries.

PER CURIAM. *Venire de novo.*

Cited: Gudger v. White, 141 N. C., 518; *Cedar Works v. Lumber Co.,* 168 N. C., 396.

(222)

O. B. D. EDWARDS AND WIFE v. JOHN TIPTON ET ALS.

Sheriff's Deed—Return to Execution—Evidence.

1. A deed made by a succeeding sheriff (or coroner) operates by virtue of the statute (Bat. Rev., ch. 35, sec. 27) to pass the title to what was sold, but it is not evidence to show what that was. Its recitals are only hearsay.

2. The return of a sheriff upon a writ is *prima facie* evidence of what it states and cannot be collaterally impeached. Therefore, where a judge in the court below refused to admit the return to an execution made by a sheriff, for the purpose of contradicting the deed of a succeeding sheriff: *Held*, to be error.

3. Parol evidence is admissible to explain a latent ambiguity in the description of land contained in a deed.

ACTION for the possession of land, tried at Spring Term, 1877, of MITCHELL, before *Furches, J.*

The plaintiffs, for the purpose of establishing their title, introduced a deed from one Brown to William Edwards, dated 15 August, 1833, and a deed from said Edwards to Lavinia Edwards, the *feme* plaintiff dated 24 January, 1861, and then offered other testimony tending to show adverse possession for more than twenty-one years.

The defendants claimed as heirs at law of one Hughes, who had bought the land in controversy of one Flemming, now deceased. Hughes took a bond for title and paid the purchase money. The bond was lost, and no deed was ever made by Flemming before his death, or by his heirs at law or personal representative. Hughes entered in 1856, and he and those claiming under him have continued in possession ever since. They then offered in evidence a deed from the coroner of the county to
(223) the heirs of said Flemming. This was objected to by the plaintiffs because it was executed by a coroner who was the successor of the coroner who made the sale, and because the defendants had not produced any execution authorizing the sale. The defendants then showed that the coroner sold the land of said William Edwards to satisfy an execution in favor of the sheriff of the county, and that Flemming became the purchaser. The records and papers were destroyed during the war, and could not be found. His Honor overruled the objection and admitted the deed in evidence. The defendants then offered evidence tending to show that said deed covered the land in dispute and their continued possession thereof since the purchase from Flemming.

The plaintiffs, in reply, offered in evidence (the defendants objecting) a copy of the levy of the coroner under which the sale was made to Flem-

ming in 1841, and showed that William Edwards, at that time, lived on the "Bowman tract" of land, and had not at any time before that lived on the *locus in quo*. They insisted that the levy was made on the land "on which William Edwards now lives, adjoining the lands of Hughes and others," and did not cover the land in dispute, because it was not the land on which said Edwards then lived. They further insisted that if the coroner's deed to the Flemming heirs did not cover the *locus in quo*, and the levy did not, the deed would be void as to that part not covered by the levy as a matter of law, and asked the court so to charge the jury. His Honor refused to give the instructions asked. Verdict for defendants. Judgment. Appeal by plaintiffs.

Busbee & Busbee and W. H. Malone for plaintiffs.
A. C. Avery for defendants.

RODMAN, J. The Revised Code, ch. 37, sec. 30 (Bat. Rev., ch. 35, sec. 27), enacts that when any sheriff or coroner sells land and goes out of office, or dies, etc., before making a conveyance therefor, his successor in office shall execute the conveyance, and such convey- (224) ance shall be as valid as if made by the officer who made the sale.

Of course, the successor can make a deed for only what his predecessor sold, and not for anything he did not sell. He can never have an official and seldom a personal knowledge of what it was that his predecessor did sell, and he must necessarily obtain his information on that point from the statements of others. But his opinion derived from such statements cannot be conclusive, either upon parties or strangers to the execution. If a sheriff should refuse to execute a deed tendered to him by one who alleges that he purchased a certain piece of land at a sale made by a former sheriff, the purchaser may apply to the court under whose process the sale took place and, in a proper case, obtain a mandamus or rule on the sheriff to execute the deed. In this case the court would necessarily receive evidence to sustain the facts allegd. *Isler v. Andrews,* 66 N. C., 552.

If the sheriff should voluntarily execute the deed tendered, it must be in like manner competent for a court, on the trial of an action putting the title to the land conveyed in the deed in issue, to hear evidence as to what was actually sold.

In *Harris v. Irwin,* 29 N. C., 432, evidence was admitted to show that the alleged purchaser had not paid the purchase money to the sheriff who sold, and the deed of the succeeding sheriff was held void.

In *Jackson v. Jackson,* 35 N. C., 159, evidence was received to show what land the sheriff had actually sold, and his return of levy was admitted to contradict the description in his deed.

The succeeding sheriff executes a deed under a power given to him by the statute, and his power is limited by certain conditions. If these do not exist, his power does not, and his deed is void as to the excess.

(225) The judge was of opinion that the deed of the coroner, under which the defendants claimed, could not be contradicted (as to what was sold by the old coroner) by his return to the execution, and told the jury that if the deed covered the land in dispute, they must find for the defendants.

In this we think the judge erred. We are not aware of any case in which the recitals of a sheriff's *deed* have been held even *prima facie* evidence of the judgment, execution, levy, and sale, or other facts recited, except under exceptional circumstances. In *Owen v. Barksdale,* 30 N. C., 81, it is said that they are not, unless the deed is ancient, and possession has been held under it. The *return* of a sheriff is, as will be seen, evidence of the facts stated in it. But whether the deed of a sheriff who makes a sale is evidence as to what he sold or not, it seems clear, on reason and principle, that the deed which a sheriff makes upon a sale made by his predecessor—in this case, fifteen years before—is not. *McPherson v. Hussey,* 17 N. C., 323. It is operative by virtue of the statute to pass the title to what was sold, but it is not evidence what that was. Its recitals are only hearsay. The sheriff does not profess to have any personal knowledge of their truth. He is not under oath himself, and he professes to state only his opinion from information whose sources are unknown to us, and which could not have been under oath. It differs from the return of a sheriff upon a writ, because it is upon the personal knowledge of the officer; is in the performance of a duty which he has sworn to perform faithfully; and if the return be false, he is liable to a penalty. For these reasons, a return is *prima facie* evidence of what it states, and cannot be collaterally impeached, although it may be corrected so as to speak the truth, on application to the court in

(226) which it is. The return of the sheriff who sold—if he made one—is evidence, and probably in a collateral proceeding the only evidence, of what he sold. Wharton Ev., secs. 833-986; *McPherson v. Hussey,* 17 N. C., 323. But that question does not arise here, and we leave it undecided. In this, we think, consisted the error of the judge: He held that the description in the deed controlled that in the return, in determining what was sold; whereas the description in the return should have guided the coroner in making his deed. There was, however, in the return a latent ambiguity. It described the land levied on and sold as "200 acres, more or less, *on which William Edwards now lives,*" etc. To explain this ambiguity the plaintiffs were allowed to prove that "William Edwards never himself" lived on the piece of land in dispute; but the judge, by his instructions, deprived them of any benefit from this testi-

mony. It was admissible to apply the description to the thing sold. There are many authorities to this effect. For this purpose it was admissible to prove the number of acres in each piece; whether the two pieces had been bought and held by Edwards as one tract or as two; whether he listed them for taxation as one or as several; whether he abandoned possession of the piece immediately after the sale, and the purchaser entered, etc. *Jackson v. Jackson,* 35 N. C., 159; *Judge v. Houston,* 34 N. C., 108; *Bradshaw v. Ellis,* 22 N. C., 20; *Rogers v. Brickhouse,* 58 N. C., 301.

PER CURIAM. *Venire de novo.*

Cited: Rollins v. Henry, 78 N. C., 348; *Walters v. Moore,* 90 N. C., 47; *Curlee v. Smith,* 91 N. C., 178.

(227)

F. M. PHILLIPS v. R. F. JOHNSTON.

Purchaser at Sheriff's Sale—Junior Judgment—Evidence—Bankruptcy.

1. Under the law as it was before the adoption of The Code, a purchaser under a junior judgment and levy acquired a good title as against a subsequent purchaser under a senior judgment and levy.
2. In an action by the former against the latter for the recovery of the land, evidence that the land had been sold to a third person before the judgment under which plaintiff purchased was obtained is inadmissible.
3. The title of plaintiff is not affected by the fact that the judgment debtor went into bankruptcy before the sheriff's sale.

ACTION for the possession of land, tried at Spring Term, 1877, of DAVIE, before *Kerr, J.*

The case is sufficiently stated by *Mr. Justice Faircloth* in delivering the opinion of this Court. Upon the issues submitted, and under the instructions of his Honor in the court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by defendant.

J. M. Clement, W. H. Bailey, A. W. Haywood, and J. M. McCorkle for plaintiff.

Watson & Glenn for defendant.

FAIRCLOTH, J. The plaintiff sues for the possession of land purchased by him at sheriff's sale, on 6 February, 1869, under an execution levied 2 January, 1868, and issued under a judgment rendered against the defendant in December, 1867.

The defendant is in possession and claims title to the land under another sheriff's sale made subsequent to the foregoing sale under judgment and levy prior to those under which the plaintiff purchased,
(228) at which second sale one Clement bid off the land and assigned his bid to the defendant.

This case is governed by the law as it was before the adoption of the Code of Civil Procedure, being a sale under a levy made 2 January, 1868; and the main question is, whether a purchaser under a junior judgment and levy acquires a good title as against a subsequent purchaser under a senior judgment and levy. This has too long been settled to need any discussion now. It was held affirmatively in *Bell v. Hill,* 2 N. C., 72, and in *Jones v. Judkins,* 20 N. C., 591, and uniformly so ever since.

The defendant then endeavored to prevent a recovery by showing that he had conveyed title to one Foard by deed of bargain and sale before the plaintiff had his judgment. His Honor was right in refusing to hear such evidence, as the well settled rule is, that "a purchaser at a sheriff's sale *as against the defendant in the execution who withholds the possession* is entitled to recover *as of course,* and the debtor cannot justify his act of refusing to give up the possession on the ground of title in a third person." *Wade v. Saunders,* 70 N. C., 277. It is not his privilege to insist on the rights of a third party, if he should have any, not even if such party was a codefendant, as was decided and illustrated in *Isler v. Foy,* 66 N. C., 547.

The plaintiff's title is not affected by the fact that his judgment debtor filed his petition in the bankrupt court before the sheriff's sale and was finally discharged.

The plaintiff's lien was of a prior date, and was not divested by the circumstances, and under our decisions he had the right to complete his remedies and reduce the fruits of his purchase into possession in the State courts. It has been decided in the Supreme Court of the United States, also, that the jurisdiction of the Federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest
(229) that of the State courts in matters of which the latter has full cognizance. *Eyster v. Gaff,* 91 U. S., 521.

PER CURIAM. No error.

Cited: Mulholland v. York, 82 N. C., 513.

JAMES J. LEWIS, ADMINISTRATOR, v. THE CITY OF RALEIGH.

Public Prisons—Treatment of Prisoners—Towns and Cities—Action for Damages.

1. Under the provisions of the Constitution, Art. XI, sec. 6, and Bat. Rev., ch. 89, secs. 9, 10, the least that is required is that persons confined in any public prison shall have a clean place, comfortable bedding, wholesome food and drink, and necessary attendance.
2. Where A. was arrested at night by a policeman for violating an ordinance of the city of Raleigh and confined in the city guardhouse, in which he died before morning, and in an action for damages instituted by his administrator against the city, the jury found that his death was "accelerated by the noxious air of the guardhouse": *Held*, that the plaintiff is entitled to recover.

ACTION for damages, tried at Spring Term, 1877, of WAKE, before *Buxton, J.*

The plaintiff's intestate, John Godwin, was arrested by one of the policemen in the service of the defendant in June, 1875, for an alleged violation of a city ordinance, and confined in the city guardhouse, where he died. It was alleged that his death was caused by the unwholesome condition of the prison, occasioned by neglect of the city authorities. Upon the issues submitted, the jury found the following facts: (230)

1. John Godwin was arrested with probable cause by authority of the defendant, and imprisoned in the guardhouse.

2. The death of John Godwin was accelerated by the noxious atmosphere of said guardhouse.

3. Damages, $2,000.

Upon this verdict, the court gave judgment for the plaintiff, and the defendant appealed.

T. M. Argo and A. M. Lewis for plaintiff.
Busbee & Busbee and D. G. Fowle for defendant.

READE, J. "It shall be required by competent legislation that the structure and superintendence of penal institutions of the State, the county jails, and city police prisons secure the health and comfort of the prisoners." Const., Art. XI, sec. 6.

"The sheriff or keeper of any public prison shall every day cleanse the room of the prison . . . and shall furnish the prisoners a plenty of good and wholesome water three times in every day, and shall find each prisoner fuel, . . . wholesome bread . . . and every necessary attendance, . . . good, warm blankets or other suitable bedclothing . . . for their use and comfort, as the season or other circumstances may require." Bat. Rev., ch. 89, secs. 9, 10.

From the foregoing quotations it will appear generally what is contemplated by our Constitution and statutes shall be the treatment of prisoners. The least that is required is that they shall have a "clean place, comfortable bedding, wholesome food and drink, and necessary attendance." This is required for *all* prisoners, even those who are convicted of high crimes. How much more ought it to be required for those who have not been convicted at all, and who may be innocent of any offense, as is often the case with those who are imprisoned before trial for safe keepnig.

(231) "All persons found lying on the streets of the city shall be taken and lodged in the guardhouse." Ordinance of the city of Raleigh, ch. 4, sec. 3.

The plaintiff's intestate was found lying on the street and taken by the city's police and lodged in the guardhouse. The guardhouse is the city's guardhouse, the ordinance is the city's ordinance, the officer is the city's officer—everything was of and by the city. No question arises as to how far the city is liable for the misconduct of its officers, because the act complained of is the act of the city itself.

Was the guardhouse a suitable place in which to "lodge" the deceased? The jury proved the fact that the death of the deceased was "accelerated by the noxious air of the guardhouse."

It is insisted, however, that this finding does not mean much; because, for instance, one falling in a fit in the open air and carried into the best house might be somewhat oppressed from lack of free circulation of the open air, and his death, which would have resulted out of doors in an hour, might be accelerated a few moments in the house. We must see, therefore, what the facts were upon which the verdict was based. The guardhouse is a small room, 8 by 14 feet. It had no window. It had no opening connecting with the outer air or light. It had but one door, and that opened into a passage, and had a grate in it, and was opposite to a window which was under the grating in the pavement. Now, here was no *passage* for the air, day or night, and none could be given; and there was no *ventilation* even, except the mere contact of the air inside the cell with the air outside, at the door, through the grate. There was nothing to drive the bad air out and the pure air in, and therefore the bad air would stay in indefinitely. So that it was an impossibility that such a place could "secure health and comfort," in the language of the Constitution, or that it could be "clean," in the language of the statute.

And, further, the cell is not only under the ground and without
(232) ventilation, but it is under the city market-house, where congregate day and night crowds of persons and animals, and where are kept meats, vegetables, melons and fruits, the impure emanations from which find a lodgment in the basement.

A moment's reflection will teach that it will not do to have a prison underground. There must be *circulation* of air. The bad air will not *go out*; it must be *driven* out; and there is the greater necessity as the prisoners cannot "go out," but all their calls must be answered in the cell; and such persons as can be employed to clean them are not likely to be very careful.

Nature teaches us that any person kept in such a place must soon die, and any person "lodged" in such a place is *injured* by the first breath.

But, further, suppose the air had been pure and the ventilation perfect, still that is not all that is necessary to a prisoner's "comfort," and he must be comfortable; not luxuriously surrounded, but the demands of humanity must be supplied; and here was not a chair, nor a bed, nor a blanket—nothing but the cold, hard floor. Just what nature teaches would be the condition of such a cell the witnesses on both sides teach us was its actual condition. They all say it was offensive, and to some it was so offensive that they had to leave it quick; and the intelligent physician called by the city said that while he saw no signs of death from carbonic gas, "yet if a man was so weak as to have to be carried there, having fallen from exhaustion, he would be injuriously affected."

This case is striking proof of the wisdom of requiring prisoners to be comfortable. So far as appears, the deceased was not a bad man. He had a family, and his employer testifies that he worked night and day to support them. He was in bad health. He was not a drunkard, but sometimes drank too much—a weakness so common that it (233) would seem invidious to call it a crime in him. He had drunk too much, and instead of letting him go home, as he asked to be allowed to do, or of carrying him home, as it would have been humane to do, and as he who made him drunk was morally bound to do, he was carried to a hole like Calcutta's, where he died before morning.

PER CURIAM. No error.

Cited: Peebles v. Raleigh, post, 236; *Bunch v. Edenton,* 90 N. C., 434; *Manuel v. Comrs.,* 98 N. C., 12; *Moffitt v. Asheville,* 103 N. C., 256; *Shields v. Durham,* 118 N. C., 456; *Gray v. Little,* 126 N. C., 388; *Levin v. Burlington,* 129 N. C., 188; *Meekins v. R. R.,* 134 N. C., 219; *Hughes v. Fayetteville, ib.,* 754; *Hull v. Roxboro,* 142 N. C., 460; *Harrington v. Greenville,* 159 N. C., 635.

ROBERT B. PEEBLES v. THE PATAPSCO GUANO COMPANY.

Action for Deceit—Corporation—Fraud of Agent—Judgment of Court of Another State.

1. An action for damages for deceit will lie against a corporation.
2. A corporation is liable for false and fraudulent representations made by its agents.
3. Where in an action for damages against a corporation for deceit the jury found that the defendant's agent falsely represented to the plaintiff that a spurious article was the genuine Patapsco guano, the defendant corporation being the manufacturer of such guano: *Held*, that such representation was necessarily *fraudulent in law*, and the plaintiff was entitled to recover.
4. A judgment in a proceeding by attachment in a court of another State is conclusive evidence that the debt sued on was due to the plaintiff in such action to the value of the property attached, but of nothing else.

ACTION for damages, tried at Spring Term, 1877, of NORTHAMPTON, before *Buxton, J.*

(234) The plaintiff complained that the defendant had contracted to deliver to him at Garysburg, N. C., sixteen tons of a commercial fertilizer known as "Patapsco Guano," and that instead of delivering the said article, the defendant delivered a spurious article, which defendant's agent falsely and fradulently represented to be the genuine Patapsco Guano, and by reason thereof he was damaged to the amount of $475.

Upon the question of damages the plaintiff proved that the defendant had attached cotton belonging to plaintiff in the hands of plaintiff's commission merchant in Norfolk, Virginia, and recovered $130 (in addition to the costs of the suit), which was applied as a credit upon plaintiff's note given for the price of guano. No personal service was made upon the plaintiff. The defendant asked the court to charge that the jury could not consider this $130 in estimating the damages. The court declined the instruction, and the defendant excepted.

The other damages proved by plaintiff amounted to $72. The jury found the answers to the issues submitted as follows:

1. Was the article, of which sixteen tons were sold to plaintiff in 1873, the commercial fertilizer usually known as "The Patapsco Guano," or was in a spurious article? Ans.: "We agree it was a spurious article."

2. Did said article correspond in analysis with the analysis marked on the bags in which it was contained? Ans.: "It did not."

3. Did the defendant's agents, or any of them, falsely and fraudulently represent to the plaintiff that the article sold was the genuine and valuable Patapsco Guano? Ans.: "It was falsely represented."

4. What damage has the plaintiff sustained, if any? Ans.: "$202, with interest from 4 February, 1874."

Judgment for plaintiff for $202 and interest. Appeal by de- (235) fendant.

Busbee & Busbee and W. W. Peebles for plaintiff.

O. A. Barnes, J. B. Batchelor, and Merrimon, Fuller & Ashe for defendant.

RODMAN, J. The plaintiff alleges that he purchased of the defendant sixteen tons of an article well known to the trade by the name of Patapsco Guano; that the article which he received was not what was known in the trade as Patapsco Guano, but a different and worthless article; that on each bag of the article which he received there was printed what purported to be a chemical analysis of the article, purporting to give the percentage of ammonia, phosphate, etc., in the article, but that this representation was false and fradulent, and that the article delivered did not contain the percentage represented of those valuable ingredients. He says that the identity of the article with what it was represented to be could not be told by inspection, or otherwise than by using it on his crop, in which use it was necessarily destroyed, and he claims damages.

The defendant admits that it sold to the plaintiff sixteen tons of Patapsco Guano, and alleges that the article which it delivered was the article known in the trade by that name, and that it did contain the percentage of valuable matters stated in the labels on the bags. The jury found that the article delivered was not the genuine Patapsco Guano, but a spurious article, and that it did not contain the percentage of ammonia and phosphate stated in the labels. They assessed the plaintiff's damages at $202, of which $72 was for what he called actual damages, and $130 was for that sum which the defendant had made by attachment upon certain cotton of the plaintiff, which it found in Maryland.

There was judgment accordingly, and the defendant appealed. (236)

1. The counsel for the defendant contends that this action is to recover damages for a fraud and deceit by the defendant, and that such an action cannot be maintained against a corporation.

Under our present system of pleading, the action may as well be considered as being for damages for a breach of warranty as for deceit. But if we take it as the latter, we think it must be considered as settled

in this State, and generally in America, that an action of tort will lie against a corporation. This was held in *Meares v. Wilmington*, 31 N. C., 73, and in *Lewis v. Raleigh, ante*, 229. The cases to the same effect in other States are very numerous, and it was, at least until the decision in *Bank v. Addie*, 1 L. R., 1 (same case cited by Mr. Fuller from Benjamin on Sales), the received law in England, as is shown by the case of *Barwick v. English Joint Stock Bank*, L. R., 2 Exch., 269; Angell & Ames, Corp., sec. 383.

There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fradulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity.

2. It is said that the jury have not found that the representations were fraudulent, but only that they were false, and without fraud the action cannot be maintained. If we consider the action as for deceit, this objection would be unanswerable if the defendant was the seller only, and not also the manufacturer of the article. It is difficult to conceive how a manufacturer of guano can make a representation concerning
(237) the substances of which it is composed which is false and not also fraudulent, in the sense that it was knowingly false. If his servants employed in the manufacture, on any occasion, by negligence, or willfully, ommitted to put in the valuable ingredients without the knowledge or connivance of the manufacturer, it would free his false representation from immorality, but he must in law be held equally liable for the acts of his servants, and he cannot be held innocent of a moral fraud if, after being informed of the omission, he seeks to take advantage of it by demanding, for a spurious and worthless article, the price of the genuine one. We think that on the facts found by the jury the plaintiff was entitled to damages.

3. As to the amount of damages, we have had considerable difficulty. If the plaintiff had paid, or become liable to pay, for the guano, he would have been entitled to recover the difference between the value of the spurious article and the genuine. It does not appear from the case whether he had paid for it in full or not, or what was the value either of the article agreed to be delivered or of that which was delivered. It was agreed that if the plaintiff was entitled to recover anything, he was entitled to recover at least $72, which is called the actual damage. What was intended by that expression, or on what principles the amount was arrived at, do not appear, and on the question of damages we confine

ourselves to the only question presented to us by the case. The plaintiff contended that he was entitled to recover back the sum of $130, which defendant had recovered from him in an action apparently for the price of the guano, begun by attachment, which was levied on certain cotton belonging to the plaintiff, and in which there had been no personal service on the plaintiff. On this question no direct authority was cited to us, and I know of none. The general rule is conceived to be that the judgment in such actions is conclusive evidence that the debt sued on was due to the plaintiff in it, to the value of the property (238) attached, but of nothing more.

To allow the present plaintiff to recover back that sum in this action would be in effect to reverse the judgment of the Virginia court, and to deny to it the full faith and credit to which it is entitled by law. As to that sum, the judgment below is reversed. In other respects it is affirmed, and the plaintiff will have judgment in this Court for $72, with interest from 4 February, 1874, and the costs of the court below. As the judgment is partly reversed and partly affirmed, neither party will recover costs in this Court, but there will be judgment against each for his own costs.

PER CURIAM. Judgment accordingly.

Cited: *Penniman v. Daniels,* 91 N. C., 435; *Alpha Mills v. Engine Co.,* 116 N. C., 802; *Morris v. Burgess, ib.,* 42; *Mfg. Co. v. Davis,* 147 N. C., 270; *Unitype Co. v. Ashcraft,* 155 N. C., 67; *Briggs v. Ins. Co., ib.,* 76; *Anderson v. Corporation, ib.,* 135; *Machine Co. v. McKay,* 161 N. C., 587.

BUNYAN BATTS ET ALS. v. AUGUSTA WINSTEAD ET ALS., EXECUTORS.

Guardian and Ward—Fraud—Impeachment of Decree—Statute of Limitations.

1. In an action by a ward to impeach a decree made in a former action between the then guardian and a former guardian of such ward, it is not necessary to show actual fraud between the parties. If it is shown that there was not a *bona fide* adverse controversy, the account of the first guardian should be reopened.
2. The fact that such decree was made under the formalities of a court of equity adds nothing to its binding force.
3. Where a guardian is discharged by an accounting *in pais*, he must be prepared to have its justice investigated until he is protected by the acquiescense or delay of the parties interested.
4. The statute of limitations has no application to a case of fraud, when the right of action accrued before August, 1868.

(239) APPEAL at Spring Term, 1877, of WILSON, from *Moore, J.*

This action was in the nature of a bill of review to reverse for error in law a final decree made in a cause in the late court of equity for Wilson, in 1868, in the matter of the present plaintiffs, by their guardian, Elisha Barnes, against Wiley W. Winstead (defendants' testator), their former guardian; and also to set aside and vacate said decree on the ground that it was obtained by fradulent collusion between the said Barnes and Winstead; and also to have an account of the dealings between the defendants' testator and the plaintiffs, his wards.

The former guardian, Winstead, having failed to renew his bond, was removed from his office as such at April Term, 1868, of the late county court of said count, and said Barnes was appointed in his stead, and executed a bond with said Winstead and a personal friend of his (Winstead's) as sureties thereto. Subsequently Barnes filed a petition against Winstead for an account of his dealings as former guardian, to which an answer was filed and the case referred to the clerk to state the account. The petition, answer, and report of the clerk were all returned to Spring Term, 1868, of said court, and were all drawn by the same attorney, the answer being signed by Winstead in his own handwritting. Some time after the decree in the case, Barnes resigned the guardianship, and on 22 January, 1869, Winstead was reappointed. The case was then submitted to the jury upon the question of fraud between the two guardians in obtaining said decree. There was a verdict for the plaintiffs. Judgment. Appeal by defendants.

Kenan & Murray for plaintiffs.
W. N. H. Smith for defendants.

RODMAN, J. This action is to impeach a decree obtained by Elisha Barnes, then guardian of the plaintiffs, against Winstead, their former guardian, at Spring Term, 1868, of the Superior Court of Wilson,
(240) on the ground that the decree was obtained by collusion between Barnes and Winstead and in fraud of the plaintiffs. That a decree may be impeached and avoided on that ground has long been settled. Adams Eq., 416; Freeman on Judgments, secs. 336, 489; Kerr on Fraud and Mistake, 293. The jury found that the decree was obtained by fraud and collusion, and the evidence was, in our opinion, sufficient to support the verdict.

The material facts of the plaintiffs' case were not controverted. Winstead was appointed guardian of the plaintiffs in 1856, and continued such until 1864, when he made returns. At some time afterwards (the date is not given) he failed to renew his bond, and was removed, and

Elisha Barnes was appointed in his place, Winstead becoming one of his sureties. Barnes then brought a suit in equity against Winstead for an account of the estate of his words. The defendant answered on oath, stating in substance that in 1862 a large part of the property of his wards consisted of bank bills; that he feared to loan it out to individuals, and, thinking that he would be compelled to serve in the Confederate army, in September and October, 1862, he invested that part in Confederate bonds, which he believed was the safest investment he could make. A decree was made that he account, and it was referred to the clerk to state his guardian account. The clerk reported at Spring Term, 1868. He charged the ex-guardian with the sums acknowledged by him to have been on hand in 1864, and credited him with certain losses, by which these sums were much reduced, and found a certain balance in favor of each of the wards. He does not state how these losses were incurred. It may be assumed, however, for the present purpose that they were incurred by the investment in Confederate bonds, as stated by the defendant. But as the report does not state the circumstances under which the investments were made, it was impossible for the court to decide considerately whether the ex-guardian was justified in (241) making them or not. The court, however, confirmed the report, and gave judgment for the balance thereby found due. Some time after this (in January, 1869) Barnes resigned his guardianship, and Winstead was again appointed guardian. It does not appear that he ever paid to Barnes the sums found owing by the judgment. The attorney who appeared for Barnes also drew the answer of Winstead (although it was sworn to by Winstead personally). The report of the clerk and the decree of the court are also in his handwriting.

From these circumstances no inference can fairly be drawn of actual fraud, which would consist in an intention to deprive the plaintiffs of something to which they were rightfully entitled. We carefully avoid the expression of any opinion which may prejudice the claims of either of the parties on any future proceeding in this case. We may say, however, without violating that intention, that for aught that appears on this record it may be that Winstead acted as guardian honestly, and not imprudently. That question is not presented to us, and we have no opinion on it. It was not necessary, however, for the plaintiff, in order to obtain the relief which they claim, to show actual fraud, as we have defined the term as applicable in this case. It was enough for them to show that there had not been a *bona fide adverse* controversy between the guardian who represented them in the suit in 1868 and their former guardian. It may very well be, consistently with all that appears in this case, that the gentleman who appears to have conducted the suit in 1868, as the attorney for both parties, was clear of any conscious impropriety, and

thought he was making a settlement which was just and equitable between the parties. And it may, perhaps, be made to appear that the settlement which was come to under his advice was, in fact, just
(242) and equitable, and such as would have received, and ought to have received, the sanction of a court fully informed of all the facts and passing on them between parties really adverse. Yet it is evident from all the facts that in the litigation of 1868 the plaintiffs (then infants) were not really and *bona fide* represented, and that their claims were not fairly presented and urged. The circumstance that one attorney advises the two parties to a settlement of accounts, whether out of court or through the forms of proceeding in court, especially if one of the parties is a guardian representing infants, is always a circumstance to raise suspicion, and although not enough by itself to justify a court in opening the account to be again inquired into, yet, coupled with the other circumstances appearing in this case, we think it fully sufficient for that purpose. There was no finding of the particular facts by which the rights of the infants could be determined. These facts were suppressed by collusion, and the exemption of the ex-guardian was conceded, and was therefore never investigated, and in form only decided by the court. Settlements of accounts are, no doubt, often fairly and justly made, where the parties have a common adviser; and if fair and just, they will stand. It is, however, only an accounting *in pais*. That it was made under the formalities of a court of equity adds nothing to its binding force. A guardian who is discharged upon such an accounting must always be prepared to have its justice investigated until he is protected by the acquiescence or the delay of the parties interested. The courts would be faithless to their duties as guardians of infants if they could permit such unsubstantial forms to be set up as an impregnable barrier to an investigation of the merits of their claims.

This case is, in principle, the same with *Ellis v. Scott*, 75 N. C., 108. There a case was agreed upon under the act. Here there were the forms of an adversary suit.

(243) The statute of limitations has no application to a case of fraud when the rights of action accrued before August, 1868. How it may be in a similar case coming under C. C. P. we do not consider.

Judgment affirmed and case remanded, in order that an account may be taken between the plaintiffs and the defendants of the receipts and dealings of their testator as guardian of plaintiffs, and such other proceedings had as may be necessary.

PER CURIAM. Judgment accordingly.

Cited: Blount v. Parker, 78 N. C., 132; *Spruill v. Sanderson*, 79 N. C., 471; *Culp v. Stanford*, 112 N. C., 669.

W. W. PEEBLES, ASSIGNEE, v. W. L. STANLEY, EXECUTOR.

Witness—Transaction With Deceased Person.

1. In an action on a bond against the executor of a deceased obligor, the principal obligor is a competent witness to prove the execution of the bond by the defendant's testator.
2. Concerning C. C. P., sec. 343, a general rule may be stated, viz.: In all cases, except where the proposed evidence is as to a transaction, etc., with a person deceased, etc., the common law disqualifications of being a party and of interest in the event of the action are removed; but as to such transaction, etc., the disqualifications are preserved, with the added one, not known to the common law, that if the witness ever had an interest, upon the question of his competency it is to be considered as existing at the trial.

APPEAL at Spring Term, 1877, of NORTHAMPTON, from *Buxton, J.*

This action was brought on a bond under seal, purporting to have been executed by one John S. Harris as principal and the defendant's testator, John Stanley, as surety. The defendant denied the execution of the bond by his testator. The plaintiff then introduced said Har- (244) ris as a witness, who testified that Stanley did execute the bond. The defendant objected to this evidence. Objection overruled. Verdict and judgment for plaintiff. Appeal by defendant.

W. W. Peebles and J. B. Batchelor for plaintiff.
D. A. Barnes and R. B. Peebes for defendant.

RODMAN, J. The only question is, was Harris, the principal in the note sued on, a competent witness to prove its execution by John Stanley, who appeared to be a coöbligor, and who at the time of the trial was deceased? It depends on C. C. P., sec. 343. He was certainly offered to prove a transaction with a person deceased, and he was not a party to the action. At the time of the trial (having been discharged as a bankrupt) he had no interest in the event of the action. So the general question is reduced to this, Had he ever had an interest in the event of the action which but for his bankruptcy would have existed at the trial? We think he never had such an interest. Putting his bankruptcy out of view as not affecting the case, he was in any event liable to the plaintiff (as he did not deny), and if the defendant should pay the debt, he would be liable to him for the debt and costs. His interest was only in the costs, and in that point of view it was with the defendant.

In *Mason v. McCormick,* 75 N. C., 263, it was held that the interest, to exclude a witness under C. C. P., sec. 343, must be an interest in the event of the action. The witness in that case had no interest in the sub-

ject-matter of the action, but he was surety to the plaintiff on the prosecution bond, and thus had an interest in the event, and he was held excluded from proving a transaction with a deceased defendant. (245) *Lewis v. Fort,* 75 N. C., 251, is distinguishable from this. That was an action brought on a note given to the guardian of the plaintiff and assigned by the guardian (who was deceased at the time of the trial) to the plaintiff. The note was made by Bardin as principal and the defendant as his surety. Bardin was not a party to the action, and the defendant offered him as a witness to prove that the note had been paid by him to the guardian in his lifetime. This Court held him incompetent to prove a transaction with the deceased guardian, because he was evidently interested in the result of the action, and his interest was to defeat a recovery by the plaintiff. It is very convenient to have a general rule tersely expressed, but it is difficult to express one.

It seems to me, however, that from a comparison of the Code with all the decisions upon section 343, a general rule may be stated thus: In all cases except where the proposed evidence is as to a transaction, etc., with a person deceased, etc., the common-law disqualifications of being a party and of interest in the event of the action are removed. But as to such transactions, etc., the disqualifications are preserved, with the added one not known to the common-law: that if the witness ever had an interest, upon the question of his competency it is to be considered as existing at the trial.

PER CURIAM. No error.

Cited: Mason v. McCormick, 80 N. C., 245; *Thompson v. Humphries,* 83 N. C., 419; *Pugh v. Grant,* 86 N. C., 48; *McGowan v. Davenport,* 134 N. C., 532.

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(246)

JOHN GRAGG v. DAVID WAGNER.

Witness—Breach of Covenant—Deed.

1. It is the *privilege,* but not the *duty,* of a party to an action to offer himself as a witness in his own behalf; and the fact that such privilege is not exercised is not the subject of comment before a jury.
2. Whether an action of covenant to which an equitable defense is made falls within the operation of Article IV, sec. 8, of the Constitution, *Quære.*

ACTION for breach of convenant in a deed, tried at Spring Term, 1877, of WATAUGA, before *Schenck, J.*

It appeared that the defendant executed a deed to the plaintiff, conveying certain lands in Johnston County, Tennessee, which were subject to encumbrances, judgments, etc., against the defendant. Convenants against these encumbrances were inserted in the deed. (See same case, 71 N. C., 361.) At the time of the trial the defendant was in the State of Oregon, and during the progress of the trial the plaintiff's counsel commented on the fact that the defendant had not offered himself as a witness. To this the defendant's counsel objected, and the objection was sustained. There was much evidence touching the manner in which the transaction was had, and upon issues submitted the jury found the following facts:

1. The convenants against encumbrances were inserted in the deed by the mutual mistake of the parties.

2. The lands sold by Wagner to Gragg were encumbered at the date of the deed.

3. The plaintiff sustained no damage by reason of having to relieve the land of the encumbrances.

4. The value of the land conveyed was $4,000.

On this verdict judgment was rendered for the defendant, and the plaintiff appealed.

G. N. Folk for plaintiff. (247)
R. F. Armfield for defendant.

BYNUM, J. The defendant Wagner was a competent witness as well for the plaintiff as for himself and in his own behalf. If he was a material witness for the plaintiff, it was the latter's own fault that he went to trial without his testimony; and if he was not material, he has received no harm by his absence. It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial as a matter of sound discretion. Only an abuse of that legal discretion is reviewable here. Nothing of the sort appears. There were but three persons present at the bargain and execution of the deed—the plaintiff, the draftsman, and the defendant. The first two were witnesses and were examined in behalf of the plaintiff; the last, at the time of the trial, was in and a resident of the State of Oregon, and not a witness. It was while arguing the facts connected with the execution of the deed that the counsel of the plaintiff was proceeding to comment on the fact that the defendant had not offered him-

self as a witness, when he was stopped by the court upon the objection to such comments being made by the counsel of the defendant. It was not alleged that the defendant Wagner knew other and different facts in connection with the bargain and the execution of the deed than those testified to by the plaintiff and draftsman of the deed. If he had such
(248) knowledge, it was the duty and right of the plaintiff to produce the witness or procure his testimony.

But his Honor placed his exclusion of the comments of the counsel in the exercise of his discretion upon the ground and finding by him that the facts touching the execution of the deed on which the counsel was commenting were not within the peculiar knewledge of Wagner, the defendant. It was not required that his Honor should have taken that precaution before stopping the counsel. The general rule was applicable, that it is not a proper subject of comment before a jury that a party to an action has not offered himself as a witness in his own behalf. *Devries v. Phillips,* 63 N. C., 53.

2. This is an action upon covenants against encumbrances in a deed executed by the defendant to the plaintiff. See *Gragg v. Wagner,* 71 N. C., 316. The defendant now alleges a mutual mistake of the parties in inserting these covenants, and asks that the deed be reformed. Upon an issue as to this mutual mistake being submitted to a jury, it is found that there was such a mistake. This being an equitable defense to the action, all the evidence has been sent up with the appeal, and we are called upon by the plaintiff to review the finding of the jury upon the evidence under Art. IV, sec. 8, of the Constitution, as amended.

Without deciding at this time whether an action of covenant, which was strictly an action at law under the former system, but to which an equitable defense can now be made under the new system,, falls within the operation of this amendment to the Constitution, we are free to say that we have examined all the testimony and feel warranted in saying that the jury are fully justified in finding their verdict.

PER CURIAM. No error.

Cited: Goodman v. Sapp, 102 N. C., 482; *Hudson v. Jordan,* 108 N. C., 15.

(249)

JOSEPH HOSKINS v. PINKNEY WALL.

Purchase Money for Land—Discharge in Bankruptcy.

A discharge in bankruptcy bars the collection of a debt contracted for the purchase of land which has been allotted to the debtor as a homestead in the proceedings in bankruptcy.

APPEAL at Fall Term, 1876, of GUILFORD, from *Kerr, J.*

The plaintiff brought this action to recover the value of a note given by the defendant for the purchase money of a tract of land bought of one A. C. Caldwell, who afterwards assigned the note to plaintiff. During the pendency of the action the defendant filed his petition in bankruptcy. No creditors proved their claims. His homestead in the land had been assigned by the sheriff before the commencement of this action, and the assignee in bankruptcy conveyed the reversionary interest in the same to the defendant, and the homestead was reassigned by order of the Federal court in the proceedings in bankruptcy. His plea of discharge in bankruptcy was filed and admitted, and as the effect of this discharge is the basis of the decision of this Court, a further statement of the facts is unnecessary. His Honor gave judgment in favor of the plaintiff, and ordered the land to be sold for the payment of his debt. From this judgment the defendant appealed.

J. A. Gilmer for plaintiff.
J. T. Morehead for defendant.

PEARSON, C. J. The only question in this case is, Does the defendant's discharge in bankruptcy apply to the demand of the plaintiff? We think it does.

The debt of the plaintiff is for the *purchase money of the land.* This, under the Constitution and the statute, rides over the homestead, and the execution creditor can sell the land, the homestead to the (250) contrary notwithstanding, provided he has an execution under which to sell. When he asks for a judgment and execution, he is met by the fact, "the defendant is discharged by a decree in bankruptcy, which is pleaded in bar of the further prosecution of your action." How is this met? The plaintiff says, "I have a lien, or something akin to a lien (as Mr. Gilmer termed it on the argument), which the bankrupt proceedings are bound to respect." That is the question. What is a lien? A mortgage is an express lien. A docketed judgment is a lien by statute, and any one wishing to be informed can see for himself by looking at the books of the county. But in regard to obligations for the payment of the purchase money, there is no mode provided by which to give it notoriety. If a vendor makes a deed for the land instead of retaining the title as

security, it is his folly. True, when he gets a judgment and issues execution, the homestead is not in his way. In that respect he is better off than other creditors, but he has acquired no lien, no "hold" on the land. Suppose the vendee sells the land to one who knows it has not been paid for, the purchaser has a good title; for the vendor can get no judgment against him, and a judgment against the vendee will not reach property that he has sold. So the vendor, although he has the notes given for the purchase money, has no lien—nothing "that sticks," like a mortgage or docketed judgment.

It follows that the defendant's charge in bankruptcy bars the plaintiff's debt, and if he can get no judgment and execution the homestead is not drawn in question.

PER CURIAM. Reversed.

Cited: *Smith v. High,* 85 N. C., 95; *Moore v. Ingram,* 91 N. C., 381.

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(251)

R. C. BADGER AND WIFE v. W. A. DANIEL ET ALS.

Notice—Purchaser Pendente Lite—Pleading—Description of Property—Motion.

1. The rule that the pendency of an action affects a purchaser *pendente lite* of the property in controvercy, with notice, in the same manner as if he had actual notice, and renders him bound by the judgment or decree in the suit, is confined to property *directly in litigation.*
2. In such case the property must be so described in the pleadings as to give a purchaser notice that the property which he buys is that in litigation.
3. Where facts necessary to the support of a motion in the cause are not shown, they must be assumed not to exist.

MOTION in the cause, heard at Spring Term, 1877, of HALIFAX, before *Burton, J.*

The plaintiffs moved the court for an order restraining the defendants from making any disposition of certain bonds until the determination of the action then pending and final judgment therein. The case is sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court. His Honor allowed the motion, and the defendant Winfield appealed.

W. N. H. Smith, Mullen & Moore, and Walter Clark for plaintiffs.
W. H. Day and Moore & Gatling for defendants.

RODMAN, J. The case is briefly this: The plaintiffs are creditors of Andrew Joyner, who died in 1856, having devised a lot in Halifax to Mary Daniel, upon whose death it descended to the two defendants, J. J. Daniel and W. A. Daniel. A decree was made in the court of equity that said lot be sold for partition, and under the decree the lot was sold on 6 November, 1871, by Gregory, clerk of the Superior Court, (252) and purchased by Conigland, who paid a part of the price in cash and gave two notes of $315 each, payable to Gregory, as clerk, for the residue. On 15 August, 1876, Gregory, the clerk, by order of the judge of Halifax Superior Court, assigned and delivered said bonds to said J. J. Daniel, he being also the administrator and sole next of kin of W. A. Daniel, who had died since the sale.

In the summer of 1876 J. J. Daniel applied to one Winfield for an advance in money and goods, and promised to assign the bonds to Winfield as a collateral security. Winfield made the advance, but did not then receive an assignment of the bonds or take possession of them. Some time afterwards J. J. Daniel, without the knowledge of Winfield, deposited the bonds with Battle, Bunn & Co., to secure a debt due to them. Battle, Bunn & Co., afterwards assigned their debt and the bonds to Winfield for value.

At Fall Term, 1871, of Halifax Superior Court the plaintiffs brought an action on the bond of W. A. Daniel, who had been guardian of the *feme* plaintiff, to which said Joyner was a surety (and the only solvent surety), and they sought to subject the property of said Joyner to their recovery. We assume that the personal representative of Joyner is a party to this action, which is still pending.

At the time Winfield made the advance to J. J. Daniel on his promise to assign the bonds as aforesaid, Winfield had no actual notice of the pendency of the above mentioned suit. Neither had Battle, Bunn & Co. any such notice when they recover the bonds as collateral security for the debt to them as aforesaid. Winfield did, however, have actual notice of the suit when he purchased the debt of J. J. Daniel to Battle, Bunn & Co., and took their assignment of the bonds to himself. On these facts, at Spring Term, 1877, the plaintiffs moved the court for an order requiring J. J. Daniel and Winfield to deposit said bonds in court, and enjoining them from collecting or disposing of them. The judge ordered accordingly, and from that order Winfield appealed to (253) this Court.

The plaintiffs admit that inasmuch as the sale of the lot was made more than two years after the death of Joyner, the purchaser acquired a good title. Bat. Rev., ch. 45, sec. 156.

They contend, however, that they can follow the property of Joyner, which the notes stand in the place of, and therefore the notes in the

hands of persons claiming as volunteers under him; and that the pendency of their action against the representative of Joyner, for the purpose stated, was notice to all the world that the title to the two notes of Conigland was in controversy, and that although Winfield and Battle, Bunn & Co., had no actual notice of the pending action when they acquired interest in the notes, it must be conclusively presumed that they had notice of it, and that therefore the notes in the hands of Winfield are subjects to the plaintiffs' recovery against the personal representatives of Joyner.

It is held on ground of public policy that "a purchase made of properity actually in litigation, *pendente lite,* for a valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." 1 Story Eq. Jur., sec. 405.

The reason of the rule is given by Story in the succeeding section, and, when confined within proper limits, it is evidently a necessary one, although even then it may occasionally work a hardship, although rarely if ever without some degree of negligence in the purchaser. It is certainly confined to property directly in litigation, and the property must be so described in the pleadings as to give a purchaser notice that the property which he buys is that in litigation. The reason of the
(254) rule does not require it to be more extensive than this, and without this limitation cases of hardship must be frequent. *Worsley v. Earl of Scarboro,* 3 Atk., 392; *Isler v. Brown,* 66 N. C., 556; *Lewis v. Mew,* 1 Strobhart Eq., 180; *Price v. White,* 1 Bailey Eq., 244; *Le Neve v. Le Neve,* 2 White and Tudor's L. C. E., Am. Notes, 121.

We have not before us the pleadings in the original action in which the motion under consideration was made. All that we know of them is from the statement in the case agreed, that it was an action on the guardian bond of Daniel, to which Joyner was a surety, and sought to subject the real and personal property of Joyner to the payment of the recovery. It does not appear from this that the lot was particularized or described in any manner, or that it was the property of Joyner, or had come to J. J. Daniel and W. A. Daniel from him. It is not probable that the title to the lot was directly in litigation. As a party moving must show facts to support his motion, when any facts necessary for that purpose are not shown they must be assumed not to exist. The extent of constructive notice which may be imputed to a purchaser from the pendency of a suit cannot exceed what he would have obtained by a perusal of the pleadings; and if Winfield had perused the pleadings in the pending action, with the notes in question before him, he would not have known that the lot for which the notes professed to have been given, and which

is described in them, had even been the property of Joyner, or was in any manner, still less directly, in litigation in that action.

Other considerations occur, but these views dispose of the question. We think Winfield acquired a title to the notes as against the plaintiffs.

PER CURIAM. Reversed.

Cited: *S. c.*, 79 N. C., 372; *Todd v. Outlaw, ib.*, 241; *Winfield v. Burton, ib.*, 391; *Dancy v. Duncan*, 96 N. C., 116; *Spencer v. Credle*, 102 N. C., 78; *Collingwood v. Brown*, 106 N. C., 365; *Morgan v. Bostic*, 132 N. C., 750; *Timber Co. v. Wilson*, 151 N. C., 157.

(255)

A. C. SANDERS v. J. C. ELLINGTON.

Practice—Agreement of Parties—Landlord and Tenant—Right of Landlord to Ungathered Crop.

1. When the parties to an action agree upon a matter of fact, they are bound by it, and it is not the duty of the court to interfere; but when they agree upon a matter of law, they are not bound by it, and it is the duty of the court to interfere, and, if there be a mistake as to the law, to correct it.
2. A crop cultivated by a tenant and left standing in the field after the expiration of his term becomes the property of the landlord. And this is so whether or not the tenant has assigned the crop.

APPEAL at January Special Term, 1877, of WAKE, from *Schenck, J.*

This action was brought to recover the value of five bales of cotton, raised upon the land of the defendant by one Pool. The plaintiff's claim was based upon a mortgage executed to him by Pool in February, 1872, conveying the crops raised upon the land for said year. The defendant's claim was based upon a verbal contract with Pool, under which Pool worked the land in 1870-71-72. The defendant introduced a witness who testified that in January, 1872, the defendant executed a paper-writing or lien for the purpose of obtaining supplies in 1872, and that defendant directed the witness to furnish Pool some supplies and charge them to him (defendant), and that Pool did accordingly get the supplies. Defendant's counsel then proposed to prove the contents of said paper-writing to show that it gave a lien on the crop in question, but this was ruled out on objection by plaintiff, for that the writing was not produced nor its loss accounted for.

It was in evidence that Pool left the State in December, 1872, without the knowledge or consent of the defendant, leaving cotton to the amount of five bales ungathered, and that in February, 1873, (256)

the defendant gathered and sold it as his property. It was insisted that, as Pool had abandoned his contract, the cotton became the property of defendant, and that he was not liable to the plaintiff even if Pool was a tenant. Upon the facts found by the jury, the court held that the defendant was liable. Judgment. Appeal by defendant.

Gray & Stamps, Battle & Mordecai, and Busbee & Busbee for plaintiff.
D. G. Fowle and W. H. Pace for defendant.

PEARSON, C. J. When the parties to an action agree upon a matter of fact, they are bound by it, and it is not the duty of the judge to interfere, for he is presumed to be ignorant of the facts. When the parties agree upon a matter of law, they are not bound by it, and it is the duty of the judge to interfere and correct the mistake, if there be one, as to the law, for he is presumed to know the law, and it is his province to declare it.

In this case all of the facts were agreed on except the facts relative to the question as to whether one Pool was a cropper of the defendant or a lessee for one year. Upon these facts there was conflicting testimony. The jury find that Pool was a tenant of the defendant, and his Honor thereupon gave judgment that the plaintiff recover. In this there is error.

Suppose Pool was a tenant for one year: the defendant, as owner of the land, was entitled to the cotton standing in the field after the expiration of the term, and the plaintiff had no cause of action in regard to the cotton. This is a matter of law, which it was the duty of his Honor to decide, and the responsibility of declaring it cannot be shifted and put upon the shoulders of the parties. This error was not caused
(257) by the admission of the parties set out in the statement of the case, that "if Pool was a tenant, the plaintiff was entitled to recover, and if Pool was a cropper, the defendant was entitled to the verdict."

A tenant for years may remove fixtures and anything put there by himself, provided he does so before his term expires; but after that, all of such things belong to the owner of the land, and the *quondam* tenant has no right to put his foot upon the land except by license of the owner. All of the cases agree that such is the law. See, among others, *Lyde v. Russell,* 20 E. C. L., 394. A tenant for years had fixed bells to the house, but did not take them away before his term expired: *Held,* that the bells belonged to the landlord, and that the *quondam* tenant could not recover them, although the landlord had severed them from the house.

See, also, *Smithwick v. Ellison,* 24 N. C., 326: "A tenant for years may remove the manure accumulated during the term, provided he does

so before the term expires, and takes care not to scrape too deep so as to take 'any part of this virgin soil'; but after the expiration of the term the manure belongs to the owner of the land." We were not referred to any case in reference to a crop left standing in the field, and we have not met with one in which the question is made; but it is manifest that if the landlord is entitled to fixtures, such as bells left attached after the term has expired, and that the *quondam* tenant has no cause of action in regard to them even after severance, it follows *a fortiori* that the landlord is entitled to a crop left standing on the ground at the expiration of the term. He may either plow it under or gather it, as he sees fit, and the *quondam* tenant has no cause of action in regard to it. The circumstance that Pool ran away without paying the rent does not affect the principle, and only makes the application of it the more forcible. The doctrine of emblements admits the general principle, and was introduced as an exception to its application in favor of tenants whose estates (258) are of uncertain duration. In such cases, to encourage tenants to sow by an assurance that they may gather, the law allows them the crop standing on the ground and the privilege of "ingress, egress, and regress" as often as may be necessary to finish the cultivation of the growing crop and to gather and convey it away; for instance, if a tenant for life dies leaving a crop growing on the land, it does not become the property of the landlord, but the personal representative of the tenant for life is entitled to emblements; that is, he is allowed to use the necessary means to avail himself of the growing crop as a part of the estate of the deceased tenant. So in case of a tenant at will: if he determines the estate by his own act, the growing crop belongs to his landlord; but if the estate be determined by the act of the landlord, the tenant is entitled to emblements. 2 Bl. Com. But a tenant for years is not entitled to emblements, for the termination of his estate is certain, and it is his folly to sow when he knows he cannot reap. So a tenant from year to year is not entitled to emblements, for he cannot be forced to leave unless he has six months notice before the end of the year, and that puts him on the footing of a tenant for years, and there is no occasion to interfere with the rights of the owner of the land under the general principle by allowing him to come in on the doctrine of emblements. If Pool had remained on the land after the expiration of his term, the defendant could have instantly entered; and if he refused to give up the possession, he could have been evicted by summary process provided for under "the landlord and tenant act" (Bat. Rev., ch. 64, sec. 19, *et seq.*), and the landlord is entitled to the growing crops and any fixtures, manure, and the like then remaining on the land. Pool's having left the premises only saved the defendant the trouble of having him evicted under this summary proceeding.

Such being the law in regard to Pool, it follows that it equally (259)

applies to the plaintiff, who claims under him. He stands in Pool's shoes, and could have no greater rights than Pool would have had after the expiration of the term. Admitting that after Pool ran away the plaintiff might, as his assignee, have gathered the crop, provided he did so during the term, yet, after the expiration of the term, the crop, as we have seen, became the property of the defendant, and the plaintiff had no interest in it, and would have been liable as a trespasser had he entered for the purpose of picking the cotton.

All of the facts being agreed on except the facts necessary to determine whether Pool was a tenant or a cropper, and that being immaterial, the judgment is reversed for error, and there is judgment here that the defendant go without day and recover his costs.

PER CURIAM. Reversed.

Cited: *Comrs. v. Trust Co.*, 143 N. C., 115.

CHARLES DEWEY, CASHIER, v. STEPHEN F. BURBANK.

Purchase by Minor—Election to Confirm.

Where a minor purchased land and after he came of age continued to live on it and paid a portion of the purchase money: *Held*, to be an election to confirm the contract of purchase

APPEAL at Spring Term, 1877, of BEAUFORT, before *Eure, J.*

The plaintiff instituted this action against the defendant to recover the amount due upon certain notes given for the purchase money of a tract of land in Beaufort County, and to obtain a decree of foreclosure of a mortgage deed executed by the defendant to secure the pay-
(260) ment of said notes. The defendant, in his answer, alleged that at the time of the execution of the notes he was under the age of 21 years. The plaintiff, in his reply, insisted that the defendant had ratified the contract of purchase by taking possession of and residing and farming on the land conveyed in the mortgage; and that he further ratified the contract by paying a part of said indebtedness after he arrived at the age of 21 years. It was admitted that the defendant was in possession of the land, and that he made the payments as alleged. His Honor gave judgment for the plaintiff, and the defendant appealed.

D. M. Carter for plaintiff.

George H. Brown, Jr., and John A. Moore for defendants.

PEARSON, C. J. A minor who makes a contract has his election, after arriving at the age of 21 years, either to avoid or to confirm the contract.

The fact that the purchaser of land continues to live on it and cultivate it after he arrives at age, together with the fact that he pays a part of the purchase money, amounts to an election to confirm the contract.

PER CURIAM. Affirmed.

Cited: *Weeks v. Wilkins,* 134 N. C., 522.

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(261)

ALANSON CAPEHART v. KADER BIGGS & CO.

Mortgage Deed—Sale Under Power—Notice to Mortgagor—Injunction.

1. The plaintiff instituted an action against the defendants for an account, Whereupon the defendants, under power contained in certain mortgages executed to them by the plaintiff, advertised his land for sale; there had been numerous dealings between the parties for many years, and the status of the account was in dispute: *Held,* that the defendants should be restrained from selling under the mortgages until the action for account is tried and the balance due ascertained by judgment.
2. A sale under a power contained in a mortgage can be invalidated by the mortgagor's showing that nothing was due under the mortgage, or that before the sale he tendered the amount really due, or by proof of a nonconformity with the power in any essential particular.
3. A mortgagee, before exercising a power of sale contained in the mortgage, should give the mortgagor reasonable notice (say, three months) that in default of payment he will sell; otherwise, the want of notice is ground for an injunction to stay the sale until proper notice is given.

MOTION for an injunction, heard at chambers, in Raleigh, on 21 June, 1877, before *Cox, J.*

The plaintiff instituted an action against the defendants at Spring Term, 1877, of NORTHAMPTON, for an account and settlement, and thereupon the defendants, who held a mortgage with a power of sale upon the plaintiff's property, worth $20,000, immediately advertised the same for sale, to the end that they might purchase it to secure their claim of $5,000, as was alleged by plaintiff, but denied by defendants. For several years there had been large transactions and numerous dealings between the parties, amounting to about $100,000, and it was alleged that there was still a large disputed account between them which the defendants refused to adjust unless the plaintiff would submit to certain claims, alleged to be unjust. Wherefore the plaintiff applied to (262) *Buxton, J.,* at Northampton, for an order restraining the defendants from selling the property until the determination of said action, and

the ascertainment of the balance due them. This order was granted, and made returnable before the judge of the district at chambers, in Raleigh, on 21 June, 1877, when the defendants appeared and filed counter-affidavits. Upon consideration of the case, his Honor held that the plaintiff was entitled to the injunction as prayed for, and gave judgment accordingly, and the defendants appealed.

W. W. Peebles and R. B. Peebles for plaintiff.
W. N. H. Smith for defendant.

PEARSON, C. J. 1. This is a special as distinguished from the common injunction; that is, if the injunction was dissolved under the old practice, or not granted until further order under the new practice, and the defendants are allowed to sell the land, the main purpose of the action would be defeated, and the merits of the case would be disposed of in this preliminary stage upon affidavits. For which reason, whenever the bill, taken as an affidavit, made a probable ground in support of the plaintiff's equity, the injunction was continued until the hearing, although the answer fully denied all of the facts upon which the equity was based.

In this case the affidavit of the plaintiff avers his belief that upon taking an account it will be found that nothing is due to the defendants, or at most only a small amount, not exceeding, say, $200. The defendants in their affidavit aver that the plaintiff is indebted to them $5,239. So here is an important controversy. How the fact is cannot be told until the trial of the action, and the Court will not permit the defendants to sell under the power and defeat in that way the main purpose of the action.

2. This case presents an unusual feature. The plaintiff commences an action for an account; thereupon the defendants seek to take
(263) a short cut and get ahead of the plaintiff by selling him out under powers contained in the deeds to secure the debt, before the action is tried and the balance due is ascertained by judgment. The defendants can hardly expect that the court will consider the balance fixed by their affidavit, which professes to set out all of the dealings of the parties, and many accounts rendered, etc., in spite of the fact that the plaintiff avers upon his oath that he believes, on taking an account, it will be found that little or nothing is due to the defendants. The plaintiff, by commencing an action, shows that he wishes an account to be taken in order to ascertain the true balance. The defendants attempt to prevent an account, or rather to make one useless for the main purpose of the plaintiff, by a sale of the land under the powers. The reason given for their hasty movement is that they became satisfied by the commencement of the action that the purpose of the plaintiff was to delay the collecting of

the large amount justly due them. Whereas, taking into consideration the fact that the land is valued for taxes at $15,000, it would be more reasonable to infer that the purpose of the plaintiff was to have the balance ascertained, and if any thing should be found against him, to raise the amount by a mortgage of the land to some other person and square off with the defndants.

The attempt on the part of the defendants to close up the matter before an account is taken, and thus to disturb the course of justice, looks badly in the absence of an averment that the debt is not amply secured, even although it amounts to $5,239, and the whole of it is secured by the mortgages, about which no question is made by the plaintiff; for if the debt be amply secured, no harm will result from the delay necessary to have the account taken.

3. There is a further consideration. Although mortgagors, when there is no controversy about the debt, frequently join in the sale and in the execution of the deed to the purchaser, in order to make the land bring its full value by assurance of a clear title, a court of equity (464) will never compel the mortgagor to join in the execution of the deed to the purchaser; he is left free to resort to such remedies as he may have in order to invalidate the sale. (See Coot on Mortgages.) In our case the plaintiff might invalidate a sale made under the power by proof that nothing was due under the mortgages, and so the power was defunct; or by proof that, before the sale, or even on the day of sale, he tenderer the balance really due, together with the expenses incurred preliminary to the sale, making the advertisement, etc.; or by proof of a nonconformity with the power in any essential particular. With this cloud on the title of the purchaser, no third person would bid except at a very low figure, for no one is willing to "buy a lawsuit," and so there would be no bidder except one member of the firm at a sale made by the other member, or by some agent of the firm, which would be the same in its legal effect.

4. There is still another consideration. These deeds contain no provision that before advertising for sale the creditor must give notice in writing that he peremptorily demands payment, and will sell under the power unless the money is paid within a reasonable time, say, three months. In our case the plaintiff is startled as "by a clap of thunder in a cloudless sky" by the announcement that his home is to be sold for cash at public auction, on an advertisement of fifteen days. Thus the plaintiff was taken completely by surprise. He has had no opportunity to make arrangements to raise the money by a mortgage to a third person, which it is reasonable to suppose it would have been in his power to do, as the land is worth three times the amount claimed by the defendants; and he does not know the amount that is really due, as he swears.

(265) Had the defendants notified the plaintiff in reasonable time, "We shall expect prompt payment, and in default, sell under the powers," the plaintiff would have had no right to complain; but he was lulled to sleep by the fact that the defendants let the day of payment pass, and to wake him up by an advertisement to sell in fifteen days is an act of gross oppression, rather aggravated than excused by the fact that the plaintiff had commenced an action for an account. Coot, in his work on mortgages, lays it down as settled that every mortgage with a power of sale ought to contain a provision to this effect, and that such is the usual form of deeds to secure the payment of money in England. The doctrine is so reasonable and fair that every lawyer will assent as soon as it is suggested. These powers to sell are inserted as substitutes for a sale under a decree of forecloure, for the ostensible purpose of saving the costs of a bill in equity to foreclose. The decree of sale is always after a reasonable notice of the decree, say three months, in order to give the mortgagor an opportunity to raise the money and prevent a sale. It follows that the power of sale should conform to what would have been the provisions in a decree of sale, and the omission of a provision that notice in writing shall be given to the mortgagor for three months prior to the time that the land is to be advertised for sale shows that the purpose was not to save costs, but to put the mortgagor at the mercy of the mortgagee. It would seem that the omission in the mortgage of a provision for notice to the mortgagor before the land is advertised for sale is not fatal to the validity of the deed, and that the omission can be cured by a notice in fact; in this way the mortgages of the present time may be helped out. It will be expected that after the publication of this opinion every mortgage of land for a loan of money with a power of sale will contain a provision for the notice referred to; otherwise, the omission will be imputed to a purpose to oppress the mortgagor. Usually, mortgages are made with a view to a permanent investment, and the debtor has a right to expect reasonable notice when the cred-
(266) itor wishes to call in his money. If the security be not ample, the creditor may enter and take the rents and profits in part payment of the mortgage debt; but notice must be given, or else the want of it will be ground for an injunction to stay the sale until the proper notice is given, on the same principle that equity interferes and gives relief against penalties and forfeitures, and allows an equity of redemption, to wit, the object was to secure the payment of the money, and provided that object is accomplished, equity does not consider "time as of the essence of the contract," and will interfere to prevent oppression by an unconscientious use of the power which one party has gained over the other at law. The courts are obliged to take notice of the fact that a man pressed for money will submit to any terms that the conscience of

the lender will permit him to impose. Shylock required a pound of his debtor's flesh if he failed to pay "the moneys and usuries" at the day. The deeds in our case authorize a sale by which the debtor is to be turned out of house and home, without an opportunity to raise the money by other means, "on advertising for a reasonable time—*not less than ten days.*" The exercise of such a power without reasonable notice that the defendants demand payment (the security for the debt being ample) is oppression from which the Court will relieve.

I have made no references to the pages in Coot's work on Mortgages, on purpose to induce the members of the bar to read that valuable work; for no mortgage with a power of sale has been called to the notice of any one of the Court in which a provision for notice to the morgagor is required before making advertisement of sale, save myself, in two or three deeds that I drafted for my own use, in which a provision for notice to the mortgagor is made. The propriety and fairness of such a provision were so apparent that I inserted it without having read Coot's book. This shows that the members of the bar have not read that valuable book or devoted much thought to the subject. Coot shows the old mode of foreclosing a mortgage, in the time when Powell (267) on Mortgages was written, by decreeing an absolute title in the mortgagee unless the money due on the mortgage be paid, say in three months after the decree. He then shows how the mode of foreclosing was gradually changed by introducing a decree of sale unless the money as ascertain to be due by an account taken under the direction of the court was paid, say in three months after the decree for sale. And he then shows how the mode of foreclosure by a power of sale was introduced as a substitute for a decree of sale *in order to save costs,* and shows that the power of sale ought to conform to what would have been the decree of sale.

This case falls under the doctrine established in *Kornegay v. Spicer,* 79 N. C., 95; *Whitehead v. Hellen,* 76 N. C., 99; *Mosby v. Hodge,* 76 N. C., 387; *McCorkle v. Brem,* 76 N. C., 407.

PER CURIAM. Affirmed.

Cited: Purnell v. Vaughan, post, 269; *Mebane v. Mebane,* 80 N. C., 38; *Banks v. Parker, ib.,* 160; *Pritchard v. Sanderson,* 84 N. C., 302; *Pender v. Pitman, ib.,* 378; *Nimrock v. Scanlin,* 87 N. C., 121; *Bridgers v. Morris,* 90 N. C., 35; *Manning v. Elliott,* 92 N. C., 53; *Howell v. Pool, ib.,* 453; *Hutaff v. Adrian,* 112 N. C., 260; *Parker v. Beasley,* 116 N. C., 6; *Faison v. Hardy,* 118 N. C., 147; *Jones v. Buxton,* 121 N. C., 286; *Flemming v. Borden,* 127 N. C., 217; *Menzel v. Hinton,* 132 N. C., 667; *McLarty v. Urquhart,* 153 N. C., 341; *Corey v. Hooker,* 171 N. C., 239.

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M. P. PURNELL v. VAUGHAN, BARNES & CO.

Mortgage Deed—Sale Under Power—Injunction.

Where there have been mutual dealings between the parties, several mortgages given, and the balance due from the mortgagor is in dispute: *Held*, that a sale advertised under the power in the mortgage should be enjoined until the balance due is ascertained and declared by a decree of court.

MOTION for an injunction, heard at chambers in HALIFAX on 29 May, 1877, before *Buxton, J.*

The plaintiff executed two mortgage deeds to the defendants conveying certain land and chattel property to secure advancements for agricultural purposes, and alleged that the defendants had failed to comply with their part of the agreement. The defendants instituted proceedings to sell the crops by virtue of a power in the mortgage; and upon affidavit of the plaintiff that he was not indebted to the defendants, there was an order stopping the sale. An action of claim and delivery was then commenced by the defendants, and is still pending; and the defendants also advertised to sell the land, etc., under the power of sale. It was further alleged that the interest claimed by virtue of said agreement was usurious, and that the matters in controversy between the parties were not determined, nor the amount due upon the mortgage ascertained. Wherefore the plaintiffs asked for an order restraining the defendants from selling said property.

It appearing from the complaint and answer, exhibits, and affidavits in the case that there had been mutual dealings between the parties and several mortgages given to secure balances on account, extending over several years, his Honor held that the sale under the mortgage should not be had until the balance due thereon was ascertained and
(269) declared by a decree of court. The motion for the injunction was allowed upon the condition that the plaintiff agree in writing to release all claim for forfeiture and penalty on account of usury, and to pay the balance, if any, which may be found against him, at 6 per cent interest thereon. From this judgment (imposing the condition as above) the plaintiff appealed.

W. H. Day, J. B. Batchelor, and R. B. Peebles for plaintiff.
Conigland & Burton and Mullen & Moore for defendants.

PEARSON, C. J. This case is stronger than *Capehart v. Biggs, ante,* 261. Here we have an unascertained balance due upon the mortgage, to say nothing of the charge of usury; the fact of an action pending for damages by reason of a failure on the part of the defendants to comply

with their part of the agreement; and the fact that the power to sell the land is subject to the conditions precedent, to wit, that the balance due is not met by a sale of the crop and by a sale of the property contained in the chattel mortgage.

The proceeds of the sale of the crop is stopped by an order still pending. The sale of the horses, mules, etc., under the chattel mortgage is stopped by an injunction still pending. In despite of these actions now pending, the defendants seeks to "cut the Gordian knot" by a sale of the land under the power in the mortgage deed. This cannot be allowed.

PER CURIAM. Affirmed.

Cited: S. c., 80 N. C., 46; *s. c.,* 82 N. C., 134; *Pritchard v. Sanderson,* 84 N. C., 303; *Pender v. Pitman, ib.,* 378; *Howell v. Pool,* 92 N. C., 453; *Hutaff v. Adrian,* 112 N. C., 260; *Whitehead v. Hale,* 118 N. C., 603; *Montague v. Bank, ib.,* 286; *Jones v. Buxton,* 121 N. C., 286;

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S. D. WAIT v. JOSEPH WILLIAMS.

Action for Money Paid to Another's Use.

The defendant being indebted to an insurance company of which plaintiff was agent, drew an order on A. for the amount due, and went with plaintiff to A., who paid a part of the order; at defendant's request, the plaintiff thereupon advanced to the company the balance due, and the defendant left the order with him to collect the balance due thereon and pay himself. The plaintiff used due diligence and failed to collect it. Held, that the plaintiff is entitled to recover.

APPEAL at January Special Term, 1877, of WAKE, before *Schenck, J.*

This was an appeal from a judgment rendered by a justice of the peace in favor of the plaintiff. The facts appear in the opinion. His Honor, upon the trial in the court below, gave judgment for the plaintiff, and the defendant appealed.

Busbee & Busbee for plaintiff.
Merrimon, Fuller & Ashe for defendant.

READE, J. The defendant was indebted to an insurance company of which the plaintiff was agent. The defendant drew an order on Jones & Co. for the amount, and the defendant and the plaintiff both together went to Jones & Co. with the order, and Jones & Co. paid a part and could not pay the whole. The plaintiff then, at the request of the defendant, advanced to the insurance company the balance which the defendant owed, and the defendant became indebted to the plaintiff individually,

and not as agent, for the amount so advanced; and the defendant left the said order upon Jones & Co. with the plaintiff, with instructions to hold it and try to collect it out of Jones & Co., and with the proceeds pay himself. The plaintiff used due diligence to collect it, and failed, because Jones & Co. could not pay it.

(271) Upon this state of facts there is not even a plausible reason why the plaintiff should not recover.

PER CURIAM. Affirmed.

FRANCIS & BROTHER v. W. J. & J. G. EDWARDS & CO.

Agent and Principal—Evidence—Pleading—Counterclaim—Nonsuit.

1. An agency must first be established *aliunde* the declarations of the alleged agent before his acts or declarations are admissible in evidence.
2. The *silence* of a party is not an assent to statements made in his presence unless they are made under such circumstances as properly call for a response.
3. Where a declaration is made fairly susceptible of two constructions, and nothing else appears to make one construction more probable than the other, it is not evidence of either alternative.
4. A counterclaim is a distinct and independent cause for action, and when properly stated as such with a prayer for relief, the defendant becomes, in respect to the matter stated by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant.
5. Where a counterclaim is duly pleaded, neither party has the right to go out of court before a complete determination of all the matters in controversy, without or against the consent of the other. Therefore, where in such case the court below permitted the plaintiff to take a nonsuit: *Held*, to be error.

APPEAL at Fall Term, 1876, of NORTHAMPTON, from *Watts, J.*

This action was brought to recover $394.56, balance due, alleged (272) to have been furnished the defendants at their request, and paid on a certain draft drawn by them. The defendants denied that this draft was drawn by their authority or for their benefit, and alleged that one J. M. Edwards, without their knowledge, had shipped five bales of cotton to plaintiffs; and after learning that said shipment had been made, they wrote to the plaintiffs to sell the same and remit proceeds to them, but the plaintiffs failed so to do; and that they never had transacted business under the firm name of W. J. & J. G. Edwards & Co. Wherefore they demanded judgment for amount of proceeds of said sale, which was set up as a counterclaim.

The testimony of the witnesses for the plaintiffs was as follows: W. J. Rogers testified that from about 1867 to 1873 he was engaged in the commission business in the city of Norfolk, and during that time the defendants were cultivating together a farm in Southampton County, Va., and had frequent dealings with them up to the time he left Norfolk, in 1872, and always understood that the firm was composed of the defendants and no one else; that he understood one J. M. Edwards lived on the farm and attended to it for the defendants, and that while doing business as aforesaid the defendants instructed him not to pay any drafts for money drawn by said J. M. Edwards, out of their funds, and that W. S. Francis, one of the plaintiffs, being a clerk of witness, was directed to make a note of this instruction on the books of the firm of which witness was a member. J. T. Atkins testified that before this action was commenced he was working on the gin at the home place of W. J. Edwards, in North Carolina, when J. M. Edwards came there under the influence of liquor and told W. J. Edwards he must go to the house and settle with the hands; that the (J. M. E.) was interested as well as W. J. Edwards; and that W. J. did go to the house.

The plaintiffs then offered to prove that a draft—"No. 269. (273) Norfolk, Va., 27 February, 1873. The Exchange National Bank, of Norfolk, Va., pay to W. J. & J. G. Edwards & Co., or bearer, $500. Francis & Brother"—was delivered to J. M. Edwards, and that the amount thereof was paid to him by the drawee. The defendants objected to this evidence on the grounds: (1) it was not responsive to the allegation, inasmuch as it was not alleged in the complaint either that the money was furnished to J. M. Edwards or that he was a copartner of defendants, and (2) that the plaintiffs had introduced no evidence to connect J. M. Edwards with the defendants, either as a partner or as an agent authorized to bind them by his contract.

The court, being of opinion with the defendants, excluded this evidence and the plaintiffs asked to be allowed to submit to a nonsuit. To this the defendants also objected, and claimed the right to introduce evidence to establish their counterclaim. The court being of opinion with the plaintiffs on this point, directed a judgment of nonsuit to be entered; and thereupon the plaintiffs appealed from the ruling of his Honor excluding said evidence, and the defendants appealed from the judgment of nonsuit.

D. A. Barnes and J. B. Batchelor for plaintiffs.
W. W. Peebles and R. B. Peebles for defendants.

BYNUM, J. Before evidence could be received that J. M. Edwards had collected the money on the check of Francis & Brother as the agent of the firm of W. J. & J. G. Edwards & Co., the agency had first to be estab-

lished *aliunde* the declarations of J. M. Edwards himself; and it was incumbent on the judge to determine whether there was a *prima facie* case of agency established, so as to render the acts and declarations of such person the acts and declaration of those whose agent he is alleged to have been. *Williams v. Williamson,* 28 N. C., 281; *Munroe v.* (274) *Stutts,* 31 N. C., 49. No such case of agency was established in this case, and for several reasons:

1. The only partnership proved was by the evidence of Rogers, and that was between W. J. & J. G. Edwards in relation to the farm *in Southampton County, Virginia;* whereas the only evidence offered to connect J. M. Edwards with this firm was that of Atkins, but this evidence related only to the *North Carolina* farm, which belonged to W. J. Edwards. Therefore, giving full force to the declarations of J. M. in the presence of W. J. Edwards and taking the silence of the latter in respect thereto as an admission of all that was alleged by the declarant, the whole amount of it would be that J. M. and W. J. Edwards were working the North Carolina farm as partners, or in some other connection. But as the action is not against this firm, but another— W. J. & J. G. Edwards & Co.—this evidence does not establish or tend to establish the alleged agency.

2. The silence of a party is not an assent to statements made in his presence unless the statements are made under such circumstances as properly call for a response. W. J. Edwards was under no obligation to admit the loose and accidental statements of an intoxicated man. They were made for no such purpose as to call for a denial, or to fix the two as partners by his silence. They accordingly seemed to have attracted little or no attention from the person addressed, and upon no rule of evidence do such declarations thus made tend to establish a partnership, even between J. M. and W. J. Edwards. Certainly they do not touch or affect J. G. Edwards, or the firm of which he was a member.

3. The language of J. M. Edwards was, "that he (W. J. Edwards) must go to the house and settle with the hands; that he was interested in it as well as he (J. M. Edwards)." How interested? One may be interested as a partner, but that is not the only way. If W. J. Edwards (275) had been an employee or overseer, getting a part of the crop as wages, he would have been interested in seeing that the hands were paid and retained to finish the crop as much as if he had been a partner. Where a declaration is made which is fairly susceptible of two constructions, and nothing else appearing to make one construction more probable than the other, it is not evidence to establish either alternative. If A. is charged with an assault upon B., and a witness testifies that A. made the assault either upon B. *or* C., such testimony by itself is inadmissible to establish the guilt of A. If J. M. Edwards had been sober

and had made the specific statement in the presence of W. J. Edwards, that he was the agent or the partner of the firm of W. J. & J. G. Edwards & Co., the silence of the latter would have been evidence of the truth of the statement. The evidence relating to the payment of the plaintiffs' check was, therefore, inadmissible to charge the defendants, and was properly ruled out.

Failing to make out their case, the plaintiffs next moved that they be allowed to take a nonsuit and go out of court. To this the defendants objected, upon the ground that in their answer to the complaint they had set up a counterclaim against the plaintiffs for the price of five bales of cotton belonging to them, which had been sold by the plaintiffs for $206.56, the money for which had not been paid over to the defendants. His Honor gave judgment of nonsuit, and in this there was error.

A counterclaim is a distinct and independent cause of action, and when properly stated as such, with a prayer for relief, the defendant becomes in respect to the matters alleged by him an actor, and there are then really two simultaneous actions pending between the same parties, wherein each is at the same time both a plaintiff and a defendant. The defendant is not obliged to set up his counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim, it becomes a cross-action, and both opposing claims must be adjudicated. The plaintiff then has the right to the (276) determination of the Court of all matters thus brought in issue, and mutually the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy, without or against the consent of the other.

This is the proper construction of the provisions of The Code in relation to counterclaim. C. C. P., secs. 100, 104. Any other construction would defeat or impair these equitable and economical provisions of it, by which all matters in controversy between the parties to a suit may be determined in the same action. Pomeroy on Remedies, secs. 734, 800; *Holzbaur v. Heine,* 37 Mo., 443; *Woodruff v. Garner,* 27 Ind., 4; *Sloan v. McDowell,* 71 N. C., 356; *Harris v. Burwell,* 65 N. C., 584; *Bitting v. Thaxton,* 72 N. C., 541; *Walsh v. Hall,* 66 N. C., 233.

There was error in allowing the judgment of nonsuit.

There were two appeals in this case, and but one record sent up. The plaintiffs appealed from the ruling of the court excluding evidence of the check and its payment to J. M. Edwards. We affirm that judgment of the court. The defendants appealed from the order of the court allowing the nonsuit. There was error in that, and for it the judgment must be reversed and a *venire de novo* awarded. This opinion applies to both appeals, and in each judgment is given against the plaintiffs for costs.

As the case goes back for another trial, the plaintiffs should be allowed to reply to the plea of counterclaim in order that the question may be tried upon its merits. The omission to reply was perhaps inadvertent.

PER CURIAM. *Venire de novo.*

Cited: Gilbert v. James, 86 N. C., 247; *Raisin v. Thomas,* 88 N. C., 150; *Johnson v. Prairie,* 91 N. C., 164; *Whedbee v. Leggett,* 92 N. C., 470; *Bank v. Stewart,* 93 N. C., 404; *Tobacco Co. v. McElwee,* 96 N. C., 74; *Asher v. Reizenstein,* 105 N. C., 217; *Taylor v. Hunt,* 118 N. C., 173; *Daniel v. R. R.,* 136 N. C., 521; *Brittain v. Westall,* 137 N. C., 35; *Jackson v. Tel. Co.,* 139 N. C., 351; *S. v. Jackson,* 150 N. C., 834; *McCormick v. Williams,* 152 N. C., 640; *Powell v. Lumber Co.,* 168 N. C., 636.

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CHARLOTTE W. NEWSOM v. RUSSELL & WHEELER.

Assignee of Note, Action by—Practice—Fraud.

1. It is no defense to an action by the assignee of a note against the maker to show that the assignment was made with intent to defraud the creditors of the assignor.
2. In such case, if the creditors of the assignor have any rights in the premises, it is their duty to interpose in such action for the purpose of asserting them.

APPEAL at Spring Term, 1877, of DAVIDSON, from *Kerr, J.*

The plaintiff alleged that the defendants executed their promissory notes to Newsom & Co. for $500, and that the same had been assigned to her for value received, and demanded judgment for the amount. The defendants alleged that she was not the *bona fide* assignee, nor was she the real party in interest; and the assignment was made to defraud the creditors of Newsom & Co., who, upon their own petition, were declared bankrupts a few days after the alleged assignment; and that one Stewart, their assignee in bankruptcy, was entitled to the beneficial interest in the notes.

The issue submitted to the jury was whether the plaintiff was the real party in interest. The evidence of the plaintiff, who testified in her own behalf, was that the notes belonged to her; she purchased them from her sons, Newsom & Co., and paid for them in money and land at a fair valuation, and held the same in her own right. The defendants then proposed to show that the transfer was made to plaintiff for the purpose of defrauding the creditors of Newsom & Co. This evidence his Honor ruled out, on the ground that it was immaterial as between the parties to this action, and that neither the creditors nor the assignee had made

themselves parties thereto. The jury rendered a verdict for plain- (278)
tiff. Judgment. Appeal by defendants.

Battle & Mordecai for plaintiff.
Shipp & Bailey for defendants.

BYNUM, J. A voluntary assignment of a promisory note without consideration and for the benefit of the assignor has no legal effect except to constitute an agency to collect, and such assignee, not being the real party in interest, cannot bring a suit on such note in his own name. *Abrams v. Cureton,* 74 N. C., 523. The case before us differs essentially from *Abrams v. Cureton,* because in this the assignment is for a valuable consideration and is not for the benefit of the assignors. As between the assignors and the plaintiff, both the legal and equitable title passed; and the money when collected will be unaffected by any claim or trust in favor of the assignors. They are estopped, and the notes as to them are the absolute property of the plaintiff, whether with or without consideration in fact.

To disprove that the plaintiff was the real party in interest, the defendant alleged and offered to show that the assignment was either without consideration or in fraud of the rights of the creditors, having been made only a few days before the assignors had been adjudicated bankrupts. The evidence offered for this purpose was ruled out by the court as immaterial. This was not error. In an action by the assignee of a note against the maker, it is no defense to show that the assignment was made with intent to defraud the creditors of the assignor. As the assignor participates in the fraud, he cannot repudiate his transfer, and has parted with all his interest in the note. It is not the duty of the maker of the note to see to the application of the money, and it is even less his duty to fight the battle of the creditors of the bankrupt. What interest is it to him if he is absolved from further liability by payment of his debt upon a judgment regularly obtained against him? (279)

If the creditors of the bankrupt had any claim upon these notes which they could vindicate, it was their duty themselves or by the assignee in bankrubtcy to interpose in this action. It may be that they have no claim upon these notes, or, if they have a claim, that they will never assert it; and thus if the defendants are allowed to show that the assignment was fraudulent as to creditors so as to defeat this action, the result might be that the defendants would altogether escape the payment of a debt they acknowledge to be due and unpaid; for the decision of the question, fraud or no fraud, in this action where neither the creditors nor the assignee of the bankrupt are parties, would not be conclusive or even evidence in an action by the assignee in bankruptcy against the plaintiff in this action for the notes or their value.

We have been able to find but one decision directly in point, and that is *Roher v. Turrill,* 4 Minn., 407, where it is expressly held that it is no defense to show that the assignment was made with intent to defraud creditors. Pomeroy on Remedies, sec. 131.

PER CURIAM. No error.

Cited: Brown v. Harding, 170 N. C., 262; *s. c.,* 171 N. C., 689.

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JOHN G. JONES v. THE COMMISSIONERS OF GRANVILLE ET ALS.

Practice—Title to Public Office—Injunction.

An injunction is not the appropriate and specific mode of trying title to a public office.

MOTION for an injunction, heard at Spring Term, 1877, of GRANVILLE, before *Buxton, J.*

This was a motion by the plaintiff for an order to prevent the defendant commissioners from inducting into office their codefendant, Manly B. Jones, who was reëlected county treasurer in 1876 and was notified to appear and give bond, which he failed to do; and thereupon the defendants declared that there was a vacancy, and appointed the plaintiff to fill the same. The said Manly B. Jones, persisting in his claim to held over until the new board-elect were allowed to qualify (see *Moore v. Jones,* 76 N. C., 182, 188, 189), has refused to surrender to the plaintiff the books, etc., of said office. The plaintiff was duly qualified by executing an official bond and taking the oath of office. His Honor refused the motion, and the plaintiff appealed.

J. B. Batchelor for plaintiff.
Merrimon, Fuller & Ashe, and T. B. Venable for defendants.

FAIRCLOTH, J. The plaintiff alleges that he is the treasurer of Granville County, and that he is "in said office and in the full, perfect, and indisputable enjoyment thereof." He also alleges that he believes that it is the "intention and purpose" of the defendant, the board of commissioners, to qualify and induct one Manly B. Jones into said office, and that it is his "intention and purpose" thereafter to claim that he

(281) is entitled to exercise and discharge the duties of said office.

The defendant M. B. Jones avers in his answer that he is and has been for several years the legal treasurer of said county, and the plaintiff prays for an injunction restraining the defendants from qualifying and inducing said M. B. Jones into said office as aforesaid.

We have thus stated the position of the parties, not for the purpose of expressing any opinion on the principal question discussed in this Court, but merely to show the actual state of the pleadings as now constituted. It is manifest that the intention of the plaintiff is to have the disputed title to said office decided, and yet he fails to allege a state of facts to justify an investigation of that question. He fails to allege that he has been disturbed in any manner in his office, or that he has been deprived of the emoluments thereof. On the contrary, he avers that he is in the full, perfect, and undisputed enjoyment of his office. We are, therefore, of opinion that if the alleged facts would justify the investigation, still an injunction is not the appropriate and specific mode of trying title to a public office. *Patterson v. Hubbs,* 65 N. C., 119.

The plaintiff does say he believes the defendant M. B. Jones intends to claim said office, but he does not allege any act or threat on the defendant's part indicating such a purpose, nor any other fact or circumstance from which the Court could determine whether his belief is well founded, or whether he is unnecessarily alarmed. The idea of removing a cloud from the plaintiff's title is not indicated or suggested in his complaint, and is inconsistent with its positive averments.

PER CURIAM. Affirmed.

Cited: Sneed v. Bullock, post, 282.

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(282)

R. G. SNEED v. B. F. BULLOCK.

Practice—Title to Public Office—Motion.

Title to a public office cannot be tried by a motion.

APPEAL from an order made at Spring Term, 1877, of GRANVILLE, before *Buxton, J.*

The facts appear in the opinion.

J. B. Batchelor for plaintiff.
Merrimon, Fuller & Ashe, and T. B. Venable for defendant.

FAIRCLOTH, J. Here we have rather a novel proceeding for trying title to an office, which is the only object of the plaintiff's appeal. During a session of the Superior Court the defendant presents his credentials from the board of county commissioners, showing that he has been qualified and inducted into the office of sheriff, so far as said board had authority to do so. The judge, after full consideration, directed the clerk to deliver all his future process and precepts to the defendant.

The plaintiff, who had been discharging the duties of said office for some time and still claimed the right to do so, resisted and appealed from said order to this Court. No action has been instituted, no complaint or answer filed, and no trial below, except as above stated.

We have held in *Jones v. Comrs. of Granville, ante,* 280, that title to an office cannot be tried by an injunction, and we now hold that it cannot be tried by motion. It has been several times declared that the appropriate and precise mode of trying title to an office is by an (283) action in the nature of a *quo warranto. Patterson v. Hubbs,* 65 N. C., 119; *Brown v. Turner,* 70 N. C., 93.

PER CURIAM. Appeal dismissed.

STATE OF NORTH CAROLINA ON RELATION OF JOHN N. BUNTING v. WESTON R. GALES.

Criminal Court of Wake—Clerk—Office and Officer—Power of General Assembly.

1. The act of the General Accembly (Laws 1876-77, ch. 271) establishing a criminal court for the county of Wake is constitutional.
2. The Legislature has the constitutional power to diminish the emoluments of an office by the transfer of a portion of its duties to another office, and in such case the incumbent must submit. He takes the office subject to the power of the Legislature to make such changes as the public good may require.

QUO WARRANTO, tried at Spring Term, 1877, of WAKE, before *Buxton, J.*

This action was instituted by the relator, John N. Bunting, clerk of the Superior Court of Wake County, to test the right of the defendant, Weston R. Gales, to hold the office of clerk of the criminal court of Wake County, which court was created under an act of the General Assembly. (Laws 1876-77, ch. 271.) The plaintiff claimed that under the amended Constitution, Art. IV, sec. 33, the General Assembly had no right during his term of office to deprive him as clerk of Wake Superior Court (284) of the fees and emoluments of his office by transferring the entire criminal business to the criminal court and appointing the defendant as clerk thereof, but that the plaintiff was entitled to perform the functions and receive the emoluments of clerk of the criminal court until the expiration of his term. The defendant answered and relied upon the amendment to the Constitution conferring upon the General Assembly power to create additional courts, etc. (Constitution, Art. IV, sec. 12.) The defendant also alleged that on account of the press of

criminal business in the Superior Court of Wake County, there was an urgent public necessity for the establishment of the criminal court. The plaintiff filed a demurrer to the answer. His Honor gave judgment overruling the demurrer and dismissing the action, and the plaintiff appealed.

E. G. Haywood, D. G. Fowle, Busbee & Busbee, Walter Clark, G. H. Snow, and T. M. Argo for plaintiff.

W. N. H. Smith and Battle & Mordecai for defendant.

RODMAN, J. It will not be necessary for the decision of this case to review the judgment in *Hoke v. Henderson,* 15 N. C., 1. In this case the Legislature has not put another man in the office of the plaintiff. It has merely created another court and transferred to it a portion of the jurisdiction of the Superior Court of Wake, of which plaintiff is clerk, and appointed the defendant clerk of the new court, thereby incidentally depriving the plaintiff of certain fees which, but for the establishment of such new court with a separate clerk, the plaintiff would have received. It has done this under a clause of the Constitution which authorizes the Legislature to establish such courts whenever the public welfare requires it.

It is admitted that a lucrative public office is private property, (285) of which no one can be divested except by the law of the land; and it may also be admitted, so far as this case is concerned, that after a law has once fixed the tenure of the office, a subsequent act of the Legislature cannot alter the tenure to the detriment of persons then in office, *e. g.,* by converting it from an office during good behavior, or for four years, into an office for two years. This was the decision in *Hoke v. Henderson,* 15 N. C., 1, and in *Taylor v. Stanley,* 15 N. C., 31.

It may also be admitted that the Legislature cannot select a particular officer, and by a special law applicable to him alone deprive him of any material part of his duties and emoluments. This partakes of the nature of a forfeiture without a trial. This was the case of *King v. Hunter,* 65 N. C., 603. Neither can the Legislature take away the entire salary of an officer. *Cotton v. Ellis,* 52 N. C., 545.

But a public office is property of a peculiar nature. It is said in the opinion of the Court in *Hoke v. Henderson* (page 20) that if the Legislature should increase the duties and responsibilities, or diminish the emoluments of the office, the officer must submit. Clearly, any other rule would subordinate the public welfare to the interest of the office. He takes subject to the power of the Legislature to change his duties and emoluments as the public good may require.

When the present plaintiff qualified as clerk, the Constitution of 1868 was in force, and by section 19 of Article IV the General Assembly was required to provide for the establishment of special courts for the trial of misdemeanors in cities and towns when the same was necessary. He took his office, therefore, with a knowledge that the Legislature might establish a criminal court substantially the same which they did establish by act of 1776-77, ch. 271, under the amended Constitution, and of which they made the defendant clerk.

(286) Having accepted the office on those conditions, he has not been injured, and has no right to complain. His case is in principle the same with *Head v. University,* 19 Wall., 526, where the plaintiff was appointed a professor in the University of Missouri, and at the same time the curators, who were the electing body, passed a resolution, "That the president and professors just elected shall hold office for six years, from 5 July, 1856, *subject to law.*" Afterwards the Legislature by an act vacated the offices of all the professors and provided for an election of others. The phrase "subject to law" was held to mean, subject not only to any law then existing, but also to any which the Legislature might afterwards pass, changing the terms of the offices. In the plaintiff's case, although that particular phrase, or any equivalent, was not expressed in his certificate of election, the idea that his duties and emoluments might be diminished by the establishment of a criminal court when the Legislature should think such a court proper, was necessarily implied both from the Constitution under which he was elected and from that since adopted. If the claim of the plaintiff be well founded, the Legislature could make no change in the laws, no matter how urgently it might be required for the public welfare, which incidentally diminished the emoluments of any officer. It could not consolidate two counties, or divide a single one, or alter the jurisdiction of the courts. These things have been repeatedly done, and the acts have never been questioned upon the idea that they took away the vested property of the county officers. The act on one Legislature cannot impair the legislative power of succeeding legislatures, except by some act which within the meaning of the Constitution of the United States amounts to a contract. If an act prescribing the duties and compensation of a public officer can in any case be held to be a contract with every such officer who may be elected while the act remains in force, it is a contract subject to the general law, and, therefore containing within itself a provision that such duties and

(287) compensation may be changed by any general law whenever the Legislature shall think a change required by the public good. This was said in substance by *Pearson, C. J.,* in *Cotten v. Ellis,* 52 N. C., 545. The case of *Conner v. New York,* 1 Seld., 285, and other cases

cited for defendant, go farther than there is any necessity for us to do for the decision of this case, and we express no opinion as to whether they can be sustained to their full extent or not.

PER CURIAM. Affirmed.

Cited: *Prairie v. Worth,* 78 N. C., 173; *Ewart v. Jones,* 116 N. C., 577; *Wood v. Bellamy,* 120 N. C., 217; *Caldwell v. Wilson,* 121 N. C., 469; *Day's case,* 124 N. C., 366; *Bryan v. Patrick, ib.,* 663; *Wilson v. Jordan, ib.,* 709; *Greene v. Owen,* 125 N. C., 215; *White v. Murray,* 126 N. C., 156, 158; *White v. Auditor, ib.,* 576; *Mial v. Ellington,* 134 N. C., 163; *Fortune v. Comrs.,* 140 N. C., 331; *Comrs. v. Stedman,* 141 N. C., 451; *Mills v. Deaton,* 170 N. C., 388.

JAMES A. CLAYWELL, ADMINISTRATOR, v. W. S. SUDDERTH, EXECUTOR.

Jurisdiction—Practice.

Where an action was pending in one county in a court having jurisdiction, and another action between the same parties for the same cause of action was afterwards instituted in another county; *Held,* that the latter was properly dismissed.

APPEAL from an order of the clerk of BURKE, heard at chambers, on 1 June, 1877, before *Furches, J.*

The defendant's counsel moved to dismiss this action upon the ground that there was a similar proceeding pending in Caldwell Superior Court between the same parties, involving the same subject-matters, and in which various orders of reference, reports, and decrees have been made. This motion was overruled by the clerk, and the defendant required to render an account, etc. Thereupon the defendant appealed to the judge of the district, who reversed the decision of the clerk, allowed the motion of the defendant, and dismissed the action. From which (288) judgment the plaintiff appealed.

J. M. McCorkle and A. W. Haywood for plaintiff.
A. C. Avery for defendant.

READE, J. The pendency of the action between the same parties for the same cause in another county, and in another court having jurisdiction, is a good defense to this action, as it avoids multiplicity of suits.

PER CURIAM. Affirmed.

Cited: Gray v. R. R., post, 299; *Williams v. Neville,* 108 N. C., 563; *McNeill v. Currie,* 117 N. C., 347.

(289)

*THE COMMISSIONERS OF CRAVEN v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY ET ALS.

Corporation—Power to Issue Bonds—Usury—Statute of Another State—Rate of Interest.

1. A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, *i. e.*, to make and issue its bonds.
2. In the absence of special legislation, corporations are affected by the usury law to the same extent as natural persons.
3. Where bonds were issured by defendant corporation to certain of its creditors at a discount in settlement of a previous indebtedness, which bonds bore interest at the rate of 8 per cent: *Held*, that under the act of 1866, ch. 24, the transaction was usurious.
4. The statute of the State of New York, forbidding corporations to plead usury as a defense, cannot govern a corporation of this State sued in this State, although the bonds in question were delivered in New York and made payable there.
5. Where such bonds express a rate of interest illegal in this State, and also in New York, and were issued in payment of a precedent debt and secured by a mortgage on the corporation property they could legally bear no greater rate of interest than that allowed in this State.
6. Neither a natural person nor a corporation can legaly sell its bonds, bearing the highest legal rate of interest, at a discount for the purpose of borrowing money. Such a sale is in effect a loan, and is usurious.

MOTION to dissolve an injunction, heard at Spring Term, 1877, of CRAVEN, before *Moore, J.*

The demand of the plaintiffs in the original action was that certain bonds issued by defendant company, some of which are held by the other defendants, John L. Morehead and Julius A. Gray, should be (290) declared void; and that the officers of the company be restrained from paying interest on said bonds. An injunction was accordingly granted, which the defendants by this motion seek to dissolve. The case is fully stated by *Mr. Justice Rodman* in delivering the opinion of this Court. His Honor allowed the motion, and the plaintiffs appealed.

Green & Stevenson, W. N. H. Smith, and D. G. Fowle for plaintiffs.

Jones & Johnston, J. T. Morehead, and Merrimon, Fuller & Ashe for defendants.

RODMAN, J. The plaintiffs are stockholders in the Atlantic and North Carolina Railroad Company. On 1 January, 1868, the company made

*FAIRCLOTH, J., being a stockholder in defendant company, did not sit on the hearing of this case.

400 bonds of $500 each, with coupons attached for interest at the rate of 8 per cent per annum, payable semiannually. The principal was due and payable on 1 January, 1888. The bonds and coupons were made payable in the city of New York, and recited that they were secured by a mortgage on the railroad and were issued by authority of an act of Assembly passed at the session of 1854-55. Shortly thereafter, before the bonds were issued, the company made a mortgage or deed in trust of all of its property to certain trustees to secure the payment of said bonds. The plaintiffs say that the company delivered to the defendants John L. Morehead and Julius Gray bonds of the par value of $100,000 in payment of a debt from the company to them of $76,899.13, and that the company sold the rest of the bonds at the rate of $80 for $100 of the *bonds*.

The plaintiffs say that said bonds were not authorized by the act referred to, and were void, and that those issued to Morehead and Gray were usurious; that the company has regularly paid to those defendants the specified interest upon the bonds delivered to them up to the date (not stated, but we suppose up to 1 January, 1877), and that (291) the excess over the legal interest so paid ought to be credited as a payment on the principal of those bonds. They further charge that the company is about to pay a further sum by way of interest on those bonds, and they ask that the company be restrained from such payment and that the bonds be declared void.

Upon this complaint, *Seymour, J.*, ordered an injunction as prayed for.

The defendants Morehead and Gray filed a joint answer, and thereupon moved before *Moore, J.*, at Spring Term, 1877, of Craven Superior Court, to dissolve the injunction so far as it prohibited payment to them, and the judge granted their motion and dissolved the injunction. From this judgment the plaintiffs appealed.

The defendants in the answer admit the facts alleged by the plaintiffs, except those touching the acquisition of bonds of the company by them. As to this (in article 2) they say that Morehead is the owner of twenty-five and Gray of thirty-three of the bonds of the company, which they purchased before maturity for value and without notice of any defect or irregularity. In the next article they say that as administrators of John M. Morehead, who died in 1866, they recovered one or more judgments against the company for work done by their intestate under a contract with the company in the construction of its road, and upon these judgments they levied execution on the property of the company, and were proceeding to sell it when the company paid to them in New York 188 of its bonds aforesaid, of the par value of $94,000, which they accepted in satisfaction and discharge of said debts. They do not state with pre-

cision what was the amount of the indebtedness of the company to them when the bonds were delivered in discharge of it, nor even when the bonds were delivered. It may be inferred, however, from what they say, that they took the 188 bonds at or about 80 cents on their face
(292) value. Neither is it clear whether or not the 58 bonds which in article 2 they say they bought for value are a part of the 188 bonds which they received as administrators. It will not prejudice them in the present stage of the case if we assume that they were. If a pleading is ambiguous, it must be taken most strongly against the pleader. And if the fact should be otherwise, they can amend their answer by stating distinctly when and for what consideration they respectively purchased those 58 bonds.

In the present stage of the case we assume the facts set forth in the answer as true.

The question before us is whether the injunction as respects the defendants Morehead and Gray was rightly dissolved or should have been continued until the hearing. Our opinion is confined to that precise question, and does not extend to holders of any of the bonds of the company other than those which were delivered to the defendants as administrators of John M. Morehead and in discharge of the indebtedness of the company to him.

1. The bonds are not void by reason of a want of power in the company to issue them. A railroad corporation must have power to contract debts, and every corporation which has that power must also have power to acknowledge its indebtedness under its corporate seal, that is, to make its bonds. It is immaterial whether the company had power to make its bonds by virtue of its general corporate powers, or of Laws 1854-55, ch. 232. We think that for a proper purpose it had it under both.

2. The much more serious question is, whether the bonds made to the administrators of John M. Morehead under the circumstances were usurious.

In the absence of special legislation, corporations are embraced in the usury law just as natural persons are, and we know of no special
(293) legislation affecting this case in this respect.

Usury may be defined to be the taking, or stipulating for, more than the legal rate of interest for the loan or forbearance of money with intent to violate or evade the law. 2 Parsons Notes and Bills, 400.

The act respecting usury which was in force in North Carolina on 1 January, 1868, at or about which date we may assume that the bonds in question were delivered, was Laws 1866, ch. 24 (Bat. Rev., ch. 114). That act says that the legal rate of interest shall be 6 per cent per annum for such time as interest may accrue, and no more: *Provided,* that any person may for the loan of money, but upon no other account, take

interest at a rate so great as 8 per cent, if both the consideration and rate of interest shall be set forth in an obligation signed, etc. And if any person shall agree to take a greater rate of interest than 6 per cent per annum where no rate of interest is named in the obligation, or a greater rate than 8 per cent where the rate is named, the interest shall not be recoverable at law, etc.

In *Coble v. Shoffner,* 75 N. C., 42, this act received a construction, and it was held that upon a bond not expressed to be for a loan of money, but in which 8 per cent is reserved, the obligee is entitled to recover at the rate of 6 per cent only.

In the present case the bonds were not given upon a loan of money, but for the forbearance of a precedent debt. It was usury, therefore, to agree to take a greater interest than at the rate of 6 per cent upon the sum forborne, and no greater rate can be collected.

The usury which the company agreed to pay consisted not alone in the excess of 8 per cent over 6 per cent on the actual debt, but also in the difference between the actual debt (which we may assume for the present purpose to have been $77,000) and the $94,000 in bonds given for its forbearance, being $17,000, for which no consideration was paid except the forbearance, and, also, the whole interest on this (294) $17,000 of bonds.

Our conclusion that the contract was usurious supposes that the law of North Carolina governs it.

3. It is said, however, for the defendants that these bonds were delivered in New York, and are made payable there, and that consequently they are governed by the law of New York in respect to the rate of interest which they may legally be made to bear, and we are referred to a statute of New York by which corporations are forbidden to plead usury as a defense. It will be admitted that the statutes of the State can have no extraterritorial operation. The act cited cannot and does not profess to control corporations other than those created by the law of New York; or if it be regarded as an act regulating the practice of the courts of New York, it might perhaps apply to corporations created by a foreign State when sued in the courts of that State. It cannot govern a corporation of this State sued in this State. *R. R. v. Bank,* 12 Wall., 226, was cited as establishing a different view, but on examination it will be found not to do so. The plaintiff corporation in that case was authorized to receive, and the defendant corporation to pay, more than the ordinary rate of interest by the laws of their respective States.

It is admitted that a debtor living in one State may give to a creditor in another State a bond or note bearing such rate of interest as is legal in either; and if no rate of interest be expressed in the note, the rate in use at the place of payment will be presumed to have been intended. (2

Parsons Bills and Notes, 376.) But in the present case the bonds expressed a rate of interest not legal in North Carolina as to such bonds, and not legal in New York, except by virtue of the rule of pleading established by the act of 6 April, 1850, which, as we have said, was confined to New York corporations, or to courts in New York.
(295) These bonds were clearly a North Carolina contract; the precedent debt which was the consideration was incurred and payable in North Carolina; both parties resided in North Carolina, and the bonds were secured by a mortgage on real property in North Carolina, which could only be enforced through the courts of this State. In our opinion, the bonds could legally bear no greater rate of interest than that allowed in North Carolina.

4. It is also contended for defendants that the bonds in question should not be regarded as having been taken in payment of the precedent debt, but as having been sold to them, and the case from 12 Wallace, *supra,* is cited in support of this view. In that case the Junction Railroad Company was authorized by statute to borrow money, *or to sell its bonds* at any rate of interest; and it was held that whether the transaction there in question was a loan of money on the security of the bonds, or a sale of the bonds, was a question of fact, and as such it was held to have been a sale. In our case, however, there was a precedent debt which the company was authorized by its general powers and by Laws 1854-55, ch. 232, page 298, to borrow money to pay. But there is no special authority given to the company to sell its bonds, beyond what belongs to all persons; and it seems to be settled that a natural person cannot legally sell his bonds bearing the highest legal interest at a discount as a means of borrowing money, and that such a sale is in substance a loan and is usurious.

It results from the above that in our opinion the agreement of the company to pay interest beyond 6 per cent on the actual sum forborne, which was the debt to the intestate of the defendants at the date when the bonds were delivered to them, was illegal as to excess, whether such excess was put in the shape of bonds beyond the principal debt or in that of an excess of interest on the amount of bonds which represented the real debt. For the company to continue to pay such an excess
(296) of interest is an injury to the stockholders which they are entitled to have enjoined.

5. Whether the plaintiffs are entitled to have the bonds given by the company in excess of the real debt to the intestate of the defendants canceled and the illegal excess of interest heretofore paid returned to it, or credited on the principal, or future accruing interest on the bonds, are questions not presented in this stage of the case, and which it would be premature to decide. These will properly arise when the case comes on

for a final hearing, and connected with them will be the question how far the statute of limitations will bar a recovery by the company.

Judgment below reversed, and the injunction against the payment of any further interest on the bonds in the hands of the defendants is continued to the hearing.

PER CURIAM. Judgment accordingly.

Cited: Comrs. v. R. R., post, 297, 299; *Webb v. Bishop,* 101 N. C., 102; *Meroney v. Loan Assn.,* 116 N. C., 895.

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*THE COMMISSIONERS OF CRAVEN v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY ET ALS.

This Court will not decide a question of great importance unless in a case where such decision is necessary to protect some substantial right. Therefore, where a conflicting question of jurisdiction arose between the Superior Courts of two counties in the matter of the appointment of a receiver for the defendant corporation, who, pending the controversy, was duly elected president thereof: *Held,* that this Court, without expressing an opinion, should affirm the order below appealed from.

MOTION in the cause, heard at Spring Term, 1877, of CRAVEN, before *Moore, J.*

In an action pending in Guilford an order was made appointing John Hughes receiver of defendant company, and the property thereof was delivered over to him. This motion was made by the plaintiffs to remove said receiver upon the ground that Craven Superior Court having first taken jurisdiction of the subject-matter, had the right to appoint the receiver, and was entitled to unobstructed control thereof as against any coördinate tribunal. Upon the hearing the motion was refused, and the plaintiffs appealed.

W. N. H. Smith and D. G. Fowle for plaintiffs.

Jones & Johnston and Merrimon, Fuller & Ashe and J. T. Morehead for defendants.

RODMAN, J. During the pendency of this action (the decision in which is reported in this volume, *ante,* 289) the plaintiffs moved in the Superior Court of Craven for an order removing John Hughes, who had been appointed receiver of the railroad company by the judge of the

*FAIRCLOTH, J., being a stockholder in defendant company, did not sit on the hearing of this case.

Superior Court of Guilford in an action begun in said court by Julius Gray, and for the appointment of another receiver in the place
(298) of Hughes. The motion was refused, and the plaintiffs appealed to this Court.

The question whether the Superior Court of Guilford had jurisdiction to appoint a receiver in the action begun by Gray, and had a legal ground for doing so, does not directly arise in this case, and need not be considered here. Whether, after such action by the Superior Court of Guilford, supposing it to have been within its jurisdiction, the Superior Court of Craven could remove the receiver so appointed and appoint another in his place by virtue of the jurisdiction previously acquired over the subject-matter by the institution of this suit, is a question of very great importance, and which we are unwilling to decide unless in a case in which a decision is necessary to protect some substantial right. It is not necessary in this case, as it appears that after the appointment of Hughes as receiver he was duly elected president of the railroad company, which office he still fills. If, therefore, this Court thought proper to decide the question, and decided it adversely to the continuance of Hughes in the receivership, the only result would be an order requiring him to turn over the property of the company to himself as president.

For this reason, without expressing here any opinion upon the questions raised by the motion, we affirm the order of the judge below refusing it.

PER CURIAM. Affirmed.

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*STATE AND JULIUS A. GRAY ET ALS. v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

1. It is against the policy of the law to allow multiplicity of suits between the same parties about the same matter. Therefore, where the plaintiff herein was a party to an action pending in the Superior Court of one county, and thereupon instituted this action in the Superior Court of another county for relief which he might have sought by proceedings in the former court: *Held,* that this action should be dismissed.
2. This Court will not try a case wherein the subject-matter is not in dispute, and only the question of costs remains.

MOTION to vacate an order appointing a receiver, and for an injunction, heard at chambers in Greensboro, on 15 March, 1877, before *Cox, J.*

*FAIRCLOTH, J., did not sit on the hearing of this case.

A statement of the facts is not necessary to an understanding of the opinion. See the two preceding cases. His Honor refused both motions, and the defendant appealed.

Merrimon, Fuller & Ashe for plaintiff.
W. N. H. Smith and D. G. Fowle for defendant.

READE, J. The subject-matter of this suit was, at the time of its commencement, already involved in a suit pending in the Superior Court of Craven, entitled "Commissioners of Craven v. A. and N. C. R. R. Company, John L. Morehead, and Julius Gray," *ante,* 289, in which the plaintiff Gray was a party; and the relief sought in this case—the appointment of a receiver and an injunction—could have been as well obtained in that case as in this; and as it is against the policy of the law to allow multiplicity of suits between the same parties about the same matter, the plaintiff's motions ought to have been refused and the suit dismissed. *Childs v. Martin,* 69 N. C., 126; *Claywell v. Sudderth, ante,* 287. There was, therefore, error in allowing the plaintiff's motions for a receiver and for an injunction. (300)

Furthermore, we have frequently held that where the subject-matter of a suit is no longer in dispute, and nothing but the costs remain, we will not try the case. *Martin v. Sloan,* 69 N. C., 128. The subject-matter of this suit has been disposed of at this term in the aforesaid Craven suit. There is no reason, therefore, why the suit should remain; and we would dismiss it here, but the appeal being only from interlocutory orders, the case is not in this Court.

The case may be mismissed below.

PER CURIAM. Reversed.

Cited: *Long v. Jarrett,* 94 N. C., 446; *Emry v. Chappell,* 148 N. C., 330.

NATHAN McMINN v. S. W. HAMILTON, ADMINISTRATOR.

Jurisdiction—Venue—Pleading.

If a court has jurisdiction of the subject-matter of an action and the *venue* is wrong, the objection must be taken in apt time. If the defendant pleads to the merits of the action, he will be deemed to have waived the objection.

APPEAL from an order dismissing the action, made at Spring Term, 1877, of TRANSYLVANIA, by *Henry, J.*

From the case agreed and the record the following facts appear: The plaintiff brought an action against the defendant in his representative character for $70.35 before a justice of the peace in said county where both parties reside. The defendant obtained letters of administration and filed his official bond in Henderson County. The defendant (301) appeared before the justice and pleaded payment and statute of limitations. Evidence was heard and judgment was rendered for the plaintiff, from which the defendant appealed. In the Superior Court he filed a demurrer, not to the jurisdiction, but on other grounds, and made a motion at the same term to dismiss the action for want of jurisdiction. The plaintiff declined to remove the case, by consent, and his Honor dismissed the action, from which order the plaintiff appealed.

J. H. Merrimon for plaintiff.
A. W. Haywood for defendant.

FAIRCLOTH, J., after stating the facts as above: Where a court has no jurisdiction of the subject-matter, the objection can be taken at any time, and indeed as soon as this fact is discovered the court *mero motu* will take notice of it and dismiss the action. But if it has jurisdiction of the subject-matter and the *venue* is wrong, the objection must be taken in apt time; and if the defendant pleads to the merits of the action, he will be taken to have waived the objection. He cannot have two chances.

Applying this principle to the case before us, we think the defendant waived the objection by pleading before the justice, and that it was then too late to raise it.

PER CURIAM. Reversed.

Cited: Devereux v. Devereux, 81 N. C., 19; *County Board v. State Board,* 106 N. C., 83; *Cherry v. Lilly,* 113 N. C., 27; *Shields v. Ins. Co.,* 119 N. C., 386; *Lucas v. R. R.,* 121 N. C., 508; *Riley v. Pelletier,* 134 N. C., 318; *Rutherford v. Ray,* 147 N. C., 258, 263; *McArthur v. Griffith, ib.,* 550; *Brown v. Harding,* 170 N. C., 261.

(302)

HENRY D. ROBERTSON v. JOHN F. PICKRELL.

Statute of Limitations.

The statute of limitations begins to run from the time that the cause of action accrues: Therefore, where the plaintiff made a contract with the defendant to do certain work, which was "to be measured, estimated and paid for monthly": *Held*, that the statute began to run at the end of each month.

APPEAL at Spring Term, 1877, of HALIFAX, from *Buxton, J.*

The defendant contracted to build the Williamston and Tarboro Railroad and employed the plaintiff, who performed labor and furnished materials in the construction of the same under a contract with the defendant. This action was brought on 4 October, 1873, to recover the amount due, and was referred to Thomas N. Hill, Esq., who submitted a report deciding the issues in favor of the plaintiff and giving judgment for the sum demanded. The referee stated, among other things, that no evidence of the amount and price of work done each month by the plaintiff was submitted to him, except the estimate for 1 February, 1870, calling for $1,103.36, and the estimate for 1 July, 1870, calling for $1,696.57. As conclusions of law he found that the plea of the statute of limitations was not available as a defense to this action, inasmuch as the contract between the parties was entire, and that the statute began to run only from the time the work was completed, which was 1 January, 1871.

To this report the defendant filed several exceptions, but relied on the third and fourth, to wit: (3) For that the referee finds as a conclusion of law that said alleged contract was entire, and not divisible, whereas the evidence was that the work was to be measured, estimated, and paid for monthly. (4) For that the referee finds that the plaintiff is not barred by the statute of limitations. (303)

His Honor overruled the exceptions and sustained the report. Judgment. Appeal by defendant.

Mullen & Moore and Walter Clark for plaintiff.

Conigland & Burton, Moore & Gatling, and J. B. Batchelor for defendant.

READE, J. It is settled that where there is a running account, all on one side, the statute of limitations begins to run on each item from its date; but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. In regard to other matters the rule is that the statute begins to run from the time when the cause of action accrued.

We are of the opinion that in this case a cause of action accrued to the plaintiff at the end of each month for the amount due for that month, and that three years from that date it was barred.

It follows that only such amount is now due the plaintiff as accrued within three years immediately preceding the commencement of the action.

We have no data by which to fix the amount, else we would enter judgment here. We must, therefore, declare that there is error, and remand the case to be proceeded in as the parties may be advised.

PER CURIAM. Reversed and remanded.

Cited: *Stokes v. Taylor,* 104 N. C., 399.

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(304)

JAMES C. LONG v. TERESA H. LONG.

Divorce—Fraud in Contracting Marriage.

1. It has always been, and is now, the policy of this State to regard marriage as indissoluble except for the causes named in the statute (Bat. Rev., ch. 37, sec. 4).
2. Where in an action for divorce brought by the husband the jury found that the marriage, so far as the plaintiff is concerned, was procured by the fraud of the defendant in not disclosing the fact of her then pregnancy, and that the plaintiff immediately upon the discovery of such fact separated himself from her, it was *Held*, that the plaintiff was not entitled to a divorce.

RODMAN, J., dissenting.

ACTION for divorce, tried at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

The plaintiff alleged that he was married to the defendant on 22 January, 1874; on 8 March following he discovered that she was pregnant and had been so for more than four months; on 29 July following she was delivered of a child; on discovering her condition in March as aforesaid, he separated from the defendant; that the defendant practiced a fraud on him in contracting the marriage, he supposing her to be a virtuous woman, and that at the time of the marriage she was more than two months gone in pregnancy, and the plaintiff was informed thereof by the defendant's own confession. Wherefore the plaintiff demanded judgment that the marriage contract be declared null and void. The defendant filed no answer, and the jury found the facts in accordance

with the allegations in the complaint. The plaintiff then moved for judgment, which was refused by his Honor, and the plaintiff appealed.

Shipp & Bailey for plaintiff.
No counsel for defenant. (305)

READE, J. There are but three causes assigned for divorce by our statutes:

"1. If either party shall separate from the other and live in adultery.

"2. If the wife shall commit adultery.

"3. If either party at the time of the marriage was and still is naturally impotent."

This is the declaration of the legislative will as late as 1871. The Legislature has not only restricted the *causes* for divorce, but it has also been careful as to the *manner of ascertaining* the causes. The declarations or admissions of the parties in court or out of court go for nothing. Every allegation is to be deemed as denied, whether it is denied or not, and nothing is to be allowed except what is found by the jury. Bat. Rev., ch. 37, sec. 7.

There are with us no such things as "divorces made easy," "divorces without publicity," and the like, as are said to prevail elsewhere; but our policy always has been, and is now, to regard marriage as indissoluble, except for such grave causes as are named above, and to hedge in the trial with such precautions as prevent collusion, surprise, or imposition.

If the findings of the jury are to govern, we must see what those findings were:

"1. Were the parties married on 22 January, 1874? Yes.

"2. Was the marriage, so far as the plaintiff was concerned, procured by the fraud of the defendant? Yes.

"3. Did the plaintiff separate himself from defendant immediately on discovering the fraud? Yes."

No one will pretend that there is anything whatever in the verdict to authorize a divorce under our statute. The marriage was procured by fraud. What fraud? Did she represent herself to be rich, when she was poor? Had she false teeth? Did she paint—or, what (306) else?

As a divorce cannot be granted upon such a verdict, it is not necessary and scarcely proper to look to the complaint to see what the verdict relates. We find that the fraud complained of was that the defendant was more than two months gone with child at the time of marriage, which fact she did not disclose. That fact may have been true and yet no fraud, for she may not have known it herself at that early stage. And if she knew, as she must have known, that the fact *might be so,* yet she may have known also that he knew as much about it as she did, for

he does not deny that he was the father of it. It is true that he says he did not know that she was pregnant until she confessed it some two months after marriage; yet that is quite consistent with his being the father of it, especially as she did not say that anybody else was, and still more especially as he does not say that anybody else was, and does not deny that he was.

It is also true that he says that immediately on discovering her condition he sent her away and has not cohabited with her since; yet that is consistent with his fear that the birth of his own child, earlier than the laws of nature would allow within marriage, would disgrace him for having gotten it before.

It is also true that he says she held herself out to be virtuous, and he thought her to be so at the time of the marriage; yet that may be quite consistent with the fact that he *knew* her to be so, in regard to all others except himself, because he himself had seduced her and no one else had, and that he was enabled to do so only by a promise of marriage.

Now, all this may be hard measure to the plaintiff, but he has courted it by seeking the dissolution of marriage with one who he says was an "orphan girl," and whom he or some one else ruined, and to turn her and her child, wrecks upon the world without the courage on his part to deny in express terms that he is the author of their ruin, and
(307) without daring to charge any other fault than that she did not disclose the fact that she was pregnant.

The fact that the complaint and the issues present a case so suspicious and so insufficient can find no excuse in the unskillfulness of counsel, for they are able and experienced, and it is our duty to assume that the fault is with the plaintiff. But consider the case in the best light for the plaintiff: He was a worthy man; married, as he supposed, a chaste woman, and found that he was deceived and had an impure woman with child by another. Is that a cause for divorce under our law? As long ago as 1832, in *Scroggins v. Scroggins,* 14 N. C., 535, it was decided that it is not. Indeed, that was a stronger case than this. There the wife was pregnant at the time of the marriage and was subsequently delivered of "a mulatto child," whereas both she and her husband were white. So that it was certain that the husband was not the father, and it was equally certain that a negro was. The case was elaborately argued on both sides, and an elaborate opinion delivered by *Judge Ruffin,* the Court being then composed of those great names—*Henderson, Ruffin,* and *Daniel*—and it was decided that a divorce could not be granted. In delivering the opinion, *Judge Ruffin* said: "The case now before us rests upon a matter existing at the time of the marriage. And it must be admitted to be as strong a case as can well be if the petitioner acted properly. . . . The petitioner puts the case upon the ground of fraud.

. . . But the fraud here consists of the other party not having the qualities and character he supposed her to have. It would be dangerous to lay down a rule of that sort. It is impossible to say where it would stop. . . . Concealment is not a fraud in such case. Disclosure is not looked for. . . . I know not how far the principle contended for would extend. If it embrace a case of pregnancy, it will next claim that of incontinence; it will be said that the husband was (308) well acquainted with the female and never suspected her and has been deceived. . . . From uncleanliness it may descend to the minor faults of temper. . . . There is in general no safe rule but this: That persons who marry agree to take each other *as they are*. . . . After the law has been settled upon this subject for ages, and when the Legislature has been unable to devise any alteration founded on a general principle worthy of their adoption, it would be too much to expect a court to pretend to have more wisdom than the Legislature and our forefathers united, and strike out new theories. And we cannot but say that nothing could be more dangerous than to allow those who have agreed to take each other in terms *for better, for worse,* to be permitted to say that one of the parties is worse than expected." And the judge concludes by calling the attention of the Legislature to the matter, in order that if the Court had erred, there might be such legislation as would prevent future error. And yet, although that has been nearly half a century, there has been no legislation enlarging the powers of the Court, but in 1871 they were actually restricted; for the act of 1827, under which *Scroggins v. Scroggins* was decided, did, after specifying impotency and adultery as causes for divorce, authorize the court to grant divorces when the "court should be satisfied of the justice of the application," which the court in that case thought might enlarge the powers of the court; but in the present statute of 1871 there is no such provision. And, therefore, we suppose that the court is restricted to the causes specified—impotency and adultery.

It is true that there have been always other grounds for declaring marriages void, but they do not fall properly under the head of divorce. They are such as idiocy, precontract, etc., in which cases there was no marriage at all. It was absolutely void for want of power to contract.

It is also true that in some of our sister States the courts have undertaken to grant divorces in cases where there was fraud in (309) procuring the marriage contract. That has been done in the very respectable courts of Massachusetts, New York, and California. But it is said that they have done so under statutes expressly authorizing it. And in New Jersey it has been done where there is no statute to authorize it so far as we are informed, but it is upon the broad ground of the power of a court of equity to relieve against fraud. *Carriss v. Carriss,*

24 N. J., 517. But it was by a divided Court. So that we have to choose whether we will stand by our own decision and our own legislation until our own Legislature shall declare a different policy, or whether we shall forsake the old landmarks and go abroad after novelties.

At the same term when *Scroggins v. Scroggins* was decided, there was another case before the Court, where a man had married a woman who had lately had a child which she induced him to believe was his, but which he found to be a mulatto, and, of course, not his. The court below had dismissed the case, and the Supreme Court sent the case back to be tried, and in doing so *Judge Ruffin* seems to have been somewhat in conflict with what he said in *Scroggins v. Scroggins.* We do not know what became of the case. It is *Barden v. Barden,* 14 N. C., 548.

RODMAN, J., dissenting: The case is this: The plaintiff on 22 January, 1874, married the defendant, having reason to believe, from the society in which she moved, and actually believing at the time of marriage, that she was a chaste and virtuous woman. Shortly after the marriage he discovered that she was pregnant, and immediately thereupon ceased to cohabit with her. In some months thereafter she was delivered of a child, from the date of whose birth it appeared that at the time of the marriage she was between two and three months gone
(310) with child. The plaintiff asks to have the marriage declared null on the ground of fraud.

I say that at the time of the marriage the plaintiff believed the defendant to be chaste and virtuous, because he swears in his complaint that he believed her to be virtuous, and chastity is included in that word when applied to a woman. It is universally admitted that although marriage is a political and social institution, and creates a certain status of the parties, yet it is begun by a contract, which, like all other contracts, may be avoided for fraud. It is, however, a contract of such an important and peculiar character that many frauds and misrepresentations which would avoid other contracts will not avoid this. There is a diversity of opinion as to the nature of the fraud which will avoid it. If either of the parties be incapable of contracting altogether, from imbecility of mind, or from duress, or from entering into that particular contract by reason of a previous existing marriage, or be incurably impotent, it is agreed that the marriage may be avoided. It seems also to be agreed that mere want of chastity on the part of the woman before marriage, although she has concealed the fact from her husband, will not suffice, nor false representations of station or fortune. To have the effect of avoiding the marriage, the false and fraudulent representations must touch some matter essential to the contract. So much seems to be agreed on by all the authorities. There are differences of opinion as to whether

the concealment by the woman of the fact that she was then pregnant by another man is such a misrepresentation in essentials as will justify a court in annulling the marriage. The suppression of such a fact, which must necessarily be known to the woman, must be regarded as a misrepresentation, especially where the husband is innocent of any intercourse with her before the marriage. No affirmation of chastity in words is possible under such circumstances. If the woman knows that the man courts her in the belief of her purity, to receive his addresses is to affirm that she is pure, as positively as the usages of decent (311) society permit.

One object of marriage undoubtedly is the pleasure of association with a female. But the paramount object is the procreation of offspring from the bodies of the twain whom marriage makes one flesh for the perpetuation of the species, and especially for the continuation of the blood of the man and of his chosen bride, unadulterated by the blood of strangers to their union. Politics, which is reason considering man as a temporary inhabitant of this earth, and religion, which is reason considering him as an heir of immortality, and the instinct which, because the Creator has implanted it in his creature, we call the law of God, all combine to consecrate marriage for this purpose. Unless we hold that in the contract of marriage each party does by the strongest implication represent that he is then competent for that purpose, and that such representation is in respect to something essential to the contract, we degrade the marriage of men to the level of the transient loves of beasts.

It is obvious that if a bride be at the time of marriage pregnant by a stranger, she is incompetent, at least for the time being, to fulfill her part of the contract in that sense which is its holiest and purest interpretation, as well as that in which by the common sense of mankind it is generally understood. She brings into the family an unexpected guest, a child who by presumption of law is the child of her husband, although they both know it not to be, and who, if the marriage subsists, must be regarded as such, entitled from their presumed father to equal care with the after-born, and to inherit equally with them in his property.

An eminent writer on this subject (Bishop, Mar. and Div.), in criticising the opinion of the Supreme Court of Massachusetts in *Reynolds v. Reynolds,* 3 Allen, 605, although he concurs in the judgment, thinks that the Court gave too much weight to the argument that the illegitimate would inherit, because he thinks the illegitimacy (312) might be proved upon a contest respecting the inheritance, as well as in an action to annul the marriage. Perhaps that might be so where the proof made legitimacy impossible, as where the mother and husband were white and the child was a mulatto, as in the recent case of *Warlick v. White,* 76 N. C., 175. But in such a case a strong presumption would

be made in favor of the legitimacy of the child, which in general it would be impossible to overcome. Besides, the evil of disputed inheritance is almost as great as that of a false one. I cannot but think that such a fraud goes to the essence of the contract, and that on every principle of justice and good morals and public policy it should be declared null. The parties should not be forced into a lifelong cohabitation, begun in fraud on one side and mistake on the other, where the mutual love and respect, which heighten good and alleviate bad fortune among parties to more fortunate unions, do not exist, and from which nothing but lifelong strife and misery can result. I am assured of the correctness of this opinion when I find it sustained by such eminently able and respectable courts as those of Massachusetts, in *Reynolds v. Reynolds, supra;* of California, in *Baker v. Baker,* 13 Cal., 87-102; and of New Jersey, in *Carriss v. Carriss,* 24 N. J. Eq., 516; and of several other States whose decisions were cited to us by Mr. Bailey.

In Virginia and Maryland cases of antenuptial incontinence are provided for by statute, and it is declared a ground for annulling the marriage. But the judgment of this Court in this case, especially as interpreted by the only authority on which it relies (*Scroggins v. Scroggins,* 14 N. C., 535), has a sweep wider than it might be seen to have at the first glance. It does not appear in this case what was the color of the child which, begotten before marriage, made its unwelcome appearance in the house of the plaintiff. I assume, as I am informed is the fact, that it is white. Certainly this will mitigate the fault of the (313) woman, and it is probable, as is usual in such cases, that she was more sinned against than sinning, and in fact guilty in nothing but in deceiving the man whom she married. But the opinion of the Court does not rest in any part upon the color of the child. Its reasoning covers just as well a case where the child was black. Such a difference would be too trivial to furnish a distinction between two cases coming in other respects within the doctrine of the decision. And in the case upon which it rests, and which, so far as I know, is the only case to that effect ever decided, the child with which the woman was pregnant at the marriage was black. It will not be unfair, therefore, to assume for the purpose *merely* of discussing the principle of the present case (although the fact, I believe, is otherwise) that the child was black. The case of *Scroggins v. Scroggins,* decided in December, 1831, was this: The plaintiff (presumably a white man) married the defendant (presumably a white woman) on 18 December, 1828. On 1 May, 1829 (about four and a half months after the marriage), she was delivered of a mulatto child. He prayed for a divorce, and the court refused it.

As I propose to discuss freely the opinion in this case, I take occasion to say in advance that it was decided in a notably brilliant period of our

judicial history. The bench of this Court was then filled by *Ruffin, Henderson,* and *Daniel,* each of whom was gifted with an intellect of unusual native vigor, which had been liberalized and expanded by a study of history and philosophy to a degree not very common among the profession, even in this day of the diffusion of knowledge, and each of whom had the habit of independent thought, as is shown by the numerous separate and dissenting opinions found in that and the succeeding volumes of our Reports. Notwithstanding this, they were not above error, and judging at this day with the advantage of lights which they did not have, I think, with all respect for them and for those who follow them at this day, that they did greatly err in that decision. (314) The question was then entirely novel. The judges complain that it is. It had never before been discussed in a philosophical, or legal, or in any but an ecclesiastical light. The able discussions in the cases in the other States which I have cited are all of a later date. The learned counsel for the defendant contended that the question was governed by the ecclesiastical law. A few lines early in the opinion of *Ruffin, J.,* give the keynote of the decision: "There is no member of the Court who is not strongly impressed with the conviction that divorces ought in no cases to be allowed but in that already mentioned (impotence) and near consanguinity." The decision is, therefore, upon the ecclesiastical and not upon the common law. It could not indeed escape the clear mind of *Ruffin* that the principles of the common law were competent without aid from any ecclesiastical canons to solve every question arising out of fraud in the making of a contract. But he failed to grasp boldly the conception which afterwards produced such admirable fruit in the minds of the judges of Massachusetts and elsewhere. He says: "The petitioner puts the case on the ground of fraud. . . . But the fraud here consists in the other party not having the qualities and character he supposed her to have. It would be dangerous to lay down a rule of that sort," etc. He failed to see that there was a broad distinction between fraud and misrepresentation in matters which the law considers not of the essence of the contract, such as temper, fortune, etc., and those which are.

Upon what ground of reason does the right to a divorce for impotence stand, except that the false representation respecting it, which is implied by entering into the contract of marriage, is a fraud which goes to the essence of the contract? The defect in the case before him came within the same principle, but he allowed impotence to be a good ground because the ecclesiastics had said so; but not the defect in question, because they had never had occasion to say so, and, of course, had (315) not said so. I have, I hope, sufficiently indicated the error in the opinion to make it plain to any one. Evidently the learned judge had no confidence in the conclusions which he drew from his slight attempt to

apply the common law to the case; for immediately afterwards he assumes, without any other ground than that the petitioner had not expressly denied any intercourse with the defendant before their marriage, which was nowhere charged against him, that such intercourse had existed, and makes an argument adverse to the petitioner on that assumption. That argument would have been entirely unnecessary if the previous one had been thought to be sufficient. That ground for refusing the divorce does not apply to this case, because here a previous illicit intercourse is denied.

Whatever weight the opinion in *Scroggins' case* might have had by itself is at least greatly impaired by the decision in *Barden v. Barden,* immediately following in the volume, but probably decided some weeks at least after the case of *Scroggins.* That case was this: The plaintiff married the defendant, knowing that she had had a child then living, which, however, he believed to be his. After a while he discovered that the child was a mulatto, and thereupon he separated from the defendant and applied for a divorce. The decision was that if the plaintiff was induced by the representations of the defendant to think that the child was white and was his, he was entitled to a divorce. *Ruffin, J.,* again delivers the opinion, and he says it is the opinion of his brethren in which he does not refuse to acquiesce. I infer from this that the other judges had merely acquiesced in his opinion in *Scroggins' case.* He says further that the decision is a concession to the "virtuous prejudices" of the people, from which I infer that the Court had heard that the common sense of the people rejected the former opinion, and like
(316) sensible men they admitted the supremacy of common sense and abandoned the opinion.

It is said that hard cases are apt to make bad law. If by a hard case one is meant in which the application of some technical rule of law, or an adherence to some obsolete precedent produces a decision manifestly opposed to justice and common sense, I think it may more properly be said that it is the bad law which makes the hard case. The positive language of a statute may perhaps sometimes compel a judge to decide contrary to justice. But it is impossible that the common law, whose foundation is reason, can in any case be opposed to justice, good morals, or public policy. Can a harder case than that of *Scroggins* (leaving out his supposed antenuptial incontinency) be conceived of? It cannot be heightened by any effort of the imagination. A mulatto has a right to sit at his board and innocently claim his paternal caresses. If, unfortunately, he has children born to him, they are not pure of his race. The blood of the woman, as physiologists tell us, has been tainted by mingling with that of her first child, and she is incapable of bearing children that will not show some mixture of African blood in appearance

or character. It is well known that a mare which has once borne a mule is incapable ever after of bearing a pure-blooded horse. The man has lost the common right lawfully to continue his pure race. The same law which, as interpreted by the courts, compels cohabitation with the woman and association around his hearth by himself and his children with her mulatto child, says that the mulatto and his white brothers shall not attend the same school. And a law not written, but which no canon of an ecclesiastical council, nor any civil rights act of Congress, nor any decision of a court can control, says they shall not associate in the same social circle.

I cannot conceive how any one can think that such a fraud does not touch the essentials of the marriage contract. I cannot believe that the common law, whose boast it is to furnish a remedy for (317) every wrong, has no remedy for a wrong such as this.

I think the marriage should be declared null.

PER CURIAM. Affirmed.

Cited: Steel v. Steel, 104 N. C., 635.

ADRIAN & VOLLERS v. R. T. SCANLIN.

Arrest and Bail—Imprisonment of Principal—Exoneration of Bail.

Bail, in a civil action, is not exonerated by the fact that the principal is imprisoned for a crime, when the term of imprisonment has expired before judgment against the bail.

ARREST AND BAIL, tried at Spring Term, 1877, of CUMBERLAND, before *McKoy, J.*

Proceedings in arrest and bail were instituted by the plaintiffs against one John D. Jackson, who was arrested and subsequently—on 16 April, 1870—discharged from arrest upon an undertaking signed by the defendant in this action. On 10 February, 1871, and before final judgment was had against this defendant upon said undertaking, Jackson was convicted of larceny in Harnett Superior Court and sentenced to imprisonment in the county jail for one year. On 20 November, 1871, judgment was rendered in Cumberland in the action by Adrian & Vollers against Jackson for $348.87. On 13 February, 1872, execution issued against the property of the defendant, and the return thereon was, "Nothing to be found." On 29 October, 1872, execution issued *against the person* of the defendant and returned "Not to be found," nor has Jackson rendered

(318) himself amenable thereto. On 25 April, 1873, this action was brought against the defendant Scanlin, the obligor in the undertaking.

Upon the trial the defendant requested the court to instruct the jury that the plaintiffs could not recover, because the bail had been exonerated by the arrest and imprisonment of the principal (Jackson) before final judgment against the bail. His Honor declined to give the instruction, and the defendant excepted. The jury rendered a verdict for plaintiffs. Judgment. Appeal by defendant.

John W. Hinsdale for plaintiffs.
MacRae & Bradford and Guthrie & Carr for defendant.

READE, J. The question is whether bail in a civil action is exonerated by the fact that the principal is indicted, convicted, and imprisoned for a crime subsequent to the date of the bail's undertaking, without regard to the fact that the term of imprisonment had expired before judgment in the civil action against the bail.

Formerly, when the sheriff returned upon a *sci. fa.* in a civil case that the principal was in prison by virtue of any process, civil or criminal, and the principal was *then actually in prison,* this should, if then pleaded by the bail, be deemed a surrender of the principal and a discharge of the bail. Rev. Code, ch. 11, sec. 7. Our present statute is substantially the same, and must have the same construction. It provides that "the bail may be exonerated either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from his obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested in execution thereof, at any time before final judgment against the bail." C. C. P., sec. 161.

(319) The defendant insists that the imprisonment of the principal had precisely the same effect as his death would have had. We do not think so. The statute does not mean that the bail shall be exonerated merely because the principal shall have been *put* in the prison, but if he shall *be* in prison at the time when the bail may be called to surrender him.

PER CURIAM. No error.

Cited: Sedberry v. Carver, post, 319.

BOND E. SEDBERRY, RECEIVER OF JAMES HARRIS, v. ALEXANDER R. CARVER.

Arrest and Bail—Imprisonment of Defendant—Exoneration of Bail—State Prison.

1. Where the imprisonment of a defendant under C. C. P., sec. 161, expired before judgment was obtained, either against the principal in the orginal action or against the bail upon his undertaking: *Held*, that such imprsonment does not exonerate the bail.
2. The term "State prison" as used in the statute applies to either the penitentiary or the county jail.

ARREST AND BAIL, tried at Spring Term, 1877, of CUMBERLAND, before *McKoy, J.*

The case is fully stated by *Mr. Justice Bynum* in delivering the opinion of this Court. Judgment for plaintiff. Appeal by defendant.

J. W. Hinsdale and C. W. Broadfoot for plaintiff. (320)
J. C. MacRae and B. Fuller for defendant.

BYNUM, J. James Harris instituted a civil action in Cumberland County against John D. Jackson and procured an order of arrest against him. On 23 March, 1870, the defendant Carver became the bail of Jackson by executing the undertaking on bail as required by C. C. P., sec. 157. On 10 February, 1871, the said Jackson was by the Superior Court of Harnett County on a criminal prosecution tried and sentenced to imprisonment for one year, and was in execution of the sentence at that time committed to the county jail of that county. At Spring Term, 1872, final judgment in the civil action was rendered against Jackson by the Superior Court of Cumberland, execution was issued against the property of the defendant and was duly returned, "Nothing to be found."

On 5 April, 1873, execution was issued against the body of the defendant Jackson, and returned indorsed, "Not to be found." On 30 October, 1873, this action against the defendant (as the bail of Jackson) was commenced, and it was tried at Spring Term, 1877. Jackson has neither surrendered himself nor been surrendered by his bail in discharge of the bail. It is contended by the defendant that he was exonerated as bail by the imprisonment of Jackson in a State prison by virtue of the provisions of C. C. P., sec. 161. That section is in these words: "The bail may be exonerated either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from (321) the obligations to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested in execu-

tion thereof, at any time before final judgment against the bail." By C. C. P., sec. 159, for the purpose of surrendering the defendant, the bail is empowered, at any time before he is finally charged, to arrest him or empower any other suitable person to arrest the defendant anywhere.

It will be observed that the time of Jackson's imprisonment expired before judgment was obtained against him in the action, and two years before the execution was issued against his person, and a still longer time before this action against the bail was instituted. The escape of the defendant from prison within a month after his committal is not material; but the evidence of the bail himself, if we consider it, establishes the fact that he saw Jackson at large a month after he was committed to prison, when he had the legal right to arrest and surrender him, and that he made no effort to do so.

The case turns upon the construction of C. C. P., sec. 161, as applied to the facts of this case.

There is no substantial reason for making a distinction between county jails and the penitentiary, where the term of imprisonment may be the same in both sorts of prisons. The term "State prison," as used in the statute, may equally apply, and was probably intended to apply, to either the penitentiary or the county jail.

At the time final judgment was had against the defendant Jackson, when he should have surrender himself in discharge of his bail, he was out of prison and at large; when execution was issued against his person he was at large, and when this action commenced to charge the bail he was still at large, and, so far as appears, he is at large yet and in the State. The imprisonment of the principal which will exonerate
(322) the bail is not such a one as had expired before judgment had been rendered against him. The condition of the bail bond in our case is, "that if the defendant is discharged from arrest, he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein." What constitutes a breach of this undertaking? Certainly there is no breach until the plaintiff first seeks the *body* of the defendant for the satisfaction of his judgment. When execution was issued against the person of Jackson, it was, and not before, the duty of the defendant to surrender himself, or of the bail to surrender him to this demand by legal process. When that execution issued, Jackson was out of prison and at large, and in legal contemplation was in the custody of his bail. The failure to surrender him then was a breach of the undertaking of the bail. This breach was a continuous one until the bail had been charged by a final judgment against him on the undertaking. From the issuing of the execution against the body until final judgment against the bail, there was a continuous demand for the body of the principal,

and an increasing duty upon the bail at any and all times during that period to surrender his principal in his own discharge.

The reason why the imprisonment of the principal under judicial sentence discharges the bail is that it renders a surrender impossible; and being the act of the law, it excuses the failure. The bail will be discharged only where the performance of the condition is made impossible by the act of God, the act of the obligee, or the act of the law. Where the principal dies before the day of the performance is a case of the first class; where the court before which the principal is bound to appear is abolished without qualification, or where the bail is released by the plaintiff, are cases of the second class; where the principal is confined in prison by judicial sentence during the period when his (323) surrender is demandable belongs to the third class. *Taylor v. Taylor,* 16 Wall, 366; *People v. Bartlett,* 3 Hill, 571; Co. Litt., 206; Bacon's Abr., title *Conditions.* No act of the law in our case rendered the surrender of the principal impossible, for he was not in prison, and the failure to surrender him was, in the view of the law, the result of the negligence or connivance of the surety.

In *Ins. Co. v. Mowatt,* 6 Cowan, 599, the defendant having put in special bail, was afterwards convicted of a conspiracy and sentenced to the penitentiary for two years. It was moved that an *exoneretur* be entered on the bail piece. But the Court denied the motion, saying: "We have not relieved special bail in this way by reason of the principal being in prison, unless *for life or for a long term of years in another State.* A temporary imprisonment for any cause might as well be urged as the ground now taken. Bail take the risk of such an event. Time, perhaps, may be given to surrender where he is pressed with a suit, but to grant an *exoneretur* at once for every imprisonment would render the security worthless." 18 Johns., 35. A similar view of the law his been taken by this Court in the case of *Granberry v. Pool,* 14 N. C., 155.

So that, from authority, the mischiefs in view, and the reason of the thing, we may safely conclude (1) that the statute, C. C. P., sec. 161, has no application to imprisonment of any duration whatever under *civil* process, for as was said in *Granberry v. Pool,* the bail may pay the debt and surrender his principal; (2) it has no application where the term of imprisonment under *criminal* process has expired before final judgment against the bail, for in such case the principal can be delivered, and (3) *it would seem* that no temporary imprisonment *within* the State will exonerate the bail, for in such case the court may, upon the motion of the plaintiff or bail, order the principal to be retained a prisoner until the debt is paid; and the service of the order on the jailer shall authorize him to detain the debtor; and this shall be deemed a surrender of the principal in discharge of the bail. (324)

To hold that any term of imprisonment merely temporary shall discharge the bail would be to encourage fraud and collusion between the bail and his principal, as well as the commission of crime. Imprisonment for life *within* the State jurisdiction would, we presume, be within the statute and exonerate the bail; because there, there could be no surrender, or act equivalent thereto, as in case of an imprisonmnt for years or a less time. So an imprisonment *without* the jurisdiction of our courts—as in a foreign State, by a judicial sentence of the courts of that State, for a term less than for life, but existing at the time the bail is sought to be charged, and up to final judgment against him—would also fall within the provisions of the statute. By such imprisonment without the State the bail would lose the power to surrender, or to have the prisoner charged after the expiration of his sentence, as he might do in this State.

But is unnecessary to decide, and we do not decide, any question except that presented by our case, and that is, whether the statute, C. C. P., sec. 161, applies to the exoneration of bail when the term of imprisonment has expired before judgment has been obtained, either against the principal in the original cause of action or against the bail upon his undertaking. Such an imprisonment will not exonerate the bail. See *Adrian v. Scanlin, ante,* 317.

PER CURIAM. Affirmed.

Cited: *Patton v. Gash,* 99 N. C., 285.

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(325)

H. T. BAHNSEN v. F. A. CHESBRO.

Arrest and Bail—Sufficiency of Affidavit—Practice.

In an action for arrest and bail, the plaintiff alleged in substance that the defendant had sold him a certain patent right, representing the same to be genuine and no infringement upon any prior patent, which representations were false and intended to deceive plaintiff; that he had been damaged the amount of the purchase money paid to defendant, and that defendant was a nonresident: *Held*, that the order of arrest was properly issued.

MOTION to vacate an order of arrest, heard at chambers on 3 April, 1877, before *Kerr, J.*

The plaintiff instituted an action against the defendant in the Superior Court of FORSYTH, demanding payment of $1,100, and at the same time filed the following affidavit in support of an allegation in his com-

plaint: "That in April or May, 1876, the defendant sold to plaintiff a certain patent, known as 'Donaldson's Inhaler,' for which this affiant paid from time to time the sum of about $1,100; that this affiant made the purchase upon the representations of defendant that the said patent was genuine and no infringement on any patent heretofore obtained, which representations caused the plaintiff to make the purchase; that said representations were false, and, as this affiant is informed and believes, were knowingly false at the time they were made, and intend to defraud plaintiff and induce him to buy; that by reason of said patent being an infringement on a patent previously granted, it was worthless to the plaintiff, he not being allowed to deal in the same without subjecting himself to an action for damages by the prior patentee; that by reason of said false and fradulent representations the plaintiff has been damaged to the amount of $1,000; and that the defendant is not a (326) resident of this State, but claims to be a citizen of Baltimore."

Upon this affidavit the clerk of the Superior Court of Forsyth County ordered the arrest of the defendant, who insisted at the hearing of this motion (1) that the controversy was on arising under the patent laws of the United States, and as such the State courts had no jurisdiction; (2) that he was acting as agent of his father and sold said "Inhaler" as an improved instrument and not as an original invention, and that plaintiff bought with a knowledge of this fact, and (3) that no fraud was practiced on plaintiff, and that there was no evidence of an infringement on any other patent. His Honor after argument refused the motion, and the defendant appealed.

Watson & Glenn for plaintiff.
J. C. Buxton, J. M. Clement, and J. M. McCorkle for defendant.

PEARSON, C. J. Upon reading the affidavits filed with the complaint, We are satisfied that there was probable cause to support the allegation that the contract was obtained by means of false and fradulent representations. We concur with his Honor in the conclusion that the motion to vacate the order of arrest ought not to be granted.

PER CURIAM. Affirmed.

(327)

ELLEN E. MOORE v. JOHN C. MULLEN.

Arrest and Bail—Action for Breach of Promise to Marry—Fraud.

1. The provisions of the Code of Civil Procedure (sec. 149, 2), authorizing the arrest of the defendant "in an action on a promise to marry," violate the Constitution (Art. I, sec. 16), and are void.
2. The breach of a promise to marry is not "a case of fraud."

ACTION to recover damages for breach of promise to marry, tried at Spring Term, 1877, of HALIFAX, before *Buxton, J.*

At the time this action was instituted, and upon the affidavit and undertaking of the plaintiff, the defendant was arrested and held to bail under the provisions of Bat. Rev., ch. 17, sec. 149 (2). On 23 October, 1876, the bail surrendered the defendant to the sheriff and applied for their exoneration, which way granted; and thereupon the defendant filed his petition before the clerk of said court, asking that he be discharged under the insolvent debtors' act. Bat. Rev., ch. 60, sec. 10. The clerk granted the petition of the defendant, and the plaintiff appealed to the judge of the Superior Court, who affirmed the decision of the clerk. From this ruling the plaintiff appealed.

Thomas N. Hill and R. B. Peebles for plaintiff.
Mullen & Moore and Walter Clark for defendant.

PEARSON, C. J. "There shall be no imprisonment for debt, except in cases of fraud." Const., Art. I, sec. 16.

"The defendant may be arrested as hereafter prescribed in the following cases," among others, "in an action on a promise to marry." C. C. P., Title IX, ch. 1, sec. 149 (2).

(328) We are of opinion that this enactment violates the Constitution and is void. It seems to us that a breach of a promise to marry is no more a "case of fraud" than a breach of any other promise; for instance, than a breach of a promise to build a house, or to lease land, or to employ one as a school-teacher, and the like. So the Constitution cannot be made to include a breach of a promise to marry without extending it to a breach of any contract whatever, and it is clear that the words "except in case of fraud" are evidently used in a very restricted sense, such as fraud in procuring a contract to be made, or fraud in attempting to evade performance—as by concealing property, or by attempting to run it out of the State, or by making a fraudulent disposition of it. How far some of the other enactments under the subsections of section 149 may not be liable to the same objection we are not called upon to say. In *McNeely v. Haynes,* 76 N. C., 122, *Mr. Justice Bynum,* in using the words "in a civil action the defendant cannot be arrested unless *he* has

been guilty of a fraud in contracting the debt, C. C. P., sec. 149 (4)," restricts his meaning to the case then in hand by italicizing the word *"he";* otherwise it might be negatively an authority for excluding the other subsections. But we know the purpose was to confine it to the case before the Court, as we do in this case, so as to let the other subsections stand on their own construction, except so far as these two cases may furnish analogies.

In consultation on the case of *McNeely v. Haynes, supra,* although it was not cited, we considered the case of..... (New Jersey), in which it is held that under the Constitution of New Jersey (which has the same provision as ours, and the like statute including a promise to marry), the statute was in conformity to the Constitution. But in that case the whole stress is put on the fact that the defendant had by means of the promise to marry seduced the plaintiff, and was attempting to abandon her by fleeing from the State. In our case there are no such additional circumstances; the complaint sets out a promise (329) to marry; the answer attempts to excuse the defendant by the allegation that after the engagement, on second thought, he was satisfied he was not in condition to take upon himself the duty of supporting a family. Ours, therefore, is a case of the breach of a promise to marry, and nothing more. Whether in a case attended by seduction and an attempt to flee the State we would feel at liberty to follow the New Jersey case is a matter about which we express no opinion, except to say such base conduct was well calculated to excite sympathy and induce the judges to bring the case within the meaning of the Constitution, if they were able to convince themselves that such was the true construction, for all would feel that such ought to be, if it is not, the law.

It is unnecessary to put a construction on Bat. Rev., ch. 60, sec. 10; that relates to the discharge of duties under the insolvent acts. We hold that the defendant was not liable to arrest in the first instance, and the order was improvidently granted.

PER CURIAM. Affirmed.

Cited: *Kinney v. Laughenour,* 97 N. C., 328; *Hood v. Sudderth,* 111 N. C., 221, 223.

(330)

JAMES M. TUCKER v. J. H. DAVIS.

Order of Arrest—Damages—Judge's Charge.

1. Malice alone will not support an action for the abuse of legal process of arrest. There must also be a want of probable cause in suing it out.
2. Where in an action for damages against a defendant for suing out an order of arrest maliciously the court charged the jury that they might award vindictive damages: *Held*, to be error.
3. An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit.

ACTION for damages, tried at Spring Term, 1877, of MONTGOMERY, before *McKoy, J.*

The case is sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court.

Under the instruction of his Honor in the court below, the jury rendered a verdict for plaintiff. Judgment. Appeal by defendant.

John W. Hinsdale and S. J. Pemberton for plaintiff.
Neil McKay for defendant.

RODMAN, J. The complaint is that the defendant wrongfully sued out an order for the arrest of the plaintiff, who was arrested upon it.

There is no controversy as to the facts. On 18 November, 1874, the present defendant, Davis, issued a summons against Tucker, returnable to the Superior Court of Montgomery. On 1 February, 1875 (which was before the return day, and before any complaint was filed), Davis made an affidavit before the clerk of the Superior Court, stating:

1. That a sufficient cause of action exists in his favor against the defendant Tucker, the grounds of which are these: That some time
(331) in the month of September last the said Tucker, came to my house and said to me, "You are a damned thief." "You are a damned liar." "You are too damned mean, or you would have been in hell long ago."

2. That the plaintiff had issued a summons, etc. Upon this the clerk issued an order for the arrest of Tucker, and under it he was arrested.

Afterwards Davis filed a complaint in his action against Tucker, properly stating a cause of action for words spoken, and Davis afterwards recovered judgment in his said action.

Upon this state of facts the judge charged the jury, in substance, that the affidavit was insufficient to warrant the order of arrest, because it did not allege a sufficient cause of action, the words set forth not being actionable *per se;* that the plaintiff was entitled to recover nominal dam-

ages, and if the jury were satisfied from the evidence that the defendant sued out the order of arrest for the purpose of extorting money from the plaintiff, he was entitled to recover vindictive damages. The judy found a verdict for plaintiff, assessing his damages at $150. There was judgment accordingly, and defendant appealed.

1. The latter part of the judge's charge, in which he says that if the jury were satisfied from the evidence that the defendant sued out the order of arrest for the purpose of extorting money they might give vindictive damages, we consider erroneous. We understand the judge as saying that if the defendant sued out the warrant maliciously, and did not state in his affidavit a lawful ground for the arrest, or a sufficient cause of action, the plaintiff was entitled to vindictive damages, notwithstanding the defendant in fact had a lawful ground for the arrest, and a sufficient cause of action against the plaintiff.

This instruction is objectionable in several respects. It submits to the jury the question whether the defendant acted maliciously, when there is no allegation to that effect in the complaint, and no evidence that he did. And it says that malice alone would entitle the (332) plaintiff to vindictive damages, notwithstanding the defendant had a legal right to arrest the plaintiff, as it appeared by the judgment in the case that he had. Malice alone will not support an action for the abuse of legal process of arrest. There must also be a want of probable cause for suing it out. This is elementary doctrine.

2. We think the first part of the judge's charge is also erroneous.

A plaintiff conceiving that he has a right to an order of arrest, applies to the clerk or to the judge for it upon an affidavit. The officer applied to is the judge in whose jurisdiction it is to decide whether the affidavit is sufficient, and whether to issue it or not. If he decides erroneously, and issues it upon an affidavit not in law sufficient, the order, being within his jurisdiction, is not void; it may be vacated, but while it remains in force it protects all persons who *bona fide* act under it. The complaint is that the defendant "wrongfully" procured an order of arrest. That can only mean that he illegally procured the order. But the order, although it may have been erroneous (as to which we say nothing), was certainly legal as having been issued by a judge having jurisdiction to issue it, and it does not appear ever to have been vacated. These doctrines are also elementary.

PER CURIAM. Judgment reversed and action dismissed.

Cited: *Bryan v. Stewart,* 123 N. C., 98.

(233)

RICHARD C. WINDLEY v. THOMAS D. BRADWAY AND SARAH A. PETITT.

Attachment—Affidavit—Sufficiency of.

An affidavit upon which a warrant of attachment is based must be in writing, and must show that the defendant is "a nonresident and has property in this State."

MOTION to vacate an order of attachment, heard at chambers on 21 December, 1876, before *Moore, J.*

The only point decided in this Court is as to the sufficiency of the affidavit upon which the proceeding was based.

The motion was disallowed by the court below, and the defendants appealed.

George H. Brown, Jr., and John A. Moore for plaintiff.
Busbee & Busbee for defendants.

READE, J. *Spiers v. Halstead,* 71 N. C., 209, is decisive of this case. To support an attachment against the property of the defendant it should appear by affidavit, not only that the defendant is not a resident of this State, but that he has property within the State. C. C. P., sec. 83.

In this case the affidavit states only the nonresidence of the defendants, and does not state that they have property within the State.

It is true that the order of publication and the warrant of attachment both recite that the affidavit does aver that the defendants have property in the State; but then there is the affidavit to speak for itself, and it is for the court to see that it avers no such thing.

(334) Again, the plaintiff says that there might have been an *unwritten* affidavit which warranted the aforesaid recitals. If that were so, still an unwritten affidavit would not support the attachment; or rather it is more proper to say that there is no such thing as an *unwritten* affidavit. An affidavit is a "sworn statement in writing." Bouvier and Webster's dictionaries. Therefore, the affidavit in the record is our guide, and that is insufficient.

The motion to vacate the attachment ought to have been allowed.

PER CURIAM. Reversed.

Cited: *Bacon v. Johnson,* 110 N. C., 117.

Overruled: *Parks v. Adams,* 113 N. C., 476; *Foushee v. Owens,* 122 N. C., 363.

LARKIN RAY v. JOHN HORTON.

Claim and Delivery—Action Against Sheriff—Collection of Taxes.

1. A sheriff is liable in an action for claim and delivery for property seized by him for taxes after the expiration of the time limited by law for their collection.
2. Where the defendant was authorized (chapter 45, Laws 1874-75) to collect taxes in arrear for certain years, "with all the powers which belonged to him as sheriff," having been theretofore (chapter 150, Laws 1873-74) allowed until 1 July, 1874, to make his final settlement with the county treasurer: *Held*, that he accepted the indulgence under such rules and regulations as were prescribed by law for the regular collection of taxes, and was entitled, under Laws 1873-74, ch. 133, sec. 44, to only one year from the date prescribed for settlement to finish his collections.

CLAIM AND DELIVERY, tried at Fall Term, 1876, of WATAUGA, before *Buxton, J.*

The plaintiff instituted this action for delivery of a yoke of oxen which had been seized by the defendant, as sheriff of said county, to satisfy an execution for taxes alleged to be due by the plaintiff. (335) The defendant proceeded under an act of Assembly authorizing him to collect taxes in arrear, and upon the case agreed his Honor gave judgment in favor of the defendant, and the plaintiff appealed.

Hill & Neal and R. F. Armfield for plaintiff.
No counsel for defendant.

FAIRCLOTH, J. From the case agreed it appears that the defendant was sheriff of Watauga County for the years of 1870-1-2-3, and failed to collect all the taxes for those years.

By Laws 1874-75, ch. 45, ratified 19 December, 1874, he was authorized and allowed to collect all taxes in arrear and still due for those years, with all the powers which belonged to him as sheriff for said years. In this act there is no limitation as to time. By an act ratified on the *same* day (chapter 47) all sheriffs, collectors, etc., are authorized to collect arrears of taxes for the years 1872-3-4 under such rules as are now (then) prescribed by law for the regular collection of taxes, with a limitation (section 4) on this power to 31 December, 1875.

By the machinery Act of 1873-74 (ch. 133, sec. 35) sheriffs and other accounting officers are required to settle and pay their public tax account on or before the first Monday in December in each year; and by section 44 they shall have one year, and no longer, from the day prescribed for settlement and payment to finish the collection of all taxes; and similar provisions are in the Machinery Act of 1874-'75, ch. 184.

By an act (1873-'74, ch. 150) the defendant was allowed until 1 July, 1874, to make his final settlement with the county treasurer.

On 29 July, 1876, the defendant seized the plaintiff's property for said taxes under said act of 1874-75, ch. 45, and the plaintiff insists
(336) that defendant's authority to do so had ceased, but the defendant says he is not limited in time by the act first above mentioned.

We have cited these several acts to show that the Legislature intends a certain day in all instances for settlement of taxes by sheriffs and tax collectors, and a certain time within which they may be collected from the citizens, and we think any other course in these two respects would be very bad policy.

The defendant by neglecting to collect the taxes at the time they were due lost his right to do so, although he was bound to make his settlement, and by said act his right is restored as a favor, and it does not look well for him to claim more privilege now than he had before he was guilty of negligence. It is true, the plaintiff should pay his taxes, but we think it would be dangerous for the Legislature to extend this privilege indefinitely to tax collectors.

When the defendant accepted the indulgence in the act of 1874-75, ch. 45, "with all the powers which belonged to him as sheriff," we think he accepted it "under such rules and regulations as were prescribed by law for the regular collection of taxes," as was declared in chapter 47 above, and passed on the same day; and one of these regulations was that he should have one year, and no longer, from the day prescribed for settlement to finish his collections (ch. 133, sec. 44), and his day for settlement had long since passed; but we find that the Legislature had extended his day of settlement to 1 July, 1874. Laws 1873-74, ch. 150.

According to this view, his authority ceased 1 July, 1875; and under this act (chapter 45) it ceased 19 December, 1875; and if we look to the simultaneous act (chapter 47) for guidance, it ceased 31 December, 1875.

We therefore think the defendant was guilty of a trespass on said property.

(337) Let judgment be entered here for the plaintiff for the amount agreed and for costs.

PER CURIAM. Judgment accordingly.

THOMAS JONES, EXECUTOR, v. T. N. WARD.

Claim and Delivery—Action Against Officer.

An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person.

CLAIM AND DELIVERY, tried at Spring Term, 1877, of MARTIN, before *Eure, J.*

The defendant was a constable, and as such had in his hands for collection an execution for $200 issued upon a judgment rendered by a justice of the peace. He levied upon certain bales of cotton on the premises and in the possession of the judgment debtor, Thomas W. Jones, the testator of plaintiff, by whom this action was instituted. Upon giving the required bond, and the defendant failing to give a counter-bond, the cotton was taken from the possession of the defendant and delivered to plaintiff's testator.

The jury found that the cotton was the property of said testator, and thereupon the defendant's counsel moved, *non obtante veredicto,* for judgment against the plaintiff for costs, upon the ground that this action could not be maintained against the defendant. His Honor refused the motion and gave judgment against the defendant for costs. Appeal by defendant.

Mullen & Moore for plaintiff. (338)
James E. Moore and Gilliam & Pruden for defendant.

PEARSON, C. J. In *Jarman v. Ward,* 67 N. C., 32, a construction is put on C. C. P., secs. 177 *et seq.,* ch. 2, title IX, in respect to "the affidavit and undertaking." This case calls for a construction in respect to the cases that come within its operation.

The words of the statute are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the "undertaking."

It is argued by the counsel of defendant that the instance of a levy on property by a constable or sheriff under an execution must be made an exception by implication, upon the ground that, notwithstanding the broad words used, the lawmakers cannot be supposed to have meant to include cases where property is taken under a writ of *fieri facias,* and is considered to be *"in custodia legis."* He puts himself on the decision and reasoning in *McLeod v. Oates,* 30 N. C., 387. It is there held that the act of 1828 (Rev. Stat., ch. 101) does not apply to the case of an

officer who takes a slave under a *fi. fa.* The decision is put mainly on the ground that the defendant is made to pay *"double damages,"* which the Court thinks to be so unreasonable in reference to an officer who levies an execution as to justify the construction that the statute was not intended to apply to the case.

That case, of course, is not an authority on the construction of C. C. P., which professes to establish a new order of things, and (339) must be judged of by its own language.

The reasoning on which *McLeod v. Oates, supra,* is put has, however, been allowed by us full weight and falls very far short of bringing our minds to the conclusion that in the face of the broad words of C. C. P., the Court can say that cases where a constable or sheriff takes property under a writ of *fieri facias* are excepted out of the operation of this statute when a third person claims to be the owner of the property and alleges a wrongful detention by the officer. When the defendant in the execution assumes the character of plaintiff, and seeks to have the property redelivered to him in the face of the levy, that is one thing, and the reasoning has much weight, *i. e.,* "Execution has been called the end of the law, but it will be only the beginning and there will be no end of the law if, after a person has established his right by judgment, the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin."

But the reasoning has no force when a third person brings an action on the ground that the property taken under the execution belongs to him, and not to the defendant in the execution. In the one case the creditor has established his right to the debt by judgment, and the defendant is not allowed to obstruct the execution by a writ of replevin. In the other case the right to the property is an open question, and there can be no reason why a third party alleging ownership should not have the same remedy against the wrongdoer as against another.

In accordance with this distinction the statute under consideration, seeing that its words are broad enough to take in every case where a party would make the affidavit and give the undertaking, takes the precaution to restrict its operation by requiring the affidavit to set out "that the property was not seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is exempt by statute."

This only applies to an action by the defendant in the execution, (340) and leaves the case of a third person to come under its broad terms. *"Expressio unius, exclusio alterius,"* is a rule that might be prayed in aid, if there was any occasion for aid when the construction is so clear.

The other instances which are excluded from the operation of C. C. P.—when property has been taken for a tax or assessment or a fine—

have the like bearing on the question of construction, and prove conclusively that all other cases embraced by the words come within the operation of the remedy provided by C. C. P.

PER CURIAM. Affirmed.

Cited: Churchill v. Lee, post, 342; *Mitchell v. Sims,* 124 N. C., 413.

(341)

CORNELIA CHURCHILL, ADMINISTRATOR, v. TIMOTHY F. LEE.

Claim and Delivery—Action Against Officer—Practice—Opening and Conclusion—Evidence.

1. An action for claim and delivery will lie against an officer for a wrongful seizure of property under execution.
2. Although the affirmative of the issues raised by the pleadings is upon the defendant, yet if the affirmative of any of the issues submitted to the jury is upon the plaintiff, he is entitled to open and conclude, if the defendant introduces evidence.
3. Where the plaintiff is not entitled to recover unless he establishes the *bona fide* ownership of certain property in controversy, he cannot be deprived of his right to open and conclude by reason of the fact that the defendant alleges that the plaintiff's title is fraudulent and void, and insists that that raises an affirmative issue on his part.
4. The plaintiff offered in evidence a paper-writing purporting to be a conveyance of the property in suit, executed by one L. to plaintiff's intestate, dated 26 April, 1869. The defendant offered evidence tending to prove that L. was in New York on 27 April, 1869, and asked a witness if he had received a letter from L. on 14 April, and of that date, in the following terms: "I am compelled to leave by first train," etc. The letter was not produced, and witness stated that he was satisfied he had it at home and could find it upon a thorough search: *Held*, that upon the issues submitted to the jury as to *bona fides* of the conveyance to plaintiff's intestate, the letter was incompetent for irrelevancy.
5. Such testimony is inadmissible: (1) Because it is the statement of a third person not a party to the action, as to his motive, when such motive was no part of the *res gestæ*. (2) Because L. himself was a competent witness to prove his whereabouts on 26 April, and the letter was mere hearsay.
6. If the letter had been admissible, the original should have been produced if practicable.

CLAIM AND DELIVERY, tried at January Special Term, 1877, of WAKE, before *Schenck, J.*

This action was brought by the plaintiff's intestate, who alleged that the defendant, as sheriff, under an execution issued against the

(342) property of one M. S. Littlefield, seized certain personal property belonging to the plaintiff. The defense was that although the property was in possession of the plaintiff's intestate at the time of the levy, yet said Littlefield owned the property at the time the judgment was rendered and upon which said execution issued, and that said judgment was in favor of a third party to whom Littlefield was indebted. Upon issues submitted the jury found the following facts:

1. Littlefield conveyed the property—horses, carriage, and harness—to plaintiff on 26 April, 1869, for a valuable consideration, and without intent to defraud the creditors of Littlefield.

2. Littlefield retained property sufficient and available for the satisfaction of his then creditors.

3. The plaintiff is entitled to nominal damages; the value of the property when seized was $625, and the value of the property capable of redelivery is $125.

Upon this verdict, judgment was rendered for the plaintiff, and the defendant appealed. The exceptions to evidence and other facts necessary to an understanding of the opinion are sufficiently stated by *Mr. Justice Bynum* in delivering the opinion of this Court.

Merrimon, Fuller & Ashe for plaintiff.

E. G. Haywood and George H. Snow for defendant.

BYNUM, J. Upon the authority of *Jones v. Ward, ante,* 337, the defendant abandoned here one of his grounds of appeal, namely, that an action for claim and delivery will not lie against a sheriff for a wrongful seizure of property under an execution in his hands. He does rely, however, upon two exceptions to the ruling of the court taken by him (343) in the progress of the trial in the court below:

1 After the jury had been impaneled, the defendant claimed that the affirmative of all the issues raised by the pleadings was upon him, and that he had the right to offer the first evidence, and, also, to open and conclude the argument before the jury, if the plaintiff offered any evidence.

So far as the case shows (and we must assume it to be so), the issues submitted to the jury were agreed upon by the parties. There were seven written issues, and among them were the following:

Did M. S. Littlefied convey the property—horses, carriage, and harness—to Churchill; and if so, when?

If said conveyance was made, was it for valuable consideration, or was it voluntary and without valuable consideration?

Did M. S. Littlefield retain property fully sufficient and available for the satisfaction of his then creditors?

These were affirmative issues material to the plaintiff's right of recovery, and to establish them the burden of proof was upon her; and that would give the plaintiff the right to open and conclude, if the defendant offered any evidence. After agreeing to these and other affirmative issues, it will not do for the defendant to fall back and say that upon the pleadings the affirmative of all the issues raised was upon him, and he had the right to open and conclude. It was the duty of the jury to respond to the issues as agreed upon and submitted; and as they are material, the Court will, to support them, assume that the pleadings were, or were intended to be, amended to suit the issues. But even upon the pleadings—the complaint and answer—the material issue made was whether the plaintiff's conveyance of the property from Littlefied was *bona fide* and for value. The plaintiff could not have been entitled to recover without establishing the affirmative of that issue. The plaintiff alleges this *bona fide* ownership in the plaintiff at the time of the seizure. This is denied in the answer, and the issue is thus formed, the affirmative of which is upon the plaintiff. But the defendant does (344) not stop with the denial of the plaintiff's title, but the pleader very ingeniously, and apparently for the purpose of obtaining the technical advantage of the opening and conclusion, goes further and alleges that the plaintiff's title is fradulent and void; and then he says that this is an affirmative issue on his part, which gives him the opening and conclusion. This is illusory, for the main question would still be as before—Was the plaintiff the *bona fide* owner of the property at the time of the seizure by the sheriff?—and her right of recovery would depend upon her establishing that fact by proof. We think in both points of view the plaintiff had the right to offer the first testimony, and, in case the defendant introduced evidence, had the right also of the opening and conclusion. 1 Greenl. Ev., sec. 74; *McRay v. Lawrence,* 75 N. C., 289.

2. The plaintiff offered in evidence a paper-writing purporting to be a conveyance of the property in suit executed by Littlefield to the plaintiff's intestate, and dated 26 April, 1869. The defendant offered evidence tending to prove that Littlefield was in New York on 27 April, 1869, and then asked Mr. Gatling, a witness introduced by him, if he, the witness, had received from Littlefield on the day it bears date in the city of Raleigh a letter in the following terms: "Raleigh, 14 April, 1869. Mr. Gatling: I am compelled to leave by the first train without seeing you. I inclose check on Mr. Swepson for $1,000. I make it thirty days. He owes me. Your servant, etc., M. S. Littlefield." The letter was not produced, and the witness stated that he was satisfied that he had it at home, and could find it upon a thorough search over his papers. In the absence

of the letter, the plaintiff objected to the witness answering the question, and his Honor sustained the objection. That is no error in that ruling.

The defense to the action set up in the answer and mainly relied on is that at the time Littlefield conveyed the horses and carriage to
(345) Churchill he had no other property and was indebted to the execution creditors for the satisfaction of whose debts the defendant seized the property; and that the conveyance was voluntary and without any consideration. Upon this allegation one of the issues submitted to the jury was, "Did Littlefield convey the property to Churchill for a valuable consideration, or was it voluntary and without consideration?" Another was, "if it was made for valuable consideration, was it with intent to hinder, delay, or defraud creditors?" Both these issues were found for the plaintiff, and disposed of the case. Upon the trial of these issues, it is evident that the letter of Littlefield to Gatling, ruled out by the court, was both immaterial and irrelevant, and, therefore, incompetent. If the conveyance was *bona fide* for full value and without fradulent intent, as the jury found, it was no odds whether it was executed on 26 April, 1869, or any other day, or whether he was indebted or not, or had or had not any other property. *Reiger v. Davis,* 67 N. C., 185; *Worthy v. Caddell,* 76 N. C., 82. But in no conceivable view was the answer to the question ruled out competent evidence. Neither Littlefield nor Gatling was a party to the action, and any communication between them was *res inter alios acta.* The declaration of one to the other, verbal or written, were mere hearsay—hearsay, not of a fact nor of an intent, but of a declaration of an intent. Suppose the letter had been produced and read upon the trial: did Littlefield really intend to leave on the first train, or was the declaration made for a purpose? *Did* he in fact leave? Did he leave *then?* Did he return before the 26th? Did he go to New York and remain until 27th April? It is thus apparent that the letter would neither establish nor tend to establish anything. The intent, even if real, proves no fact in this case, and the admission of such evidence would lead to a sea of uncertainty. The proposed testimony was, therefore, inadmissible, first, because it is the statement
(346) of a third person not a party to the action as to the motives of Littlefield, when such motives are no part of the *res gestæ.* Even the declaration of third parties that they killed the deceased are inadmissible upon the trial of the accused for murder. *S. v. Duncan,* 28 N. C., 236; second, because Littlefield himself, who was not a party to the action, was a competent witness to prove his whereabouts on 26 April. His declarations are hearsay and are excluded where the witness himself could have been produced or his testimony procured. Whart. Ev., secs. 247, 257; *Carrier v. Jones,* 68 N. C., 130.

If the letter itself had been admissible in evidence, whether its contents could have been thus proved without its production in evidence is a qustion which does not properly arise in the view we have taken. But it may generally be said that whether the writing whose contents are in controversy be one which the law requires to be in writing, or whether it is a contract put in writing by the parties, or whether it belongs to neither class, if it is one whose meaning it is important to preserve accurately for the purpose of justice, the policy of the law requires the original to be produced if practicable. "For *lex scripta manet,* while memory as to words is treacherous, and even though not memory, but a written copy be offered, such copy has between it and the original the possibility of mistake or falsification." Whart, Ev., sec. 60; Greenl. Ev., secs. 88, 463.

PER CURIAM. No error.

Cited: Hudson v. Wetherington, 79 N. C., 4; *Brooks v. Brooks,* 90 N. C., 146 *S. v. Shields, ib.,* 694; *Wallace v. Robeson,* 100 N. C., 211.

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(347)

A. BRANCH v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Common Carriers—Railroads—Construction of Statutes—Computation of Time.

1. A common carrier is bound by the common law to convey goods committed to him for that purpose within a reasonable time, and on failure is liable in damages.
2. A common carrier, especially one having a monopoly, who invites public custom, is bound to provide sufficient power and vehicles to carry all goods which his invitation naturally brings to him.
3. Corporations, like all other persons, are subject to the police power of the State. Therefore, the act of Assembly (Laws 1874-75, ch. 240, sec. 2) which prescribes a forfeiture of $25 per day for delay of local shipments beyond five days after the receipt of goods by a railroad company, is constitutional.
4. In computing the time in such case, the words "five days" include Sunday, and must be taken to mean five *running* days.

Legislative exercise of the police power of the State reviewed by MR. JUSTICE RODMAN.

APPEAL from a justice of the peace, tried at Spring Term, 1877, of WILSON, before *Moore, J.*

On 10 October, 1876, the plaintiff delivered to defendant company at its depot in the town of Black Creek, Wilson County, thirty-one bales of

cotton, to be shipped to Norfolk, Virginia, and at the same time the defendant gave to the plaintiff a bill of lading for the cotton, signed by the agent of the company. The plaintiff did not tender payment of freight, nor was it demanded, nor was it the custom for shippers to prepay freight, nor was there any agreement between the parties that the cotton was not to be shipped within five days from the date of its delivery to the company. The cotton was shipped on the morning of 19
(348) October, 1876.

The defendant owned a large number of cars and engines—more than sufficient for the ordinary freight business—but during the season of 1876 there was a great press of business for about six weeks in transportation through cotton from Wilmington to the northern markets, which amounted to 4,200 bales during the said month. The cars were used for the shipment of this freight, a large quantity of which was detained in Wilmington, owing to the inability of the company to afford more speedy transportation. There was considerable competition between different reads for this class of business. The gauge of the road south of Wilmington, from which the cotton was received, is different from that of defendant's road, which rendered it necessary to break bulk at Wilmington. The gauge of the roads north of Weldon is the same as that of defendant's road, and the defendant could have obtained from the north a sufficient number of cars for the transportation of all its freight, both local and through.

Upon the foregoing facts found by his Honor, a jury trial having been waived, there was judgment that the plaintiff recover of the defendant the sum of $100 and costs, and the defendant appealed.

(349) *F. A. Woodard for plaintiff.*
W. H. N. Smith for defendant.

RODMAN, J. 1. The recent decisions in the Supreme Court of the United States in what have been called the *"Granger Cases"* (not yet officially reported, but which will probably be found in 94 U. S.) enable us to put our decision in this case upon a principle not only satisfactory as being reasonable and just, but which, as being established by a judgment of the Court of final resort having jurisdiction of the question, must be taken as beyond controversy.

The principle is this: "When private property is devoted to a public use, it is subject to public regulations." And this is more especially true when the owner has either a legal or a virtual monopoly of the business in which the property is used.

The principle has immemorially in England, and in this country from its first settlement, been assumed in acts of the several legislatures, pre-

scribing the charges of innkeepers, ferrymen, and other common carriers, public wharfingers, warehousemen, etc.

The act of 1798 (Rev. Code, ch. 79, sec. 3) as to ordinaries and innkeepers authorized the county courts to rate their prices for liquor, diet, lodging, provender, etc. The act of 1779 (Rev. Code, ch. 101, sec. 27) regulates in like manner the tolls at public ferries, and the act of 1777 (Rev. Code, ch. 71. sec. 61) the tolls at public mills.

The constitutionality of these acts has never been questioned, but they have been always regarded as wise and politic exercises of the police power of the State.

There can be no distinction in principle between the power to enact those acts and the one in question in this case. Of course, it cannot affect this case that the defendant is a corporation. Corporations, like all other persons, are subject to the police power of the State. There is no exemption in this respect in the charter of the company. It was granted great privileges in consideration of the performance of certain duties to the public. It enjoys a virtual monopoly of the carriage of freight within a certain distance on each side of its line across nearly the entire breadth of the State. It enjoys, through the proverbial "wisdom (350) of the Legislature," the privilege of having its property exempt from the general burden of taxation. There could not be a clearer case of private property devoted for a valuable consideration to a public use, and consequently subject to public regulation.

That the regulation in question is within the scope of the police power of the State seems clear to us. A common carrier is bound by the common law to convey goods committed to him for that purpose within a reasonable time, and on failure is liable in damages.

The Legislature considered the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interest of local shippers, for whose interest principally the road was built, and against whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage in order that the company might obtain the carriage from points where there were competing lines by land or water—as from Wilmington or Augusta. It declared, therefore, that the maximum of delay should be five days after a receipt for carriage, and imposed a penalty for very day's delay beyond. The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty.

2. Having seen that the company was *prima facie* liable, we proceed, to consider its excuse. It is unnecessary to consider whether any excuse

short of "an act of God or of the King's enemies" would suffice. 1 Pars. Shipping, 314. We concur with the judge that the excuse offered was insufficient.

A common carrier (especially one having a monopoly of the carriage) who invites the public custom is bound to provide sufficient power and vehicles to carry all the goods which his invitation naturally
(351) brings to him. The quantity of local freight he can foresee with approximate accuracy, and his first duty is to provide for that. If in consequence of special inducements held out by him the amount of freight from distant and foreign points, or through freights, which may not be a matter of certain calculation, is unexpectedly large, he is not at liberty to delay and injure the local shippers whose wants he foreknew and was bound to provide for; but he must rather reject the distant freight at the risk of breaking his promise and incurring damages to those shippers, because the quantity of their freight he could not foresee, and was, therefore, bound absolutely to provide for only by his own voluntary promise, and not by a duty imposed by the common law.

That the defendant did not have a sufficiency of cars of which to carry plaintiff's cotton cannot be deemed a legal excuse, when it is seen that the deficiency was in consequence of its own acts in inducing large shipments from points beyond its southern terminus.

The effect of these inducements it was bound to foresee and provide for. If a railroad should advertise that on a certain day it would take all persons, say from Raleigh to Charlotte, on its regular passenger train at half price, and its cars should in consequence be filled, it would not excuse in excluding any local passenger. Its duty was to provide accommodation for the extraordinary passengers *in addition* to the necessary accommodation of its usual local travel, and not *to the exclusion* of such travelers.

We can cite no case in which the question we have been considering has been made; but our conclusion seems just and reasonable.

A delay of local shipments, caused by a lack of cars, which lack is caused by a pressure of through freight, caused by inducements held out by railroad companies, was the very evil which the act of 1874-75 undertook to remedy; and if such an excuse is admitted, the act is a
(352) dead letter, and we shall continue to see farmers, whose taxes built the roads, carrying their crops to market in ox carts along the sides of the railroads.

3. It appears, however, that the defendant company could have gotten additional cars from the north, and it does not appear that they could not have been gotten by ordinary diligence.

A railroad company is bound at common law, independently of any statute, to use at least ordinary diligence in procuring a sufficiency of

cars to carry all the freight tendered it, and certainly all that is accepted by it for shipment. This principle is so reasonable that it needs no support from authority, but it may be illustrated by two cases. In *Williams v. Vanderbilt,* 28 N. Y., 217, the plaintiff purchased of the defendant tickets entitling him to a passage from New York to Greytown, thence to San Juan, and thence by the steamer *North America* to San Francisco. That steamer, however, had been wrecked and lost before the tickets were purchased, but the loss was unknown to both parties. The plaintiff was carried to San Juan, but in consequence of the neglect of the defendant to procure a steamer from thence to San Francisco, was detained for some time on the isthmus, and the Court held that it was the duty of the defendant to procure another steamer, if by ordinary diligence he could have done so; and that plaintiff was entitled to recover for the damages caused by his failure to do so. In *Collier v. Swinney,* 16 Mo., 484, the defendant agreed to carry tobacco for plaintiff from Glasgow to St. Louis on defendant's steamer *Wapello.* This boat was detained for some time with the cargo on board, by low water, while boats of less draught were running. It was held that defendant should have transmitted the tobacco by the smaller boats.

These cases, it is true, were actions on contracts, and it may be (353) that sometimes an excuse will relieve from a mere statutory duty, which will not from a duty assumed by contract. But here the statute did not create the duty. That existed at common law, and by the contract implied upon the receipt of the goods. The statute only added a penalty for the neglect to perform the duty after a certain time.

4. The only remaining question is, For how many days did the company incur the penalty? The cotton was received and a bill of lading given on Tuesday, 10 October. It was shipped on 19 October. The act (1874-75, ch. 240, sec. 2) says: "It shall be unlawful for any railroad company, etc., to allow any freight they may receive for shipment to remain unshipped *for more than five days,* unless otherwise agreed, . . . and any company violating this section shall forfeit and pay $25 for each day said freight remains unshipped, to any person suing for the same."

The rules for the computation of time ordinarily cited are not applicable here. They may be found in Com. Dig. *Temp;* 13 U. S., Dig., sec. 1, *Time.* In all cases where it can be gathered from the words, the intent must prevail, and one day or both will be included or excluded, as the intent may require. If the language of a penal statute is ambiguous, that construction will be given it which is most to the advantage of the person upon whom the penalty is imposed. *Judd v. Fulton,* 10 Barb. (N. Y.), 117; *S. v. Schnierle,* 5 Rich. (S. C.), 299; *O'Connor v. Towns,* 1 Tex., 107.

In this case the longest time of delay before the penalty attaches is evidently advantageous to the defendant; and we think, also, that the intent of the act is clear to allow five *full* days of demurrage. Five full days expired with Sunday, 15 October. If Sunday is to be counted as one of the days, the first penalty was incurred on Monday, 16th, the second on the 17th, the third on the 18th. On Thursday, the 19th, the cotton was shipped. The day of shipping should not be counted, because no (534) penalty is incurred by any delay of a fraction of a day. The question remaining, then, is, Shall Sunday be counted as one of the five days of permitting demurrage? or shall it be ignored as a day, and the following Monday be allowed as an additional day of demurrage? in which case the penalty will have been incurred for two days only, instead of for three days, if Sunday be counted. The only analogous case that occurs to us, on which there is any authority, is where a certain number of days is stipulated for in a charter party for loading or unloading, which is called demurrage. There it has been held that the days are running days, and not working days, unless otherwise stated, and that Sundays and holy days are to be counted. *Brown v. Johnston,* 10 M. & W., 331; *Brooks v. Minturn,* 1 Cal., 481. In support of a difierent view, *Cochran v. Retberg,* 3 Esp., 121, was cited on the argument of these cases, but there a custom of the port was provided, that Sundays should not be counted. There is no such proof in this case. We think that by the words "five days" the act meant *running* days, and that Sunday was one of them.

Judgment below reversed, and the plaintiff will have judgment in this Court for $75.

PER CURIAM. Judgment accordingly.

Cited: Katzenstein v. R. R., 84 N. C., 694; *Keeter v. R. R.,* 86 N. C., 348; *Whitehead v. R. R.,* 87 N. C., 260, 264, 265, 270; *Branch v. R. R.,* 88 N. C., 572; *McGowan v. R. R.,* 95 N. C., 425, 427; *Middleton v. R. R., ib.,* 169; *Alsop v. Express Co.,* 104 N. C., 285, 294, 299; *S. v. Moore, ib.,* 794; *Hodge v. R. R.,* 108 N. C., 32; *Purcell v. R. R., ib.,* 420; *Sutton v. Phillips,* 116 N. C., 505; *Glanton v. Jacobs,* 117 N. C., 428; *Hansley v. R. R., ib.,* 576; *Carter v. R. R.,* 126 N. C., 442; *Grocery Co. v. R. R.,* 136 N. C., 402; *Meredith v. R. R.,* 137 N. C., 481; *R. R. Connection Case, ib.,* 24; *Stone v. R. R.,* 144 N. C., 222, 228; *Davis v. R. R.,* 145 N. C., 211; *Efland v. R. R.,* 146 N. C., 138; *Davis v. R. R.,* 147 N. C., 70; *Garrison v. R. R.,* 150 N. C., 579, 592; *Reid v. R. R., ib.,* 758, 764; *Peanut Co. v. R. R.,* 155 N. C., 163; *Mule Co. v. R. R.,* 160 N. C., 220; *Bell v. R. R.,* 163 N. C., 185.

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ALANSON CAPEHART v. THE SEABOARD AND ROANOKE RAILROAD COMPANY.

Common Carrier—Contract—Bill of Lading—Action for Damages.

1. A stipulation in a bill of lading given by a common carrier, that all claims for damages shall be made by the consignee at the delivery station *before* the article is taken away, is reasonable. Therefore, in an action against a railroad company for damages to certain cotton, when the plaintiff had not complied with such stipulation contained in his bill of lading: *Held*, that he was not entitled to recover.
2. Such a provision in a bill of lading will not protect a common carrier from liability for latent injuries.

APPEAL at Spring Term, 1877, of NORTHAMPTON, from *Buxton, J.*

The plaintiff alleged negligence on the part of defendant corporation, a common carrier, in transportating sixty-five bales of cotton from a certain landing on the Roanoke River to Norfolk, and that by reason of such negligence the plaintiff was damaged. The negligence was denied by the defendant, and thereupon issues were submitted to the jury. In the bill of lading is the following: "And it is further stipulated that in case any claim arise from any damage or loss of articles mentioned in this receipt, while *in transitu* or before delivery, the extent of such damage or loss shall be adjusted in the presence of an officer of the line before the same be removed from the station, and such claim must be sent, within thirty days after the damage or loss occurred, to James McCarrick, trace agent, Portsmouth, Va., who has authority to settle such claims." The counsel for defendant asked the court to charge the jury that the plaintiff was not entitled to recover, because he had not proceeded according to the above stipulation in the bill of lading. This prayer was refused, and under the instructions of his Honor the jury rendered a verdict for plaintiff. Judgment. Appeal by defendant.

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R. B. Peebles and W. W. Peebles for plaintiff:
W. N. H. Smith and D. A. Barnes for defendant.

READE, J. The duties of common carriers are well defined, and public policy requires that they shall be performed at all hazards, except the act of God or the public enemy. Ordinary cases avail nothing and ordinary liabilities cannot be provided against, even by special contract. But still it is allowable for them to make reasonable regulations to protect themselves from imposition, and to make the service more convenient for themselves and for the public.

We think that it is a reasonable regulation that a claim for damages should be made by the consignee at the delivery station *before* the article

is taken away. This is not only reasonable in itself, but under the system of continuous, connecting, and coöperating lines of railroads and steamboats, it is almost indispensable, in order that liability may be fixed upon the proper person by immediately tracing back the article and locating the injury. This is the advantage to the carrier service itself, added to the further advantage that it prevents false claims for injuries after the articles are delivered. The advantage to the public is that it enables and encourages carriers to act as forwarding agents for shippers, thereby dispensing with the necessity for the shippers to have receiving and forwarding agents at the end of every line. This is a great convenience and saving of expenses to shippers, which the carriers would not perform if they were not permitted to protect themselves by requiring claims for damages to be made before they part with the article.

To this it is objected that goods are often sent from the delivery station to the consignee without his having an opportunity to ex-
(357) amine them. The answer is, that if the carrier delivers the goods to an unauthorized person, that is his fault, and the provision would not apply. If the consignee send an agent, as a hackman, he could give instructions not to receive, except in good order. Of course, the provision would not protect the carrier against liability for latent injures.

The extent to which our decisions go is that the stipulation for claim of damages *before* delivery is reasonable, and that the defendant was entitled to the instructions prayed for.

PER CURIAM. *Venire de novo.*

H. L. BUMPASS, EXECUTOR, v. E. T. CHAMBERS ET ALS.

Executors and Administrators—Legacy—Pleading.

1. If an executor, after sufficient time for settling the testator's estate, voluntarily delivers possession of property to a legatee, he must allege and prove *special circumstances* showing that he was in no default, to enable him to recover back the property.
2. In such case where it appeared on the face of the complaint that the executor assented to the legacy: *Held*, to be demurrable.

APPEAL at Fall Term, 1876, of PERSON, from *Kerr, J.*

The plaintiff is executor of John A. Bailey, deceased, under whose will the defendant Elizabeth T. Chambers took certain real and per-
(358) sonal property "during her natural single state," with remainder over to the other defendants.

The facts are sufficiently stated by *Mr. Justice Faircloth* in delivering the opinion of this Court.

The demurrer of the defendants was sustained by his Honor in the court below. Judgment. Appeal by plaintiff.

E. G. Haywood and A. W. Tourgee and Edwards & Batchelor for plaintiff.

Graham & Ruffin for defendants.

FAIRCLOTH, J. The plaintiff's testator, after providing for the payment of his debts, devised and bequeathed his entire estate to the defendant E. T. Chambers, during her natural life or single state, with remainders to other defendants. After sufficient time for the settlement of the estate, the plaintiff voluntarily delivered possession of the whole legacy to the tenant for life, which inured to the benefit of the remaindermen.

This action is brought to recover back the possession of the same property, alleging that the other defendants are the legatees and heirs at law of the testator; that there are some of the debts of his testator unpaid; that he has turned over the legacy to the tenant for life, who has or is about to dispose of the personal property, and that he has filed his final account in the probate court.

To this complaint the defendants filed a demurrer on the ground:

1. That the plaintiff should have commenced by "special proceedings in the probate court."

On inspection, we find that the summons was made returnable before the clerk of the Superior Court within twenty days, which has been held sufficient. *Staley v. Sellars,* 65 N. C., 467.

2. On the ground that it appears on the face of the complaint (359) that the plaintiff assented to the legacy. This is a fatal objection to plaintiff. It is well settled that when an executor assents to and delivers a legacy, he cannot recover it back, or call on the legatee to refund the amount of a debt paid by him afterwards, of which he had no notice at the time he assented, unless he alleges and proves *special circumstances* showing that he was in no default, and relieving him from the imputation of negligence. *Donnell v. Cooke,* 63 N. C., 227.

The plaintiff does not allege that since he assented to the legacy he has paid any debt, nor that he had no notice of it before, nor that he took a refunding bond, and if not, why not; and he fails to set forth a single circumstance tending to bring him within the exception to the rule above stated. He ought to have stated distinctly the matters of fact out of which his right to relief arises, in order that the defendants might put those matters in issue, and, having failed to do so, or even to make the attempt, his complaint would have been demurrable on account of its vagueness. *Marsh v. Scarborough,* 17 N. C., 551.

On the argument it was urged that the allegation that defendant Chambers was about to sell the personalty gave the plaintiff a right of

action under the fifth item of the will, "to see that the property is not wasted." This was disposed of by the decision in *Chambers v. Bumpass,* 72 N. C., 429, declaring that the plaintiff in that action was entitled to the use and enjoyment of the legacy, and it is to be presumed that the defendants, all of age, will attend to that matter.

It was also urged that the action could (under Bat. Rev., ch. 45, sec. 147) be maintained for a final settlement by "setting forth the facts and praying for an account and settlement of the estate committed to his charge"; but he does not propose to do so in his complaint, nor ask for an account, and does not allege that defendants owe *him* anything. It cannot fail to impress any one reading the complaint that its sole purpose is the recovery of the possession of the property, which we (360) have seen cannot be done under such circumstances. If the plaintiff has properly managed the estate as required by law, he is safe from the creditors; and if he has not, it is his fault, and the Court cannot help him by disturbing the possession of the legatees.

PER CURIAM. Affirmed.

Cited: Lowery v. Perry, 85 N. C., 134; *Gay v. Grant,* 101 N. C., 218; *Lyle v. Siler,* 103 N. C., 266.

JOHN M. ARMSTRONG, ADMINISTRATOR, v. JASPER STOWE, EXECUTOR.

Executors and Administrators, Removal of, for Failure to Account.

Integrity on the part of a personal representative, shown by an open hand, full and accurate accounts, and frequent reports, constitutes the chief safeguard to a decedent's estate. Therefore, where an executor who had remained in his office as such for twenty years, and had made no statement of the account of his testator's estate: *Held,* that he was properly removed from his office by the judge of probate.

SPECIAL PROCEEDING, commenced in the probate court of GASTON and heard on 1 June, 1877, at chambers, in Charlotte, before *Cloud, J.*

The plaintiff is administrator of Nathan Foard, and had recovered judgment for a considerable sum against the defendant Jasper Stowe, E. B. Stowe, and W. A. Stowe, executor of Larkin Stowe. The judgment was obtained in an action upon the official bond of Jasper Stowe, as guardian of plaintiff's intestate, Nathan Foard, to which bond the defendants' testator, Larkin Stowe, was surety, who, at the time of his death in 1857 owned real and personal estate amounting to about (361) $25,000, of the disposition of which no account has ever been filed.

It was further alleged that the defendants had instituted proceedings to subject a portion of their testator's land to the payment of his debts; that said defendants were insolvent, and that the plaintiff as a creditor of said estate would be unable to realize anything on his debts unless the defendants were removed from their office as executors and some competent person appointed administrator with the will annexed.

In their answer the defendants alleged that the personal property which remained after the emancipation of the slaves was sold, and the proceeds applied to the payment of debts, and a return thereof made according to law; and they believed that all the debts for which the said estate was liable were paid, they filed no final account or settlement of the estate, especially as all the heirs and distributees were of full age; that they have never used any part of said proceeds on their own account, but applied the same to the payment of the debts of their testator in good faith; and that they filed said petition for the sale of land with the *bona fide* intention of applying the proceeds thereof to the payment of his outstanding debts.

Upon the hearing of the case in the probate court, the letters testamentary were revoked, and the defendants appealed to the judge of the district, who affirmed the decision of the judge of probate and gave judgment accordingly. From this ruling the defendants appealed.

Wilson & Son for plaintiff.
A. Burwell for defendants.

READE, J. The following safeguards are placed by the law around the estates of deceased persons: (1) The persons most interested shall be appointed to manage them. Bat. Rev., ch. 45, sec. 3. (2) They must be persons "competent" to do the business. (3) They (362) must give bonds and sureties. (4) They must take oaths. Sec. 15. (5) They must render accounts. Sec. 25. (6) Upon failure to do which they are liable to indictment and imprisonment; and (7) To removal.

Some of these safeguards are omitted in case of executors, where much is left to the discretion of the testator, as he may appoint whom he pleases, unless the person be expressly disqualified, and may or may not require bond.

After all, the chief safeguard and the one most valued is *integrity*, shown by an open hand, full and accurate accounts, and frequent reports.

The defendants have been in their office of executors for twenty years. They returned no inventory of the estate which came to their hands, which was their first and most important duty; and so far as appears, the secret to this day is locked up in their own breasts. They have rendered no account current showing what they have received and what they

have paid out, and have not made or offered to make any "final settlement." The excuse which they render is that they did make a report of sales, and as they paid off all the debts of which they had knowledge and had nothing left, and the legatees were all of age, they thought an account unnecessary.

Now, the judge of probate might very well have doubted the accuracy of the statement that the debts of the estate and the assets fitted precisely—not a dollar too much or too little; and the fact that the legatees were all of age made no difference, because an account not rendered was just as unintelligible to an adult as to an infant.

But the defendants are mistaken in supposing that they had paid off all the debts of which they had knowledge; for the large debts now claimed by plaintiff, and for which he has judgment, was owing by defendant Jasper Stowe, as guardian, with his testator as his surety. He may well be supposed to have known that he was a defaulter to
(363) his ward, and that his testator was his surety; and it was his duty, instead of delivering over the property to the legatees to be by them squandered, to have subjected the property to the payment of the plaintiff's debt. As it is, the plaintiff's debt seems to be in jeopardy. Everything is gone but the land; that has been delivered over to the legatees; some of them have sold; and two years have elapsed, and only what remains unsold with some of the legatees remains to satisfy the plaintiff's debt. This remnant the defendants seek to get their hands upon. The plaintiff may well be alarmed. It is true that the court may require of the defendants a bond, but a bond cannot supply the want of integrity. They have already been guilty of malfeasance in office. They have spent their own estate. The defendant Jasper has spent his ward's estate. They have squandered, or allowed to be squandered, their testators's estate, and they have no excuse, unless it be in "the fashion of the times," which the courts ought to rebuke.

We agree with his Honor, and we are gratified to agree also with the probate judge, that the defendants ought to be removed.

PER CURIAM. Affirmed.

Cited: Simpson v. Jones, 82 N. C., 325.

(364)

W. T. STEPHENSON, ADMINISTRATOR, v. W. W. PEEBLES.

Executors and Administrators—Parties—Practice.

1. A. instituted action against the defendant and died pending the same; his administrator was made party plaintiff and died; an administrator *d. b. n.* was appointed, who declined to further prosecute the action; thereupon B. files an affidavit in the cause, setting forth that the action was originally brought by A. for his use, and asking to be made a party plaintiff and to be allowed to use the name of the administrator *d. b. n.* in the prosecution of the action; B. thereafter died, and his administrator renewed the application: *Held*, (1) that the administrator of B. should not be made party plaintiff; (2) that upon his filing proper indemnity to secure the costs, he was entitled to have the administrator *d. b. n.* made party plaintiff and the action prosecuted in his name.
2. In such case, where the original administrator died in March and the application by B. to be made party plaintiff was made in December following: *Held*, that it was in apt time.

MOTION in the cause, heard at Spring Term, 1877, of NORTHAMPTON, before *Buxton, J.*

Upon the death of the intestate, Samuel A. Warren, W. T. Stephenson was appointed his administrator, and made a party plaintiff. Upon Stephenson's death (pending the action), R. B. Peeples, Esq., was appointed administrator *d. b. n.*, but refused to become a plaintiff in the action. The defendant thereupon moved that the action abate; and William Grant, the administrator of Edmond Jacobs, for whose benefit the original action was alleged to have been brought, applied to be made a party plaintiff. His Honor allowed the application of Grant, and also a rule on R. B. Peebles to show cause why he should not be made a coplaintiff. The defendant's motion that the action abate was refused. From which ruling the defendant appealed.

D. A. Barnes and W. N. H. Smith for plaintiff. (365)
R. B. Peebles and J. B. Batchelor for defendant.

FAIRCLOTH, J. This action was commenced by Samuel A. Warren, who died, and an administrator on his estate was made plaintiff, upon whose death an administrator *de bonis non* was appointed on said estate, The administrator *d. b. n.*, declines to prosecute the action, and refuses to be made a party plaintiff.

After the death of Warren's administrator, one Edmund Jacobs filed an affidavit in the cause, setting forth that the action was originally instituted for the sole use and benefit of him, the said Jacobs, and that Warren had no interest in the recovery except as trustee for said Jacobs,

and prayed to be made a party plaintiff, and to be allowed to use the name of Warren's administrator *d. b. n.* for the purpose of prosecuting the action, and proposed to conduct the suit and assume all responsibility for the costs. After his death, his administrator renews and urges the same application by an affidavit substantially the same as Jacobs'.

Upon this motion the case is before us, and we neither express nor intimate any opinion on the merits of the controversy. For the purposes of this motion, we must assume that Jacobs' allegation is true, in order that he may have an opportunity to be heard; and we think on this assumption that the refusal of Warren's administrator to be made a party should not be allowed to deprive Jacobs' representative of an opportunity for an investigation into the merits of the controversy between the plaintiff and defendant, on the conditions proposed by the administrator of Jacobs.

It is our opinion that the administrator of Jacobs should not be made party plaintiff, as it would introduce unnecessary confusion in the case, and that part of his Honor's order is reversed.

(366) It is also our opinion that upon filing an indemnity bond with the clerk in this case, to be approved by him, against the costs of the action, he is entitled to have the administrator of Warren made a party plaintiff, and to be allowed to prosecute said action in his name, and in this respect the order made below is affirmed.

We concur with his Honor in refusing to allow the action to abate on defendant's motion. The administrator died in March, 1876, and in December following Jacobs applied by affidavit and motion to have the succeeding administrator made a party, and there is no ground on which it should abate. The refusal of the administrator *d. b. n.* to come in as a party cannot have the effect to deprive others of their rights, which were demanded in proper time.

The case is remanded for further proceedings; each party to pay his own costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: *Merrill v. Merrill,* 92 N. C., 660.

(367)

B. F. ARRINGTON, EXECUTOR, v. W. T. DORTCH, EXECUTOR, ET ALS.

Executors and Administrators—Widow's Distributive Share—Advancements.

1. In ascertaining the distributive share of a widow who dissents from her husband's will, all his personal estate, whether consisting of advancements theretofore made to children or legacies to grandchildren or to strangers, is to be brought together, and her share is to be taken out of it, pursuant to the statute of distributions.
2. There is no substantial difference between Bat. Rev., ch. 117, sec. 7, and Rev. Code, ch. 118, sec. 12.

PROCEEDINGS for the settlement of an estate, heard at Spring Term, 1877, of NASH, before *Buxton, J.*

This proceeding was instituted by the plaintiff as executor of John Harrison against his legatees and W. T. Dortch, executor of his (Harrison's) widow. The facts as agreed upon were substantially as follows: John Harrison died in said county in 1870, leaving a last will and testament, of which the following is a copy: . . . "I give to my wife, Celestia E. Harrison, one year's allowance, $100 in specie, and (a considerable amount and variety of personal effects). The three beds and the stock not disposed of, to be sold at my death, and the household and kitchen furniture, still and fixtures to remain in her possession during her natural life. Whatever she may bring here, I consider hers.

"My desire is that all the land on the south side of her dower, including the tract on which N. C. Harrison formerly lived, be sold or divided between N. C. Harrison's children. After the death of my wife, the dower to be divided equally between the children of my deceased son, John F. Harrison, viz., Bettie and Mary.

"I have already given to my daughter, Mary Drake, one note (368) for $500 and one gold watch, to be handed to her after my death.
My will is that all the bonds and money on hand, if any, and the proceeds of the sale be equally divided between my grandchildren, who have already been mentioned in this will."

After the death of the testator, his widow dissented from the will, had her year's support allotted, and in 1873 she married again, and died in 1874, leaving a last will and testament, which was admitted to probate, and the defendant Dortch, named as her executor, duly qualified as such.

Before the marriage of the plaintiff's testator with said Celestia E., he made advancements to his children (the said John F. and N. C., Harrison and Mrs. Mary Drake) of slaves and other personal property of the value of several thousand dollars, they being his only children by a former marriage. It was insisted by the defendant executor that said

advancements should be accounted for in ascertaining the share of his testatrix in the estate of her first husband. It was insisted by the other defendants that the defendant executor was only entitled to one-fourth of the personal property, and that the other threefourths should be divided between the defendants, who are grandchildren of the plaintiff's testator.

It was then agreed that if the court schould be of opinion with the defendant executor, all the money in the hands of the plaintiff should be paid over to said Dortch; for that the same is not equal to the value of advancements made to each of said children; and if the court should be of opinion that the defendants are not required to account for the advancements, then it was agreed that one-fourth should be paid to said Dortch, and three-fourths divided equally between the defendants, who are grandchildren of the plaintiff's testator.

(369) Thereupon his Honor decided that said Dortch was entitled to one-fourth of said personal estate, and that the grandchildren—residuary legatees in said will—were not chargeable with advancements made to their parents, nor were the advancements to be taken into *hotch-pot* for the benefit of the widow. And as Mrs. Drake was a legatee, she would have to account for any advancements she may have received. From this ruling the defendant executor appealed.

J. J. Davis and C. M. Cooke for plaintiff.
Busbee & Busbee for defendant.

BYNUM, J. Bat. Rev., ch. 117, sec. 7, provides that where she dissents from her husband's will, "the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate." The Rev. Code, ch. 118, sec. 12, provided that "Where a widow shall dissent from her husband's will, she shall take as fully and such part of his personal estate as she would take in case of his intestacy." We can see no substantial difference between the two statutes, as was attempted to be shown in the argument, and therefore we must give the same construction to the former as to the latter has invariably received in the decisions of this Court. *Worth v. McNeil,* 57 N. C., 272, was decided in 1858, after the enactment of the Revised Code, and was a case entirely like the present, in that advancements had there been made of slaves to the children by a former marriage. It was there held, on the dissent of the widow, that in ascertaining her distributive share, as in a case of intestacy, she was entitled to have advancements made under the will estimated as a part of her husband's estate. The same principal was decided in *Headen v. Headen,* 42 N. C., 159; *Hunter v. Husted,* 45 N. C., 97; *Credle v. Credle,* 44 N. C.,

(370) 225.

His Honor in the court below held that Mrs. Drake, one of the children of the testator, being a legatee under the will, must account for advancements made to her, but that the other two children, not being legatees, the advancements made to them were not to be estimated in favor of the widow as against the grandchildren who claimed under the will. No such distinction can be sustained. In ascertaining the widow's share who dissents, there is no will to her, but the husband dies intestate; and of course all his personal estate, whether consisting of advancements theretofore made to children, or legacies to grandchildren or strangers, is to be brought together, and her share is to be taken out of it pursuant to the statute of distributions. Bat. Rev., ch. 45, sec. 103. His Honor was probably misled by what the Court said in *Worth v. McNeil, supra,* and by not adverting to the distinction there made between the case of the widow claiming against the will as in an intestacy, where all the personal property must be brought in *hotchpot* for her benefit, and the case of a division among the children claiming under a will, where advancements are not to be accounted for as between themselves. In this case all the advancements are to be accounted for and as of time when made, and the widow or her personal representative is entitled to a child'spart, as in case of an intestacy.

It may be a hardship upon the children and legatees, as the advancements were made in slaves, which have been emancipated by the results of the war; but, then, the law operates by fixed principles, and cannot bend to cases of individual and exceptional hardship.

There is error. Judgment reversed, and judgment here according to the agreement in the case stated.

PER CURIAM. Reversed.

Cited: University v. Borden, 132 N. C., 501.

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(371)

MARY HALE ET ALS. v. WILLIAM E. AARON, EXECUTOR, ET ALS.

Executors and Administrators—Purchaser—Account—Residuary Legatee.

A purchase by an executor of a special legacy is not in fraud of the rights of the residuary legatees, and he can be held to no accountability to them for any profit he may make by such purchase.

MOTION in the cause, heard at Spring Term, 1877, of HALIFAX, before *Buxton, J.*

Lewis Hale died, leaving a last will and testament appointing his widow, Sarah Hale, executrix; and upon her death, and under her will, the defendant entered upon the discharge of his duties as executor of the estates of both of them. Lewis bequeathed his whole estate to his widow, except $1,000, to be paid in annual installments of $100. After disposing of her real estate, Sarah bequeathed several thousand dollars to sundry persons, to be paid out of the money and choses in action on hand at her death. The plaintiffs, the residuary legatees, alleged that a settlement had been made with all the legatees except themselves, and that the interest of two other legatees had been purchased for less than its value by defendant Grizzard for the benefit of the defendant executor, who has now on hand a large amount of money, etc., unadministered. Wherefore they demanded an account of the administration of the defendant executor, and judgment for the amount of their legacies. They also asked that the defendant Grizzard release to them any claim he may have to any portion of the assets by reason of said assignment, and pay over to them any money he may have received by virtue thereof.

(372) The defendant Aaron, in his answer, says he has filed a full and perfect account, and has assets sufficient to pay only a ratable part of the amount bequeathed by said Sarah, and that he has paid the amount of the legacy under the will of said Lewis in full.

The defendant Grizzard, in his answer, says that he is the *bona fide* owner of the interest assigned as aforesaid, and holds the same in his own right for a valuable consideration.

The plaintiffs now move that certain promissory notes mentioned in their affidavit and alleged to be a part of the assets of the defendant's testatrix be delivered to the clerk of said court to abide the determination of the action. His Honor did not pass upon the truth of the allegations in the pleadings, but based his decision upon the question of law arising thereon, namely, that the executor had a right, as against the residuary legatees, to purchase and hold the special legacies, and could not to be held to account for the profits he might make by such purchase. Motion overruled. Appeal by plaintiffs.

Mullen & Moore for plaintiffs.
E. Conigland, W. H. Day, and John Gatling for defendants.

BYNUM, J. His Honor below properly enough rested his decision upon a point which goes to the merits of the action. The case is this: A testator makes a bequest of $1,000 to A. and $4,000 to B., and the residue of his estate to C., D., and E. The executor purchases and takes an assignment of the special legacies to B. and C.—at, say, half their value. Can the residuary legatees claim the benefit of such purchase?

We think not. The case presents no such questions as to whether such an assignment would not be void as against creditors, or to be set aside at the instance of these special legatees themselves, and the executor be held to account for the full value of the legacies. The debts are paid, and the special legatees who have assigned do not complain. The (373) only parties, then, who do complain are the residuary legatees. What interest have they in the special legacies? They are entitled to nothing until these legacies have been paid, and are then entitled only to what of the estate is left.

In *Peyton v. Smith,* 22 N. C., 325, the administrator purchased at a discount an interest in and to a distributive share of the estate while a suit was pending therefor. The other next of kin alleged that he had paid too little, and claimed that the profit made on the purchase should result to them. But the Court held that while such contracts are viewed with jealousy, whether the purchase ought to stand or not is exclusively a matter between the parties to the contract. "As to all others, it must be understood as transferring the right which it professes to sell; and the price paid by the purchaser is a matter which concerns none but the parties." It is attempted to distinguish the case before us from the one just cited, in that in the latter there was no ulterior trust, but the administrator purchased the distributive share from the *cestui que trust* himself. We do not see the distinction. In our case the purchase was also from the *cestuis que trustent,* the special pecuniary legatees. There was no ulterior limitation of these legacies, but they belonged absolutely to the first takers. If they had died either before or after reducing the whole or part of the legacies into possession, the plaintiffs could claim no portion of them under the will as residuary legatees. So far as they are concerned, it was nothing to them whether the special legatees sold for value or were cheated out of their legacies by the executor or any one else.

There is but one view in which the residuary legatees could have had an interest in the special legacies and a right to maintain such an action as this. If the specific pecuniary legatees, or either of them, had *released* such legacy, the release would have inured to the benefit (374) of the residuary legates. But the deeds here by which the transactions were carried into effect were not releases of the estate, but direct and formal assignments of the legacies to the purchaser or in trust for him. It is true that the executor cannot sustain this purchase, which was clearly made by him in his fiduciary character; but the residuary legatees cannot treat the assignment as if it had been a release, and claim the benefit of the executor's purchase. They were not parties to the instruments, and cannot insist on their being upheld for their advantage. The benefit of the purchase must belong to the legatees who as-

signed, when they see fit to claim it, subject to the payment of the principal and interest paid by the executor. Upon such an assertion of their rights they will be remitted to the former state and condition. If this had been a contest between the general creditors and the executor who made the purchase, or if it had been the purchase of an outstanding encumbrance at an undervalue, in either case the purchase would have inured to the benefit of the estate. It was neither. *Barton v. Hassard,* 3 Drury & Warren's Ch. Cases, 461. His Honor was therefore correct in holding that the executor had a right as against the residuary legatees to purchase and hold the special legacies, and was not accountable to them for any profit he might make by the purchase.

PER CURIAM. Affirmed.

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(375)

W. H. SHIELDS, ADMINISTRATOR, v. W. N. ALLEN ET ALS.

Sale of Land—Special Proceeding—Parties—Executors and Administrators—Homestead.

1. Where a particular piece of land is sold under an order of court, a good title is deemed to be offered, and a purchaser will not be compelled to complete his purchase by payment of the price, if it appear that a good title cannot be made. It is otherwise in cases where the sale is ordered merely of the *estate* of a person named.
2. Where a sale of land was made by an administrator under an order of court for the purpose of making real estate assets, in a proceeding to which certain infant heirs at law were not made parties by personal service of process, which land was afterwards set apart to such infants as a homestead: *Held,* that the purchaser was entitled to have the sale vacated, the cash paid as part of the purchase money refunded, and his note given to secure the residue of the purchase money canceled.

SPECIAL PROCEEDING, commenced in the probate court and heard on appeal at Spring Term, 1877, of HALIFAX, before *Buxton, J.*

The defendants are the heirs at law of James V. Allen, the intestate of plaintiff, whose land was sold for the payment of his debts. A portion of the land was bought by one John Manley, who paid a part of the purchase money and gave a note for the balance due, with one John A. Reid as surety. Manley is insolvent. Reid died intestate, and J. M. Mullen is his administrator. The report of the sale was returned and regularly confirmed, and the plaintiff directed to collect the balance of the purchase money at the maturity of the note. On the day of sale the defendants gave notice that they claimed the land as a homestead. See Allen v. Shields, 72 N. C., 504.

The plaintiff now applies for a rule on Mullen, the adminis- (376) trator of Reid, to show cause why judgment should not be rendered for the balance of the purchase money. This was resisted upon the ground that the plaintiff could convey no title to the land, and that the court had no power to order a sale thereof; and it was insisted that the amount of the cash payment should be refunded. The probate judge refused the application, and his Honor affirmed the judgment, and the plaintiff appealed.

Thomas N. Hill for plaintiff.
Mullen & Moore for defendant.

RODMAN, J. It is conceded that the minor children of John V. Allen were entitled to a homestead in the lands described in the pleadings. *Allen v. Shields,* 72 N. C., 504. After such homestead was laid off, there was no excess; the whole land did not exceed $1,000 in value. The homestead estate could not be sold to pay debts, nor could the reversion after the expiration of the homestead. *Hinsdale v. Williams,* 75 N. C., 430. There was nothing, therefore, which the court could authorize to be sold, or which the administrator could sell. The purchaser acquired nothing. All this seems to be admitted; at all events, we take it to be clear.

The plaintiff, however, contends that the purchaser took the risk of getting a title, and must pay his bid, although it happens that he gets no title, just as a purchaser at an execution sale must.

There is no doubt but that such is the law of execution sales. It is equally clear that when a court orders a sale of a particular piece of land for partition or any other purpose, it offers to sell a good title, and will not compel a purchaser to complete his purchase by payment of the price if it appears that a good title cannot be made, except when the sale is expressly or by implication stated to be merely of the *estate* of a person named, as on the foreclosure of a mortgage, or of some other certain and definite estate or right.

The counsel for the plaintiff contends that the distinction is (377) between a sale *in invitum,* as by a sheriff under an execution, and one which in fact or in form is by consent of parties, as under a judgment for partition.

But we conceive that no line of distinction on that ground can be maintained, because in proceedings in partition or by creditors or others to enforce a trust, and in other analogous cases in which a sale may be ordered and in which a good title is offered, the decree may be, and often is, both in fact and in form *in invitum.*

The test whether a good title or merely the estate of a named person, whatever it may turn out to be, is offered for sale, must be found in the decree itself; and where that is not clear, in the nature of the proceedings in which it is made. In a proceeding for partition, the court first determines that the title to the property is in the parties, and between the parties the adjudication is conclusive. It then decrees that the land or other property be sold. Consequently it offers for sale a good title, and cannot insist upon payment by a purchaser unless such a title can be made. So it is in cases where a court decrees a sale by an executor or other trustee, and other analogous cases. The nature of the proceeding implies that a good title is offered, and it will be so deemed unless there be something in the decree for sale which forbids such an implication. A court may, of course, always describe in its decree what estate its commissioner is to sell, and it ought always to do so; and especially is it needful to do so when it means that the purchaser is to take the risk of title. Generally, it would unduly disparage the value of property to order a sale at the risk of the purchaser as to the title, and it would be unjust to the owners. It suggests that the title is doubtful. Hence, a court will never order a sale on such terms except in exceptional cases.

(378) In the present case the complaint alleges that John V. Allen had died seized of the land which descended to his heirs, some of whom were infants, and that it was necessary to sell it to pay his debts. The court orders that the administrator sell the *land,* and the order implies that it had adjudicated as to all the parties to the action that the land could properly be sold for the purpose. The land—that is, a good title to the land—was, and under the decree ought to have been, offered for sale by the commissioner. That was what the purchaser contracted for, and he is at liberty to rescind the contract when it appears that the commissioner cannot perform his part of it, *i. e.,* cannot make a good title by reason of the right of the minor children to a homestead in it, which takes the whole area sold.

If the infants had been regularly made parties, and had then neglected to claim their homestead, probably their rights would have been barred by the adjudication. All bidders had a right to suppose that the infants were barred, and the purchaser cannot now be compelled to complete a contract different from that which he entered into. He did not get what the court ordered to be sold and what was offered for sale, which was the land.

The distinction between such cases and a sale by a sheriff under execution is obvious. In the case of execution sales the order of the court, that is, the *fi. fa.,* commands the sheriff to sell any property of the de-

fendant. Nothing in particular is directed to be sold. The nature and form of the proceedings show that there has been no inquiry as to the property or estate of the defendant in the thing sold. Consequently the purchaser buys what is professed to be sold, viz., the estate of the defendant in the thing, and nothing more.

The court should have vacated the sale and ordered the note (379) to be canceled and returned to the maker, and the cash price returned to the purchaser.

The case is remanded to be proceeded in according to this opinion. The defendant in the motion will recover his costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Edney v. Edney, 80 N. C., 85; *Miller v. Feezor,* 82 N. C., 195; *Ellis v. Adderton,* 88 N. C., 476; *Grimes v. Taft,* 98 N. C., 198; *Whitlock v. Lumber Co.,* 152 N. C., 194.

J. B. LITTLEJOHN AND WIFE v. C. J. EGERTON ET ALS.

Homestead—Adverse Possession Under Sheriff's Deed—Practice in Supreme Court.

1. A *condition* is a quality annexed to land whereby an estate may be defeated. A *homestead right* is a quality annexed to land whereby an estate is exempted from sale under execution for debt, and cannot be defeated by failure of a sheriff to have the homestead laid off by metes and bounds.
2. In such case, where there is an actual adverse possession under a sheriff's deed, this Court, in order to give full effect to the constitutional provision, will remand the case, to the end that the Superior Court may have the homestead laid off.

The homestead act discussed and explained by the CHIEF JUSTICE.

MOTION in the cause by plaintiffs to have homestead ascertained and for possession, heard at June Term, 1877, of the Superior Court.

The facts are stated in same case, 76 N. C., 468.

Busbee & Busbee and A. M. Lewis for plaintiffs.
J. B. Batchelor for defendants.

PEARSON, C. J. At the last term we decided that the plaintiffs (380) are entitled to a homestead; but it was held that judgment could not be rendered or a writ of possession issue, for the reason that the

homestead had not been assigned according to law; the assignment which the sheriff attempted to make before he sold under execution being void for uncertainty, in this, that it does not describe the homestead by metes and bounds, or give any description by which it can be identified. See *Grier v. Rhyne,* 69 N. C., 346.

The case was retained for further directions under the expectation that the plaintiffs would take the necessary steps in order to have a homestead assigned by metes and bounds. The plaintiffs now move for an order of this Court to the sheriff, commanding him to summon three appraisers and lay off a homestead according to law.

The complaint demands judgment that the plaintiffs be put into possession of so much of the homestead as can be identified, to wit, "the dwelling-house and curtilege, and the land on each side of the road," and that the assignment may be perfected as to the balance by having the 200 acres ascertained by metes and bounds.

The assignment of a homestead, if void in part is void *in toto.* The party is not at liberty to have possession of a part and ask to have the balance "patched up." So the plaintiffs now cut loose from the former assignment and ask to have a homestead assigned *de novo.* Can this Court make the order?

The homestead act, Bat. Rev., ch. 55, provides two modes of laying off the homestead; one by the officer who levies an execution or other final process obtained on any debt, and the officer is required to summon three appraisers, who are to lay off the homestead by metes and bounds; the other, upon application of any resident of the State to a justice of the peace, who shall appoint three assessors whose duty it shall be to lay off a homestead by metes and bounds.

We see no ground on which this Court can lay off a homestead by an order to the sheriff of the county, commanding him to have the
(381) homestead laid off by appraisers. It is suggested that the pendency of an action in which it becomes necessary that a homestead should be assigned gives this Court power to have it done, as incident to its jurisdiction. We do not think so. The pendency of the action and the necessity for having a homestead assigned gives the Court power to stay proceedings until the assignment can be made, but it does not give this Court power to have it done; for it is a court of appellate jurisdiction, and to have a homestead assigned would be to assume original jurisdiction. The homestead act makes no provision for a case like the present; and yet there must be some remedy, for the plaintiffs' right to a homestead was not extinguished by the fact that the land was sold under execution. When there is a right, there is a remedy. The sheriff cannot give the remedy, for having sold under the execution and made a deed, he is *functus officio,* and has nothing more to do in the matter.

Can the justice of the peace give the remedy? The homestead act, sec. 7, assumes that the debtor who applies to a justice of the peace to have his homestead laid off is in possession; so that section does not fit our case.

By section 11 the justice of the peace is required to give notice to the *creditors*. Here the creditors have no longer any interest in the question. The purchaser at sheriff's sale (and those claiming under him) is the only other party concerned, save the party who is making claim to a homestead. So that section does not fit our case.

Ex parte Branch, 72 N. C., 106, was referred to as being in conflict with this view, and as tending to show that a justice of the peace has power to give the remedy. There the debtor conveyed his land to a trustee to secure certain creditors, with an express exception of "so much of the land as may be laid off and assigned as a homestead under the act of Assembly." After his death, the widow filed a petition before a justice of the peace to have a homestead laid off. The justice of the peace gave notice to the creditors, who made themselves parties. (382) The justice of the peace decided in favor of the petitioner, the creditors appealed, and the Superior Court affirmed the judgment of the justice and ordered a writ of *procedendo*, and upon appeal to this Court the judgment was affirmed. No objection was made on the ground of adverse possession, and it is assumed that the maker of the deed of trust remained in possession up to his death, and it was considered that the homestead did not pass by the deed, because of the exception. In our case there is an actual adverse possession by the defendants claiming under the sheriff's deed, and that deed conveys the entire legal estate in the land, without any exception of the homestead. We conclude that these facts distinguish the cases, and that in our case the justice of the peace has no jurisdiction. The land is beyond his reach.

It remains to be seen whether the Superior Court has power to give the remedy and cause a homestead to be laid off, notwithstanding the sheriff's sale and deed, and the adverse possession of the defendants under that title. If the sheriff's deed had excepted so much of the land as may be laid off as a homestead, *Branch's case* would have been applicable. But the deed conveys the entire tract and makes no exception. So the plaintiffs are forced to rely for their protection upon the provision of the Constitution which secures to them a homestead. Suppose a sheriff willfully refuses to have a homestead assigned, and sells and conveys the entire tract; or suppose the appraisers, through ignorance or mistake, omit some matter essential to the validity of the assignment of a homestead, and the sheriff sells and makes a deed; can it be that the defendant in the execution will thereby lose his homestead?—and can the purchaser

at sheriff's sale, with a good conscience, take advantage of the wrongful conduct of the sheriff, or the ignorance or mistake of the
(383) appraisers, and thereby defeat the homestead? It is no answer to say the sheriff is liable to indictment and to a civil action for damages. That does not "enforce the right," which is for the man to enjoy his homestead. And in the latter instance he would not have even the poor consolation of an indictment and civil action against the appraisers, for we suppose that, as in our case, they acted from ignorance or mistake. In these cases equity will interfere and say to the purchaser, You are not allowed to take this iniquitous advantage, but will be treated as holding the title subject to the homestead right. If it be said, however it might have been against the purchaser at sheriff's sale, the court cannot take sides against the defendants, for they are purchasers for full value without notice, and equally entitled to the protection of the court, the reply is: In the first place, it is not true that they purchased without notice; they had notice of the plaintiffs' homestead right, and they have notice that the waiver on his part was by parol, and not by *deed,* "with voluntary signature and assent of the wife signified on her private examination according to law." It was therefore folly to buy and take the chances, and they have no right to complain when the game goes against them. In the second place, this is not an ordinary trust or equity, which is annexed to the person and not to the land; on the contrary, it is a right annexed to the land, and follows it like a condition into whomsoever's hands it goes, without regard to notice. When the equity is personal, and not annexed to the land, one who acquires the legal title by purchase for valuable consideration without notice can put himself on the doctrine, "When the equities are equal, the law prevails," and his legal title will not be disturbed; otherwise when the right is annexed to the land by an express condition or by the act of law.

An instance of the former kind is that of a right to redeem land held under mortgage. A condition was annexed to the estate at its creation whereby it was to be void on payment of the money. This condi-
(384) tion follows the land after the time of payment has expired, and it may be redeemed in the hands of one who acquired the legal title for valuable consideration without notice. This is familiar learning, and I will not take the trouble to cite the authorities.

An instance of the latter kind is the one we now have under consideration. True, no authorities can be cited, and our conclusion must depend upon "the reason of the thing"; but that is so convincing and the analogy to a right of redemption is so clear, that authority is not necessary to support it. It will stand alone, because it is a principle necessary to give full effect to a provision of the Constitution. A *condition* is a quality

annexed to land whereby an estate may be defeated. A *homestead right* is a quality annexed to land whereby an estate is exempted from sale under execution for debt.

The cause will be remanded to the Superior Court, with certified copies of the two opinions that are filed, to the end that the Superior Court may appoint three commissioners to lay off the homestead of the plaintiffs, with instructions to give notice at the time to the defendants, and in all particulars to observe as near as may be the requirements of the Constitution and of the homestead act. Each party will pay his own costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: *Gheen v. Summey,* 80 N. C., 191; *Adrian v. Shaw,* 82 N. C., 477; *Keener v. Goodson,* 89 N. C., 277; *Markham v. Hicks,* 90 N. C., 205; *Jones v. Britton,* 102 N. C., 242; *Jones v. Britton, ib.,* 183; *Van Story v. Thornton,* 112 N. C., 208; *Gardner v. Batts,* 114 N. C., 500; *Formeduval v. Rockwell,* 117 N. C., 325; *Thomas v. Fulford, ib.,* 672, 680, 683; *Benton v. Collins,* 125 N. C., 95; *Jordan v. Newsome,* 126 N. C., 558; *Joyner v. Sugg,* 132 N. C., 588; *Atwell v. Shook,* 133 N. C., 391.

(385)

ELIAS J. JENKINS v. WILLIAM O. BOBBITT.

Homestead Estate—Reversionary Interest—Deed—Assent of Wife.

1. A married woman has no interest or estate in the reversion which takes effect after a homestead estate. Therefore, the assent of the wife is not necessary to give validity to a deed of the husband conveying such estate in reversion.
2. Under Article X, sec. 8, of the Constitution, the assent of the wife is necessary to a disposition of the *homestead* estate.

APPEAL at August Special Term, 1876, of GRANVILLE, from *Seymour, J.*

This action was brought to foreclose a mortgage, and a jury trial being waived by the parties, his Honor found the following facts:

1. On 23 January 1874, the defendant executed to the plaintiff a mortgage on certain lands in the county of Granville, to secure a debt of $500 which he owed to plaintiff.

2. The mortgage deed was without the consent, signature, or private examination of the defendant's wife.

3. Previous to the execution of the mortgage the said land was, upon petition of defendant, and in conformity to the act of Assembly in such

case made and provided, assigned to him as his homestead, and the defendant, with his wife and one minor child, is now living thereon.

4. The defendant was married to his said wife in 1851, and bought the land in controversy in 1858.

5. The amount due plaintiff in the indebtedness which said mortgage was given to secure is $500, with interest from 23 January, 1874.

Upon these facts, his Honor held that the deed conveying said lands was invalid, upon the ground that the wife did not assent thereto,
(386) and that plaintiff was not entitled to judgment of foreclosure, but was entitled to judgment for the amount due, with interest. From so much of said judgment as refused an order for foreclosure the plaintiff appealed.

J. B. Batchelor, L. C. Edwards, and Merrimon, Fuller & Ashe for plaintiff.

Busbee & Busbee for defendant.

PEARSON, C. J. Previous to the execution of the mortgage mentioned in the pleadings, the homestead of the defendant had been duly assigned in the land. The question is, Was a conveyance of the land subject to the homestead valid to pass the reversion? His Honor ruled that the conveyance was invalid for want of the assent of the wife of the defendant.

The wife has no estate, interest, or concern in the reversion. It does not take effect in possession until after the termination of the homestead estate. So we are at a loss to see on what ground the assent of the wife should be necessary in order to give validity to the deed of the husband, by which he conveys his estate in reversion. We learned on the argument that the opinion of his Honor was based on what he conceived to be the proper construction of the Constitution, Art. X, sec. 8: "Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law." We think it clear that this section refers exclusively to the disposition of the homestead estate by the owner thereof, and has no reference whatever to any conveyance he may make of his estate in reversion. By the proper construction, this sec-
(387) tion should read: "But no deed *purporting to dispose of the homestead,* made by the owner of a homested, shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law." Read in this way, there is sense in it;

but to make it apply to a disposition of the reversion as well as a disposition of the homestead estate incurs the censure of the rule, *Hœret in litera hœret in cortice.*

By the common law there was the same right of disposition in respect to an estate in reversion as to an estate in possession; the only difference being that a reversion after a freehold estate was passed by grant, and an estate of freehold in possession was passed by feoffment.

As the owner of an estate in reversion after a homestead estate had a right to make a voluntary alienation, it followed that his creditors had a right to have it sold under execution. Hence the necessity for the statute, Bat. Rev., ch. 55, sec. 26. If the wife had the power to put a veto upon the sale of the reversion by refusing to give her assent, that act would not have been needed. But such a power on the part of the wife, to object either to the voluntary disposition of the reversion by the husband or to an involuntary disposition of it by execution, was not then suggested by any one.

Hinsdale v. Williams, 75 N. C., 430, extends the operation of the act to sales of the reversion by an administrator to pay debts; but a sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. It is his property; why should he not have a right to dispose of it? The right seems to be conceded by his Honor, unless it be restrained by the section of the (388) Constitution upon which we have commented.

Error. Judgment appealed from reversed. Judgment of foreclosure by sale may be entered in the court below.

PER CURIAM. Reversed.

Cited: Murphy v. McNeill, 82 N. C., 223; *Castlebury v. Maynard,* 95 N. C., 285; *Jones v. Britton,* 102 N. C., 184; *Hughes v. Hodges, ib.,* 260, 261; *Van Story v. Thornton,* 112 N. C., 208; *Thomas v. Fulford,* 117 N. C., 682; *Williams v. Scott,* 122 N. C., 548; *Joyner v. Sugg,* 131 N. C., 326, 339, 348, 349; *S. c.,* 132 N. C., 587, 597; *Dalrymple v. Cole,* 156 N. C., 357.

BRANCH & CO. v. WILEY TOMLINSON.

Personal Property Exemption—Waiver—Executory Contract.

1. Where the defendant agreed under seal not to claim his personal property exemption against the collection of a certain debt: *Held*, that such agreement is not binding upon him.
2. In such case the contract is executory, and a levy and sale by the sheriff of any portion of his personal property exemption in no way affects the title of the defendant thereto.
3. In such case the court will not compel the defendant to a specific performance of his contract, but will leave the plaintiff to his action for damages for its breach.

CASE AGREED, heard at Spring Term, 1877, of WILSON, before *Moore, J.*

The case is sufficiently stated by *Mr. Justice Faircloth* in delivering the opinion of this Court.

His Honor held that the waiver in the note was binding upon the defendant, and that at the time of the levy by the sheriff on the property of defendant he was estopped from claiming his personal property exemption. Judgment for plaintiff. Appeal by defendant.

(389) *Connor & Woodard for plaintiff.*
Kenan & Murray for defendant.

FAIRCLOTH, J. The agreed case states the following facts: The defendant made the following written agreement with the plaintiffs:

WILSON, N. C., 4 July, 1876.

One day after date, for value received, I promise to pay Branch & Co., or order, $49.09, with interest from 1 January, 1876, at 8 per cent. I hereby agree that I will not claim any homestead or personal property exemptions on any final process issued for the collection of this note, and expressly waive the same. Witness my hand and seal.

Witness: J. F. FARMER. WILEY TOMLINSON. [SEAL]

The plaintiffs had a judgment on this instrument, issued an execution to the sheriff, who sold defendant's horse thereunder, and plaintiffs purchased it, and bring this suit to recover the same. The defendant at the time of the levy claimed his personal property exemption, which was not allowed him. Did the defendant waive his right to his personal property exemption? is the question presented, and we are of opinion that he did not.

The Constitution, Art. X, exempts from sale under execution a homestead for the benefit of every resident of the State, and after the death

of the owner thereof, for the wife or children during her widowhood or their minority. It also provides the *only* mode of disposing of the same, namely, by a deed of the husband and wife and her privy examination duly taken.

It also exempts $500 worth of the personal property of every resident of the State from sale under execution, and the Legislature (Bat. Rev., ch. 55, sec. 10) has given the wife or children a right to have the same laid off, if he fails to do so before his death, and the Constitution and Legislature both are silent as to the mode of disposing of such (390) exempted property.

These provisions manifestly disclose the settled policy of the State to secure a home and the means of support to each one of its resident citizens, which the courts must recognize and sustain.

It may be assumed that the defendant, as he could sell the exempted property at any time, or mortgage it, could waive his right at the time of the levy, and that a sale then made by the sheriff would pass the absolute title to the purchaser; but an agreement beforehand to do so, being merely an executory agreement, in no way affects the title, which remains in the defendant until a sale, nor does it prevent him from disregarding his contract if he chooses to do so, and leave the plaintiffs to their action for damages. It is an agreement with the plaintiffs, and not with the sheriff, whose duties are prescribed by law.

It is urged that the defendant should be compelled to perform his agreement specifically. This remedy is not a matter of absolute right in the parties, but is one resting in the sound discretion of the court.

An agreement even for the purchase of land must be certain, just, and fair in all its parts, impartial for the plaintiff and not oppressive to the defendant, before the aid of a court of equity can be invoked to enforce it; but when the contract is fit for the intervention of the court, a decree of performance will follow as a matter of course. Whereas, in the case of a contract for the sale of personalty, it will not be decreed specifically except in certain cases for peculiar reasons. This is the settled rule, and it does not rest upon any distinction between real and personal property, but upon the ground that, in the former case, damages at law will not afford an adequate remedy, because lands have a peculiar and special value, some being more valuable and more convenient to the purchaser than others. Whereas, in the latter case, damags calculated at the market value afford a remedy as full and complete as the de- (391) livery of the articles to the purchaser would be, because like articles can be easily purchased with the money recovered. One horse or one ton of iron has no peculiar value over another of the same kind.

In some cases, however, the court will enforce contracts of the latter kind, as in the case of an heirloom, a favorite picture, a portrait, or other

family relics, in favor of members of the family; because these articles have something above their market value, called *pretium affectionis.* In *Williams v. Howard,* 7 N. C., 74, the contract for a favorite slave was ordered to be executed, *Chief Justice Taylor* saying that "for a faithful family slave, endeared by a long course of service or early associations, no damage can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart."

The same order was made in *Austin v. Gillaspie,* 54 N. C., 261, on a contract for shares in a railroad not yet completed, on the ground of a trust; and, notably, that there is a difference between Government stock in England, which may be bought readily in market at a well known value, and shares in a railroad company taken for the purpose of constructing the same, the value of which shares could not well be estimated in damages.

It will be observed that in our case there is no description of property, no agreement to sell or make title to anything; so that specific performance is out of the case.

The agreement is to waive a right in contravention of State policy, which agreement this Court cannot undertake to enforce. We find that the same conclusion in regard to the supposed waiver has been adopted in Kentucky. *Maxley v. Ragan,* 10 Bush., 156.

PER CURIAM. Reversed.

(392)

EVA C. HUNTLEY v. JACKSON WHITNER, ADMINISTRATOR.

Married Women—Bonds of, Void.

A married woman is not bound upon a bond executed by her for the acquisition of property to make equality of partition of land between herself and her sisters.

APPEAL from a justice of the peace, tried at Spring Term, 1877, of CATAWBA, before *Schenck, J.*

David Link died intestate in 1870, leaving a widow and three children, namely, the plaintiff, the defendant's intestate (Sarah Cline), and Barbara Sigmore. The last two named were married women in 1873, and the plaintiff a widow.. These three persons held the land, of which their ancestor died seized, as tenants in common, and with their husbands procured commissioners to divide the same between them. After the division, they joined their husbands in executing quitclaim deeds for their respective shares.

The commissioners charged the dividend alloted to Sarah Cline with $200, and she, without objection from her husband, executed a note, of which the following is a copy:

One day after date I promise to pay to Eva C. Huntley the sum of $200, the land to stand security until paid for, for value received. 28 October, 1873. SARAH CLINE. [SEAL]

This note was given to make the shares equal in value, and is the subject of this action. His Honor held that the plaintiff could not recover, upon the ground that Sarah Cline was a *feme covert* at the time she executed the note. Judgment for defendant. Appeal by plaintiff.

M. L. McCorkle and R. F. Armfield for plaintiff.
G. N. Folk for defendant.

READE, J. The question is, whether the bond of a married (393) woman to pay money given for fair and full consideration is binding upon her.

It is familiar learning that the contract of a married woman is not merely voidable, like the contract of an infant, but that it is absolutely void and of no effect, and cannot be ratified.

It is supposed, however, that our Constitution of 1868, and our Legislature since, have made some exceptions to the common-law doctrine. They have made none whatever as to the general doctrine. If a married woman borrows of me $100 and gives me her bond for it, she is no more liable than she was at common law. So if she sells me her land or other property and I pay her for it.

The exceptions are that under the constitutional provision all that is hers at the time of marriage, and all that she shall acquire during marriage, shall remain her sole and separate property, and may be devised or bequeath by her to take effect after her death, and may be conveyed by her to take effect immediately or at any time, with her husband's written assent. Const., Art. X, sec. 6. And under the statute she may make a contract affecting her property for her necessary personal expenses, and for the support of the family, and to pay her debts existing before marriage. This she may do of her own accord, by her own separate act, without the consent of her husband. Bat. Rev., ch. 69, sec. 17.

This case does not fall under any of the exceptions. To put it in the strongest light for the plaintiff, it was a bond given for the acquisition of property to make equality of partition of land between her and her sisters. She is not bound upon the *bond*. But whether the *land* is not bound is a question in regard to which the plaintiff will do doubt be advised.

PER CURIAM. Affirmed.

Cited: *Smith v. Gooch,* 86 N. C., 279; *Dougherty v. Sprinkle,* 88 N. C., 303; *Flaum v. Wallace,* 103 N. C., 304; *Baker v. Garris,* 108 N. C., 223; *Sanderlin v. Sanderlin,* 122 N. C., 3; *Harvey v. Johnson,* 133 N. C., 357; *Vann v. Edwards,* 135 N. C., 674.

(394)

JOHN W. KIRKMAN, ADMINISTRATOR, v. THE BANK OF GREENSBORO.

Married Women—Right to Receive Their Property Not Restricted.

1. The constitutional and statutory restriction upon the rights of married women in regard to the management of their separate estate does not operate to prevent them from receiving or reducing their property into possession without the written assent of the husband.
2. Where an attorney collected money due a married woman as distributee of a decedent's estate, and paid the same in a certificate of deposit on a bank, and the bank subsequently paid her the amount thereof: *Held,* that the husband, as administrator of his wife, could not recover the amount of the certificate from the bank on the ground that his written assent to the transaction had not been obtained.

APPEAL at Spring Term, 1877, of GUILFORD, from *Cox, J.*

The plaintiff John W. Kirkman married Nancy E. Clymer in 1858, who was a widow with two children, namely, Joseph Clymer and a daughter, who married Henry A. Wilson.

The said Nancy, in 1872, was a distributee of a certain estate, and as such was entitled to the sum of $690. In the settlement of this matter in 1873 Messrs. Dillard & Gilmer, her attorneys, deposited said amount with the defendant bank, and took a certificate of deposit, which they turned over to her, and she held the same more than six months.

The said Nancy died intestate on 12 February, 1875, and the plaintiff was duly appointed her administrator. He then demanded of the defendant payment of the amount of the certificate. The other facts necessary to an understanding of the case are stated by *Mr. Justice Reade* in delivering the opinion of this Court.

Upon issues submitted, and under the instructions of his Honor, the jury rendered a verdict for the defendant. Judgment. Appeal (395) by plaintiff.

Scott & Caldwell for plaintiff.
Scales & Scales for defendant.

READE, J. Under the Constitution, the real and personal property of the wife "shall remain and be her sole and separate estate, . . . and

may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." Const., Art. X, sec. 6.

No power whatever is given to the husband, and no restriction upon the wife, except as to the "conveyance" of the property to take effect during her life, which requires the husband's assent in writing.

The statute, which was intended to carry out the constitutional provision, uses somewhat different language: "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, without the written consent of her husband." Bat. Rev., ch. 69, sec. 17.

It is not worth while to consider whether the Legislature could restrict or enlarge the rights of the wife or of the husband, as they are declared in the Constitution, because it is evident that the Constitution and statute are in harmony and mean the same thing—to make the wife's property her own as if she were unmarried, without the power of sale or charge, to operate during her life, without the husband's written consent.

Does the constitutional restriction against her "conveying" her property, or the statutory restriction against her "making any contract to affect it," without the written assent of the husband, operate to prevent her from acquiring, receiving, or reducing her property into (396) possession without his written assent? Can the husband, by withholding his written assent, prevent the wife from reducing her property into possession? If I have her property, may I not deliver it up to her? If I owe her a debt, may I not pay her? Undoubtedly; else, instead of making the wife's property her own, "sole and separate," she would be completely at the mercy of her husband.

If she had not the right to *receive* her property in this case, then she never has received the $690 from anybody, from the administrator, from Dillard & Gilmer, nor from the bank. They all owe it to her now, and her administrator had his choice to sue any of them. But if she had the right to receive it from the administrator, from Dillard & Gilmer, or the bank, then she has received it, and her administrator cannot recover it.

Dillard & Gilmer owed her $690, which they had collected for her of an administrator, and they, for safety and convenience, deposited the money in bank, the defendant, to her credit, and took a certificate of deposit as evidence that they had done so; and in the presence of her husband, and with his *oral* but not his *written* assent, they delivered to her the certificate of deposit, and she gave them a written receipt for the amount, which receipt was witnessed by her husband.

In that $690 which they had collected for her, and which they owed her, she had a property, and in some sense the discharging them and taking the bank in their place was a "contract affecting her property," and yet it would seem monstrous to held that by that transaction she had "conveyed" her property to them in the sense used by the Constitution, or made a "contract with them affecting it" in the sense used by the statute. They owed her a debt and paid it to her; that was all.

Now, suppose she had gone immediately to the bank with the certificate and drawn the money and given up the certificate: how could that have differed from the transaction with Dillard & Gilmer? Not at all. In both cases she was "receiving" her property, and not "conveying" or "disposing" of it.

(397) If she could have gone to the bank and received the money with her own hands, she could have sent an agent just as well; and that is just what she did. At one time she sent her son to the bank with the certificate and with a written order to the bank to pay her son $300 "for her," which the bank did, and indorsed the payment on the certificate and sent it back to her. Subsequently there was another payment of $90 indorsed on the certificate, but it is not stated to whom the payment was made, as there had also been a priorpayment of $50 indorsed. And finally the certificate was sent by another son, or son-in-law, to the bank, with the following indorsement: "Mr. Gray: Please pay the amount of this note to H. A. Wilson. Yours, Nancy E. Kirkman." And the bank paid the money and took up the certificate.

Now, in all this, what property did she "convey" to the bank, or what contract did she make with the bank affecting her property? It is admitted that the payments of $20 and $90 were for her; the order for $300 stated expressly that it was for her, and the indorsement requesting the balance to be paid to Wilson only made him her *agent* to receive it, the certificate not being negotiable, being payable in currency. So that the bank paid the whole of it to her, or her agent.

But, then, it is said that notwithstanding that, yet she in fact received the money and gave the $300 to one son and the balance to another son or son-in-law. Grant that to be so, and yet it does not affect the defendant. The defendant knew nothing of that fact, and was not obliged to look to the use made of the money after she had received it.

It should be noticed that this is not the suit of the husband in his individual right, but as administrator of his wife, and as such he

(398) has no right which she would not have if she were alive and the plaintiff in this action. And having received her property from the bank by herself or her agents, or by persons whom she induced the bank to believe were her agents, and having "conveyed" nothing to the bank, she could not recover.

We have laid but little stress upon the issues or the finding of the jury, because they are so confused as to be unintelligible. We have gathered the facts as best we could from the whole record.

PER CURIAM. No error.

Cited: *Holliday v. McMillan,* 79 N. C., 317; *Hall v. Short,* 81 N. C., 278; *George v. High,* 85 N. C., 101; *Morris v. Morris,* 94 N. C., 617; *Battle v. Mayo,* 102 N. C., 439; *Osborne v. Wilkes,* 108 N. C., 668; *Blake v. Blackley,* 109 N. C., 264; *Walker v. Long, ib.,* 513; *Walton v. Bristol,* 125 N. C., 424, 425; *Hallyburton v. Slagle,* 132 N. C., 948.

STATE ON RELATION OF M. V. PRINCE, CHAIRMAN, ETC. v. K. M. MCNEILL, ET ALS.

Sheriff—Official Bond—Breach of—Conditions Expressed.

1. Where an action was brought on the bonds of a sheriff, given in 1872 and 1873, conditioned only for those years, for default in collecting taxes for the year 1874: *Held,* that a demurrer to the complaint was properly sustained.
2. In such case the conditions expressed in the bonds cannot be enlarged so as to embrace the year 1874; nor will the law prescribe the conditions, without regard to the conditions expressed in the bonds after they are executed.

ACTION for breach of official bond, tried at Fall Term, 1876, of HARNETT, before *Furches, J.*

This action was brought by the plaintiff as chairman of the (399) board of county commissioners against the defendant, K. M. McNeill and the sureties on his bonds as sheriff of Harnett County, executed respectively on 2 September, 1872, and 1 September, 1873.

The allegation was that the sheriff failed to collect and to pay over the whole amount of taxes as evidenced by the list placed in his hands in July, 1874; that there was a balance due of $7,606.06, and that the county treasurer, refusing to bring action as he is required to do, is made a party defendant.

The defendants demur to the complaint, and assigned as cause:

1. Because the action is in the name of plaintiff as chairman of the board of commisssioners.

2. Because it appeared from the complaint that the bond declared on was given for a special purpose, and conditioned for the collection and payment of "all the taxes due for said county for said year" (1872), etc., and that the same was unauthorized by law and not binding on defendants.

3. Because the complaint does not allege that there was any failure on the part of the sheriff to collect and pay over the taxes assessed upon the list which came into his hands on 1 July, 1873.

4. Because the complaint assigns as a breach of the bond given in September, 1872, a failure to account for and pay over the taxes collected, or which ought to have been collected, upon the list which came into the hands of the sheriff in July, 1874.

5. And because the complaint assigns as a breach of the bonds given in September, 1872 and 1873, a failure to collect the taxes upon the list which came into the hands of the sheriff in July, 1874, and demands judgment against all the defendants for the penalty of both of said bonds.

His Honor sustained the demurrer, and gave judgment in favor of defendants for costs. Appeal by plaintiff.

(400) *John Manning and N. W. Ray for plaintiff.*

W. A. Guthrie, Neill McKay, and W. E. Murchison for the defendants.

READE, J. The plaintiff insists that his right to recover is clear under the decision in *S. v. Bradshaw,* 32 N. C., 229; that upon a sheriff's bond conditioned that "he shall pay all money by him received by virtue of any process, to the person or persons to whom the same shall be due, and in all other things will truly and faithfully execute the said office of sheriff during his continuance therein," the sureties were liable for the sheriff's default in collecting and not paying over money, which by law he was bound to collect and pay over. That is the whole case, and how it governs this is not seen.

In this case there is no such condition in the bonds, general or special; and the only conditions in the bonds to collect and pay over the taxes for the years 1872 and 1873 were strictly complied with.

The plaintiff insists that the defendant sheriff, instead of giving a bond in September, 1872, conditioned for the collection and payment of the taxes of 1872, and another bond in 1873 for the collection and payment of the taxes of 1873, both of which bonds he complied with, *he ought* to have given a bond in September, 1872, and in September, 1873, conditioned for the collection and payment of the taxes of his *whole term of office,* which would have included the year 1874, in which year he was a defaulter, and that what he ought to have done he is to be taken as having done; and his bonds of 1872 and 1873, although conditioned only for those years, are to be construed as if conditioned for the collection and payment of the taxes of 1874.

It is not pretended that that would be so at common law, or (401) by the ordinary rules of construction; but that it is so under the

statute, which provides as follows: "Whenever any instrument shall be taken or received under the sanction of the board of county commissioners, etc., purporting to be a bond executed to the State for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring the offices, etc., or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid, and put in suit in the name of the State for the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred, etc., and as if the penalty and condition of the instrument had conformed to the provisions of law."

It is insisted that under that statute the conditions of the bonds sued on are to be enlarged and construed as if they embraced in express terms the year 1874, or the whole term of office; that as soon as the defendants executed the bonds, the law prescribed the conditions without regard to the conditions as expressed in the bonds. If the statute had been intended to be as broad as that, then the statute itself ought to have set out the conditions, so that the obligors could have know what obligation they were incurring. Other sections of the statute require the sheriff, before entering upon the duties of his office, to execute three bonds, namely, "one conditioned for the collection, payment, and settlement of the *county,* poor, school, and special taxes, as required by law, in a sum double the amount of said taxes; one for the collection, payment, and settlement of the *public* taxes, as required by law, in a sum double the amount of such taxes; and a third in the sum of $10,000 conditioned as follows"; and then the conditions are set out in detail, being for the faithful execution of process and the collection and payment of money, etc., "and in all other things well and truly to execute the (402) said office of sheriff during his continuance therein."

Now, the conditions of the bonds sued on do not conform to the requirements of these sections of the statute. Instead of being one bond for the county taxes in double their amount, and another for the State taxes in double their amount, the two bonds are blended into one for both county and State taxes, and without specifying the amounts.

Now, prior to the curative statute above set forth, these bonds could not be recovered upon at all as statutory bonds, as a number of decisions will show, but would have had to be sued on as common-law bonds. But now that statute cures such defects. It being apparent from the conditions expressed in the bonds that they were intended to be for the collection of the State and county taxes, they shall be valid for that purpose as statutory bonds, notwithstanding the formal variance between the conditions as expressed in the bonds and those prescribed by law. The object was to enforce the substance of the obligation without regard to

formal defects or variances. But it certainly never was the purpose of the act to make men do that which they never undertook to do in form or substance; nor especially to do precisely the contrary of their undertaking.

Here the undertaking was in plain terms which admit of no other construction—to collect and pay the taxes of 1872 and 1873, and not the taxes of 1874.

To this the plaintiff objects that although the bonds sued on have not conditions to cover the taxes of 1874, yet they *ought* to have, and therefore under the statute they are to be construed as if they had; and *S v. Bradshaw,* 32 N. C., 229, is relied upon as express authority.

That is stated to be "an action of debt on a general bond given by the sheriff of Rowan in the sum of $10,000 for the discharge of the
(403) duties of his office for the year 1847, of which the condition is in the form prescribed by the statute. The breaches assigned were that the sheriff failed to collect the *town* taxes of Salisbury for 1847. The defense was that the bond sued on was for the collection of the *State* and *county* taxes, and that the *town* taxes were neither, and therefore the bond did not embrace them. What the decision would have been if that had been the only condition of the bond does not appear; but a further condition of the bond was that "he shall pay all money by him received by virtue of any process to the person or persons to whom the same shall be due, and in all other things will truly and faithfully execute the said office of sheriff during his continuance therein"; and then the learned judge who delivered the opinion proceeded to say: "These words are, therefore, broad enough to cover the present case."

It will be seen, therefore, that the only point in that case was whether to collect the *town* taxes was a part of the sheriff's duty. If it was, then the bond, which covered *all* his duties in express terms, and specifying the payment of all money collected, of course covered this *particular* duty, and the particular money collected. And there having been an act making it his duty to collect the *town* taxes before the bond was executed, the bond was held to cover it. It is difficult to see a single particular in which that case is like this.

The plaintiff supposed that that case is in direct conflict with *Holt v. McLean,* 75 N. C., 347; *Eaton v. Kelly,* 72 N. C., 110, and admits that if these cases are to stand, then he has no showing. We think these cases were well decided, and are not in conflict with *S. v. Bradshaw,* and are supported by *Crumpler v. Governor,* 12 N. C., 52; *S v. Long,* 30 N. C., 415; *S. v. Brown,* 33 N. C., 141, and by the well settled rules of construction both of bonds and statutes.

The cases of *Holt v. McLean* and *Eaton v. Kelly, supra,* which were cited as in conflict with *S. v. Bradshaw, supra,* are not so. They sim-

ply decide that when specific duties are mentioned, and there is (404) a general clause of faithfulness in all other things, it means all other *like* things. As, for instance, the bond to serve process, etc., and faithfully to do all other things, does not cover the collection of taxes; and *S. v. Bradshaw* simply decides that a bond to serve process, collect and pay out money, etc., is broad enough to cover money collected for a town which it was his duty to collect.

PER CURIAM. Affirmed.

THE COMMISSIONERS OF GREENE v. WILLIAM J. TAYLOR ET ALS.

Sheriff—Official Bond—Settlement of Taxes—Fraud.

1. The bond of a sheriff, conditioned for the due collection of taxes during *his continuance in office*, is liable for taxes collected by him upon a tax list which had been in the hands of his predecessor in office.
2. Where a sheriff had rendered an account of the taxes collected by him in a settlement with the county treasurer, which account was not itemized: *Held*, in an action upon his bond that it was not necessary for the complaint to *specify* any errors in such settlement.
3. Such settlement can be reopened for *fraud*, and when a public officer renders an account which is not true, it is *prima facie* fraudulent.

ACTION for breach of official bond, tried at Spring Term, 1877, of GREENE, before *Moore, J.*

This action was brought on the bond defendant Taylor, as sheriff of GREENE. The plaintiffs alleged that Taylor was elected sheriff in 1869, for the term of one year, and executed a bond, with the other defendants as sureties, on 13 August, 1869; that said sheriff (405) collected a large amount of taxes and failed to pay over or account for a part thereof, viz., $1,000; that a committee was appointed by the plaintiffs to examine and report on the accounts of Toylar for the fiscal year 1869; that the report submitted by said committee did not itemize the account, and that the plaintiffs are unable to specify the errors therein; but they are informed and believe that the error in the report was in not charging Taylor with the unlisted taxes, and in allowing him the insolvent taxes in an order on the county treasurer for the same. The defendants, in their answer, alleged that Taylor had paid over and accounted for said taxes, and had receipts in full from the treasurer. Upon the hearing, his Honor was of opinion; (1) That the bond sued on in this case is not responsible for the taxes of 1869; and (2) that the plaintiffs, in their complaint, failed to allege such specific error in the

report of the committee of settlement for 1869 as is contemplated by Bat. Rev., ch. 102, sec. 40. Thereupon the plaintiffs submitted to a nonsuit and appealed.

H. F. Grainger for plaintiffs.
W. N. H. Smith for defendants.

READE, J. The defendant sheriff was duly elected sheriff on 7 August, 1869, for the term of one year, and gave bond, with the other defendants as his sureties, conditioned that he would collect and pay over the county and school tax during his continuance in office.

It is not explained in the case why the election was for one year instead of for the usual term, but no point was made as to any irregularity in the election, if there was any, and therefore we give no consideration to it; nor was any point made as to any irregularity in the bond; nor, indeed, would such an objection have availed anything
(406) so far as we can see, under our statute for curing defects and irrigularities in official bonds. Bat. Rev., ch. 81, sec. 16.

But his Honor was of the opinion that the plaintiff could not maintain the action "because the bond sued on is not responsible for the taxes of 1869." We do not agree with his Honor. The bond, by its precise terms, is liable for all the taxes "during his continuance in office." It does not matter, therefore, whether he collected taxes in 1869 or in 1870, or in both; his bond covers them. We suppose that the idea was that the tax list of 1869 was in the hands of his predecessor, and that he is living, or his administrator if he was dead, was entitled to collect the tax list for 1869. That may be so; but still if the defendant did in fact collect them, then the bond covers them, and it is not for him or his sureties to say that they are not liable for them. It is their convenant that they will pay all that he collects during his continuance in office.

His Honor further held that the action could not be maintained because the plaintiff had not "specified" any error in the amount of the taxes as settled by the sheriff with the county treasurer, and approved by the board of commissioners, as provided for in Bat. Rev., ch. 102, sec. 40. How could the plaintiff *specify* anything? The defendant took care that there should be no opportunity to specify. He did not *itemize* his account. He simply said that he had collected so much, and had paid it over to the treasurer. And of course all that the plaintiff could do was to say generally, "You have collected more than that." And although it is true, both outside of the statute and under it, that in order to surcharge and falsify an account you must specify the items, yet that is only true where there are items to specify, and here there were none. And, furthermore, the statute provides for opening the settlement, not only where you can specify errors, but where there is "fraud." And

where a public officer renders his account and does not render a (407) true one, that is *prima faci* fraud. And if he is squeamish about a revision of his accounts, it might be well enough to try what virtue there is on the criminal side of the court. It sounds badly and smacks of corruption when public officers are unwilling to open their accounts to a fair inspection; and it is just as bad where their sureties encourage them in it.

But the plaintiffs say that, although they cannot specify accurately because the amount is not itemized, yet they are informed and believe that the errors were in not charging the sheriff with the unlisted taxes and in allowing him insolvent taxes, and also an order given on the treasurer for said taxes; that is to say, that the commissioners had allowed him those taxes and given him an order on the treasurer, which he had credit for, and that in his final account he claimed credit a second time. Now, this would seem to be quite specific, and, if true, quite fradulent. The plaintiff ought to have been allowed to show whether the allegation was true.

PER CURIAM. *Venire de novo.*

Dist.: Suttle v. Doggett, 87 N. C., 206.

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(408)

STATE ON RELATION OF JOHN A. VANN, TREASURER, ETC., v. ISSAC PIPKIN, JAMES M. WYNNS, AND JAMES M. WYNNS, EXECUTOR OF JOHN W. SOUTHALL.

Official Bond—Breach of—Forfeiture of Office—Vacancy.

1. A forfeiture of office and a vacancy can be judicially declared only after trial and culpability established. Therefore, the office of sheriff does not become vacant by failure of the incumbent to renew his bond.
2. The sureties on the bond of a sheriff are liable for all official delinquencies of which the principal may be guilty during the continuance of his term of office.
3. Where a sheriff, elected in 1872, continued to exercise the duties of the office after his failure to renew his bond and produce his receipts, and was reëlected in 1874 and failed to collect and pay over the taxes for that year: *Held*, that he was liable on his bond of 1872.

ACTION for breach of official bond, tried at Fall Term, 1876, of HERTFORD, before *Moore, J.*

The facts so far as material to present the points made and decided are as follows:

The defendant Isaac Pipkin was reëlected to the office of sheriff of Hertford County in 1872, took the prescribed oath, and executed the bond described in the complaint, with the other defendants as sureties.

On the first Monday in September, 1873, he failed to renew his official bond, and also failed to produce the receipts of settlements of public taxes for preceeding year. No action was taken by the county commissioners against him, and he continued to exercise and discharge all the duties of the office until the end of his term. The tax list was made out and delivered to him for collection. He was again elected in 1874, and qualified, and executed the bond described in the answer, and
(409) to which other persons than the defendants were sureties. The tax list for 1874 was, in August of that year, placed in his hands for collection, and for default in not collecting these taxes the treasurer of said county instituted this action.

The facts being admitted, his Honor held that the plaintiff was entitled to judgment, and the defendants appealed.

W. N. H. Smith for plaintiff.
D. G. Fowle and D. A. Barnes for defendants.

BYNUM, J. By law, the term of the office of sheriff is two years. Before entering upon the discharge of the duties of the office, the person elected sheriff is required to execute bonds for the faithful collection and payment of the State and county taxes during his term of office. The term of the defendant Pipkin began on 1 September, 1872, at which time he executed the required bonds, one of which is the one now in suit, and entered upon the discharge of the duties of his office.

By law, the sheriff is also required to renew his said bonds annually, "and produce the receipts from the public treasurer, county treasurer, and other persons in full of all moneys by him collected, or which ought to have been by him collected, for the use of the State and county, and for which he shall have become accountable; and a failure of the sheriff-elect to renew his bonds or to exhibit the aforesaid receipts shall create a vacancy." Bat. Rev., ch. 106, sec. 5. The defendant Pipkin failed to renew his bonds or produce the receipts from the public officers in full of all moneys collected, or which ought to have been collected, by him, but he nevertheless continued in his office without hinderance until the regular expiration of the term. In August, 1874, the tax lists for the taxes of that year were duly made out and delivered to him for
(410) collection, and for his default in not collecting these taxes the action is brought.

It is admitted by the counsel of the defendants that the defendant Pipkin is liable upon his said bond, if he in law continued to be sheriff after his default in renewing his bond and producing his recepts, but it

is insisted that upon his failure to do so, the office of sheriff became vacant *ipso facto* by the express provisions of the statute above recited, and that this vacancy having occured on 1 September, 1873, no action lay upon the bond of 1872 for the noncollection and nonpayment of the taxes assessed for 1874. Such is not the law. Until the office shall be declared vacant by some competent tribunal authorized by lay to declare a vacancy, the sheriff-elect may rightfully hold the office until the end of his term; and he is liable upon his bond for all official delinquencies of which he may be guilty during the continuance of his term of office. Nor can such a vacancy be declared until the alleged delinquent shall have had due notice and a day in court, if in reach of its process. A forfeiture of office and a vacancy can be judicially declared only after trial and culpability established. The sheriff has a property in the emoluments of his office, of which he cannot be deprived but by the law of the land. Const., Art. I, sec. 17; *Hoke v. Henderson,* 15 N. C., 1.

The sheriff, therefore, continued in office, and is liable upon the bond declared on for the taxes of 1874. *Coffield v. McNeill,* 74 N. C., 535; *Comrs. v. Clarke,* 73 N. C., 255; *Moore Co. v. McIntosh,* 31 N. C., 307.

The plaintiff is entitled to judgment according to the case agreed.

PER CURIAM. Affirmed.

Cited: Dixon v. Comrs., 80 N. C., 120; *Trotter v. Mitchell,* 115 N. C., 193; *Caldwell v. Wilson,* 121 N. C., 478; *Wilson v. Jordan,* 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215.

Dist: *Rea v. Hampton,* 101 N. C., 54.

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(411)

P. H. CAIN v. THOMAS A. NICHOLSON, EXECUTOR.

Report of Referee—Jurisdiction.

1. The evidence in writing upon which facts are found by a referee must accompany his report.
2. Where the main purpose of an action is to have the defendant declared a trustee, and a statement of his account as executor is demanded as a necessary incident to the determination of the action, the Superior Court has jurisdiction, and the judge thereof may give full relief.

APPEAL at Spring Term, 1877, of DAVIE, from *Kerr, J.*

The plaintiff is the assignee of the distributees and heirs at law of one Powell, on whose estate Samuel Holman administered and sold the land of his intestate for assets, and it is alleged that he purchased said lands at his sale through an agent.

After action brought, Holman died and the defendant was qualified as his executor and made a party to this action, which was brought to have said Holman declared a trustee of said land for the benefit of plaintiff, and for an account of his said administration of the assets and of the rents and profits of said land since the sale, and it was referred to the clerk to state these accounts and report to the court, which he did. The plaintiff excepted to the same, because the referee failed to report the evidence on which his report was based, and the exception was sustained by his Honor, and the defendant appealed.

(412) *J. M. Clement for plaintiff.*
J. M. McCorkle for defendant.

FAIRCLOTH, J. after stating the facts as above: It has been frequently decided that the evidence in writing should accompany the report, so that the appellant may have the findings of the referee reviewed, or that he may file exceptions before the court, if they have not been taken before the referee. *Mitchell v. Walker,* 37 N. C., 621; *Faucett v. Mangum,* 40 N. C., 53; *Green v. Castlebury,* 70 N. C., 20.

On the argument in this Court the defendant raises the question of jurisdiction, and says this proceeding should commence before the probate court, where legacies and distributive shares are recoverable. This would be so if nothing more was intended; but the main purpose of this action is to have the defendant declared a trustee of said land, which cannot be done before the clerk, and the secondary purpose is the account as a necessary incident to the determination of the first question, and the judge having jurisdiction over the main question may retain the case and give full relief. *Oliver v. Wiley,* 75 N. C., 320.

We therefore refuse the motion made in this Court, and sustain the ruling of his Honor on the exception, and as the case goes back, we will suggest whether or not the heirs at law and devisees of defendant's testator are necessary parties.

PER CURIAM. Affirmed.

Cited: Comrs. v. Magnin, 85 N. C., 117.

(413)

GIDEON PERRY ET ALS. v. HENRY M. TUPPER.

Trial by Referee—Consent Reference.

1. Where an action, by agreement between the parties, is referred to a referee *for trial: Held,* that the court has no power to discontinue the reference at its discretion, or to vacate the same upon demand of one of the parties for a jury trial.
2. Such a reference may be terminated by the death of the referee, or for good and sufficient cause shown to the court.

MOTION to set aside an order of reference, heard at January Special Term, 1877, of WAKE, before *Schenck, J.*

In this action (see same case, 74 N. C., 722) the plaintiffs moved the court to impanel a jury to try the issues of fact therein, which was resisted by the defendant upon the ground that the order and agreement of reference to Joseph B. Batchelor, Esq., precluded the right of plaintiffs to have a jury. The motion was allowed, and the defendant appealed.

D. G. Fowle and A. M. Lewis for plaintiffs.
E. G. Haywood, A. W. Tourgee, and W. N. H. Smith for defendant.

FAIRCLOTH, J. "In all issues of fact joined in any court the parties may waive the right to have the same determined by a jury." Const., Art. IV, sec. 13.

"All or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties." C. C. P., sec. 244.

If the parties to an action need any authority to submit the issues therein to a referee, it is found in the above provisions. The right to waive is as explicit as the right to claim a jury trial of (414) such issues.

In the present case the parties agreed in writing to submit all the issues of law and fact to a referee *for trial,* his finding upon the issues of fact to be final, and his finding upon issues of law to be subject to review, which agreement was filed with the record by order of the court. Exceptions to the referee's report were filed and sustained in this Court, and the case was remanded for another trial. In the Superior Court the plaintiffs demanded to have the issues of fact tried by a jury, which was resisted by the defendant. The court allowed the motion, and defendant appealed. The order of this Court remanding the case for another trial does not affect the question, as it was not intended and does not change the status of the case below in this respect. In *Armfield v. Brown,* 70 N. C., 27, and in several other cases, we have held that when the parties

have by consent referred the matter for trial, it is a wavier of a jury trial, and that they cannot afterwards demand it. Any other conclusion would enable either party to procure delay in the final determination of the action, to accumulate unneccessary costs, and to trifle with the good order of judicial proceedings.

It is, however, claimed that the judge has the power to discontinue the reference at his discretion. We think not. We can see no reason why the judge should be authorized to withdraw the trial of the controversy from that tribunal voluntarily selected by the parties, without their mutual consent, except for good and sufficient cause assigned and made to appear to the court, and of this there is no pretension in this case. If the parties cannot violate their agreement thus solemnly entered into, surely the court cannot permit or enable either one to do so without the consent of the other. For the purpose of trying the facts, the case is before another tribunal, and the court has nothing to do with it, except to stay proceedings until the report of the referee is before it.

(415) The death of the referee would terminate the reference, and for sufficient cause the judge may do it, but not otherwise.

There is error. The cause is remanded to the Superior Court, to the end that the referee may proceed with the case.

PER CURIAM. Reversed.

Cited: White v. Utley, 86 N. C., 417; *Stevenson v. Felton,* 99 N. C., 61; *Patrick v. R. R.,* 101 N. C., 604; *Smith v. Hicks,* 108 N. C., 251; *McDaniel v. Scurlock,* 115 N. C., 297; *Driller Co. v. Worth,* 117 N. C., 518; *Kerr v. Hicks,* 129 N. C., 144.

W. W. FLEMMING ET ALS. v. G. M. ROBERTS ET ALS.

Referee—Compliance with Order—Full Report.

1. Where parties to an action agree to refer the matter in controversy to a referee, their assent continues until the order of reference is complied with by a full report.
2. In such case an objection of one of the parties to a rereference to the same referee was properly overruled.

PETITION to restore a record of the late court of equity, heard at Spring Term, 1877, of BUNCOMBE, before *Furches, J.*

The case is sufficiently stated by *Mr. Justice Reade* in delivering the opinion of this Court. His Honor in the court below refused to grant the order prayed for in the petition of the plaintiffs, and they appealed.

W. H. N. Smith for plaintiffs.
J. H. Merrimon and T. F. Davidson for defendants.

READE, J. The guardian of the plaintiffs instituted a proceeding in equity some twenty years ago to have their land sold in order that the proceeds of sale might be put at interest. A sale was ordered and made by the clerk and master, and a bond taken of the purchaser (416) for the price, and a deed subsequently made to the purchaser by the master. And the defendants are purchasers from the purchaser for value and without notice of any fraud or irregularity. So much is not disputed.

The plaintiffs alleged that the master made title deed to the purchaser without an order of court and without having collected the money, and therefore they seek to follow the land, and to have it charged with the amount of sale and interest in the hands of the defendants.

But the defendants allege that at the time when the sale money fell due, the guardian of the plaintiffs, being desirous to invest the money at interest, agreed with the purchaser to lend the money to him upon bond and good sureties, which was consented to by the purchaser, and bond and sureties were given to the guardian for the amount, and thereupon the master surrendered the purchaser's bond and made him a title deed; and that all this was done under the sanction and by the order and decree of the court of equity in that case.

Whether the allegation of the plaintiffs or the defendants was true would, of course, appear by the record of the court of equity; but then the record had been destroyed by fire, so that it became necessary for the plaintiffs to file a petition in the Superior Court under the statute (Bat. Rev., ch. 14, sec. 14.) to set up the destroyed record; and that is the matter now before us.

When the petition and answer were in, it was, by consent, referred to a person named to take testimony and find the facts, and to report the facts and the testimony. The referee reported, but, his report not being full, it was recommitted and a second report was made. And thereupon his Honor hearing the case upon the report and the facts found by the referee and the testimony, found the facts to be as alleged (417) by the defendants. And the referee having reported the record, it was ordered by his Honor to be recorded as *the* record of the case. From this the plaintiffs appealed to this Court, assigning for error:

1. That the second reference was without the consent and against the will of the plaintiffs. The answer to that objection is that the first reference was by the express consent of both parties, and that assent continued and could not be revoked by one party until the order of reference was complied with by a full report. Furthermore, the record does not

show that there was any objection to the reference; and a party is never justified in stating what is not true in his exceptions in order to put his Honor in the wrong.

2. That the facts found are not justified by the evidence, but are against the weight of the evidence. The question being whether there was or was not a record, and *what* it was, was the office of *the court* to determine. The reference could only be to aid his Honor in gathering the testimony. We should think the evidence fully justified his Honor's finding of the facts, even if it were our office to review his Honor in that particular, as we do not think it is, upon the weight of evidence. There is no force in the other exceptions.

PER CURIAM. Affirmed.

Cited: Barrett v. Henry, 84 N. C., 537; *s. c.,* 85 N. C., 325; *White v. Utley,* 86 N. C., 417; *Stevenson v. Felton,* 99 N. C., 61; *Morisey v. Swinson,* 104 N. C., 561; *Smith v. Hicks,* 108 N. C., 251; *McDaniel v. Scurlock,* 115 N. C., 297.

(418)

BENJAMIN S. ATKINSON ET ALS., ADMINISTRATORS, v. WILLIAM WHITEHEAD.

Practice—Reference.

A reference by consent is the mode of trial selected by the parties, and is a waiver of the right of a trial by jury.

MOTION for the removal of an action, heard at Spring Term, 1877, of PITT, before *Eure, J.*

Peyton Atkinson died in 1862, leaving a last will and testament, appointing his wife, Virginia, his executrix, who qualified as such. In 1866 she married the defendant, who gave bond and qualified as administrator with the will annexed. In 1869 he was removed from his office, and the plaintiffs B. S. Atkinson and Henry Sheppard were appointed in his place, and in 1871 instituted proceedings against the defendant to compel a final settlement of his administration. At Fall Term, 1874, of said court, the following entry was made on the docket: "Referred, on motion of plaintiffs, to B. W. Brown to state account." By virtue of this authority, the referee, upon notice to the parties, took the testimony in the case, in presence of plaintiffs and defendant, completed the account, and returned it to Spring Term, 1876, of said court, when the plaintiffs filed exceptions thereto.

The plaintiffs now, upon affidavit, ask that the cause be removed to another county for trial. This was resisted by the defendant on the

ground (1) because the plaintiffs had, by moving the reference, waived a trial by jury; (2) that until the exceptions were disposed of, no issues could be joined for trial by jury; (3) that until the report was set aside and the order of reference revoked, no issues could be submitted to a jury; and (4) that the order of reference was a substantial (419) compliance with C. C. P., sec. 246. His Honor allowed the motion, and ordered the case to be removed to Edgecombe County for trial. Appeal by defendant.

James E. Moore and D. M. Carter for plaintiffs.
Gilliam & Pruden for defendant.

BYNUM, J. The general constitutional right to a trial by jury is qualified by Art. IV, sec. 13, of the Constitution, which provides: "That in all issues of fact joined in any court the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict of a jury." The C. C. P., sec. 245, seems to have gone a step beyond this limitation of the Constitution, and in a certain class of cases to authorize a compulsory reference, or a reference upon the application of one party to the action, without or against the consent of the other. This Court, however, has put such a construction upon section 245 of The Code as harmonizes it with the constitutionel right of trial by jury, by declaring that although a compulsory reference may be ordered under this section of the Code, yet when the report of the referee is made and the material issues are eliminated by the exceptions taken thereto, the issues of fact thus joined by the pleadings, report, and exceptions shall be submitted to a jury, if demanded in apt time. *Kluttz v. McKenzie,* 65 N. C., 102; *Armfield v. Brown,* 70 N. C., 27; *Green v. Castlebury, ib.,* 20; *Keener v. Finger, ib.,* 35.

The only question to be determined in our case is whether the reference ordered was compulsory or by the consent of the parties. After the pleadings were all in and the issues joined, upon the motion of the plaintiffs themselves, the referee was ordered by the court to take and state the account between the parties. This motion was not opposed; that is, was assented to by the defendant. The reference was, (420) therefore, by consent, and is the mode of trial selected by the parties, and is a waiver of the right of trial by jury. After the reference so made, neither party, as a matter of right, is entitled to have a jury. The motion for a jury comes with no good grace from the party on whose motion it was waived.

As the account ordered to be stated involves all the issues made by the pleadings, including the entire administration of the defendant, there

can be no force in the point made that the reference ordered applied only to the first cause of action stated in the complaint, and not to the second cause of action. Both causes of action, if there are two, relate to the same matter and are inseparable in this action, which is for the final settlement of the defendant's administration. The reference necessarily embraces all the issues, and must be proceeded with according to law. There being no issues for trial by jury, it was error to order the action to be romoved to another county.

PER CURIAM. Reversed.

Cited: *Britt v. Benton,* 79 N. C., 180; *Overby v. B. and L. Assn.,* 81 N. C., 63; *Grant v. Reese,* 82 N. C., 74; *Vaughan v. Llewellyn,* 94 N. C., 478; *Grant v. Hughes,* 96 N. C., 190; *Yelverton v. Coley,* 101 N. C., 250; *S. v. Giles,* 103 N. C., 396; *Nissen v. Mining Co.,* 104 N. C., 310; *Smith v. Hicks,* 108 N. C., 251.

(421)

JOHN F. WEEKS ET ALS., INFANTS, BY THEIR GUARDIAN, F. N. MULLEN, v. ALETHA WEEKS AND JAMES M. WEEKS.

Will, Construction of—Bequest of Another's Property.

1. A devisee or legatee cannot claim both under a will and against it. If the will gives his property to another, he may keep his property, but he cannot at the same time take anything given to him by the will. Therefore, where a testator bequeathed to certain of his children a fund arising from a policy of insurance which belonged to all his children equally, and directed that in the event the fund should be used in the payment of debts, the bequest should be made good out of his land, and the residue of the land divided among all his children equally: *Held,* that the children not included in the bequest should be required to elect either to take their respective shares of the insurance money and abandon all claim to the land or to abandon their shares of the insurance money and take the shares of the land given to them by the will.
2. It is only when a party put to an election is under a disability that the court will order a reference or account for the purpose of ascertaining what is to his advantage.

SPECIAL PROCEEDING for partition, commenced before the clerk of PASQUOTANK and heard on appeal by *Cannon,* J., at chambers, on 6 February, 1877.

The plaintiffs and defendants were children of one James E. Weeks, who died in 1866, leaving a last will and testament, the portions of which material to this case are as follows:

"2. Inasmuch as provision has been made for my two eldest children, Alethia and James, by their uncle, James G. Mullen, in his last will and

testament, I give and bequeath unto my four youngest children, namely, John, Charles, Catherine, and Stephen, the $5,000 for which my life is insured in the Ætna Life Insurance Company, to them and their heirs forever, to be equally divided among them, share and share alike. But as my estate is greatly involved in debt, and as I am most desirous that provision shall be made for the payment of the same, I direct (422) the guardian of my children, namely, John, Charles, Catherine, and Stephen, to employ the fund above mentioned to be derived from the insurance upon my life in the payment of all my debts not included in a deed of trust which I have this day made to Dr. Francis N. Mullen for purposes therein specifically set forth: *Provided, however,* and it is upon the condition, that my said debts not included in the said deed of trust can be compromised at an amount not exceeding 50 cents on the dollar, and in case of the application of the said fund, or any part thereof, to the payment of my said debts, it is my will and desire that an equivalent value of my real estate shall be set apart to my said four youngest children, and that they shall take such share of my real estate in addition to what they would have taken had no part of said insurance fund been applied to the payment of my debts; or, in other words, it is my will and desire that in the event the whole or any part of said fund shall be used in the payment of my debts, then and in that case a share of my real estate equal in value to the amount of said fund so used shall be set apart and assigned to my said children, John, Charles, Catherine, and Stephen, to them and their heirs forever. But if my creditors not named in said trust shall refuse to accept an amount not exceeding 50 cents on the dollar in full payment and satisfaction of my indebtedness to them, then I desire no part of sail insurance fund to be susbstituted for real estate as hereinbefore provided, but I give and bequeath the whole of said fund to my four youngest children, John, Charles, Catherine, and Stephen, to them and their heirs forever, to be equally divided among them, share and share alike.

"3. The residue of my estate, both real and personal, after the payment of my just debts, I give and bequeath to my children living at the time of my death, to them and their heirs forever, to be (423) equally divided among them, share and share alike."

The policy of insurance referred to upon the life of the testator was "for the benfit of his children," the company in said policy agreeing "at the death of said James E. Weeks to pay said sum of $5,000 to the children of said James E. Weeks, their heirs, executors," etc.

The executor named in the will collected the amount of the policy (less a sum due the company upon certain notes executed to it by the testator), and used the same in payment of the debts of the estate.

The plaintiffs demanded judgment that a portion of the land of the testator, equal in value to the sum of $5,000, be allotted to them as tenants in common, and the residue of land be equally divided between the plaintiffs and defendants.

The defendants insisted that the lands should be divided in equal parts among the plaintiffs and defendants.

Upon the pleadings and exhibits the clerk adjudged that the plaintiffs and defendants were tenants in common of equal shares, and not of unequal shares, as claimed by plaintiffs, in the several tracts of land named in the pleadings, and that partition be made among them.

From which order the plaintiffs appealed to the judge of said court, who affirmed the same. Plaintiffs thereupon appealed to this Court.

Gilliam & Pruden for plaintiffs.
W. N. H. Smith for defendans.

RODMAN, J. The insurance money ($5,000) which the testator expected to be paid, and which was in part paid after his death, was the property of his six children. Nevertheless, he bequeathed it in effect to his four younger children, who are plaintiffs.

It is immaterial whether he supposed this sum to be his own, or knew it to be the property of all the children equally. He owned land (424) which he might dispose of at his pleasure, and he devised that the aforesaid sum should be applied, on an event which took place, to the payment of his debts, and that the plaintiffs should first have that value laid out to them in his land, and that then the residue of the land should be equally divided among all the children.

There is no doubt about the intent of the testator, that the plaintiffs shall have all the land in case the defendants do not release their rights in the insurance money. It is a familiar principle of equity that a devisee or legatee cannot claim both under a will and against it. If the will gives his property to another, he may keep his property, but he cannot at the same time take anything given to him by the will; for it was given to him on the implied condition that he would submit to the disposition of his property made by the testator. He is put to his election. Adams' Eq., 92.

In the present case the defendants, who are the two older children of the testator, might have elected to take their respective sixth parts of the insurance money, abandoning thereby all claim to the land of the testator under his will. They were entitled to a reasonable time for making their election. In case any of the parties put to an election are under a disability, the court will order a reference to ascertain what is to their advantage, and if an account be necessary for that purpose, will order one. In the present case the defendants are competent to decide for

themselves. No account would assist them. There is no way to ascertain the value of the shares of the land which they would get under the will, except by sale, which neither party has asked for.

There is error in the judgment below, which is reserved. The defendants will be required to elect whether they will take their respective sixth parts of the insurance money and abandon all claim to any part of the land of the testator mentioned in his will, or whether they (425) will abandon their respective shares in said insurance money to be applied as directed by the will, and take the shares of the land given them by the will.

If the defendants shall elect the first alternative, their election will be entered of record and the action dismissed, as the plaintiffs will be then sole seized, unless they shall amend their complaint with a view to a partition among themselves.

If the defendants shall elect the second alternative, a portion of the land devised, of the value of the insurance money, will be laid off to the plaintiffs in common, and the residue divided equally among all the children, or a division upon the principle stated may be made in any way agreed on by the parties, or which the court considers just and equitable.

The case is remanded to be proceeded in according to this opinion.

PER CURIAM. Judgment accordingly.

Cited: *S. c.*, 79 N. C., 77; *Tripp v. Nobles,* 136 N. C., 103.

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(426)

HENRY HART, EXECUTOR, ET ALS. v. JOSEPH WILLIAMS.

Will—Pecuniary Legacy—Interest on.

1. Where a testator bequeathed $250 to A., and the rest of his estate to B.; *Held,* that such a legacy is a charge upon the estate after the payments of debts.

2. The rule is that pecuniary legacies bear interest from one year after the death of the testator; but where they appear to be given for the support and maintenance of the legatee, they bear interest from the death of the testator.

SPECIAL PROCEEDING, commenced in the probate court of YADKIN, and heard at chambers on 18 December, 1876, before *Cloud, J.*

The plaintiffs are Henry Hart, executor, and Alfred Williams, a legatee of Nicholas L. Williams, who died in 1866, leaving a last will and testament, as follows:

"1. I will my estate, both real and personal, except as hereinafter mentioned, to Henry Hart and his heirs, in special trust and confidence that he keep, hold, use, and apply the same to the sole and special use and benefit of my mother, Mary G. Williams, for and during her natural life; and at her death to be equally divided between my father, N. L. Williams, Sr., and my brothers, Joseph Williams and Lewis J. Williams, free and discharged of all the above trust.

"2. I will that my executor pay to Alfred Williams, freedman, formerly the property of N. L. Williams, Sr., $250. This bequest is given to Alfred for his fidelity and his kind and benovelent attention to me."

A controversy having arisen as to the proper construction of the will it was referred to John A. Gilmer, Esq., who found, in substance,
(427) that the land had been sold by the executor, subject to the life estate of Mary G. Williams, for assets to pay debts of testator; that defendant became the purchaser at $2,061, and executed a note for the amount, and that he has paid the same in cash and by the extinguishment of debts of testator, except about $600. The personal estate, amounting to $500, and the rents of the land, by consent of the tenant for life, were also applied to the payment of debts. The defendant is the assignee of the life estate of Mary G. Williams, and agreed to pay the outstanding debts of the testator, except the legacy to Alfred Williams—insisting that his right as assignee aforesaid to retain any balance of rents, etc., after payment of debts was prior to the right of the legatee. And for Alfred Williams it was insisted that the legacy was a charge upon the whole trust fund, and that the defendant's right to retain any such balance was postponed until the legacy was paid.

The referee decided in favor of Alfred Williams, the probate judge reversed the decision, and, on appeal, his Honor reversed the decision of the probate judge and sustained the referee. Judgment. Appeal by defendant.

Alspaugh & Buxton and J. M. McCorkle for plaintiffs.
Watson & Glenn for defendant.

BYNUM, J. 1. By reading the second clause of the will as the first, the meaning of the testator more plainly appears, though it is apparent as it now stands. Taking the second clause first, the substance and effect of the will is: "I will that my executor pay to Alfred Williams, freedman, $250. I will the rest of my estate, both real and personal, to Henry Hart," etc.

Taking the will as it is written, the sum of $250 directed to be paid to Alfred Williams is expressly excepted from the operation of the
(428) devise and bequest to Henry Hart, in trust for the widow for life

and remainder over. After the payment of the debts of the testator, this legacy to Alfred is to be first paid, and is the first charge upon the estate, real and personal, devised and bequeathed to Hart in trust.

2. The rule is that pecuniary legacies bear interest from one year after the death of the testator. Where they appear to be given for the support and maintenance of the legatee, they bear interest from the death of the testator. *Swann v. Swann,* 58 N. C., 297; *McWilliams v. Faulcon,* 59 N. C., 235.

PER CURIAM. Affirmed.

Cited: Worth v. Worth, 95 N. C., 242; *Moore v. Pullen,* 116 N. C., 287.

(429)

*BENJAMIN SUTTON, ADMINISTRATOR, v. WILLIAM H. WEST, EXECUTOR.

Will—Vested Legacy—Administrator Entitled to Recover.

1. Where a testator bequeathed to each of his children a pecuniary legacy "when the youngest child arrived at the age of 12 years," and provided that his whole estate should be enjoyed by his family in common until that time: *Held,* that the legacy was a vested one, and that the testator intended only to postpone the time of payment.
2. In such case the administrator of a deceased legatee is entitled to recover the amount of the legacy.

CASE AGREED, heard at Spring Term, 1876, of LENOIR, before *Seymour, J.*

One K. T. West died in Lenoir County in 1865, leaving a last will and testament appointing the defendant his executor. Elizabeth A. West, one of the legatees under the will, married the plaintiff, Benjamin Sutton, and died intestate in 1867, and her husband was appointed her administrator. That portion of the will necessary to an understanding of the opinion is as follows:

"2. I give to each of my nine youngest children, to wit, . . . Elizabeth A. West and (naming them), as they shall arrive at the age of 21 years or get married, (articles of personal property).

"3. I give to each of my eight youngest children, to wit, . . Elizabeth A. West, etc., when the youngest shall arrive at the age of 12 years, $500 in money.

*FAIRCLOTH, J., having been of counsel in the court below, did not sit on the hearing of this case.

(430) "4. I give to my beloved wife, Teresa L. West, when my youngest child shall arrive at the age of 12 years, if she be then living, $500 in money.

"5. I lend to my wife, Teresa, and my seven youngest children, to wit, . . . Elizabeth, etc., all my real and personal estate, with the understanding that they are to enjoy so much of the rents . . . as may be necessary for their support in common until the youngest child shall arrive at the age of 12 years; and after the youngest shild shall have arrived at said age. it is then my will and desire that all of the estate above named shall be sold and the proceeds divided equally between my wife, if she should then be living, and all of my shildren or their legal representatives, to wit, . . . Elizabeth, etc. It is, furthermore, my will and desire that if any of my seven youngest children hereinbefore mentioned shall marry before the youngest child arrives at the age of 12 years, he, she, or they shall immediately . . . cease to enjoy the rents and profits accruing from my said estate until the final division between all my children shall take place."

The plaintiff has demanded of defendant the sum of $500, with interest from 9 June, 1875, and the defendant refuses payment upon the ground that said Elizabeth A. Sutton, the intestate of plaintiff, died before Robert S. West, the youngest child of said testator, arrived at the age of 12 years, and insisted that said legacy was contingent upon Elizabeth's living until Robert arrived at the age of 12 years, and was not vested. Robert arrived at the age of 12 after the death of plaintiff's intestate.

His Honor held "that the will showed an intention to keep the estate together until the youngest child reaches the age of 12, so that the widow and her family might have a support. The postponement of the legacies of the eight youngest children had 'reference to the convenience of the estate,' and by a rule of law the legacies vested immediately."

(431) Judgment for plaintiff. Appeal by defendant.

H. F. Grainger for plaintiff.
W. N. H. Smith for defendant.

RODMAN, J. It is conceded that the words "if" and "when" are ordinarily words of condition, or of conditional limitation. *Guyther v. Taylor,* 38 N. C., 323; *Giles v. Franks,* 17 N. C., 521. It is equally clear that their meaning may be controlled by provisions in the will which show an intent that the legacy shall be vested. If the third clause in the present will stood alone, we probably should consider the legacy of $500 to Elizabeth West as contingent on her being alive when the youngest child of the testator became 12 years of age. The language of the

fourth clause, as well as that of the fifth, shows that the testator knew very well how to make a legacy clearly and unmistakably contingent.

In our opinion, the legacy in question was vested, and the testator intended only to postpone the time of payment. Our opinion is founded on the following reasons:

1. By the fifth clause the testeator lends to his wife and seven youngest children (naming them, and among them Elizabeth), all his real and personal estate for their support out of the profits until his youngest child shall arrive at the age of 12 years. And the will proceeds: "It is then my will and desire that all of the estate above named shall be sold, and the proceeds thereof divided equally between my wife, if she should then be living, and all of my children, or their legal representatives, to wit"—naming them, and among them the said Elizabeth.

This legacy of the residue is certainly vested. If we were to hold the legacy of $500 to Elizabeth in the third clause to have lapsed upon her death before the arrival of the youngest shild to the age of 12 years, it would fall into the residue, and her representative would (432) take a part of it under this fifth clause. We can conceive of no reason why a testator should make dispositions of his property in consistent with each other, in part at least.

2. The payment of the $500 is to take place when the youngest child becomes 12 years of age. At that time the whole estate of the testator is to be sold. The pecuniary legacies are then to be paid, and the residue is then to be divided among certain children named. It is settled that if in the third clause the testator, in giving the legacy of $500, had used the words "to be paid" when the youngest child attains 12 years, the legacy to Elizabeth would have been vested. The language of the fifth clause is to that effect, and it is immaterial where it is inserted. *Perry v. Rhodes,* 6 N. C., 140.

PER CURIAM. Affirmed.

Cited: Elwood v. Plummer, 78 N. C., 395; *Hooker v. Bryan,* 140 N. C., 405.

(433)

ROBERT C. PERKINS, ADMINISTRATOR, WITH THE WILL ANNEXED,
v. H. P. R. CALDWELL, ET ALS.

Will—Construction of—Executors and Administrators—Account.

1. An administrator or other trustee who wishes to obtain the construction of a will must set out in his application all the facts material for a decision on the rights and liabilities of the parties interested; and the trustee should be in possession of the property in respect to which he seeks the advice of the court.
2. To ascertain the facts in such case it is proper to order an account to be taken of the property of the testator in the hands of the representatives of his deceased executor.

ACTION for the construction of a will, tried at Spring Term, 1877, of BURKE, before *Furches, J.*

The testator, John Caldwell, died in 1856. Tod R. Caldwell was appointed executor, and upon his death Robert C. Perkins was appointed administrator with the will annexed, and instituted this action against the defendant legatees and their representatives, asking for a construction of the will of John Caldwell, and for an account by the representative of the executor of said testator. No decision was made upon the questions involved in the controversy, for the reason that the material facts were not ascertained. His Honor granted an order to take the account as demanded by plaintiff, and the defendants appealed.

No counsel for plaintiff.
A. C. Avery and G. N. Folk for defendants.

RODMAN, J. We are of opinion that in the present stage of this case we cannot pass on any of the questions on which the plaintiff asks our advice. No doubt, an administrator or other trustee may in many
(434) cases apply to a court for its instruction in the administration of a doubtful trust. 2 Story Eq. Jur., sec. 1267; *Bullock v. Bullock,* 17 N. C., 307.

Applications of this sort are most frequently made when the object is merely to obtain a construction of an ambiguous will, although they are not confined to such cases. In the present case the will of the testator is of unusual clearness, considering its length and the nature of its provisions. The difficulties in its execution are in consequence of the destruction of a large part of the property intended for the payment of legacies, since the death of the testator.

But before a court can undertake to decide the questions of duty presented upon such an application, it seems plain that all the facts upon

which the duty depends must be set forth and admitted by all the persons interested, or ascertained in some proper way; otherwise, the decisions of the court would be upon hypothetical or supposed states of fact, liable to be modified or entirely changed when the real facts shall be ascertained. Such advise would be more liable to mislead a trustee than to guide him safely.

It also seems essential to the exercise of such a jurisdiction that the trustee should be in the possession of the property in respect to which he seeks the advice of the court, and thus able to carry it into effect.

In both these respects the present application is defective. Many of the facts alleged are admitted, but not all that are material; for example, it does not appear whether or not Tod R. Caldwell assented to the legacy of bank stock to himself. Ordinarily, it would be presumed that he did, but it is a presumption which may be rebutted, and it is denied on his part that he did.

The plaintiff does not appear to be in possession of the property of the testator, John Caldwell. In fact, an essential part of the relief demanded is to obtain possession of so much of the property as has not been lost, from the representatives of the executor of John.

The plaintiff is clearly entitled to an account of the property (435) of John Caldwell, which is or ought to be in the hands of the representatives of his executor unadministered. On the taking of this account, all the facts material for a decision on the rights and liabilities of the several parties will necessarily be ascertained, and the questions then presented may be very different from what they appear to be now.

This course will prove in the end more convenient and even more expeditious.

For these reasons, the case is remanded in order that an account, etc., may be taken, and such other proceedings had, etc. Neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: *S. c.*, 79 N. C., 441; *Ruffin v. Ruffin,* 112 N. C., 109; *Balsley v. Balsley,* 116 N. C., 477.

L. D. BYRD ET ALS., EXECUTORS, v. W. B. SURLES AND WIFE ET ALS.

Will—Marriage of Testator.

The marriage of a testator subsequent to the making of a will is a revocation of the will.

APPEAL at Spring Term, 1877, of HARNETT, from *McKoy, J.*

This was an issue of *devisavit vel non,* and the jury rendered a verdict in favor of the caveators. The case was brought to this Court on appeal by plaintiffs.

Neil McKay, W. E. Murchison, J. W. Hinsdale, T. H. Sutton, and J. A. Spears for plaintiffs.

John Manning, D. H. McLean, and N. W. Ray for defendants.

(436) FAIRCLOTH, J. Richard Byrd made his will, 26 February, 1876; was married 4 May, 1876, and died 26 December, 1876, and the jury said by their verdict that the said paper-writing propounded was *not* the will of said Richard.

There is no judgment, order, or exceptions in the case, and we have nothing to decide, except that the marriage revoked the will, and to render judgment against the appellants for the costs in this Court.

PER CURIAM. Judgment accordingly.

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(437)

*JAMES M. TOWLES AND WIFE ET AL. v. JEFFERSON FISHER.

Will—Power Thereunder—Husband and Wife—Parol Release—Negligence—Fraud.

1. A testator devised the land in controversy to A. for life, with power to sell the same (with the consent and advice of a majority of the executors named in the will), with remainder over to B. of "all the property belonging to my estate which may be in her (A.'s) possession at the time of her decease." A. and three others were named as executors, A. and one of them qualifying. Afterwards A. sold the land to C. and executed a deed therefor, without the advice or consent of the other executor, who had removed from the State; this deed did not purport to be made by virtue of any power under the will. C. entered into possession of the land under A.'s deed, and has retained it since that time. In an action by B. for the land: *Held,* (1) That by the words "may be in her possession," etc., the testator did not intend to give A. an unlimited power to sell the land. (2) The deed to C. was not in execution of the power given

*READE, J., did not sit on the hearing of this case.

to A. by the will, and conveyed only the life estate of A. (3) The fact that her coexecutor had removed from the State did not authorize A. to sell without his consent.

2. When the donee of a power to sell has an estate of his own in the property affected by the power, and makes a conveyance thereof without reference to the power, the presumption is that he intended to convey only what he might lawfully convey without the power.

3. A husband is not *jure mariti* the agent of his wife competent to estop her by representations concerning her claims to land. Therefore, evidence of a statement made by a husband concerning the claim of his wife to certain land is incompetent, it not being proven that he spoke by her authority.

4. A purchaser of land who has notice of the refusal of a married woman to execute a release of her claims thereto, and who proceeds to improve the land without obtaining such release, is guilty of negligence.

5. The parol relinquishment of a claim to land by a married woman, even for a valuable consideration, is invalid by reason of her disability, and she is not thereby estopped from asserting her claim. *Semble*, if she convey her interest by a deed without a privy examination, it is color of title.

6. To estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might *reasonably* rely, and upon which he did rely, and was thereby injured.

ACTION to recover possession of land, tried at January Special (438) Term, 1877, of WAKE, before *Schenck, J.*

The case is sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court. Upon issues submitted, and under the instructions of his Honor, there was a verdict for the plaintiffs. Judgment. Appeal by the defendant.

Battle & Mordecai and W. N. H. Smith for plaintiffs.
D. G. Fowle for defendant.

RODMAN, J. This action is to recover a piece of land in Raleigh in the shape of a parallelogram, 3 feet wide on Fayeteville Street and of like width on Wilmington Street, the other sides being parallel. It is admitted that as to James Callum, one of the two parties plaintiff, the action is barred by the statute of limitations, so that it is in effect an action to recover an undivided half of the parallelogram.

The plaintiffs claim under the will of William Shaw, who died in 1827. By the sixth clause of that will he devises the land in controversy to his wife, Priscilla, for life; and by the seventh clause he devises to James Callum and Mary Callum (now Mrs. Towles), the plaintiffs in this action, "on the death of my wife, Priscilla, all the property, real and personal, belonging to my estate, *which may be in her possession* at the time of her decease, to be equally divided between (439)

them," etc. In the same clause are found these words: "When I said above that my wife, Priscilla, should have, hold, and use the property to her bequeathed during her lifetime for her own comfort and convenience, it was not intended to preclude her from making donations to charitable or religious objects as she may think proper." The testator appoints Joseph Gales, his wife, Priscilla, and two others, his executors. Gales and the widow alone qualified.

By a codicil he devised that his wife, with the consent and advice of his executors, or a majority of them, should have power to sell and dispose of any part of the land left to her for life, whenever it should appear to her and them that such sale was proper and for her convenience and for the general interest of his estate, and that his wife and any two of his executors might make the deed.

In June, 1833, Priscilla, the widow, for a valuable consideration, conveyed to Primrose in fee the land in question. The deed does not profess to be made by virtue of any power in her under the will. Upon these facts the plaintiff Mrs. Towles contends that upon the death of Priscilla in 1847 she and James Callum were entitled to the possession of the land in question. The defendant denies this, and contends:

1. That as the land was not in the possession of Priscilla at her death by the terms of the will, it did not pass to the devisees in remainder. We do not think that by the use of these words, "which may be in her possession," the testator intended to give his widow an unlimited power to sell his land, which would be the result of the construction contended for. Such power is inconsistent with the very limited power given to her to make donations for religious and charitable objects, by which he probably meant nothing more than such moderate and reasonable donations of money as he had been in the habit of making; and it is especially inconsistent with the power given to her by the codicil to sell any part of the land with the consent of the executors.

(440) 2. We think it clear that the deed to Primrose was not in execution of the power given to the widow by the codicil. It may be, and probably is true, that the sale was proper for her convenience and for the general interest of the estate. But that is immaterial. The consent of a majority of the executors, or at least of those who qualified, was a condition precedent to the exercise of the power, and that consent did not exist. It was a condition which the testator had a right to prescribe. That Gales, who with the widow alone qualified as executors, had removed from the State, did not authorize her to sell without his consent. And no court can *now* substitute its judgment on the propriety of the sale for the consent which testator required to procede or accompany the sale.

In addition to this, when the donee of a power to sell has an estate or her own in the property affected by the power, and makes a convey-

ance of the property without reference to the power, the construction established by the decisions is that she intends to convey only what she might rightfully convey without the power. These doctrines are so generally accepted that we think no reference to the authorities in necessary. They may be found cited in the brief of the counsel for the plaintiff. The deed to Primrose conveyed only the life estate of Priscilla Shaw.

3. The defendant also contends that the plaintiff Mrs. Towles (for it is agreed by the parties that the estate of her husband need not be considered) is estopped by her acts *in pais* from asserting a claim to the land in question.

On this part of the case we have had considerable doubt. As to what acts *in pais* will estop a *feme covert* from alleging a title to land, it is difficult to state any general rule which will not be too general to be useful; and it is even more difficult to apply the general rule to the facts of the particular case. The undisputed facts seem to be these:

Mrs. Towles' estate accrued in possession at the death of Mrs. (441) Shaw in 1847, What was done on the premises by Primrose prior to that time was done under the estate for the life of Mrs. Shaw. It is not contended that any act of omission of Mrs. Towels before that time is of any significance.

From 1847 to 1874 the land remained in the possession of Primrose and his heirs. On 30 April, 1874, it, with some adjoining land, was sold by the heirs of Primrose at public sale, and bought by Fisher. Up to, at, or about the time of this sale the case was simply that of an adverse possession submitted to by Mrs. Towles, and it does not alter the effect of such possession whether he knew of her rights to the land so possessed or not. She was, during all that time, under a disability, which still continues, and the statute of limitations did not run against her. It is in evidence that she did not know of the sale by Primrose until after it was made. At all events, it is not alleged that she was present at the sale, and knowing that the land now in question was being sold, and knowing of her title or claim thereto, willfully concealed the same.

In August, 1874, after Fisher had paid $5,000 on the price of the land bought by him of Primrose, which included this land, he was first informed of the claim of Mrs Towles to it. The heirs of Primrose procured a release of the land in question, to be drawn for execution by Towles and wife, which, on 1 September, 1874, was shown to Towles, and on the next day it was returned to W. S. Primrose, one of the heirs, unexecuted. The defendant then offered to prove that Towles, on returning the deed, said that his wife refused to sign it because it embraced half the wall on Wilmington Street; that she claimed the whole wall, but nothing beyond it. The judge excluded this evidence. We think

(442) it was properly excluded, if for no other reason, because it was not offered to be proven that in fact Mrs. Towles had authorized her husband to deliver such a message, and a husband is not *jure mariti* the agent of his wife competent to estop her by representations concerning her claims to land. For the same reason, the evidence of Fisher as to his conversation with Towels concerning his wife's claims was properly excluded. If he relied on them, as probably he did, he was guilty of negligence. We must assume that he knew that Mrs. Towles had refused to execute the release which Primrose had tendered to her, and that she claimed the whole parallelogram now in question. If he supposed that her refusal to sign the release was only because it included one-half of the wall on Wilmington Street, and he was willing to forego any title to that, common prudence demanded that he should procure her release for the rest of the parallelogram. It was negligence to proceed without it. If Mrs. Towles had personally told Fisher what it was offered to be proved that her husband told him as coming from her, it would have informed him of her claim and of her refusal to release it. And if she had assigned a reason for her refusal which reached only a small part of the land claimed, but did not offer to execute a release which would have avoided her objection, it ought to have put him on his guard. At all events, he cannot reasonably be supposed to have acted on the belief that Mrs. Towels informally and by a mere declaration released a claim which he knew that she refused to release by a binding instrument. That she assigned a partial or insufficient or even a false reason for her refusal did not annul the refusal as to the part that did not come within the reason; and she cannot fairly be considered as having done the greater part of what she was requested and refused to do, because the reason which she assigned for her refusal applied only to a small part of it. Besides, if Mrs. Towels had then and there said to Fisher, " I claim title to this parallelogram of land, but I promise to convey it to (443) you, and I will never set up my claim to it against you," is it not clear that by reason of her disability she would not have been estopped by such promise? Supposing that there had been a consideration for her promise, which in this case there was not, it would be the case of a purchaser from a woman whom the purchaser knows is married, but who contents himself with a deed to which she is not privily examined, or with a mere parol conveyance. All the cases say that she is not estopped by such a conveyance.

We have examined with care many of the cases cited in Biglow on Estoppel, 485, 492, and they all concur that a married woman who is under a disability to contract cannot be estopped by anything in the nature of a contract. To estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon

which a person dealing with her, or in a matter affecting her rights, might *reasonably* rely, and upon which he did rely, and was thereby injured. No one can reasonably rely upon the contract of a married woman, or on a representation of her intentions, which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound.

In January, 1875, Fisher completed his purchase from Primrose by paying the residue of the purchase money and taking a deed which included the land in question. He says he held the land without objection from Mrs. Towles from that time until August or September, 1875, when he began to build, and had made considerable progress in building when he was notified of plaintiffs' claim to the land in question. But it has been seen that he was informed of Mrs. Tawles' claim in or about August, 1874. Probably he means only to say that he was formally notified of the claim in August or September, 1875, and not that he was then first informed of the claim of Mrs. Towles.

No doubt the defendant supposed that he had a good title to the premises, and was therein mistaken. But that he was deceived by anything that can in law be called a tort or fraud on the part of Mrs. (444) Towles, even supposing that she had personally said to him what he offered to prove that her husband said as coming from her, we see in the case no evidence to establish. Having notice of Mrs. Towles' claim to the title in August, 1874, and knowing that she had not released it in the only way in which she could by law do so, it was his negligence to proceed as if it had been released. In reversing the judgment, as we are bound to do, and remanding the case, it may be remarked that we have not been called on to consider, and have not considered, any claims or equities of the defendant arising out of the increase in value of the land by reason of his improvements. Any questions of that sort can be presented by an amendment of the pleadings in the Superior Court. This opinion and judgment applies to both the appeals in the case.

PER CURIAM. Reversed.

Cited: *Scott v. Battle,* 85 N. C., 191; *Boyd v. Turpin,* 94 N. C., 141; *Hodges v. Powell,* 96 N. C., 69; *Weathersbee v. Farrar,* 97 N. C., 111; *Walker v. Brooks,* 99 N. C., 210; *Thurber v. LaRoque,* 105 N. C., 313; *Farthing v. Shields,* 106 N. C., 300; *Fort v. Allen,* 110 N. C., 192; *Williams v. Walker,* 111 N. C., 609; *Wells v. Batts,* 112 N. C., 289; *Exum v. Baker,* 118 N. C., 547; *Bizzell v. McKinnon,* 121 N. C., 189; *Strother v. R. R.,* 123 N. C., 199; *Smith v. Ingram,* 130 N. C., 106; *s. c.,* 132 N. C., 964, 965; *Cameron v. Hicks,* 141 N. C., 28; *Rich v. Morisey,* 149 N. C., 45; *Herring v. Williams,* 158 N. C., 9, 12, 23.

(445)

JAMES W. WILSON ET ALS. v. THE WESTERN NORTH CAROLINA LAND COMPANY.

Contract—Mistake—Bona Fide Purchaser Without Notice—Entry and Grant—Nonresident—Practice—Violation of Restraining Order.

1. To justify a court in setting aside a contract on the ground of mistake, it is essential to show either a mistake of both parties or the mistake of one with the fraudulent concealment of the other.
2. To the general rule that an act done or contract made under mistake or ignorance of a material fact is viodable in equity, there are certain exceptions, viz: (1) The material fact must be such as the complaining party could not, by reasonable diligence, obtain a knowledge of, when he was put upon inquiry. (2) Where the means of knowledge are alike open to both parties, and where each is presumed to exercise his own judgment in regard to intrinsic matters. (3) Where the facts are equally known to both parties, or where each has equal and adequate means of information, or the facts are doubtful from their own nature, if the party has acted in good faith.
3. Where a *bona fide* purchaser for value and without notice has acquired the legal title to land, equity will not interfere to deprive him of his legal advantage. Therefore, when A., in whose name certain entries of land had been made for the benefit of others, conveyed his interest in the same to B., who purchased for value and without notice, and B. took out grants in A.'s name, who thereafter executed to B. a quitcalim deed for the land: *Held*, in an action by A. and the parties for whose benefit the entry in A.'s name had been made, to set aside his conveyance to B., that B. had acquired a good title.
4. An entry in the name or for the benefit of a nonresident is void; and a grant issued pursuant to such entry to such nonresident is voidable at the suit of the State.
5. A grant taken out upon an entry, which has lapsed by the efflux of time, is valid. A grant, taken out upon an entry made by a nonresident, by a person capable of taking and holding under the law of the State, is valid.
6. A plaintiff claiming under void entries of land cannot be aided by the defective title of defendants.
7. One who executes a deed despite a restraining order enjoining him from so doing is estopped from invalidating the deed for that cause.

(446) ACTION for the cancellation of a deed and other relief, tried at Spring Term, 1875, of CALDWELL, before *Mitchell, J.*

The plaintiffs are J. W. Wilson, G. N. Folk, J. C. Tate, H. F. Bond, W. D. Sprague, and E. M. Davis.

The defendants are the Western North Carolina Land Company and J. G. Ralston, its president.

The plaintiffs alleged that on 5 March, 1869, C. A. Cilley entered a large body of vacant land in Caldwell County, known as the Wilson

Creek lands, and that he afterwards, for valuable consideration, sold to E. M. Davis, of Philadelphia, his interest in such entries. No grants were taken out upon these entries, and the same lapsed. On 8 January, 1872, said Cilley made other entries of the same land in the name of George N. Folk, for the purpose of carrying out his contract with Davis. On 4 July, 1874, the plaintiff Junius C. Tate entered the same lands in his own name. Thereafter, Tate assigned his interest in the entries to the plaintiffs Henry F. Bond and William D. Sprague. A controversy having arisen between Davis and Bond & Sprague, a compromise was made whereby grants were to be taken out and the title to the lands held by a trustee, who was to sell the lands and divide the proceeds of sale between Davis and Bond & Sprague. This compromise was approved by said Folk, who agreed in writing to its stipulations. On 10 March, 1872, E. T. Mockridge procured entries of certain lands in said Caldwell County to be made in the name of said Folk, which lands adjoined the lands entered as aforesaid. On 16 February, 1874, the de- (447) fendant company, consisting of said Mockridge and others, was incorporated by the General Assembly, and the defendant Ralston became president thereof. On 12 June, 1873, said William D. Sprague made entries of the lands entered by said Mockridge on 10 March, 1872.

That on 25 October, 1874, W. W. Flemming, as agent and attorney for defendant company, without the knowledge or consent of the plaintiffs, or any of them, procured the entry-taker of said county to give him warrants directing the county surveyor to lay off and survey for said Folk the lands covered by said entries, and placed the same in the hands of said county surveyor. That by a combination between the surveyor, Flemming, and Mockridge, the lands were surveyed secretly and without the knowledge of plaintiffs. That said survey was finished on 27 December, 1874, the surveyor adopting, in order to have the same completed by 31 December, certain surveys theretofore made by him at the instance of plaintiffs. That while said survey was in progress the plaintiff Folk gave to said Flemming, as agent, a paper-writing authorizing him to take out in his name grants from the State for any lands in Caldwell County, but that said Folk only intended that such authority should apply to the lands entered on 10 March, 1872, and not to the Wilson Creek lands, and that the defendants were aware of such intention. That on 16 December, 1874, the defendant company, by presenting said paper-writing to the Secretary of State, and upon payment of the necessary fees and charges, obtained grants for the lands in said Caldwell County, including the Wilson Creek lands, and placed the same in the hands of the register of Caldwell County for registration.

That prior to 31 December, 1874, a civil action had been commenced in Caldwell Superior Court by said Tate against said Davis, Mockridge,

(448) and Folk, in which a restraining order had been granted, enjoining said Folk from conveying the Wilson Creek lands to either Davis or Mockridge. On 30 December, 1874, said Flemming handed to said Folk for his signature a quitclaim deed to said Ralston, as president of defendant company, of a large quantity of land in Caldwell County, reciting a consideration of $8,000, and only describing the land by the numbers of the grants conveying the same to said Folk. That said deed was without consideration. That said Folk carried the deed to his house, had it copied, omitting the consideration, signed it, and placed it in an envelope directed to Mockridge, and was about to send it to the postoffice when Mockridge called at his house. That folk thereupon called his attention to the aforesaid restraining order, but stated that in his opinion the order was in operative, as it seemed based upon the belief that he intended to convey the Wilson Creek lands; that Mockridge did not undeceive said Folk, but strengthened the impression that the deed did not cover the Wilson Creek lands, and Folk executed and delivered the same to him; that said Folk remained in ignorance of the fact that the quitclaim deed covered the Wilson Creek lands until 7 January, 1875, when he became aware of it from information received of the number of grants in his name in the register's hands; and that he thereupon conveyed the said Wilson Creek lands to the plaintiff James W. Wilson, in order that the compromise between Davis and Bond & Sprague might be carried into effect.

Plaintiffs asked that the deed obtained from Folk by Mockridge might be canceled, and for such other relief as they might be entitled to.

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

It was admitted that the defendants had no notice of the equities of the plaintiffs.

(449) The following are the issues submitted to the jury and the findings thereon:

1. Did C. A. Cilley make the entries in the spring of 1869, for his own use and benefit, as stated in the complaint? Answer: "Yes."

2. Were they afterwards sold by him to E. M. Davis under the contract, as stated in the complaint? Answer: "Yes."

3. Were they afterwards entered by said Cilley, 8 January, 1872, in the name of G. N. Folk, to enable said Cilley to carry out said contract with Davis, as stated in the complaint? Answer: "Yes."

4. Were the lands described in said complaint as entered by said Cilley, 5 March, 1869, and afterwards entered in the name of said Folk, 8 January, 1872, ever entered by E. T. Mockridge, or by any one else for his use and benefit? Answer: "No."

5. Did said Folk assign and transfer said entries to E. M. Davis, as stated in the complaint? Answer: "Yes."

6. Did said Folk, at the time he conveyed to J. G. Ralston, president, believe that he was conveying such entries only as were made by said Mockridge in the name of said Folk? Answer: "Yes."

7. Did the said Mockridge, at the time he received the deed from said Folk, know that it embraced entries which were not made for his use and benefit? Answer: "No."

8. At the time said Mockridge received said deed from said Folk was there an injunction issued restraining said Folk from conveying and said Mockridge from receiving a conveyance of said lands? Answer: "Yes."

9. Did said Mockridge represent to said Folk that the deed only embraced lands which had been entered for his use, and to which he was entitled? Answer: "No."

10. Did he represent to said Folk that the said injunction did not extend to the lands embraced in said deed? Answer: "No."

11. Was the deed made by said Folk to said Mockridge, 16 (450) June, 1874, only intended to convey the entries made in said Folk's name for Mockridge? Answer: "Yes."

12. Were the lands entered on 8 January, 1872, in the name of G. N. Folk, entered for the benefit of E. T. Mockridge or for the benefit of E. M. Davis? Answer: "For Davis."

13. Did E. T. Mockridge pay to the entry-taker of Caldwell County his fees for the entries made on 8 January, 1872, in the name of G. N. Folk? Answer: "No."

14. Did E. M. Davis pay to the entry-taker of Caldwell County his fees for the entries made on 8 January, 1872, in the name of G. N. Folk? Answer: "Yes."

15. Has E. M. Davis, or any one of the other plaintiffs, ever paid to the State of North Carolina any money for the lands included in the entries of 8 January, 1872? Answer: "No."

16. On 4 January, 1875, the date of the execution of the deed from said Folk to said Mockridge, did said Mockridge insist that the lands described as the Wilson Creek lands, which were entered 8 January, 1872, were the lands which he claimed? Answer: "No."

17. Did Folk represent to said Mockridge that the injunction did not extend to the lands embraced in the deed? Answer: "Yes."

18. Was the deed executed by Folk to Mockridge on 16 June, 1874, conveying the entries of all the lands by him in Caldwell County, procured by fraud? Answer: "No."

19. Was the deed executed by Folk to the Western North Carolina Land Company on 4 January, 1875, conveying the lands mentioned and described as the Wilson Creek lands, procured by fraud? Answer: "No."

His Honor gave judgment against the plaintiffs for costs, from which they appealed.

(451) *Armfield & Folk for plaintiffs.*
W. W. Flemming and W. H. N. Smith for defendants.

BYNUM, J. The plaintiffs base their claim to relief upon two propositions: first, that the defendants procured the execution of the deed from Mr. Folk by fraud; and, second, that it was executed by mutual mistake of facts between the parties to it. They allege that the defendants, by the concealment of facts within their knowledge and by misrepresentation, induced Folk to execute a deed to one body of land, when he supposed, and was fraudulently induced to believe, that he was conveying another and distinct one. They also allege that if there was no fraud in the inducement to the execution of the deed, there was such a mutual mistake of fact in respect to the land conveyed and that intended to be conveyed as will entitle them to the relief they seek.

Without stopping to comment on the inconsistency of the two allegations, one of fraud on the part of the defendant and the other of mutual mistake of the parties, which rebuts the idea of fraud, it is enough to say that the charge of fraud in procuring the execution of the deed is expressly denied in the answer and negatived by the finding of the jury, who, upon issues submitted to them for their verdict, declare that neither the deed of 16 June, 1874, by which Mr. Folk assigned the entries of the land to Mockridge, nor the deed of 4 January, 1875, by which he conveyed the land itself to the defendant, was procured by fraud.

The question of fraud being thus out of the way, the plaintiffs' right to relief must turn upon the single question whether the impeached conveyance was executed in such a mutual mistake of facts in respect
(452) to the body of land intended to be conveyed as a court of equity will take congnizance of. The general rule in this class of cases is that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity. But the general rule has many qualifications. For instance, the material fact must be such as the complaining party could not by reasonable diligence obtain a knowledge of when he was put upon inquiry; for if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would encourage culpable negligence. So where the means of knowledge are alike open to both parties, and where each is is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. Nor, again, will equity interpose where the facts are equally known to both parties, or where each has equal and adequate means of information, or the facts are doubtful from their own nature,

if the party has acted in good faith. It is upon this ground that if A., knowing that there is a mine in the land of B., of which he knows that B. is ignorant, should buy the land without disclosing the fact to B., for a price in which the mine was not taken into consideration, B. would not be entitled to relief from the contract, because A. as the buyer is not obliged from the nature of the contract to make the discovery.

There must always be shown either the mistake of both parties, or the mistake of one with the fraudulent concealment of the other, to justify a court of equity in reforming a contract. *Wright v. Goff,* 22 Beavan, 207; 26 Beavan, 454; 1 Story Eq., secs. 146-53; *Crowder v. Langdon,* 38 N. C., 476. In order to set aside such a transaction, it is essential, not only that an advantage should be taken, but there must be some obligation in the party to make the discovery; not an obligation in point of morals only, but of legal duty; the policy of equity being to afford relief to the vigilant and put all parties upon the exercise of the most searching diligence. This is peculiarly so in cases of written (453) agreements—a solemn deed, as in this case. The whole sense of the parties is presumed to be comprised in such an instrument, and it is against the policy of the law to allow parol evidence to add to or vary it, as a general rule. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, relief will be withheld, upon the ground that the written paper must be treated as the full and correct expression of the intent until the contrary is established beyond reasonable controversy. 1 Bro. Ch. R., 338, 341; *Woolam v. Hearn,* 7 Ves., 217; *Davis v. Symonds,* 1 Cox, 404; 1 Story Eq., sec. 153.

In this case it is the vendor who seeks to avoid his own deed upon the ground of mistake. We have already seen that he must clearly show either a mistake of both parties or the mistake of one with the fraudulent concealment of the other, to justify the interposition of a court of equity. Now, it is expressly denied by the defendants that there was any mistake on their part as to the lands they purchased. In fact, the complaint does not allege a mistake on their part; so far from it, the plaintiffs charge that the defendants made no mistake, but knowingly purchased the Wilson Creek lands, purposely concealing that fact from the plaintiffs by pretending that the deed taken by them was for the Yadkin lands. All question of a mutuality of mistake is thus effectively disposed of, as we have before shown there was no question of fraud on the part of Mockridge, the vendee. There was no mistake and no fraud on the part of the purchaser. But the jury have found by their verdict that Mr. Folk, the vendor, did convey to the defendants the Wilson Creek lands, when he intended to convey and supposed he had conveyed the Yadkin River lands. That was *his* mistake. But it is not every mistake of a vendor, however, material or however fully established by proof,

(454) that will evoke the interference of the court of equity. There must be some concealment or other ingredient in the nature of fraud on the part on the purchaser. Here none is found.

Relief is given only to the vigilant, and not to the negligent, or those who, being put upon inquiry and having equal or superior means of information, have chosen to omit all inquiry which would have enabled them to avoid, obviate, or correct mistakes. Who is in fault here? Mr. Folk did *not* own the Yadkin River lands, and both he and Mockridge knew it; he did not convey these lands. He *did* own the Wilson Creek lands, and both he and Mockridge knew that; he did convey these lands. Had he conveyed the lands to which he had no title, it would have been evidence of mistake; but as he conveyed only those he could lawfully convey, the reasonable presumption from that fact is the other way. The entries of those lands were made in his name, and he by deed assigned them to the defendants in June, 1874. Six months later—in January, 1875—and after grants had been taken out in his name on these entries, he, by another deed, conveyed the lands themselves to the parties to whom he had previously assigned the entries. Now, it is this vendor who complains and asks for equity in the face of his solemn deed. That he executed the deed in mistake is found by the jury; but a mistake cannot afford a foundation for relief where there has been such unquestionable negligence, without the violation of every principle governing that jurisdiction. The plaintiffs are therefore not entitled to relief on the ground of fraud or mistake.

But it is alleged that the defendants purchased with and are affected by notice of the prior rights and equities of the plaintiffs, and upon that question their case is this: In 1869 Mr. Cilley, in pursuance of the law (Bat. Rev., ch. 41) making all vacant and unapproved lands belonging to the State subject to entry and grant by any citiben of the State, made entries of the lands in dispute, and, in 1870, assigned his (455) entries to one Davis, a citizen of Pennsylvania, contracting to take out grants for the lands and convey to him. These entries were allowed to lapse, and, in 1872, Cilley reëtered the same lands in the name of G. N. Folk, but for the purpose of carrying out his contract with Davis.

In July, 1874, Junius C. Tate made entries covering the same lands, which entries he assigned to Sprague & Bond. Thereupon a dispute arose between Davis, claiming under the Folk entries, and Sprague & Bond, claiming under the Tate entries; neither party having perfected their entries by taking out grants from the State. This dispute was compromised between the parties by the agreement that the grants were to be taken out under the Tate entries in the name of a trustee, by whom the lands were to be sold and the proceeds equally divided between Davis

and Sprague & Boyd. This compromise was approved and indorsed by Mr. Folk, who had assigned his entries to Davis.

In October, 1874, Mr. Flemming, as the agent of the defendants, procured warrants of survey from the entry-taker and had the Wilson Creek lands surveyed in the name of Mr. Folk. Pending this survey, Folk gave Flemming a paper-writing authorizing him to take out and obtain in his name grants from the State for any lands entered in his name in the county of Caldwell. Accordingly, in December, 1874, Flemming presented this power of attorney to the Secretary of State at Raleigh, and obtained from the State grants in the name of Folk for all the lands in controversy by paying the price of the lands and the fees. Afterwards, on 4 January, 1875, by a deed duly executed by himself and wife, Folk conveyed the lands thus granted to Mockridge for the Western North Carolina Land Company, of which Flemming was the agent and attorney.

Upon this state of facts it is clear that the grants from the State conveyed the legal title of the Wilson Creek lands to Mr. Folk, and it is equally clear that his deed conveyed the legal title to the defendants. Is that title encumbered by any equity in favor of the (456) plaintiffs? Certainly not; for the defendants, in their answer, deny any notice of the several transactions between the other parties in respect of the entries and transfers of them from one to the other, and there is no proof or finding by the jury that the defendants had any such notice. According to the case, they had no knowledge and no reason to believe that these lands were originally entered by Cilley for Davis, or afterwards by Tate for Sprague & Bond, or that Folk had assigned his entries for their benefit. The entries under which the plaintiffs seek relief were in the name of Folk, and the grants were issued to him. Flemming and Mockridge knew him alone in their negotiations for the purchase of the land, as he along was known on the books of the entry-taker, and did not impart to the defendants any knowledge of his relations with the plaintiffs in respect to these lands.

Where a vendor contracts to sell land to one person, and afterwards sells the same lands to another, who purchases without notice, the latter acquires a good title. *Taylor v. Kelly,* 56 N. C., 240. Even where both parties are equally entitled to consideration, equity does not aid either, but leaves the matter to depend upon the legal title. Thus, where a *bona fide* purchaser for a valuable consideration and without notice has acquired the legal title, a court of equity will not interfere to deprive him of his legal advantage. *Crump v. Black,* 41 N. C., 321; *King v. Trice,* 38 N. C., 568.

Whatever remedy the plaintiffs may have against Folk, in respect to these defendants they cannot be in a better position than a purchaser

who has a bond for title from the vendor and afterwards for value sells and conveys to another without notice. But had these plaintiffs even an equity which they could enforce against Folk? An entry of land only creates an equity entitling the party to a grant where the purchase money is paid to the State within the time prescribed by statute, (457) which is on or before 31 December the second year after the entry. Rev. Code, ch. 42, sec. 8; *Plemmons v. Fore,* 37 N. C., 312. Folk's entries of 1872, therefore, lapsed on 31 December, 1873, and with this lapse expired the plaintiff's equity, unless the entries were kept alive by statutes extending the time for taking out grants. There may be such statutes, but we have not examined, because the question does not affect the rights of the defendants in this action; it only affects the rights of Folk and the other plaintiffs as between themselves.

Again, it appears in the pleadings, and is not denied, that Davis, for whom the entries of 1872 were made, and under which the plaintiffs claim, was not a citizen of the State, and had expressed no intention to become a citizen and resident when the entries were made for him. As to him, the lands were not subject to entry, and all entries in his name and for his benefit were void. Rev. Code, ch. 42, sec. 1; Bat. Rev., ch. 41, sec. 1; Laws 1869-70, ch. 19. Had grants been issued to Davis pursuant to such entries, they would have been voidable at the suit of the State; but he having entries only which were void as to himself, was not entitled to grants from the State, and the other plaintiffs claiming under these entries with notice can have no better standing in his Court.

But it is said in reply that the defendants claim under the same entries as the plaintiffs do, and that their title is therefore equally defective. Admitting that to be so, the defective title of the defendans cannot aid that of the plaintiffs. Claiming under void entries and nothing more, the plaintiffs are in no condition to impeach a defective or voidable title of the defendants. But the defendants have more than these entries; they have the grants from the State, and also a deed which conveys the legal title, which is good until avoided by the State for cause, or by a party having a better title or superior equity. Because a grant is taken out upon an entry which has lapsed by the efflux (458) of time, it does not follow that it is void. On the contrary, it is valid. *Horton v. Cook,* 54 N. C., 270. So if a grant is issued upon an entry which is void because of the noncitizenship of the enterer (as Davis here), the grant itself is nevertheless valid, and passes the title, if the grantee is a person capable of taking and holding by the laws of the State.

The defendant, the Western North Carolina Land Company, was made a corporation by an act of the Legislature ratified 16 February, 1874, and is empowered by the act to take and hold lands. As the grants

were issued and the deed was executed to or for the benefit of this corporation on 4 January, 1875, the corporation was at that time as capable of taking and holding lands as any citizen of the State.

We have put no stress upon the Tate entries of July, 1874, because the plaintiffs, on 9 January, 1875, but subsequent to the execution of the deed to the defendants, obtained a deed from Mr. Folk for the same lands before conveyed by him to the defendants, and now claim the lands by virtue of the grants issued to Mr. Folk on his entries of 1872; and this action is framed upon the idea that if the defendans' deed can be avoided, the plaintiffs can hold the lands under this subsequent deed. The rights, if any, acquired under the Tate entries have not been, and cannot be, properly insisted on in this action. It will be sufficient to say, however, that the same principles of equity apply to the Tate entries as to the Cilley and Davis entries, to wit, that as the defendants are purchasers for value and without notice, their title is not affected by these entries.

The last position of the plaintiffs is that the deed to the defendants is void because at the time of its execution by Mr. Folk he had been enjoined by a restraining order, at the suit of Tate and others against Folk and others, from conveying the Wilson Creek lands to the defendants or others. In this view the case is this: That Mr. Folk, the (459) principal defendant in that action, is the plaintiff in this, and now claims that although he conveyed the lands in the teeth of the restraining order, he can insist that his own voluntary deed is void. Disobedience to the restraining order of the court is a matter between him and the court, but he himself is estopped from invalidating his own deed for that cause. If at the time of the execution of the deed to the defendants they were entitled to the conveyance under their previous contract of purchase, and by reason of having paid the purchase money to the State and taken out grants in the name of Mr. Folk, but in fact for themselves, the conveyance was rightful, and being also without notice of the restraining order, was not affected by it. Such an effect must be given to the conveyance under which the defendants claim.

PER CURIAM. No error

Cited: Day v. Day, 94 N. C., 412; *Stump v. Long, ib.,* 620; *McMinn v. Patton,* 92 N. C., 375; *Ely v. Early,* 94 N. C., 8; *Anderson v. Rainey,* 100 N. C., 338; *Harding v. Long,* 103 N. C., 7; *Gilchrist v. Middleton,* 107 N. C., 678; *Moody v. Johnson,* 112 N. C., 830; *Johnson v. Lumber Co.,* 144 N. C., 720; *Sykes v. Insurance Co.,* 148 N. C., 20; *Barker v. Denton,* 150 N. C., 725; *Culbreth v. Hall,* 159 N. C., 591; *Torrey v. McFadden,* 165 N. C., 240; *Riley v. Carter, ib.,* 336; *Cedar Works v. Lumber Co.,* 168 N. C., 394.

(460)

*AMOS WADE v. THE CITY OF NEW BERN.

Statute of Frauds—Lease—Municipal Corporation—Contract of.

1. If a municipal corporation has power under its charter to *build* a market house, it has power also to *lease* a building for market purposes.
2. Under the statute (Bat. Rev., ch. 64, sec. 2), no "memorandum or note" of a lease of land for more than three years can bind the party to be charged, even if signed by him. The *lease or contract of lease* must be signed by such party.
3. Where the plaintiff proposed to lease certain real estate upon certain terms to defendant for ten years, which proposition was received and adopted by its board of councilmen and entered upon their minutes, and thereafter a lease executed by plaintiff was tendered to and accepted by said board, but was never actually signed on the part of defendant: *Held*, that the defendant was not bound by the contract.
4. A contract of a municipal corporation (unless it be one required by law to be in writing, etc.) need not be under seal, unless required by its charter.
5. The authorized body of such corporation can bind it by an ordinance, if intended to operate as a contract or by a resolution; it can, by vote, clothe its officers or agents with power to act for it, and a *parol* contract made by such persons (unless it be one required by law to be in writing) is binding upon the corporation.
6. An ordinance, resolution, or vote of a municipal corporation, accepting a lease or contract tendered, does not constitute a *signing* within the meaning of the statute.
7. An action cannot be maintained for damages for the breach of a void contract.

ACTION to recover damages for breach of contract, instituted in CRAVEN and removed to and tried at Spring Term, 1874, of CARTERET, before *Clarke, J.*

(461) There was an appeal from the judgment of the court below, and in this Court the appeal was dismissed. Same case, 72 N. C., 498. At June Term, 1875, of this Court, the defendant moved to rehear the case and for a *certiorari* to bring up the case for review as on appeal, which motion was allowed. Same case, 73 N. C., 318. The facts appear in the opinion.

D. G. Fowle, George Green, and Alex. Justice for plaintiff.
J. H. Haughton and Smith & Strong for defendant.

*The opinion in this case was filed at June Term, 1876, but not heretofore reported.

BYNUM, J. That the city of New Bern, under its charter, has the power to build a market house is decided in *Smith v. New Bern,* 70 N. C., 14. It follows that it has the power of leasing a building for market purposes until one is built.

But the contract here declared on is void. It is a lease of real estate, and is not in writing and signed by the party to be charged, or by any other person duly authorized to sign it, pursuant to the statute of frauds. Bat. Rev., ch. 64, sec. 2.

The statute provides that . . . "All other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

In the construction of this section of the statute (Laws 1868-69, ch. 156, sec. 2), it is to be noted that it contains an important change of the same section, as it is expressed in Rev. Stat., ch. 50, sec. 8, and in Rev. Code, ch. 50, sec. 11, where the language is: "shall be void and of no effort unless such contract or lease, or *some memorandum or note thereof,* shall be put in writing," etc. It is clear, since (462) the act of 1868-69, no memorandum or note of a lease of land for more than three years, as distinguished from the lease itself, can bind the party to be charged, even should it be signed by him. It is a statute to prevent frauds, and it was supposed that this end would be more effectually accomplished by excluding from it the words, "memorandum or note thereof," which, from their definiteness, were often seized upon by the courts to give effect to contracts, especially where there would be a real or apparent hardship in not giving effect to them. The statute as altered prescribes the limit of such contracts by a more rigid, but a more unerring, and therefore better rule.

As little as possible is left for construction. The *lease* or *contract itself* must be signed by the party to be charged. In this action the party sought to be charged is the defendant.

In *Rice v. Carter,* 33 N. C., 298, A. sold a tract of land to B., and gave him a bond for title. B. verbally promised to pay for the land the stipulated price; *Held,* that while A. was bound, B. was not, because he was the party to be charged with the payment of the purchase money, but had not signed the contract, as required by Rev. Stat., ch. 50, sec. 8. This case was subsequently affirmed upon the same point in *Simms v. Killian,* 34 N. C., 352, and in *Mizell v. Burnett,* 49 N. C., 249.

The material question, then, is, Did the defendant sign the contract of lease, or cause it to be signed by any person duly authorized to sign it? As to this, the facts set out in the case stated for this Court are these:

On 8 March, 1879, the plaintiff Wade submitted to the board of councilmen of the city of New Bern a proposition to lease to the city for a market house, his warehouse and lot for ten years, agreeing to first make certain repairs thereon. He also, at the same time, proposed to lease from the city a certain water lot owned by it. He asked $1,800 per annum rent for the warehouse, and offered $600 per annum rent
(463) for the water lot, which sum he proposed to deduct from the rent of the warehouse, leaving $1,200, for the payment of which he proposed to take each year thirty city bonds of $40 each, the bonds to be receivable by the city in payment of taxes or other dues. The record of the proceedings of the city council, which were admitted in evidence, contains this entry in respect to these propositions:

"After a lengthly debate, Mr. Wade's proposition in relation to the warehouse was received and adopted, and Union Point selected as the market site." Subsequently, other propositions modifying the foregoing were submitted by Mr. Wade, which were in like manner "received and adopted" by the board. Up to this time none of the propositions are stated to have been in writing.

On 17, March, 1869, some misunderstanding having arisen among the board of councilmen as to the character of Mr. Wade's proposition, he was called before the board, and he then submitted still other propositions; and the minutes of the board contain this fiscal entry upon the subject:

"The foregoing being reduced to writing, and added to the original proposition made by Mr. Wade, on motion of Councilman Croom, the same was received and adopted. Mr. Wade presented to the board a lease containing the substance of the original proposition with the foregoing addition, and for a further binding of the contract between him and the board. The lease being read, on motion of Councilman Croom, the same was adopted.

"Councilman Howard presented the following resolution, viz.: 'Whereas the lease of Amos Wade has been tendered to the city of New Bern, according to the contract agreed on between him and the city; therefore, *Resolved,* That the mayor be required to sign and affix the corporate seal of the city of New Bern to the certificates of indebtedness, as
(464) specified in the lease executed by Amos Wade to said city, dated 8 March, 1869.' "

The minutes of the council then go on to set forth the objections taken by the mayor to signing the bonds, etc., and that while the matter was being discussed, and before any action was taken on the resolution, the sheriff of the county appeared before the board and served upon the

council an injunction against issuing the said city bonds, procured at the instance of many of the taxpayers of the city. After the service of the injunction, nothing further was done, and the council adjourned.

The foregoing facts do not constitute, on the part of the corporation, such a signature to the contract of lease as is required by either the letter or spirit of the statute of frauds. It cannot be pretended that the lease itself was actually signed by the corporation or any of its offices, authorized or unauthorized. It was competent for the board of councilmen to instruct by resolution either the mayor or other person to sign the lease in behalf of the corporation. This was not done. The lease was tendered to and accepted by the council, just as the bond for title was tendered and accepted in *Rice v. Carter.*

If the lease was such a one as the corporation could lawfully accept, the acceptance bound Wade, but did not bind the corporation.

In *Laythroop v. Bryant,* 2 Bing. N. C., 744, which was cited in *Rice v. Carter,* the defendant had signed a written contract to convey land. The plaintiff (like the defendant in this case) had only made a verbal promise to pay the price; and it was urged by the defendant that he ought not be held liable under this written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the *Chief Justice,* "Whose fault was that? The defendant might have required the plaintiff's signature. The object of the statute was to secure the defendant."

If the contract were such as is not required by the statute of (465) frauds to be put in writing and signed by the party sought to be charged, it is clear from the modern decisions that the contract of a municipal corporation need not be under *seal* unless the charter requires it. The authorized body of the corporation may bind it by an ordinance, which will, if so intended, operate as a contract; or it may bind itself by a resolution, or by vote clothe its officers or agents with power to act for it; and a contract made by persons thus appointed, though by parol (unless it be one which the law requires to be put in writing), will bind it. 1 Dillon Mun. Corp., sec. 374.

But in our case the contract is one which cannot be made by parol; and where the statute to prevent frauds requires the contract to be put in writing and signed by the party to be charged, we know of no authority or adjudicated case, which holds that a resolution, ordinance, or vote of the corporation, accepting or adopting a lease or contract tendered, constitutes a signing within the words or intent of the statute. The contract in this case must derive its validity, not from the contracting powers of the corporation, but from the statute; and unless the mode prescribed by the act is pursued, the contract is a nullity.

The question is not one of corporate power, but of compliance with the statute. The statute has not been complied with, and the contract is void as to the defendant.

Whether the city is liable to one who has *bona fide* performed labor under a void contract is a question that does not arise here. The complaint is for a breach of contract, and the prayer is for damages resulting from the breach on the part of the defendant. The position is too plain for doubt, that an action cannot be maintained for damages for the breach of a void contract.

If the work done under a void contract had been *accepted and used* by the defendant, whether a *quantum meruit* would lie in such case is an interesting question; but that question cannot arise upon the (466) facts of this case, even if another action should be brought, declaring on a *quantum meruit;* for the work done was not only not accepted and used by the defendant, but it was done upon the house and lot of the plaintiff, and he has continued in the exclusive possession and enjoyment of it, without even a tender of the premises to the defendant.

He may have lost money by the transaction. If so, it is his own fault. It is, therefore, *damnum absque injuria.*

Many other interesting questions arose and were argued in this Court, but as the decision of the case is put upon the single point discussed, it precludes the necessity of examining any other.

PER CURIAM. Reversed.

Cited: Jordan v. Furnace Co., 126 N. C., 147; *Hall v. Fisher, ib.,* 209; *Davis v. Yelton,* 127 N. C., 348; *Love v. Atkinson,* 131 N. C., 547; *Winders v. Hill,* 144 N. C., 617; *Swinson v. Mount Olive,* 147 N. C., 612; *Brown v. Hobbs,* 154 N. C., 556.

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(467)

PINKNEY ROLLINS ET ALS. v. R. M. HENRY ET ALS.

Restitution—Receiver—Practice.

1. When this Court has decided that certain tenants of H. were wrongfully evicted, and ordered writs of restitution, these writs must issue and must be obeyed, and possession of the premises restored to H. or his tenants before the court will entertain any motion for the appointment of a receiver to collect and hold the rents and profits.

2. Whenever the contest is simply a question of disputed title to property, the plaintiff asserting a legal title in himself against a defendant in possession, receiving the rents, etc., under a claim of legal title, a receiver will not be appointed, even if the defendant is insolvent.

3. A receiver will be appointed only when plaintff sets forth an apparently good title, not sufficiently controverted in the answer, and shows imminent danger of loss by defendant's insolvency.
4. The bond required of defendants under C. C. P., sec. 382, is not for costs only, but secures plaintiffs such damages as they may sustain in the loss of rents, etc.; and it seems that this bond may be increased in the discretion of the court if defendant shows any disposition to delay a trial.

MOTION by the plaintiffs for the appointment of a receiver of certain premises, pending an action for the recovery of the same, heard at Spring Term, 1877, of BUNCOMBE, before *Furches, J.*

The case is sufficiently stated in the opinion of this Court. His Honor overruled the motion, and the plaintiffs appealed.

J. H. Merrimon for plaintiffs.
T. F. Davidson and Battle & Mordecai for defendants.

BYNUM, J. In *Rollins v. Rollins,* 76 N. C., 264, and the two next succeeding cases of the same plaintiffs against Bishop and Henry, it was decided by this Court that R. M. Henry was entitled to defend those actions, and that the tenants claiming under him had been (468) illegally evicted, and were entitled to restitution of possession pending the actions. In part execution of the judgment of this Court, at the last term of the court below the several actions were consolidated, and the defendant R. M. Henry, on filing the bond required by law, was allowed to put in his defense to the action. But when, in further compliance with the decision of this Court, the counsel for the defendants moved that writs of restitution be issued in behalf of the evicted tenants, it was met by a counter-motion of the plaintiffs for the appointment of a receiver of the premises in dispute, pending the litigation of the title. The court refused to appoint a receiver, and ordered writs of restitution to issue, and from these orders the plaintiffs appealed to this Court. There is no error. This Court had adjudged that the tenants were entitled to restitution of possession, and a prompt obedience to that decision was the first duty of the plaintiffs; instead of which the plaintiffs proceeded, to use a military phrase, by a "flank movement," the effect of which, if allowed, would have been not only to evade the decision of the Court, but still more effectually to deprive the defendants of that possession of the premises to which the Court had declared they were entitled.

Possession, entire and complete, must be given to the defendants; and it matters not to the plaintiffs whether this restitution is made directly to Henry himself or indirectly through his tenants, but the plaintiffs are to divest themselves of all possession as fully as they were divested before they sued out the writs under which they obtained the possession; and the defendants are to be placed in the same state and condition as

they were at that time. Placed thus at arm's length, as they were before the wrongful eviction, the court will then be open to hear and determine such motions as may properly arise in the progress of the cause. (469) While, therefore, the court properly enough refused to appoint a receiver or make any other order before the plaintiffs had restored their tortious possession, it does not follow that after such possession is delivered the plaintiffs may not present a case fit for the protective interference of the court. But as no such question can be raised until after the judgment of this Court, as determined at last term, has been complied with by the surrender of the premises to the defendants, we might properly say no more at this time. As, however, the same motion for a receiver will doubtless be renewed after the decision of this Court has been complied with by the restitution of the possession to the defendants, it will be convenient to the parties in the further conduct of the action, as far as possible, to dispose of that question now.

We believe that no authority can be found where a court of equity ever appointed a receiver in a case like this. The rule seems to be universal in this country and in England, that whenever the contest is simply a question of disputed title to the property, the plaintiff asserting a legal title in himself against a defendant in possession and receiving the rents and profits under a claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. Nor does the fact that the defendant in possession and receiving the rents and profits is insolvent at all affect the rule. There are exceptions to this general rule, but they are only where the relief is granted upon special circumstances of an equitable nature, appealing strongly to the conscience of the court. The farthest the courts have ever gone in taking jurisdiction to appoint a receiver in actions of ejectment against a tenant in possession of real property is where the plaintiff shows a probable title and danger of the rents being lost. *Scott v. Scott,* 13 Irish Eq., 212; High on Receivers, secs. 553, 554, 567; 2 Story Eq., secs. 826, 829. And such is the (470) provision of our statute defining the cases where a receiver may be appointed. C. C. P., sec. 215. By that provision a receiver can be applied for only when the party has established an apparent right to the property which is the subject of the action, and which is in possession of the adverse party, and the property or its rents and profits are in danger of being lost, injured, or impaired. This apparent right of property, which will authorize the appointment of a receiver, must, we conceive, appear to the court from the pleadings, or in the progress of the trial, and not by separate affidavits. It may be that insolvency or the danger of the loss of rents and profits can be so established, but not

the right of property—the very matter in issue. For instance, if the pliantiffs here in their action to recover this land had set forth in their complaint an apparently good title, which was not successfully controverted in the answer, and in addition thereto had shown imminent danger of loss of rents and profits by the insolvency of the tenants in possession, a motion for a receiver might be granted for the preservation of the rents and profits *pendente lite*. But without the establishment of this apparent good title, such interference would in effect amount to a complete ouster of the defendants, by taking away from them the subject-matter of the litigation without trial or judgment. High on Receivers, sec. 575.

If he plaintiffs desire to establish by the pleadings such an apparent good title as would warrant the appointment of a receiver, it was their duty to set forth in their complaint a good title in themselves, with such particularity of statement, description, and averment as would compel the defendants, by their sworn answer to the allegations, to admit or enable the Court to see a *prima facie* or apparent title in the plaintiffs. Nothing of the sort is done. Indeed, so defective and meager are the pleadings that it would seem to be impracticable to try the action without amendments. But although no case is presented warrant- (471) ing the extraordinary remedy of a court of equity applied for, the law has not left the plaintiffs without that degree of protection which their own disputed claim authorizes the courts to furnish. Before the defendant Henry could be allowed to defend the action, the law required that he should file a bond, with sureties, for the sum of $200, to be void on condition that he pay to the plaintiffs all such costs and damages as the plaintiffs may recover in the action, C. C. P., sec. 382. We are of opinion that this bond is not for costs only, but that it was intended to and does secure he plaintiffs, in case they recover, such damages as they may sustain in the loss of rents and profits, or otherwie, by the wrongful possession of the defendants. We are also inclined to hold that this bond may be increased from time to time as the court may order in its discretion, having reference as much to the readiness of the parties to try as to the preservation of the property and its rents and profits to answer the ultimate recovery by the true owner. If the defendant shows a readiness to try the title and to interpose no obstacle to a speedy determination of the action, the courts will be slow in imposing upon him the inconvenience and hardship of giving a larger bond. In such case the plaintiff cannot by his own delay in bringing on a speedy trial impose this additional burden upon the defendant, who is in no default. To give that effect to the procrastination of the plaintiff would be to allow him to take advantage of his own wrong to the oppression of the defendant.

Subject to this precaution and the circumstances surrounding each case, the power of the court to enlarge the bond seems to be similar to that which the courts constantly exercise in regard to bonds for costs.

It is true that in case the defendant is unable to give the bond, he may nevertheless defend the action without giving bond, on a proper application for that purpose, under C. C. P., sec. 382; and thus (472) the plaintiff would have no security for the recovery of rents and profits from the tenant holding wrongfully. Whether this state of things would constitute such an equitable element as to invoke the jurisdiction of a court of equity, to prevent wrongs and anticipated mischiefs, by the appointment of a receiver, or whether the plaintiff must submit to this inconveninece and probable loss just as defendants do when the plaintiff is allowed from poverty to prosecute his action without giving bond for costs, are questions which do not now arise and which we do not answer in anticipation.

PER CURIAM. Affirmed.

Cited: *Kerchner v. Fairley,* 80 N. C., 26; *Nesbitt v. Turrentine,* 83 N. C., 538; *Boyett v. Vaughan,* 86 N. C., 726; *Vaughan v. Vincent,* 88 N. C., 118; *Kron v. Dennis,* 90 N. C., 329; *Bryan v. Moring,* 94 N. C., 698; *Durant v. Cromwell,* 97 N. C., 374; *Bond v. Wool,* 107 N. C., 153; *Credle v. Ayers,* 126 N. C., 15; *Kenney v. R. R.,* 166 N. C., 571.

(473)

STATE v. JOHN B. TURPIN.

Murder—Evidence—General Character—Uncommunicated Threats.

1. To the general rule that in trials for homicide evidence of the general character of the deceased as a violent and dangerous man is inadmissible, there are two exceptions: (1) Such evidence is admissible where there is evidence tending to show that the killing may have been done from a principle of self preservation. (2) Such evidence is admissible where the evidence is wholly circumstantial and the character of the transaction is in doubt.

2. If the killing is done under such circumstances as to create a doubt as to the character of the offense committed, the general character of the deceased may be shown, *if such character was known to the defendant.*

3. On a trial for murder there was evidence of threats made by deceased against defendant and communicated to defendant; there was also evidence that deceased had followed defendant to the house, and that a rock was used by deceased upon defendant's head during the fight, but it did no clearly appear by whom the rock was introduced into the fight, the

evidence upon which point was circumstantial. The defendant offered evidence of threats made by deceased, but not communicated to defendant, which was excluded: *Held*, that the evidence of uncommunicated threats was admissible (1) to corroborate the evidence of communicated threats; (2) to show the state of feeling of the deceased toward defendant, and the *quo animo* with which he had pursued defendant to the house; (3) as one of the circumstances tending to show who introduced the rock into the fight, the evidence upon that point being wholly circumstantial.

INDICTMENT for murder, tried at Spring Term, 1877, of HAYWOOD, before *Henry, J.*

The defendant was indicted for killing one Creighton Morrow, and on the trial in the court below his Honor refused to admit evidence of the general character of the defendant for violence, and also (474) refused to admit evidence of threats made by the deceased, which had not been communicated to the defendant The case is sufficiently stated by *Mr. Justice Bynum* in delivering the opinion of this Court. The jury found the defendant guilty of manslaughter. Judgment. Appeal by defendant.

Attorney-General for the State. (475)
Busbee & Busbee, A. T. & T. F. Davidson, and J. H. Merrimon for defendant.

BYNUM, J. The prisoner was indicted for murder, and was convicted of manslaughter. He relied upon the plea of justifiable self-defense, and, to make that defense good, offered testimony of the general character of the deceased as a violent and dangerous fighting man, and also threats made by the deceased against the prisoner, but which were not communicated to him. The exclusion of this evidence is the subject of exceptions by the prisoner.

If the proposed testimony when admitted could not have reduced the offense below manslaughter, the crime of which he was convicted, then the prisoner has received no prejudice and it was not error to exclude it. We are first to see, then, whether the testimony offered and rejected would have tended, not to mitigate the offense from murder to manslaughter, but to establish a case of justifiable homicide.

The prisoner alleges that he was drawn into the combat against his consent by the machinations of the deceased, with the intent to take his life; and that the combat on his part was in self-defense, retreat was impossible, and the killing was unavoidable and necessary to save his own life. To establish this defense, the prisoner introduced testimony showing, or tending to show, that the deceased had malice towards him; that he had a short time before the homicide threatened to kill

(476) him, and particularly if he did not keep away from Mrs. Tate's, the place where he then was; that the deceased had seen him that evening going in the direction of Mrs. Tate's, and had secretly followed him; that the deceased entered the house suddenly and "mad," and immediately began a quarrel with the prisoner by false accusations, and by charging him with doing the very act for which he had threatened to kill him; that the deceased was secretly armed with a stone of 3 pounds weight, with which he began and continued the fight without any notice to the prisoner, and before he drew the pistol; that from the suddenness of the attack, its deadly nature, and from being hemmed up in the house, retreat was impossible; and the pistol was then drawn and discharged upon the deceased in necessary self-defense and to save his life.

In confirmation of this, and to show the true character of the struggle and his imminent danger, the prisoner offered to prove the general character of the deceased as a violent and dangerous fighting man, and also to prove other threats which had been made against him by the deceased, but which had not been communicated before the homicide. Was this testimony admissible?

The *general* rule prevailing in most of the American States is that such evidence is not admissible, and in this State such a general rule is well established. *S. v. Barfield,* 30 N. C., 344; *Bottoms v. Kent,* 48 N. C., 154; *S. v. Floyd,* 51 N. C., 392; *S. v. Hogue, ib.,* 381. But these cases which are cited as establishing a general rule excluding such evidence admit that there may be exceptions to it, depending upon the peculiar circumstances of each case. And these exceptions themselves are now so well defined and established by the current of the more recent decisions that they have assumed a *formula* and have become a general rule subordinate to the principal rule. It is this: Evidence of the general character of the deceased as a violent and dangerous man is admissible *where there is evidence tending to show that the killing may* (477) *have been done from a principle of self-preservation,* and also where the evidence is wholly circumstantial and the character of the transaction is in doubt, as in *S. v. Tackett,* 1 Hawks, 210; Horrigan & Thompson Self-defense, 695, and Index, under the head of "Character of the Deceased for Violence," for reference to the cases at large.

Where one is drawn into a combat of this nature, by the very instinct and constitution of his being he is obliged to estimate the danger in which he has been placed and the kind and degree of resistance necessary to his defense. To do this he must consider not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done

under the circumstances, it should, as far as can, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose, which the defendant possessed. If the prisoner was ignorant of the character of the deceased, then the proof of it would have been inadmissible, because his action could not have been influenced by the dangerous character of a man of which he had no knowledge. That is not our case. Here the prisoner was the neighbor of the deceased, and was fully cognizant of his violent and dangerous nature. Should this knowledge in the possession of the prisoner, and reasonably influencing his actions, be withheld from the jury which is to pass upon the criminality of the act of killing? The jury must ascertain the true character of the combat; for if from the nature of the attack there was reasonable ground to believe there was a design to destroy his life or commit a felony upon his person, the killing the assailant would be excusable homicide. And this would be so even though it should afterwards appear that no felony was intended: as if one comes rushing upon you with a pistol in his (478) hands pointing at your breast and making violent threats against your life, and when he comes in reach you knock him down with a club, and of the wound he dies. This would be excusable homicide, although it should afterwards turn out that the pistol was not loaded, and the design was only to terrify. Certainly if the appearances of danger are real instead of apparent merely, they are not the less admissible in evidence. The purpose here was to prove, not only that the circumstances surrounding the prisoner were such as to induce a reasonable belief of imminent danger, but that they were real; that the deceased had not made empty and unmeaning threats insufficient to move a man of ordinary firmness, but that from his known character as a violent and dangerous fighting man, *a character well known to the prisoner,* the danger was so imminent and unavoidable as to justify the taking of life.

It is true that the character of the deceased *per se* can never be material in the trial of a party for killing, because it is as much an offense to kill a man of bad character as a man of good character. If the killing is done with a felonious intent, the character of the deceased cannot come in question. But if the killing is done under such circumstances as to create a doubt as to the character of the offense committed, the general character of the deceased may be shown, if that character is known to the prisoner, because it then becomes material, and it may be a necessary fact to enable the jury to ascertain the truth, and as such it is involved in and becomes an essential part of the *res gestæ*. *S. v. Dumphey,* 4 Minn., 438; *S. v. Hicks,* 27 Mo., 588; *S. v. Keene,* 50 Mo., 357; Am. Cr. L., 296; Wharton on Homicide, 215.

In the more recent trials of capital offenses the laws of evidence which once governed the courts have been much mitigated from their ancient rigor, and more latitude of investigation is allowed, in order that
(479) the jury may be possessed of the true character of the transaction. And it must be conceded that a strong current of decisions in our sister States has considerably modified the stern rule of evidence as laid down in *S. v. Barfield,* 30 N. C., 344. The courts of this State, also, in subsequent decisions have more accurately defined and explained the limits of the general rule, and pointed out some of the exceptions to it where evidence of the general character of the deceased would be admissible. *S. v. Hogue,* 59 N. C., 381, and *S. v. Floyd,* 59 N. C., 392.

It was in evidence that the deceased had, a short time before the homicide, threatened to take the life of the prisoner if he did not keep away from Mrs. Tate's, which threats had been communicated to him. The prisoner also offered testimony to show other similar threats made by the deceased, but which had not been communicated. This evidence was competent, and should have been admitted for several reasons:

1. The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had already been given.

2. They were admissible to show the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house.

3. In ascertaining whether the prisoner had acted in self-defense, a most material question was, Who introduced the rock into the conflict, and when and for what purpose? Whether for offense or defense was it used? As to this important inquiry the evidence was wholly circumstantial, and testimony of both the general character and threats of the deceased was competent under the principles laid down in *S. v. Tackett,* 8 N. C., 210, and in *Floyd's* and *Hogue's cases, supra.* If the prisoner entered into the fight armed with both the pistol and the rock, of which there was evidence by his admission that he usually went so armed, then it was a case of murder or manslaughter, as the jury might con-
(480) sider these with other facts as indicating or not indicating malice. But the prisoner contends that the deceased provoked the fight armed with the rock, as was evident from the severe contusions he received in the struggle from some such instrument on the front and side of his head. And to corroborate this view and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case, the threats were equally admissible, whether communicated or uncommunicated, and in connection with the other facts indicating a felonious assault upon the prisoner would constitute a case of murder, manslaughter, or justifiable homicide, as the jury under proper instructions might determine upon

all of the facts. *S. v. Keener,* 18 Ga., 194; *S. v. Sloan,* 47 Mo., 604; *S. v. Heller,* 37 Ind., 57; *Cornelius v. Commonwealth,* 15 B. Mon. (Ky.), 539; *The People v. Scoggins,* 37 Cal., 677; *S. v. Dixon,* 75 N. C., 275; 1 Starkie on Ev., 39; Roscoe Cr. Ev., 77.

Objections were taken to the charge of the court, but without foundation. The charge was minute, impartial, and able, and but for the exclusion of the testimony upon a view of the case which the prisoner had a right to present to the jury, the judgment would be affirmed. What new features the rejected testimony may develop we cannot foresee, but as the case is now presented it has in it more of the elements of murder than of manslaughter or justifiable homicide.

There is error.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Matthews,* 78 N. C., 530; *S. v. Chavis,* 80 N. C., 357; *S. v. McNeill,* 92 N. C., 819; *S. v. Gooch,* 94 N. C., 1010; *S. v. Hensley, ib.,* 1032; *S. v. Rollins,* 113 N. C., 732; *S. v. Byrd,* 121 N. C., 688; *S. v. McIver,* 125 N. C., 646; *S. v. Sumner,* 130 N. C., 721; *S. v. Castle,* 133 N. C., 777; *S. v. Exum,* 138 N. C., 608; *S. v. Powell,* 141 N. C., 787; *S. v. Banner,* 149 N. C., 526; *S. v. Fisher, ib.,* 558; *S. v. Peterson, ib.,* 535; *S. v. Kimbrell,* 151 N. C., 704, 706; *S. v. Green,* 152 N. C., 838; *S. v. Baldwin,* 155 N. C., 496; *S. v. Price,* 158 N. C., 647; *S. v. Blackwell,* 162 N. C., 680, 686; *S. v. Heavener,* 168 N. C., 164; *S. v. Williams, ib.,* 197.

(481)

STATE v. WILLIAM LOCKE.

Indictment—Murder—Judge's Charge.

1. Where on the trial of an indictment for murder the court charged the jury "that if they believed the witnesses A., B., and C., or *either* of them, the fact of slaying was proved": *Held,* to be error.
2. It is the exclusive province of the jury to say whether the evidence proves a fact or not. Therefore, the court cannot weigh the evidence and declare the result as a matter of law to the jury.

INDICTMENT for murder, removed from ROWAN and tried at Spring Term, 1877, of DAVIDSON, before *Kerr, J.*

The facts necessary to an understanding of the point decided in this Court are sufficiently stated by *Mr. Justice Faircloth.* Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General and J. M. McCorkle for the State.

Shipp & Bailey for defendant.

FAIRCLOTH, J. The defendant was indicted for the murder of one Barringer, and was convicted. There were several witnesses examined, who proved that there was a fight taking place between the other parties, and the evidence was conflicting in regard to the conduct of the deceased and the prisoner. His Honor charged the jury that "if they believed the witnesses Plummer, Livengood, and Cully, or *either* of them, the fact of slaying had been proved," and the prisoner excepted.

The witness Livengood testified as follows: "Prisoner was standing near a fence whittling with his knife; a difficulty arose between Matt Locke and Tom Hyde; deceased passed by the witness going (482) across the log; prisoner passed on below witness, going towards the deceased; in a short time the prisoner leaving deceased, and saw blood running from the deceased, and the prisoner trotting off for about 50 yards, and then he took off his hat and ran with great speed; the deceased had nothing to do with the fight going on; prisoner approached deceased coolly and slowly; . . . did not see prisoner after he passed witness, until he saw him running off as before stated."

The case was argued before us on this exception alone, and we sustain the exception. The homicide, of course, is a material fact to be established by proof, and it is the exclusive province of the jury to say whether the evidence proves the fact or not. Livengood does not say that the prisoner slew the deceased, but only deposes to certain circumstances which might or might not satisfy the jury. His Honor invaded their province by charging the jury that if they believed Livengood, the fact of slaying is proved. This was weighing the evidence and declaring the result as a matter of law to the jury.

"No judge, in giving a charge to the petty jury, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury," etc. Bat. Rev., ch. 17, sec. 237.

We have looked carefully through the whole of his Honor's charge, and find nothing to cure the error above designated.

PER CURIAM. *Venire de novo.*

Cited: McCanless v. Flinchum, 98 N. C., 362; *Benton v. Toler,* 109 N. C., 241; *S. v. Blackley,* 131 N. C., 732.

(483)

STATE v. W. Y. DAVIS.

Indictment—Murder—Evidence—Declaration of Third Party.

1. On the trial of an indictment for murder, the declarations of a third party, which have no legal tendency to establish the innocence of the prisoner, are not admissible as evidence in his behalf. Therefore, evidence that a third party "had malice towards the deceased, a motive to take his life, and the opportunity to do so, and had threatened to do so," is not admissible.

2. In such case, where the prisoner offered to prove that "some time before the deceased was killed" a third party went in the direction of the house of the deceased with a deadly weapon, threatening to kill him: *Held*, that the evidence was not admissible.

Whether, when proof of the *res gestæ* constituting such third party's alleged guilt has been given, his acts and declarations are competent in confirmation of the direct testimony connecting him with the fact of the killing, *Quære.*

INDICTMENT for murder, tried at Spring Term, 1877, of MADISON, before *Furches, J.*

The case is sufficiently stated by *Mr. Justice Bynum* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
Busbee & Busbee and W. H. Malone for defendant

BYNUM, J. This case is here upon two exceptions taken on the trial below to the rulings of the court, excluding as incompetent certain testimony which was offered by the prisoner:

1. The prisoner proposed to prove by one Peck "that George Nicks had malice towards the deceased, and had a motive to take his life, and the opportunity to do so, and had threatened to do so, (484) before court."

2. He offered to prove by one Rice that one Peck took a gun and went in the direction of the house of the deceased, with the threat that he was going to kill the deceased, some time before the deceased was killed.

Both exceptions are untenable, and have been repeatedly so held by this Court; the first, because they are the declarations of a third party and are *res inter alios acta,* and have no legal tendency to establish the innocence of the prisoner; and the second, for the same and the additional reason that the time when Peck is alleged to have gone with his gun in the direction of the house of the deceased with the threat to kill

him is too vaguely and indefinitely set forth. *"Some time* before the deased was killed" hight be a week, a month, or a year. Such evidence is irrelevant, and can afford no safe guide to a jury when the charge is a killing on a particular day, which is in no way connected by other proof with the time when Peck is alleged to have gone in the direction of the house of the deceased. But the homicide was committed, not at the house of the deceased, but on a public road, while the deceased was asleep under a "shelter," where he was carrying on a distillery. There was no evidence, so far as the case shows, that this shelter was near or in the direction of the house of the deceased, from the point whence Peck took his departure on his alleged mission of murder. Such evidence is inadmissible, because it does not tend to establish the *corpus delicti*. Unquestionably it would have been competent to prove that a third party killed the deceased, and not the prisoner. But this could only have been done by proof connecting Peck with the *fact,* that is, with the prepetration of some deed entering into the crime itself. Direct evidence connecting Peck with the *corpus delicti* would have been admissible. After proof of the *res gestæ* constituting Peck's alleged
(485) guilt had been given, it might be that the evidence which was offered and excluded in this case would have been competent in confirmation of the direct testimony connecting him with the fact of the killing. No such direct testimony was offered here.

It is unnecessary to elaborate, as the questions of evidence here made have been fully discussed and decided by this Court in many cases. It is only necessary to refer to the principal ones: *S. v. Bishop,* 73 N. C., 44; *S. v. May,* 15 N. C., 328; *S. v. Duncan,* 28 N. C., 236; *S. v. White,* 68 N. C., 158. Also, *S. v. Crookham,* 5 W. Va., 510.

There is no error.

PER CURIAM. Affirmed.

Cited: S. v. England, 78 N. C., 554; *S. v. Baxter,* 82 N. C., 604; *S. v. Beverly,* 88 N. C., 633; *S. v. Lambert,* 93 N. C., 623; *S. v. Millican,* 158 N. C., 621; *S. v. Fogleman,* 164 N. C., 461; *S. v. Lane,* 166 N. C., 338.

STATE v. N. P. OVERTON.

Murder— Practice—Trial and Conviction—Judgment.

1. A defendant in a criminal action brought by appeal to this Court is not "tried" or "convicted" *here.*
2. Where the court below, after the decision of this Court was certified, continued the case and rendered judgment as a subsequent term: *Held*, not to be error.

MOTION for an order to release the defendant, heard at Spring Term, 1876, of BEAUFORT, before *Eure, J.*

The ground upon which his motion was based is sufficiently stated by *Mr. Justice Reade* in delivering the opinion of this Court.

His Honor overruled the motion, and the defendant appealed.

Attorney-General for the State. (486)
D. M. Carter for defendant.

READE, J. The defendant had been tried and convicted of murder in the court below, and appealed to this Court, and this Court decided (75 N. C., 200) that there was no error in the record of the trial and conviction, and ordered its decision to be certified to the court below, to the end that the court below might proceed to judgment and execution. When the defendant was called to receive the judgment of the court, he objected that judgment ought not to be rendered because he had been improperly convicted and denied his constitutional right, in that he had not been present in *this* Court when his case was argued and determined, and had therefore not been properly convicted. This objection is founded upon an erroneous idea of a criminal trial, and of the power and duty of this Court in such case brought before it by appeal. The Constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. *That* is his *trial.* This, of course, implies that he shall have the right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this Court.

Here are no "accusers," no "witnesses," and no "jury"; but, upon inspection of the record, this Court decides whether there was error in the trial, and, without rendering any judgment, orders its decision to be certified to the court below. It has never been understood, nor has it been the practice, that the defendant shall be present in *this* Court; nor is he ever "convicted" here. A second objection taken by the defendant is that no judgment was rendered against him by the court below at the first term after the decision of this Court was certified; that judg-

(487) ment could be rendered after the first term. There is no force in this objection. It was at the defendant's request that judgment was not rendered at the first term and the case continued. And without such request, the court had the power to suspend the judgment and continue the case until the next term. No authority is cited for these objections; there are no precedents in practice to sustain them, and it is at least questionable whether it is not a perversion of the liberal indulgences *in favorem vitæ* to make them.

PER CURIAM. Affirmed.

Cited: *S. v. Leak,* 90 N. C., 657; *S. v. Jacobs,* 107 N. C., 779.

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(488)

STATE v. RICHARD SMITH.

Indictment—Homicide—Murder—Manslaughter.

1. Homicide is murder unless attended with extenuating circumstances, which must appear to the satisfaction of the jury, and if the jury are left in doubt on this point, it is still murder.
2. If A. assaults B., giving him a severe blow or other great provocation, and B. strikes him with a deadly weapon and death ensues, it is *manslaughter.*
3. If the provocation from A. is slight, and B. strikes, and it appears from the weapon used or other circumstances that B. intended to kill A. or do him great bodily harm, and death ensues, it is *murder.*
4. On an indictment for murder, where it appeared that the prisoner and deceased were angrily quarreling and the deceased began to pull off his coat, and prisoner being in striking distance, started to draw his knife, when a bystander interferred and carried him out of the house, and prisoner rushed back into the house, asking where deceased was, who answered "Here!" both swearing, and thereupon prisoner ran at him and fatally cut him: *Held,* to be murder.

INDICTMENT for murder, tried at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

The case is sufficiently stated by *Mr. Justice Faircloth* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
J. E. Brown for defendant.

FAIRCLOTH, J. Homicide is murder unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury, and if the jury are left in doubt on this point, it is still murder. If A.

assaults B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon and death ensues, the law, in deference to human passion, says this is man- (489) slaughter.

If the provocation be *slight,* and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is murder. The violence flows rather from brutal rage than human frailty. Foster's Cr. Law, 291.

In the present case the killing is put beyond controversy, and there is no pretension that it is excusable or justifiable homicide.

The defendant requested his Honor to charge the jury that, if they believed the evidence, it was manslaughter, and not murder. This was refused, and a verdict for murder was rendered.

The prisoner and deceased were quarreling and using very angry words in the house; the deceased began to pull off his coat, and the prisoner started to draw his knife, being in striking distance of each other. A witness caught prisoner around the body and carried him by force out of the door 4 or 5 feet from where the prisoner was standing. Prisoner immediately rushed into the house with a knife drawn above his head, and asked where was Sam Ross (the deceased), who answered "Here!" both swearing. Prisoner ran at deceased, caught him by the collar, and cut him with the knife, from which he died. This is the material evidence on this point, and we think the case is embraced in the last proposition stated above from Foster.

The provocation was very *slight,* the attack was violent with a deadly weapon, taking the deceased at an undue advantage, without time to prepare for his defense or an even-handed chance. These circumstances show more than sudden passion. They point clearly to the *mala mens.*

In *S. v. Ellick,* 60 N. C., 450, words passed between prisoner and deceased, who were sitting on the doorsill, and prisoner got up, the deceased rose up and reached his hand inside the door to get a stick. As he was turning around with the stick, the prisoner stabbed him with a bowie knife 9 inches long. This was held to be murder. There was a greater provocation than here, and the disadvantage of the deceased was less. (490)

We think the prayer was properly refused.

PER CURIAM. No error.

Cited: S. v. Brittain, 89 N. C., 502; *S. v. Mazon,* 90 N. C., 683; *S. v. Gooch,* 94 N. C., 1002; *S. v. Jones,* 98 N. C., 657; *S. v. Byers,* 100 N. C., 518; *S. v. Whitson,* 111 N. C., 700; *S. v. Rollins,* 113 N. C., 733; *S. v. Byrd,* 121 N. C., 686; *S. v. Clark,* 134 N. C., 707, 715; *S. v. White,* 138 N. C., 716, 723; *S. v. Quick,* 150 N. C., 824; *S. v. Pollard,* 168 N. C., 120; *S. v. Hand,* 170 N. C., 706.

STATE v. THADDEUS DAVIS.

Indictment—Burglary—Variance.

Where in an indictment for burglary, charging the defendant with breaking and entering the dwelling-house of A. and B., partners, it appeared in evidence that one furnished the capital and the other the house and labor, in pursuance of a partnership agreement: *Held*, that the ownership and occupation of the house were in both the parties, and that it was properly described as their dwelling-house.

INDICTMENT for burglary, tried at Spring Term, 1877, of FORSYTH, before *Kerr, J.*

The defendant insisted that there was a variance between the allegation and the proof. The facts stated by *Mr. Justice Rodman* are sufficient to an understanding of the opinion. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General and Watson & Glenn for the State.
J. C. Burton and J. M. McCorkle for defendant.

RODMAN, J. The defendant excepts:

1. That whereas the indictment charges that he broke and
(491) entered the dwelling-house of Welfare & Yeates, the evidence was that the house was the property of Welfare alone.

It appears, however, that the house was occupied by Welfare & Yeates, who were partners in the jewelry business. Yeates furnished the money capital to buy the stock of goods, and Welfare furnished the use of the house and his personal labor. The profits were to be divided between them. Butner, who was an apprentice of Welfare to learn the jewelry business, and a member of his family, was also a clerk to the partnership, and slept in the house.

We think, upon the evidence, that both the ownership and occupation of the house were in both the partners at the time of the breaking, and that it was properly described as their dwelling-house. A house is properly described as the dwelling of a tenant who occupies it; and in this case, although Welfare had not let the house to the firm for any definite time, yet he had for an indefinite time, and the firm was in the actual occupation of it according to the partnership agreement. It could not have been described as the dwelling-house of Welfare alone, because his *sole* ownership was only of the reversion. It could not be described as the dwelling-house of Butner, for he was a mere servant of the firm, and his occupation was that of the firm. It does not follow that this house was not the dwelling-house of Welfare & Yeates because each of them had another dwelling house in which he slept. A man may have several

dwelling-houses, one of which he occupies at one season and the other at another, or one which he occupies in person and another by his servants.

2. There was evidence that the goods stolen were the property of the partners.

3. There was also evidence from which the jury might reason- (492) ably find, as they did, that the house was entered in the nighttime.

PER CURIAM. No error.

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

STATE v. WILLIAM N. LUTHER.

Criminal Action—Overseer of Road—Defective Warrant.

A warrant before a justice of the peace against the defendant for failure to work a public road is fatally defective if it does not conclude "against the form of the statute."

APPEAL at Spring Term, 1877, of ASHE, from *Schenck, J.*

The defendant was held to answer before a justice of the peace for failure to work on a certain public road in Ashe County. (See Laws 1874-75, ch. 161.) Upon motion of the defendant, the justice of the peace dismissed the action upon the ground that the report of the commissioners who laid off said road had not been confirmed by the county commissioners, and the complainant (the overseer) appealed to the Superior Court. In that court the jury found a special verdict: (1) That the defendant lives within 3 miles of said road; (2) that he had two weeks notice to work on the same; (3) that the overseer did not notify the defendant what kind of tools to bring; and (4) that the defendant refused to work on the road. Thereupon, his Honor held that the defendant was not guilty; for that the warrant was too (493) indefinite and charged no offense, nor did it conclude against the peace and dignity of the State or against the statute. From which ruling Cowles, solicitor for the State, appealed.

Attorney-General for the State.
M. L. McCorkle for defendant.

FAIRCLOTH, J. The State and the overseer obtained a warrant against the defendant for failing to work a public road. It is doubtful whether

it was issued for the penalty or the misdemeanor. His Honor, in disposing of the case, seems to have treated it as the latter.

In looking through the record, as we are required to do, we find the warrant fatally defective because it does not conclude *contra formam statuti*, which is not cured by the statute of jeofails.

As an indictment, according to all the forms and authorities, it should so conclude; and as a proceeding for a penalty, it must so conclude in order to show the defendant "how it become due." *Turnpike Co. v. McCarson*, 18 N. C., 306.

PER CURIAM. Affirmed.

Cited: *S. v. Lowder*, 85 N. C., 565.

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(494)

STATE v. REUBEN HAWKINS.

Indictment—Overseer of Poor—Public Officer—Malfeasance in Office—Evidence.

1. An overseer of the poor is a public officer and liable to indictment at common law for any neglect of his duties or abuse of his powers.
2. Where such officer is indicted for cruel treatment of paupers, and the indictment neither sets out the names of such paupers nor states that their names are unknown: *Held*, that the indictment is defective, and judgment thereon should be arrested.
3. Upon the trial of an indictment against a public officer for neglect or omission of duty, evidence of acts of positive misfeasance is inadmissible.

INDICTMENT against the defendant as overseer of the poor, for cruel treatment to the paupers under his control, tried at Spring Term, 1877, of WILKES, before *Schenck, J.*

There was a verdict of guilty, and the defendant moved in arrest of judgment upon the ground that the indictment was too vague and indefinite, and in that the names of the paupers alleged to have been maltreated did not appear. And it was insisted that the defendant was not an officer, and that the county commissioners were the only officers criminally liable. The indictment is sufficiently set out in the opinion delivered by *Mr. Justice Rodman*. His Honor in the court below overruled the motion in arrest, and gave judgment that the defendant be imprisoned four months in the county jail, from which the defendant appealed.

Attorney-General for the State. (495)
No counsel for defendant.

RODMAN, J. There can be no doubt that the defendant is a public officer in the sense of being liable at common law for any neglect of his duties, and for any abuse of his powers. His appointment is provided for by Bat. Rev., ch. 88, sec. 1.

The meanness of a crime with which a defendant is charged does not deprive him of the right to have applied to his case the rules which the common law has provided for the ascertainment of guilt and the protection of innocence. One of these rules is that the indictment shall describe the offense with reasonable certainty, so that the accused may be informed of what he is to meet, and prepare himself to meet it. In the present case the charge is that the defendant, being overseer of the poorhouse of Wilkes County, "did unlawfully, willfully, and knowingly neglect and permit the said paupers so committed to his charge and care to go without adequate, wholesome, and suitable provision for their care and comfort, whereby the health and welfare of the said paupers were greatly injured and destroyed, by failing to provide suitable food and clothing for the said paupers, by failing to give them suitable food when sick, and failing to provide suitable and comfortable places for them to sleep and repose, and permitting others under him in authority and in his employ to treat them harshly, cruelly, and abusively."

This indictment is defective and uncertain, in not giving the names of the paupers to whom the defendant neglected to give suitable food, etc., or in not stating that their names were unknown. It is always necessary to name the person injured, or to state a reason for not doing so. The precedents all run that way. Upon this ground we feel bound to arrest the judgment.

It may be observed, also, that whereas the indictment charges merely neglect and omission of duty, the State was allowed to give in evidence acts of positive misfeasance—such as the beating of an insane pauper woman. This was improper and calculated to prejudice the jury against the accused. If intended to be used, it should have been averred in the bill, so that the accused might come prepared to answer it. (496) As there must be a new trial, we call the attention of the solicitor to a *possible* defect in the indictment, although no point was made upon it either in the court below or in this Court, and we express no opinion as to whether it is a material defect or not: The offense charged is failure to provide suitable food, etc. Clearly it is not the duty of an overseer of the poorhouse to provide the inmates with food, etc., unless he has been provided with it by the county commissioners, or who would have

been so provided on application to them. Whether it is necessary to aver that he was or might have been provided, it will be for the solicitor to consider.

PER CURIAM. Judgment arrested.

Cited: *S. v. Norris,* 111 N. C., 655; *S. v. Hatch,* 116 N. C., 1005; *S. v. Ostwalt,* 118 N. C., 1213; *Williams v. Greenville,* 130 N. C., 99.

STATE v. MARTIN LILES ET ALS.

Indictment—Disqualification of Juror.

Where an indictment was quashed upon the ground that one of the grand jurors who found the bill was a party to an action pending and at issue in the Superior Court: *Held,* not to be error. (Bat. Rev., ch. 17, sec. 229g.)

INDICTMENT for larceny, tried at Spring Term, 1877, of ANSON, before *McKoy, J.*

The defendants moved to quash the indictment on the ground that one of the grand jurors who found the bill against them was disqualified by Bat. Rev., ch. 17, sec. 229 (g), which is as follows: "If any of the jurors drawn have a suit pending and at issue in the Superior Court, the scrolls with their names must be returned into partition No. 1 of the jury box."

(497)

His Honor allowed the motion, and Pemberton, solicitor for the State, appealed.

Attorney-General for the State.
No counsel for defendants.

FAIRCLOTH, J. The defendants were indicted, and on being called to answer the charge, moved to quash the indictment on the ground that one of the grand jurors who presented the bill, at the time he was drawn as juror had a suit pending and at issue in the Superior Court of the same county. The motion was allowed, and the solicitor appealed. We sustain the order of his Honor, and hold that the juror was disqualified simply because the law is so written. Bat. Rev., ch. 17, sec. 229 (g).

In such cases the objection must be taken in apt time, as was done in the present instance. *S. v. Griffice,* 74 N. C., 316.

PER CURIAM. Affirmed.

Cited: *S. v. Smith,* 80 N. C., 411; *S. v. Martin,* 82 N. C., 674; *S. v. Haywood,* 94 N. C., 850.

(498)

STATE v. RUFUS YOUNG.

Verdict—Right to Have Jury Polled.

Upon rendition of a verdict in a criminal action, both the defendant and the solicitor for the State have a legal right to demand that the jury be polled, and it is error in the court to refuse it.

INDICTMENT for rape, tried at Spring Term, 1877, of ROWAN, before *Kerr, J.*

There was a verdict of guilty, and the defendant's counsel demanded that the jury be polled, which demand the court refused. Judgment. Appeal by defendant.

Attorney-General and J. M. McCorkle for the State.
W. H. Bailey for defendant.

FAIRCLOTH, J. After the jury had consulted together and returned, upon being interrogated by the court they stated through their foreman that they had agreed on a verdict of guilty, and thereupon, and before the verdict was recorded, the defendant demanded that the jury be polled, which was refused by the court, and the defendant excepted.

This is the only exception we find it necessary to consider, and the question presented has not been heretofore decided in this State.

We think a defendant on trial in a criminal case (and of course the solicitor for the State) has the right to have the jury polled, whether it be an oral or a sealed verdict. He has no right to say in what manner it shall be done, nor to propound any question, but simply to know that the verdict given by the foreman is the verdict of each juror, and we think it is error in the court to deny it when demanded.

The right of the judge to poll the jury is immemorial, and has (499) never been questioned, so far as we are informed. We can see no good reason why it should be denied to the defendant, and we cannot conceive of a case in which any harm would result from the exercise of it under the direction of the court, and experience shows that notwithstanding the response of the foreman for the jury, there are cases in which individual jurors refuse to assent on being polled. How is the defendant to know that this is really the verdict of all, and that no one has been deceived or coerced into an assent to that which his judgment does not now concur in? There is no mode of ascertaining this fact except by the evidence of the jurors themselves when they come into court.

When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: "So say you all?" At this time any juror can retract on the ground of conscientious

scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the *fact* that it is the verdict of the whole jury.

On examination, we find that in several States the right is conceded and the practice well settled, but the decisions are not uniform. It was so expressly decided in *Jackson v. Gale,* 3 Cowen, 23; *Hargent v. State,* 11 Ohio, 472; *Stewart v. People,* 23 Mich., 63. Mr. Bishop says: "And it is held in most of our States that either party may claim as of right to have the jury polled, and a denial of this right is an error in the proceedings." 1 Crim. Prac., sec. 830.

And we feel somewhat supported in our conclusion by Article I, sec. 13, of our Constitution, which declares that "No person shall be
(500) convicted of any crime but by the *unanimous* verdict of a jury of good and lawful men in open court."

PER CURIAM. *Venire de novo.*

Cited: *S. v. Toole,* 106 N. C., 744; *Smith v. Paul,* 133 N. C., 67.

STATE v. JOHN H. STRAUSS.

City Ordinance—Criminal Prosecution—Defect in Indictment.

Where the defendant is prosecuted under a city ordinance which provides that any person "refusing or neglecting to pay license tax, etc., for the space of five days, etc., shall be subject to criminal prosecution," the indictment is fatally defective if it fails to allege that the defendant neglected or refusel to pay the tax, etc., *for the space of five days.*

APPEAL at January Special Term, 1877, of NEW HANOVER, from *McKoy, J.*

This was an appeal from the judgment of the mayor of the city of Wilmington, who imposed a fine of $25 on the defendant for failure to obtain a license as liquor dealer, as provided by city ordinance. Upon a special verdict in the court below, his Honor adjudged the defendant guilty. Judgment. Appeal by defendant.

Attorney-General and D. L. Russell for the State.
A. T. & J. London for defendant.

FAIRCLOTH, J. The defendant was indicted for engaging in the business of a liquor dealer in the city of Wilmington without having ob-

tained a license to do so, in violation of an ordinance of the city, to wit, section 8, which provides "that any person refusing or neglecting to pay the license tax assessed against them for the privilege of doing business, *for the space of five days,* shall be subject to criminal (501) prosecution," etc.

Upon a special verdict, the defendant was adjudged guilty. In this Court the objection was taken that the indictment does not allege that the defendant had neglected or refused to pay the tax and obtain a license for the space of *five days.*

On inspection, we find this to be true. This is a fatal defect, and the prisoner ought to have been acquitted. This allegation does not appear either in the bill, the special verdict, or in the statement of the case. Nothing can be added to a special verdict by inference. If the bill is defective, or any essential fact be omitted from the special verdict, the prisoner is entitled to an acquittal.

PER CURIAM. Judgment arrested.

(502)

STATE v. DANIEL J. UNDERWOOD.

Indictment—Larceny—Severance—Privilege of Counsel—Variance—Amendment of Record.

1. The refusal of the court below to order a severance is an exercise of discretionary power, and not subject to review in this Court.
2. It is not erorr for a prosecuting officer to comment on the personal appearance of the defendant in reply to remarks of defendant's counsel calling attention to his appearance.
3. A defendant is entitled to a new trial where counsel abuse their privilege in addressing the jury to his prejudice, but not where there is "cross-firing," which is stopped by the court before any real injury is done.
4. In an indictment for larceny, where the article stolen is described as a "strain-cloth," and is proven on the trial to be a "strainer-cloth": *Held,* to be no variance between the allegation and the proof.
5. It is not sufficient ground for an arrest of judgment that the court below permitted the transcript of the case to be amended from the original records by the clerk of the court of the county where the indictment was originally found, so as to show that the same was returned in "open court."

INDICTMENT for larceny, removed from CUMBERLAND and tried at Spring Term, 1877, of MOORE, before *McKoy, J.*

The defendant and others were indicted for larceny and receiving stolen goods, the property of E. J. Lilly, knowing them to have been

stolen. The facts are sufficiently stated by *Mr. Justice Faircloth* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General and Neill McKay and G. M. Rose for the State.
McRae & Broadfoot, Guthrie & Carr, and T. H. Sutton for defendant.

(503) FAIRCLOTH, J. After a verdict of guilty, the defendant moved for a new trial on the grounds:

1. Because the court refused a motion for severance on the trial. This was a matter of discretion with the judge, and we cannot review it.

2. Because the solicitor commented on the personal appearance of the defendant, in reply to remarks of defendant's counsel calling attention to his appearance. This was not objected to nor called to the attention of his Honor at the time.

3. Because one of the counsel for the State said the defendant seemed to be popular with the ladies, as one had become his security, who might be a bouncing lass of 16 or a fancy character. On objection by defendant's counsel, his Honor said, "There is no evidence of this, and this case must be tried on the evidence." Whether this was said in a loud or low voice we cannot tell from the record, but we must assume that it was heard and understood by the jury. This was all that we can see that he should have done, and whether he should have emphasized his language or reproved the counsel was a matter of sound discretion with the judge.

We have in some cases ordered a new trial on account of the abuse of privilege by counsel, and will always do so when it seems probable that the defendant has been prejudiced on his trial by such abuse; but the present seems to have been a case of cross-firing with small shot, which was ordered to cease by his Honor before any real injury was done.

4. Because of the variance between "strain-cloth" charged in the bill, and "strainer-cloth" proved by the evidence. This exception is disposed of by the opinion and authorities cited in *S. v. Campbell,* 76 (504) N. C., 261; besides, there was evidence of the identity of hats and shoes, etc., of the prosecutor, alleged and proved to have been stolen at the same time, with his private mark, and there is no variance between the allegation and proof of the names of these articles.

The defendant then made a motion in arrest of judgment because the transcript from Cumberland County did not show that the bill of indictment had been returned in *open* court as a true bill in that county. His Honor allowed an amendment of the transcript to be made by the

clerk of Cumberland County from the original records of said county, and we think he had the power, and that it was proper for him to do so. *S. v. Upton,* 12 N. C., 513.

PER CURIAM. No error.

Cited: Coble v. Coble, 79 N. C., 592; *S. v. Bryan,* 89 N. C., 535; *S. v. Debnam,* 98 N. C., 719; *Cawfield v. R. R.,* 111 N. C., 604; *S. v. Tyson,* 133 N. C., 696; *Smith v. R. R.,* 142 N. C., 22; *S. v. Holder,* 153 N. C., 607; *Pigford v. R. R.,* 160 N. C., 104.

(505)

STATE v. JAMES HEATON.

Jurors—Indictment—Public Officer—Failure to Perform Duty—Private Statute.

1. A juror is not disqualified for failure to pay his taxes for the preceding year, when the sheriff had been enjoined from collecting the same.
2. The law presumes every act in itself unlawful to have been criminally intended until the contrary appears. Therefore, where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is *willful,* and makes it incumbent upon him to rebut the presumption.
3. Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter and date and its material provisions incorporated in the indictment.

INDICTMENT for misdemeanor, tried at April Term, 1877, of the criminal Court of NEW HANOVER, before *Meares, J.*

The defendant was clerk of the Superior Court of said county, and as such had received the sum of $25 tax on an inspector's license, issued by virtue of Pr. Laws 1870-71, ch. 6, and was indicted for a failure to pay the same into the treasury of the city of Wilmington.

The case is fully discussed by *Mr. Justice Bynum* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General and D. L. Russell for the State.
A. T. & J. London for defendant.

BYNUM, J. 1. The Revised Code, ch. 31, sec. 33, provides that (506) "the judges of the Superior Courts, at the terms of their courts, shall direct the names of all the persons returned as jurors to be written on scrolls of paper and put into a box or hat, and drawn out by a child

under 10 years of age; whereof the first eighteen drawn shall be a grand jury for the court." In this case the grand jury was so drawn, and then sworn, impaneled, and charged.

Afterwards, during the same term, and before this indictment was found, it having been made to appear to the court that some of the grand jury so chosen were disqualified, they to the number of six were discharged. The bill of indictment was acted upon and found by the remaining twelve, who composed the grand jury.

Upon the arraignment of the defendant, he filed a plea in abatement, alleging that George N. Harriss, one of the twelve grand jurors who found the indictment, was disqualified because he had not paid tax for the preceding year, as required by C. C. P., sec. 229.

Upon this plea, an issue was made by the State, upon the trial of which it appeared in evidence that the juror had paid a part of the said tax, and that the sheriff was enjoined by an action from collecting the residue of the tax for that year, of this juror and other citizens of the county; and that the injunction was not vacated until after the time for collecting the tax of that year had expired; and that in fact the residue of the tax had not been paid at the time of the trial. Upon this state of facts, the court held that Harriss was a competent juror. We concur in that opinion.

It does not appear at whose instance the injunction was obtained, but suppose it had extended to all the taxpayers, and that in consequence none had paid the tax of the preceding year. Could it be held that this failure operated as a suspension of the criminal law of the State? The statute must, if possible, receive a reasonable construction not inconsistent with the public welfare.

(507) The failure to pay the tax was not the juror's voluntary act, but was caused by the act of the court insuspending its collection. It nowhere appears but that the juror was able, ready, and willing to pay the tax, and in fact he had paid all that the law, as then administered, required him to pay.

2. The defendant is indicted under chapter 6, Private Laws 1870-71, for the failure to pay into the treasury of the city of Wilmington, within thirty days after receiving the same, a certain license tax, as prescribed in the act.

The offense is made indictable by chapter 32, sec. 107, Bat. Rev., which enacts that if any clerk of the Superior Court "shall willfully omit, neglect, or refuse to discharge any of the duties of his office," etc., he shall be deemed guilty of a misdemeanor. The failure to pay over the tax within the prescribed time was not disputed, but the defendant insisted, and so asked the court to instruct the jury, that the neglect to pay over, to be indictable, must be *willful*, and that no presumption of

willfulness arises from the single fact of nonpayment, and that there is a distinction in this respect between acts of omission and commission, in that a corrupt intent is imputed by the law to a postive or affirmative act, but not to a negative or omissive one.

His Honor refused the instructions asked for, and charged the jury that the neglect or omission to pay the money into the treasury within the time prescribed by law being established, the law raised the presumption that the act was willful, and it was incumbent on the defendant to offer evidence to rebut the presumption. There is no error in the instructions given.

The text-writers upon the law of evidence divide presumptive evidence into two classes, namely, *Conclusive* and *Disputable* Presumptions. We have now to deal only with the latter.

As men do not generally violate the criminal code, the law pre- (508) sumes every man innocent, and this presumption of innocence is to be observed by the jury in every case. But some men do violate the law, and as they "seldom do unlawful acts with innocent intentions, the law therefore presumes every act in itself unlawful to have been criminally intended until the contrary appears." 1 Greenl. Ev., sec. 34. A familiar example is on the trial of a case of homicide. Malice is presumed from the fact of killing, and the burden of disproving the malice is thrown upon the accused. The same principle pervades the law in civil as well as criminal actions. Indeed, if this were not so, the administration of the criminal law would be practically defeated, as there is in most cases no other way of ascertaining the intent than by establishing the unlawfulness of the act. Nor, in many cases, including this, is the intent in a moral sense, as importing corruption of the mind or fraud, the test of criminality.

A refusal to accept a public office to which one has been duly elected is indictable, and the presumption of guilt can be repelled only by showing a lawful excuse for the refusal. The same reasons which impose the duty of accepting a public office require him who has accepted faithfully to discharge all official trusts. Any act or *omission* in disobedience of this duty in a matter of public concern is, as a general principle, punishable as a crime. Particularly is this so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion. 1 Bish. Cr. Law, secs. 912, 913, and cases cited. *S. v. Powers,* 75 N. C., 281; *London v. Headen,* 76 N. C., 72.

And this is the distinction drawn in the books between a ministerial act (which is our case) and an act done in a judicial capacity, where the officer is called upon to exercise his own judgment. In the latter case the act, to be criminal, must be willful and corrupt. 1 Bish. Cr. Law, sec. 913; *People v. Coon,* 15 Wend., 277 (509)

3. A motion is made in this Court in arrest of judgment, upon the ground that the statute upon which the indictment was instituted is a private statute, and is not sufficiently set forth in the indictment. This objection was not raised on the trial in the court below, and is raised here for the first time. If there was any force in the objection, it is cured by our statute. Bat. Rev., ch. 33, sec. 60. The charge is expressed in a plain and intelligible manner, and sufficient matter appears in the bill to enable the court to proceed to judgment. Whether the statute is a public or private act is not material in this case, for assuming it to be a private act, it is set forth in the bill by chapter and date, and its material provisions prescribing the duty of the clerk are incorporated in the indictment. The defendant could not possibly have been mislead as to the offense charged, or as to the defense he was called upon to make.

PER CURIAM. Affirmed.

Cited: *S. v. Craft,* 168 N. C., 212.

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(510)

STATE v. HILLSMAN MORGAN.

Appeal—Practice in Criminal Cases.

In criminal cases, a defendant cannot appeal without security, unless he makes an affidavit that he is advised by counsel that he has reasonable cause for appeal and that his appeal is in good faith. The Superior Court has no right to allow such appeal merely for delay.

INDICTMENT for murder, tried at Spring Term, 1877, of FRANKLIN, before *Buxton, J.*

The exceptions upon which the appeal was taken are set out by *Mr. Justice Reade* in delivering the opinion of this Court. There was a verdict of guilty. Judgment. Appeal by the defendant.

Attorney-General for the State.
No counsel for defendant.

READE, J. In criminal actions every reasonable indulgence is granted the defendant. And if convicted he is allowed an appeal to the Supreme Court without security if he is unable to give it. There is, however, one restriction upon his right of appeal. Inasmuch as he has no new trial in the Supreme Court, but only questions of law are determined, he is reasonably required to make an affidavit that he is *advised by counsel* that he has *reasonable cause* for appeal and that his appeal is in good faith.

The law is strictly just to its subjects and it is the duty of the courts to execute justice in mercy, but still there must be firmness and decision.

Punishment must follow guilt, and that with reasonable dispatch and without evasion. The Superior Court has no right to allow an appeal without security merely for delay. There must be a compliance with the statute. It is not a matter of discretion. If the Legislature had contemplated an appeal for delay merely, there would have (511) been no necessity for the expense and trouble of an appeal. It might have provided that no convict shall be punished until six months after conviction.

There having been no affidavit by the defendant that he had been advised by counsel that he had reasonable cause for the appeal, and that the appeal was in good faith, it might be dismissed as improvidently granted.

The exceptions upon which the case comes up very clearly indicate that the appeal was for delay merely. Probably no counsel would have risked his reputation in indorsing them, and no counsel ought to have taken them. There is not only no force in them, but they are trifling. They are:

"1. Because witnesses summoned for the prisoner were not present

"2. Because until up to a recent period the prisoner was without counsel.

"3. Because the prisoner had not asked for a continuance.

"4. Because the solicitor had entered a *nol. pros.* on the first bill and tried on the second bill.

"5. Because the *venire* were not summoned to try on the second bill.

"6. Because his Honor excused a juror who swore he was too infirm to serve as a juror."

It is apparent that there is no force in any of the exceptions taken as they appear of record.

We have examined the whole record and there is

PER CURIAM. No error.

Cited: Stell v. Barham, 85 N. C., 90; *S. v. Moore,* 93 N. C., 502; *S. v. Payne, ib.,* 613; *S. v. Jones, ib.,* 618; *S. v. Wylde,* 110 N. C., 502; *S. v. Jackson,* 112 N. C., 850; *S. v. Harriss,* 114 N. C., 832; *S. v. Bramble,* 121 N. C., 603; *S. v. Smith,* 152 N. C., 842.

(512)

STATE v. WILKES MORRIS.

Legislative Power Over Charter—Lotteries—Constitution.

1. A right conferred in the charter of a corporation to dispose of property by means of lottery tickets is not a *contract* between the corporation and the State, but a mere *privilege* or *license*, and is revocable at will by the legislative power.
2. The act of 1875 (Laws 1874-75, ch. 96) does not repeal the charter of the North Carolina Beneficial Association, but restrains the corporation from disposing of property by lottery (which was allowed by its charter), and is not in conflict with the Constitution of the United States.

The power of the General Assembly to repeal or modify charters, and to revoke licenses, discussed by BYNUM, J.

INDICTMENT for conducting a lottery, tried at June Term, 1877, of the Criminal Court of NEW HANOVER, before *Meares, J.*

The case is fully stated and discussed by *Mr. Justice Bynum* in delivering the opinion of this Court. Upon the special verdict his Honor adjudged the defendant not guilty, and Moore, solicitor for the State, appealed.

Attorney-General for the State.
D. L. Russell and A. W. Tourgee for defendant.

BYNUM, J. The defendant is indicted for conducting a lottery, and the case is here by appeal from the judgment of the court below on a special verdict of the jury, which is in the following words: "That the defendant did expose to sale by lot or chance, and did offer to dispose of, by lot or chance, personal property of the value of $500, and that defendant in doing so acted as the general manager of a company known as the North Carolina Beneficial Association," etc.

(513) This association was incorporated in 1870 (Pr. Laws 1869-70, ch. 14), for the period of thirty years, subject to the payment of such taxes as may be required of insurance companies, and was clothed with power to sell and dispose of real or personal property purchased by them or placed in their hands for sale, by lot or chance, or in any other mode the association might deem best.

Subsequent to this act of incorporation and the organization of the company under it, to wit, in 1875, it was enacted (Laws 1874-75) that all persons, associations, or organizations of persons whatever, who engaged in disposing of property of any kind by the distribution of gifts, prizes, or certificates sold for that purpose, shall be indictable under the provisions of the general law prohibiting lotteries, as contained in Bat. Rev. ch. 32, sec. 69. The act contains a *proviso* allowing such lottery

companies as had theretofore sold tickets, the proceeds of which were to be applied exclusively to benevolent or charitable purposes, until 1 January, 1876, to close their business. This *proviso* is material only as showing that all other lottery associations whatever, except those for charitable purposes, fall within the prohibition, whether specially named or not. No other reasonable construction can be put upon the sweeping language of the act, *"any* person or persons, association, company, or organization *whatsoever."* The indictment is for vending lottery tickets since the act of 1875.

The defendant denies that he is indictable, because he says that by the act incorporating the "North Carolina Beneficial Association" a contract was created between the State and the company which is protected by the Constitution of the United States, and cannot be annulled or impaired by subsequent legislation; that having had conferred upon it by charter the right to sell and dispose of property by lot or chance, the Legislature cannot make the exercise of the right unlawful (514) and a crime.

The first and main question is, whether a right to vend lottery tickets conferred in the charter is a contract at all, within the meaning of the Federal or State Constitution. We think it is not, but that it is only a privilege, permit, or license subject to withdrawal whenever the Legislature in the exercise of the general police power of the State may deem its exercise prejudicial to the public morals or the general welfare of society. Every grant from the State is received with the implied condition that all the rights conferred by it are subservient to such regulations as the Legislature may establish for the preservation of the public morals, the prevention of intemperance, pauperism and crime, and for the abatement of nuisances. It has never been held that the legislative exercise of these police powers is void, even where it incidentally tends to prevent the fulfillment of contracts previously made, and thereby violates the obligation of contracts. In the celebrated *License Cases,* arising out of the State laws known as the Prohibitory Liquor Laws, it was held competent to declare all liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to size and condemn the building occupied as a dramshop, on the same ground. *Our House v. State,* 4 Greene (Iowa), 172; *S. v. Robeson,* 33 Maine, 568; *License Cases,* 5 How., 589; *People v. Hawley,* 3 Mich., 330. Cooley Const. Lim., 583, 595, 596.

In discussing the meaning of the word "obligation" of a contract as used in the Constitution of the United States, as it may affect the power of the State to enact general police regulations for the preservation of the public morals, Mr. Parsons says: "Can a Legislature having authorized an individual or a company to raise a certain sum of money by

lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the (515) public morals recall such authority or license by a general law prohibiting lotteries or the sale of spirituous liquirs? And if this can be done when the grant is gratuitous, can it be done if a certain price or premium is paid for it?" After stating that the prevailing adjudications of this country favor the rule that such general laws are not in either case within the purview or prohibition of the Constitution, he proceeds: "If nothing is paid for the license or authority, the authorities are quite uniform that it may be taken away by such general law," and although there are cases which hold that where a fee or premium has been paid it constitutes a contract binding on both parties, he concludes that the prevailing authorities hold that even in that case it is not such a contract. 3 Pars. on Contracts, 556, 557 (5th Ed.); *Phalen's case,* 1 Rob., 713; *Phalen v. Virginia,* 8 How., 263; *Baker v. Boston,* 12 Pick., 194; 7 Cowen, 349.

It cannot be denied that lotteries are a species of the game of hazard more alluring and more generally indulged in, publicly and secretly, than any other form of gambling, and that they are pernicious to good morals and industry. The policy of the State has been almost from the beginning opposed to lotteries, and they have been prohibited by law and punished as gambling. Why has not the Legislature the power to suppress this enormous vice, as it has to prevent the rise and spread of any other dangerous contagion? Suppose a reckless Legislature should incorporate a school for prostitution, or a gambling saloon, or a company for the sale of obscene and indecent books and pictures: can it be thought for a moment that a succeeding Legislature could not repeal such legislation and make these pursuits criminal? A doubt about the power would shock the moral sense; and to hold that such grants by the State are contracts protected from repeal or change by the Constitution of the United States would subvert the well-being of society and was never contemplated.

Moore v. State, 48 Miss., 147, is a case directly in point, though much stronger than ours. There a corporation was created by the Legislature for twenty-five years on the payment of a *bonus* of $5,000 to the (516) State, and on giving bond for the further payment of a certain per cent on its profits was authorized to carry on the lottery business. It was created and complied with all terms in 1867. Afterwards, in 1869, the Constitution was adopted which prohibited all lotteries to be authorized thereafter, and also provided that those then in existence should not be drawn or the tickets therein be sold. The defendant, claiming to act under his charter of 1867, did not desist from his business, and was indicted and convicted. On appeal by the defendant it was

held that he was properly convicted, and that authority to raise money by lotteries or to sell spirituous liquors is not protected by the prohibition in the Federal Constitution against impairing the obligation of contracts; it not being the intention of the prohibition to restrain the police power of the States in the preservation of the public morals, and that the State cannot abnegate or surrender the duty which is perpetually upon it to consult the physical and moral good of the people. *Prigg v. Pennsylvania,* 16 Pet., 625; 9 Wheat., 203; *Stuyvesant v. Mayor of New York,* 7 Cowen, 588.

The "North Carolina Beneficial Association" is an imposing title, but the law has pronounced it in its lottery features to be a cheat and a nuisance to be suppressed like other public pestilences. Of all the forms of gambling, it is the most widespread and disastrous, entering almost every dwelling, reaching every class, preying upon the hard earnings of the poor, and plundering the ignorant and simple. 8 How., 168. It is not in the power of the Legislature to either give or sell out for a consideration the public police power of the State, or so to bind the hands of Government as to disable it for the period of thirty years from prohibiting what may be considered as an immoral and corrupting pursuit. To conduct a lottery is a mere permit or privilege, revocable at the will of the Legislature, and cannot be dignified with the name and substance of a *contract. Reynolds v. Geary,* 26 Conn., 179; *Commonwealth v. Kindall,* 12 Cush., 414; 5 Gray, 97; 13 Gray, 26; Cooley Const. (517) Lim., 583, 584; *Fell v. State,* 42 Md., 71.

It is to be observed that the act of 1875, by virtue of which this prosecution has been instituted, does not repeal or profess to repeal the act incorporating the North Carolina Beneficial Association. The corporation still exists and is clothed with all the rights of buying, receiving, and selling real and personal estate as are possessed by individuals or conferred upon other corporations. The only effect of the act of 1875 is to restrain the association from disposing of property by lottery or the selling of chances, and this is done in the reasonable exercise of the police power of the State.

In the view we have taken, as one not involving the question of contract, it does not become important to inquire into the extent of the powers of the Legislature over corporations created since the adoption of the Constitution of 1868. This corporation has been created since, and falls within the operation of Art. VIII, sec. 1, of the Constitution, by which it is provided that corporations other than municipal may be created by general laws or special acts, but that all such general laws or special acts may be altered from time to time or repealed. The most obvious construction to be placed upon this clause of the Constitution is that all subsequent acts of incorporation partaking of the nature of con-

tracts between the State and and incorporation are granted and taken in reference to this power of alteration or repeal by the Legislature, and that this power of change or repeal is a part of the contract itself. But it cannot probably be maintained that this power over new corporations is unlimited and without qualification. The constitution of Massachusetts has a clause similar to ours, and a new and onerous duty was imposed upon a corporation by the Legislature, for the nonperformance of which it was indicated. The Court held that it had not this unlimited power, and this case it put: Suppose an authority has been given
(518) by law to a railroad company to purchase a lot of land for railroad purposes, and they purchase such lot from a third person: could the Legislature prohibit the company from holding it? If so, in whom should it vest? Or could the Legislature direct it to revest in the grantor, or escheat, or how otherwise? In that case the rule suggested as the most reasonable was this, that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. *Commonwealth v. Essex Co.,* 13 Gray, 239; *Crease v. Babcock,* 23 Pick., 334.

No such question, however, arises in this case. No additional burden from which they had been exempted by the charter has been imposed upon this association by the act in question, nor have they been deprived of any property or rights which had become vested in them under a legitimate exercise of the powers granted. The corporation paid no *bonus* for the charter, and is liable to no taxation which is not imposed on other corporations. Nor can we see the analogy between the power to conduct a lottery and the exclusive right to construct a bridge or ferry and exact tolls. The one is a license to do something immoral in itself without any compensation to the public, while the other possesses all the elements of a contract by which money is to be expended in building the bridge or ferry for the use and benefit of the public on the one part, in consideration of tolls to be paid on the other part. There is, however, an analogy between the right to conduct a lottery and the right to sell liquor, in that both are mere permits, revocable at the will of the State; and the authorities before cited establish that it makes no difference whether a *bonus* or tax has been paid for the privilege for a time
(519) unexpired or not. Also, see *Fell v. State,* 42 Md., 71; *Miller v. Bl*dsoe,* 61 Mo., 96; Cooley, 595, 596.

Whenever the Legislature sees fit to exercise its paramount duty to take care of the health, happiness, morals, and welfare of the community, it has the right, and it is its duty, to withdraw the abnoxious grant. Where the privilege has been paid for for a time yet unexpired, it would be nothing more than equitable and just that a ratable compensation

should be made; but it would seem that it is not recoverable as a matter of right any more than in other cases of the abatement of a public nuisance. But that question does not arise in this case and is not decided.

There is error. Judgment should have been given for the State upon the special verdict.

PER CURIAM. Reversed.

(520)

STATE v. THOMAS L. JONES.

Indictment—Assault and Battery—Practice—Argument of Counsel—Judge's Charge.

1. It is not improper for a prosecuting officer, in his argument to a jury, to comment upon the fact that the defendant had sworn a witness and afterwards declined to examine him.
2. Where the court below instructed a jury "that in passing on the credibility of a witness they should consider that it is *a rule of law*, a presumption, that men testify truly and not falsely": *Held*, to be error.
3. The same act cannot be in self-defense and also an excess of force. Therefore, where on a trial for assault and battery the court below instructed the jury that "Suppose the witness did strike the defendant, and that defendant drew his pistol in *self-defense*, although he did not cock it or point it at the witness, it would amount to an excessive use of force," etc.: *Held*, to be error.

ASSAULT AND BATTERY, tried at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

The prosecutor Smith testified that he was a witness in a trial of an action before a justice of the peace wherein the present defendant was plaintiff and one Johnston was defendant, and that just after the decision of the justice was given, this defendant struck Johnston, and in a few minutes thereafter drew a pistol and said to witness, "You are the scoundrel I have been waiting for," and thereupon the witness struck the defendant. This was the assault for which conviction was asked.

The comments of the State solicitor, in closing his argument to the jury, as to the failure of the defendant to examine one Whitley, who had been sworn as a witness, were objected to by the defendant, but his Honor declined to interpose, and the defendant excepted.

The charge of his Honor, to which the defendant also excepted, (521) is sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of the Court. There was a verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
Shipp & Bailey for defendant.

RODMAN, J. 1. We think the solicitor had a right to comment on the fact that the defendant, after having sworn Whitley as a witness, declined to examine him. It does not appear that his comments were in any way improper. It may be that no inference against the defendant should have been drawn from a circumstance which seems trival enough, but the jury alone could pass on its weight.

2. The judge spoke inaccurately and without due care when he said to the jury that in "passing on the credibility of the witness Smith they shall consider that it is *a rule of law,* a presumption, that men testify truly and not falsely." An expression somewhat similar was commented on in *S. v. Smallwood,* 75 N. C., 104. A judge may properly instruct the jury that the law presumes, and that they should presume, that a witness speaks the truth, unless there be some reason for thinking otherwise. But this is not a presumption of law in a technical sense, but of fact, being drawn from our experience of human veracity. Its force depends upon a number of circumstances which the jury must consider before acting on it. It has no artificial force. 1 Starkie Ev. (10th Ed.), 821. In 2 Wharton Ev., sec. 1237, the subject is treated of with ability. Probably the judge meant what is above expressed, and it is not probable that his inaccuracy of expression misled the jury. If it had been called to his attention at the time, he would probably have corrected the inaccuracy. For these reasons we should be very reluctant to grant a new trial if this were the only exception.

3. We think also the judge erred in saying, "Suppose witness Smith did strike the defendant first, and that defendant drew his pistol
(522) *in self-defense,* although he did not cock it or point it at witness Smith, it would amount to the excessive use of force, and in that aspect they should convict him." The error is plain. The same act cannot be in self-defense and also an excess of force. Moreover, it is for the jury to say whether force was used in excess of what was necessary in defense.

PER CURIAM. *Venire de novo.*

Cited: S. v. Bullock, 91 N. C., 616; *S. v. Kiger,* 115 N. C., 750; *Cox v. R. R.,* 126 N. C., 106; *S. v. Costner,* 127 N. C., 573; *S. v. Goode,* 132 N. C., 985; *S. v. Harris,* 166 N. C., 246.

STATE v. LAURA DAVIDSON.

Assault and Battery—Witness—Husband and Wife.

1. Neither the wife nor the husband is a competent witness against the other upon the trial of an indictment for assault and battery, where no lasting injury is inflicted or threatened.
2. But where the wife is indicted for assault and battery in striking her husband with an axe, the husband is a competent witness against her.

ASSAULT AND BATTERY, tried at Spring Term, 1877, of MECKLENBURG, before *Cloud, J.*

The defendant was indicted for an assault and battery upon her husband. The State introduced the husband as a witness, who testified that the defendant struck him with an axe. The defendant objected to this testimony, and the opinion of this Court is based upon its competency. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
Shipp & Bailey for defendant.

(523)

FAIRCLOTH, J. In *S. v. Hussey,* 44 N. C., 123, the principle involved in this case was considered, and it was determined that the wife was not a competent witness against her husband for an assault and battery upon her by him where no lasting injury is inflicted or threatened to be inflicted upon her; from which it would follow that neither was a competent witness against the other in such cases. *S. v. Rhodes,* 61 N. C., 453; *S. v. Oliver,* 70 N. C., 60.

In the present case the wife is indicted for an assault and battery upon her husband by striking him with an axe, without any sufficient provocation. Is he a competent witness to prove the assault? The instrument used is a dangerous one, and is a deadly weapon, calculated to inflict lasting injury. The use of it indicates malice, and its character would be considered by a jury upon a question of an assault with intent to kill. We think in such case the defendant is indictable, and *ex necessitate* that the husband is competent, as the wife would be if the assault had been upon her. We think it unnecessary to say more, as it would be substantially a repetition of the reasoning in the cases above cited.

PER CURIAM. No error.

Cited: *S. v. Parrott,* 79 N. C., 616; *S. v. Fulton,* 149 N. C., 497.

(524)

STATE v. WILLIS YARBOROUGH.

Indictment—Poisoning—Defective Indictment.

An indictment for administering poison (strychnia) with intent to kill, which does not contain an averment that the defendant "well knew that the said strychnia was a deadly poison," is fatally defective.

INDICTMENT for administering poison with intent to kill, tried at Spring Term, 1877, of GRANVILLE, before *Buxton, J.*

The jury rendered a verdict of guilty, and the defendant moved in arrest of judgment for that the bill did not charge that the defendant administered the poison knowingly and secretly. His Honor overruled the motion, and the defendant appealed.

Attorney-General for the State.
George Wortham and Merrimon, Fuller & Ashe for defendant.

BYNUM, J. The defendant was indicted and convicted of administering poison to William Mills with intent to kill, and he now moves in arrest of judgment for defects in the bill of indictment.

The bill charges that the defendant on a certain day "felonously and unlawfully did administer to William Mills a large quantity of certain deadly poison, called strychnia, to wit, two drachms, with intent," etc., omitting the averment that he "then and there well knew that the said strychnia was a deadly poison," etc.

The precedents all contain this averment either in express terms or in substance and effect. For example, here is one from Chitty, for sending poison with intent to kill: "That G. L., late, etc., not having, etc.,
(525) but being moved and seduced, etc., and of his malice aforethought, contriving and intending the said A. B., with poison, feloniously to kill and murder, on, etc., with force and arms, at, etc., aforesaid, a great quantity of yellow arsenic, being a deadly poison, with a certain quantity of white wine, feloniously, willfully, and of his malice aforethought, did mix and mingle, he the said G. L. then and there *well knowing the said yellow arsenic to be a deadly poison,*" etc. Chit. Cr. L., 776; *S. v. Blandy,* 18 Howell's State Trials, 1118.

It is always safest to follow long approved precedents. Strychnia is a technical term, used and well known in the *Materia Medica* as descriptive of a deadly poison, but this poison with its technical name is of recent discovery, and, though generally, may not be universally known among the laity as a deadly poison, and its administration to another

without this knowledge of its deadly effects may not necessarily be a crime. Hence there should be an averment that the accused knew it to be a deadly poison.

PER CURIAM. Judgment arrested.

Cited: *S. v. Slagle,* 83 N. C., 633.

(526)

STATE v. JOHN F. HAMPTON.

Indictment—Selling Liquor—Construction of Statute—Jurisdiction.

1. The act of 1874-75, ch. 126, making it indictable to sell liquor, etc., "within 3 miles of the located line of the Asheville and Spartanburg Railroad, during the construction of the said road," applies only to that part of the road actually undergoing construction. Therefore where a defendant was indicted under this act, and the jury found specially that he sold liquor within 2 miles of the *located line,* but that the road had never been in *process of construction* within 7 miles of the place of sale: *Held,* that he was not guilty.
2. A misdemeanor punishable "by a fine of not less than $10 nor more than $50, or by imprisonment of not less than ten days," is not within the jurisdiction of a justice of the peace.

INDICTMENT for a misdemeanor, tried at Spring Term, 1877, of BUNCOMBE, before *Furches, J.*

The defendant was indicted for selling liquor in violation of Laws 1874-75, ch. 126, sec. 1: "That it shall be unlawful for any person or persons to sell or in any manner give away any intoxicating liquors, or either directly or indirectly receive any compensation for the same, within 3 miles of the located line of the Asheville and Spartanburg Railroad during the construction of the said road," and sec. 2: "Any person violating the provisions of this act shall be guilty of a misdemeanor, and on conviction before any justice of the peace shall be punished by a fine not less than $10 nor more than $50, or by imprisonment of not less than ten days."

It was found by a special verdict that the defendant sold liquor in Asheville; that the line of said railroad was located 2 miles south of Asheville, and that the road had never been in process of construction within 7 miles of the place of selling the liquor. Thereupon the court held that the defendant was guilty. Judgment. Appeal by defendant.

Attorney-General for the State.

A. T. & T. F. Davidson and J. H. Merrimon for defendant. (527)

FAIRCLOTH, J. This case turns on Laws 1874-75, ch. 126, making it unlawful for any person to sell any intoxicating liquors "within 3 miles of the located line of the Asheville and Spartanburg Railroad during the construction of the said road."

The defendant sold liquor within 3 miles of the "located line," but not within 3 miles of any part of it undergoing construction, which seems to be the proper interpretation, especially as this view remedies the evil probably aimed at.

If the Legislature intended to give exclusive jurisdiction of this offense to a justice of the peace, they failed to do so, by not complying with Art. IV, sec. 33 (now sec. 27) of the Constitution.

PER CURIAM. Reversed.

Cited: *S. v. Eaves,* 106 N. C., 756.

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(528)

STATE v. WILEY TOMLINSON ET ALS.

Indictment—Navigable Streams—Obstructions.

1. Upon an indictment charging that the defendants did "unlawfully and willfully fell trees and place obstructions in the mill-race below the mill of F., the same being a natural passage for water, but not navigable for rafts, etc., whereby the natural flow of water through said race was retarded," etc.: *Held,* (1) that as the obstructions were placed below the mill, the offense charged was not a violation of Bat. Rev., ch. 32, sec. 110; (2) that as the indictment does not contain an averment that the obstructions were not put in the race "for the purpose of utilizing the water as a motive power," it is fatally defective under Bat. Rev., ch. 32, sec. 154.
2. An indictment should negative an exception contained in the same clause of the act creating the offense.

INDICTMENT for a misdemeanor, tried at Spring Term, 1877, of WILSON, before *Moore, J.*

The defendants, Wiley, Frank, John, and Buck Tomlinson, were indicted as follows:

"The jurors, etc., present, that (defendants) did . . . unlawfully and willfully fell trees and place obstructions in the mill-race below the mill of one C. F. Finch, the same being a natural passage for water, but not navigable for flats or rafts, whereby the natural flow of water through said mill-race was retarded, contrary," etc. Upon motion of defendants' counsel, his Honor quashed the bill of indictment, and Moore, solicitor for the State, appealed.

Attorney-General for the State. (529)
Hugh F. Murray for defendants.

FAIRCLOTH, J. The bill of indictment cannot be held to embrace the offense denounced in Bat. Rev., ch. 32, sec. 110, which provides against obstructions to the modes of furnishing water for the operation of mills, etc., because by its express terms the obstruction is located "in the mill-race below the mill." It was no doubt drawn in view of section 154 of said chapter, but it is fatally defective under that section, inasmuch as it fails to aver that said obstructions were not put in the race "for the purpose of utilizing water as a motive power," or words of the same import. "If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant, or the subject of the indictment, does not come within the exception." Archbold Cr. Pl., 25; *S. v. Norman,* 13 N. C., 222.

PER CURIAM. Affirmed.

Cited: S. v. Narrows Island Club, 100 N. C., 482; *S. v. Turner,* 106 N. C., 694; *S. v. Poole, ib.,* 700; *S. v. Downs,* 116 N. C., 1067; *S. v. Newcomb,* 126 N. C., 1106; *S. v. Yoder,* 132 N. C., 1118; *S. v. Hicks,* 143 N. C., 694.

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(530)

STATE v. JESSE F. HOSKINS ET ALS.

State and Federal Courts—Conflict of Jurisdiction.

The act of Congress (U. S. Revised Statutes, sec. 643) authorizing the removal of civil suits and criminal prosecutions from a State court to a circuit court of the United States is constitutional. Therefore, where a defendant in an indictment for an assault and battery made affidavit that he was a revenue officer of the United States, and that the alleged offense was committed under color of his office: *Held,* that the judge in the court below committed no error in ordering further proceedings in said court to be stayed.

RODMAN, J., dissenting.

ASSAULT AND BATTERY, tried at Spring Term, 1877, of GUILFORD, before *Cox, J.*

The defendants, Jesse F. Hoskins, George J. Cronenberger, and John Starr, were indicted for an assault and battery upon one Levi Humble. They were arrested and gave bond for their appearance, and on Saturday, 3 March, 1877, before said court conveyened (5 March), they filed a petition with the clerk of the Circuit Court of the United States for the

Western District of North Carolina, praying that the prosecution against them in the Superior Court should be removed to the Circuit Court, pursuant to the provisions of section 643 of the Revised Statutes of the United States. On said 5 March a copy of an order removing the case was duly served on the clerk of the Superior Court, and when the case was called the defendants objected to further proceedings in the State court on the ground that said court had no further jurisdiction, the order of removal having already been served upon the clerk thereof.

Upon issue joined on the question of law involved, and it appearing that the defendants were officers of the Internal Revenue Department of the United States, and it being alleged that the offense with
(531) which they were charged was committed under color of their office, his Honor held that said act of Congress was constutional, and ordered the proceedings in the Superior Court to be stayed. From which judgment Strudwick, solicitor for the State, appealed.

D. G. Fowle, J. T. Morehead, John Gatling, and W. H. Bailey appeared with the Attorney-General for the State.

Ball & Gregory and R. C. Badger for defendants.

READE, J. The preparation of the opinion in this case was assigned to our learned brother, the *Chief Justice,* but on account of his protracted indisposition he was unable to undergo the labor, and, therefore, he turned the case over to me.

We quote such parts of the Constitution of the United States and of the Constitution of North Carolina as bear upon the questions involved in the case, in order that they may all be under the same view at the same time.

"The Congress shall have power to lay and collect taxes," etc. Const. U. S., art. I, sec. 8 (1).

"To make all laws which may be necessary and proper for carrying into execution the foregoing powers." Const. U. S., Art. I, sec. 8 (17).

"The Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Const. U. S., Art. VI, sec. 2.

"That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no
(532) law or ordinance of the State in contravention thereof can have any binding force." Const. N. C., Art. I, sec. 5.

"That this State shall ever remain a member of the American Union; that the people thereof are part of the American Nation," etc. Const. N. C., Art. I, sec. 4.

There was much in the discussion before us upon the trite subjects of "State rights" and "Federal powers," which used to divide the politicians and statesmen; but we have no purpose to ally the Court with either school, or to express our individual opinion as to what *ought to be* the form of government; we mean to declare only what we believe to be the proper construction of what is written.

In order to see what are the precise questions involved, we must state the facts:

The Congress under its power to "lay and collect taxes" passed the revenue law now in operation, the validity of which no one questions, although its propriety is very much assailed. The defendant was appointed by the United States authorities to collect United States taxes in North Carolina. While engaged in that business, and in the execution of his office, and by color thereof, he did what but for his office would have been an assault and battery and a breach of the law of North Carolina. For that act he was indicted in the State Superior Court and held for trial in that court. The defendant thereupon filed his petition in the Circuit Court of the United States to have the case removed from the State court to the United States court, upon the ground that he was an officer of the United States, and that what he did was by virtue of his office. The Circuit Court of the United States made an order for the removal of the case, and his Honor, *Judge Cox,* of the State court, obeyed the order under that clause of the Constitution of the United States quoted above, which provides that, "The judges in every State shall be bound by the supreme law of the land," and from that order of *Judge Cox* the State appealed to this Court.

The comprehensive question arising out of these facts is, Was (533) the order of *Judge Cox* a proper one?

Let us first consider it as a question of *comity.* The State, a sovereign, claims that the defendant has trespassed upon its rights; the United States, a sovereign, claims that the defendant was its officer and acting under its orders, and, for the purposes of the demand, assumes the responsibility of the act complained of, and demands its officer in order that it may investigate his conduct and punish or protect him, as he may deserve. Now, what ought the State to do? Ought it to hold the officer and punish him, although he was acting under orders and is justified by his Government? That would be pusillanimous. Sovereigns to do not quarrel with *servants,* but with sovereigns, when they are *angry.* And when they are *friendly* they defer to each other the control of their own servants. Wheaton's International Law, 209, 224, 225. So it is with neighbors: A. and B. are neighbors, and their children play on common ground, and the child of A. trespasses upon the child of B. B. does not try and punish the child, but turns it over to A. with the cause of com-

plaint. If A. will redress the wrong, well; if not, then the quarrel is with A. and no longer with the child. Concede, then, that the State had a good cause of complaint against the defendant, yet the moment that the United States assumed the responsibility and demanded him as her servant, if in friendship, comity required his surrender to his master; if in anger, then the quarrel is with the master.

But the case does not turn upon *comity* alone.

We have seen that Congress has power "to lay and collect taxes" and "to pass all laws necessary and proper to execute the power," and a law has been passed and an officer appointed to execute it, and that officer says he has been resisted. Now, must not the United States pro-
(534) tect its officer? What is the use of the power to lay the tax and to appoint the officer if he may not be protected? It is no answer to this to say he may be protected when he does right, but not when he does wrong; for how can the United States know whether he has done right or wrong unless she can try him, and how can she try him unless he be delivered up on demand? It would seem to be too plain for discussion that the right to protect the officer is indispensable to the service and inseparable from the power of the Government which appoints him. Nor is it an answer to say that the *State* will protect him if he deserves protection; for no one ever heard that one Government could intrust the execution of its laws, or the control of its officers, to another Government, however friendly. Governments could not remain friendly upon such relations.

But the case does not stand upon this *implied* right alone of the United States to protect its officers, but upon an express act of Congress, which is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under any revenue law of the United States . . . on account of any act done under color of his office, or of any such law, . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court, and in the following manner," etc. U. S. Rev. Stat., sec. 643.

It is not denied, but is admitted by all, that that act of Congress in *express terms* authorizes the removal and justifies the order of *Judge Cox* in this case. But then it is said that that act is unconstitutional and void. And we now have to consider that question.

As preliminary, we would remark that if we were satisfied that his Honor was in error in holding the act to be constitutional, we would still commend his prudence; for it is settled by all the authorities that
(535) no court, not even the highest, upon full consideration, ought to

declare an act, either of Congress or the General Assembly, unconstitutional unless it is *plainly* so. And the act in question, substantially in the same form as now, having been upon our statute-book for a half century, and repeatedly considered and never having been declared void by any court or text-writer, it would have been a judicial adventure to make a conflict of jurisdiction between the State and the United States courts. But we think his Honor was not only prudent, but wise, and that his decision was right.

We invite attention to a short history of the act in question, which we are able to give from the act itself as enacted and reënacted at different times and for different purposes. This will be found most conveniently by reference to 1 Abbott's United States Practice and the United States Revised Statutes. And we are also aided by an opinion of the Solicitor-General of the United States, indorsed by the Attorney-General of the United States, filed in the case.

As early as the Judiciary Act of 1789 it was provided for the *removal* of causes from the State to the Federal court *before trial* in certain civil suits, and for the "reëxamination" of certain cases *after judgment* in the highest State court. In 1815 removals were provided for *before trial* in revenue cases, both in civil and criminal cases, except in *such* criminal cases as inflicted corporal punishment. *Note* that here was the removal of criminal cases, which is now so stoutly denied.

For one purpose and another this provision for removal was repeatedly reënacted until 1833, when the matter was brought most prominently forward, in order to meet the pretensions of nullification. It was brought before Congress by President Jackson. It was elaborately discussed and fully considered by the ablest men which this country has ever produced. The Judiciary Committee of the United States Senate—Wilkins, Webster, Frelinghuysen, Grundy, and Mangum—reported the bill, (536) Mangum dissenting. It was fully discussed and passed almost unanimously in the Senate, and by a large majority in the House. That bill was not precisely, but substantially, the same as the act of 1815, and the act now under consideration of 1866. The act of 1815 allowed the removal of all cases, civil and criminal, not involving corporal punishment. The act of 1833 left out the exception and substituted any "suit or prosecution," and the act of 1866 substituted "any civil suit or criminal prosecution."

It is not now denied that *civil* action may be removed, but it is denied that *criminal* actions can be. Why not? There are both expressly named in the act. The objection is put principally upon two grounds: First, that although the act says criminal actions may be removed, yet it provides *how* civil actions may be removed, and does not provide *how* criminal actions may be removed. This is a mistake; and it is a little

surprising that the learned counsel did not discover the fallacy of the argument which led them to that conclusion. They say that the act provides that if the suit was commenced by summons, then it may be removed simply by *certiorari;* but if by *capias,* then by *habeas corpus;* and that this only applies to civil actions. But the truth is that it applies to both civil and criminal. It means that if the action, whatever it is, was by summons, so that the defendant is at large, a *certiorari* will bring the record, and the defendant can come himself. But if the action, whatever it is, was by *capias,* so that the defendant is in custody and cannot come, then there must be a *certiorari* to bring the record and a *habeas corpus* to bring the defendant.

The second objection is that it is a violation of the rights of the State; that the State has the right to try offenders against her criminal law, and that she cannot be deprived of it; and that the United States (537) has no right to try offenses against State laws.

Here lies the fallacy and the danger. Every mind assents to the proposition that the United States has no jurisdiction to try offenses against the State by her citizens, or in any manner to interfere in the police regulations of the State. In these matters the State is sovereign and supreme. The fallacy consists in supposing that the matter in hand has anything to do with the State or the State with it. And the danger consists in the ease with which the people may be deceived by the fallacy, and irritated against the United States for the supposed aggression.

Let it be true, as often charged, that the United States revenue law is a bad one, and that its execution is still worse, and that it is oppresive altogether, yet North Carolina is not responsible for it. She did not pass it. She cannot repeal it. Nor can she or her citizens resist it. Any attempt to do so has always involved and will always involve, the most hurtful troubles. Yet the remedy is plain. The law was passed and is executed by the United States. The United States is not a foreign government. It is *our* Government, as much so as North Carolina is; we are represented in it, and we are its citizens. It can protect its citizens, it can punish its officers, and it can repeal bad laws. How puerile, then, it is to regard the United States as a *"foreign"* government, and to look to North Carolina or any other government to protect us against its oppressions! As well might we appeal to Virginia to protect us against the aggressions of North Carolina!

In certain particulars, North Carolina is our Government, supreme. In all matters in which there is no "Federal ingredient," she is supreme. An instance of this is the laying and collecting of her own taxes by her own officers out of her own citizens. She acts precisely as if the United States was not in existence.

So, there are particulars in which the United States is our (538) Government, supreme. In all matters in which there is a Federal ingredient, it is supreme, a familiar instance of which is the postoffice system, and so is the revenue system. In such matters it acts as if there were no State in existence. The United States lays and collects its own taxes, by its own officers out of its own citizens. It does not law a dollar of tax upon the State of North Carolina, nor upon any citizen of North Carolina, *as such.* No citizen of North Carolina, *as such,* ever paid a dollar of taxes to the United States. Its taxes are laid upon citizens of the United States by a uniform rule all over the Nation. If it oppresses any one, it is not a citizen of any State, *as such,* but its own citizen. What, then, has North Carolina to do with it? Can it be supposed that when the United States lays a tax upon its citizens uniform over the whole Nation, and sends out its officers to collect it, its officers are subject to arrest and trial in each of thirty-eight States of the Union, with as many different views and constructions? If so, then the collection of the United States taxes is at the mercy of the States; and as taxes are necessary to the existence of every government, the very existence of the United States would be at the mercy of the States, or of any one of them.

It is claimed for the State that she must try every offense against her "peace and dignity," and that an assault and battery and a trespass upon property are such offenses. This, as a general proposition, is undoubtedly true. But suppose a United States revenue officer arrests a delinquent United States taxpayer, or seizes his property, and a question arises as to whether the arrest or seizure was regular: is that a matter for the State or is it for the United States to try? It is claimed for the State that she must try the officer in the State Superior Court, and then there may be an appeal to the State Supreme Court, and then it may be removed to the United States Supreme Court. (539) Now, upon the supposition that it was a matter of State sovereignty, how is it preserved by allowing the United States to take it out of its hands at all? It is a luxury which a sovereign State should covet, to try and convict a man whom she cannot punish? It is an insult to her dignity, they say, to refuse to let her try and convict, but it is quite a compliment not to let her punish!

It is true that if the State does try and convict, the officer may be protected in the manner above stated, by removing the case to the United States Supreme Court by writ of error, but it is vaxatious and dilatory to the officer and destructive of the United States service; for although another and another officer might be appointed in the place of the one arrested, yet they all might be arrested in like manner.

To prevent these evils, an act of Congress has been passed to remove the case from the State to the Federal court *before trial;* and it is this

act which is resisted. Admitting that the case may be moved *after trial,* they deny that it can be removed *before* trial. Now, in the discussion in the United States Senate upon the passage of the removal act of 1833, it was said that while it might be supposed to be some reflection upon the State courts to allow them to try the case and convict, and then remove it from them, yet there could be no such supposition where the removal was *before* trial. But now, conceding the propriety of removal *after* trial, the sensitiveness is about the removal *before* trial. The truth is that there ought to be no sensitiveness about either. It ought to be a matter of satisfaction that the United States is ready at any time, and especially at the earlist time, to take judicial control of its officers for trial, and for protection of its citizens and taxpayers; for just as two neighbors, although they may be the best friends, or even brothers, cannot live in peace if either will punish the children or servants of
(540) the other, so two sovereigns cannot preserve friendly relations, or even their own existence, if either seeks to control and punish the servants of the other. Hence, "the moment a public minister, or agent, enters the territory of the State to which he is sent, during the time of his residence and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, civil and criminal." Wheaton's International Law, 224, 209n. "In all cases of offenses committed by public ministers affecting the existence and safety of the State where they reside, if the danger is urgent their persons and papers may be seized, and they may be sent out of the country. In all other cases it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender." *Ibid.,* 225.

These are the views which have occured to us, without reference to the decisions of other tribunals. And now, in deference to the importance of the subject and the ability with which it has been discussed, and in respect to other tribunals and in justice to ourselves, we will consider the matter in the light of the decisions of other courts.

The act of Congress having in express terms authorized the defendant to apply for the removal of the case from the State to the Federal court, and the Federal court having ordered the removal, and the State court having obeyed the order, the question is, Is the act of Congress constitutional?

We have already stated what has been the legislation upon the subject of the removal of cases from the State to the Federal courts, from the passage of the Federal judiciary act in 1879, down to the act now under consideration (1866). We will now notice a few of the more celebrated decisions under them.

In 1816, in *Martin v. Hunter,* in the Supreme Court of the (541) United States, 1 Wheaton, 335; and in 1821, in *Cohen v. Virginia,* 6 Wheaton, 264, in the same Court, the whole matter was most elaborately discussed by the ablest counsel, and exhaustive opinions delivered by the Court, in the first case by *Justice Story,* and in the second by *Chief Justice Marshall.* And the questions were subsequently fully treated of in the light of those decisions by *Justice Story* in his work upon the Constitution. 3 Story, secs. 1695 *et seq.* It would be superfluous to say that every question then involved was settled for all time.

In the first named case the precise point was whether a *civil* suit which involved "a Federal ingredient" could be removed from a State to a Federal court, and it was decided that the removal could be made.

In the second case the precise point was whether a *criminal* prosecution involving "a Federal ingredient," and where a State was a party, could be removed from a State to a Federal court, and it was decided that the removal could be made.

Why, then, do not those cases settle this case, which is the removal of a criminal action from the State to the Federal court? It is objected that they do not, for the reason that those cases were *tried* in the State courts, and judgments rendered by the State courts, and were then removed to the Federal Supreme Court for revision; whereas this is an attempt to remove the case from an inferior State court to an inferior United States court, for which it is said for the State that there is no authority in the United States Constitution or laws. Let us examine that position, and in doing so we prefer to rely upon what has been said by those luminaries of the law, *Story* and *Marshall,* rather than upon any line of argument of our own.

It may be stated as a fact, not disputed by any, that the Federal judiciary has in one form or another supreme jurisdiction over every conceivable case which can arise which has in it a Federal ingre- (542) dient, as it is admitted this case has. The supreme Court of the United States has original jurisdiction—that is, suits may be commenced in that Court in two cases: (1) where ambassadors, etc., are concerned, and (2) where a State shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the Congress shall make. Art. III, sec. 2. It follows that if the United States judiciary has jurisdiction of all cases with a Federal ingredient, and the United States Supreme Court has original jurisdiction in only two cases, then the inferior United States courts must have original jurisdiction in all other cases except the two, as they also have in those two under certain circumstances But it does not follow that because the United States inferior courts have original jurisdiction in all cases except the two, that they may not have also appellate

jurisdiction from one to another, and from a State court. It is said expressly by *Justice Story* and by *The Federalist,* contemporary with the adoption of the United States Constitution, that inferior courts may have such jurisdiction.

Justice Story says: "But although the Supreme Court cannot exercise original jurisdiction in any cases except those specially enumerated, it is certainly competent for Congress to vest in any inferior courts of the United States original jurisdiction of all other cases not thus specially assigned to the Supreme Court; for there is nothing in the Constitution which excludes such inferior courts from the exercise of such original jurisdiction. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power; and except so far as the Constitution has made any distribution of it among the courts of the United States, it remains to be exercised in an original or appellate form, or both, as Congress may in their wisdom deem fit. Now, (543) the Constitution has made no distribution except of the original and appellate jurisdiction of the Supreme Court. It has nowhere insinuated that the inferior tribunals shall have no original jurisdiction. It is nowhere affirmed that they shall have appellate jurisdiction. Both are left unrestricted and underfined. Of course. as the judicial power is to be vested in the supreme and inferior courts of the Union, both are under the entire control and regulation of Congress." Story Const. L., sec. 1698, citing *Martin v. Hunter, Osborne v. Banks,* and *Cohen v. Virginia.*

And again he says: "There is no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction, section 1701. *The Federalist,* No. 82, is put as a note to that section as follows:

"*The Federalist,* No. 82, has spoken of the right of Congress to vest appellate jurisdiction in the inferior courts of the United States from State courts (for it had before expressly affirmed that of the Supreme Court in such cases) in the following terms: 'But could an appeal be made to lie from the State courts to the subordinate Federal jurisdictions? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affimative.' And then, after enumerating the considerations, proceeds: . . . 'Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the Legislature.' And this being the case, I see no impediment to the establishment of an appeal from the State courts to the subordinate National tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of Federal courts, and would admit of arrangements calculated to contract the

appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of Federal causes, and appeals in most cases, in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State (544) courts to district courts of the Union."

In *Cohen v. Virginia, Chief Justice Marshall* says: "There can be no doubt that Congress may create a succession of inferior courts in each of which it may vest appellate as well as original jurisdiction."

Again he says: "If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. . . . And if the right of removal from State courts before judgment, because it is included in the appellate power, it must for the same reason exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising the power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment as after, and both must stand or fall together."

And again he says: "The remedy, too, of the removal of suits would be utterly inadequate to the purposes of the Constitution if it acted only on the parties, and not on the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in many civil suits there would in many cases be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases there would at once be an end of all control, and (545) the State decisions would be paramount to the Constitution."

The expression above, that "in respect to criminal prosecutions it seems to be admitted to be insurmountable," has had a strange construction in the argument in this case. It is construed to mean that there is an insurmountable difficulty *against* their removal. Whereas it means precisely the contrary. It means that if they cannot be removed, the difficulties would be insurmountable, because it would make the State courts superior to the Constitution of the United States. And *Chief Justice Marshall* says: "The public mischiefs which would attend such a state of things would be truly deplorable."

We will refer now to a late case in the Supreme Court of the United States, *The Mayor v. Cooper*, 6 Wallace, 247. It was a civil suit, commenced in the State court, for trespass on property. The defendants'

defense was that they were acting under orders of the President of the United States, and under the acts of Congress of 1865, '66—same as in this case. They filed their petition in the Federal Circuit Court for the removal of the case from the State to the Federal court. The State court sent the case to the Federal court, and the Federal court dismissed the case and sent it back to the State court for trial, holding that the acts of Congress were void; and from that ruling the case went up to the Supreme Court of the United States. We call attention to the fact that here was a case which went from a subordinate State court to a subordinate Federal court, and thence to the Supreme Court of the United States, without having gone to the State Supreme Court at all.

The opinion of the United States Supreme Court in that case, speaking of the jurisdiction of the courts, says: "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extend-
(546) ing as well to the courts of the States as to those of the Nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. . . . It is the right and the duty of the National Government to have its Constitution and laws interpreted and applied by its own judicial tribunals. . . . This is essential to the peace of the Nation and to the vigor and efficiency of the Government. A different principle would lead to the most mischievous consequences. The courts of the several States might determine the same question in different ways. There would be no uniformity of decision. For every act of an officer, civil or military, of the United States, including alike the highest and the lowest, done under his authority, he would be liable to harassing litigation in the State courts. However regular his conduct, neither the laws nor the Constitution of the United States could avail him, if the views of those tribunals and of the juries which sit in them should be adverse. The authority which he had served and obeyed would be impotent to protect him. Such a government would be one of pitiable weakness and would wholly fail to meet the ends which the framers of the Constitution had in view. They designed to make a government, not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of this Court have uniformly held that it is so. . . . We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen."

These authorities are too plain to be misunderstood, and of too high authority to be disregarded.

But we repeat, and desire it to be distinctly understood, that neither these authorities nor anything that we have said go to the extent of say-

ing that the United States courts have any power to try offenses "against the peace and dignity of the State," nor to control the State courts therein. But where a United States officer is charged with a duty (547) and does acts under color of his duty which, but for his office, would be a crime against the State, then and in that case the United States courts have jurisdiction, and under the act of Congress can remove the case from the State courts into the Federal courts. This power is indispensable to the United States, and is in no way derogatory to the State.

How the Federal courts dispose of the case, and of the officer, is for them to determine. All that the State has to do is to send the case, when demanded, to the Federal court. As has been already said, the defendant is an officer of the United States; the taxpayers whom he has offended are citizens of the United States; the United States is able and we are to suppose willing to protect its citizens from the oppression of its officer, if he has oppressed them; and to protect its officer, if they have resisted him. Just as North Carolina is bound to protect its citizens in "life, liberty, and property," so the United States is bound to protect its citizens in "life, liberty, and property." When the United States is dealing with its citizens—collecting its taxes, for instance—the State must stand off; and when the State is dealing with its citizens the United States must stand off.

Nor is it to be understood from anything that we have said that when a man commits a crime against the laws of the State *in his individual capacity,* whether the crime is small or great, that he can defend himself by the fact that he is a United States officer. Not at all. He is just as guilty, and may be convicted—hung it may be—just as if he was not an officer. It is only where the act complained of is an official act, or done by virtue or under color of his office, that he is entitled to have his case passed upon by the power which appointed him. To his own master he must stand or fall; for illustration: If the defendant arrested a man, that is a crime against the State for which the (548) State court may try him; but if he says, "True, I arrested him; but I as a United States officer arrested him as a delinquent taxpayer," then that which *seemed* at first to be a crime against the State *seems* now to be official duty to the United States; and whether it is or not, the United States has the right to determine.

It would seem that the proper way to have disposed of this case was that which was pursued in the case already cited—*The Mayor v. Cooper.* In that case, as in this, the State court sent the case to the subordinate Federal court, and the plaintiff followed the case into the Federal court and moved to dismiss it and send it back to the State court for trial, which the Feedral court did, and then the defendant appealed to the

Supreme Court of the United States by writ of error. So here, when *Judge Cox* ordered the case to be sent to the Federal court, the State ought to have followed the case to the Circuit Federal Court and moved to dismiss it upon the ground that the act complained of was done by the defendant, not as an *officer,* but as a *man,* and then the Federal court could have determined that matter; and if it had been satisfied that the defendant was not acting as an officer, or, if he was. that he was misbehaving, then the case could have been returned to the State court for trial; but if satisfied that the defendant was only doing his duty as an officer, then he could have been discharged, and from the judgment of the Circuit Court either party could have carried it to the Supreme Court of the United States.

But to this it is objected that the Circuit Federal Court has no power to do anything with it, if it were sent to it, and, therefore, why send it? That is a mistake. If that were so, what would have been the action of the Supreme Court of the United States in the case last cited—*The Mayor v. Cooper?* It would have sustained the action of the court below in dismissing the case for want of jurisdiction; but instead of that, it reversed the action of the court below, and said, "An order will
(549) issue that the cause be *reinstated,* and that the court below proceed in it according to law."

Why "reinstate" it if it ought not to have been there? Why "proceed in it according to law" if it could not proceed at all?

The question as to *how* the Circuit Federal Court will proceed, or what it should do, is not before us. If there is any defect of the machinery, Congress can supply it. Nor is there any difference between criminal and civil cases so far as the power of removal is concerned, as we have already shown. The points intended to be decided are: (1) That the act of Congress under which the removal was ordered is constitutional; and (2) that the ruling of *Judge Cox* was proper.

RODMAN, J., dissenting: I am unable to concur in the opinion of my associates, and it is respectful to them to state my reasons.

The question has been learnedly and ably discussed at the bar here and elsewhere, and probably every argument has been exhausted which can properly bear upon it.

We have been informed, also, that it is the intention of the parties, whatever our decision may be, to obtain the decision of the Court having final jurisdiction of all questions arising out of the Constitution of the United States. We hope that course will be taken. The importance of the question requires it. All the reasons that exist on either side will be presented to that Court, and whatever its decision may be, it will be

acquiesced in and cheerfully followed by this Court, and I have no doubt by every department of the Government, as well as by the people of North Carolina.

For these reasons, I shall be as brief as possible, stating merely the principles upon which I think the case ought to be decided, without uselessly consuming space by attempting to support them by a full exposition of the argument or by a citation of authorities. For (550) those, I refer to the discussions I have alluded to.

No doubt the act of Congress of 1866 intended to embrace criminal prosecutions for offenses against the State such as that for which the present defendant is indicted. If the act is constitutional, they must be removed to the Circuit Court, whatever may be done with them there. That Congress has not provided for the trial of such cases after their removal is not an argument that it did not intend a removal, which can weigh against the plain language of the act. It would prove that the act was defective. But this would not justify a State court in refusing to obey it.

The only question is, Had Congress the constitutional power to pass the act? I think it had not.

It is conceded, I think, and I will assume it, that the Circuit Courts of the United States have no original jurisdiction of an indictment for a crime which is such merely by the common law and has never been made a crime by any act of Congress. The indictment in this case, which is for an assault and battery by one citizen of North Carolina upon another citizen of the State within a county of the State, could not have been found in the Circuit Court.

A jurisdiction acquired by the removal of an action from a State court, I think, is original jurisdiction, according to the legal as well as the ordinary meaning of the term.

Before there can be an appeal, some decision of fact or law, or of both, must have been made which it is the object of the appeal to reverse. In the present case there has been no decision (except an interlocutory one), and there can be no appeal, except in some new and forced sense of the word.

It is an established rule that technical terms must be interpreted in the sense which they bear by the usage of the profession. If we abandon this rule, then we may give them any meaning that we please, and for any reason, or by caprice. (551)

When *Judge Marshall* classed the jurisdiction acquired by removal as appellate, he did so merely *arguendo*. The classification formed no part of the decision, and its accuracy in this respect was not necessary to support it. Whatever so great a judge says, even if it be without

much consideration, deserves respect; but it is not authority, in the proper sense of that term, to which the courts must submit their reason.

The United States and the several States may be regarded as in some respects foreign to and independent of each other. Each has its sphere of action in which it is severeign. The Constitution, in giving powers to the Federal courts, gave, or authorized Congress to give to them, all such jurisdiction as was necessary to preserve the independence and sovereignty of the United States in all cases within the sphere of its duties, but it left to the State courts jurisdiction to administer the domestic laws of the State among its own citizens. Of a crime against the United States the Federal courts alone have jurisdiction. Of a crime against the State the courts of the State alone have original jurisdiction; and if in the course of the trial some Federal element appears, the case may be decided on appeal by the Supreme Court of the United States, in order that the sovereignty of the United States may be guarded and an uniform construction given to its laws. It would break in upon this harmonious arrangement of powers, whereby no clashing can ever occur, if it were held that the State courts could not try breaches of the peace within the borders of the State between its own citizens whenever the party accused was an officer in the revenue service of the United States and claimed that the act had been done in the discharge of his official duty. If such be the law, the States have lost the last remnant of sovereignty. They cannot preserve order within their territories. A class is created that defies their laws, is independent of their jurisdiction, and relies for immunity upon a government which has no duty and no
(552) interest to preserve the peace of the State, and, in my opinion, no power under the Constitution to do so through the original jurisdiction of its courts, or except in cases of which this is confessedly not one.

The Circuit Courts can have no jurisdiction in a case which they cannot determine. They cannot try the accused in this case, because he is not charged with any offense against the Government whose laws *only* they administer. They cannot punish if they should convict him, because Congress has prescribed no punishment, and the court can inflict none at common law. Nor can any act of Congress remedy these defects of power. If Congress could, and should, make every crime at common law a crime against the United States, still they would remain crimes against the State, which the State courts could try and punish. The States must have jurisdiction to try offenses against their laws, or they cease to be States. It is a power necessarily inherent in a State. It alone makes a State.

It is said that the Federal courts must have the sole power of trying its revenue officers for assault and other offenses committed by them by

color of their office, and of determining their criminality, as otherwise it could not collect its internal revenue. The jurisdiction of the Federal courts in such cases is thus argued to be a necessary and proper incident to the power to collect taxes. If it were true that the United States could not collect internal taxes without this jurisdicion in the Federal courts, it would follow that Congress could constitutionally give it, for the power of Congress to lay and collect taxes is undoubted. These apprehensions spring from an excessive sensibility. I believe they are groundless. I think that the United States, with its unlimited irregular army of revenue collectors, detectives, and marshals, with all their assistants and deputies, backed in case of need by the regular army, *can* collect its taxes, and *still* leave to the State courts the jurisdiction to try (553) one of these officers for a crime against the State committed within the borders of the State, and which is a crime against no other sovereignty but that of the State. The State of North Carolina collects its revenues, which are all from direct taxation, by ninety-four sheriffs, without violence, without oppression, and without complaint.

If the officer acted in what he did within the scope of his duty, it would be a defense in the State court; and if it be possible that juries might from prejudice sometimes fail to give due weight to the evidence in his behalf, the judges of the State, whom we must assume to be equal in integrity and impartiality to the Federal judges, may certainly be trusted to set aside all convictions against the weight of evidence. If we may suppose it possible that any judge should so fail in his duty from prejudice or partiality, this Court would probably have the power, and certainly the inclination, to give relief. 11 Bush. (Ky.), 495. If the highest State Court, when the case is brought before it, shall err in any matter of law, it is admitted that the error could be corrected on appeal to the Supreme Court of the United States.

On the other hand, if the power of withdrawing an indictment against a revenue officer from the State courts shall be sustained, immunity will practically be secured for all these officers for all offenses. Conceding, as I do, that the judges and officers of the Circuit Court may be expected to discharge their duties with fidelity, yet when an offense committed in a distant part of the State is removed for trial to Raleigh or Greensboro, in the great majority of cases the prosecutor and the witnesses will be unable to attend, and a verdict of acquittal will be the necessary result. The injured persons would brood over their supposed or real injuries, and a spirit of dissatisfaction with the Government would grow up by no means conductive to the public good. The insurrection of Watt Tyler was caused by the crime of an internal revenue officer com- (554) mitted under color of his office. To deprive the State courts of the power of punishing such offenses would result in breeding a band of

marauders under color of law, forming a class with peculiar and odious privileges, whose existence would be as incomparable with the honor and welfare of the United States as with the dignity of the States and their power to preserve peace and order within their limits. These considerations far outweight any increased facilities in the collection of taxes which might be gained by depriving the States of this jurisdiction.

Fortunately, this question is of an interest and importance not confined to any section. Taxes are collected in all the States, and it may be supposed that the manners and methods of proceeding of the inferior officers of internal revenue are of the same polite and agreeable character all over the world. The same questions must arise, sooner or later, in every State, and every State has the same interest in the decision of this case that North Carolina has. In my opinion, the order of the Superior Court for the removal of this action to the Circuit Court of the United States should be reversed and the Superior Court directed to try the prisoner.

PER CURIAM. Affirmed.

Cited: S. v. Deaver, post, 555; *S. v. Sullivan,* 110 N. C., 518; *Baird v. R. R.,* 113 N. C., 609; *Harkins v. Cathey,* 119 N. C., 664.

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(555)

STATE v. WILLIAM H. DEAVER ET AL.

Where the court below, upon motion of a defendant (a United States officer), in an indictment for conspiracy, ordered the removal of the cause to a Federal court in pursuance of section 643 of the Revised Statutes of the United States: *Held,* not to be error.

MOTION for the removal of a cause upon petition of defendants, made in pursurance of the United States Revised Statutes, sec. 643, heard at Spring Term, 1877, of RUTHERFORD, before *Cloud, J.*

The defendant Deaver, a United States deputy collector, and the defendant J. W. Green, a United States commissioner, were indicted at Fall Term, 1876, of said court, for a conspiracy to extort money from one Henry Summit, who was arrested at the instance of the defendants and carried before said commissioner to answer an alleged charge of defrauding the revenue of the United States, in having in his possession manufactured tobacco without the same being stamped as required by law. When the case was called, the defendants moved the court to order its clerk to send to the United States Circuit Court for the Western District of North Carolina a transcript of the record, in obedience to a writ

of *certiorari* issued therefrom. This motion was resisted on the ground that the act of Congress authorizing the removal of a cause of this character was unconstitutional. His Honor being of a contrary opinion, allowed the motion, and Montgomery, solicitor for the State appealed.

Same counsel as in S. v. Hoskins, ante, 530.

READE, J. The principles involved in this case are the same (556) as those in *S. v. Hoskins, ante,* 530, and the decision is the same, and the opinion in that case will be certified as the opinion in this

PER CURIAM. Affirmed.

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