[ANNOTATIONS INCLUDE 161 N. C.]

NORTH CAROLINA REPORTS

VOL. 79

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1878

THOMAS S. KENAN, REPORTER.

ANNOTATED BY
WALTER CLARK
2D ANNO. ED.

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CASES REPORTED

	PAGE
Achenbach, Boyden v.	539
Alspaugh v. Winstead	526
Anderson, Gardner v.	24
Ashcraft v. Lee	34
Ashford, Jones v.	172
Askew v. Capehart	17
Austin, S. v.	624
Badger v. Daniel	372
Bahnsen v. Clemmons	556
Ballard, S. v.	627
Bank, Brown v.	244
Banks, Parker v.	480
Bank v. Williams	129
Barham, S. v.	646
Barnes v. Brown	401
Barnes, Dickens v.	490
Beard v. Hall	506
Beard, Lord v.	5
Beardsley, Straus v.	59
Benton, Britt v.	177
Bernheim v. Waring	56
Blue v. Blue	69
Boyden v. Achenbach	539
Boyett v. Vaughan	528
Brandon, Paschall v.	504
Bratton v. Davidson	423
Britt v. Benton	177
Brock, Price v.	600
Brower, Furr v.	408
Brown, Barnes v.	401
Brown v. Bank	244
Brown, Norment v.	363
Brown, S. v.	642
Bryson, S. v.	651
Buie v. Commissioners	237
Bunting v. Stancill	180
Burbank v. Wiley	501
Burgwyn, Grant v.	513
Burnett v. Nicholson	548
Burton, Winfield v.	388
Bushee v. Surles	51
Caldwell, Perkins v.	441
Capehart, Askew v.	17
Capehart, Hyman v.	511
Castle, Ray v.	580
Chadbourn, McNeill v.	149
Chambers, Dobson v.	142
Chastain v. Coward	543
Clemmons, Bahnsen v.	556
Clerk's Office v. Com'rs	598
Coble v. Coble	589
Collins v. Insurance Co.	279
Com'rs v. Com'rs	565
Com'rs v. Buie	267
Com'rs v. McPherson	524
Com'rs, Clerk v.	598
Conigland v. Smith	303
Cook v. Sexton	305
Copeland, Matthews v.	493
Coward, Chastain v.	543
Coward, Chastain v.	543
Crafton, Hoff v.	592
Daniel, Badger v.	372
Davidson, Bratton v.	423
Davis, S. v.	603
Dawson v. Hartsfield	334
Dewey, Isler v.	1
Dickens v. Barnes	490
Dobson v. Chambers	142
Dunn v. Tillery	497
Durham, Porter v.	596
Edwards, State v.	648
Evans v. Williamson	86
Fickey v. Merrimon	585
Forehand, Whitsett v.	230
Fraley v. Kelly	348
Froneberger v. Lewis	426
Furr v. Brower	408
Gardner v. Anderson	24
Gholson v. King	162
Gidney v. Logan	214
Gold Co. v. Ore Co.	48
Grant v. Burgwyn	513
Green v. Green	343
Green, Jeffries v.	330
Gregory v. Morisey	559
Griffith, Young v.	201
Hall, Beard v.	506
Hardin, Cowles v.	577
Harrell v. Peebles	26
Hartsfield, Dawson v.	334
Haywood v. Haywood	42
Heck v. Williams	437
Henderson v. Lemly	169
Henderson v. McBee	219
Heptinstall, Powell v.	206
Hewlett v. Nutt	263
Hill v. Oxendine	331
Hill, S. v.	656
Hobbs, Moore v.	535
Hodges v. Spicer	223

	PAGE
Hoff v. Crafton	592
Holliday v. McMillan	315
Houston v. Wash	35
Howard, Manix v	553
Hudson v. Wetherington	3
Humphrey v. Humphrey	396
Hyman v. Capehart	511
Hyman, Lawrence v	209
Ins. Co., Collins v	279
Ins. Co., Willis v	285
Isler v. Dewey	1
James, Wilson v	349
Jeffries v. Green	330
Johnson v. Parker	475
Jones v. Ashford	172
Jones v. Mial	164
Jones v. Reddick	290
Jones, S. v	630
Jones v. Swepson	510
Kelly, Fraley v	348
Kenan, Pearsall v	472
Kerchner, Oldham v	106
King, Gholson v	162
King v. M'f'g Co	360
Krider v. Ramsay	354
LaFountain v. So. Underwriters Asso.	514
Lane v. Richardson	159
Lanier, S. v	622
Lawrence v. Hyman	209
Lee, Ashcraft v	34
Lemly, Henderson v	169
Lewis, Froneberger v	426
Lewis v. Rountree	122
Logan, Gidney v	214
Lord v. Beard	5
Lord v. Merony	14
Manix v. Howard	553
Manning v. Manning	293, 300
Mfg. Co., King v	360
March v. Verble	19
Matthews v. Copeland	493
McBee, Henderson v	219
McCombs, Sudderth v	398
McKee v. Vail	194
McLaughlin, Sever v	153
McMillan, Holliday v	315
McNeil v. Chadbourn	149
McPherson, Com'rs v	524
Meekins v. Tatem	546
Merony, Lord v	14
Merrimon, Fickey v	585
Mial, Jones v	164
Michaux, Perry v	94
Mizell v. Simmons	182
Monroe v. Whitted	508
More v. Hobbs	535
Moore, Smith v	82
Morisey, Gregory v	559
Morris v. Pearson	253
Mulford v. Sutton	276
Myers, Swann v	101
Neely v. Neely	478
Nicholson, Burnett v	548
Norment v. Brown	363
Nutt, Hewlett v	263
Oldham v. Kerchner	106
Orchard, Ten Broeck v	518
Outlaw, Todd v	235
Oxendine, Hill v	331
Parish, S. v	610
Parker, Banks v	480
Parker, Johnson v	475
Parrott, S. v	615
Paschall v. Brandon	504
Patrick, S. v	655
Paxton, Pruden v	446
Pearsall v. Kenan	472
Pearson, Morris v	253
Peebles, Harrel v	26
Penland, Wiseman v	197
Perkins v. Caldwell	441
Perry v. Michaux	94
Pickens, S. v	652
Pipkin, Smith v	569
Porter v. Durham	596
Powell v. Heptinstall	206
Price v. Brock	600
Pruden v. Paxton	446
Ramsay, Krider v	354
Ray v. Castle	580
Reddick, Jones v	290
Reddick, Whedbee v	521
Richardson, Lane v	159
Rogers, S. v	609
Rountree, Lewis v	122
Sanderson v. Sanderson	369
Sanderson, Spruill v	466
Sever v. McLaughlin	153
Sexton, Cook v	305
Shelton, S. v	605
Shields v. Smith	517
Shinn v. Smith	310
Simmons, Mizell v	182
Skinner, Wood v	92
Smith, Conigland v	303
" v. Moore	82
" v. Pipkin	569
" Shields v	517
" Shinn v	310
" v. Smith	455

CASES REPORTED

PAGE

So. Underwriters, La Fountain v. 514
Spicer, Hodges v. 223
Spruill v. Sanderson 466
Stancill, Bunting v. 180
S. v. Austin 624
" Ballard 627
" Barham 646
" Brown 642
" Bryson 651
" Davis 603
" Edwards 648
" Hill 656
" Jones 630
" Lanier 622
" Parish 610
" Parrott 615
" Patrick 655
" Pickens 652
" Rogers 609
" Shelton 605
" Swepson 632
" Sykes 618
" Willard 660
Stinson, Withers v. 341
Straus v. Beardsley 59
Sudderth v. McCombs 398
Surles, Bushee v. 51
Sutton, Mulford v. 276
Swann v. Myers 101
Swepson, Jones v. 510
" S. v. 632
Sykes, S. v. 618

Tankard v. Tankard 54
Tatem, Meekins v. 546
Ten Broeck v. Orchard 518
Thompson, Whitehead v. 450
Tillery, Dunn v. 497
Todd v. Outlaw 235

Vail, McKee v. 194
Vaughan, Boyett v. 528
Verble, March v. 19

Walsh, Houston v. 35
Waring, Bernheim v. 56
Webber v. Webber 572
Weeks v. Weeks 77
Wetherington, Hudson v. 3
Whedbee v. Reddick 521
Whitehead v. Thompson 450
Whitsett v. Forehand 230
Whitted, Monroe v. 508
Wiley, Burbank v. 501
Willard, S. v. 660
Williams, Bank v. 129
" Heck v. 437
" v. Williams 411, 417
" v. Wooten 414
Williamson, Evans v. 86
Willis v. Ins. Co. 285
Wilson v. James 349
Winfield v. Burton 388
Winstead, Alspaugh v. 526
Wiseman v. Penland 197
Withers v. Stinson 341
Wood v. Skinner 92
Wooten, Williams v. 414

Young v. Griffith 201

CASES CITED

Abrams v. Cureton..... 74 N. C., 523..... 421
Archer v. Haithcock..... 51 N. C., 421..... 292
Armfield v. Brown..... 70 N. C., 27..... 213
Armistead v. Harromond..... 11 N. C., 339..... 387
Ashbee v. Cowell..... 45 N. C., 158..... 71
Ashe v. Moore..... 6 N. C., 383..... 313
Atkinson v. Richardson..... 74 N. C., 455..... 331
" v. Whitehead ..... 77 N. C., 418..... 180
Austin v. Rodman..... 8 N. C., 71..... 30

Badger v. Daniel..... 77 N. C., 251.....391, 241
Baird v. Baird..... 62 N. C., 317..... 240
Baker v. Evans..... 4 N. C., 417..... 483
Barnard v. Kilpatrick..... 71 N. C., 281..... 45
Barham v. Lomax..... 73. N. C., 78..... 471
Batts v. Winstead..... 77 N. C., 238..... 471
Becker v. Saunders..... 28 N. C., 380..... 68
Bell v. Walker..... 50 N. C., 43..... 112
Benbow v. Robbins..... 71 N. C., 338..... 474
Benedict v. Hall..... 76 N. C., 113..... 580
Bender v. Askew..... 14 N. C., 149..... 30
Blake v. Respass..... 77 N. C., 193..... 570
Blount v. Blount..... 4 N. C., 389..... 260
Blum v. Ellis..... 73 N. C., 293..... 342
" v. Stafford..... 49 N. C., 94..... 211
Bond v. Billups..... 53 N. C., 423..... 387
Bost v. Bost..... 56 N. C., 484..... 449
Bost Ex Parte..... 56 N. C., 482..... 76
Boyd v. Hawkins..... 17 N. C., 105..... 430
Brannock v. Brannock..... 32 N. C., 428..... 257
Brinkley v. Swicegood..... 65 N. C., 626..... 113
Brockway v. Crawford..... 48 N. C., 433..... 607
Brodnax v. Groom..... 64 N. C., 244..... 35
Brooks v. Britt..... 15 N. C., 481..... 193
Brothers v. Brothers..... 42 N. C., 150..... 431
Brown v. Brown..... 37 N. C., 309..... 448
" v. Coble..... 76 N. C., 391..... 492
" v. Pike..... 74 N. C., 531..... 379
" v. Pratt..... 56 N. C., 202..... 292
Bryan v. Foy..... 69 N. C., 45..... 589
" v. Hubbs..... 69 N. C., 423..... 33, 40
Bufferlow v. Newsom..... 12 N. C., 208..... 352
Burke v. Stokely..... 65 N. C., 569..... 512
Burnett v. Thompson..... 48 N. C., 113..... 237
Bynum v. Bynum..... 33 N. C., 632..... 627

Campbell v. Drake..... 39 N. C., 94..... 395
" v. McArthur..... 9 N. C., 33..... 190
Cansler v. Fite..... 50 N. C., 424..... 188
Capps v. Holt..... 58 N. C., 153..... 492
Carraway v. Cox..... 30 N. C., 79..... 217
Carrier v. Hampton..... 33 N. C., 307..... 237
Carson v. Burnett..... 18 N. C., 546..... 187
Carter v. Cocke..... 64 N. C., 239..... 261

Chambers v. Payne ..... 59 N. C., 276 304
" v. Penland ..... 78 N. C., 53 10
Cherry v. Slade ..... 10 N. C., 82 193
Childs v. Martin ..... 69 N. C., 126 44
Churchill v. Lee ..... 77 N. C., 341 4
Clayton v. Jones ..... 68 N. C., 497 74
Clegg v. S. S. Co ..... 66 N. C., 391 ..... 30, 511
Clements v. State ..... 77 N. C., 142 112
Cobb v. Fogleman ..... 23 N. C., 440 23
Com's v. Clarke ..... 73 N. C., 255 525
" v. Ballard ..... 69 N. C., 18 567
Cook v. Redman ..... 37 N. C., 623 222
Cooper v. White ..... 46 N. C., 389 190
Cotton Ex Parte ..... 62 N. C., 79 11
Council v. Rivers ..... 65 N. C., 54 ..... 10, 595
Covington v. Stewart ..... 77 N. C., 148 480
Cowles v. Hayes ..... 69 N. C., 406 ..... 30, 510
Crow v. Holland ..... 15 N. C., 417 584
Crump v. Morgan ..... 38 N. C., 91 576

Davis v. Coleman ..... 42 N. C., 424 161
Davis v. Gulley ..... 19 N. C., 360 551
DeCourcy v. Barr ..... 45 N. C., 181 242
Deloach v. Worke ..... 10 N. C., 36 30
Derr v. Dellinger ..... 75 N. C., 300 239
Devereux v. Burgwyn ..... 33 N. C., 490 126
Devries v. Haywood ..... 63 N. C., 53 592
Dobbin v. Guster ..... 26 N. C., 71 40
Dobson v. Finley ..... 53 N. C., 495 193
Draughan v. Bunting ..... 31 N. C., 10 68

Earp v. Richardson ..... 75 N. C., 84 368
Edwards v. Jarvis ..... 74 N. C., 315 474
Edwards v. Thompson ..... 71 N. C., 177 56
Emerson v. Mallet ..... 62 N. C., 234 11

Faison v. McIlwaine ..... 72 N. C., 312 9
Falkner v. Hunt ..... 76 N. C., 202 340
Falls v. McAfee ..... 24 N. C., 236 551
Finger v. Finger ..... 64 N. C., 183 94
Finley v. Smith ..... 15 N. C., 95 40
Fisher v. Pender ..... 52 N. C., 483 170
Flemming v. Burgin ..... 37 N. C., 584 ..... 237, 483
Flynn v. Williams ..... 29 N. C., 32 259
Fraley v. Kelly ..... 67 N. C., 78 349
Freeman v. Lisk ..... 30 N. C., 211 40

Gaither v. Gibson ..... 63 N. C., 93 205
Gee v. Hines ..... 68 N. C., 315 11
Gordon v. Finley ..... 10 N. C., 299 428
Gorham v. Brenon ..... 13 N. C., 174 352
Governor v. Williams ..... 25 N. C., 152 421
Gray v. Cooper ..... 65 N. C., 183 24
Green v. Castlebury ..... 70 N. C., 20 ..... 193, 213
Green v. R. R. Co ..... 77 N. C., 95 90
Griel v. Vernon ..... 65 N. C., 76 512
Griffin v. Carter ..... 40 N. C., 413 292

Hafner v. Erwin ..... 23 N. C., 490 256
Hall v. Craige ..... 65 N. C., 51 366
Harris v. De Graffenreid ..... 33 N. C., 83 258

Harrison v. Bradley..... 40 N. C., 136..... 71
Harry v. Graham..... 18 N. C., 76..... 188
Hawkins v. Savage..... 75 N. C., 133..... 474
Heilig v. Foard..... 64 N. C., 710..... 426
Helme v. Saunders..... 10 N. C., 563..... 420
Hendrickson v. Anderson..... 50 N. C., 246..... 113
Henley v. Lanier..... 75 N. C., 172..... 349
Hervey v. Edmunds..... 68 N. C., 243..... 32
Henson v. King..... 47 N. C., 385..... 13
Hill v. Kesler..... 63 N. C., 437..... 320
Hinchey v. Nichols..... 72 N. C., 66..... 492
Hinton v. Hinton..... 61 N. C., 410..... 473
" v. Whitehurst..... 68 N. C., 316..... 384
Hodges v. Hodges..... 22 N. C., 72..... 227
Hogan v. Strayhorn..... 65 N. C., 279..... 260
Hook v. Fentress..... 62 N. C., 229..... 499
Horah v. Horah..... 60 N. C. 454
Hornthal v. McRae..... 67 N. C., 21..... 349
Houser v. Belton..... 32 N. C., 358..... 190
Howzer v. Dellinger..... 23 N. C., 475..... 73
Hudgins v. White..... 65 N. C., 393..... 511
Huggins v. Fonville..... 14 N. C., 392..... 73
" v. Hinson..... 61 N. C., 126..... 278
Hunt v. Snead..... 64 N. C., 180..... 406
" v. Bass..... 17 N. C., 292..... 429
Hutchinson v. Smith..... 68 N. C., 354..... 506
Hyman v. Devereux..... 63 N. C., 624..... 175
" v. Devereux..... 65 N. C., 588..... 337

Jackson v. Beaman..... 51 N. C., 44..... 203
" v. Hampton..... 30 N. C., 457..... 260
Jarman v. Saunders..... 64 N. C., 367..... 9
Jenkins v. Ore Co..... 65 N. C., 563..... 592
Johnson v. Sedberry..... 65 N. C., 1..... 12
" v. Winslow..... 63 N. C., 552..... 473
Jones v. Posten..... 23 N. C., 166..... 448

Keaton v. Banks..... 32 N. C., 381..... 30, 510
King v. Little..... 77 N. C., 138..... 494
" v. Murray..... 28 N. C., 62..... 352
Kirby v. Masten..... 70 N. C., 540..... 217
Kirkham v. Coe..... 46 N. C., 423..... 550
Kirkman v. Bank..... 77 N. C., 394..... 317
Kissam v. Gaylord..... 44 N. C., 116..... 188
Kyle v. Com'rs..... 75 N. C., 445..... 269

Lambert v. Lambert..... 33 N. C., 162..... 237
Lane v. Davis..... 2 N. C., 277..... 325
Land Co. v. Beatty..... 69 N. C., 329..... 579
Lassiter v. Wood..... 63 N. C., 360..... 444, 454
Latham, In Re..... 39 N. C., 231..... 571
Leach v. Harris..... 69 N. C., 532..... 362
Lee v. Howell..... 69 N. C., 200..... 435
Leggett v. Bullock..... 44 N. C., 283..... 237, 483
Linker v. Benson..... 67 N. C., 150..... 480
Lit'y Board v. Clarke..... 31 N. C., 58..... 194, 188
Luther v. Skeen..... 53 N. C., 356..... 624, 13

Mabry v. Erwin..... 78 N. C., 46..... 19, 510
Mace v. Ramsey..... 74 N. C., 11..... 112, 125

Macon v. Macon ..... 75 N. C., 376 454
Mason v. Miles ..... 63 N. C., 564 10
Matthis v. Matthis ..... 48 N. C., 132 23
Mauney v. Comrs ..... 71 N. C., 486 569
" v. Pemberton ..... 75 N. C., 219 ..... 10, 595
McAden v. Bannister ..... 63 N. C., 478 40
McCain v. Hill ..... 37 N. C., 176 227
McDaniell v. Watkins ..... 76 N. C., 399 19
McDowell v. Tate ..... 12 N. C., 249 368
McKenzie v. Culbreth ..... 66 N. C., 534 589
McKesson v. Mendenhall ..... 64 N. C., 286 500
McLennan v. McLeod ..... 70 N. C., 364 483
McNeill v. Riddle ..... 66 N. C., 290 261
McRae v. Lawrence ..... 75 N. C., 289 4
Mercer v. Wiggins ..... 74 N. C., 48 366
Miller v. Washburn ..... 38 N. C., 161 98
Mizell v. Moore ..... 29 N. C., 255 335
Monroe v. McIntyre ..... 41 N. C., 65 98
Moore v. Ballard ..... 69 N. C., 21 567
" v. Hobbs ..... 79 N. C., 535 542
" v. R. R. Co ..... 74 N. C., 528 12
Morris v. Avery ..... 61 N. C., 238 474
Morrison v. Conelly ..... 13 N. C., 213 64
Myers v. Williams ..... 58 N. C., 362 304

Nance v. R. R ..... 76 N. C., 9 359
Nash v. R. R ..... 67 N. C., 413 193
Neal v. Fesperman ..... 46 N. C., 446 4
Neeley v. Craige ..... 61 N. C., 187 474
Neighbors v Hamlin ..... 78 N. C., 42 407
Newkirk v. Hawes ..... 58 N. C., 265 304
Nichols v. Freeman ..... 33 N. C., 99 500
Norwood v. Thorp ..... 64 N. C., 682 33

Paige v. Price ..... 78 N. C., 10 580
Paschall v. Harris ..... 74 N. C., 335 439
Patton v. Alexander ..... 52 N. C., 603 193
" v. Baird ..... 42 N. C., 255 362
" v. Thompson ..... 55 N. C., 285 430
Peoples v. Maxwell ..... 64 N. C., 313 23
Perkins v. Hollowell ..... 40 N. C., 24 98
Pippen v. Wesson ..... 74 N. C., 437 331
Plummer v. Baskerville ..... 36 N. C., 252 227
" v. Brandon ..... 40 N. C., 199 421
Polk v. Gallant ..... 22 N. C., 395 237
Powell v. Weith ..... 66 N. C., 423 & 68 N. C., 342, 30, 511
Pugh v. York ..... 74 N. C., 383 340
Purvis v. Carstaphan ..... 73 N. C., 575 331
Purvis v. Jackson ..... 69 N. C., 474 411

Reid v. Pass ..... 33 N. C., 589 11
Riddick v. Moore ..... 65 N. C., 382 421
Righton v. Pruden ..... 73 N. C., 61 516
Roberts v. Roberts ..... 65 N. C., 27 432
Robinson v. Willoughby ..... 70 N. C., 358 237
Rogers v. Holt ..... 62 N. C., 108 11
Rollins v. Henry ..... 78 N. C., 342 241
Rose v. Rose ..... 63 N. C., 391 326
Rowland v. Rowland ..... 24 N. C., 61 203

Rowland v. Thompson..... 65 N. C., 110..... 426
Ryden v. Jones..... 8 N. C., 497..... 428

Sanders v. Jones..... 43 N. C., 246..... 421
Sellers v. Streaton..... 50 N. C., 261..... 169
Sharpe v. King..... 38 N. C., 402..... 98
Shewell v. Knox..... 12 N. C., 404..... 67
Shober v. Hauser..... 20 N. C., 91..... 257
Simmons v. Hassell..... 68 N. C., 213..... 434
Simonton v. Lanier..... 71 N. C., 498..... 134
Singletary v. Whitaker..... 62 N. C., 77..... 11
Singleton v. Kennedy..... 1 N. C., 629..... 535
Skillington v. Allison..... 9 N. C., 347..... 64
Skinner v. Maxwell..... 66 N. C., 45..... 351
Slade v. Smith..... 2 N. C., 248..... 485
Small v. Small..... 74 N. C., 16..... 242
Spencer v. Carter..... 49 N. C., 287..... 68
Spiers v. Halsted..... 74 N. C., 620..... 112
Springs v. Hanks..... 27 N. C., 30..... 260
Spruill v. Davenport..... 44 N. C., 134..... 188
Stack v. Williams..... 56 N. C., 13..... 381
S. v. Angel..... 29 N. C., 27..... 653
S. v. Bennett..... 75 N. C., 305..... 610
S. v. Brown..... 12 N. C., 137..... 656
S. v. Bryant..... 65 N. C., 327..... 607
S. v. Campbell..... 76 N. C., 261..... 655
S. v. Casey..... 44 N. C., 209..... 640
S. v. Clark..... 30 N. C., 226..... 656
S. v. Davis..... 78 N. C., 433..... 13
S. v. England..... 78 N. C., 552..... 658
S. v. Faucett..... 20 N. C., 107..... 659
S. v. Godet..... 29 N. C., 210..... 656
S. v. Haddock..... 3 N. C., 162..... 659
S. v. Harper..... 64 N. C., 129..... 659
S. v. Helmes..... 25 N. C., 364..... 658
S. v. Hogg..... 6 N. C., 319..... 661
S. v. Horan..... 61 N. C., 571..... 656
S. v. Jackson..... 34 N. C., 329..... 658
S. v. Jenkins..... 78 N. C., 478..... 656
S. v. Johnson..... 12 N. C., 360..... 654
S. v. Johnson..... 23 N. C., 354..... 627
S. v. Johnson..... 61 N. C., 140..... 540
S. v. Jones..... 31 N. C., 38..... 647
S. v. Krider..... 78 N. C., 481..... 656
S. v. Lamb..... 65 N. C., 419..... 652
S. v. Manuel..... 64 N. C., 601..... 650
S. v. McDaniel..... 53 N. C., 284..... 542
S. v. Molier..... 12 N. C., 263..... 644
S. v. Mooney..... 64 N. C., 54..... 618
S. v. O'Neal..... 26 N. C., 88..... 624
S. v. O'Neal..... 29 N. C., 251..... 627
S. v. Osborn..... 67 N. C., 259..... 24
S. v. Parks..... 25 N. C., 296..... 624
S. v. Pepper..... 68 N. C., 259..... 648
S. v. Powell..... 70 N. C., 67..... 648
S. v. Revels..... 44 N. C., 200..... 23
S. v. Scott..... 19 N. C., 35..... 658
S. v. Smith..... 61 N. C., 302..... 629

S. v. Smith ..... 75 N. C., 306..... 592
S. v. Speight ..... 69 N. C., 72..... 624
S. v. Stamey ..... 71 N. C., 202..... 654
S. v. Thornton ..... 35 N. C., 256..... 641
S. v. Tilghman ..... 33 N. C., 513..... 640
S. v. Tisdale ..... 19 N. C., 159..... 640
S. v. Tilletson ..... 52 N. C., 114..... 641
S. v. Underwood ..... 77 N. C., 502..... 592
S. v. Whitford ..... 34 N. C., 99..... 662
S. v. Williams ..... 18 N. C., 372..... 661
S. v. Williams ..... 65 N. C., 505..... 592
S. v. Woody ..... 47 N. C., 276..... 641
Stilly v. Rice ..... 67 N. C., 178..... 434
Stone v. Marshall..... 52 N. C., 242..... 387
Strickland v. Murphy ..... 52 N. C., 300..... 258
Sutliff v. Lunsford..... 30 N. C., 318..... 63
Sutton v. Askew..... 66 N. C., 172..... 316
" v. Madre..... 47 N. C., 320..... 23

Tally v. Tally..... 22 N. C., 385..... 572
Tatum v. Paine..... 11 N. C. 64..... 193
Taylor v. Taylor ..... 46 N. C., 528..... 576
Taylor v. Taylor ..... 54 N. C., 246..... 221
Terrell v. Terrell..... 69 N. C., ... 452
Thomeguex v. Bell..... 69 N. C., 56..... 228
Thompson v. Newlin..... 1 N. C., 44..... 575
Trustees v. Satchwell ..... 38 N. C., 338..... 221
Turner v. Elford..... 71 N. C., 111..... 261

Wade v. Odeneal..... 58 N. C., 106..... 221
Walkup v. Houston..... 14 N. C., 423..... 30
Walters v. Jordan..... 65 N. C., 501..... 366
Walton v. Robinson..... 34 N. C., 170..... 307
Ward v. Saunders..... 27 N. C., 341..... 161
Washburn v. Picot..... 28 N. C., 382..... 229
Waters v. Simons ..... 14 N. C., 390..... 88
Weaver v. Cryer..... 52 N. C., 541..... 192
Wellborn v. Finley..... 12 N. C., 337..... 292
West v. Sloan..... 52 N. C., 228..... 483
" v. Tighman..... 56 N. C., 102..... 430
Whedbee v. Whedbee..... 31 N. C., 163..... 230
Witesides v. Twitty..... 58 N. C., 392..... 469
Wilcoxon v. Galloway..... 30 N. C., 431..... 63
Wiley v. Wiley..... 67 N. C., 463..... 76
Williams v. Clayton..... 61 N. C., 131..... 94
" v. Collins..... 29 N. C., 442..... 229
" v. Griffin..... 4 N. C., 382..... 67, 64
" v. Hunter..... 49 N. C., 31..... 237
Wilson v. Wilson..... 10 N. C., 545..... 550
Winborn v. Gorrell..... 19 N. C., 377..... 574
Winborn v. Gorrell..... 38 N. C., 117..... 237
Wittkowsky v. Wasson..... 71 N. C., 451..... 23
Woods v. Woods..... 44 N. C., 290..... 453
Worth v. Gray..... 59 N. C., 4..... 313

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1878

B. M. ISLER v. HARRIET M. DEWEY and others.

Practice—Continuance.

Where the Court below continued an action, the pleadings raising issues to to be tried either by a jury or by the Court, and the Court holding that a trial could not then be had; *Held*, not to be error.

APPEAL from an order of Continuance at Spring Term, 1878, of WAYNE, by *Eure, J.*

This cause was called for trial by plaintiff's counsel, after the discharge of the jury, when the defendants' counsel objected, for that an issue of fact was raised by the pleadings requiring the intervention of a jury, and insisted on a continuance. In reply to this the plaintiff insisted that defendants were estopped by proceedings heretofore had in an action between the same parties, but His Honor held otherwise and ordered the continuance, from which ruling the plaintiff appealed.

Mr. S. W. Isler, for plaintiff. (2)
Mr. A. K. Smedes, for defendants.

READE, J. The action is for a tract of land and for $400 a year for nine years for use and occupation.

When the case was called below the jury had been discharged (for the term as we suppose), and the defendant moved for a continuance which the plaintiff resisted upon the ground that the issue which would seem to require a jury, *e. g.* the value of the use and occupation, had been adjudicated in a former action between the parties, and therefore no jury was necessary. All this was denied by the defendant. What was adjudicated in another suit between the parties was of course a matter of fact to be determined on the *trial,* and not upon a motion for *continuance.*

The plaintiff insists that the evidence of what was adjudicated in a former action is a matter of record, and therefore to be determined by the Judge and not by the jury. Take that to be so for the sake of argument, still it is to be determined *on the trial,* and not before. The pleadings certainly raise issues, and they can only be determined on the trial, which trial His Honor held could not then be had. Nothing appears in the case to satisfy this Court that His Honor erred in his ruling, and therefore we affirm his judgment.

The uselessness of appealing from a continuance will be understood, if it be considered that the appeal itself works a continuance. If we could have sustained the objection to the appeal, still the case could not stand for trial until the next term of the Court below. And that would have been the result if there had been no appeal.

PER CURIAM. Judgment Affirmed.

Cited: Grant v. Reese, 82 N. C., 72; *Jaffray v. Bear,* 98 N. C., 58.

SAMUEL HUDSON, Executor of James Herriet, v. SOLOMON WETHERINGTON and others.

(3)

Practice—Right to Open and Conclude—Affirmative Issue.

1. The affirmative of an issue "Did plaintiff's testator pay or purchase the note?" in suit, is upon the plaintiff.

2. The rule that a party alleging an affirmative is bound to prove it, means the affirmative of any matter the truth of which is essential to his case.

3. Where the Court below ruled that the affirmative of the issues was upon the defendant and required him to open the case by introducing evidence and then allowed the plaintiff to open and conclude the argument, he having also introduced evidence; Held to be error.

ACTION, tried at Spring Term, 1878, of JONES, before *Kerr, J.*

The facts bearing upon the point decided appear in the opinion. Verdict and judgment in favor of plaintiff. Appeal by defendant.

Mr. A. G. Hubbard, for plaintiff.

Mr. H. R. Bryan, for defendant.

FAIRCLOTH, J. The note sued on was payable to Clark, and the plaintiff alleged that his testator, Herriet, was the owner thereof for value. This was denied by the defendants, who also alleged that it had been paid. The only issues of fact submitted to the jury were:

"1. Did plaintiff's testator pay or purchase the note? Ans.—He purchased it.

"2. Has the note been paid? Ans.—No."

The findings of the jury on these issues are not reviewable in this Court, and we have nothing to consider except a plain question of practice, there being no exception to the charge of the Court (4) in any other respect. His Honor held that the affirmative was on the defendants, and required them to open the case to the jury by introducing evidence, and then allowed the plaintiff to open and conclude the argument, he having also introduced evidence. The defendants objected to this mode of proceeding, and we think their objections were well taken. *Ei incumbit probatio qui dicit, non qui negat.* Evidently the burden of proof on the first issue was on the plaintiff, for without proof on either side he would not have been entitled to a judgment, and this is the test in such cases. When both parties introduce evidence in a case like the present the plaintiff opens and concludes the argument. The rule that the party alleging an affirmative is bound to prove it, does not mean an affirmative in form merely, but the affirmative of any matter or relation, the truth of which is essential to the allegant's case.

These rules are important, manifestly convenient, and are agreeable to the suggestions of natural reason; but as they have been so often and so recently declared, we are content with a reference to a few authorities only. 1 Greenl. Ev., sec. 74; Starkie Ev., 585, 595 (10 Am. Ed.). *Neal v. Fesperman,* 46 N. C., 446; *McRae v. Lawrence,* 75 N. C., 289; *Churchill v. Lee,* 77 N. C., 341; *Phelps v. Hartwell,* 1 Mass., 71; *Costigon v. R. R.,* 2 Denio, 609.

Let this be certified.

PER CURIAM. Judgment reversed.

Cited: Wallace v. Robeson, 100 N. C., 206; *McBrayer v. Haynes,* 132 N. C., 610.

(5)

STEPHEN F. LORD and wife v. MARGARET S. BEARD.

Practice—Separate action—Evidence—Judge's charge.

1. A party cannot resort to a new action where the relief demanded can be obtained by motion or proceeding in the original action; Therefore, where land belonging to an infant was sold by a Clerk and Master under decree of a former Court of Equity, and the note for the purchase money was executed to him as guardian (he having become guardian of the infant after the sale), and on settlement the note was thereafter transferred to the ward; It was held, that the ward could not bring an action upon the note and to subject the land to its payment, but was limited to her remedy by motion in the original cause; and this is so, notwithstanding the fact that the original cause was never docketed pursuant to C. C. P., sections 400, 401.

2. Where there was a conflict of testimony between two witnesses and it appeared that one (an old person) had had an attack of paralysis; Held, that evidence of an expert that "paralysis in old persons has a tendency to impair the mind" was admissible.

3. Where there was a conflict of evidence as to whether a certain deed had been executed to the defendant by B, a witness for plaintiff, and a letter from one of the defendant's witnesses was introduced as contradictory of her testimony that such deed had been executed; Held, to be error for the Court to charge "that it was for the jury to say whether the letter was inconsistent with any idea that B had made any deed for the premises to the defendant." The only effect the letter could have would be to weaken or discredit the testimony of the witness; it was not admissible as evidence that B had not made a deed to defendant.

APPEAL at January Special Term, 1878, of ROWAN, from *Kerr, J.*

(6) It was admitted that Luke Blackmer was appointed guardian of the feme plaintiff, and that prior to said appointment the said Blackmer, as clerk and master in equity in obedience to a decree in an ex parte proceeding of the feme plaintiff before her marriage, sold certain real estate near the town of Salisbury, on 8 May, 1859, when the defendant became the last and highest bidder at $1,200, and that the defendant afterwards—30 January, 1863—gave her note to the guardian of the feme plaintiff for the same. The plaintiffs were married in March, 1875, and thereafter the guardian assigned said note to the feme plaintiff, she having arrived at full age.

It was alleged that the note had not been paid and judgment was demanded for the value thereof, but this allegation was denied by the defendant who alleged full payment, but had obtained no title to the land by reason of the fact that the deed which had been executed by said clerk and master was accidentally lost or destroyed.

The defendant moved to dismiss the action for want of jurisdiction on the ground that it should have been a motion in the cause (the ex parte proceeding aforesaid). His Honor refused the motion because the said proceeding had been terminated, the case not having been docketed under the Code, and because the note sued on was made payable to Blackmer as guardian, and not as clerk and master in equity. Defendant excepted. Thereupon the jury were empannelled and the evidence was substantially as follows:

The said guardian, witness for plaintiff, testified that he sold the land and took the note to him as guardian as alleged, defendant paid no part thereof, nor did he execute any deed for the premises; that he received for defendant as her agent $5,000 in October, 1863, and defendant requested him to appropriate enough of it to pay her said note,

which he declined to do; that he and defendant submitted all matters of difference between them, including the note sued on, to (7) arbitrators, who decided that the feme plaintiff was entitled to said note, and in pursuance of the terms of said award the plaintiffs released the witness from all liability; that he had never seen the confidential agent or adviser of the defendant, and that said sum received of her was part of the proceeds of sale of property by her to one Hall for $10,000, one-half of which she invested in Confederate bonds, and the balance he received as aforesaid, and paid it out for her as she directed, and several hundred dollars besides; and that she at the same time owed him a considerable sum as clerk and master.

The deposition of defendant was then read in evidence. The deponent testified that she paid Blackmer in June, 1862, $400 on her purchase, and he promised her to appropriate enough of the $5,000 to pay off the balance of the note; that in 1864 he, as clerk and master, executed and delivered to her a deed for the premises, which she handed to him to be registered, but which was not registered, Blackmer telling her that it had been destroyed during the occupancy of said town by the federal troops, and that he would make another deed. Deponent also testified that she was sixty-eight years old.

Dr. Summerell was next introduced and testified that he was a physician, knew the defendant well, met her about fifteen months before this trial and after she had received a stroke of paralysis, and that he could then discover no impairment of her faculties. On the cross-examination of this witness, the plaintiff proposed to ask if paralysis did not have a tendency in old persons to impair the mind. This was objected to by defendant, objection overruled and defendant excepted. The witness then stated that paralysis did have that tendency.

Julia Beard, witness for defendant, testified that Blackmer was for a long time before June, 1863, and until after the close of the late war the attorney and confidential adviser and agent of defend- (8) ant; that she was present when defendant asked him to take pay for said premises out of the $5,000; he at first declined, saying he would not accept Confederate money for the property, but afterwards in the same conversation he said he would make an exception with the defendant and apply the money as requested; and corroborated said deponent in her evidence touching the lost deed.

Upon her cross-examination a letter purporting to have been written by her on 5 May, 1869, to Blackmer was shown to witness and admitted to be hers. The plaintiff recalled Blackmer, who, after recapitulating his testimony in respect to said payments by the direction of defendant,

stated that said payments were made between December, 1863, and March, 1865. And then the plaintiff put said letter in evidence in which the writer stated substantially that the defendant (her mother) was quite unwell and seemed to be troubled about the title to said property, appealed to Mr. Blackmer to have it arranged, and believed that her mother could prevail upon members of her family to sign the paper writing which he had required as the condition upon which the title would be made.

His Honor charged the jury that the note sued on being admitted, the burden was on the defendant to show that it was obtained by fraud, accident or mistake; that it was for them to say whether said letter was inconsistent with any idea that Blackmer had ever made any deed to defendant for the premises. Defendant excepted, and in writing requested the Court to charge,—that there is evidence that the relation between the defendant and Blackmer at the time the note was given was of such a character as to relieve the defendant from proof of fraud, and the fraud was suggested only with reference to the execution of the bond. His Honor declined to give the instruction and the defendant excepted.

Upon the issues submitted there was a verdict for plaintiffs.

(9) Judgment. Appeal by defendant.

Messrs. J. S. Henderson and *J. M. McCorkle,* for plaintiffs.
Mr. W. H. Bailey, for defendant.

BYNUM, J. An original action begun by summons and complaint. In 1859, the land of the feme plaintiff was sold by the clerk and master under a decree of Court, made in a suit in equity instituted in her name, and the defendant became the purchaser. The clerk and master after the sale became the guardian of the feme plaintiff, and in 1863, the defendant executed to him as guardian a note for the purchase money, bearing interest from the date of sale, which note the guardian endorsed to the feme plaintiff in 1876, after her marriage with the male plaintiff. So that in this action we have the same person as plaintiff, who was plaintiff in the original suit for the sale of the land, and the same person as defendant, who was the purchaser at that sale.

The objection is made to the jurisdiction of the Court, and it is fatal to the action. It has been repeatedly held by this Court, that a party cannot resort to a new action, where the relief he demands can be had by motion or proceeding in the original action, and emphatic warning has been given against the error of seeking relief by a separate action in such cases.

In the earlier stages of practice under the Code of Civil Procedure,

before the profession had fairly adjusted themselves to the new practice, the summons and complaint were sometimes treated as a motion in the cause, as in *Jarman v. Saunders,* 64 N. C., 367. But in the subsequent case of *Faison v. McIlwaine,* 72 N. C., 312, referring to *Jarman v. Saunders* and speaking for the court, RODMAN, J., said: "In this last case, a proceeding like the present was regarded as a motion in the original action, but the decision on that point of practice was there put on the ground, that the Code had been but recently (10) introduced, and the practice arising out of it could not be supposed to be known to the profession universally. That excuse for irregularity should by this time have ceased to exist."

In *Council v. Rivers,* 65 N. C., 54, a civil action was brought to recover the amount of a bond given for the purchase of a contract of land sold by the clerk and master under the order of the late Court of Equity; *it was held* that the action could not be sustained, because the Superior Court has under the present system succeeded to the jurisdiction of the Court of Equity, and has plenary power by an order in the cause to compel the purchaser to pay the debt, and the action was dismissed. The same principle is announced in *Mason v. Miles,* 63 N. C., 564; *Mauney v. Pemberton,* 75 N. C., 219; *Chambers v. Penland,* 78 N. C., 53.

But it is insisted that where the sale has been made by the clerk and master, and the bond for the purchase money has been executed to the guardian of the ward, or by him assigned as in the case of the ward, the latter can sustain an original action. We perceive no reason for the distinction. The rights and remedies of the parties remain the same. It is still the same feme plaintiff whose land was sold, proceeding money by a new action against the purchased for the purchase money, and seeking to subject the land to its payment. The jurisdiction of the Court can not be shifted by a change in the payee of the note, which is only technical at most, and the effect of which is merely to convey the legal title in the note to the true owner.

But without reference to the practice under the Code, by recurring to the practice in equity prior to the Code, it is seen that the same rule prevailed, that the remedy must be sought in the original suit, else the new action would be dismissed.

In *Rogers v. Holt,* 62 N. C., 108, the bill recited that a petition for a sale of land had been filed and was still pending in (11) the same Court, and that the money was still due by the purchaser; and prayed that inasmuch as the price bid was based upon Confederate currency, the purchaser and his sureties should be de-

creed to pay its reasonable value; *it was held* that as this relief was no other than might have been had in the petition then pending, the bill would not be entertained, and it was dismissed.

Singletary v. Whitaker, 62 N. C., 77, was similar to the present, and in answer to the claim of jurisdiction here, because the notes are made payable to the guardian. There, land had been sold under a petition in the name of an infant. The sale was confirmed and the master ordered to collect the note when due, and upon payment, to make title. At another term the Court ordered the master to pay the note over to the infant's guardian. This was done and the master made title to the purchaser. On petition *filed in the cause* by the infant on coming of age, praying that the land might still be held subject to the payment of the purchase money, *it was held* that the deed was irregular and invalid, and that the petitioner was entitled to relief. It was insisted in that case that the transfer of the note by the master to the guardian destroyed the lien upon the land, but it was held otherwise. See also *Cotten ex parte,* 62 N. C., 79; *Gee v. Hines, Ib.,* 316; and *Emerson v. Mallett, Ib.,* 234.

What was the regular course of proceedings in suits in equity prior to the Code, is now, under the Code, the established practice in all judicial proceedings without reference to their equitable or legal nature. *Reid v. Pass,* 33 N. C., 589.

The plaintiffs contend, however, that the original suit in equity under which the land was sold in 1859, is not now pending, because not having been docketed pursuant to C. C. P., secs. 400, 401, it has abated, and no motion can now be made in the cause. But it has been repeatedly held by this Court, that an action is pending until the final judg-
(12) ment in the cause is satisfied, or until the plaintiff has obtained the fruits of his recovery. *Johnson v. Sedberry,* 65 N. C., 1. Section 401 of the Code is not self-executing, but the action can be abated only on motion of a party, and by the judgment of the Court, as was held in *Moore v. R. R.,* 74 N. C., 528. No such judgment having been given in this case, in fact and in contemplation of law, the original action is still pending, and under the various remedial statutes can be, upon the application of the party, brought forward upon the docket, and be proceeded in by any appropriate motion. The plaintiffs can not be allowed to prosecute a new action by alleging their own default in not keeping upon the docket the original suit.

As in another trial the same exceptions to the testimony admitted, and to the charge of the Court may arise, as have been presented in this it may be best to decide them now:—

1. Mrs. Beard having been examined as a witness in her own behalf, and it appearing that she was an aged woman and had had an attack of paralysis, Dr. Summerell was examined in her support, and testified that he knew her well, and had seen her about fifteen months subsequent to her paralytic attack, and that he could then discover no impairment of her faculties. On cross-examination the plaintiff proposed to ask the witness, if paralysis did not have a tendency to impair the mind, in old persons. The evidence was objected to by the defendant, but was admitted by the Court, and the witness answered that it did have that tendency. The evidence was admissible. There was a direct conflict of testimony between Blackmer and Mrs. Beard, and it was material for the jury to know which of the two was more reliable; and to that end it was competent for an expert to testify as to the tendency of a disease with which she was affected, to impair those faculties of the mind, the full possession of which most fit a witness to give exact and truthful testimony. 1 Greenl. Ev. 552. The evidence of (13) the expert went to weaken the force of the testimony of Mrs. Beard. 1 Starkie Ev. 824.

2. Mrs. Beard had sworn in her examination that she had paid the note sued on in October, 1863, and that a deed was executed to her; and Julia Beard, her daughter, was introduced and confirmed her mother by testifying that she was present when Blackmer received the money in satisfaction of the debt, and executed the deed. On cross-examination the witness admitted, on its being shown to her, that she had written a letter to Blackmer, dated in May, 1869, which was read to the jury, and insisted to be contradictory to her evidence as to the payment of the debt to Blackmer, and the execution of a deed by him.

Upon this part of the case His Honor charged: "That it was for the jury to say whether the letter written by Julia Beard, dated 5 May, 1869, was inconsistent with any idea that Blackmer had made any deed for the premises to the defendant." The only effect the letter could have was to weaken or discredit the testimony of the witness; and it was not admissible as evidence that Blackmer had not made a deed for the premises to the defendant. To give it that effect would be to make it substantive evidence as to the matter in controversy. The charge was therefore erroneous and calculated to mislead the jury, falling directly within the principle decided in *Henson v. King,* 47 N. C., 385; *Luther v. Skeen,* 53 N. C., 356; *S. v. Davis,* 78 N. C., 433; 1 Starkie Ev. 238-41.

PER CURIAM. Judgment reversed and action dismissed.

Cited: Lord v. Meroney, post, 14; *Askew v. Capehart, post,* 17;

Hoff v. Crafton, post, 595; *Macay ex parte,* 84 N. C., 67; *Murrill v. Murrill, Ib.,* 182; *Fleming v. Roberts, Ib.,* 532; *Kemp v. Kemp,* 85 N. C., 491; *Grant v. Moore,* 88 N. C., 77; *Murrill v. Humphrey, Ib.,* 138; *Lynn v. Lowe, Ib.,* 478; *Long v. Jarrett,* 94 N. C., 443; *Dula v. Seagle,* 98 N. C., 458; *Lackey v. Pearson,* 101 N. C., 651; *Featherstone v. Carr,* 132 N. C., 801; *Joyner v. Futrell,* 136 N. C., 305; *In re Propst,* 114 N. C., 567; *Campbell v. Farley,* 158 N. C., 43.

(14)

STEPHEN F. LORD and wife v. T. J. MERONEY and another.

Practice—Separate action—Sale of land under Decree—Subsequent Purchaser.

1. Where land belonging to an infant was sold by a Clerk and Master under decree of a Court of Equity which directed title to be retained until the payment of the purchase money, and a note for the purchase money was executed by the purchaser to the Clerk and Master as gaurdian of the infant (he having become guardian subsequent to the sale) who thereupon made title to the purchaser; and thereafter strangers to the decrees made in the original cause became bona fide purchasers of the land with notice of the non-payment of the purchase money by the original purchaser at the Master's sale; and the note on settlement with the guardian had become the property of the ward; It was held, that the ward could not maintain a separate action against the purchasers of the land to subject the same to the payment of the note, but was limited to her remedy by motion in the original cause.
2. Land sold under decree of Court remains in custodia legis until the final disposition of the case by payment of the purchase money and execution of title by the regular order of the Court, and all who claim title, mediately or immediately, through the first judgment of the Court and before the final disposition of the cause, must claim subject to the rights of the parties to the original suit, and to the orders of the Court made or to be made in that suit.

APPEAL at January Special Term, 1878, of ROWAN, from *Kerr. J.*

The facts set out in *Lord v. Beard, ante* 5, so far as they relate to the appointment of Luke Blackmer as guardian of the feme plaintiff, and the sale of certain real estate as clerk and master under a decree in equity, are applicable to this case. And the additional facts material to the point decided here, are—that Blackmer sold a large quantity of land to Isaac Lyerly who gave his bond for the purchase money, and the clerk and master retained the title until the payment thereof under the provisions of said decree; that J. W. Hall (who died before the suit was begun) bought a portion of said land from Lyerly, and
(15) at a subsequent term of the Court a decree was made authorizing the clerk and master to adopt the sale by Lyerly to Hall. And thereupon Hall executed to Blackmer as guardian aforesaid a note

with good security for the purchase money, and Blackmer gave him a deed for the premises. On failure to pay the note Blackmer brought suit, recovered judgment, and transferred the same to the feme plaintiff in a settlement with her. The plaintiffs now seek by this action to subject said land to the satisfaction of the judgment.

It was in evidence that Hall and his sureties upon said note were declared bankrupts; but that before going into bankruptcy, Hall surrendered the possession of the premises to said guardian; and that under the proceedings in bankruptcy, a homestead was assigned to Hall in said land, and an order made directing his assignee in bankruptcy to sell the reversionary interest therein, at which sale Lewis Hanes became the purchaser, and afterward sold his interest with warranty to the defendants in this action, informing them of the equities of the plaintiffs. The defendants in their answer also admitted the plaintiff's allegation, to the effect, that said claim was proved in bankruptcy against Hall's estate, and that no dividend was ever declared for the benefit of said guardian.

Upon issues submitted, the jury found for the plaintiffs. Judgment. Appeal by defendants.

Same counsel as in preceding case.

BYNUM, J. It is claimed that this case differs from the case of *Lord v. Beard, ante,* 5, in this, that other parties, strangers to the decrees made in the case, and not parties to the sales made under the orders of the Court in the original action, have become the *bona fide* purchasers and grantees of the premises from the first purchaser, Dr. Hall, and that therefore the case is taken out of the rule, that all relief (16) must be sought in the original action, and that the Court has lost jurisdiction to interfere against these subsequent purchasers by summary proceedings in the cause. But these purchasers, although strangers to the decree of sale, by their purchase submit themselves to the jurisdiction of the Court in respect to the purchase. All acquiring title under the master's sale take subject to the jurisdiction. They take with a knowledge of the power of the Court over titles thus acquired, and take no better or more perfect title as against the interference of the Court, than any of the preceding grantees had. *Hall v. Clawson,* 60 N. Y., 339.

When the Court in the first suit acquired jurisdiction over the subject matter of the action, it was from that time, as it were, *in custodia legis,* until the final disposition of the case by the payment of the purchase money and execution of the deed to the purchaser, by the regular

order of the Court. The Meroneys can be in no better condition than Hall, the first purchaser; for they bought as confessed in their answer with *actual* notice that the purchase money had not been paid by Hall, but that in lieu thereof, only a guardian note for the money had been given. The land therefore remained bound for the purchase money, and this proceeding is in the nature of a proceeding *in rem* to subject that specific property to its payment. The original suit in equity drew this land within its jurisdiction, and draws all parties interfering with it, where it and they must remain until the debt is satisfied. The Court lays hands upon the *corpus* of the thing so as to enforce its decrees in whosoever's posession it may be found; and all those who claim title, mediately or immediately, through the first judgment of the Court and before the final disposition of the cause, must claim subject to the rights of the parties to the original suit, and to the orders of the
(17) Court, made or to be made in that suit.

The rights acquired by the defendants in the land are held subject to the lien of the plaintiffs for the purchase money. The right of the plaintiffs to the relief they claim is so clear that it is a matter of regret that they have resorted to the wrong jurisdiction for redress. The settled principles upon which the Courts act in the enforcement of even the most obvious rights must be maintained. It is better for parties who mistake their remedy to submit to temporary delay in reaching their rights, than that the Courts should counfound wholesome distinctions established by a uniform course of decisions and inculcated by the pith and spirit of the Code of Civil Procedure. *Lord v. Beard, ante* 5.

PER CURIAM. Judgment reserved and action dismissed.

Cited: Mast v. Raper, 81 N. C., 330; *Macay ex parte,* 84 N. C., 61; *Murrill v. Murrill, Ib.,* 183; *Fleming v. Roberts, Ib.,* 532; *Kemp v. Kemp,* 85 N. C., 491; *Bank v. Creditors,* 86 N. C., 323; *Dula v. Seagle,* 98 N. C., 458; *Lackey v. Pearson,* 101 N. C., 651; *Joyner v. Futrell,* 136 N. C., 305.

THOMAS R. ASKEW v. THOMAS J. CAPEHART and another.

Practice—Relief against Erroneous Judgment—Notice.

1. A party to an action seeking relief against a judgment rendered therein, must do so by motion in the original action; he can not maintain a separate action.
2. A motion under C. C. P., sec. 133, to correct errors and mistakes in a judgment must be made within one year after rendition of the judgment; the law presumes that every party to an action takes notice of all that occurs in the progress of the action and of the judgment rendered.

ASKEW *v.* CAPEHART.

APPEAL at Spring Term, 1878, of BERTIE, from *Henry, J.*

This action was heard upon complaint and demurrer upon the state of facts set out in the opinion. In answer to the objection that the proceeding should be by motion in the cause, the plaintiff avowed his willingness to have his complaint in the action considered as such motion upon such terms as the Court might impose, but His Honor sustained the demurrer and dismissed the action, and the plaintiff appealed.

Mr. P. H. Winston, for plaintiff.
Messrs. Gilliam & Gatling, for defendants.

BYNUM, J. This action must be dismissed upon two grounds:—

1. If the plaintiff is entitled to relief, it is by a motion in the cause and not by a new action. One Mitchell was the administrator on the estate of Charles Capehart, deceased, and the plaintiff was the surety on his administration bond. In 1873 the defendants, who are two of the distributees of the estate, brought an action against the administrator and his surety upon the bond for their share of the estate, and in the spring of 1874 obtained a judgment, and this original action was begun in the fall of 1875 to correct certain alleged errors and mistakes in the judgment, and for an injunction against the execution issued thereon. *Lord v. Beard, ante* 5, is an express authority that such an action will not be sustained.

2. By C. C. P., sec. 133, if we could take jurisdiction of this action, as a motion in the cause, the motion must be made "within one year after notice thereof." The motion was not made until more than a year had elapsed after the rendition of the judgment. The plaintiff, however, alleges that he did not discover the mistake until a few months before the institution of this action. But he was a party defendant to the action wherein the alleged mistake occurred. The law presumes that he took notice of all that occurred in the progress of the action, and of the judgment rendered. He has neither (19) shown nor alleged any excuse in rebuttal of this presumption. It was his duty to take notice. This also is decided: *McDaniel v. Watkins,* 76 N. C., 399; *Mabry v. Erwin,* 78 N. C., 46. C. C. P., sec. 132, has no application to this case but applies only to amendments made before or at the trial, and not at a time subsequent.

PER CURIAM. Judgment affirmed.

Cited: McLean v. McLean, 84 N. C., 366; *Parker v. Bledsoe,* 87 N. C., 221; *Lynn v. Lowe,* 88 N. C., 478.

ALICE V. MARCH and others v. JOHN H. VERBLE, Adm'r.

Practice—Evidence—Transaction with Person Deceased.

1. Where the plaintiffs claimed as assignees of M, and failing to prove the assignment by reason of technical difficulty, obtained leave to have M brought in as a party plaintiff, and the jury found for the plaintiffs, the judgment should have been in favor of M to the use of the other plaintiffs, the real parties in interest.

(The Court suggests that in a case of radical amendments like the above, either the defendant should be allowed a mistrial, or the plaintiff should be taxed with such costs as may be presumed to result from the change in the character of the action.)

2. Testimony which merely raises a conjecture or suspicion of a controverted fact should not be submitted to the consideration of a jury.

3. Where plaintiff sues defendant's intestate for the value of a bull alleged to have been sold by the former to the latter in a certain year, it is competent for the plaintiff to prove by his own oath the value of the bull, and that he had owned but one such animal since the war. This is not evidence of a transaction or communication with a person deceased, but of a substantive and independent fact.

(20)

APPEAL at Spring Term, 1878, ROWAN, before *Buxton, J.*

The plaintiffs alleged that the defendant was appointed administrator of Daniel Shaver prior to July, 1869, and that his intestate was indebted to W. B. March (who was subsequently made a party plaintiff in this action) for goods sold and delivered, and for money loaned, according to an account stated; that the interest of said March was assigned to plaintiffs before the commencement of this action, and that they are the real parties in interest. The defendant in his answer alleged that there were debts against his intestate of a higher dignity than the plaintiffs', and that he had fully administered the estate which was subject to the payment of the same.

It was in evidence for the plaintiff that W. B. March had supplied said intestate with goods and chattels to a large amount, and had loaned him a considerable sum of money; and among the chattels sold since the war was a bull, and said March was allowed to testify, after objection, that he did not own but one bull since that time, and also to give his opinion that the value of the bull was fifty dollars, another witness having testified that he was worth from thirty to forty dollars. Defendant excepted.

The jury found the following issues: Was Daniel Shaver, intestate of defendant, indebted to W. B. March, and if so, in what amount? Answer, yes, $1,832.50. Has any part of same been paid to March or the plaintiff? Answer, no. And in addition to these issues a third

issue was suggested at the opening of the case, and accepted, as follows: Did W. B. March assign said indebtedness to the plaintiffs before the commencement of this action? And on the examination (21) of March touching this issue, he testified that he had assigned his interest to the plaintiffs in writing and upon the defendant's request His Honor excluded the evidence; thereupon the counsel for the original plaintiffs moved to make March a party plaintiff, which was allowed, and then asked leave to withdraw the third issue as being immaterial, which was also allowed. Defendant excepted. There was much other evidence for plaintiffs. The defendant offered no testimony, but called the attention of the Court to the evidence of one of the plaintiff's witnesses in reference to a conversation between March and the intestate of defendant in the spring of 1868, and asked certain instructions thereon, which with the refusal of His Honor, are set out in the opinion. Verdict and judgment for plaintiff. Appeal by defendant.

Mr. W. H. Bailey, for plaintiffs.
Mr. Kerr Craige, for defendant.

SMITH, C. J. This action is prosecuted to recover for goods sold and money loaned to the defendant's intestate, and for money received by him to the use of W. B. March. The complaint alleges that prior to the suit, the creditor W. B. March assigned his claim to the plaintiffs, and this is denied in the answer.

Issues were made up from the pleadings and submitted to the jury, and among them one as to the alleged assignment. At the trial the plaintiffs failed to prove the affirmative, and thereupon obtained leave of the Court to amend by making March co-plaintiff, he assenting thereto, and the issue was withdrawn. The jury found to be due from the defendant's intestate the sum of one thousand, eight hundred and thirty-two dollars and fifty cents.

The complaint being otherwise unamended, the effect of the introduction of the new plaintiff into the pleadings, is to make (22) the allegation of the assignment as well as that of the assignor, as of the other plaintiffs, and to conclude both as to any future demand on the intestate's estate, and indeed to make the withdrawn issue wholly immaterial to the defendant, unless he should have some set-off or equity, which is not suggested, to be affected thereby. Indeed the assignment not being proved as to him, he can avail himself of any defences personal to the assignor, as if the assignor was sole owner of the debt, and the only plaintiff. The form of the judgment must be

modified so that the assignor recovers the money due to the use of his co-plaintiff.

We deem it proper to suggest that an amendment, so radical in its effects as to change impending defeat into success, and substantially to substitute a new action, would entitled the defendant to a mistrial, and this would without doubt have been ordered if it had been asked, and it would seem to be a proper case to impose costs previously incurred, or to such part of them as would not have been incurred if the action had always been in the form resulting from the amendment.

But these rested in the sound discretion of the Judge who tried the cause, and as has been often said, are not subject to our review.

The defendant in the cross-examination of one of the plaintiff's witnesses, proved a conversation between the plaintiff and the defendant's intestate, which occurred in the spring of 1868, and was to this effect: The intestate said to March, "You have got to get that money for me, you must let me have it by Court." March answered, "These are tight times for money, and I don't think I can let you have it." The intestate added, "You had better let me make you a deed for the way-side property," to which March said, "Any time will do," and the intestate replied, "That is what you always say." No deed was ever made, and the property was partially paid for in 1867 by March to the
(23) intestate.

The defendant asked the Court to charge the jury, that this conversation furnished some evidence that March was indebted to the intestate at that time, and had paid the claim in suit. The Court declined to give the instruction, and told the jury this was not evidence of payment.

We concur in the propriety of the refusal to give the instruction. The evidence was too indistinct and shadowy to warrant any such deduction. It at most and when favorably interpreted raises a *conjecture* or *suspicion* of the fact, and from such the jury would not be warranted in inferring that payment had been made. The cases cited in the brief of plaintiff's counsel fully sustain this position. *Cobb v. Fogleman,* 23 N. C., 440; *Sutton v. Madre,* 47 N. C., 320; *Matthis v. Matthis,* 48 N. C., 132; *S. v. Revels,* 44 N. C., 200; *Wittkowsky v. Wasson,* 71 N. C., 451.

The counsel of defendant further excepts that the plaintiff March was allowed to testify that he owned but one bull since the surrender, and to give his opinion that it was worth fifty dollars. The sale of a bull to the intestate since the war was one of the charges contained in the

account and in controversy before the jury, and another witness had estimated the value of the bull to be from thirty to forty dollars.

We see no objection to this evidence and no error in admitting it. The plaintiff did not testify to any *conversation* or *transaction* with the intestate within the meaning of C. C. P., sec. 343, but to a substantive, and independent fact, and the evidence was not rendered incompetent because in association with other matters proved *aliunde*, it tended to charge the intestate's estate. Its competency is fully supported by the cases cited in the brief of plaintiff's counsel, and we simply refer to them. *Peoples v. Maxwell*, 64 N. C., 313; *S. v. Osborn*, 67 N. C., 259; *Gray v. Cooper*, 65 N. C., 183.

In the last case the action was to recover for the services of a (24) slave belonging to the plaintiff's testator, and in the employment of the defendant's intestate. The plantiff was allowed to prove by his own oath that the intestate had the slave in his possession and in his service for two years, and the value thereof. This Court held the witness competent to testify to those facts and sustained the ruling of the Judge. This case decides the question now before us. There is no error, and the judgment as modified must be affirmed.

PER CURIAM. Judgment modified and affirmed.

Cited: Best v. Frederick, 84 N. C., 176; *Reynolds v. Smathers*, 87 N. C., 24; *Lockhart v. Bell*, 90 N. C., 499; *S. v. Shields, Ib.*, 687; *Kron v. Smith*, 96 N. C., 389; *Brown v. Mitchell*, 102 N. C., 347; *Marsh v. Richardson*, 106 N. C., 539; *Bank v. Burgwyn*, 110 N. C., 276; *Lane v. Rogers*, 113 N. C., 173; *Johnson v. Rich*, 188 N. C., 270; *Davidson v. Bardin*, 139 N. C., 2; *Hicks v. Hicks*, 142 N. C., 233; *Witty v. Barham*, 147 N. C., 482; *In re Bolling*, 150 N. C., 510.

WILLIAM GARDNER and wife and others v. A. G. ANDERSON.

Practice—Probate of Wills—Jurisdiction.

1. An application to the Probate Court to incorporate into the record of a will an agreement between the executor and the other parties interested under it, that the former, in consideration of a promise by the latter to forbear resisting the probate thereof, would pay certain legacies and a sum additional, which should be a charge on the land of the testator, is irregular.
2. The Probate Court has jurisdiction of claims for legacies, but not of claims founded on contract.

GARDNER *v.* ANDERSON.

SPECIAL PROCEEDING commenced in the Probate Court and upon issue joined transferred to and heard at Spring Term, 1878, of BUNCOMBE, before *Cloud, J.*

The plaintiffs alleged that William Anderson died in 1856 leaving a last will and testament appointing the defendant his executor,
(25) and that they and the defendant are devisees and legatees under the will; they resisted the admission of the will to probate, and thereupon the defendant agreed that if the plaintiffs would allow him to prove the will, he would pay them the legacies named therein, together with the additional sum of six hundred dollars; and that a record of said agreement should be made with the will and become a part therof; that in pursuance thereof a paper writing was signed by the parties, and the said sum was to bind the lands devised to defendant as effectually as the legacies named in the will, but that said agreement was never recorded; that they have demanded payment of said sum, and also payment of said legacies, which defendant has refused; wherefore the plaintiffs ask for an order to correct the record of the probate of said will and to record said agreement as a part of the same; for a judgment for $600 and interest and a decree subjecting the land to the payment of legacies, etc.

The defendant in his answer alleged among other things that the plaintiffs did not resist the probate of the will, but agreed to pay them five hundred dollars and the legacies mentioned in the will, which was accepted but never reduced to writing; that said sum was not to be a lien on the land as alleged, but this defendant in consideration of the same was to have his mother's dower in the land, and the use of the household furniture, etc., during her life; and denies that there was any written agreement between them in the premises.

There was judgment in the Probate Court according to plaintiffs' demand, and His Honor gave judgment for the amount of the legacies due the plaintiffs, and the defendant appealed.

No counsel for plaintiffs.
Mr. J. H. Merrimon, for defendant.

READE, J. It may be that an action may be maintained for a
(26) breach of the agreement to pay $600 for forbearing to resist the probate of the will, but the idea of incorporating the agreement into the will as a part of it, is novel and absurd. Nor had the Probate Court jurisdiction to hear and determine a complaint for that cause. The Probate Court ought therefore to have dismissed that part of the

complaint, and proceeded to consider the claim for the legacy of which it had jurisdiction. But instead of that it proceeded to give judgment for the legacy and for the $600 besides.

The record does not state what issues were sent to the Suuperior Court in term time, but we suppose it was the question of jurisdiction of the Probate Court. Whatever it was, it ought to have been passed upon and then sent back to the Probate Court with instruction to proceed to decree as to the legacy; but instead of that His Honor proceeded to decree as to the legacy. This was error.

PER CURIAM. Judgment reversed.

JOHN W. HARRELL v. JOHN T. PEEBLES and others.

Practice—Nul Tiel Record—Irregular Judgment.

1. The plea of *nul tiel* record is tried by the Court upon an inspection of the record itself, and when the record is regularly certified by the proper officer, it cannot be explained by parol, but is conclusive upon this plea.
2. Where, upon a *sci. fa.* to enforce a judgment, the defendant pleads *nul tiel* record and the Court finds the issue in favor of the plaintiff, such finding is not conclusive as to validity of the judgment de- (27) nied, but only as to its existence.
3. An irregular judgment may be impeached and set aside on motion within any reasonable time upon parol proof that it was not rendered according to the course of the Court.
4. Where issues of law and fact are joined in term time before a Court and jury, and afterwards, by consent of counsel, the case is withdrawn from the jury, the facts being agreed upon, and the questions of law left open for his Honor's decision during the session of his Court in a neighboring county, a judgment rendered at such last named Court in the absence of counsel and without argument or briefs filed, and not communicated to the defeated party until six months after its rendition, is not irregular, but is conformable to the present practice and to the provisions of the Constitution, Art. IV, sec. 22, and C. C. P., sec. 315.
5. Where the record in such case states that a jury was duly impaneled and found all issues in favor of the plaintiff, upon which the judgment in question was rendered, any party in interest is entitled to have such record amended and made to speak the truth.

MOTION, to set aside and vacate a judgment heard at Spring Term, 1877, of HERTFORD, before *Eure, J.*

This is an appeal from the judgment of the Court below denying a

motion of the defendants to vacate and set aside a judgment theretofore obtained against them by the plaintiff.

On 10 January, 1871, the plaintiff instituted an action upon a bond dated 7 June, 1852, executed by the defendants, Warren and Daughtry, and Gatling, the intestate of the defendant, Peebles, to him the plaintiff and another as guardians of two minors. The administration upon the estate of Gatling was undertaken at June Term, 1857, of the County Court of *Northampton*. The defendants in their action deny
(28) the execution of the bond sued on, and in addition thereto, Peebles as administrator "pleads fully administered," and the statutory bar of two and seven years. The action was tried at Spring Term, 1872, of Hertford, and the record of that Court shows that a jury was duly impaneled upon the issues and rendered a verdict finding all the issues in favor of the plaintiff, and that the judgment in question was thereupon rendered at the same term of the Court.

Upon hearing the motion to vacate the judgment, the following facts were found by the Court:—That on the trial of the original action the plaintiff introduced and proved by one witness the execution of the bond, upon which the counsel of the defendants "remarked that it would be unnecessary to introduce further testimony, that he would admit the execution of the bond, and it was then and there agreed by the counsel for the plaintiff and defendants that the plaintiffs should take a verdict upon the facts, and the counsel should argue the questions of law to the Court." Pending the arguments upon the law of the case, it was agreed by the Court and counsel of both sides, that the Court should adjourn, and that the Judge should take the case and decide it at Gates Court, which followed the next week. At Gates Court, the week following, the Judge did sign the judgment now in question at Chambers in the absence of counsel and without further argument or brief. The judgment so signed was delivered to one Parker to be handed to the plaintiff's counsel, who from inadvertence failed to do so until the next term of Gates Court, six months thereafter. When coming to the hands of the plaintiff the judgment was shown to defendants' counsel, and he was asked if he desired to appeal. The counsel replied that he thought he would appeal, and it was then agreed that he should have three or four weeks in which to make up his mind and in the *interim* that no execution should issue.

No appeal having been taken, the judgment was docketed in
(29) Hertford county on 17 December, 1872, and execution was issued the same day. This execution was returned *"nulla bona,"* to Spring Term, 1873. A *sci. fa.* was then sued out against Peebles, the administrator, returnable to the Fall Term, to show cause why execu-

tion *de bonis propriis* should not issue against him. At the said Fall Term, which was held on the 3d Monday in October, 1873, the administrator pleaded *nul tiel record,* which was found against him by the Court and judgment was given against him and execution *de bonis propriis* awarded. His counsel then (being at the same term) made this motion to vacate the original judgment.

The administrator on a settlement with the Court on 5 and 19 March, 1860, had in his hands for distribution nine thousand dollars, $2,000 of which he paid to the widow and the residue he divided into two equal parts, retaining one part himself in right of his wife, who was one of the next of kin, and paying over the other half to the guardian of Isaac Gatling, the other distributee. These are the material facts as found by the Judge, and upon them he denied the motion to vacate or amend the judgment, and the defendants appealed.

Mr. J. B. Batchelor, for plaintiff.
Mr. R. B. Peebles, for defendants.

BYNUM, J. (After stating the case as above.) There is no error of which the defendants can complain. It was insisted by the plaintiff that when the Court found the plea of *nul tiel record* against the defendant, Peebles, in the *sci. fa.* upon the original judgment, it was conclusive of the validity of the judgment, and precluded him from thereafter moving to vacate it. This position can not be maintained.

Upon the plea of *nul tiel record* the *fact* is tried by the Court upon *inspection* of the record itself, and when the record is reg- (30) ularly certified by the proper officer it can not be explained by parol testimony, but is conclusive upon this plea. When, however, direct proceedings are instituted for that purpose, a record may be impeached and vacated at any time upon motion in the same Court in which it was rendered, and upon parol proof that the judgment, for instance, was entered irregularly and against the course of the Court. *Austin v. Rodman,* 8 N. C., 71; *Wade v. Odeneal,* 14 N. C., 423; *Keaton v. Banks,* 32 N. C., 381; *Bender v. Askew,* 14 N. C., 149; *Cowles v. Hayes,* 69 N. C., 406. And the facts must be found. *Clegg v. Soap Stone Co.,* 66 N. C., 391; *Powell v. Weith,* 66 N. C., 423; S. c., 68 N. C., 342.

The motion to vacate the judgment was therefore in order, and no length of time is a bar to the application. But the question is, are the facts as found by the Court below sufficient to authorize this Court as matter of law to declare the judgment null and void, and to set it aside, in the first place; or denying this, in the second place, to so amend the

record as to make the judgment inefficient to the plaintiff? Although the judgment impeached appears of record as having been given in term time in point of fact, it was not rendered then, but some weeek or two after the expiration of the term and in another county. This it is insisted is such error as should vacate the judgment.

In *Deloach v. Worke,* 10 N. C., 36, a decision upon the old practice prior to the Code, it was held that where upon the plea of *nul tiel record* it appeared that no formal judgment had been entered of record, it must be overlooked, as otherwise, owing to the looseness of the practice, the proceedings of Courts for years back would be overturned. Much more does the same reasoning apply since the adoption of the Code, as it has been for years a prevailing practice of the Judges, especially by consent of parties, to reserve questions of law and give judgment thereon,
(31) weeks and months after the expiration of the term of the Court in which the action was tried. We say nothing in commendation of the practice, however convenient it may be to Judges and counsel, but it would be of disastrous consequence if such judgments could be ripped up and vacated at any time, however remote thereafter.

Nor do we think they are irregular and void upon a proper construction of the constitution and laws, and therefore it is not material in this case whether or not the record of the Court be so amended as to show the time and place of the actual rendition of the judgment, and other proceedings had subsequent to the trial Court. The Judge performed no judicial act in the cause subsequent to the trial term which the counsel of both plaintiff and defendants did not agree he should perform, of which he was not competent to perform upon the trial, and the facts found warrant no imputation of fraud or unfairness in the Judge or counsel, in giving or procuring the judgment to be given.

The defendant does not and can not now assail the judgment itself as erroneous, because that can be done only on appeal, which he declined to take. The objection is that it was signed at an improper time and place, though he himself fully assented to it, both before and after the judgment was so given.

The objection so made raises the simple question of power, has the Court no jurisdiction to render such a judgment in vacation by the consent of parties? By the Constitution, Art. IV, sec. 22: "The Superior Courts shall be at all times open for the transaction of business within their jurisdiction, except the trial of issues of fact requiring a jury." The issues of fact in our case had been disposed of by a consent verdict, and the court having jurisdiction of the case, clearly, and being always open, there is nothing in this clause of the Constitution which

forbids the rendition of a judgment upon verdict after the expira- (32)
tion of the term, as well as during the term.

In furtherance of this provision of the Constitution, C. C. P., sec. 315, expressly provides in certain cases that the Judge, out of term time, shall hear and determine the questions of law in these civil actions, and that his judgment shall be entered in the judgment docket as in other cases. This section of the Code has been held to be still in force, and not repealed by the act suspending the Code of Civil Procedure, Bat. Rev., ch. 18. See *Hervey v. Edmunds,* 68 N. C., 243. We do not see why the same course of reasoning applied in that case does not equally apply here and support this judgment. If the jurisdiction to give such judgments is confined by the Constitution, its exercise may be regulated, but can not be impaired or destroyed by legislation. It is true that the act suspending the Code, sec. 5, provides, "that issues, whether of law or fact, shall stand for trial at the next term succeeding the term at which the pleadings are completed," from which it may be inferred that issues of law as well as fact can be tried only in term time; yet the true construction of this provision is that the parties shall have the right to demand a trial at that time, and not that they may not by consent postpone the trial of issues which do not require the intervention of a jury, and which can be as well or better tried out of than in term.

While, therefore, a judgment upon issues of law reserved by consent, may be rendered out of term time, and when truly entered of record as rendered, must be upheld as a valid judgment, yet this and like judgments should show by the record when they were rendered and when they were recorded.

The record here does not speak the truth, for contrary to the fact the judgment appears to have been given at the trial Court, whereas it was actually not recorded until six months after. According to the
record as it now is, such a judgment constitutes a lien upon the (33)
land of the debtor from the term of the Court, at which it purports to have been rendered. But if the record is amended according to the truth of the matter the question would arise whether the judgment, as a lien, relates back to the trial term of the Court, or how it effects intervening judgments rendered at the same time, or docketed from other Courts.

No such question can probably arise in this case, because the judgment was taken against the administrator, Peebles, in his representative character, and he seems to be the only contestant; but the record should always speak the truth so as to place parties in the condition to litigate

their rights. *Bryan v. Hubbs,* 69 N. C., 423; *Norwood v. Thorp,* 64 N. C., 682.

In conclusion, the facts as found upon the pleadings do not show merits in the defendant, or such a case as would entitle him to relief if the judgment was vacated and a new trial awarded. The note had never been paid, and the debt was due. The verdict found the facts for the plaintiff, and the issues of law do not appear to have been decided erroneously.

The record may be amended if desired in the particulars designated, but the amendment will avail the defendant, Peebles, nothing, as it will not affect the validity of the judgment.

PER CURIAM. Judgment affirmed.

Cited: Shackleford v. Miller, 91 N. C., 186; *Bynum v. Powe,* 97 N. C., 378; *Brooks v. Stephens,* 100 N. C., 299; *Taylor v. Gooch,* 110 N. C., 392; *Fertilizer Co. v. Taylor,* 112 N. C., 145; *Benbow v. Moore,* 114 N. C., 274; *Bank v. Gilmer,* 118 N. C., 670.

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(34)

T. E. ASHCRAFT and others v. T. N. LEE and others.

Practice—Appeal—Proceedings Concerning Roads, etc.

1. No appeal lies to this Court from the judgment of the Superior Court upon a petition to discontinue a public road, heard on appeal from the action of the Board of County Commissioners.
2. Such proceeding is regulated by statute and the exercise of the power thereby granted to the county authorities is a matter of discretion, subject to the right of appeal to the Superior Court.

PETITION to discontinue a public road, filed in Union and removed to and heard at Spring Term, 1878, of STANLY, before *Moore, J.*

The petition was filed by the plaintiffs before the board of township trustees, and upon the hearing before them it was refused, and the plaintiffs appealed to the board of county commissioners, who affirmed the judgment, and they again appealed to the Superior Court. There was much evidence in relation to the necessity, etc., of the road, and the jury found in favor of the defendants. Judgment. Appeal by the plaintiffs.

Mr. J. D. Shaw, for plaintiffs.

Messrs. N. McKay, J. F. Payne, and *S. J. Pemberton,* for defendants.

FAIRCLOTH, J. The Legislature has invested the township boards of trustees and the boards of county commissioners with full power and authority to order the laying out of public roads where necessary, and to discontinue such roads as shall be found useless, etc., etc. Bat. Rev., ch. 105, sec. 1. And by sec. 3 if any person shall appeal from the judgment of the board the Superior Court shall hear the whole matter anew. The power here given is complete, and its exercise is a (35) discretionary matter with the county authorities, with the right of appeal above stated. We see no authority for submitting the question to a jury in the Superior Court unless as was suggested the Judge may call a jury to his aid.

There is no authority whatever for bringing the matter before this Court, and if there was we should find much difficulty in deciding upon the usefulness or uselessness of a particular road, ferry, or bridge. It was not seriously contended that we ought to undertake it, but it was argued that we might say whether certain evidence was improperly excluded by His Honor. We might do so, but for what purpose to the appellant and what effect would it have? The county authorities can allow or disallow these applications with or without the rejected evidence. The power is with them and we could not control it, and to direct the mere details would be utterly useless to the parties. The whole matter must remain where the Legislature placed it. *Brodnax v. Brown,* 64 N. C., 244. The appeal is dismissed with costs.

PER CURIAM. Appeal dismissed.

Reversed on Rehearing, 81 N. C., 136.

Cited: Robinson v. Lamb, 126 N. C., 498.

H. M. HOUSTON & CO. v. JOHN H. WALSH.

Practice—Arrest and Bail—Execution against the Persons—Insolvent Debtor—Issue of Fraud.

(36)

1. An order of arrest issued after final judgment in an action is illegal and void.
2. Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under C. C. P., sec. 258.
3. Such execution is irregular if, (1) it does not run in the name of the State and convey its authority to the officers to arrest the defendant, (2) if it is made returnable to a term of the Court, (3) if it commands the officer "to commit the defendant to jail until he shall pay the judgment, etc.", instead of "to have the defendant's body before the Court at its next term."
4. The provisions of sec. 21, ch. 60, Battle Revisal (Insolvent Debtor's Act), "that after an issue of fraud or concealment is made up the debtor shall not discharge himself as to the creditors in that issue except by trial and verdict or by consent" only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it.

MOTION to vacate an Order of Arrest, heard at Spring Term, 1878, of UNION, before *Moore, J.*

The plaintiffs recovered judgment against defendant before a Justice of the Peace for one hundred and eleven dollars and seventy-eight cents, and on 22 December, 1877, caused the same to be docketed in the Superior Court. No formal complaint was filed before the Justice, but the note itself was exhibited instead, as the plaintiffs demanded. Execution issued against the property of the defendant and was returned unsatisfied. Whereupon the plaintiff, H. M. Houston, made affidavit before the clerk and therein set out the judgment, execution and the sheriff's return, and alleged on information and belief that the defendant had so disposed of his property as to place it beyond the process of law, and was in various ways attempting to evade payment of his debt, and that he was then about to remove from the State with intent to hinder and delay the plaintiffs in collecting their claim and de-
(37) feat its payment. Upon this affidavit the plaintiffs applied for an order of arrest, and it was issued by the clerk in this form:

"To the sheriff of Union County—Greeting: For the reasons set forth in the foregoing affidavit you are hereby commanded forthwith to arrest the defendant, John Walsh, and to commit him to the jail of the county

until he shall pay the judgment described in the foregoing affidavit, or until he be discharged according to law. Of this order make due return. This 5 February, 1878. G. W. FLOW, C. S. C."

The plaintiffs having given bond with surety as required by law, the precept was delivered to the sheriff who executed it, and endorsed thereon, "Executed and defendant in custody, 7 February, 1878.

"J. W. GRIFFIN, Sheriff."

The defendant thereupon entered into an undertaking with a surety payable to no particular person for his appearance before the Superior Court, and filed his application for his discharge as an insolvent debtor under the provisions of ch. 60, Bat. Rev., and gave notice to the plaintiffs and other creditors. It does not appear from the record whether he was released on giving the undertaking or remained in custody of the sheriff. The plaintiffs in answer to defendant's petition for discharge filed written specifications of fraud. On 16 February the matter came on to be heard before the clerk, upon a motion of the defendant to vacate the order of arrest. The motion was denied and the defendant appealed. On 27 February a motion for discharge as an insolvent debtor was also made before the clerk and refused, and issues of fraud made up and transmitted to the Superior Court. On the hearing before His Honor it was by him adjudged that the order of arrest be vacated and set aside and the defendant discharged, at the same time a motion made by plaintiffs' counsel to dismiss the appeal was denied, from which ruling the plaintiffs appealed. (38)

Messrs. Wilson & Son and *D. A. Covington,* for plaintiffs.
Mr. James F. Payne, for defendant.

SMITH, C. J. (After stating the case as above.) The correctness of this ruling of the Court presents the only question for us to consider and decide:

The arrest was illegal. The Constitution, Art. I, sec. 16, declares that "there shall be no imprisonment for debt in this State except in cases of fraud." It is left to the General Assembly to provide by law for arrest and imprisonment in cases of fraud as it may deem proper, and to regulate and to define all proceedings which may be had in relation thereto. This has been done, and the legislation on the subject will be found in the Code of Civil Procedure.

It is enacted (sec. 148) that "no person shall be arrested in a civil

action except as prescribed by this act" unless in proceedings for contempt.

The arrest of a defendant is allowed in cases of fraud which are specified in sec. 149, but the order therefor must proceed from the Court in which the action is brought or from a Judge thereof (sec. 150) and these only under restrictions. It may accompany the summons or may issue thereafter, before, but not after final judgment is rendered. Unless the order of arrest is served twenty days before it is docketed it is unavailing and on motion of the defendant may be vacated or set aside. Sec. 153.

In the present case the order was granted and the defendant arrested after the issuing and return of execution against the property of the defendant. It was therefore wholly without the sanction of law and the arrest was illegal.

(39) But it is suggested that the process directed to the sheriff is not within the purview of those provisions of the Code which apply to preliminary arrest, but in an execution against the person of the debtor under sec. 258.

Difficulties equally great are encountered in this aspect of the case. The only authority for issuing this form of process, in substance the old writ of *capias ad satisfaciendum,* is conferred in sec. 260, which permits it in actions wherein the defendant might have been arrested and "after the return of an execution against his property unsatisfied in whole or in part." "But no such execution shall issue against the person of a judgment debtor *unless an order of arrest has been served* as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by sec. 149." There are two alternative essential conditions here prescribed, on one of which such process may rightfully issue, and neither is found in the present case. There never was any lawful arrest before judgment, nor was there any complaint averring such facts as would have justified the order. No complaint was filed, and had it been it must have contained a statement of preëxisting facts sufficient under the law and unaided by what may have subsequently occurred. The affidavit on which the plaintiffs obtained the capias set out mainly, if not altogether, matters which have since transpired and could not have been embodied in a complaint as the statute requires. Indeed the Code seems to intend this as final process, and to be subsidiary to and in aid of the intermediate arrest, and confines it to cases where the order has been or might have been obtained. The Justice could upon a sufficient affidavit have ordered the arrest, and had this been done, such affidavit and order should have been sent

up and docketed with the transcript of the judgment (and no parol evidence could be heard to supply the omission if they were not sent) in order to confer jurisdiction on the clerk to issue such execution at all. This is decided in *McAden v. Banister,* 63 N. C., (40) 478.

There are other objections to the process itself to which we will for a moment advert: 1. It does not run in the name of the State and convey its command and authority to the officer to arrest the defendant. It simply issues from the clerk's office and bears his official signature. 2. It is not made returnable to any term of the Court as directed by the act of 1870 suspending the Code of Civil Procedure. Bat. Rev., ch. 18, sec. 7. This defect seems to be substantial and unlike that decided in *Bryan v. Hubbs,* 69 N. C., 423. 3. The writ does not command the sheriff to have the defendant's body before the court at its next term as it should have done, but "to commit him to the jail of the county until he shall pay the judgment described in the foregoing affidavit or until he be discharged according to law."

A case not very dissimilar came before the Court in *Finley v. Smith,* 15 N. C., 95. There a writ had been issued to the sheriff commanding him "to arrest the body of Peter Newton and him safely keep until you cause to be made the sum of sixty-one dollars, etc., which, etc.," and GASTON, J., says in reference to the writ: "It is a singular species of *distringas* against the body of Newton by reason of which the officer is at all events to squeeze the money out of him and have that money forthcoming at the next Court. In our opinion it is not our well known *capias ad satisfaciendum* but a stranger to our law."

Admitting the want of authority to issue the process and its invalidity, the plaintiff's counsel insists that it is too late to go into that inquiry after issues of fraud have been made up, and that it is expressly so declared in sec. 21, ch. 60, Bat. Rev. For this are also cited *Dobbin v. Gaster,* 26 N. C., 71, and *Freeman v. Lisk,* 30 N. C., 211.

The statute does provide that after an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in the issue, except by trial and verdict, or by consent. But this obviously presupposes the defendant to be in lawful custody and (41) by virtue of an authority competent to order it. It was not intended to justify and prolong an imprisonment, wrong and unwarranted in its origin, and continued in plain disregard of the mandate of the Constitution and the law. The cases referred to were decided respectively in 1843 and 1848, when a creditor had a legal right to sue out a *capias,* and imprison the judgment debtor at his election, and the only

relief for the latter was to be procured in giving bond for his appearance at Court, and then obtaining his discharge as an insolvent debtor. Mere irregularities in the *capias,* as these cases decide, must be considered waived when its force was spent, and a new reversed proceeding is instituted by the defendant himself, and new issues are to be passed on by a jury. Yet RUFFIN, J., delivering the opinion in the earlier case, says: "The party might have been relieved from arrest upon a *habeas corpus,* and we will not say that he might not also have been relieved even after giving bond if he had appeared and placed himself again in actual custody, and then moved the Court to quash the proceedings or discharge him."

There was not then, as there is now, a distinct constitutional guaranty of the liberty of a citizen, protecting his person from arrest at the will of the creditor whose demand he may be unable to pay, except where he is charged with fraud, and then in the manner and under the circumstances pointed out and regulated by law. It may well be that mere irregularities in a process emanating from a Court of competent jurisdiction, and rightful when in proper form, should not be allowed to frustrate proceedings consequent upon its enforcement, and that the defendant should be required to avail himself of such defence before they have been entered upon. When the process is void and the imprisonment is entirely unwarranted, it is the duty of the Court so to declare
(42) and correct the wrong and discharge the debtor, notwithstanding he may also be seeking it through the instrumentality of the insolvent law. A prominent feature in our present system of practice, apparent throughout the Code, is to grant relief when a party may be entitled, by a motion in the cause, and not to force him to seek it elsewhere.

PER CURIAM. Judgment affirmed.

Cited: Kinney v. Laughenour, 97 N. C., 329; *Preiss v. Cohen,* 117 N. C., 59; *Settle v. Settle,* 141 N. C., 564; *Ledford v. Emerson,* 143 N. C., 535, 536.

Dist.: Patton v. Gash, 99 N. C., 285.

ELIZABETH G. HAYWOOD, Executrix, v. E. BURKE HAYWOOD, Executor.

Practice—Creditor's Bill—Superior and Probate Courts—Concurrent Jurisdiction.

1. Where an action in the nature of a creditor's bill was brought by the plaintiff (a creditor of defendant's testatrix) to the Superior Court at term time, under sec. 6, ch. 241, Laws 1876-7, and after the institution of the action the defendant commenced a special proceeding in the Probate Court for a sale of the land of his testatrix for assets, *It was held*, that the Superior Court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the Probate Court.
2. Under Bat. Rev., ch. 45, sec. 73 and Laws 1876-7, ch. 240, sec. 6, there is not a conflict of jurisdiction between the Probate and Superior Courts in regard to the settlement of estates, but the jurisdiction is concurrent.
3. When there are Courts of equal and concurrent jurisdiction, that Court possesses the case in which jurisdiction first attaches.

BYNUM and RODMAN, JJ., dissenting.

ACTION in the nature of a Creditor's Bill brought by a creditor of the estate of defendant's testatrix and heard, upon a motion (43) by plaintiff for an injunction to restrain proceedings in a special proceeding brought by the defendant in the Probate Court for a sale of his testatrix's real estate to make assets, at Spring Term, 1878, of WAKE, before *Seymour, J.*

His Honor decided that the action was prematurely brought by plaintiff, and denied the motion for the injunction, and the plaintiff appealed.

Messrs. E. G. Haywood, Merrimon, Fuller & Ashe, J. B. Batchelor and *A. W. Tourgee,* for plaintiff.

Messrs. D. G. Fowle, Gilliam & Gatling, Battle & Mordecai, R. C. Badger and *A. W. Haywood,* for defendant.

FAIRCLOTH, J. This is an action by the plaintiff as a creditor of defendant's testatrix, and in behalf of all other such creditors, brought to the Superior Court at term time praying for the necessary accounts, sale of lands, and for the payment of the assets to the said creditors according to their several amounts and rights, etc. After this action was in progress and defendants had entered their appearance, the defendant executor filed his petition in the Probate Court for the sale of the real estate of his testatrix for assets, and thereupon and upon notice the

plaintiff moved for an order restraining further proceedings in the Probate Court, which was refused by His Honor. This we think was error.

The plaintiff is proceeding under the act of 1876-'77, ch. 241, sec. 6, which provides: "That in addition to the remedy by special proceeding as now provided by law, actions against executors, administrators, collectors and guardians may be brought originally to the Superior Court at term time, and in all such cases it shall be competent to the Court in which said actions shall be pending to order an account to be
(44) taken by such person or persons as said Court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief as the nature of the case may require."

Sec. 7. "That all laws and clauses of laws coming in conflict with the provisions of this act be and the same are hereby repealed."

The defendant claims the right to administer the estate in the Probate Court alone by special proceeding under the act, Bat. Rev., ch. 45, sec. 73. These acts, in our view, do not present an instance of a conflict, but of concurrent jurisdiction. The latter act instituted a new mode of settling the estates of deceased persons and was a necessary consequence of that excellent provision of our law requiring creditors to be paid *pro rata.*

The former act (1876-'77) does not necessarily change the mode of administering the estate materially, but only permits it to be done in another Court. "The rule is, where there are Courts of equal and concurrent jurisdiction, the Court possesses the case in which jurisdiction first attaches." *Childs v. Martin,* 69 N. C., 126, where an inconvenience of a different rule is forcibly put by PEARSON, C. J. The wisdom of giving different Courts concurrent jurisdiction over the estates of deceased persons is not for our consideration. It is our duty to declare the law as we find it written.

There is error in the interlocutory order appealed from.

BYNUM, J., *Dissenting.* The unwisdom of the act of 1876-'77, under which this action was instituted, must be self-evident and apparent to all. Confessedly, every relief to which the plaintiff may be entitled in this Court is equally and more speedily attainable in the Court of Probate. The plaintiff in this Court can place herself on no higher ground than as a creditor in a creditor's bill; for in *Ballard v. Kilpatrick,*
(45) 71 N. C., 281, it is held that every action brought in the Probate Court to recover a debt against an administrator, is necessarily a creditor's bill, as all the creditors must be brought in and their claims

ascertained before any judgment for the payment of any one can be given. As the latter Court is always open, and the Judge upon the spot, while the action in the Superior Court can only be brought in term time, and the Judge is only then present, it is evident that the Probate Court in which the inventory and other records pertaining to the estate are filed, affords superior facilities for adjusting the rights of creditors and others in the settlement of estates. Under the law now, executors and administrators can make no preference in the payment of debts, the statute designating the order in which they shall be paid; *Hence,* the plaintiff's action, so far as it seeks to contest the validity of certain judgments (its only professed purpose), is unnecessary, inasmuch as the same contest can be made with more speed and the same certainty of result in the Court of Probate. But this action, if sustained, does impair and I think infringe upon the exclusive jurisdiction of the Probate Court; for the Superior Court has no power conferred upon it by the act, certainly no express power to decree a sale of a decedent's lands to make assets for the payments of debts.

Before lands can be sold for assets, the *executor, administrator* or *collector,* only must apply to the Court of Probate by petition, *verified by oath,* setting forth the statutory causes for the sale, and the decree of sale must be made by that Court. Bat. Rev., ch. 45, secs. 61, 62.

The Superior Court, therefore, having no jurisdiction to hear the petition and decree a sale, it was competent and proper, and no infringement of any jurisdiction of the Superior Court acquired by the action pending in it, if any could be thus acquired, for the executor to file a petition for the sale of the land in the Court certainly having jurisdiction, and according to the express provisions of the stat- (46) ute. The rightful jurisdiction of a Court ought not to be ousted by implication from an improvident and carelessly drawn statute, when such a construction can but lead to confusion and mischief. Nor is such a mischievous construction of the statute necessary to carry out the probable intent of its authors. I have no idea that it was any part of such intent to interfere with the executor's duty to reduce the estate into possession, and convert it into cash for the payment of debts. Yet such obstruction is the precise object and effect of the present action. Nor do I think it was a purpose of the act to authorize an action against an executor for a settlement of the estate before he has reduced, or had an opportunity to reduce, the land into money and place himself in a condition to pay debts or make settlement of the estate. The action is premature—as much so as would be an action on a bond before it fell due. Could creditors maintain such an action in the Court of Probate,

begun the next day after administration granted? Certainly not. Then where is the limit?

This action was begun within four months from the grant of letters testamentary, without notice, demand, or warning to the executor. Hereafter jurisdiction will be a race to the swift. Unless the executor or administrator shall file his petition for the sale of the land on the day of administration, right or wrong, he may be taken by the heels and lose both the jurisdiction and the administration after regularly obtaining it, by an enemy lying in ambush. It is idle to say that the Superior Court may appoint the executor to make the sale and fulfill the trusts of the will. The executor claims administration as a matter of right by the appointment of the testator, and the question is—can he be deprived of it without default? The Superior Court in its discretion
(47) may appoint another as commissioner to make sale and settlement under its discretion, and that yields the question. This brings us up to the main question before hinted at—when can the creditor maintain such an action as this, if at all, in the Superior Court, under this act? I think it clear that such action can be maintained only in those cases and at those times, that a similar action could have been instituted in the Court of Probate (by Bat. Rev., ch. 45, sec. 73 *et seq.*) not under twelve months from the date of administration, in analogy to the length of credit usually given upon administration sales, and the time usually required to collect the assets by actions at law. This I think should be the rule subject to exceptions arising out of special circumstances. For instance, one exception authorizing a speedier action would be, where the plaintiff could allege that the executor has funds which he is about to misapply, or threatens to misapply, or is about to do any other act in derogation of the rights of the plaintiff. Nothing of the kind is alleged here. The executor has no fund in hand applicable to debts, and has neither threatened nor proposed to apply them when received, in any other than the regular course of administration.

The injunction to my mind is clearly erroneous, to the extent that it enjoins the sale of the land. Both parties desire and pray for such sale. The only apprehension of the plaintiff is that the *fund* when received would be misapplied. That danger would be sufficiently guarded against by modifying the injunction so as to forbid the disbursement of the proceeds of sale when collected, except under the order and direction of the Court. This is upon the supposition that the Court has jurisdiction, and the plaintiff a right of action, which, for the reasons I have given, I deny. I therefore dissent from the judgment of the Court, and

am of opinion that the judgment of the Court below dismissing (48) the action, should be affirmed.

RODMAN, J., concurs in this opinion.

PER CURIAM. Judgment reversed.

Cited: Pegram v. Armstrong, 82 N. C., 325; *Houston v. Howie,* 84 N. C., 349; *Young v. Rollins,* 85 N. C., 485; *S. v. Williford,* 91 N. C., 529; *Clement v. Cozart,* 107 N. C., 695; *Fisher v. Trust Co.,* 138 N. C., 98; *Shober v. Wheeler,* 144 N. C., 409; *Oldham v. Reiger,* 145 N. C., 257; *Yarborough v. Moore,* 151 N. C., 119.

*NORTH CAROLINA GOLD AMALGAMATING COMPANY v. NORTH CAROLINA ORE DRESSING COMPANY.

Practice—Injunction Bond—Reference to Ascertain Damages.

1. It is not contemplated, under C. C. P., sec. 192, that a separate action shall be brought upon an injunction bond; the damages sustained by reason of the injunction shall be ascertained by proper proceedings in the same action, by reference or otherwise as the Judge shall direct.
2. It is not error for the Court below to direct that issues of fact, raised by exceptions to the report of a Referee appointed to ascertain the damages sustained by reason of an injunction, be submitted to a jury.
3. An injunction bond is not void, under C. C. P., sec. 192, because it specifies no amount in which the signers to it are bound.

APPEAL from an Order at January Special Term, 1878, of ROWAN, by *Kerr, J.*

In the original action the plaintiff asked among other things for an injunction to restrain the defendant from selling certain premises under the terms of a mortgage deed, and a restraining order was granted by *Henry, J.,* with a notice to defendant to show cause, etc. On the return day the parties appeared before *Cloud, J.,* who vacated said order and refused the injunction, from which ruling the plaintiff (49) appealed; it was ordered, however, that in the meantime the defendant be restrained from selling as aforesaid, upon the plaintiff's entering into an undertaking with sureties to indemnify the defendant against all such damage as he may sustain by reason of the restraining order; the plaintiff accordingly executed the required bond with one Ephraim Mauney and others as sureties. Upon said appeal the judgment refusing the injunction was affirmed and the case remanded. (See

*Smith, C. J., did not sit on the hearing of this case.

S.c., 73 N. C., 468.) And at Fall Term, 1876, of said Court the action was dismissed, and a reference had to ascertain the amount of damages which defendant had sustained by the restraining order as aforesaid. The referee notified said Mauney to appear on a certain day, but did not notify the plaintiff, and proceeded to take testimony, Mauney protesting that he did not waive any of his legal rights by appearing before the referee, and that he could not be made a party to the action against his consent, etc.; a report was made and returned to Court, to which Mauney filed exceptions when the case was called for trial, Mauney moved for an order directing the issues raised by the report and exceptions to be submitted to a jury; motion allowed, cause retained, and the defendant appealed.

Messrs. Kerr Craige and *J. S. Henderson,* for plaintiff.
Mr. W. H. Bailey, for. defendant.

BYNUM, J. Upon the coming in of the report of the referee appointed by the Court to ascertain the damages sustained by the defendant by reason of the injunction, E. Mauney, the surety on the undertaking of the plaintiff, filed exceptions to the report and asked the Court that the issues of fact raised by the exceptions be submitted to a jury. This motion was allowed and from it the defendant appealed to this Court.

So the single question presented by the appeal is—had the Judge
(50) the power to have the damages sustained by reason of the injunction ascertained by submitting issues to a jury? As to the order submitting the issues to the jury was made upon the motion of Mauney, the surety, and the appeal from that order is by the defendant, the many protests made and questions raised by Mauney must pass for nothing now, as he is not the appellant. It is sufficient to say that the Code, sec. 192, does not contemplate that a separate action shall be brought on an injunction bond, but that the damages sustained by reason of the injunction shall be ascertained by proceedings in the same action and in a mode most expeditious and least expensive to the parties, consistent with the due administration of justice and with orderly proceedings. C. C. P., sec. 192, expressly declares that "the damages may be ascertained by reference or otherwise, as the Judge shall direct." The Judge accordingly did direct a reference, and that the cause should be retained until the report came in to be passed upon. When the report was made to a succeeding term and the exceptions were filed thereto which raised such issues of fact as the Judge then presiding thought were most fitting to be submitted to a jury, it was competent for him to

make the order and was not at all inconsistent with the order of reference made by the preceding Judge.

We do not decide that a jury trial in such cases is a matter of right under the Constitution, because the question is not presented by the appeal. It was not denied but was allowed here, and it is from that order that the appeal was taken. As the statute before cited seems to place such references under C. C. P., sec. 192, within the control of the Court by declaring that the damages may be ascertained as the Judge may direct, certainly there is no inhibition against the course adopted by him in a case where the facts, as here, are complicated and many grave questions arise. (51)

We are of opinion that the Judge had the power to order the issues raised by the exceptions to be submitted to a jury, and that the making such order was but in performance and a part of the general order of reference. Whether all the charges allowed by the referee are or were intended to be covered by the undertaking, or whether the maxim applied by him that "no one shall take advantage of his own wrong" precludes the defendant from proof of benefits put upon the property while in its possession under the injunction order of the Court, are questions which do not now come before us.

We are of opinion that the undertaking is not void because it specifies no amount in which the signers to it are bound, and that the requirement of C. C. P., sec. 192, in that particular is only directory, as the sum to be fixed is for the benefit of the party enjoined, by satisfying him that it is large enough to cover the probable damages, and that he may see that the sureties are responsible men for the amount. The purpose is indemnity. The defendant here is satisfied with the undertaking and we do not see that the surety can impeach his voluntary undertaking.

PER CURIAM. Judgment affirmed.

Cited: Crawford v. Pearson, 116 N. C., 719; *McCall v. Webb,* 135 N. C., 365; *Moseley v. Johnson,* 144 N. C., 269.

CONSIDER BUSHEE and others v. LEWIS M. SURLES and others.

Practice—Discretionary Power—Reference—Amendment—Interest.

1. It is not error for the Court below to set aside a reference for the statement of an account, after the report has been made and exceptions filed, and proceed to try the case; such action is a matter of discretion and not reviewable by this Court.

(52)

2. Nor, in such case, is the exercise of the discretionary power of the Court below in refusing to allow the defendants to amend their answer, reviewable by this Court.

3. In an action by heirs-at-law against an administrator when the final account of the administrator showed a net balance in his hands due the 1st of December, 1858; *Held*, that the defendant is liable for interest from that date, it being more than two years from the death of the intestate and no reason appearing why the amount should have remained in hs hands.

APPEAL at Spring Term, 1878, of HARNETT, before *Moore, J.*

The principle facts appear in same case, 77 N. C., 62, and those material to the points now decided by this Court are stated in its opinion. Judgment for plaintiffs. Appeal by defendants.

Messrs. T. H. Sutton and *Alex'r Graham,* for plaintiffs.
Messrs. N. McKay and *Guthrie & Carr,* for defendants.

FAIRCLOTH, J. This cause was referred for the statement of an account at Fall Term, 1877, and the referee filed his report at the next term of the Court. The defendants filed exceptions to the report, and on plaintiff's motion His Honor set aside the reference and proceeded to try the case. The defendants urged that the Court had no authority at that stage of the matter to set aside the order of reference. We think he did have the power, and that the exercise of his discretion in regard thereto is not reviewable in this Court, as it is in a certain class of references under C. C. P.

The defendants then moved to be allowed to amend their answer, so as to present an issue not then raised by the pleadings, which was refused. This we think was a matter of discretion and not appealable. The cause has been in this Court once before—77 N. C., 62—
(53) after it had been submitted to trial on its merits below, and we fail to discover from any part of the record in either Court that the defendant is injured by the refusal to allow such amendment.

The plaintiff then introduced a county court judgment against the defendant for the amount now claimed, and moved for judgment accordingly. His Honor held that there was no issue presented by the pleadings for the jury and gave judgment for the balance due, $699.93, with interest from 1 December, 1858. In this we perceive no error.

The defendant, however, insisted that the judgment is erroneous, in that it allows interest from 1 December, 1858, instead of 5 April, 1870. The record now before us is not as complete as good practice requires,

but we extract the following facts as pertinent to the question of date of interest.

Some time in 1857 the defendant as administrator of Patience Bushee recovered the county court judgment referred to, and in May, 1858, the collection of the same in part was restrained by a Court of Equity. What further proceedings were had under the injunction does not appear. The above judgment is the basis of the present claim. In this action the plaintiffs allege in their complaint that the defendant, L. M. Surles, in 1870, filed his final account as administrator as aforesaid, with the Judge of Probate in said county, "showing a net balance in his hands due 1 December, 1858," and this allegation is not denied by the answer, but substantially admitted. Upon these facts it is clear that the defendant is liable for interest from that date, it being two years or more from the death of the intestate, and no reason appearing why the amount should remain in the administrator's hands. Let (54) judgment be entered here for the plaintiffs.

PER CURIAM. Judgment affirmed.

Cited: Commissioners v. Magnin, 85 N. C., 114; *Skinner v. Carter,* 108 N. C., 108; *Worthington v. Coward,* 114 N. C., 291; *Cummings v. Swepson,* 124 N. C., 585; *Rogers v. Lumber Co.,* 154 N. C., 109; *Lance v. Russell,* 157 N. C., 453; *Overman v. Lanier,* 159 N. C., 438; *Lee v. Giles,* 161 N. C., 546.

WILLIAM M. TANKARD v. SALLIE A. TANKARD and others.

Practice—Issues—Inconsistent Findings—New Trial.

1. Where the issues submitted to the jury on the trial in the Court below were confused, it was not error to set aside the verdict and order a new trial.
2. Where in an action to recover land, the replication of the plaintiff admitted the open and notorious possession of defendants' ancestor when plaintiff purchased, and on the trial the jury found that defendants' ancestor had certain equitable rights against plaintiff's vendor, and also found that the plaintiff was a *bona fide* purchaser for value without notice; *It was held,* that the possession of defendants' ancestor was actual notice to plaintiff of his equities in the land, and that the facts admitted and the findings of the jury were inconsistent and contradictory, and a new trial was properly ordered.

CIVIL ACTION to recover land, tried at Spring Term, 1878, of BEAUFORT, before *Henry, J.*

The facts stated in the opinion are deemed sufficient to present the points decided by the Court. The plaintiff moved for judgment but His Honor held that the issues were confused and that he could not render judgment thereon, and ordered them to be reformed and granted a new trial, from which ruling the plaintiff appealed.

(55) *Messrs. J. E. Shepherd* and *G. H. Brown, Jr.,* for plaintiff.
Mr. D. M. Carter, for defendants.

FAIRCLOTH, J. His Honor ordered a new trial on the ground that the issues were confused, and he could render no judgment. From this order the plaintiff appealed, and says he is entitled to a judgment according to the verdict on the second and third issues, notwithstanding the verdict on the other issues and the facts admitted in the pleadings. Some of the issues submitted were badly constructed, and, with a single response, are without meaning. For example—"Did said O. H. P. Tankard purchase said land for benefit of said Ransom Tankard and his family, under an agreement with Ransom to the effect, and did said Ransom remain in possession under that agreement as long as he lived, or was the possession of said Ransom and his family permitted by said Oliver, as a gratuity on the part of said Oliver?" Answer—"Yes."

But this is not the principal difficulty in the way of the plaintiff. It appears from the findings on the issues that the vendor of the plaintiff in 1849 attended the sale of his brother's land, and by his representations suppressed bidding, and by express agreement purchased the land in trust for the benefit of his brother and family, and if we understand the substance of the findings, this agreement and understanding existed between the two brothers until Ransom's death in 1872.

The verdict on the second and third issues, on which plaintiff demands judgment, is, that the plaintiff's vendor has not been paid the purchase money and charges on the land, and that the plaintiff is a *bona fide* purchaser for value, and without notice of defendants' equities. The plaintiff purchased in 1869. It is admitted by plaintiff in his replication that said Ransom was in possession of the land, cultivating and otherwise using it from 1849 until his death in 1872, and that since his death the defendants have used it in the same way, and this is
(56) substantially the finding of the jury on other issues. Here, then, was notice to the plaintiff at the time he purchased, of an actual possession by a third person, which gave him notice of all the equities of such third person. In *Edwards v. Thompson,* 71 N. C., 177, it was held by this Court that the possession of a tenant was notice of the land-

lord's equities to the purchaser, although he lived in another State and did not *in fact* have knowledge of the tenant's possession. Open, notorious, and exclusive possession puts a purchaser upon inquiry, and is notice of every fact which he could have learned by inquiry. The plaintiff therefore was a purchaser with notice of the defendants' ancestors' equitable rights to redeem the land, if in fact he had not made the payments, and still on the third issue the finding is that the plaintiff purchased without notice. We agree with His Honor not only that the issues were confused, but that the findings and facts admitted were inconsistent and contradictory, and that a new trial was properly ordered.

PER CURIAM. Judgment affirmed.

Cited: Tankard v. Tankard, 84 N. C., 288; *Smith v. Fuller,* 152 N. C., 12; *Campbell v. Farley,* 158 N. C., 44.

C. H. BERNHEIM v. T. R. WARING and D. G. MAXWELL.

Practice—Jury Trial.

It is the constitutional right of every litigant to have the issues of fact joined in the progress of his cause determined by a jury, except where he voluntarily waives the privilege; and *therefore* a compulsory reference of such issues to the determination of a single person is *error.*

(57)

ACTION commenced in *Cabarrus* and removed to and tried at January Special Term, 1878, of ROWAN, before *Kerr, J.*

At Fall Term, 1876, the plaintiff moved for a reference to the clerk to state an account of partnership dealings between him and defendant, Waring, to ascertain the amount due plaintiff as alleged in his complaint. The defendant, Maxwell, was surety upon a bond of his co-defendant conditioned for the faithful performance of the partnership contract. The said motion was opposed by Maxwell, and thereupon an order was made as follows: "Referred to J. M. Horah, clerk, to state an account, not to prejudice D. G. Maxwell." The account was taken and filed at the subsequent term, to which no exceptions were either then or since made. Certain depositions tending to show that Waring did not owe the plaintiff were considered by the referee in taking the account. When the case was called, the defendant, Maxwell, demanded that the issues be tried by a jury, after being refused leave to

file exceptions to the referee's report. The Court declined to allow a jury trial and confirmed the report and gave judgment accordingly, and defendant, Maxwell, appealed.

Mr. Kerr Craige, for plaintiff.
Mr. W. H. Bailey, for defendant.

FAIRCLOTH, J. The constitution guarantees the right of trial by jury to every one, and no one can be deprived of it except by his or her consent. When this consent is once given and some other mode of trial is adopted in the due course of proceeding, the right is gone and the suitor can no more return to it; but until it is given or waived or lost by negligence it remains unimpaired by an order of Court or by any action of other parties.

In the present case defendant Maxwell opposed the motion for
(58) reference to state the partnership account between Waring and the plaintiff. The reference, however, was made without prejudice to him, Maxwell. At Fall Term, 1877, the cause was continued and this record made: "Report of referee filed—open for exceptions." At the following special term of the Court held in January, being the first after the Fall Term, the defendant Maxwell "demanded a jury trial of the issues, having first asked leave to file exceptions to the report and been refused." His Honor refused the motion and confirmed the report and rendered judgment accordingly for the plaintiff. No reason is given why the defendant was not allowed to file exceptions to the report and have such material issues as were thereby raised submitted to a jury, and we are unable to see any ourselves. Counsel have argued in this Court that exceptions can be filed as a matter of right in the party, only at the term when the report is filed, and that after that time they may be filed or not at the discretion of the Court. If that be the rule it has no bearing in this case, for the reason that at Fall Term, 1877, when the report was filed it was left "open for exceptions" by the Court. This meant either that either party might subsequently put in exceptions as of that term and as a matter of right, or that the Court in its discretion would allow the parties to file exceptions at some future time, but at what time is not indicated. In either view the parties neither waived nor lost their right to file exceptions, because no laches will be imputed to any one who avails himself of time granted by the Court.

It is quite plain that defendant Maxwell from the outset intended

to have his case submitted to a jury, and it is equally clear that he has not consented to any other mode of trial.

PER CURIAM. Judgment reserved.

Cited: McCandless v. Flinchum, 98 N. C., 358; *Wilson v. Featherston,* 120 N. C., 447.

(59)

STRAUS, HARTMAN, HOFFLIN & CO. v. L. P. BEARDSLEY, Adm'r., and others.

Practice—Statute of Limitations—Guaranty—Notice.

1. If the Judge to whose decision are referred both the law and the facts of a case under C. C. P., sec. 240, should fail to find the facts fully and distinctly, so that his conclusions of law cannot be reviewed on appeal, the case will be remanded for a fuller finding on the facts.
2. It is the duty of an appellant excepting to the rejection of evidence to set forth the evidence offered, so that the appellate Court may judge of the propriety of its rejection.
3. If suit be brought 20 March, 1872, on a cause of action, founded on simple contract, arising subsequent to 1 August, 1860, and such action be dismissed for want of jurisdiction, in March, 1874, the plea of the statute of limitation will not avail against a second suit on the same cause of action begun 31 December, 1874.
4. Where several persons undertook, in the sum of one hundred dollars each that if a certain mercantile firm should furnish J. L. P., as agent for said firm, with goods for sale on commission *"or otherwise,"* in default of his fairly settling and accounting with said firm, they would pay the amounts for which they were respectively bound; *Held,*

(1) That the obligation was to guaranty *the contract* of J. L. P. and was therefore absolute and unconditional; and that the makers of the paper were not entitled to notice from the firm of the delivery of the goods, nor of the failure of J. L. P. to pay for the same accompanied with a demand on the guarantors.

(2) That the obligation was not restricted to accountability for the first lot of goods delivered, but was intended to secure the firm from loss in their successive dealings with J. L. P., and provide them a continuing indemnity.

Semble, that the obligation bound the makers only for the acts of J. L. P., as agent, and not for absolute purchases made by him.

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

This action was brought upon an instrument of writing as (60) set out in the opinion, and upon the trial before a Justice of the Peace, the defendant pleaded general issue, statute of limitations, pay-

ment, accord and satisfaction, and a want of notice and demand. Judgment was rendered for the plaintiffs, and the defendant appealed to the Superior Court.

The case states: Upon the trial in the Court below, in order to repel the bar of the statute of limitations, the plaintiffs offered in evidence the record of an action brought upon the same bond, the summons in which was issued on 20 March, 1872, served on all the defendants, and that the said action was dismissed at March Term, 1874, for want of jurisdiction. The summons in the present action was issued on 31 December, 1874, and served on W. K. Delany, administrator of W. B. Eborn, and during the pendency of the action, Delaney died, and Beardsley was made a party defendant as administrator d. b. n. of Eborn.

The plaintiffs offered in evidence the deposition of Stern Hartman, one of the plaintiffs, taken during the pendency of the original action by a commissioner of affidavits for North Carolina, in the city of Baltimore. Notice of taking the deposition was given to the attorney, who represented all the defendants, except the defendant administrator, whose attorney, before the date of the notice to take depositions, filed an answer for defendant administrator, and the other attorney also filed answers for the other defendants. The deposition was taken, sent to the clerk and opened in open Court.

The defendants objected to the reading of the deposition upon the ground: 1.—That the deponent was a party plaintiff and incompetent because J. L. Paul, plaintiff's agent, was dead at the time the deposition was taken. 2.—That there was no notice of taking the same served on the representative of W. B. Eborn, or his attorney. 3.—That
(61) the deposition was taken in another suit of which the Court had no jurisdiction. The objection was sustained and the plaintiffs excepted.

The plaintiffs then offered the deposition of D. S. Stewart, taken by the commissioner as aforesaid, to which the defendants objected. Objection overruled. The deponent testified that in 1860-61, he was the shipping clerk of plaintiffs, and that the paper writing (sales and transactions between plaintiffs and Paul), is a bill of goods sold and delivered to James L. Paul, doing business at Greenville, N. C., at or about the dates as charged. Deponent attended to packing and shipping the goods. The account was just and correct, and prices the same as paid by other customers at the dates of sale.

The plaintiffs further proved that Paul died insolvent in 1870, and that demand was made upon his administrator to pay the amount of the bill of goods. And demand was also made upon Delaney, adminis-

trator of Eborn, some time after the death of Paul, and before this action was brought.

The defendants insisted that the plaintiffs could not recover: 1.—Because there was no evidence of the existence of any such firm as that of the plaintiff at the time the action was brought, and that it could only be maintained by the surviving member of the same. 2.—Because the terms of the guaranty were not complied with by the plaintiffs. 3.—Because the guaranty of the defendants was to pay for such goods as plaintiffs might deliver to Paul as their agent, and the evidence was that the sale was an absolute one from plaintiffs to Paul; and the guaranty was not a continuing one, but confined to the first transaction between Paul and plaintiffs, and all goods obtained by Paul were paid for. 4.—Because there was no evidence that the paper writing declared on was accepted by plaintiffs and no notice was given to defendants by plaintiffs that plaintiffs intended to act under it; nor was notice given to the defendants of the sales made to Paul, or of the default of Paul until 1872. 5.—That plaintiffs' cause of action (62) is barred by the statute of limitations. His Honor being of opinion with defendants dismissed the action, and the plaintiffs appealed.

Messrs. Battle & Mordecai, for plaintiffs.
Messrs. Jarvis & Sugg, and *Gilliam & Gatling,* for defendants.

SMITH, C. J. This action was commenced on the 31st day of December, 1874, before a Justice of the Peace, and upon the following contract:

"GREENVILLE, N. C., 1 August, 1860.

"We, the undersigned, acknowledge ourselves indebted to the firm of Strauss, Hartman, Hofflin & Co. in the sum of one hunded dollars each, for payment of which well and truly to be made, we bind ourselves, our executors, administrators and heirs. The condition of the above obligation is such that if the said firm of Strauss, Hartmann, Hofflin & Co. shall furnish James L. Paul as agent for them, with goods for sale on commission or otherwise, and the said James L. Paul shall thereafter fully and fairly settle and account for the said goods, then the above obligation to be void; otherwise to be and remain in full force and effect."

The contract is executed by W. B. Eborn, the defendant's intestate, and fifteen other persons.

The record of proceedings is very imperfect, but its omissions are

supplied by the statements contained in the case sent up with it. The following defences are made to the action. (1) A general denial of liability on the contract. (2) The want of notice to the intes-
(63) tate of the delivery of the goods to Paul, and of a demand of payment. (3) The bar of the statute of limitations. The action was brought against W. K. Delaney, the administrator of W. B. Eborn, who died pending the suit, and the present defendant as administrator *de bonis non* was substituted in his place.

There was but one distinct exception of the plaintiffs taken at the trial, and this was to the rejection of the deposition of the plaintiff, Stern Hartman, offered in evidence. The deposition had been taken in a former action instituted in the Superior Court by the plaintiffs against the first administrator of the intestate, Eborn and others, who signed the contract, and was dismissed for want of jurisdiction. The evidence contained in the deposition is not set out, nor the purpose for which it was offered stated, and we are consequently unable to see that it was either relevant or competent, or that any injury resulted from its exclusion. It was the duty of the plaintiffs, as has repeatedly been decided, to show that the rejected evidence was competent and proper. *Sutliff v. Lunsford,* 30 N. C., 318; *Whitesides v. Twitty,* 30 N. C., 431. The exception must be overruled.

The evidence given by the plaintiffs is set out in the case, and without finding any fact, the Judge who, under the agreement of parties was to find the facts, being of opinion that the plaintiffs could not recover, dismissed their action. But we are not informed upon what grounds the action is dismissed, nor which of the defendants' objections are deemed valid and fatal to the plaintiffs' recovery. We must, therefore, in reviewing the correctness of the ruling of the Court below, assume as proved, not only such facts as are directly testified to, but such as may be reasonably inferred from the evidence. We will therefore consider the defences set up, and their sufficiency to warrant the judgment of the Court:

1. The statute of limitation is insisted on as a bar to the action: This defence is not tenable. The goods were delivered to Paul
(64) in August, 1860, and afterwards. The first action, dismissed for want of jurisdiction, was commenced 20 March, 1872, and ended at March Term, 1874, of the Court. The present suit was instituted on 31 December, 1874. Excluding the interval during which the statute of limitations was suspended, three years had not elapsed from the delivery of the goods when suit was instituted, and the present action is brought within a year after the termination of the other. The

plaintiffs are thus relieved from the effects of the lapse of time, and their claim protected. The judgment dismissing the action is in substance a nonsuit and must be attended with the same legal consequences; and a nonsuit though not within the very words of the act, has been held by express adjudication, and long uniform practice, to be within its scope and meaning. Rev. Code, ch. 65, sec. 8. *Skillington v. Allison,* 9 N. C., 347; *Morrison v. Conelly,* 13 N. C., 233.

2. The contract is alleged to be one of guaranty, and to require notice of delivery of goods under it, in order to create a liability therefor: It is true in ordinary cases of guaranty, such as letters of credit, the guarantor can not be made responsible for goods sold on the faith of it, unless notice is given him in a reasonable time, and [he] be thus afforded an opportunity of securing from the party to whom they are delivered an indemnity against loss to himself. But if the undertaking be to *guaranty* the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional and no notice is necessary. *Williams v. Collins,* 4 N. C., 382. Such in our opinion is the contract of the intestate. It is in the form of a penal bond, and lacks only one element, a seal, to make it such. The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only when goods have been delivered under its provisions, by *actual payment* of the purchase price. If the goods are delivered, the contract is to pay for them, and a compliance with this condition is the (65) only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished goods to Paul, and that they were paid for, and no notice or demand was necessary to charge them with the debt.

3. The contract as construed by the defendant applies only to a delivery of goods to Paul, as agent of the plaintiffs, for sale on commission or other compensation, and is confirmed to a single transaction; and it is insisted that the dealings between these parties, as disclosed by the evidence and account exhibited, are those of vendor and vendee, and are outside the protection of the contract.

If we admit this to be the true and proper meaning of the undertaking, and we are inclined to do so, we are not prepared to say it does not embrace the transactions now under investigation. The evidence shows a delivery of goods shortly after the contract was entered into, at different times and at specified prices, and the witness speaks of it as a sale. But the entry on the plaintiffs' books specifying the articles delivered, their dates and prices, would be similar in all probability, if they were transmitted to an agent for disposal, and is but a detailed

memorial of the transaction. The *terms* and conditions on which the deliveries were made are not shown, nor the true character of the dealings revealed in the evidence. In the absence therefore of any findings of fact by the Judge, we can not declare these dealings not embraced in the intestate's obligation. The facts should have been reported, as found by the Judge, and not meagre evidence set out instead, in order that we may properly apply the principles of law which control and govern them.

In our opinion the obligation is not restricted to one act of delivery, but was intended to secure the plaintiff from loss in their successive dealings with Paul, and provide for them a continuing indem-
(66) nity. The cause must be remanded in order that the true character of the transaction, and the terms and conditions on which the plaintiffs delivered the goods may be ascertained, and the liability if any incurred by the intestate in regard to them, determined.

The judgment below was erroneous and is reversed and the cause remanded. Let this be certified.

RODMAN, J., *Dissenting.* I do not concur in the judgment of the Court. I think the judgment below dismissing the action should be affirmed. It is clear to me that taking all the evidence for the plaintiffs as true, they have failed to make out a case entitling them to recover. On the contrary the case presented by them is fatally defective:

1. The writing signed by the intestate of defendant, and others, which the plaintiffs exhibit as the foundation of their claim, is an *offer* to guaranty that if plaintiffs would furnish Paul with goods to sell as agent for plaintiffs, he (Paul) would account for the same, or that in case of his failure to do so, each of the signers would severally make good his proportion of the loss to an amount not exceeding $100. The form of writing is an acknowledgement of indebtedness to the plaintiffs, conditioned to be void in a certain case. But the substance and effect of the writing is as I have stated. If the object be justice, we must in all cases look beyond the form into the substance and effect of a contract; and especially is this true of commercial instruments of writing. Men of business are rarely acquainted with the forms of technicalities of the law; and in order to ascertain the intent of their contracts, we must construe them without reference to form or technicality. The writing, however else it may be construed, could be nothing but an offer. The plaintiffs on receiving it were not bound to intrust Paul with goods to sell as their agent, and no contract was completed between them
(67) and the signers of the offer, until its acceptance was notified

in some way to the signers. No authority need be cited for this but I refer to 2 Pars. Contracts, 12. Notice of assent may often be inferred from the conduct of the parties, but I find no evidence of it in this case.

In the case of an offer to guaranty payment for goods to be sold, or the fidelity of an agent to be intrusted with goods for sale, it has been held that notice is required, not merely of assent to the offer, but of the fact that the agent has actually been intrusted with goods for sale, according to the contract; and some cases say the guarantor should be notified of the value of the goods. 2 Pars. on Contracts, 12, *et seq.*

I refer to two cases only, not only because they are in point, but they settle the question discussed in this Court in *Shewell v. Knox*, 12 N. C., 404: On 25 September, 1832, Calvin Jones (of Raleigh) wrote to the plaintiffs, merchants in New York, offering to become security for any goods Miss Miller might purchase, etc. The plaintiffs thereupon sold goods to Miss Miller on the faith of the guaranty which they kept, but gave no notice thereof to the defendant. Miss Miller failed to pay; suit was brought against the defendant, and the Supreme Court of the United States gave judgment for him, on the ground of the want of notice that his offer had been accepted and acted on. *Adams v. Jones*, 12 Pet. 207. The second case is *Reynolds v. Douglass*, 12 Pet. 497, and is to the same effect. It is to be noted that in both these cases the letter offering to guaranty was addressed to a particular firm.

As an authority that no notice was required in this case, the Court cites *Williams v. Collins*, 4 N. C., 382, decided as far back as 1816. In my opinion the decision does not support the proposition. The instrument on which the action was brought was addressed by the defendant to the plaintiffs, and was in substance this: "If you will sell Henry a vessel, etc., I will *guaranty* any contract he may (68) enter into with you for the same, etc." On the failure of Henry to pay his note given for the articles bought, plaintiff sued and got judgment against him. The defence was that by due diligence plaintiff might have made his judgment out of Henry, and that by his want of diligence he had discharged defendant. The Court held that by the terms of the guaranty, the defendant on Henry's failure to pay became absolutely bound to pay the debt, and that plaintiff was not bound to any effort to collect it from Henry. I think the decision was right, although TAYLOR, C. J., dissented. But there was no question as to notice, and the case has no bearing on the present. *Seawell, J.*, said the contract was an absolute one, but he meant only that it became absolute on Henry's failure to pay. It could not be absolute at its

making, because Henry was certainly liable, and defendant only on his failure. *Draughan v. Bunting,* 31 N. C., 10, a later and leading case, denes decisively when a contract is collateral; it is so whenever some one else is liable in the first instance, and the promise sued on is superadded. See also *Beeker v. Saunders,* 28 N. C., 380, and *Spencer v. Carter,* 49 N. C., 287.

I think that the defendant was entitled to notice that Paul had been intrusted with goods to sell as plaintiffs' agent, and as there is no pretense that he had it, he was never bound.

2. It positively appears from the evidence for the plaintiffs that the offer was never accepted or acted on. The plaintiffs *sold* Paul goods. They do not say that they intrusted him with goods to sell as their agent. The defendant agreed to be liable only for Paul's fidelity as an agent, not for his solvency as a purchaser. The practical difference is great, and need not be enlarged on. The Court are inclined to agree with me on this point. If my opinion and the inclination
(69) of the opinion of the Court are right, the plaintiffs can never recover. Why hold out hopes that can only lead them into deeper bogs of litigation? If their case is doomed to death, give it quickly the *coup de grace,* the merciful blow which ends hope and suffering. It is to the plaintiff's interest as it is to that of the republic *"ut sit finis litium."*

PER CURIAM. Judgment reversed and cause remanded.

Cited: *Wharton v. Com'rs,* 82 N. C., 11; *Roberts v. Roberts,* 85 N. C., 9; *Gadsby v. Dyer,* 91 N. C., 311; *Mining Co. v. Smelting Co.,* 99 N. C., 445; *Fertilizer Co. v. Reams,* 105 N. C., 283; *Webb v. Hicks,* 125 N. C., 202; *Woodstock v. Bostic,* 128 N. C., 248; *Weeks v. McPhail,* 129 N. C., 74; *Walker v. Brinkley,* 131 N. C., 20; *Prevatt v. Harrelson,* 132 N. C., 254; *Harris v. Davenport,* Ib., 701; *Cowan v. Roberts,* 134 N. C., 420; *Womack v. Gross,* 135 N. C., 397.

ANGUS BLUE and others v. DANIEL BLUE and others.

Practice—Sale of Land for Division—Fraud—Irregular Judgment—Purchaser—Mistake.

1. A Court of Equity will not disturb a sale of land for division, made by a commissioner of the Court, after a decree of confirmation merely because of an advance offered in the price; *Aliter,* if an advance of ten per cent is offered before confirmation.

2. Generally, such a sale will not be set aside after confirmation except upon the ground of fraud, but "fraud" should here be understood in its largest sense as including those cases of accident, mistake and surprise of which it is unconscientious to take advantage.
3. In order to acquire such sanctity as will make it inviolable except for the causes above set forth, a judgment or decree must be regularly rendered according to the course and practice of the Court. An irregular judgment is entitled to no such protection.
4. A judgment confirming the report of a commissioner selling for division rendered without notice to the parties in interest to come in and oppose the same if so advised, is an irregular judgment and may be vacated on motion.
5. Except in the case of an order merely formal and of course, a Probate Court has no power, on its own motion and without application from any party in interest, to make any order in an action. (70) Such order is irregular and voidable, if not void.
6. A purchaser at a sale of land for division is under no obligation to disclose his opinion that the area of the land is greater than it is described to be at the sale.
7. A Court of Equity will set aside a judicial sale for division when it appears (1) that the commissioner to make the sale sold for cash instead of on credit as he was directed by the Court to do, and (2) that there was a grave mistake as to the area of the land, common to all parties.

PETITION for Partition of Land filed in 1874, in the Probate Court, and heard on appeal at Fall Term, 1877, of RICHMOND, before *Seymour, J.*

It was alleged that the parties were tenants in common of certain lands which descended to them as heirs at law of Malcolm Blue. The plaintiffs asked for an order of sale for partition, which order was granted, a sale made by a commissioner appointed for the purpose, his report returned and confirmed on 12 December, 1876. And shortly thereafter John Campbell, the purchaser, filed an affidavit stating that he bought a certain portion of the land known as the "McIntyre tract," and had tendered to the commissioner the amount of the purchase and demanded a deed for title, which was refused. Thereupon a rule was served upon the commissioner to show cause why he should not be attached for contempt in refusing to make the deed in accordance with the decree of the Court, and on the day after the service of the rule, notice was given to the commissioner and purchaser of a motion to set aside the sale of said tract and for a resale of same. In answer to the rule, the commissioner stated that before its service upon him, the parties in interest had instituted proceedings to set aside the sale upon the ground of certain irregularities in conducting the same, which are sufficiently embodied in the opinion of this Court delivered (71) by Mr. Justice RODMAN. The judgment of confirmation was

set aside by the Probate Court and a resale of said tract ordered. His Honor reversed said judgment and remanded the case to the end that the commissioner upon receiving the amount of the purchase money execute a deed for the land. From which ruling the petitioners appealed.

Messrs. McNeil & McNeil, J. D. Shaw, and *N. W. Ray,* for plaintiffs.

Messrs. N. McKay, J. W. Hinsdale, and *R. A. Johnson,* for defendants.

RODMAN, J. It is admitted that the rule is established that a Court of Equity will not disturb a sale of land made by a commissioner of the Court for partition, *after a decree of confirmation,* merely because of an advance offered in the price. It has been said generally, that such a sale would not be set aside after confirmation, except upon some circumstances of fraud. *Ashbec v. Cowell,* 45 N. C., 158; *Harrison v. Bradley,* 40 N. C., 136. Probably the Court did not use the word "fraud" with absolute strictness; for certainly cases of accident, mistake, and surprise are conceivable, which would call upon a Court to set aside a sale, as strongly as a case strictly of fraud. The rule is only an application of the general doctrine which prevails in all Courts, that no order of proceeding will be vacated, unless application for that purpose be made in apt time, and where no time is positively prescribed, apt time has been held to be before any proceeding has been taken, founded on the one which it is sought to vacate or modify. This doctrine is not only just and reasonable, but it is necessary for the orderly progress of a cause to final judgment. If a Court could be called
(72) on at the pleasure of a suitor to go back and review every previous order, and to disturb everything which had been done under it, nothing would ever be established, and justice would be indefinitely delayed. But that an order confirming a sale may have the effect of precluding any inquiry into its own legality and propriety, and into the circumstances of the sale, it must be itself regularly made according to the practice of the Court, which is prescribed by considerations of justice and convenience.

When, therefore, the purchaser in this case sets up the order confirming the sale as conclusive against the plaintiffs in the absence of fraud, and as prohibiting any inquiry whether in consequence of some accident or mistake the property did not sell for less than its real value, it becomes material to inquire whether the order of confirmation was made

under circumstances to make it binding on the plaintiffs, that is to say, whether they had an opportunity to be heard in oposition to it. It is a principle of universal justice, that no one is bound by a proceeding which he had no notice of, and on which he could not be heard.

These observations bring us to the inquiry, whether the order of confirmation in this case was regular. The facts bearing on this question are these: John McKay was appointed by the Probate Court a commissioner to sell, among other tracts, the McIntyre place, which is the subject of this application. I purposely omit to state the terms on which he was to sell, as not bearing on the particular inquiry we are now pursuing. He reported (the date of his report is not given) that he had sold the lands on 28 November, 1876, and that John Campbell had purchased the McIntyre place for $2,000. On 12 December, 1876, the Court confirmed the sale. Upon whose motion this order was made, or whether upon the motion of anyone, or by the Court *ex mero motu*, does not appear. And it does not appear that any party (under which term I include the purchaser) had any notice that the (73) report of sale had been made, or that an order of confirmation would be moved for. Neither does it appear when the parties became informed of the order. In March, 1877, the plaintiffs made the motion to set aside the sale which is now before us. It is contended for the plaintiffs, that this order of confirmation was irregular for want of notice, and was void or voidable; that a motion to set it aside, if necessary, must be considered as included in the motion to set aside the sale; and that it ought not to be an obstacle to the consideration of their motion to that effect upon its merits.

When courts were held at fixed periods, and for a few days only, parties to suits might reasonably be required to be in attendance during the whole of every term, and to take notice that at any time a motion for confirmation of a sale, or any other motion, might regularly be made. They were presumed to have notice of every proceeding in their suit.

But even then, notice was required to be given of every proceeding to be had out of term time, as of taking depositions, assigning dower, the surrender of bail, etc. *Huggins v. Fonville*, 14 N. C., 392; *Howzer v. Dellinger*, 23 N. C., 475. When the constitution of 1868 declared that the Courts should be always open for the transaction of all business, except trials by jury (Art. IV, sec. 28, now 22), it was necessary to provide for notice of all motions and other proceedings to be made or had out of term time, and the C. C. P. does provide for it specially in several cases; and in Sec. 297, enacts generally, that all orders made

out of Court,—that is, not in term time,—without notice, may be vacated, on motion.

After the enactment of the act suspending the Code of Civil Procedure in certain cases, and requiring (generally) all proceedings in actions in the Superior Courts to be taken in term time, it was held in *Clayton v. Jones,* 68 N. C., 497, as a consequence of that act,
(74) that this rule of the presumption of notice was revivied. But as the Probate Courts are always open, this presumption of notice cannot reasonably or justly be held to apply to proceeding in them. In them no day is even approximately fixed on which a report of sale shall be returned, or on which a motion to confirm or vacate a sale shall be made. In such case sec. 297 of C. C. P. applies. Continuous or perpetual attendance cannot be required from parties.

If the time for moving for an order to confirm or vacate a sale or other proceeding can be chosen by one party without notice to the other, and if an order so made is to have the effect contended for, and to shut off all inquiry into its legality or propriety, frequent injustice is likely to result, and a rule founded on reasons of justice and public convenience will become convenient only as a means of fraud. In England, it seems that some actual notice of every motion or proceeding is in general required. But the difference in this respect between the stated terms of the Nisi Prius Courts, and Courts always open, or open only at uncertain periods, seems to be taken. "A notice to try at the Assizes, need not specify any particular day, but it is otherwise if the trial be before the sheriff, or the recorder of a borough." *Farmer v. Mountford,* 1 Dowl, 366 N. C.; Tidds Pr. 9th Edition, 468.

A Probate Judge has no power to make an order in an action, except one merely formal and of course *ex mero motu,* without an application from any party, in the absence of all of them, and without notice to them. He has no right to become an actor or a party in any case pending before him. Such an order is irregular and voidable, if not void. The order of confirmation was at least irregular, because made without notice to the parties, and when they had no opportunity to oppose it. It was liable to be vacated on the application of any party within a reasonable time. By the act of 1868-69 (Bat. Rev., ch.
(75) 85, sec. 5), a notice of ten days is required before the confirmation of an *actual* partition. We think that the motion to set aside the sale now under consideration, includes within it, a motion to vacate the order of confirmation, which therefore presents no obstacle to a consideration of the motion to set aside the sale upon its merits. We consider this motion as if it had been made when the motion for

confirmation was made, and in opposition to it. Should the sale be confirmed?

There is no evidence of fraud on the part of any one. It is possible, and even probable, that the purchaser thought that the area of the land was greater than it was described to be at the sale, but he was under no duty to publish his opinion, and guilty of no fraud in omitting to do so. Kerr on Fraud, etc., 414,57,58. It appears, however, (1) that the commissioner sold for cash instead of on credit, as he was ordered by the Court to do, and, (2) that there was a gross mistake as to the area of the land, common to all the parties. It was described in the original petition as estimated to contain 1,400 acres, and by the commissioner in his report, and impliedly at the sale, as 1170 acres, and it seems probable, and for the present purpose we must assume that it does in fact contain 2,400 or 2,500 acres. The commissioner sold without having made an effort to ascertain the true area. We conclude that the commissioner was guilty of some negligence, and that the misdescription of the area caused the land to sell for less than its real value. The practice in this State is to set aside a sale before confirmation upon an offer of an advance of ten per cent upon the price. That also is the English practice. Generally in the United States the Courts will not set aside a sale upon a mere advance of price; they require in addition some circumstances of fraud or accident, mistake or surprise; but slight circumstances are sufficient if they appear to have materially depreciated the price, and especially if the application is made before the purchaser has incurred expenditure for improvements, etc., for which he will generally be allowed. *Bost ex parte,* 56 N. C., 482. (76)

In *Goode v. Crow,* 51 Mo., 214, the sale was set aside because rumors had gotten in circulation that the sale would not take place on the day advertised, but on the next day. In *Leferre v. Laraway,* 22 Barb., 173, one of the owners and parties swore that he had intended to pay $9,000, but was in such a state of nervous excitement during the sale, that he permitted the property to go for $7,000. The sale was set aside on terms.

There is no offer in this case to advance the price. The cotenants do not all appear to be *sui juris.* Some of them are described as the heirs of such an one,—names unknown. These, of course, can not be represented by counsel. We can not therefore be governed by the wishes or conceptions of those of the cotenants who are *sui juris,* as expressed by their attorneys, but have to regard the interest of those unknown parties who are not represented, and some of whom are probably infants. who are not represented, and some of whom are probably infants. We

We are not therefore at liberty to assume absolutely that a resale will be for the interest of all the cotenants, and we have endeavored to provide for those who do not appear, in our decree. We think it can not be doubted that a contract for sale *inter partes,* would be rescinded at the instance of either party, when it appeared that a mutual mistake existed as to the area of the land contracted to be sold, of so grave a character as appears to have existed in this case, although neither party was in fault. *Wilcox v. Calloway,* 67 N. C., 463; Fry Specific Performance, 109; 1 Story Eq. Juris., sec. 132; Kerr Fraud and Mistake, 363, citing *Earl of Durham v. Lagard,* 34 Beav., 612; *Marbury v. Stonestreet,* 1 Md., 147; *Kent v. Careand,* 17 Md., 291.

The order of confirmation is set aside for irregularity, and the case is remanded to the Superior Court, with directions to remand it
(77) to the Probate Court with directions to that Court, to order a survey of the McIntyre place, for the purpose of ascertaining its boundaries and area. And if it shall appear to contain materially more than 1,170 acres, and any person will advance the bid of Campbell by ten per cent or more, and give security to pay that advanced sum in case he shall be declared the purchaser, then to set aside the sale, and order a resale by the same or another commissioner, on a credit as originally ordered.

As the purchaser is not in the wrong, the plaintiffs will pay their own and his costs in this Court. Let this be certified, etc.

PER CURIAM. Judgment accordingly.

Cited: *White ex parte,* 82 N. C., 377; *Stradley v. King,* 84 N. C., 635; *Attorney General v. Nav. Co.,* 86 N. C., 408; *Vass v. Arrington,* 89 N. C., 103; *Trull v. Rice,* 92 N. C., 572; *Dula v. Seagle,* 98 N. C., 458; *State v. Johnson,* 109 N. C., 855; *Taylor v. Gooch,* 110 N. C., 392.

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*JOHN F. WEEKS and others, infants by their guardian, F. N. MULLEN, v. ALETHIA WEEKS and JAMES WEEKS.

Practice—Judgment—Legatees, right of election between land and another fund.

1. A judgment declaring expressly or impliedly certain facts as admitted by the pleadings, can only be reviewed (if at all) upon some direct proceeding instituted for that purpose.

*SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

2. Where a testator bequeathed to certain of his children a fund arising from a policy of insurance which belonged to them all equally, and directed that in the event the fund should be used in the payment of his debts, the bequest should be made good out of his land, and the residue of the land divided among all his children equally, (78) thereby putting the children not included in the bequest to an election between their interest in the insurance money and their claim to the land under the will: *It was held* that they were entitled to an account to ascertain how much of the insurance fund had been applied to the payment of the debts before they could be compelled to make their election.
3. Parties put to an election between land and another fund, have no right to call for a sale of the land to ascertain its value before making their election; they must rely upon their own judgments.
4. No Court has power to order a sale of land except where it is bound by some trust, or the like; or when the power is given by statute.

PETITION in the Cause filed by the defendants and heard at Spring Term, 1878, of PASQUOTANK, before *Furches, J.*

The facts are stated in same case, 77 N. C., 421. When the opinion in that case was certified to the Court below, the defendants filed their petition asking for a sale of the land, and for an account to ascertain the amount of insurance money paid upon debts not secured in the deed of trust mentioned in the will of James E. Weeks, the ancestor of the parties to this proceeding. The Court refused the application and required the defendants to elect whether the would take their shares of the insurance money and abandon their claim to the land under the will, or *vice versa.* They elected to take the insurance money, and the Court ordered the action to be dismissed. From which ruling the defendants appealed.

Messrs. Gilliam & Gatling, for plaintiffs.
Messrs. Busbee & Busbee, for defendants.

RODMAN, J. This professes to be a petition by James Weeks and Alethia Weeks who are defendants in the action in which the decision of this Court is reported 77 N. C., 421.

The defendants who are the two older children of the testator say that the insurance money was received by the guardian of (79) all the children, and that instead of having been used by him as directed by the testator in compromising and *discharging* his debts, (except certain debts provided for in a deed of trust) was partly applied by the guardian to buying up and keeping alive for the use of his wards the debts of the testator which he had directed to be compromised and discharged, and partly in buying up on the same trust the debts of

the testator provided for in the deed of trust which the testator had excepted from those which he had directed to be compromised. These purchases were not made under or in obedience to the will, but as investments for the wards.

The petitioners say that they ought not to be required to make an election until it shall be ascertained, first, by an account how much of the insurance money has been applied in buying up the debts which the testator had directed to be compromised, and how much otherwise, and second, the value of the land, by a sale. And they pray for such an account and for a sale of the land.

No answer on behalf of the infant plaintiffs was put in to this petition, but the interest of the infants can not be prejudiced by this omission of their guardian. No evidence appears to have been given of the facts stated in the petition, and the Judge does not find them.

If under any circumstances a judgment declaring expressly or impliedly certain facts as admitted by the pleadings could be reviewed and reversed as to those facts, and the case heard again upon a different state of facts presenting different questions of law for the decision of the Court, certainly it can only be done upon a direct proceeding to that end, and not in the collateral proceeding here used, and upon proof of the newly alleged facts. We must therefore disregard the statements of the petition of any other or different state of facts
(80) from that agreed upon by the parties in their pleadings in the principal action, on which it was originally heard in the Court below, and upon appeal in this Court.

We may say this however, not as necessary to the decision of this case, but as pertinent to the facts now alleged, that if the guardian instead of compromising and *discharging* the debts of the testator had in fact bought them and kept them alive for the benefit of his wards and refused to discharge them at the maximum rate fixed by the testator, then there would have been no case for an election by the defendants between the money and the land; for in that case they would be entitled to their shares of the fund, and the devise of the whole land to the plaintiffs would have been absolute by the terms of the will. In such case the guardian would have exceeded his powers and violated the trust reposed in him, and it would be in the election of each one of his wards, either to take his share of the fund in money, or in the property in which the fund had been invested.

Considering the facts to be as admitted by the pleadings in the principal case which we have again examined, as it did not distinctly appear in that case (although it seems to have been assumed in the pleadings

and on the hearing both by the counsel and by the Court) that the *whole* fund had been used in discharging the debts which the testator had directed to be discharged, it is yet open to the defendants to contest this, and to have it ascertained by an account how much of the fund was used in this way; for by the will it is only such a part of the land as is equivalent to the sum so used, which is to be set apart to the four youngest children in addition to the shares which they would have taken upon an equal division among all the children. We think that in this respect, that is, in refusing such an account, the order below was erroneous; and it is certain that such an inquiry must be made before a final decree, because if the whole fund has not (81) been spent, and less than the whole has sufficed, the plaintiffs will be entitled by the terms of the will—in case the defendants elect to take their whole shares in the fund—not to the whole land, but only to an equivalent as has been stated, and the defendants will be entitled to their share of any excess of the fund, and also to shares in the land after the equivalents given to the plaintiffs have been deducted. It does not appear to us how such an account can aid the defendants in making their election, but, as it does not appear that it can injure any one, and it must ultimately be taken, we see no reason why it should not be taken before the defendants are required to elect. To that extent the order below is reversed.

As to the prayer for the sale of the land: No Court has power to order a sale of the land of an infant, or indeed of a party generally, except in a case where the land is bound by some trust, or the like, or where the power is given by some statute, and we are not aware of any which gives it in a case like this. The defendants must act upon their own estimate of the value of their shares in the land. They may perhaps have been misled by the language of the opinion, "that there was no way to ascertain the value of the land except by a sale, and a sale had not been asked for." This meant merely that as a sale was not asked for, the question of ordering it had not been considered. Although the valuation of land by appraisers is uncertain, yet it is adopted in all cases of partition, except where an actual partition can not be made without injury, and that fact must be clearly established before the Court will order a sale for partition. In the present case it will suffice to say that upon the facts now appearing, no Court has the power to order a sale. In this respect the judgment below is affirmed.

The judgment below requiring the defendants to elect before the taking of the account described is reversed, and the case is remanded to be proceeded in accordance to this opinion. As the (82)

judgment is partly sustained and partly reversed, neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

JOHN T. SMITH and wife v. WILLIAM A. MOORE.

Practice—Pleading—Sale by Commissioner.

1. The fact of the pendency of another action or proceeding involving the same controversy between the same parties as the one under consideration must appear of record by plea, answer or demurrer, before this Court will notice it.
2. If two actions are between the same parties for the same cause, and the first is so constituted as to afford complete relief to all the parties, the second is unnecessary, and must be dismissed.
   If a final decree has been entered in the first, this would bar a new action, or even a motion in the same action, until the decree is impeached or vacated for cause.
   If the allegations in the second action should set forth the substance of the pleadings in the former, and disclose facts calling for the same measure of final relief as in the first action, and nothing more is demanded, such pleading is demurrable.
3. *It seems* that there is no means known to our practice of holding a commissioner appointed to make a judicial sale pecuniarily responsible for the money collected by him, except by an action instituted by the parties entitled to such money.

APPEAL at Spring Term, 1878, of CHOWAN, from *Furches, J.*

It appeared that upon the petition of the feme plaintiff and other tenants in common, the defendant was appointed commissioner to sell certain lands, that the sale was made, the money collected by (83) the defendant, title made to the purchaser, and the fund paid to the parties entitled, except the feme plaintiff, who complains and alleges that the defendant is indebted to her in the sum of $272, being her share of the proceeds arising from the sale of lands in Perquimans County, described in the petition of Joseph W. Barrow and others, *ex parte,* and received by the defendant as commissioner. The defendant admits that he received the fund as aforesaid, but alleges that he paid her the amount due before her marriage with the plaintiff, and that she was of full age when she received the same. And he further alleges that if she was an infant when she employed him as an attorney to collect her debts and received the money demanded in the complaint, she has ratified and confirmed her contract with him after she attained the age of twenty-one years, by bringing this action for the proceeds of

sale instead of sueing the tenant for possession; and that since her marriage with the plaintiff, John, and since she attained the age of twenty-one years, she has ratified said contract and payment by receiving in full all monies due her from the defendant, through her agent, the said John T. Smith, her husband, and that if she was an infant when said money was received to her use by the defendant, she was without guardian, and the defendant at her request expended the same for her necessary maintenance and support; and that if she was an infant when said money was paid to her, she obtained the same from the defendant by fraudulently pretending to him that she was of full age; and for further answer the defendant says that he did not promise to pay the sum demanded within three years before the commencement of this action, and pleads the statute of limitations in bar of the same. The plaintiffs in reply deny the payment alleged in the answer, and say that at the time of any payment by the defendant to the feme plaintiff, she was an infant, and specially plead her infancy in bar thereto.

Upon the trial at Spring Term, 1877, the jury found the issues (84) in favor of plaintiffs, and on defendant's motion the verdict was set aside and a new trial granted. Upon the hearing before His Honor, the defendant moved to dismiss the action for want of jurisdiction, which motion was allowed and the plaintiffs appealed.

Messrs. Gilliam & Gatling, for plaintiffs.
Messrs. Mullen & Moore, and *J. B. Batchelor,* for defendant.

FAIRCLOTH, J. We are not informed by his Honor nor by any statement of the case, as it is called, on what ground this action is dismissed. We are told by counsel in their argument here, that it was done because there was another proceeding pending in which the plaintiffs could have complete relief, and that, therefore, this action can not be sustained. This objection is not made by demurrer, plea or answer, but it is insisted that this Court, looking at the pleadings alone, can see, as a matter of law, that the plaintiffs had a complete remedy in another proceeding therein referred to. On reference to the pleadings we find the plaintiffs alleging that the defendant is indebted to them for monies received by him as commissioner, being the share of the feme plaintiff in the funds arising from the sale of certain lands in Perquimans County, described in the petition of Joseph W. Barrow, and others, *ex parte,* and the defendant admitting that "he received for the use of the said Martha the sum of $—, being her share of the fund arising from the sale of certain lands in Perquimans County, de-

scribed in the petition of Jos. W. Barrow, and others, *ex parte,* filed by the said defendant as attorney for the petitioners," and alleging
(85) that he has paid the plaintiffs, with which, however, we have nothing to do at present. The records also shows that a jury trial was had at Spring Term, 1877, and the verdict of the jury was set aside, and that at Spring Term, 1878, the action was dismissed as above stated. This is all we find in the record material to our inquiry. We can not tell whether the sale was made under our former system of Courts, or in the Probate Court, under the present system, and we can see nothing of the orders or decrees fixing the duties of the commissioner, but the defendant admits that he received the money for the feme plaintiff. If two actions are between the same parties and for the same cause of action, and the first is still pending and so constituted as to afford complete relief to the complainant, either plaintiff or defendant, then the second is unnecessary and must be dismissed.

If a final decree has been entered in the first, this would bar a new action, and even a motion, in the same, until the decree is impeached for some cause and vacated. If the allegation in the second action should set forth the substance of the pleadings in the former, and disclose facts entitling the party to the same measure of final relief in the first action, and demands nothing more, then it would be demurrable. The defendant thinks his case is within this rule, although he fails to demur, plead or answer to this effect, and cites several cases in our reports, in support of his position. We have examined them, and no one of them fits his case. All of them refer to controversies among the purchasers, or to an adjustment of equities among sureties, or to demands by the owners of the fund against the purchasers, or some one claiming under them. None of them, nor any we have been able to find, embrace the case of a commissioner making a judicial sale. He might be discharged from his office at any time by the Court, without affecting the rights or the status of the parties in Court.

It is true he is liable to an attachment for disobedience or
(86) failure to do his duty, but this is a remedy *in personam* merely. The Court has no power to award judgment and execution against his property. It may do so against the purchaser of property at its own sale, upon notice and in a summary way. Rev. Code, ch. 31, sec. 129. It may do so in the same way against sheriffs, coroners, constables, clerks and clerk and masters, when they have received money by virtue or under color of their offices. Rev. Code, ch. 78, sec. 5. This power is derived from statute, and is limited to the persons therein named. We are therefore unable to see that the plaintiffs could obtain

full relief in the original proceeding against the commissioner, the defendant in this action, and are therefore unable to say that this action was unnecessarily and improperly begun.

PER CURIAM. Judgment reversed.

Cited: Walton v. Walton, 80 N. C., 26; *Wilson v. Sikes,* 84 N. C., 215; *Gilbert v. James,* 86 N. C., 244; *Hawkins v. Hughes,* 87 N. C., 115; *Curtiss v. Piedmont Co.,* 109 N. C., 405; *Emry v. Chappel,* 148 N. C., 330.

MARY EVANS, guardian, v. K. M. C. WILLIAMSON and another.

Practice—Contract—Seal—Pleading—Parol Evidence.

1. The title to real estate can not be drawn into controversy by the defendant on a trial in a Justice's Court except by delivering to the Justice an answer in writing showing that such title will come in question.
2. The reference in the constitution (Art. IV, sec. 27) and Battle's Revisal (ch. 63, secs. 16, 18) to controversies respecting the title to realty is, probably, meant to be applied only to those cases where the defendant sets up title in himself, and not where he alleges title in a stranger for some collateral purpose; *Therefore,* where the defendant, sued upon a promissory note, undertook to show, by way of establishing a failure of consideration, that it was given for timber (87) growing upon land the title to which was in a third party, *Semble,* that the title to land was not in dispute within the purview of the constitutional and statutory provisions.
3. In an action on a note, with or without seal, a recovery cannot be defeated nor the sum due be lessened by showing a partial failure of consideration.
4. Where a party not himself bound by a contract, because of noncompliance with certain statutory requirements, seeks by action to enforce it against another who is bound, or does not rely on the statute, the latter can not defend himself by setting up the voidability of the other party's contract against his own legal obligation; *Hence,* where a guardian sold timber on the land of his ward without an order of Court as required in Bat. Rev., ch. 53, sec. 33, and took a note for the purchase money, the maker of such note can not when sued on the same by the guardian and ward (the latter thereby ratifying the contract) set up the failure of the guardian to observe the statutory mandate.
5. Where the seal to a bond is defaced by the obligee, the bond is made void; if the defacement be by a stranger, it has no such effect.
6. In an action before a Justice of the Peace on a promissory note, an exhibition of the same accompanied with a statement that a specified sum is due thereon, which the plaintiff seeks to recover, is a sufficient complaint.

7. On an appeal to the Superior Court from a Justice's judgment, parol evidence is admissible to explain the intent and meaning of an entry on the Justice's docket.

APPEAL at January Special Term, 1878, of CUMBERLAND, from *Buxton, J.*

This action was commenced before a Justice of the Peace on a note for $250, due January 1, 1874, on which the plaintiff had made an endorsement remitting seventy-five dollars of the principal money. The residue, one hundred and seventy-five dollars was the sum demanded in the summons. The note itself was exhibited as the plaintiff's complaint, and the defendant among other defences to the recovery set up that of fraud, and specially that the note was given for timber growing on land the title to which was in dispute.

(88) On the trial in the Superior Court to which the cause was removed on appeal, there were no specific issues made up and submitted to the jury, and a general verdict was rendered for the plaintiff. Judgment. Appeal by defendant.

Messrs. Guthrie & Carr, for plaintiff.
Mr. N. W. Ray, for defendant.

SMITH, C. J. (After stating the case as above.) Several exceptions were taken by the defendant during the progress of the trial which we propose to consider and decide in the order in which they are presented in the record:

1. The title to land was in controversy and the Justice had no jurisdiction: It does not appear that this objection was made "in writing by the defendant and delivered to the Justice" as in express terms is prescribed by Bat. Rev., ch. 63, sec. 16. The requirement of the act is not satisfied by the brief memorandum taken down by the Justice and transmitted with the appeal, and would not be sufficient, if the plaintiff should afterwards sue in the Superior Court, to estop the defendant from denying "the jurisdiction of that Court by an answer contradicting the answer in the Justice's Court." Sec. 18. The defence therefore does not conform to the substantial directions of the act, and is unavailing to defeat the jurisdiction.

But if the prescribed form had been pursued the objection would be untenable. In an action on a note with or without seal a recovery can not be defeated nor the sum due be lessened by showing a partial failure of consideration. *Washburn v. Picot,* 14 N. C., 390. And consequently the title to any part of the timber for which the note was given

can not come into controversy, unless the entire consideration is involved. It is by means of a counter claim or cross action only that the defendant can obtain compensation in damages for the timber which he fails to get by reason of a superior right thereto in another, and thus diminish the amount of the plaintiff's recovery. This counter claim he may not choose to set up, and therefore the plaintiff's prosecution of his claim does not bring into controversy the title the real estate within the meaning of Art. IV, sec. 27, of the Constitution, or of the act passed to give the effect to this constitutional provision. Bat. Rev., ch. 63, secs. 14-18. (89)

It may be further suggested that the controversy which may arise as to the title to the timber is not directly between the parties to the action, but comes up collaterally and incidentally. The defendant has no dispute of his own with the plaintiff, growing out of his purchase, but he asserts title superior to his own, acquired under his contract with the plaintiff, in a stranger, as a means of lessening his own liability, and thus seeks to introduce a controversy as to title, not between the plaintiff and himself, but between the former and a stranger, and thus substitute an issue as to the title to the land in an action to enforce a contract obligation. This is inadmissible, and in our opinion contemplated neither in the provisions of the Constitution nor of the statute.

It further appears that the timber on the upper tract was first sold for seventy-five dollars; and on a subsequent sale of the timber on the other and lower tract of land, the note for this sum was surrendered; and of the whole purchase money the defendant then paid in cash one-half, and gave the note sued on for the residue. The sum remitted or forgiven eliminates the sum involved in the sale of the disputed timber, and with the jurisdiction of the justice in the premises. The exception is not sustained.

2. The sale was made by the guardian without an order of Court as required in Bat. Rev., ch. 53, sec. 33: The contract is in writing, and the infant, Dickson, having arrived at full age, ratifies the act of his guardian by becoming a party plaintiff, and in association with the guardian, prosecuting the claim. This obviates any objection to the want of authority in the guardian to make the sale. The defendant can not be allowed to resist a recovery on this ground. In *Green v. R. R.*, 77 N. C., 95, the plaintiff had by parol sold to the defendant certain growing timber, and sought to recover the value of the timber, alleging his contract to be void under the statute of frauds. This he was not permitted to do, and the Court says: "The contract is void unless signed by the party to be charged therewith. (90)

There is no attempt 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 can not take shelter under it for the purpose of getting rid of the contract and holding the defendant liable for the wood, as if there had been no agreement on his part to take the tract of land in full payment." The principle thus declared, the defendant here being the actor in asserting his counter claim, is applicable to our case, that where a party not himself bound by a written contract embraced within the statute of frauds, seeks by action to enforce it against another who is bound, or does not rely on the statute, the latter can not defend himself by setting up the unwritten contract of the former against his own legal obligation. This exception is also overruled.

3. The seal affixed to Williamson's signature having been defaced, cancelled the bond and annulled its obligation: There was no evidence adduced as to the circumstances under which the obliteration was made, nor how, when or by whom it was done. The defendant testified to making the seal, and the plaintiff's guardian denied having defaced it herself, or having any knowledge or information of the act. The
(91) Court submitted the question to the jury, instructing them that if the cancellation was done by the plaintiff, the bond would be rendered void, but if done by a stranger, it would not. The instruction is not subject to any just complaint.

4. There could not be a common complaint against two defendants, one of whom executed the note with, and the other without, seal: The Justice states that the complaint was on a note, the exhibition of which is a substitute therefor, authorized by Bat. Rev., ch. 63, sec. 20, rule 7. This is as effectual pleading as the most formal complaint which could be drawn to enforce the payment of the note.

5. The plaintiff offered to prove, and (though not so stated) to give force to the exception we must assume was allowed to prove, that the sum remitted was for the timber on the disputed land: To this evidence the defendant objected, for that, the entry of the Justice was not susceptible of explanation. The evidence was properly admitted. The defendant sets up a failure of title to part of the timber for which the note was given, and there being an indefinite entry as well on the note as on the docket of the Justice of a remission of seventy-five dollars, it was entirely competent for the plaintiff to show on what account the sum was remitted, and thus eliminate all matters of inquiry which could under any circumstances lead to a controversy in regard to title to land.

PER CURIAM. Judgment affirmed.

(92)

*W. C. WOOD, Executor, v. J. H. SKINNER and others.

Practice—Jurisdiction—Petition to sell real estate for Assets.

1. Petitions to sell real estate for assets by executors of administrators must be filed in the Probate Court.
2. When issues of fact are raised on such petitions, it is the duty of the Probate Court to transfer the trial thereof to the Superior Court in term time where all the questions, both legal and equitable, can be settled.

SPECIAL PROCEEDING, commenced in the Probate Court of CHOWAN, and heard on appeal at Chambers, in 1877, before *Eure, J.*

The plaintiff executor filed a petition in the Probate Court to sell the land of his testator, John Skinner, to pay debts. His personal property was of the value of $...., and fully sufficient to discharge the same. The property of the testator was kept together by the executor, the lands cultivated, and the money raised by a sale of the crops applied to the payment of debts, as also was the proceeds of sale of slaves in 1863, except the sum of $9,800, which was invested in Confederate bonds. All the debts were paid except the one described in the pleadings due Edward Wood, who refused to take Confederate money, and in November, 1863, he bought the land at private sale for the amount of his debt, and went into possession of the same, and after the close of the war he put up valuable and permanent improvements thereon, and has cultivated the land up to the commencement of this proceeding. The plaintiff executor, and the executor and heirs at law of said Edward (93) Wood (who died in 1872) asked that an account be taken of the debt alleged to be due Edward Wood's estate, and the value of said improvements, agreeing to be charged with the rents and profits, and that a sale of the land be ordered to pay such balance as may be found due. The defendants insist that the proceeding be dismissed because the debt once due to Edward Wood has been satisfied by the said purchase of the land by him, and because the plaintiff executor has not accounted for the personal assets which were sufficient to pay all debts as aforesaid. The Probate Judge held that said debt was not satisfied, and that the plaintiff executor was not chargeable with the amount of sales of the slaves, which was lost in Confederate bonds, and ordered an account to be taken to ascertain the amount of principal and interest of the Wood claim, the value of said improvements, and the value of the rents and profits of said land since the purchase by Edward Wood. And upon the hearing before His Honor the defendants' motion to dismiss for want

of jurisdiction was allowed, and the plaintiff appealed. See *Skinner v. Wood,* 76 N. C., 109.

Messrs. Gilliam & Gatling, for plaintiff.
Messrs. J. B. Batchelor, and *J. W. Albertson,* for defendants.

READE, J. The statute authorizes the Probate Court upon the application of the personal representative of a deceased person to order a sale of real estate for assets to pay debts whenever the personal estate is exhausted and there are debts outstanding and unpaid. And also authorizes said Court to take an account of the administration so as to determine the necessity for such sale. Bat. Rev., ch. 45, sec. 99.

(94) It was therefore proper for the plaintiff to file his petition as he did in the Probate Court to sell the land. The said Court had jurisdiction.

When the defendants were brought in as parties, and objected to the sale, that did not oust the jurisdiction; but when they objected to the sale for the reasons alleged—that there was no debt due and unpaid, and that the plaintiffs had wasted the personal estate—then issues of fact were raised which the Judge of Probate could not try. And it became necessary that he should transfer the issues to the Superior Court in term time to be tried, or there might have been an appeal. C. C. P., sec. 490. And then the Superior Court in term time could dispose of all the questions, legal and equitable, meeting the suggestions in *Wiley v. Wiley,* 61 N. C., 131, and *Finger v. Finger,* 64 N. C., 183.

It was error, therefore, to dismiss the petition for want of jurisdiction in the Probate Court. There is no other point presented to us at this time.

PER CURIAM. Judgment reversed.

Cited: Thompson v. Shamwell, 89 N. C., 283; *Daniel v. Bellamy,* 91 N. C., 78; *Austin v. Austin,* 132 N. C., 266.

JOHN P. PERRY and others v. RICHARD V. MICHAUX.

Practice—Injunction.

An injunction will be dissolved when the answer and affidavits of defendant are full and complete, denying the whole equity of plaintiff, and are creditable, exhibiting no attempt to evade the material charges in the complaint and affidavits of plaintiff.

MOTION to dissolve an Injunction, heard at Fall Term, 1877, (95) of CALDWELL, before *Cloud, J.*

The complaint states that in 1864 William Carroll owned a large estate, consisting of lands, slaves, and other property, and being advanced in age, he determined to divide his lands among his three sons, William, James, and John. Accordingly he conveyed to James a five hundred acre tract in Caldwell county, on which the plaintiff, John Perry, now lives, and also other tracts to his other sons. Shortly after the late war James sold his interest to one Marler, who subsequently sold to the plaintiff Perry. John died during the war, leaving a widow and children, and the widow has since intermarried with the plaintiff William Ollis. About the latter part of the year 1862, said William Carroll executed a note to the defendant for $2,000 in Confederate money, and after the note fell due the defendant transferred it to W. F. McKesson, who held it several years after the war. At the time McKesson bought the note he was indebted to said Carroll in the sum of $15,000 in Confederate money. Before the defendant sold the note to McKesson, the said Carroll tendered the full amount thereof in Confederate money, which he refused to receive. When the said deeds were executed, the value of Carroll's estate greatly exceeded the amount of the note to the defendant, even if it was not liable to the set off of the debt which Carroll held against McKesson. That in fact Carroll had taken separate notes of one and two thousand dollars on McKesson, and after reserving enough of them to amount to as much in value as the note he had given to defendant, and which McKesson then owned, he gave the residue to his daughters; that at the time the said deeds were executed Carroll owed no debts except the one to defendant, and that he regarded it as (96) satisfied in full by the circumstances above set forth; that the deeds were not made to defraud creditors, and since their execution he has disposed of the balance of his property, and is out of debt, unless he owes the note given to defendant; that since the war he had repeatedly requested McKesson to settle and surrender the Michaux note to him, which he had refused to do, but continued to hold it for the purpose of selling it to some third person; and to prevent this the plaintiffs agreed to buy it, and for that purpose they employed Alfred Perry, the father of the plaintiff, John, and agreed to pay him for his services; that Alfred understood the agency and applied to McKesson to buy the note, but he refused to sell it to any one but Alexander Perry, a son of Alfred, and Alexander did buy the note for forty dollars and took an assignment of the same and delivered it to his father, Alfred, who kept it until the

said defendant by a trick or some contrivance obtained possession of it from said Alfred; and that the defendant had notice that the note was purchased as aforesaid for the benefit of the plaintiffs, and has not paid any one for the note, but got possession thereof by snatching it, or by a fraudulent combination with said Alfred, to cheat the plaintiffs.

The complaint further states that shortly after obtaining the note the defendant brought suit on it against William Carroll, recovered judgment and caused execution to issue, and has had his homestead laid off entirely on the land of the plaintiff, John, and has directed the sheriff to advertise and sell the other lands levied on; that either from ignorance or enmity to plaintiffs induced by defendant, the said Carroll refused to defend said suit, or to allow plaintiffs to intervene for that purpose; wherefore the plaintiffs asked that an injunction issue to restrain the defendant from selling said land, and that it be declared that
(97) said note is the property of plaintiffs and satisfaction thereof be entered of record. Thereupon in Statesville at Chambers on 19 July, 1877, before *Furches, J.*, a restraining order was granted, and the defendant notified to appear and show cause why an injunction should not issue.

In obedience to said order the defendant appeared at said term and filed his answer, in which he stated in substance that Carroll conveyed the said lands to his children with intent to defraud his creditors; that said Marler did not sell to plaintiff as alleged, but that James contracted to sell to Marler, and took his note for the price, and Marler left the State without paying it, and said Alfred induced James to receive his note in place of Marler's and took a deed therefor, with notice of the fraudulent intent in the conveyance of William Carroll as aforesaid; and that Alfred then conveyed to the plaintiff, John, with like intent. The defendant alleged that after the execution of the note Carroll sold his slaves to McKesson for a large sum, payable in Confederate money, for a part of which notes were made payable to Carroll and to his daughters, as advancements, long before he executed the deeds to his sons; and denied that he retained any of said notes to offer as a set-off to the Michaux note, or retained property sufficient to pay his debts after making the said deeds which were voluntary and without consideration; that defendant has no knowledge of the alleged transaction in which said agent was employed to buy said note, and does not believe it to be true, and he alleged that in 1872 he bought said note back from McKesson, giving him credit for the amount on a note which he held against him for $4,130, dated 27 March, 1863, and thereupon McKesson gave defend-

ant an order on his attorney, in whose hands said note had been placed for collection, and upon presentation of the order he was informed by the attorney that it had been returned to McKesson; that the defendant then sent said Alfred Perry to McKesson for the note, and on his return he stated to defendant that McKesson said he could not (98) find it; that the defendant afterwards heard that said Perry had the note, and on demanding the same he was refused, and informed by Perry that he bought it of McKesson; and upon an adjustment of the matter between them at the office of an attorney in Morganton, Perry delivered the note to defendant's attorney and suit was brought thereon, and Carroll appeared and answered the complaint therein at Spring Term, 1873; and at a subsequent term the case was continued upon affidavit of William Carroll, Jr., as agent of his father, and one of the plaintiffs in this action, and at Fall Term, 1876, a trial was had, which resulted in a verdict and judgment for Michaux; whereupon the defendant asked that the restraining order heretofore granted be dissolved.

The complaint and answer were supported by the affidavits of the parties. His Honor refused the motion to dissolve, and continued the injunction, from which ruling the defendant appealed.

Mr. G. N. Folk, for plaintiffs.
Mr. R. F. Armfield, for defendant.

BYNUM, J. If upon the hearing of an answer the statements are such as to leave upon the mind of the Court a reasonable doubt whether the plaintiff's equity is sufficiently negatived, the injunction will not be dissolved, but be continued to the hearing. *Munroe v. McIntyre,* 41 N. C., 65; *Miller v. Washburn,* 38 N. C., 161.

But it is also a well settled rule that when by the answer the plaintiff's whole equity is denied, and the statement in the answer is credible and exhibits no attempt to evade the material charges in the complaint, an injunction on motion will be dissolved. *Perkins v. Hollowell,* 40 N. C., 24; *Sharpe v. King,* 38 N. C., 402.

In the case before us the answer is full and complete, containing a positive and specific denial of every material allegation of (99) the complaint, accompanied with such a connected and reasonable narration of the facts of the case that no Court could hesitate to dissolve the injunction, if it were here upon complaint and answer alone. Do the affidavits of the plaintiffs and defendant, made a part of the case, present it in a different aspect? We think not. The complaint, from its vagueness of statement and evident suppression of matters within the knowledge of the plaintiffs, peculiarly as the dates and places of the

occurrence, upon which they found their equity, is in striking contrast with the precision and minuteness of statement in these particulars, by the defendant. For instance—the complaint does not set forth the date of the deeds under which the plaintiffs claim, or of the sale of the negroes, but it does state that at the time the deeds were executed William Carroll owned a large number of slaves and other property, far more than enough in value to satisfy all his debts, when in truth as is clear from the affidavit of Carroll himself the negroes had all been sold six months before the deeds to the land were executed. And so the important fact is suppressed that the note to Michaux was executed only a week before Carroll sold all his negroes and six months before he conveyed away without consideration all his lands, and six months before the note fell due; so that before the maturity of the note the debtor Carroll had made way with all his property, negroes and lands.

The affidavits so far from helping the plaintiffs case, compromise it, in this, that they make clear what was only obscurely seen in the complaint, to wit, that Carroll had made way with his property to avoid his creditors, and that the plaintiffs knew it, and were conscious that they could not hold the land unless they could succeed in getting up the Michaux debt. Did they purchase and acquire the title to the note given by Carroll to Michaux? Unfortunately the main witness to
(100) establish this is Alfred Perry, the alleged agent who made the purchase. He does not directly deny the charges in the answer that he was the messenger sent by Michaux to McKesson for the note after the defendant had repurchased the note, and given McKesson credit for it on a larger note which he held on the latter.

On his own affidavit he stands self-convicted of duplicity of conduct, and of assenting to a division of the proceeds of the note with the defendant, and of the actual receipt of a part of the money. It is reasonably certain, upon the whole case, that Michaux, for full value, purchased and was entitled to the possession of the note. It is therefore immaterial how he obtained the actual possession, whether by snatching as the plaintiffs allege, or by paying tribute to a faithless agent who was acting in collusion with the plaintiffs or for his own corrupt gain, as the defendant alleges, with the better reason as we think. For early in 1873 Michaux brought suit upon the note against William Carroll, the obligor. The plaintiffs, it is confessed, then knew that the defendant had possession of the note, how he had acquired it, and that he was enforcing its collection as the owner. This action was pending until 1876, before judgment was rendered, during all of which time the plaintiffs herein, though cognizant of all the facts, neither asserted nor made claim

of the ownership of the note, but so far from it, one of the plaintiffs, William Carroll, Jr., acted as agent of his father in defending the action, by filing an affidavit for continuance and alleging a tender and refusal by the father of the principal and interest of the note. If these plaintiffs had a pretence of title to the note why did they for three years stand silent spectators of Michaux possessing and claiming the note as his own, suing on it and prosecuting his action to final judgment against Carroll? No claim was made, no action instituted by them against Michaux to try the title until an execution is levied upon (101) their land, four years after the commencement of the action. It is too late, even if the claim had the appearance of credibility. The plaintiffs have failed to make out a case for a continuance of the injunction to the hearing, and it must therefore be dissolved upon the answer and counter affidavits.

When the land shall be sold under the execution and the purchaser put to his action for the possession, it will be time enough for the plaintiffs, if they desire to defend further, to assert their title as purchasers for value without notice, or that Carroll, when he executed the deed retained property amply sufficient to pay his then debts, or any other defence to the action not involving the title to the note and judgment. There is error. Judgment reversed and injunction dissolved.

PER CURIAM. Judgment reversed.

Cited: Blackwell v. McElwee, 94 N. C., 425; *Riggsbee v. Durham,* 98 N. C., 81.

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*F. J. SWANN and others v. GEORGE MYERS and others.

Practice—Removal of action to U. S. Court—Parties in Interest.

1. Where there are several parties defendant to an action pending in the Superior Court, and one of them is a non-resident, a motion by such defendant to remove the action to the United States Court (102) (under U. S. Rev. Stat., sec. 639) will be granted if the other defendants are not necessary parties and a full and final determination of the matter can be had without their presence in Court.
2. In an action to recover land, in the possession of M, a non-resident defendant, who claimed the legal estate therein, where the plaintiffs alleged that the co-defendants of M were their trustees and held the legal estate in the land for their use; *It was held,* that the co-defendants of M were not necessary parties defendant, that their interest in the land, if any, was adverse to M, and that they were substantially plaintiffs; and that the action, on motion of M, should be removed for trial to the United States Court.

*SMITH, C. J., having been of counsel, did not sit on this case.

MOTION heard at Spring Term, 1878, of COLUMBUS, before *Eure, J.*

The material facts appear in the opinion. His Honor refused the motion and the defendant appealed. (See S.c., 75 N. C., 585.)

Messrs. W. S. & D. J. Devane, T. H. Sutton and *Battle & Mordecai,* for plaintiffs.

Messrs. A. T. & J. London, for defendant.

RODMAN, J. This is a motion by Myers, one of the defendants, to remove the action to the Circuit Court of the United States for trial upon the ground of prejudice or local influence, under the act of 2 March, 1867. (Rev. Stat. of U. S., sec. 639, and 2 Abbott Prac., 39.) All the plaintiffs are citizens and residents of North Carolina, as are all the defendants except Myers, who is a citizen and resident of New York. If Myers were the only defendant there would be no objection to granting his motion. We understand it to be settled however by the cases of the *Sewing Machine Co.,* 18 Wall., 553; *Vanever v. Bryant,* 21 Wall., 41, and *Gardner v. Brown, Ib.,* 36, that if the other defendants are necessary parties to the action without whose presence in Court no full or final determination of the matters in controversy can be made, the defendant Myers is not entitled to have his motion granted. Then, are the other defendants, or any of them, such necessary parties?

(103) For the intelligible consideration of this question it is necessary to state in a summary way the claims of the parties upon what seem to be the undisputed facts.

Alice Heron being seized in fee of the land in question made her will and died in 1813. By said will she devised the residue of her land (which included that in question) "to John Waddell and John R. London, and the survivor, and *the executor of such survivor,*" in trust for the separate use of Francis Swann (her granddaughter) for life, with remainder to her children living at her death, and in default of children living at her death, in trust for the issue of her children, and in default of such issue who arive at the age of twenty-one, then to her own heirs.

By a subsequent clause of her will the testatrix provided as follows: "And it is my will that the trustees aforesaid, and the survivor, and the executor of the survivor, in the soundness of their discretion may join with the *cestui que use* or guardian of *cestui que use* in making any conveyances of the above property settled as aforesaid as may to them seem proper." Of the executors named, London alone qualified. He survived Waddell and died leaving a will by which he made Marsden Campbell and William C. Lord his executors.

On the 12th of February, 1836, a deed professing to be under the power in the will was made by John Swann, and the said Francis his wife, and the said Lord, and the said Campbell by said Lord as his attorney, conveying said land to one Buck under whom defendant Myers claims, and he and those who claim under him have been in possession ever since. There is no evidence other than that appearing in the deed that Lord was the attorney of Campbell. Lord survived Campbell; the defendants (except Myers) are his heirs, and the plaintiffs are the children or issue of Frances Swann and also heirs of Alice Heron. Frances Swann died in 1871.

The case came before this Court at June Term, 1876, on an appeal by the plaintiffs. 75 N. C., 585. The *decision* of the Court granted a new trial. The opinion of the Court, however, held (104) (1) That the deed to Buck was not a valid execution of the power, for want of execution by Campbell, and it consequently did not convey a fee simple. (2) That it did convey the equitable life estate of Frances Swann, and that the possession of Buck and his assignee did not become adverse until her death in 1871. (3) It expressed a doubt as to whether upon the death of Lord the bare legal estate descended to his heirs (the defendants, excepting Myers) or reverted to the heirs of Alice Heron. This question, however, is merely one of form and of no practical importance, for if there be a trust outstanding for the plaintiffs, the Court will compel the trustees, whoever they may be, to hold the legal estate or them. It seems sufficiently clear though that by force of sec. 45 of ch. 119 of Bat. Rev. (Wills) by which all devises are construed to be in fee unless otherwise expressed, that Lord took a fee and the legal estate descended to his heirs.

If this Court shall decide that the case can not be removed, it can only be on the ground taken by the plaintiffs, that the defendants (excepting Myers) are trustees and hold the legal estate; which would be to decide that they are trustees for the plaintiffs and bound to convey to them. It is not and can not be contended that the said defendants are trustees for Myers. His claim is and must necessarily be that the legal estate passed to Buck either by the deed of 1836 or by an adverse possession beginning at that time, and is now in him as the assignee of Buck. The only substantial question in the case is whether the said defendants are trustees. By refusing to remove the case on the ground that said defendants are trustees, and therefore necessary parties to a full determination of all the matters in controversy, this Court would decide against the defendant the only matter in controversy; it would refuse to him a trial of his claim by a Court which he

(105) believes more free from prejudice and local influence than a State Court, because in our opinion he has no legal claim. We are of the opinion that the title of the plaintiffs can be tried and adjudged on the absence of the said defendants who are alleged to be trustees for the plaintiffs, and whose estate if any is a merely nominal one. The plaintiffs claim only an equitable estate, and can under our law recover upon that. They might have joined the nominal defendants with them as plaintiffs, and they may be more naturally arranged on that side. That they have been put on the same side with the defendant Myers with whom they have no community but an opposition of interest, ought not to prejudice his rights. Their interest as far as they have any are with the plaintiffs who claim them as their trustees, and such they are if they have any legal interest at all, and if those defendants had been made nominally plaintiffs as substantially they are, there could be no question as to the right of Myers to remove the case.

We think his motion should be allowed and the case removed to the Circuit Court of the United States and an order will issue to the Superior Court of Columbus to that effect.

PER CURIAM. Judgment reversed.

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(106)

ALEXANDER OLDHAM v. F. W. KERCHNER.

Contract—Breach of—Action for Damages—Measure of Damages—Issues—Judge's Charge—Practice on Appeal.

1. Where, on the trial of an action for damages for breach of contract, it appeared that the defendant, a judgment creditor of the plaintiff, had agreed with him that the judgment debt should be liquidated by the plaintiffs grinding a quantity of corn to be furnished by defendant, sufficient to pay off the debt, at eight cents per bushel of meal delivered to defendant, the plaintiff agreeing to grind all corn delivered to him under the contract at that price; and that thereafter the defendant after delivering a portion of the corn had declined to deliver more and had collected the balance of the debt out of the plaintiff under execution; *It was held*,

   (1) That it was not error for the Court below to refuse to submit an issue to the jury,—"Was getting the payment of the judgment the defendant's *sole* inducement for making the alleged contract?"

   (2) That it was not error to refuse to instruct the jury "that the profits which plaintiff would have made if the contract had been fully carried out, are not the proper measure of damages; that plaintiff is only entitled to actual damages, and having offered no proof of such, is entitled to only nominal damages."

(3) Nor was it error to refuse to instruct the jury "that the contract was *nudum pactum*, or at least that it was so, if eight cents per bushel was a fair price for grinding."

2. In such case upon an issue as to whether or not the causes of action alleged in the complaint were compromised and settled between the parties upon sufficient consideration, it was not error for the Court to charge "that the jury must say whether plaintiff agreed with defendant's attorney to surrender his right of action for the alleged breach of contract, and if he did so agree in consideration of receiving the forbearance on the execution, as testified to, then this was a sufficient consideration binding on plaintiff, and the jury must find the issue in the affirmative; that a contract is the assent of two minds to the same thing in the same sense, and the jury must consider all the testimony on this point and say whether the plaintiff did so agree; that the plaintiff was not barred from recovering in this action by reason of his agreement in regard to any matter other than the cause of action sued on, and if in the conversation with said (107) attorney, the plaintiff did not understand him as referring to the cause of action sued on, that they must find the issue in the negative."

3. In such case, the true measure of damages is the difference between the cost of grinding and the contract price; that the charge of the Court below to that effect is not erroneous for failing also to charge "that the actual loss sustained by defendant's breach of contract was the true measure of damages, and if the plaintiff after defendant's refusal to deliver corn, did receive from others employment for such part of his machinery as would have been occupied in performing his contract with defendant, or by reasonable effort might have received such employment, the profit that was or might have been thus made must be deducted from the profit he would have made had defendant performed his contract, in order to ascertain the actual damage," there being no evidence to which such a doctrine was applicable.

4. Where in an action for damages for breach of contract, the plaintiff proves a contract, its breach and the loss of certain profit resulting from the breach, the burden is on the defendant to prove anything in diminution of damages.

5. In this Court in a case on appeal the position of the appellee is strictly defensive; the judgment below is assumed to be right unless some specified error is shown; *Therefore*, in this action the plaintiff is not required to show from the case made out on appeal, that his claim was supported by evidence that his mill had not been so employed as to diminish his damages.

SMITH, C. J., dissenting.

APPEAL at January Special Term, 1878, of NEW HANOVER, from *Moore, J.*

This was an action for damages for an alleged breach of contract, and the facts are sufficiently stated in the opinion delivered. There was a verdict for plaintiff, judgment, and appeal by defendant.

Mr. D. L. Russell, for plaintiff. (108)

Messrs. W. S. & D. J. Devane, for defendant.

RODMAN, J. The plaintiff being indebted to the defendant by a judgment for about $2,300, wrote to defendant on 29 April, 1871, who was a large dealer in corn and meal, as follows: Dear Sir—I am without means now, of paying the Oldham, Denmark & Co. claims (alluding to said judgment) and I propose to liquidate the claims with means at my command, and they are these, viz., to grind all the meal you want, on the following terms—for every 56 pounds of good clean corn furnished, I will return fifty pounds of bolted meal, sewed up in your sacks and delivered to your store, (you deliver corn to mill,) and you credit O. D. & Co's. old account with eight cents per bushel. Hoping this liberal proposition may meet your approbation, I am, etc. (Signed by plaintiff.)

The defendant accepted this proposition as is shown by his sending corn to plaintiff's mill and crediting plaintiff with the price of the grinding according to its terms, until 1 September, 1871, when he ceased sending corn to plaintiff's mill for about two weeks. On 20 September, the plaintiff wrote to defendant a second letter, which is not material to be set out here, and on the next day the defendant resumed sending corn to plaintiff's mill, and continued to do so until 15 October, when he notified plaintiff that he would not send any more corn, and demanded payment of the balance due on the judgment, and issued execution thereon, which was levied on the property of plaintiff. The plaintiff afterwards paid the said balance. The defendant sent no corn afterwards.

The defendant endeavored to prove that plaintiff had released him from liability on the contract above stated, but the jury found against defendant upon that issue, and we do not concern ourselves with it here.

The Judge presented several questions to the jury, and they (109) found the contract to have been in substance:

1. That defendant should deliver to plaintiff, corn to be ground, enough in quantity to pay off the said debt of plaintiff at eight cents per bushel of meal delivered to defendant, and plaintiff agreed to grind all corn delivered to him under the contract at that price, and upon the other terms of the contract, which are not material to be noticed here.

2. That the difference between the eight cents per bushel which defendant agreed to pay for grinding, and the actual cost of grinding, to the plaintiff, was five cents per bushel.

3. That the quantity of corn which the defendant ought to have de-

livered according to his contract, and failed to deliver, was 20,430 bushels.

4. That plaintiff had sustained damages by defendant's breach of his contract to the amount of $1,021.50, which included interest from 20 September, 1872, to the time of the trial.

Before considering the questions which are made on the merits of the case, it will be convenient to dispose of some which are collateral: The defendant asked the Judge to submit an additional issue "was getting payment of the judgment the defendant's *sole* inducement for making the alleged contract?"—and the Judge refused to do so. We think the Judge was clearly right. What was the inducement or motive of the defendant to making the contract, as distinct from the consideration, was immaterial; and evidently the getting his corn ground on the terms prospered, was the consideration of his contract, and at least a part of his inducement to make it. The submission of such a question to the jury would only have embarrassed them.

The defendant prayed the Court to instruct the jury, "that the profits which plaintiff would have made if the contract alleged in the complaint had been fully carried out, are not the proper measure of damages; that plaintiff is only entitled to actual damages; that having offered no proof of any such, is entitled to only nominal (110) damages." The Judge refused, and although some part of the prayer was correct (as will be seen), yet as a whole it was erroneous, and the Judge was justified in refusing it.

The defendant also prayed the Court to instruct the jury that the contract was *nudum pactum* or at least, that it was so if eight cents per bushel was a fair price for grinding. The Judge declined to do so, and in our opinion rightly. There was a consideration for the defendant's contract, to wit, the agreement of plaintiff to do the work; and it was not the less a consideration because it was to be done at a fair price.

The charge of the Judge as to the compromise and release of the plaintiff's claim seems to have been fair and correct. [The issue in respect to this was—"were the causes of action alleged in the complaint compromised and settled between the parties upon sufficient consideration? Answer, No." And the instruction on it was—"that the jury must say whether the plaintiff agreed with defendant's attorney to surrender his right of action for the alleged breach of contract, and if plaintiff did so agree in consideration of receiving the forbearance on the execution, as testified to, then this was a sufficient consideration binding on plaintiff and the jury must find the issue in the affirmative; that a contract is the assent of two minds to the same thing in

the same sense, and that they must consider all the testimony on the point and say whether the plaintiff did agree to compromise as alleged; that the plaintiff was not barred from recovering in this action by reason of his agreement in regard to any matter other than the cause of action which he now sues on, and if in the conversation with said attorney, the plaintiff did not understand him as referring to the cause of action sued on, then the jury must find the issue in the nega-
(111) tive."] If two parties in bargaining do actually misunderstand each other, if their language is equivocal, and one is meaning to speak of one subject, and the other of another, it is clear that there is no contract; for there is not that *aggregatio mentium* necessary to make one. If the words are clear and unequivocal, neither party can say that he understood them in a different sense from what they plainly bear; and if either party knows that the other understands him as speaking of one object, or with one meaning, he will not be allowed to say that he had in his mind another object, or intended a different meaning. But the question as to whether the plaintiff did agree to release the claim sued on or not, was fairly left to the jury and decided by them in the negative.

These observations meet all the questions which appear to have been raised up on the trial, or which appear from the written argument of the defendant's counsel filed in this Court, to have been presented here. It is agreed, I believe, by all the members of the Court that on all these questions the position of the defendant is untenable, and that the Judge committed no error in his rulings on them.

We can proceed now to consider such objections to the judgment in favor of the plaintiff as bears the merits of the case: The Judge told the jury that the measure of damages was the difference between the cost of grinding, and the contract price; and the jury, as has been seen, found this difference to be five cents per bushel. We think it is now well established that the profits which a plaintiff would have made if the contract had been complied with is the measure of damages for its breach, in cases like the present. There are of course cases not within the rule, as where the profits are speculative and incapable of accurate ascertainment, or, so remote that they can not be supposed to have been within the contemplation of the parties, or, where they depended on facts of which the defendant had no notice, and which therefore could have not been in their contemplation.

(112) Where a defendant had covenanted to teach a slave a trade, and failed to do so, the owner was held entitled to recover the sum which would have been added to his value, if he had been taught. *Bell v.*

Walker, 58 N. C., 43. In *Spiers v. Halstead,* 74 N. C., 620, the damages were held to be the profit which the plaintiff would have made upon selling the goods, if they had arrived in due time. To a like effect are *Mace v. Ramsey,* 74 N. C., 11, and *Clements v. The State,* 77 N. C., 142.

It is suggested, however, that the instructions of the Judge as to the measure of damages, though correct as far as they went, were erroneous, in this, they ought to have stated that the actual loss sustained by defendant's breach of contract was the true measure of damages, and if the plaintiff after defendant's refusal to deliver corn to be ground under the contract, did receive from other persons employment more or less lucrative, for such part of this machinery as would have been occupied in performing his contract with the defendant, or by reasonable effort on his part might have received such employment, the profit that was, or might have been thus made must be deducted from the profit he would have made, had defendant performed his contract, in order to ascertain the actual damage. We think the instructions given would not have been erroneous with this or some equivalent addition, and that they would have been positively erroneous without it, if there had been anything in the evidence to which such a doctrine was applicable.

In the law of master and servant the doctrine is established both on reason and authority, that if a servant be wrongfully discharged by his master during the time of service contracted for, he *may* treat the special contract as rescinded by the discharge, and sue immediately, in which case he would recover as upon a *quantum meruit* for the service rendered before the discharge, if he had not received (113) payment for that; and also, damages for the breach of contract in discharging him, though it seems that the rule by which this last damage is to be ascertained is not well settled (*Brinkley v. Swicegood,* 65 N. C., 626; 31 Barb., N. Y., 81; Hilt, N. Y., 300), or, he may wait until the end of the term and recover the full price agreed to be paid for the term, subject to be diminished on proof by the master, that the servant did receive or might have received employment elsewhere. *Hendrickson v. Anderson,* 50 N. C., 246. This doctrine would be applicable in this case if there were facts to make it so. The contract of plaintiff to grind a certain quantity of corn for defendant, although it did not create strictly the relation of master and servant, yet did create an analogous one; and if it had appeared that plaintiff's mill had, after defendant's refusal to send corn, in fact received, or but for plaintiff's refusal would have received a quantity of custom sufficient to disable him in whole or in part from performing his contract with

defendant, such a fact ought to have gone in diminution of plaintiff's damages; and the Judge ought, if requested by defendant, so to have told the jury. But he was not so requested; no such point in defence was made in the Court below or by counsel in this Court. It deserves consideration, whether it will promote the attainment of justice in a case, to allow apparent defects in the evidence of a particular fact in the case of a party successful below, to be first pointed out and excepted to in this Court by an appellant. The case is made out by the appellant subject to the revision of the Judge, upon objection by the appellee; but it is a substitute for, and is in the nature of, a bill of exceptions upon a writ of error. Such a proceeding is regarded as a new suit in which the judgment below is taken to be right unless the plaintiff in error shows affirmatively some error therein, and that exception was taken on the trial to the proceeding or ruling alleged to be erroneous. The
(114) defendant in error is in no case required to show affirmatively and upon the bill of exceptions, or case, that he was entitled to the judgment in his favor obtained below. His position is strictly defensive. The judgment below is assumed to be right until some specified error is shown. Still less is the appellee bound to show that he had a good case "to a certain intent in every particular," so as to exclude every supposition to the contrary, as in effect he will be held to do, if the appellee's claim or defence is supported in all respects by full proof. It is the rule of all Courts of appeal, and this Court has repeatedly said, that no more of the evidence or facts should be inserted in a case than is necessary to explain the exceptions of the appellant.

Hence, in this case it would be contrary to established practice to require the plaintiff to show from the case made out by the appellant that his claim was supported by evidence that his mill had not been so employed as to diminish his damages. It may be that the evidence to that effect was ample, but was omitted from the case as superfluous, because the want of such evidence was not excepted to. We think, however, that it does appear in the case that the plaintiff in fact proved all that was incumbent on him in this respect. The case states as a fact not apparently disputed "that plaintiff was ready, *able* and willing "to grind the whole amount of corn necessary to pay the judgment at the contract price. When the plaintiff proved a contract, its breach, and the loss of a certain profit resulting from the breach, upon all the authorities the burden lay on the defendant to prove anything in diminution of the damages.

In *Hendrickson v. Anderson, supra,* it was held that an overseer employed for a year and prematurely discharged, could recover the

full stipulated wages, unless the defendant should misconduct, etc., (115) in diminution of damages. BATTLE, J., says: "But in a suit for the stipulated compensation, the defendant may show in diminution of damages, that after the plaintiff had been dismissed, he had engaged in other lucrative business. *This, however, must be proved by the defendant, and must not be presumed.*" The case of *Cortigan v. R. R.*, 2 Denio 609, is cited and fully sustains the positions that the burden is on the defendant; The Court say—"but first of all the defence set up should be proved by the one who sets it up. * * * The rule requires him to prove an affirmative fact; whereas the opposite rule would call upon the plaintiff to prove a negative. * * * He is the wrong doer, and presumptions between him and the person wronged should be made in the favor of the latter. For this reason, therefore, the *onus* must in all cases be upon the defendant." To the same effect are *Walworth v. Pool*, 9 Arm., 394; *King v. Steien*, 44 Penn., St., 99; *Jones v. Jones*, 2 Swan (Tenn.), 605.

In the present case the defendant introduced no evidence of the sort spoken of, and there was therefore nothing in the evidence to call for or justify the addition or qualification to the Judge's instructions, which has been suggested as proper, even if such addition or qualification had been asked for. The judgment below is affirmed.

SMITH, C. J., dissenting. The plaintiff and defendant, on 29 April, 1871, entered into an agreement for grinding corn at the plaintiff's mill, at the price of 8 cents per bushel, and that 50 lbs. of meal be returned for 56 lbs. of corn. The terms of the contract were controverted before the jury, but they found that the defendant bound himself to send to the mill a quantity of corn, sufficient for the toll to pay off and discharge a judgment, which he held against the plaintiff and that it should be thus applied. Between the 1st day of May and September following, 5,791 8-56 bushels of corn were delivered (116) and ground, when the defendant denied his obligation, and refused to send any more corn to the mill. Conflicting evidence was offered as to what was a fair charge for grinding, when 50 lbs. of meal were to be returned for 56 lbs. of corn, the plaintiff's witnesses estimating it at fifteen, and some as high as twenty cents a bushel, while those of the defendant estimated it at eight cents, the contract price.

There was no evidence that plaintiff's mills were stopped or delayed, in consequence of the defendant's refusal to send the additional quantity, for which he contracted; or that the withdrawal of his patronage was not supplied with a full equivalent, from other sources; or that the

mills were not taxed to their working capacity, after the breach. It was shown that the expense of grinding to the plaintiff was three cents a bushel. The sum due for the corn ground was credited on the defendant's judgment, and the plaintiff compelled to pay the residue. The plaintiff was prepared and ready to do the work, if the corn had been delivered. The second issue submitted to the jury was to this effect:

What was the difference between the contract price and the actual cost to the plaintiff of grinding the quantity of corn necessary to pay off the judgment, and what additional quantity was required to raise that sum? The jury responded that the difference was five cents a bushel, and the additional corn needed, 20,430 bushels.

The defendant asked the Court to charge the jury that the profits which the plaintiff would have made, if the contract alleged in the complaint had been fully carried out, were not the proper measure of damages, and that the plaintiff is only entitled to actual damages, and having offered no proof of any such, is only entitled to nominal damages. The Court refused to give the charge, and instructed the jury that the measure of damages was the difference between the cost of grinding and the contract price. To this the defendant excepts. The
(117) jury awarded the plaintiff damages at the rate of five cents per bushel.

In this ruling of the Court I do not concur. For the violation of the contract, the plaintiff was entitled to recover those damages which fairly flowed from the breach, and no more. Had the mill been stopped, or so interrupted in its operation as to have lost as much time as would be required to do the additional grinding, and that after reasonable efforts to prevent the loss, the plaintiff could have claimed the full sum awarded him under the instruction of the Court. But he should have shown the extent of his losses in this respect. He had no right quietly to close up his mill, or permit it to lie idle for a period necessary to do the defendant's grinding, and then charge him as for a total loss. It was his duty to make reasonable efforts to prevent those losses, by seeking patronage elsewhere. If the losses were fully, or partially replaced by the employment of others, the defendant was entitled to an equivalent reduction on the full claim now made against him. This rule, just and reasonable in itself, which fully indemnifies against all losses sustained for a broken contract, is abundantly supported by authority.

The general principle is this lucidly stated by Mr. Greenleaf: "In cases of special contract, where one party agrees to do a certain thing, or to perform specific services for a stipulated sum of money, as for

example, to perform a piece of mechanical work for an agreed price, or to occupy a tenement for a certain time, at a specified rent, and deserts the undertaking before it is completed, or is turned away and forbidden to proceed by the other party, the measure of damages is not the entire contract price, but a *just recompense for the actual injury,* which the party has sustained. And in all cases of breach of such specific contracts, it is to be observed that if the party injured can protect himself from damages at a trifling expense, *or by any reasonable exertions, he is bound to do so.* He can charge the delinquent party (118) only for such damages, as by reasonable endeavor and expense, he could not prevent." 2 Greenl. Ev., sec. 261.

So an eminent writer on the law of damages says: In actions for breach of contract, the measure of damages is not the price stipulated to be paid in full performance, but the actual injury sustained in consequence of the defendant's default. For the rule that the contract furnishes the measure of damages, is subject to the other rule, already stated, that compensation is only to be given for actual loss. Sedg. Damages, 210. To the same effect Mayne on Damages; 82 Law Lib., 113.

There is some conflict in the cases in regard to the damages to which one wrongfully dismissed, during his contracted term of service, is entitled, but the better opinion seems now to bring these cases under the rule, applicable to other special contracts.

In *Elderton v. Emmens,* 60 E. C. L., 117, an attorney, who had contracted to render professional service during the year at the sum of an hundred pounds, was dismissed before it expired, and brought his action. PARKE, J., delivering the opinion of the Court, thus expresses himself: "If it be held that such a contract as this is for service and pay respectively, and that although the employer has determined the relation by an illegal dismissal, the employed may entitle himself to the wages for the whole time by being ready to serve, a doctrine would be sanctioned that would be of pernicious consequence, as in the case of a business being discontinued, or a dismissal for misconduct, without legal proof."

In *Goodman v. Pocock,* 69 E. C. L., 583, a clerk who was dismissed in the middle of his quarter sued his employer for his wrongful act, and EARLE, J., says: "I think the true measure of damages is the loss sustained at the time of dismissal. The servant, after dismissal, may and *ought* to make the best of his time and he may (119) have an opportunity of turning it to advantage."

Commenting on these cases, and referring to what had been said by others that a dismissed servant could recover for the whole time upon

the doctrine of constructive service, Mr. Mayne uses this language: That doctrine, however, after being severely commented on in *Smith v. Haywood,* seems to have been tacitly overruled by the Exchequer Chamber in *Elderton v. Emmens,* and expressly by PATTERSON and EARLE, JJ., in *Goodman v. Pocock.* Mayne on Damages, 113.

The rule in this country seems to have been similarly settled.

In *Shannon v. Cumstock,* 21 Wend. (N. Y.) 457, the contract was to transport horses on a canal boat for a given sum of money, and the action was brought to recover damages for the breach. The Court say: "Suppose that the plaintiff had the next hour been furnished with freight entirely adequate to the voyage at the same sum, he would have been entitled to the damage arising from the detention for that time, but no more. A tender and offer to perform is *quasi* performance, but it does not regulate the amount of damages.

By way of illustration COWAN, J., proceeds thus: "A mason is engaged to work for a month and tenders himself and offers to perform, but his hirer declines his service. The next day this mason is employed at equal wages elsewhere for a month. Clearly his loss is but a day and it is his *duty* to *seek other employment.* Idleness is itself a breach of moral obligation. But if he continues idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance."

In this case, and also in the subsequent case of *Hecksher v. McLean,* 24 Wend., the words of Chief Justice MELLEN, of the Supreme Court of Maine, used in *Miller v. Mariners Church,* 3 Greenleaf, 51, 55,
(120) 56, are quoted with strong approval: "If the party, entitled to the benefit of the contract, can protect himself from a loss, arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omits to do so, regardless of the increased amount of damages, for which he may intend to hold the other contracting party liable."

So, too, in Kentucky, it was held that a party contracting to work at a stipulated price who is ready and willing to perform his agreement, but is prevented by the defendant, can not recover the price named in the contract for the whole work, but only the actual damages sustained by him. *Chamberlain v. McAlister,* 6 Dana 352.

These cases, some of which are almost identical with that extent of his damages, and such damages as he could not by reasonable efforts avert. The rule finds illustration in a familiar case of trespass. The defendant pulls down the plaintiff's fence around his cultivated field for the purpose of passing through, and neglects to put it up. In conse-

quence, stock enter the field and depredate upon the crops. As soon as the plaintiff is advised of this it becomes his duty to replace the fence, and his claim to compensation for injury suffered is the cost of repairs, and the value of the injury to the crop before he had notice and time to replace the fence. He could not remain passive, after (121) knowledge, and permit his entire crop to be destroyed, and then demand compensation for its value. It was his duty to make prompt and reasonable efforts to prevent unnecessary damage, and if he will not he has no just ground of complaint against the wrongdoer.

Suppose the plaintiff had brought his action at once upon the defendant's repudiation of the contract, the damages, it would seem, must be estimated upon the same principle as when he waits a year or more before doing it. In such case the estimate must be purely speculative and conjectural, and the anticipated profits certainly could not be recovered. There are many contingencies attendant upon all business—the possible loss by fire, the breaking of machinery, death, sickness, and other causes may interrupt, or suspend its prosecution. These can not be estimated in advance, and profits must be largely dependent upon them. It is for this reason that the actual, not conjectural loss, constitutes the plaintiff's claim to compensation.

Clements v. State, 77 N. C., 142, seems to conflict with the doctrine enunciated. There the plaintiff was permitted to recover as damages in the Court below, the profits which he would have made if he had been permitted to execute his contract, and which he lost by the default of the State, and this ruling was sustained on the appeal. The opinion delivered here simply declares that there is no error, and the subject does not seem to have been fully and carefully considered. Recognizing the importance of adhering to the decisions of this Court, to give stability and firmness to our system of jurisprudence, yet a principle so eminently practical, and so farreaching in its results, should not be permanently settled without ample and thorough examination of all its bearings, and I have felt myself at liberty to treat it as an open question still.

I am constrained therefore to dissent from the opinion of the Court and to say that I think there was error in the charge en- (122) titling the defendant to a new trial.

PER CURIAM. Judgment affirmed.

Cited: Lewis v. Rountree, 79 N. C., 122; *Coal Co. v. Ice Co.,* 134 N. C., 588; *Machine Co. v. Tobacco Co.,* 141 N. C., 292; *Hawk v. Lumber Co.,* 149 N. C., 15; *Wilkinson v. Dunbar, Ib.,* 25.

Dist: Jones v. Call, 96 N. C., 337.

*R. G. LEWIS, surviving partner v. W. D. ROUNTREE & Co.

Vendor and Vendee—Action for Breach of Warranty—Measure of Damages—Interest.

1. A vendee who takes a warranty and gives notice that he buys to sell again in another market may include in his damages both the losses he actually sustains by reason of a breach of the warranty, and also the profits he would have made upon resale, had the article been what it was represented to be.
2. In an action for breach of warranty, where it appeared that the plaintiff purchased certain rosin from the defendants at Wilson, N. C., to be sold by him in some other market than Wilson, *of which defendants had notice*, and the rosin failed to come within the description warranted; *It was held*,
   (1) That the contract of defendants was to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble and expense of the transportation.
   (2) That the knowledge by the vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be sustained by a breach of warranty.
   (3) That in such case, the only just measure of damages is the difference between what the rosin would have sold for *in a reasonable time* after its purchase in the market which the plaintiff had by the circumstances of the contract a right to select, and did select (New York), if it had been what it was warranted to be, and the sum it did actually sell for or could have been sold for in that market, being what it was.
3. In such case, the plaintiff is not entitled to interest upon the amount recovered for breach of warranty.

(123)

APPEAL at June Special Term, 1878, of WAKE Superior Court, from *Seymour, J.*

Upon the opinion of this Court in same case, 78 N. C., 323 (where the main facts are stated) being certified to the Court below, and upon argument of the question of damages as found for the plaintiff by the referee, His Honor amended and corrected the report as to facts in the following particulars:—

1. That plaintiff bought 517 barrels of rosin at $3.50 a barrel, of defendants, on 25 October, 1865, which were delivered to and accepted by plaintiff at Wilson, N. C., and that plaintiff expended two dollars a barrel in shipping the same to New York; that he bought the same to sell in some market other than Wilson, and defendants had notice of its delivery.

2. The market price of strained rosin in New York on 3 January,

*SMITH, C. J., did not sit in this case, having been of counsel.

1866, when said barrels arrived there, and the rosin was inspected, was $6.75 a barrel; and said price fell between said dates $1.75 a barrel in that market.

3. The said price also fell between 3 January and February, 1866—during the period when Dollner, Potter & Co. were causing 401 barrels of dross rosin to be prepared and strained for market—$1.25.

The Court held as matter of law that the measure of plaintiff's damages was the difference between the market price at Wilson on 25 October, 1865, of 401 barrels of strained rosin, and the value at the same place and date of the 401 barrels of dross rosin actually delivered, with interest on same from 11 September, 1866, the day of service of the writ in the action, until payment; and found the damages so assessed, to be $588.36, of which sum $327 bears interest from 24 June, (124) 1878, till paid, and gave judgment accordingly, from which ruling the plaintiff appealed.

Messrs. E. G. Haywood and *D. G. Fowle* for plaintiff.
Messrs. Gilliam & Gatling, for defendants.

RODMAN, J. Many cases may be supposed in which the measure of damages adopted by the Judge would be properly applicable. We think, however, it was not applicable under the circumstances of this case. The Judge finds as a fact that plaintiff bought the rosin to ship to and sell in some other market than Wilson, of which defendant had notice, on 25 October, 1865, when it was delivered. No certain market was stated and the meaning of the notice then would be that the purpose of the plaintiff was to sell in any of the usual markets for the article which he might afterwards determine on, such as Norfolk, New York, or Boston, and it might perhaps include any usual market in a foreign country. *For the purposes of the present question* the contract of the defendant may be regarded as a contract to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble and expense of the transportation. As damages recoverable on a breach of a contract are the natural and probable consequences which the parties may be supposed to have had in contemplation, it would seem reasonably to follow that a knowledge by a vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be sustained by a breach. Many cases support this proposition. If a visitor to a watering place on the ocean should contract with an owner of a boat for its use for the purpose of a pleasure sail, the damages on a breach by the boatman would be merely the additional price which the visitor might be

(125) compelled to pay for another boat, or if no other could be got, the value which a jury might put on his disappointment. But in *Mace v. Ramsey,* 74 N. C., 11, charterer of the boat was held entitled to recover the profit which he would have made under the circumstances which were in the contemplation of both parties.

So in *Haoley v. Baxendale,* 9 Exch., 341, it was said by the Court that if the defendant had been informed that the consequence of his delay in delivering the shaft would be the stoppage of plaintiff's mills, the measure of the damages would have been the damages which would naturally follow under the special circumstances.

In *Page v. Parcy,* C. & P. (34, E. C. L., 628), the wheat might have been good for flour, but it was sold with a knowledge that it was intended for sowing, and it was warranted to come up, and as it did not, the vendor was held liable for the loss of the crop.

In *Randell v. Raper,* 96 E. C. L, 84, the barley sold might have been as good for malting as Chevalier barley, but it was sold with a knowledge that it was to be sown, and as the vendor had warranted it to be Chevalier barley and it was not, the vendor was held liable for the deficiency in the crop, which probably exceeded several times the cost of the seed. See also *Passinger v. Thorburn,* 34 N. Y., 634, where cabbage seed was sold as Bristol cabbage seed.

There can be no doubt that a vendee who takes a warranty and gives notice that he buys to sell again in another market, may include in his damages both the losses he actually sustained by reason of the breach, and also the profits he would have made upon resale, had the article been what it was warranted to be. The authorities cited by *Mr. Haywood* in his learned argument, as well as the case of *Oldham v. Kerchner, ante* 106, and the authorities there cited fully sustain the doctrine.

(126) The only just measure of the plaintiff's damages in this case is the difference between what the rosin would have sold for in a reasonable time after its purchase in the market which the plaintiff had by the circumstances of the contract a right to select, and did select—New York—if it had been what it was warranted to be, and the sum it did actually sell for, or could have been sold for in that market being what it was. This implies of course that the valuation in New York was a fair one, which is not disputed. In stating what we conceive to be the rule, I have said that the sale must be within a reasonable time; a vendee would not be allowed to hold on for an indefinite time, during which fluctuations of price might occur, and sell at a time prejudicial to his warrantor. In this case, however, no question of that sort occurs, as the prices of strained rosin in New York fell between the earliest

period at which it could have been got there, and the day of its arrival, when the defect in the article was discovered and the valuation of it made, and the delay was favorable to the vendor. It is found by the Judge that 401 barrels of strained rosin would have sold in New York on 3 January, 1866, for $2,706.75, and the article which was warranted to be strained, but turned out to be an inferior article, could have been sold for $675.50 and no more. The difference being $2,031.25 is, we think, the amount of damages which the plaintiff has sustained by defendants' breach of warranty.

Whether interest from the commencement of the action should be added to this sum is a question on which we have had some difficulty. I know of no established rule which governs such a case. The nearest approximation to a rule that I have found is in *Devereux v. Burgwyn*, 33 N. C., 490. The facts of that case are not fully stated. It appears, however, that the parties being tenants in common of large bodies of land agreed to a partition to be made by arbitration, whose award was not to be absolutely binding, but either party might refuse to abide by it, in which event he was to pay $1,000 as stipulated (127) damages. The award was made and the defendant refused to abide by it, and the plaintiff sued for $1,000 and claimed interest from the time when defendant refused to abide by the award, or at least from the time when the writ issued, and also filed a bill in equity for the partition of the lands. This Court refused to allow interest from either date, on the ground that it was not given by law. In the course of the opinion PEARSON, J., says, in brief: Interest is allowed when given by statute or by express or implied agreement, as for money lent or due on account stated, etc. In *trover* or trespass *de bonis asportatis*, the jury might in their discretion allow interest on the value from the time of the conversion or seizure. He says: "We are not at liberty to relax the rule any further," etc. This case does not come strictly within either class of the illustrations given. But clearly the plaintiff is not of the class which is said to be entitled to interest as a right and *ex debito justitia*. His claim would be subject to the discretion of a jury. But in this case a trial by jury was waived, and it was left to the Court to find the facts and the law. The Judge below, in the view which he took of the case and of the rule as to the measure of damages, allowed the plaintiff interest upon the damages which he found he had sustained. But the view which he took of the facts governing the measure of damages and of the law applicable to them is so different from that taken by this Court, that we can not take his finding on that question as the verdict of the jury. A verdict we could not alter, we could only set it aside and

send the case to a new jury; and it was to avoid the expense and delay of such a proceeding that the parties submitted the facts and the law to the Court. Probably this Court would not think itself justified in changing any state of facts found by the Judge. But the right to interest is not a fact; it is in its nature and necessarily a legal con-
(128) clusion from the facts. And although it has not in cases like this yet been defined by clearly cut rules, and has therefore usually been left to the discretion of a jury, yet in the progress of the law as a science it must and will be so defined; and the question in what cases interest shall be allowed, and in what not, will be recognized as properly coming within the duty of judicial instruction, just as the questions of that sort were considered too versatile and various to admit of being governed by certain principles, and were left necessarily as was supposed to the discretion of a jury.

In the present case we are obliged to decide whether the plaintiff is entitled to interest or not. It can not be sent to a jury, for the parties have waived that mode of trial; or sent back to the Judge, for he has once decided it and his decision is before us on appeal. We have before us every fact which he had or can have, and he could only decide it as we may, by applying some rule of law.

We have a precedent in *Devereux v. Burgwyn, supra,* in which this Court did decide on the right to interest as a question of law, and refuse to allow it, although the debt on which it was claimed as little belonged to either of the classes mentioned, as that in this case does. It is a rule which may be gathered from the cases that whenever a debtor has notice or ought to know that he owes a *certain* sum, and when he is to pay, if he fails to pay it, he ought to pay interest. In the present case although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet as a fact, not only was the amount technically unliquidated, but owing to the unsettled state of the law, it was uncertain. He could not safely and without risk pay any sum until it was ascertained by a judgment which he might expect it speedily would be.

Moreover, although the defendant warranted the article and it
(129) did not correspond to the warranty, whereby he became liable in damages, yet there was no fraud or gross negligence on his part. The plaintiff threw him off his guard by assuming to select the article, and was guilty of what may be called by analogy "contributory negli-

gence." For these reasons we think the plaintiff is not entitled to interest.

He will have judgment here for $2,031.25 and costs.

PER CURIAM. Judgment reversed.

Cited: Patapsco v. Magee, 86 N. C., 350; *Jones v. Call,* 96 N. C., 337; *Critcher v. Porter,* 135 N. C., 550; *Machine Co. v. Tobacco Co.,* 141 N. C., 293; *Tilinghast v. Cotton Mills,* 143 N. C., 273.

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*THE BANK OF NEW HANOVER v. WILLIAMS, BLACK & CO.

Bank of New Hanover—Charter—Contract—Equitable Assignment—Factor's Lien—Commercial Usage—Issues of Fact.

1. The provisions of section 11 of the charter of the bank of New Hanover (Private Laws 1871-'72, ch. 31) do not include *merchants* and can not by implication be extended to them.
2. Under the provisions of such section the *lien* and *advancements* should be contemporaneous acts; it was not intended that the bank at any time after making an advancement could take a lien upon all future purchases of the mortgagor for a general balance due on such advancements.
3. On the trial below, it appeared that the plaintiff advanced money to one M., for the purchase of certain rosin, with the understanding that M was to draw a draft upon the rosin to pay for the advancement; them in favor of plaintiff, sending a bill of lading to defendants (130) with a letter "that he had drawn on them at 30 days for $2947.98 in favor of the cashier of plaintiff bank, *please protect;*" defendants protested the draft for non-acceptance and thereupon plaintiff telegraphed them "we hold registered mortgage on rosin shipped you by M and must follow it if draft is not accepted;" at the time of the shipment there was a balance due defendants from M on account of mutual dealings theretofore of more than the value of the rosin; defendants had no notice of agreement between M and plaintiff that the proceeds of rosin should be applied to the payment of the draft; defendants sold the rosin and applied the proceeds due them from M; *Held,*
   (1) That the telegram from plaintiff to defendants was evidence that the plaintiff did not claim that its agreement with M constituted an equitable assignment.
   (2) That an agreement to pay a debt out of a particular fund is not an equitable assignment of the fund; and the agreement between M and plaintiff did not vest in the plaintiff any title, legal or equitable, to the rosin when purchased.
   (3) That it was properly submitted to the jury as to whether or not the draft and letter constituted an *instruction* to defendants, by commer-

*FAIRCLOTH, J., did not sit on the hearing of this case.

cial usage, to appropriate the proceeds of the rosin to the payment of the draft; and the jury having found in the negative, the plaintiff can not recover.

(4) That it was not error to submit to the jury, an issue, that even if such instruction was given, did the long continued dealings between M and defendants, leaving a balance due them, warrant the defendants by the commercial usage of New York in refusing to accept the draft and applying the proceeds of the rosin to their own balance.

4. In such case the defendants, not being parties or privies to the agreement between M and plaintiff, were left free to enforce their factor's lien against the proceeds of the rosin consigned to them by M, without liability to plaintiff.

5. Courts, in administering commercial law, have the power and it is proper to submit to a jury as a question of fact, as well what is the meaning of commercial terms, as what was the established commercial usage in respect of a certain course of dealing.

READE, J., dissenting.

(131) APPEAL at Fall Term, 1877, of NEW HANOVER, from *Moore, J.*

The plaintiff bank was duly chartered by an act of assembly ratified on 12 January, 1872, and by a power alleged to have been granted, it took a mortgage on 6 April, 1873, from Moffit & Co., merchants in the city of Wilmington, to secure payment of $20,000 advanced to enable them to carry on business. This mortgage was proved and registered on 9 July, 1873. On 9 and 10 September, 1873, Moffit arranged with plaintiff to raise money on a shipment of 1,003 barrels of rosin. At this time the balance due on the original advancement exceeded the amount in controversy in this action. He obtained the money with the understanding that he was to draw a draft on the rosin to pay for the advancement, and shipped said rosin on said 10 September to defendants, commission merchants in New York, in the usual course of trade with a bill of lading, and a letter stating "that he had drawn on defendants at 30 days for $2,947.98, in favor of the cashier of plaintiff bank, please protect," and signed by Moffit & Co., who informed the plaintiff thereof. The draft was for the invoice value of said rosin. Moffit commenced shipping cotton and naval stores to defendants in 1872, and so continued until the time of the above transaction, when defendants protested the said draft for nonacceptance, and thereupon the plaintiff telegraphed to defendants—"we hold registered mortgage on rosin shipped you by Moffit, and must follow it if draft is not accepted," which was the first information defendants had of plaintiffs' claim to the rosin in their possession, it having been delivered to them by virtue of said bill of lading. At the time of said shipment, the balance due the defendants from Moffit on account of mutual dealings as aforesaid was about $3,000. The rosin was sold by defendants in the usual way, and

the amount realized ($2,541.96) was placed to the credit of Moffit & Co., leaving an unpaid balance still due the defendant. (132)

On 13 September, 1873, Moffit & Co. failed in business, and have since been largely insolvent. The defendants did not know of said failure when they refused to accept said draft, and it was admitted that they had no notice of the agreement between the plaintiff and Moffit, that the proceeds of the sale of said rosin should be applied to the payment of said draft. The plaintff, however, contended that the words "please protect" in said letter was a commercial phrase to which, taken in connection with the letter, the usage among merchants had attached a technical and well known meaning, to wit, an instruction to defendants to apply proceeds of that shipment to payment of that draft; and evidence was adduced to show the same, which was replied to by the defendants, who insisted that in this case they had a right to appropriate said proceeds, by the custom of merchants, to the payment of their own balance. There was much evidence upon this point. The plaintiff claimed the right to recover the amount of sales of the rosin by virtue of said mortgage, and also by virtue of an equitable assignment of the proceeds thereof by Moffit to the plaintiff.

The issues submitted to the jury, which are material, were as follows:

1. Did Moffit & Co. consign to defendants on 10 September, 1873, 1,003 barrels of rosin of the invoice value of $2,947.98, with instructions to appropriate and apply the proceeds thereof to the payment of a draft of same date and like amount, payable to the order of S. D. Wallace, cashier of plaintiff, thirty days after date? Ans.—No.

2. If such instructions were given, and there had been a long series of shipments and drafts, in the course of which Moffit & Co., became indebted to defendants, was there any general commercial usage in New York by which defendants were entitled to refuse the draft, and apply the proceeds of the shipment to their own balance? (133) Ans.—Yes.

His Honor thereupon rendered judgment for the defendants, and the plaintiff appealed.

Messrs. C. M. Stedman and *W. S. & D. J. Devane,* for plaintiff.
Messrs. A. T. & J. London, for defendants.

BYNUM, J. This is an action by the plaintiff to recover from the defendants the sum of $2,541.98, the proceeds of the sale of 1,003 barrels of rosin, sold by them. The plaintiff corporation bases its right of recovery upon two alternative propositions; first, that it had acquired the legal title to the rosin under a mortgage executed by Moffit & Co., to the

plaintiff, bearing date 6 May, 1873; and second, under an equitable assignment of the proceeds of the sale of the rosin alleged to have been made to the plaintiff by Moffit & Co., on 10 September, 1873.

We will first dispose of the claim under the mortgage. By sec. 11 of the charter of the plaintiff corporations, it is provided: "That to aid planters, miners, manufacturers and others the said bank shall and may have power to advance or loan to any planter, farmer, miner, manufacturer or other person or persons, any sum or sums of money and to secure the repayment of the same, taking in writing a lien or liens on the crop or crops to be raised, even before planting the same, or upon the present or prospective products of any mining operaton, or upon any article or articles then existing or thereafter to be made, purchased, manufactured, or otherwise acquired, and any lien so taken shall be good and effectual in law," etc.

The mortgage under which the plaintiff claims was executed 6 May, 1873, and registered 9 July, 1873, and the rosin claimed under it in this action was purchased by Moffit & Co., the mortgagors, on 10
(134) September, 1873, thereafter, and by Moffit & Co., was on the same day consigned to the defendants, commission merchants in New York for sale. Moffit, the mortgagor, was neither a planter, miner nor manufacturer, but was a merchant only. The act therefore does not expressly embrace a merchant, and it is by construction only that he can be included in this section of the charter.

We by no means decide that any of the classes expressly named, can execute a mortgage of property, indefinitely thereafter to be acquired, which shall be valid as to third persons. Such a provision in the charter is so obviously an "exclusive privilege" within the meaning of the constitution, and so opposed to common right and the general law of the land if it could be inforced by law would be such an *incubus* upon that freedom of commerce which it is the policy of this State and country to foster and encourage, that this Court would long hesitate before affirming its validity. *Simonton v. Lanier,* 71 N. C., 498. We waive that discussion and confine ourselves to the construction of the section.

1. The language of the section does not embrace merchants, and we can not by implication extend it to them. They are a class distinct from the producing class. Merchants are not producers, and it was the manifest purpose, at the time this charter was granted by the legislature, to benefit that class. The persons expressly described are planters, miners and manufacturers, who are producers. If it were necessary to give effect to the words "others" and "other persons" to make complete

sense, as is contended by the plaintiff, those words might be extended so as to embrace persons occupied in the fisheries, for instance, as an important producing class. This would satisfy the letter without violating the spirit and purpose of the act, by giving it the universal and dangerous application contended for.

2. The section of the charter we are considering provides that to aid planters, etc., "advancements may be made," etc. "taking (135) liens," etc., plainly contemplating that the "lien" and the "advancements"—the one in consideration of the other—should be contemporaneous acts. It was never intended under this section that the bank could at any subsequent period of time after the advancements had been made, take a lien upon all future purchases for a general balance on such advancements. The mortgage under consideration was made by Moffit & Co. to the plaintiff, not to secure advances then to be made or thereafter—like the mechanics' or farmers' lien—but it was made to secure a general balance of an indefinite past indebtedness. This is an improper construction of this section of the charter, when under this mortgage a legal title is set up to property purchased in the usual course of mercantile trade subsequent to the execution of the mortgage. The mortgage nevertheless is not invalid, for under the first section of the charter, the bank is endowed with "capacity to take, hold and coney real and personal property and with all the powers, rights, and privileges granted to any bank by that or any preceding legislation," etc. Under this provision it was competent for the bank to take this, or other mortgage to secure a present or past indebtedness. But it can not be contended that such a mortgage expressly securing a past debt of $20,000, and that only, can be extended so as to vest in the mortgagee the legal title of 1,003 barrels of rosin, purchased by Moffit & Co., four months after the execution of the mortgage. Unless it can have this effect (and it certainly can not) for the purpose of this action the mortgage must be put out of the way.

Failing to recover upon the mortgage the plaintiff falls back upon the claim of an equitable assignment by Moffit & Co. of the anticipated proceeds of the sale of the rosin. To this new cause of action the defendants make a preliminary objection, that to constitute an equitable assignment the intent and agreement to make the trans- (136) action such, must appear, and that such intent and agreement, not only do not appear but are here rebutted; because when the plaintiff received notice on 22 September that the defendants had protested the draft of Moffit & Co., payable to S. D. Wallace, cashier, it dispatched to the defendants a telegram in these words: "We hold *registered*

mortgage on the rosin shipped you by Moffit, and must follow it if draft is not accepted." From this telegram it appears that the plaintiff did not then claim or rely upon the agreement and promise of Moffit & Co. as constituting an equitable assignment or other contract which could be enforced, but on the contrary relied solely upon its rights as derived from and under the mortgage. This is a strong view of this part of the case, for if the parties themselves intended to make no such contract as is now insisted on, the law will not step in and make one to the prejudice of intervening rights of persons dealing with the property in the usual course of trade.

The exact transaction between the plaintiff and Moffit & Co., as found by the jury was this: "That the said draft was discounted by the plaintiff and the money advanced for the purchase of said 1,003 barrels of rosin, at the request of Moffit & Co., upon the understanding and agreement that the proceeds of the sale of said rosin so purchased should be applied to the payment of said draft for $2,947.98." This contract did not vest in the plaintiff any title in the rosin when purchased, either legal or equitable.

An agreement to pay a debt out of a particular fund is not an equitable assignment of that fund. The distinction is between promise and performance; a promise is something to be done, an assignment is something done and finished, leaving nothing more in the assignor to do, to complete the right. For the breach of promise the aggrieved party must proceed against the promisor for damages or specific performance, while upon the assignment he may proceed for the fund itself
(137) against the party in possession. 3 Lead. Cases in Eq., notes to *Row v. Dawson,* 230; *Trist v. Child,* 21 Wall. 447; *Christmas v. Russell,* 14 Wall. 84.

The plaintiff, however, does not so much rely upon this particular agreement between it and Moffit & Co. to have constituted an equitable assignment of the fund, as upon the subsequent draft and letter, construed together, amounting to such an assignment. If the draft and letter constituted an *instruction* that the proceeds of the sale of the rosin should be applied to the payment of the draft, we might concede for the purposes of this case that such an instruction was an equitable assignment, and that the defendants could not receive the consignment without incurring the obligation to pay the draft, the one thing being the complement of the other. This proposition was the plaintiff's chosen battle ground, and without at all admitting that the affirmative of it would establish the plaintiff's right to recover, the defendants joined issue upon it. It became material, therefore, to ascertain the

commercial construction of the terms employed in the letter and draft, by commercial men in the course of their business, as constituting or not consttuting the "instruction" contended for by the plaintiff.

It was admitted that the meaning and effect of these instruments were to be arrived at by the commercial usage. The question was submitted to a jury in the first issue, and upon the evidence of merchants it was found by verdict that by the custom of merchants such a draft and letter do not constitute an instruction to appropriate and apply the proceeds of the sale of the rosin to the payment of the draft. This finding of the jury would seem to be decisive of the case, for if no appropriation of the proceeds of the sale had been made by Moffit & Co., and regarding the equities of the parties as equal, the one who acquires the possession or legal title will not be compelled to yield it unless his claim is satisfied. This would be so apart from the rights of the defendants as the factors of Moffit & Co. But it was (138) further insisted by the defendants that even if the consignment of the rosin had been accompanied by the instruction, as contended for by the plaintiff, yet if there had been a long series of shipments and drafts, in the course of which Moffit & Co. became indebted to the defendants, then by the general commercial usage in New York the defendants were entitled to refuse the draft and apply the proceeds of the shipment to their own balance.

This question of a general commercial usage, though objected to by the plaintiff, was also submitted to the jury as one of fact, and it was found by their verdict upon the second issue that such was the custom of merchants in New York. This issue and finding do not seem to us to be material, after the jury upon the first issue had found that by the law merchant, the shipment had been made to the defendants without instruction as to the application of the proceeds of sale; for in the absence of such instruction a factor has the undoubted right to apply such proceeds of sale to the payment of a general balance due from his customer. So that the jury by their verdict upon the second issue in connection with their finding upon the first only declared what the law was without such finding. Such an issue and verdict can not be assigned for error. "Factors and brokers to whom goods are consigned to be sold," says Addison, "have a lien for the general balance due to them from their employers, or principals in the ordinary cause of their business as factors, and for their occupations on behalf of such employers, upon the goods whilst in their possession and on the moneys realized by the sale of them. This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially

taken notice of by the Courts, no proof ever being required as a matter of fact that such general lien exists." 2 Addison Cont., sec. (139) 932.

To such an extent are the rights of lien of the factor protected by the law merchant that even where he has made advances on the credit of a deposit, not knowing the depositor to be an agent, he can retain for a general balance due by such agent, against the true owner; and the same rule applies to insurance brokers, 2 Add., sec. 933, and note. The rights of the factor are well illustrated in the late case of *Bank v. Rice,* 107 Mass., 37, which is directly in point. There, a merchant consigned twelve bales of cotton to a factor and on the same day drew a bill of exchange upon him expressed on its face to be drawn "against twelve bales of cotton," procured its discount by a bank, and advised the factor of the consignment and the draft. Upon presentment of the draft the factor refused to accept it and advised the merchant by letter that he did so because he had not received the bill of lading, and that he would accept when the bill was received. Two days later he received the bill, and a few days afterwards the bank to which his letter in the meantime had been shown, again presented the draft to him together with his letter and a duplicate bill of lading, and requested his acceptance, which he again refused. Upon the subsequent receipt of the cotton, the factor sold it and credited its proceeds to the merchant, who was his debtor to a large amount. It was there contended, as it has been here, that the plaintiff had an equitable lien upon the cotton to the extent of the draft discounted by the bank, that it had brought the draft with the memorandum ("against twelve bales of cotton") upon it and in reliance upon the cotton as security for its payment; that under these circumstances the defendant could not accept the consignment without accepting the draft. But the Court decided otherwise, and held that the plaintiff had acquired no title to the cotton against which the draft was drawn; that the bill of lading was (140) not attached to the draft or made payable to the holder thereof, or delivered to the plaintiff. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendant and drawer was largely in favor of the defendant. There was no ground, therefore, for implying a promise from the defendant to the plaintiff to pay either the amount of the draft or the proceeds of the cotton.

"The plaintiff," said the Court, "did not take the draft or make advances upon the faith of any promise of the defendant or of any actual receipt by him of the cotton or the bill of lading, but solely upon the

faith of the drawer's signature, and implied promise that the defendant should have funds to meet the draft. The whole consideration for the defendant's promise moved from the drawer and not from the plaintiff. And the defendant made no promise to the plaintiff." See also *Tiernan v. Jackson,* 5 Pet. 588; 1 Sandf. 416; 1 Seld. 525; 3 B. & Ald. 643; 3 Sand. 285; 18 Wend. 319.

So that whatever may be the rights and the remedies of the plaintiff and Moffit & Co. between themselves, and arising out of their contracts and promises, the one with and to the other, the defendants, who were not parties or privies thereto, and made no promise to the plaintiff, have not made themselves liable for the claim of the plaintiff, but are left free to enforce their factor's lien against the proceeds of the rosin consigned to them by their debtor, and in execution of the contract with Moffit & Co., upon the faith of which the advancement was made. *Robey & Co. v. Ollier L. R.,* 7 Ch. App., 695 (3 Moak, 571).

We are aware that there are *dicta* in some of the elementary writers upon this subject, that when one writes to his factor that he has sent him certain goods for sale, and drawn on him to a certain amount, the factor if he receives the consignment would be bound to accept the bill. 1 Pars. Bills and Notes, 281; 2 Story Eq. Jur., sec. (141) 1045.

But it will be found on examination that the authorities they cite do not support them, or are explained away or overruled by subsequent decisions, and that the law is correctly stated in *Bank v. Rice,* 107 Mass., 37. See also 1 How. 239; *Sweeney v. Easter,* 1 Wall, 166; 1 Smith L. C. 635, 417; 5 Sandf. 267; 1 Sugden on V. & P. 381.

If the finding of the jury upon the second issue had not become immaterial by the finding upon the first, it would seem to be settled by the highest authority that the Courts in administering the commercial law have the power, and it is proper to submit to the jury as a question of fact, as well what is the meaning of commercial terms, as what was the established commercial usage in respect of a certain course of dealing; as for instance, the meaning of the words "please protect," and whether factors can refuse to accept a draft in a case like the present and apply the proceeds of sale in payment of a general balance.

Merchants dealing in a particular kind of merchandise, and bankers discounting bills of persons in particular trades are presumed to know and make their contracts in reference to the custom of the trade. In *Ex Parte Watkins,* L. R., 8 Ch. App. (6 Moak, 466), SIR G. MELLISH, L. J. said: "I must always say I think it extremely desirable that as far as can be done consistently with the rules of law, the law should

be so interpreted as to be in accordance with the custom of trade. To make the law needlessly conflict with the customs of any trade causes the greatest inconveniences and injustice to persons in that trade." Also *Ashforth v. Redford,* L. R. 9 C. P. 20 (7 Moak, 135).

In conclusion the plaintiff here had a well known and usual means of protection which he refused or neglected to take, to wit, either to take the bill of lading deliverable to its own order, or to attach the bill of lading to the draft, not to be delivered to the drawee until (142) he accepted the draft; and it was in evidence that such was the custom where the drawer was weak. The plaintiff well knew that Moffit & Co. were weak, for it had a mortgage upon all they had then, or should ever thereafter acquire by the terms of it. The plaintiff at the date of the draft knew that the firm of Moffit & Co. were insolvent and it is evident put a mistaken reliance upon the effect of the mortgage, or upon the personal promise of the firm.

PER CURIAM. Judgment affirmed.

Cited: Blalock v. Clarke, 137 N. C., 142.

JOSEPH W. DOBSON v. JOHN G. CHAMBERS, Adm'r. of John Brigman.

Contract—Substitution of Security—Evidence—Practice.

1. On the trial below, it appeared that B and W, partners, executed a certain note in bank, with one P as security, which at maturity was replaced by another note executed by the same parties; that the latt r after it became past due was surrendered to one V in exchange for certain drafts drawn by him upon W and payable to P, which drafts were made for the purpose of renewing the note, (B being then sick); that these drafts were afterwards taken up by the plaintiff who executed his own note to the bank; *Held,* that the indebtedness of B upon the original notes was not extinguished by the drafts of V; but V in his relation to the others was their surety and held their note for his own indemnity until relieved by the execution of plaintiff's note.

2. To charge one with a liability, positive and direct evidence of a previous request is not always attainable and is not required; *Therefore,* where it appeared that the plaintiff had purchased certain stock from B and W, partners, and it was in evidence that B had said on the day of sale (143) that "he and W owed a large debt in bank and had a chance to make a large payment in stock"; that the plaintiff and B and W were seen together in conversation and that B afterwards said that "he had got $3,000 for his stock;" that afterwards B being then deceased, the plaintiff took up the note of B and W by executing to the bank his own note, to which W was a surety; *It was held* in an action against B's adminis-

trator, that there was sufficient evidence to warrant the jury in finding that the plaintiff was requested by B and W to take up their note.

3. Where a substituted security is given at the instance and for the benefit of a debtor, the liability of the debtor is not destroyed, but is transferred to him who gives such security.

4. Where on a rehearing of a case in this Court, it appears that no exception to the amount of the judgment was taken in the Court below on the trial, nor any issue submitted to the jury, nor any reference asked for to ascertain what was really due, and no error was pointed out in regard thereto on the former hearing, this Court will not disturb the judgment.

PETITION to rehear heard at June Term, 1878, of THE SUPREME COURT.

The defendant asked that the case (as decided and reported in 78 N. C., 334) be reheard for the following reasons:

1. That he is advised that the holding of the Court—that the liability of John Brigman to the Miners and Planters Bank upon his note to said bank was not discharged by the drafts of R. B. Vance,—is erroneous.

2. That one of the exceptions in the case was—that there was no evidence to support the verdict of the jury. One of the issues submitted to the jury and found in favor of plaintiff was—"did John Brigman and J. W. Woodfin in 1860, request plaintiff to pay their bank debt, and promise to repay him, if he would do so"? The exception so far as this issue was concerned, was not passed upon by the Court, and your petitioner insists that there was no evidence to support the finding of the jury upon this issue, and he was entitled to a new trial on this ground, and it was error in not passing upon this part of said exception.

3. That another exception in the case was—that the judgment, if for aything at all, should not be for any greater amount (144) than the difference between the amount alleged in the complaint to have been paid plaintiff and the six thousand dollars. This exception was not passed upon, and your petitoner insists that this was error.

4. That there was error in the holding of the Court—that the taking up of the Vance drafts by plaintiff in September, 1861, was a compliance with his alleged contract with defendant's intestate and J. W. Woodfin to pay their note in bank.

Messrs. Busbee & Busbee, for plaintiff.
Mr. J. H. Merrimon, for defendant.

SMITH, C. J. The petition asks us to reconsider an exception which

it alleges was not passed on when the case was decided at the last term. The exception is this: There was no evidence before the jury to warrant their finding that the plaintiff discharged the debt of the copartners Brigman and Woodfin, at their instance or at the instance of either upon any promise of repayment or indemnity.

It is true this exception was not specially noticed and overruled in the opinion then deliered, but it was not overlooked. The proof of the copartnership, and that it was a copartnership debt, exclusively looked after and provided for by Woodfin during Brigman's illness and after his decease, seemed so fully to involve a common responsi-
(145) bility to the plaintiff as to make it unnecessary to give the objection a special prominence in the discussion.

The defendant's answer to the allegations of the complaint in regard to the debt is indefinite if not evasive, in that, while the defendant admits that he has heard his intestate "say something of a debt due from himself and the late J. W. Woodfin to the Miners and Planters bank, and that said debt was six thousand dollars," he does not disclose what was said by the intestate, and adds that "he has no knowledge, information, or belief concerning said debt except from hearsay." The denials when made are almost in the words of the complaint, and are wanting in that fullness which is contemplated in our present system of pleading and practice. But we attach no special significance to these omissions, and will proceed to the consideration of the argument of the defendant's counsel and the alleged want of evidence on which it is based.

The argument is that Brigman's indebtedness was extinguished by the delivery of the acceptances of Woodfin, and did not exist in September, 1861, when the plaintiff gave his note and took up the drafts, and that his act, unless done at the request of the intestate was officious, and imposed no responsibility; and that there was no evidence of such previous request. Numerous authorities are cited in support of the first part of the proposition. Without discussing them we contnent ourselves with saying they do not dispose of the point at issue. It is to be observed, however, that as positive and direct evidence of a previous request is not always attainable, so it is not required to charge one with a liability. The plaintiff need not "prove an express assent of the defendant in order to enable the jury to find a previous request. They may infer it from his knowledge of the plaintiff's act and his silent acquiesence,"
(146) 2 Greenl. Ev., sec. 108.

The undeniable facts developed on the trial so far as they have a bearing on the question now to be considered are these: Woodfin

and Brigman were partners in buying and selling stock, and in prosecuting their joint business borrowed of the Planters and Miners bank the sum of six thousand dollars for which, on 4 June, 1860, they personally with John E. Patton executed a note payable at ninety days. At maturity this note was replaced by another of like amount executed by the same parties and payable on 4 December following. The last note went to protest, and was some time afterwards surrendered to R. B. Vance in exchange for drafts of $3,000 each, drawn by him on Woodfin, payable to Patton, and accepted and endorsed by them respectively. The drafts were delivered to the bank, as the cashier testifies, for the purpose of *renewing the note of Brigman,* who was then sick and unable to attend to the matter in person. The drafts were taken up by the plaintiff who gave his own note, executed also by Woodfin and one Smith, on 3 September, 1861, for $6,238.66, payable at six months, and this, after successive renewals, was paid by a sale of plaintiff's property under execution. The debt of Brigman was not therefore paid in fact, but his note, the evidence of it, transferred to Vance, who, in his relations with the other parties liable on these accommodation drafts, was their surety, and it must be inferred, received and held them for his own indemnity until he was relieved by the plaintiff. It then appears that the substitution of Dobson's note for the acceptances held by the bank was made with the full *knowledge and consent of Woodfin* (upon whom, by the death of Brigman, had devolved the sole duty of managing and settling up the partnership business) manifested in his signing the plaintiff's original note and its various renewals. In fact and in legal effect the debt secured in the note was *Woodffin's own debt* and his copartner's also; and the only reasonable explana- (147) tion of the form of the note must be found in some antecedent understanding and agreement, by which the plaintiff was to assume the debt and make it his own. The living partner thus directly participates in the transaction and assents to the plaintiff's act, and himself and the partnership taking the benefit thereof must be held responsible for its legal consequences.

But let us examine and see whether there be any positive evidence to warrant the finding of the jury. The statement of the testimony shows that in September, 1860, Brigman and Woodfin had a large lot of mules in Asheville, their common property, of which the former sold to the plaintiff a considerable number for $2,875, and Woodfin sold him others of the value of $2,500. The trade with Brigman was made at his house.

A witness who assisted Brigman in driving the stock to Asheville at

that date, testified that he let Brigman have four mules and heard him say "he wanted to put them on the debt he and Woodfin owed the bank," and further "that he and Woodfin owed a large debt in the bank, and had a chance to make a large payment in stock." The witness saw the plaintiff, Brigman and Woodfin, in conversation, which he did not hear; but while on their way home, Brigman told witness "he had got $3,000 for his stock but had taken one mule back." The notes and drafts were all produced on the trial.

Do these facts furnish no evidence that the plaintiff assumed the partnership debt under some antecedent arrangement with the partners? How were the stock sales to be made available for the bank debt except by the plaintiff's appropriating the money he owed towards its payment? How is Woodfin's conduct after his partner's death to be reconciled with the theory of an unauthorized and officious intermeddling?

Upon what other principle than a previous consent can the act
(148) of giving one's note in place of another's, be accounted for or explained? How does it happen that all the securities, representing in different forms the same debt, are produced at the trial uncanceled? We can not say it was an unreasonable inference that the plaintiff incurred his liability *in consequence of a previous request* of the partners, one or both, and upon a promise, express or to be implied, of reimbursement. Still less can we say there was no evidence sufficient to authorize the verdict.

It is not material to ascertain the legal effect of an exchange of one note for another executed by a different person and for the same debt upon the rights of the creditor, and whether thereby the former obligation becomes extinct, or the securities are cumulative in his hands. The authorities collected in the carefully prepared brief of defendant's counsel are mainly directed to the elucidation of this point. However this may be, when the substituted security is given for the benefit of the debtor and at his instance, his liability is not destroyed, but transferred; and out of the very act of discharge, springs a new obligation to him who discharges it. Through all the forms which the debt at different times has assumed with the additional sureties, a *subsisting liability to some one* has rested upon the debtor, and when the debt was ultimately paid out of the proceeds of sale of the plaintiff's property, and all the other sureties thereby released, the intestate became absolutely liable to the plaintiff as a surety who had paid his principal debt, and by virtue of that relation between them.

It has been suggested that the judgment is for too large a sum, and ought to be reduced, and estimates have been submitted making a con-

siderable reduction. It may be that the sum is excessive, but no exception seems to have been taken in the Court below to the amount, if defendant was liable at all, and none was made in the argu- (149) ment upon the former hearing.

As no issue was submitted to the jury, and no reference asked for to ascertain what was really due, and no exception in this respect appears upon the record when the judgment was rendered, although objection was made to its form in another aspect, and no error was pointed out on the former hearing, we do not feel at liberty, from estimates mainly conjectural, to disturb the judgment. We are therefore of opinion that there is no error in the former judgment, and it is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Brooks v. Brooks, 90 N. C., 142; *Robeson v. Hodges,* 105 N. C., 49; *Moore v. Garner,* 109 N. C., 158.

NEILL McNEILL v. CHADBOURN & CO.

Contract—Inspection of Lumber in Wilmington—Vendor.

The provisions of the "act concerning inspector of lumber in Wilmington" (Priv. Laws 1874-5, ch. 155) are for the benefit of the vendor; and a sale of timber upon an inspection and measurement not in accordance with the act, the vendor making no objection thereto is binding upon him.

(Observations by SMITH, C. J., upon the necessity of a "statement of the case" in a record sent up to this Court on appeal.)

APPEAL at Spring Term, 1878, of ROBESON, from *Eure, J.*

The complaint states that the plaintiff had for sale in the city of Wilmington a raft of ton timber of superior quality, and that defendant, Green, sold the same to his codefendants, and that by their joint action the plaintiff sustained loss to the amount of $308.78 in (150) measurement and price, in that, a large part thereof was declared to be refuse timber, contrary to the statute regulating said measurement, etc. In their answer, the defendants allege that they bought the timber from Green as plaintiff's agent, subject to inspection; and after some negotiations in respect to the sale, Green came to the defendants and stated that he was authorized by plaintiff to accept their offer, and thereupon the bargain was made; they admit that the inspection was not in strict accordance with the statute, but was according to the

invariable usage that prevailed at that time, which was known to plaintiff, who was present when the timber was inspected, and made no objection to the proceedings; they further allege that they have paid plaintiff for the timber, and that he is precluded by his conduct from setting up any claim against them, and they deny that the inspection was unfair or unjust.

His Honor gave judgment for the defendants on the verdict, and the plaintiff appealed.

Messrs. N. McLean, and *G. Leitch,* for plaintiff.
Messrs. Geo. Davis, and *W. F. French,* for defendants.

(151) SMITH, C. J. The plaintiff owned a raft of logs at Wilmington, and was offered a certain price for them by defendants, Chadborn & Co., which he refused to take. He thereupon employed the defendant, Green, as his agent to make the sale for him, who applied to the defendants, and was offered a small advance for a portion of the logs, and the same price as before for the others. This proposal was communicated to the plaintiff, and accepted, and an inspection of the timber made by an inspector selected by himself. The amount due under the contract, according to the inspector's estimate, was paid to the agent and by him to the plaintiff, and a receipt in full taken. The inspection was made according to the usage prevailing at Wilmington, but not in accordance with the directions of the act entitled "An act concerning inspectors of lumber in the city of Wilmington." Private Laws 1874-75, ch. 155. This act, sec. 4, prescribes how measurement shall be made and what shall be deemed refuse lumber.

Sec. 3 declares that no inspection of rafts of lumber shall be made except upon the request of the owner or his agent, and that such owners "are fully authorized and entitled to sell said rafts *by bulk or otherwise,* at the wharf or elsewhere, as they may desire, and in case inspection is had, the same shall be before sale is made of the lumber, and the inspector shall deliver to the owner or his agent a bill descriptive of said lumber, by which bill said lumber may be sold." The plaintiff alleges that a measurement under the provisions of the statute would have given him an excess of about $85 over the sum paid him, and for this difference, stated at a much larger amount in the complaint, the action is brought.

If the act referred to has any application, it is quite obvious it leaves the owner at full liberty to make his own contract of sale and see to its execution. Its provisions are for the benefit and protection of the vendor. The plaintiff fully understood and assented to every part of

the transaction, and though his bargain may not have been judicious, he must judge for himself as to that, and for his own (152) errors has no just ground for complaint, and no cause of action against the defendants. Issues involving these facts were submitted to the jury, and they are established by the verdict. The authorities cited for defendant fully sustain this view.

There is no case made up and sent up with the record, and we have to ascertain the facts by examining the pleadings, and the findings of the jury. This is not in accordance with the provisions of sec. 301 of C. C. P., regulating appeals, which requires the appellant to prepare a concise statement of his case, embodying the instructions given and refused when exception is made thereto, and setting out the exceptions themselves in separately numbered articles. The importance of this requirement of the Code and the frequency with which it is disregarded, make it proper to call the attention of the profession to the matter, and to say that it must be observed.

It can not be expected of this Court that it shall explore voluminous proceedings to ascertain what is in controversy and extract the questions arising therein for solution. We have already, in another case at the present term called the attention of the profession to the necessity of following the directions of the Code in this respect.

PER CURIAM. Judgment affirmed.

SEVER & WILD v. J. MCLAUGHLIN & SON.

Contract—Judge's Charge. (153)

The defendants directed the agent of the plaintiffs to order certain cotton bagging to Charlotte, with the understanding that the defendants should accept and pay for the same if it suited them in quality and price. The bagging was attached *in transitu* at Portsmouth, Va., by R. & Co., to satisfy a claim held by them against the agent of the plaintiffs. Defendants intervened, by leave of Court, in the attachment proceeding, and claimed the property as theirs. The controversy with R. & Co. was finally settled by their paying to defendants a certain sum for their interest in the property; *Held*, that the transaction amounted to a conversion by defendants of the plaintiffs' goods entitling the latter to a recovery.

Held further, that the Court should have so instructed the jury instead of leaving it to them to decide the matter by the testimony of one of the defendants as to what *he* meant by his conduct in representing the firm.

SEVER *v.* MCLAUGHLIN.

APPEAL at Spring Term, 1878, of MECKLENBURG, from *Cox, J.*

It was alleged that the plaintiffs, a firm doing business in Boston, sold to the defendants a lot of bagging, and brought this action to recover the price thereof. The defence set up was that the transaction was had with one J. Y. Bryce, and that after shipment of the goods, they were seized in Norfolk as the property of Brice, to satisfy a certain debt he owed to a Norfolk house. The evidence as stated in the case agreed was substantially as follows: Said Brice, a witness for the plaintiffs, testified that about 11 October, 1873, he called at the store of defendants in the city of Charlotte, and told them that plaintiffs wished to sell cotton bagging, and solicited their order. Defendants replied that they would give thirteen and a half cents a yard for fifty rolls and requested witness to telegraph to plaintiffs to that effect, which was done. The witness also wrote to plaintiffs and in reply received their letter of date 14 October, 1873, inclosing him an invoice of the
(154) goods (and a railroad receipt), shipped for defendants, which he delivered to the defendants properly endorsed. The goods not having arrived in due course of transit, the witness learned they had been attached in Portsmouth, Virginia, as his property in a proceeding by Reynolds & Bros. against him, and at once informed defendants of this fact, asking if they proposed to assert their right to the property, to which defendants replied in the affirmative and stated that they would employ counsel to attend to the matter; that afterwards they handed witness a letter from counsel in Norfolk wishing to know the names of the witnesses whose testimony would be necessary in the case which was soon to be tried; that he subsequently learned from defendants that they had received $100 from Reynolds Bros. through a party in Charlotte, and in consideration thereof had transferred to Reynolds Bros. their claim to the goods.

The plaintiffs also introduced a paper writing sworn to by defendants and stating that they had ordered the goods of plaintiffs through Brice, to be paid for in thirty days, that the same were attached as aforesaid; that Bryce had no interest therein, and that they had shipped cotton to pay for the goods, but afterwards drew for the value of the cotton, supposing the bagging lost.

The plaintiffs also introduced the record of the said proceeding of Reynolds against Bryce, showing that on 22 October, 1873, Reynolds sued out an attachment against Bryce in the court of hustings in Portsmouth, which was levied upon the goods, then in the possession of the Seaboard & Roanoke railroad company, marked to Bryce at Charlotte. This record further showed that on 10 February, 1874, the defendants

filed a petition in said proceedings, claiming the goods levied on, and it appearing to said Court that the petitioners by their attorneys for value received had surrendered to the plaintiffs all their interest in the property, and it further appearing that before said (155) surrender the petitioners were the owners in absolute equity of the same, it was considered and adjudged, by consent of parties, that the proceeds be paid to plaintiffs, that the order theretofore made be set aside, and the petitioners recover costs of petition of the plaintiffs.

One of the defendants testified in his own behalf that Bryce came to him about 11 October, 1873, and told him he had a lot of bagging to sell, and he told Bryce he would take fifty rolls when it arrived in Charlotte, if the quality and price suited him; that nothing was said about the plaintiffs or the price, except that Bryce would make it to the interest of witness to buy the goods, and that he was well pleased with the house from which he was buying. The witness denied that he requested Bryce to telegraph as aforesaid, or that he corresponded with said attorneys, or that he had endorsed the invoice and receipt; but he took the receipt to the depot and inquired for the bagging to see if the quality and price suited, and if so, he expected to buy it of Bryce. He further testified that Bryce informed him of the said proceedings in attachment and asked him for the use of defendant's name to protect the interest of the plaintiffs; that witness at first refused, but afterwards consented for him to thus use the name of defendants' firm if he would indemnify them against any loss that might result therefrom; that on failing to indemnify them, and the goods not having arrived, and knowing Bryce to be insolvent, the witness consented to a withdrawal of his firm name from the suit in Portsmouth on payment of $100 by Reynolds Bros. as damages, or to cover what he had lost by being compelled to buy bagging for his customers at retail prices in consequence of the nonarrival of the goods as aforesaid. It also appeared in evidence for the defendants, by the deposition of John E. Oats, that on 26 March, 1874, the defendants gave Reynolds Bros. a receipt for $100, for which they surrendered their inter- (156) est in said suit to them.

Upon issues submitted the jury found, 1st—that the defendants did not buy the goods in question of the plaintiffs; 2d—the defendants did not confirm or assume the contract of purchase.

His Honor, among other things, charged the jury that unless there was a contract, defendants could not in law be damaged by the nondelivery of the goods, but that the jury could take into consideration the defendants' explanation of what he meant by damages—the loss

and inconvenience by having to purchase bagging at retail prices. Judgment for defendants. Appeal by plaintiffs.

Messrs. A. Burwell and *W. W. Fleming,* for plaintiffs.
Messrs. Dowd & Walker and *Wilson & Son,* for defendants.

READE, J. The jury found that the defendants did not buy the goods of the plaintiffs, and therefore if there was no error in His Honor's charge, we have to take that to be true. We will not stop to consider whether there was error in that part of the case, because we are of the opinion that even if the first transaction between Bryce and the defendants did not amount to a purchase upon the part of the defendants, yet the transaction between Reynolds Bros. of Norfolk, and the defendants, made the defendants liable to the plaintiffs.

Taking the transaction to be as shown by the defendants themselves, the facts are, that Bryce, the agent of the plaintiffs, offered to sell to the defendants fifty rolls of bagging, and that defendants agreed to take the goods on arrival, if the goods and the price suited. That the goods were shipped by the plaintiffs from Boston to Charlotte, to Bryce, who gave the bill of lading and bill of goods to the defendants to receive and examine them, to see if they would take them. That the
(157) goods never arrived, but were attached *in transitu* at Portsmouth on legal process at the instance of Reynolds Bros., creditors of Bryce. That in the suit of Reynolds Bros. against Bryce, in Portsmouth, the defendants intervened and claimed the goods as their property, saying "that on or about 14 October, 1873, we ordered of Messrs. Sever & Wild of Boston, through Mr. J. Y. Bryce of Charlotte, 50 rolls of bagging, to be paid for in 30 days. The said bagging was attached by Reynolds Bros, of Norfolk, for a debt of J. Y. Brice & Co. We certify that J. Y. Brice & Co. had no interest whatever in the bagging, and that we shipped cotton to pay for the same, but afterwards drew for the value of the cotton, supposing the bagging lost.

J. MCLAUGHLIN & SON.

The foregoing was sworn to by J. F. McLaughlin, one of the defendants, and filed in the said suit in Portsmouth. And the final decree in that suit declares that "on motion of J. McLaughlin & Son, by their attorneys, it is ordered, etc. And thereupon the said petitioners (McLaughlin & Son), by their attorneys, agreeing that for value received they have surrendered to the plaintiffs (Reynolds Bros.) all the interest they have in this suit, the said plaintiffs take all the interest the said petitioners claim in the property attached, to wit, 50 rolls of bag-

ging in this cause and it appearing to the Court by the evidence filed in the cause that the said petitioners (McLaughlin & Son) were before the said surrender to the plaintiffs the owners in absolute equity of the said bagging by consent of parties, it is considered by the Court that * * * the proceeds of the sale of the bagging be paid to the plaintiffs, Reynolds Bros.

And then the defendants, McLaughlin & Son, gave to Reynolds Bros. the following writing: Received of * * * Reynolds Bros. * * * $100, for which we surrender to said Reynolds Bros. (158) all the interest we have in the suit of Reynolds Bros. against J. Y. Bryce & Co., now pending in the Court of Hustings, * * * in which suit we had filed a petition claiming the property attached, viz, fifty rolls of bagging, the said Reynolds Bros. to pay all the costs and to take all the interest we claim in said bagging." Signed by J. McLaughlin & Son.

It is true that J. McLaughlin, the elder, who was examined as a witness in the case before us, says that all this was done at the request of J. Y. Bryce, for the purpose of protecting the interests of the plaintiffs, Sever & Wild. But it matters not at whose instance it was done, nor what the defendants say they meant, the meaning of these writings is that the defendants claimed the goods of the plaintiffs while they were in Portsmouth as their own property, and sold them to Reynolds Bros. for a valuable consideration.

They converted them to their own use. His Honor erred in not telling the jury what these writings and proceedings meant, and what was their legal effect, and in leaving it to the jury to find, from the testimony of McLaughlin, what *he* meant.

One of two things is manifest—the forwarding the goods from Boston by the plaintiffs, to Charlotte for the defendants, either vested it in the defendants or left it in the plaintiffs. If it vested it in the defendants they are liable as purchasers. If it left it in the plaintiffs, then the transaction between the defendants and Reynolds Bros. was a conversion. And in either event the defendants are liable.

PER CURIAM. *Venire de novo.*

Cited: *Williams v. Lumber Co.,* 118 N. C., 939.

J. J. LANE v. W. B. RICHARDSON.

Contract—Joint Obligors—Judgment.

A judgment suffered by one of several joint obligors on a sealed instrument for the payment of money maturing before the adoption of the C. C. P. Title IV, being a proceeding *in invitum*, is not such an acknowledgment by the judgment debtor, of a willingness to pay notwithstanding the statutory presumption of payment as will bind his co-obligors.

ACTION commenced in a Justice's Court and tried on appeal at Fall Term, 1877, of MOORE, before *Seymour, J.*

On 6 February, 1875, a summons was issued in the name of E. A. Craven who was then the owner of the note, which is the subject of this action, and directed to Killis Gibbs, A. M. McNeill and W. B. Richardson, the defendant, requiring them to appear before the Justice and answer, etc., or judgment would be taken against them for the sum due upon a note executed by them for two hundred dollars. The summons was served on Gibbs only and judgment was rendered against him. Subsequently a summons was issued in the name of the plaintiff, and served on the defendant, under Bat. Rev., ch. 17, sec. 318, who appeared and answered by setting up the statute of limitations as a defense to the action. It was admitted that at the time the summons issued in the name of Craven v. Gibbs and others, the presumption had not arisen; that at the time the summons issued in the name of J. J. Lane v. W. B. Richardson, more than ten years had elapsed since the execution of the note sued on; and that since the rendition of the aforesaid judgment and before the commencement of this proceeding, the plaintiff became the owner of the note and judgment.

His Honor being of opinion of the facts that the judgment
(160) suffered by Gibbs was an admission not only that Gibbs had not paid the note, but that it was unpaid, and that the admission of one joint maker rebutted the presumption as to all, rendered judgment for the plaintiff, and the defendant appealed.

Mr. J. W. Hinsdale, for plaintiff.
Mr. Neill McKay, for defendant.

FAIRCLOTH, J. A and B make and deliver their promisory note under seal for the payment of money. Before the presumption of payment arises A is sued on said note and judgment by default is entered against him. After the lapse of ten years from the date and maturity of the

note B was notified under the provisions of C. C. P., sec. 318, to show cause why the judgment should not stand against him, as if he had been originally summoned. B relies on the presumption of payment and the statute of limitations. The contract being made before 1868 and action brought afterwards, the statutes and law in force before that year are applicable. C. C. P., sec. 16.

At common law any act or admission of the existence of the debt, from which the law could imply a promise to pay it, made by one partner before or after a dissolution of the partnership, or by one joint debtor made before or after the presumption of payment or the bar of the statute, would repel the presumption or bar which would otherwise have protected the other debtors; and this was so notwithstanding the act, Rev. Code, ch. 31, sec. 84, making all contracts joint and several, on the principal that the debtors were cocontractors and jointly liable for the debt.

By our act of assembly in 1852, Rev. Code, ch. 65, sec. 22, followinng substantially 9 Geo. IV, ch. 14, it is enacted that no such act or admission done or made *after* the dissolution of the partnership, or *after* the debt shall be barred, shall be received as evidence to repeal the statute, but as against the party doing the oct or making (161) the admission or acknowledgment. The question therefore is whether the judgment by default amounts to such an admission by Gibbs as will deprive the defendant of the benefit of this statute and the lapse of time.

It makes no difference whether the debtors are all principals or whether they are in part sureties.

They are cocontractors and are *jointly* liable to the creditor. In some of the States it is held that an acknowledgement of the debt and an actual promise to pay it is necessary to repel the effect of the statute. This does not however appear to be the better opinion, which is that an implied promise is sufficient, and this will always arise from the direct and unqualified acknowledgement of the existence of the debt, when there is nothing in the admission nor any attending circumstances which repels the intention to pay. For instance, when a creditor receives a dividend from an assignee in bankruptcy of his debtor, it would be absurd to say that the petitioner by filing and admitting the correctness of the debt, meant thereby to indicate a willingness to pay it, beyond his assets, and therefore the law could not imply such promise. In one case where the defendant said the debt was just and ought to have been paid long ago by his partner, but "he did not think he ought to pay," this Court hesitated and declined to say that the implication was suffi-

cient to repel the bar of the statute. *Walton v. Robinson,* 27 N. C., 341. In *Moore v. Bank,* 6 Peters 92, the U. S. Supreme Court said, "where there is no express promise there must be an unqualified and direct admission of a subsisting debt which the party is willing to pay."

Payment in person or by agent was held to be sufficient before the act of 1852, *Davis v. Coleman,* 29 N. C., 424, and would be so now if made within time, and it is even so when made by a stranger (162) voluntarily, if afterwards ratified by the debtor. *Walton v. Robinson, supra.*

The implied promise must arise out of the act done or admission made and not depend upon the original agreement, except that it may be supported by the same consideration.

In the case under consideration no act or actual promise is alleged and the action was *in invitum* against Gibbs, and the judgment by default therein was at the instance of the plaintiff by the force of the law and not by the consent of the debtor. We therefore think there was no such admission as showed a willingness to pay the debt on the part of the debtor and consequently the defendant is not liable.

PER CURIAM. Reversed.

Cited: *Rogers v. Clements,* 98 N. C., 180.
Dist.: *Campbell v. Brown,* 86 N. C., 376.

D. B. GHOLSON and another v. R. M. KING.

Contract—Note—Interest.

A note, as follows, "On 25 December, 1873, I owe and promise to pay G, *with legal interest,* the sum of, etc., this 21 October, 1871," bears interest from its date.

APPEAL, January Special Term, 1878, of HALIFAX, from *Schenck, J.*

On 21 October, 1871, the parties to this action entered into a contract for the sale and purchase of a tract of land, as follows "Know all men, etc., that: plaintiffs have this day bargained and sold to defend- (163) ant a certain tract of land, adjoining * * * on condition that defendant pay $960 in five equal installments (the first payment to be made in cash, and notes to be given for the balance), and we bind ourselves, etc., to make the defendant, his heirs, etc., a good and lawful deed to said land, when the money shall have been paid or tendered for the last, and all of the aforesaid notes, with all legal in-

terest, and we further bind ourselves to give defendant possession, etc." This instrument was signed by the plaintiffs, and the defendant made the cash payment, and gave four notes for the balance, payable respectively on 25 December, 1872-'73-'74-'75, a copy of one of which is set out in the opinion.

The plaintiffs contended that these notes bore interest from date until paid, but the defendant insisted that interest should be calculated only from the time the notes became due. The Court being of opinion with plaintiffs gave judgment accordingly, and the defendant appealed.

Messrs. Mullen & Moore, for plaintiffs.
Mr. J. B. Batchelor, for defendant.

FAIRCLOTH, J. "On 25 December, 1873, I owe and promise to pay D. B. and J. C. Gholson, *with legal interest,* the sum of one hundred and ninety-two dollars for value received. Witness my hand and seal this 21 October, 1871. R. M. KING [Seal."]

At the time of making this note and as a part of the same transaction, the plaintiffs covenanted with the defendant to make him title to certain real estate, for which this and other notes were given, as soon as the money on said notes shall be paid "with all legal interest," and the only question is, does this note bear interest from its date or maturity? The question depends on a construction of the contract, which is quite plain. The terms of the two written instruments are in (164) effect the same. The expression, *with legal interest,* is a well defined term, and too well understood to be regarded as surplusage. These words are never used without an important meaning in business matters.

The law allows interest from the time when the debt falls due, when not otherwise agreed. Contracts allow it according to their own terms. The contract in this case without the words "legal interest" would not have included interest until maturity, and the adoption of these words into it necessarily means from the date of the contract. The agreement was to pay on a particular day the debt with interest, and these words can not be applied to the time after maturity, because the law gives interest for that period without these words.

The consideration for these notes passed into the possession of the defendant at or about the date of the contract. The profits were probably equal to the interest on the notes given for the land. *Dorman v. Dibdon,* Ryan and Moody, N. P., 381; Chitty on Bills, 446.

PER CURIAM. Affirmed.

JOHNSTONE JONES v. A. T. MIAL and others.

Contract—Pleading.

Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Where the contract has been abandoned on both sides the innocent losing
(165) party will be driven to a *quantum meruit* or some other form of action founded upon a disaffirmance of the special agreement.

SMITH, C. J., dissenting.

APPEAL at Spring Term, 1878, of WAKE, from *Seymour, J.*

The plaintiff brought this action for an alleged breach of a contract which is substantially as follows: This agreement, made on 30 May, 1876, between the plaintiff and defendants, witnesseth, that the plaintiff covenants to establish a weekly agricultural journal, * * * and the defendants covenant to furnish the plaintiff with a paid up list of annual subscribers, not less than 1,500, at $2 each per annum, 1,000 of them to be furnished by 1 October, 1876, and the balance by the following January * * * and the plaintiff covenants to execute a bond for the publication of the same, and to pay to the treasurer of the State grange one-half of all the cash received by him on account of subscriptions furnished by defendants, or from other sources, over and above the guaranteed subscription of 1,500 * * * said payments to be made quarterly and continue until $3,000 and interest shall have been paid.

The case states the evidence of the plaintiff—that in pursuance of the contract the plaintiff commenced the publication of the journal on 2 August and continued until 25 October, 1876, satisfactorily to defendants, a thousand copies being issued each week. The plaintiff executed the required bond which was accepted by defendants. One hundred and fifty-six subscribers were secured, and the plaintiff received $348 in payment for their subscriptions. During the said month of October several interviews were had between the parties, and the plaintiff informed the defendants that he had exhausted all his means in the publication of the paper, and that unless they complied with
(166) their contract the paper must stop, and he proposed that if they would advance him $600 on the contract he would continue its publication until the general meeting of the State grange in February, 1877, which the defendants declined, and thereupon the plaintiff discontinued the publication, and soon afterwards sold the name, good will, subscription list, etc., belonging to the paper, for $200. The plaintiff

expended $650 in its publication, returned $7.50 to subscribers, informing others that he and defendants were liable for their subscriptions, and owed $120 to an assistant editor.

The witness further stated that he had had experience in the newspaper business, and that a paid-up subscription list had a definite market value. After argument of counsel the Court stated that the plaintiff could not recover on the contract, and that the measure of damages was the value of his services in attempting its performance, and the amount expended by him over the amount received. In submission to this intimation the plaintiff asked to be allowed to introduce further evidence as to the amount of damages, which the Court refused; but offered to allow an amendment of the pleadings so as to declare on the general assumpsit. The plaintiff declined to amend, took a nonsuit and appealed.

Messrs. W. W. Jones, G. H. Snow and *Merrimon, Fuller & Ashe,* for plaintiff.

Messrs. E. G. Haywood and *J. B. Batchelor,* for defendants.

READE, J. The parties entered into a written contract to establish a public journal, the success of which was uncertain, depending upon popular favor. It is fair to suppose that each party intended and endeavored to perform what was promised, and that the failure was accidental. It is conceded by the defendants that they made the first breach in not furnishing the number of paid-up subscribers by (167) 1 October, as promised, and they do not controvert the position that if the plaintiff had abided by the contract he could have sued upon it and recovered of the defendants for their breach, but they deny the plaintiff's right to sue upon the contract, because he elected to rescind it and put it beyond his power to perform it by selling out the enterprise. And so the defendants say that just as both made the contract so both broke it, and therefore neither can sue upon it. So His Honor held. And we are of the same opinion.

The position which the plaintiff endeavored to support is that the covenants are independent, and that he can maintain an action against the defendants for their breach without alleging performance or readiness to perform on his part. But that is not so. The contract has but one subject matter, the establishment of the "journal" to which both parties were to contribute, and neither can sue the other *upon the contract* without alleging performance on his part. What the rights of the parties may be in an action on the common counts is not before us. There is no error.

SMITH, C. J. *Dissenting.* I do not concur in the opinion that the plaintiff is not entitled to recover. It is true that under the former system of pleading and practice, technical distinctions are made between declarations on special contracts and on the common counts, under which the nonsuit in this case would be required. But, as I understand, these technicalities are not recognized in the more rational and simple system of our present Code. The Constitution adopted in 1868 abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits and substitutes therefor a single form of action. Art. IV, Sec. 1.

The complaint which supercedes the declaration is required to (168) contain only a plain and concise statement *of the facts* constituting a cause of action, without unnecessary repetition, each material allegation being numbered. C. C. P., Sec. 93 (2). The judgment where there is an answer may be for any relief consistent with the case made by the complaint and embraced within the issue. Sec. 249.

It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which a plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. In the present case the essential facts are contained in the pleadings, and whether the remedy is on the special contract or on what are called the common counts, it ought not to be denied. It is obvious that the funds which were to be furnished by the defendants through the subscription list were relied on by the plaintiff, and necessary to enable him to carry out the projected enterprise. Through their failure to perform their undertaking the publication of the paper became impracticable, and its suspension and a sale of the materials were a necessity forced upon the plaintiff. Regarding this as a decision of the contract, it resulted from the wrongful act of the defendants, involving loss to the plaintiff, and excused him from further fruitless efforts to continue the publication, and gave him a right to compensation against the defendant for damages caused by their violation of their engagements. The cases cited and commented on in the argument of the defendants' counsel, all proceed upon the distinctions in the form of the remedy between actions on special contracts and those implied by law, and do not apply to the present mode of legal procedure.

PER CURIAM. Judgment affirmed.

Overruled in part. S.c., 82 N. C., 256.

Cited: Jones v. Mial, 85 N. C., 597; *Ducker v. Cochrane,* 92 N. C., 600; *Moore v. Cameron,* 93 N. C., 59; *Moore v. Nowell,* 94 N. C., 273;

Stokes v. Taylor, 104 N. C., 396; *Collins v. Pettit,* 124 N. C., 736; *Corinthian Lodge v. Smith,* 147 N. C., 246.

(169)

JOHN S. HENDERSON v. H. A. LEMLY and another, Adm'rs.

Bond—Liability of Endorser—Estoppel.

Where the defendants' intestate endorsed to the plaintiff for value, a bond which had been executed to him by one member of a firm in the name of the firm; *It was held,* in an action on the bond against the administrators of the endorser, that they were stopped from setting up any infirmities in the bond.

APPEAL at January Special Term, 1878, of ROWAN, from *Kerr, J.*

The plaintiff brought this action against the defendants as administrators with the will annexed of John I. Shaver upon his endorsement of the following instrument:

"One day after date I promise to pay John I. Shaver or order the sum of $101.25, value received. Witness, etc., this 28 February, 1872.

MILLS & BOYDEN [Seal.]

The instrument was signed, sealed and delivered by A. H. Boyden, one of the firm of Mills & Boyden, for a valuable consideration to the testator who endorsed and transferred it to the plaintiff for full value as specified on its face. The defendants deny the testator's liability as endorser under the statute, and say the instrument is not negotiable and is inoperative, binding neither the partnership on account of the seal, nor the individual partners because they are not within its terms, according to the ruling of this Court in *Sellers v. Treator,* 50 N. C., 261, and *Fisher v. Pender,* 52 N. C., 483.

His Honor instructed the jury that as defendants had admitted that plaintiff had paid their testator full value for the note, they were liable as for money had and received. Verdict for plaintiff. (170) Judgment. Appeal by defendants.

Mr. Kerr Craige, for plaintiff.
Mr. W. H. Bailey, for defendants.

SMITH, C. J. (After stating the case as above.) The defence can not avail to defeat the recovery. If the instrument be altogether void there

is an entire failure of consideration and the action lies for money had and received to the plaintiff's use. If the instrument be the act and deed of Boyden, it is in fact as well as in form negotiable within the statute, and the endorsement renders the testator liable as a surety. Bat. Rev., ch. 10, secs. 1, 10.

The case of *Fisher v. Pender, supra,* decides that a writing in these words—"Due J. Fisher forty-five dollars for value received 12 October, 1854, Pender & Bryan, [Seal],"—executed by one of the partners only, does not, as such, bind either the firm or himself. The contrary had been held in *Elliot v. Davis,* 2 B. & P., 338, and BATTLE, J., delivering the opinion in the former case undertakes to distinguish between them in the form of the respective instruments declared on. In *Elliot v. Davis,* these words were used: "Know all men by these presents, that J. T. Davis and G. Marsh," etc., and this language it is said indicates an intent to impose a personal as well as joint liability, and may be effectual as to the partner who made the deed. If this authority is recognized it would seem to embrace the case now before us, in which language almost identical is used. But it is not necessary to determine this question.

The assignment of a negotiable chose in action by endorsement, besides its legal operation in transferring title, contains by implication a warranty, (1st) that the instrument is genuine and valid; (2d) that the parties to it are competent to enter into the contract and are bound by it, and (3d) that the money specified on its face is due. 2 Par-
(171) sons on Notes and Bills, 26-29; 1 Daniel on Neg. Instr., sec. 669.

If these warranties or any of them fail, the assignee may recover adequate compensation for the breach of the contract against his assignor. Moreover, in an action against the endorser of negotiable paper, the same defences are not open to him that might be set up by the maker, if the suit was against him on the original contract; and some which he might set up against the payee, he can not set up against the assignee. But we do not propose to discuss these matters further. We put our decision upon higher ground, that of estoppel growing out of the act of assignment. The defendant was a party to the bond, and knows, or is presumed to know, not only the consideration for which the bond was given, but the circumstances attending its execution. He has dealt with it, sold it, and received its value, as a valid and subsisting obligation to the plaintiff. There is not any defect touching its integrity as a bond apparent upon its face. The form of the signature does not disclose the alleged imperfection. If both partners were present directly participating in its execution, or the signing partner had

authority under seal to act for his copartner, it would be the covenant of both. The plaintiff has a right to presume, from the testator's manner of dealing with and disposing of the bond, the existence of such facts as give it legal efficacy. By his very endorsement the testator has so represented, and upon its faith the plaintiff has purchased. The defendant can not be allowed to take advantage of his own wrong and escape the consequences of his own act. It would be a fraud on the plaintiff to allow him to prove the invalidity of the bond by evidence dehors and thus discharge himself. 1 Daniel Neg. Instr., sec. 674; Story Prom. Notes, 128; Bigelow Estop., 429, 479; *State Bank v. Fearing,* 16 Pick., 533.

The principle is forcibly stated by Mr. Justice DAVIS in discussing a kindred subject in a case before the Supreme Court (172) of the United States: "It is accordingly established doctrine that whenever an act is done or statement made by a party which can not be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel will attach to what otherwise would be new matter of evidence." *Dair v. United States,* 16 Wall. 1.

The application of the rule to the facts of our case precludes the defendant from showing infirmities in a bond to which he has himself given currency, as containing a legal and unimpeachable obligation. It is not necessary to inquire how far the rule would require modification if the alleged infirmities were patent, or communicated previous to the assignment, because such is not our case. Our conclusion is that the testator's estate in the defendants' hands is liable to the plaintiff, whether the bond is deemed binding on the firm, or on the acting member only, or be itself a nullity, in this action against the administrators of the endorser.

PER CURIAM. Judgment affirmed.

Cited: Redman v. Graham, 80 N. C., 236.

RACHEL JONES v. JOHN ASHFORD.

Guaranty.

1. The distinction between a guaranty for the payment of a debt and a guaranty for the collection of the same is clear and well defined. The former is an absolute promise to pay the debt at maturity if not paid

(173) by the principal debtor, and the guarantee may bring an action on default of payment at the day named against the obligor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.

2. What amounts to due diligence in any given case is a question of law for the Court.

3. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona* to the execution issuing thereon, has always been regarded as one of the extreme tests of such diligence, and this Court adopts it as such.

4. An agreement in writing "to guaranty the payment" of a certain note to a party named, "and in case she fail to recover the money on said note," to pay the principal, interest and costs thereon, is merely a guaranty for the collection of the note.

APPEAL at Spring Term, 1877, of SAMPSON, from *Seymour, J.*

On 6 March, 1869, the defendant sold and conveyed to one B. L. Scott a tract of land. Scott gave his note for the purchase money, and secured its payment by a mortgage on the land. On 15 May thereafter, the defendant assigned the note to the plaintiff without endorsement, and at the same time gave the plaintiff a paper writing in the nature of a guaranty, by which the defendant agreed to guarantee the payment of the note in case the plaintiff failed to collect it.

At the time of the assignment, the defendant proposed to John H. Jones, the agent of plaintiff, who arranged the matter with defendant for his mother, to transfer the note and mortgage without any guaranty, which was declined by Jones, who said that he preferred the guaranty of defendant to the mortgage, and thereupon the assignment was made with the guaranty as aforesaid.

The plaintiff obtained judgment on the note, and sold Scott's equity of redemption under an execution issuing thereon for $84, and
(174) then brought this action on the guaranty for the balance due on the note.

On the trial the only question was—whether the rights of the defendant under the mortgage passed to the plaintiff by virtue of the assignment of the note, and if so, whether the plaintiff could maintain this action without and before a foreclosure of the mortgage. The question was reserved, and after a verdict for plaintiff, His Honor being of opinion with plaintiff, gave judgment accordingly, and the defendant appealed.

W. S. & D. J. Devane, and *D. L. Russell*, for plaintiff.
Battle & Mordecai, for defendant.

FAIRCLOTH, J. The defendant held a promissory note against one

Scott, secured by a mortgage on real estate. He transferred said note for value to the plaintiff without endorsement, and at the same time agreed in writing "to guarantee the payment of the aforesaid note to the said Jones, and in case she fails to recover the money on said note, that I (he) will pay to her the principal and interest and costs due thereon." At the time of the transfer the defendant proposed to plaintiff to transfer the note and mortgage without any guaranty, but the plaintiff declined this arrangement, saying that she preferred the guaranty of defendant to the mortgage. Judgment and execution were had on the note against Scott, under which only $84 could be realized, and this amount is credited by plaintiff on her claim. (175) She now demands payment from the guarantor, and he insists that she was bound to foreclose said mortgage before calling on him.

The first question discussed in this Court was whether the mortgage, under the circumstances in this case, passed to the plaintiff with the transfer of the note. It is well settled that the assignment of a note passes to the assignee, the mortgage or any other collateral security, unless the parties agree otherwise. *Hyman v. Devereux,* 63 N. C., 624.

Without discussing the question, we will assume that the mortgage and all the rights and remedies thereunder did pass to the grantee and consider the main question, which is,—has the guarantee performed the condition precedent to her right to sue the guarantor? In contracts of this kind the distinction between the guaranty of the *payment* of a note, and the guaranty for the *collection* of a note, or debt, is well marked out in books and adjudications on this subject. The former is an absolute promise to pay the debt at maturity if not paid by the principal debtor, and the guarantee may begin an action at once against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.

We think the present case belongs to the latter of the above classes, and that the rule applicable to the case derived from the contract, is the guarantor will pay. What amounts to due diligence is a question for the Court to decide in each case upon the facts found or admitted. Suppose a case of guaranty for collection, and before the maturity of the debt, the principal debtor should reside and remain in a distant State. It would not be reasonable to require the guarantee to go there and pursue the collection. Suppose the principal debtor can be shown by sufficient proof to be entirely and utterly insolvent at the maturity of the debt, and to continue so. This would seem to satisfy the demand of due diligence and excuse any (176)

legal proceeding whatever. To sue would benefit no one. It would be a vain thing, and would incur useless expense and trouble. The usuual mode of collecting money on a note is by judgment, and execution, and there is nothing in the agreement to indicate that the plaintiff was to pursue more than the usual remedies. Foreclosure of a mortgage is generally dilatory and troublesome, and this may have been the reason why the plaintiff would not purchase without defendant's guaranty. In *Camden v. Doremus,* 3 How., 515, it is held that "the diligent and honest prosecution of a suit to judgment with a return of *nulla bona* has always been regarded as one of the extreme tests of due diligence." The guaranty is only required to employ the usual legal means of collecting, and this is all that is implied in the agreement if "she fails to recover the money on said note." The only case we find directly in point is reported in 4 Wisconsin, 214, *Day v. Elmore,* where it is said "that the return of the execution unsatisfied is evidence of the exhaustion of the legal means of collection. The guarantee is not obliged to pursue right, credits, etc., by collateral or unusual remedies." In this case it was expressly decided that the guarantee was not compelled to foreclose a chattel mortage after judgment and execution unsatisfied before his right of action arose against the guarantor. 2 Parsons Notes and Bills, 142; *Brockett v. Rich,* 23 Amer., 703.

Our opinion then is that plaintiff may recover, and that the defendant will be subrogated to the rights and remedies of plaintiff under the mortgage.

Let judgment be entered here for plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Jenkins v. Wilkinson, 107 N. C., 709; *Guilford v. Georgia,* 112 N. C., 37; *Sullivan v. Field,* 118 N. C., 360; *Hutchins v. Bank,* 130 N. C., 287; *Cowan v. Roberts,* 134 N. C., 419; *Voorhees v. Porter, Ib.,* 601; *Mudge v. Varner,* 146 N. C., 149.

(177)

*JOHN W. BRITT v. JESSE S. BENTON.

Processioning Land.

1. In a proceeding under the processioning act, Bat. Rev., ch. 91, it is not necessary that the processioner should sign the report of the freeholders; it is sufficient if it appear affirmatively from the report that he was present participating with them.

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

2. In such proceeding it is sufficient if a majority of the free-holders act.
3. The act of processioning land having been in operation since 1723, the long acquiescence of the Courts raises a presumption of its constitutionality which, at all events, cannot be questioned by one who has voluntarily submitted his claim to the statutory tribunal for the settlement of disputed boundaries.

PROCEEDING under the statute, Bat. Rev., ch. 91, for processioning land, heard on appeal at January Special Term, 1878, of WAYNE, before *Eure, J.*

The plaintiff gave notice in writing to the defendant that on 3 April, 1877, he would with the county surveyor proceed to procession his land adjoining defendant's, which was accordingly done and a report and plat made by H. G. Maxwell, the surveyor; and 12 April following, it was certified to the clerk of said Court that on arriving at a certain point in running and marking the lines the plaintiff was forbidden by the defendant from proceeding further, and thereupon the clerk issued a notice to five freeholders to meet on the premises with the processioner, and after being duly sworn to establish the line and do equal justice between the parties interested and report their proceedings to Court. The report was submitted on 14 May following, to which the plaintiff excepted. The clerk overruled the exceptions, (which are set out in the opinion,) and upon appeal His Honor affirmed (178) the judgment and the plaintiff appealed to this Court.

Mr. A. K. Smedes, for plaintiff.
Mr. H. F. Grainger, for defendant.

SMITH, C. J. The plaintiff's exceptions to the ruling of the Court below, and which are relied on in the argument here, will be noticed in their proper order:—

1. The plaintiff excepts, for that, the processioner did not concur in and sign the report of the freeholders, and it does not appear he was in consultation with them. The report states that on 11 October, 1877, the freeholders after being duly sworn "appeared *with the processioner* on the disputed line," and then sets out their action in the premises in detail. It thus appears that the processioner was present, participating with the freeholders in what they did, and as we must assume, performing his legal duties in regard thereto. It is not necessary he should sign the report. The act requires the appointment "of five respectable freeholders who shall appear with the precessioner on the line or lines in dispute," and that they, the freeholders, shall proces-

sion the same and make report of their proceedinngs. Bat. Rev., ch. 91, sec. 6, amended Laws 1878-'75, ch. 40, sec. 1.

2. The next exception is that four only of the five freeholders appointed acted in processioning the land and determining the disputed lines. Whatever force there might be in this objection in the absence of any statutory provision, it is remedied by the act which declares that "all words purporting to give a joint authority to three or more *public owners or other persons* shall be construed as giving such authority to a *majority of such owers or other persons.*" Bat. Rev., ch.
(179) 108, sec. 2.

3. The last exception is that issues of fact regarding boundary having arisen and been returned to the clerk, he should have transmitted them to the Superior Court for trial before a jury there. It is true, the right of trial before a jury in all controversies at law respecting property is secured in the bill of rights annexed to the constitution of 1776, and also to the Constitution of 1868, and in our present constitution. The statute for processioning land substantially in its present form has been in operation since 1723, and numerous cases arising under it has been before the Court, and in some of them unfriendly criticisms have been indulged in respect to its operation and effect upon rights of property; but in none of them does it appear that objection to its validity under the constitution was raised. It can scarcely be supposed that this point would have escaped the vigilance of counsel and the Court; and the enforcement of the law must be deemed a concession of its compatibility with the constitution. We should be reluctant now by questioning its validity to disturb this long and continued acquiescence. Indeed, this method of procedure may be regarded as a substitute for a jury trial, possessing the advantages of a personal inspection of the land and its boundary marks, and the presence before freeholders of the different objects to which the testimony of witnesses is directed. These cermonies are wanting in a trial before the Court. There is the further protection afforded to rights of property in the requirement of two successive processionings to ascertain and determine them.

But it suffices for our present purpose to say that the plaintiff, who alone complains, has voluntarily sought this statutory tribunal and submitted his claims to its determination. He has waived his right to a jury trial and can not be permitted to repudiate the jurisdiction he has himself invoked to decide his controversy with an ad-
(180) joining proprietor when the result is adverse to himself. There is an apt time and mode in which rights must be asserted, and

when one must make his election. In our opinion he has waived his right, and must abide by his election and its consequences. *Atkinson v. Whitehead,* 77 N. C., 418. We therefore overrule the exceptions and affirm the judgment. Let this be certified.

PER CURIAM. Judgment affirmed.

Cited: Forney v. Williamson, 98 N. C., 329; *R. R. v. Parker,* 105 N. C., 248; *Parker v. Taylor,* 133 N. C., 104.

W. T. BUNTING and others v. JESSE STANCILL and others.

Proceeding to Drain Land—Jurisdiction.

1. Under ch. 222, Laws 1876-7, proceedings to drain land must be commenced by summons returnable to a regular term of the Superior Court.
2. The provisions of ch. 142, Laws 1876-7 are repealed by ch. 222.

PROCEEDING for Draining Lands commenced before the Clerk, and heard at Spring Term, 1878, of EDGECOMBE, at Chambers, before *Henry, J.*

The defendant objected to the jurisdiction, the objection was sustained by the Court on the ground that the proceeding should have been commenced by summons returnable to the Court at term time as provided by ch. 222, Laws 1876-'77, and the proceeding dismissed, from which ruling the plainntiffs appealed.

Messrs. Battle & Mordecai, for plaintiffs. (181)
Mr. J. L. Bridgers, Jr., for defendants.

SMITH, C. J. At the last session of the general assembly an act was passed and went into effect on 27 February, 1877, which repeals chapter 39 of Battle's Revisal and chapter 112, Laws 1874-'75, and reinstates and declares in force chapter 164, Laws 1868-'69. The statute thus revived provides fully for the drainage of wet and overflowed lands, through canals or ditches cut in the lands of others, and regulates in detail the proceedings necessary thereto.

At the same session another act was passed entitled, "An act for draining wet lands," which was ratified on 9 March following, and was in force from and after that day. Laws 1876-'77, ch. 222. This act also undertakes to regulate the whole subject of drainage, and is

full and explicit in prescribing how its provisions shall be carried into effect. It also repeals all laws and clauses of laws in conflict with itself. Sec. 14. This act directs proceeding to be commenced by summons "returnable to the next term of the Court," that all persons interested be made parties, and that a complaint shall be filled as in civil actions. This was not done by the plaintiff, but he commenced his suit as a special proceeding before the clerk under the act of 27 February, and if this act is superceded and annulled by the act of 9 March, his action must fail. This is in our opinion the correct view of the case. The two acts are *in pari materia,* cover the entire subject matter of drainage and reclaiming of wet lands, and direct how it shall be done. Their provisions are inconsistent, and confession and embarrassment would flow from an attempt to give effect to each. The last expression of the legislative will must in such case prevail. It is true there may be cumulative remedies for the enforcement of the same right, and to be sought in concurrent jurisdictions. But when (182) the right and remedy are given in a single enactment, and as here, are so inseparably associated that the one can not be enjoyed except through the use of the other, it must be considered as having the effect of repealing the former legislation for which it is substituted. The title of the act clearly indicates this purpose, as do the provisions contained in its body execute that purpose.

We therefore declare that the plaintiff has misconceived his remedy and his action was properly dismissed.

PER CURIAM. Judgment affirmed.

Cited: Durden v. Simmons, 84 N. C., 555; *S. v. Monger,* 111 N. C., 679.

MIZELL & WALKER v. DENNIS SIMMONS and W. J. HARDISON.

Description of Land—Boundary—Course and Distance—Mistake.

1. A call in a grant for a line "beginning at the mouth of a gut, *supposed* to be J's bounds, running along his *supposed* line south 300 poles in the pocosin to or near the head of Speller's creek, etc., indicates that there was no established and known line, and the course and distance being certain in themselves must govern.
2. In such case the call being from an established corner "south 300 poles in the pocosin *to or near* the head of Speller's creek," the course and distance must prevail, without being controlled by the words "*to or near the* head of Speller's creek."

3. In such case, to repel the allegation that there was a mistake in the mathematical call by course and distance or that there was any intention to make the head of the creek the terminus of the line irrespective of course and distance, it is competent to consider (183) all the calls of the grant and also the diagram made at the time of the entry and survey and referred to in the grant.
4. In such case, it was unnecessary as a matter of fact to ascertain where was the head of Speller's creek, because as a matter of law the terminus of the line was at the end of the course and distance called for.
5. The Courts will construe "east" to mean "west," in the call for a line in a grant, when the mistake is obvious and fully corrected by the other calls and an annexed plat.

SMITH, C. J., disagrees.

ACTION to recover Damages for trespass on land, tried at Spring Term, 1878, of MARTIN, before *Henry, J.*

The case involved the title to land, and the material facts applicable thereto are as follows: The plaintiffs claimed under two patents,—"A" for 300 acres, dated 13 October, 1778, lying on the south side of Roanoke river, beginning at the mouth of a gut supposed to be Isaac Jordan's bounds, running along his supposed line south 300 poles in the pocosin to or near the head of Middle or Speller's creek, thence north 45 east 168 poles in the pocosin, thence north 330 poles to Roanoke river, then up the river to the beginning; and "B" for 300 acres, dated 15 June, 1787, beginnig at an oak opposite to the cedar landing lying on the south side of said river, running south 15 east 400 poles, thence east to the line of his other land, thence with said line 283 poles to said river, then down the river to the first station.

It was insisted by defendants that "A" was the beginning of Isaac Jordan's land, and it was found as a fact by referee that patent "A" commenced on Roanoke river at a point agreed upon by (185) the parties, the distance from the same to the creek south, being 204 poles. The referee to whom the case had been referred, reported that the reputed head of Speller's creek was established to be at GB, but that the precise source of the head waters of the creek could not be found. He also reported that "the reputed line of Isaac Jordan, which is called for in patent 'A' as Isaac Jordan's supposed line, is a straight line from GB to the sycamore on the river bank; there is however no evidence of any marked line, and at the date of patent 'A,' Isaac Jordan's line was not known or established; I decide that it does not control the plaintiff's call for course and distance."

The grantee had no land or lines east of the first line of patent B, which together with the fourth call down the river to the beginning, is the material evidence in the cause. The line from CH to D by actual

measurment is 282 1-2 poles, and from CG to LH is 330 poles. The land trespassed upon lies south of the creek. The defendants own the land adjoining the plaintiffs' on the south and west.

The defendants filed exceptions to the referee's report, and those considered material are:—1. That the first line of plaintiffs' patent terminates at the head of the creek if it can be found, and that point is the "head" for the purpose of boundary, which is reputed to be the head of the creek and not "the source or head waters." 2. The referee erred in reporting that plaintiffs' patent covers the course and distance called for; for to do so, the creek must be crossed and the line extended 96 poles south of the creek at a point 312 yards below the reputed head, and more than that below the head waters of the creek. 3. He sets out that a line due south from the beginning as called for in patent "A" reaches the creek at 204 poles from the river, and 57 poles from the point GB, and his conclusion that if patent "A" (186) stops at the creek or at said point, the defendants have not trespassed on plaintiffs' land; whereas he erred in not reporting as conclusive of law, that the plaintiffs' line did not cross the creek and that the defendants had not trespassed on plaintiffs' land, and were entitled to judgment; that the concurrent testimony of nineteen witnesses establish the reputed head of Speller's creek to be at the point GB, and the referee should have adopted that as the terminus of the first line of plaintiffs' patent "A." 4. He erred in reporting that Isaac Jordan's line was not known or established in 1787—ninety years ago—inasmuch as such proof by witnesses was impracticable, and the line is shown by reputation and tradition, which is sufficient in law; that marked lines or line trees are not necessary to establish the boundary between natural objects called for, as here—the sycamore and head of the creek —and he erred in attaching any importance to their absence or the want of proof of them. 5. As to the line of patent "B" the referee reported "that the second call was clearly an error, as an east course would not strike his other line, when a west course would, and the last call says down the river to the first station,—I decide that the line mentioned runs west to his other line," etc.; to which the defendants excepted, for that, he erred in construing "east" to mean "west;" he should have decided only that the call should be "to my other line" and adopted the line on the diagram which strikes his other line at a point 283 poles from the river.

The referee gave judgment for plaintiffs, and the Court sustained the exceptions and gave judgment for defendants, from which the plaintiffs appealed.

Messrs. P. H. Winston and *Mullen & Moore,* for plaintiffs.
Messrs. Gilliam & Gatling, for defendants.

BYNUM, J. The decision depends on the length and course of the first line. The beginning corner is upon the south side of the Roanoke river, and is not disputed. The call of the grant is: (187) "Beginning at the mouth of a gut supposed to be Isaac Jordan's bounds, running along his supposed line, south 300 poles in the pocosin, to or near the head of Middle or Speller's creek."

Where the call is for the line of another tract of land, the course and distance must yield to it, provided that at the time of the grant, the line called for was an established line, or capable of being then established. But where there is no such established line at the date of the call, a call for such line must be disregarded, and the course and distance pursued. *Carson v. Burnett,* 18 N. C., 546.

There was no evidence here, other than what appeared in the grant itself, of the previous or contemporaneous existence of an Isaac Jordan boundary, or of any grant, deed, possession, line or corner answering such a description. But the call itself, the "supposed bounds" and the "supposed line" of Isaac Jordan, clearly indicate that there was then no established and known line. It was therefore totally irrelevant to show, that long subsequent to the grant, a line between the beginning corner of the grant and the head of Speller's creek, at GB, proved to be the Walling line, was reputed to be the same as the Isaac Jordan line. Course and distance is a certain description in itself, and to make it yield to a "supposed line" supported by neither deed, possession, nor marked boundaries, would be to make the more certain yield to the less certain and fallacious, when the rule is that course and distance give way only to something which is more certain.

Laying aside so much of the call as relates to Isaac Jordan's bounds and linne, the real question in the case is,—when the call of a grant is from an established corner on the river, "south 300 poles in the pocosin, *to or near,* the head of Speller's creek," the course and distance must prevail, or be controlled by the call "to or near the head of Speller's creek." It will be observed that the term (188) "near" answers the call of the grant as fully as the word "to," and as it is only comparative as a description of the terminus of a line, it is vague, uncertain, and establishes nothing. We say Neuse river runs near Raleigh, yet it is several miles distant. So in *Cansler v. Fite,* 50 N. C., 424, the call was to a Spanish oak, *"in or near* Richman's line." The tree could not be found, and the distance gave out

30 poles short of Richman's line. The Court held that the call, "in or near," could not control course and distance, and that the line terminated at the end of the distance, and could not be extended to Richman's line. Speaking of the term, "in or near," as a definite call,—"How near," said the Court, "one pole or fifty? Either would fill the description."

The same principle is decided in *Kissam v. Gaylord,* 44 N. C., 116, and *Spruill v. Davenport,* Ib. 134. Our reports contain many decisions in land cases, and perhaps the legal principles which should govern in the ascertainment of boundaries have been as thoroughly discussed and settled in North Carolina as in any other State, but we have been unable to find a single case where it has been held that when a deed without other description calls for a certain course and distance to an object designated by the alternative words "to or near," the mathematical call shall be controlled by such an ambiguous and elastic description. Neither course nor distance can be departed from, further than the one or the other is necessarily controlled by other calls which demonstrate that the course and distance stated in the deed, were stated by mistake. To give such an effect to the undeterminate call, "to or near the head of a creek," would be to cut loose from all the rules established for the ascertainment of boundaries with the greatest degree of precision and certainty. *Literary Board v. Clark,* 31 N. C., 58; *Harry v. Graham,* 18 N. C., 76.

(189) To repel the allegation that there was any mistake in the mathematical call by course and distance, or that there was any intention to make the head of the creek the terminus of the line, irrespective of distance and course, it was competent to consider all the calls of the grant, and also the diagram made at the time of the entry and survey, and referred to in the grant, and thus made a part of it. By the grant and plat annexed, the first call from the river is south 300 poles to or near the head of Speller's creek as before stated "then north 95 east 160 poles in the pocosin, then north 330 poles to the Roanoke river, then up the river to the beginning." Both the plat and grant call for 300 acres of land, and by computation, that is the quantity enclosed by the calls of the grant, as run by course and distance; whereas if the first line should be run to the head of the creek, instead of being 308 poles, as called for by the grant, it is only 172 poles, and the course, instead of being south, as in the grant, is south 14 east; and the third line, which is 330 poles by the grant, is only 282 poles; and the quantity of land enclosed is less than 200 acres, when both the plat and the grant call for 300 acres, and that is the

precise amount enclosed by running the course and distance stated in the grant. So that the intent to convey 300 acres is expressed in the grant and demonstrated by the annexed map and calls; and no case can be found where the Courts have permitted the intent of the parties to be disappointed by deflecting the line and shortening the distance, to reach a vague, incidental call, no better defined than by the terms "at or near the head of the creek," which this Court has declared to be too uncertain to control course and distance.

Where it is clear that if there was a mistake, it was not in the course and distance, but in supposing that there was such a place as the head of the creek, in the neighborhood of the end of the line, there can be no deviation from course and distance. *Carson v. Burnett, supra.*

It was insisted upon the argument that if the course and distance of the first line were not controlled by the call for the (190) head of the creek, yet that it could not extend across and beyond the creek, but must stop at it. We know of no such rule of construction. The creek is not a call of the grant. If the distance had given out short of the creek, the line could not have been extended to it; and by the same rule, if the distance extended beyond the creek, the end of the distance is still the true call and the terminus of the line. Upon inspecting the map of the creek furnished to us, it appears that it has several prongs or branches leading into and composing it; some extending above the point designated as the head, and some extending out from below and reaching towards the end of the call in the grant. The more reasonable hypothesis, and the one that avoids much of the confusion, is, that in using the words "to or near the head," the surveyor meant to say "to or near the head waters of Speller's creek," as indicting a general description of the terminus of the line and location of the grant, not as controlling course and distance, but pointing out by natural objects, the general direction of the call.

So far we have forborne to mention that the plaintiffs claim under two grants, the second of which lies below, adjoining and along side of the first grant. The only contention in reference to this, respects the second call, which is east to the line of the first, whereas that course would lead directly from the first tract, and the lines would not close so as to include any land. The mistake is so obvious, and so fully corrected by the other calls and the plat annexed, that it presents no difficulty. The Courts will construe east to mean west, to correct a mistake, when the intent of the parties appears, and the means of correcting it are presented. *Cooper v. White,* 46 N. C., 389; *Houser v. Belton,* 32 N. C., 358; *Campbell v. McArthur,* 9 N. C., 33. *So also in*

extending the line west instead of east, the course called for in the grant as corrected, is due west, until the line of the first grant is reached. (191) By none of the rules of construction can it be made to run north 60 west, to conform to the theory of the defendants.

It has been often held by this Court, that what are the termini or boundaries of a deed, is a matter of law for the Court; but where they are, is a matter of fact for the jury. In our view it was necessary as a matter of fact to ascertain where was the head of Speller's creek, because as matter of law, the terminus of the first line of Patent A was at the end of the course and distance called for, from the beginning corner. In that we concur in the conclusion of the referee. We also concur with him that the second call of Patent B must be construed to call west, when the call is east. No exception was taken to the finding of damages by the referee. The rulings of His Honor sustaining the exceptions of the defendants will be reversed, and the judgment of the referee upon the report will be affirmed. The Court below allowed the referee $125 for his services, and as the allowance was not excepted to, that sum will be added to the judgment against the defendants.

There is error. Judgment reversed and judgment will be rendered here according to the finding of the referee, with the addition of his allowance as indicated.

SMITH, C. J., *Dissenting:* During the progress of the inquiry before the referee, the defendant introduced witnesses to prove declarations of living persons as to the place known as the head of Speller's creek, which testimony was taken down, and the plaintiffs' exception thereto noted. In his report the referee states that the evidence fails to establish the locality of the head of the creek, and he accordingly finds the true line of the Jordan grant, under which the plaintiffs claim to run from the admitted starting point on the river, according to course and distance, over and beyond the creek. This running includes (192) the land in dispute in the grant.

On the hearing of the case before the Judge upon the defendants' exceptions, none being filed by the plaintiffs, it does not appear that any question was made as to the competency of the evidence, or that it was brought to the notice of the Court, or any ruling asked or made upon it. Nor can we see that it was acted on either by the referee or the Court. It can not, therefore, be made here as our jurisdiction is limited to the correction of errors in the Court below, and these should be pointed out by exceptions. If, however, the objection had

been pressed, I am not prepared to say it should be sustained. It was certainly proper to receive evidence of the locality of the head of the creek, as of the creek itself. In *Waters v. Simmons,* 52 N. C., 541, one of the calls of the deed was, "thence north, 10 east, 485 poles to the head of Speller's creek," and a witness was allowed to testify as a matter of personal knowledge, where the head of the creek was. The Court in the opinion says: "If a river, creek, marsh, swash, swamp, savanna, mountain cove or ridge be called for in a deed or grant, it can not be identified by the instrument itself, but its location must in the very nature of things be pointed out by parol proof, that is, by witnesses who profess to know and to be able to state where it is," and that "the difficulty of the proof can be no reason why the testimony should be rejected as incompetent."

It is true that declarations from persons who are living are not admissible to prove private boundary lines, and it is only when they are dead that in this State, from necessity, the rule excluding hearsay has been so far relaxed as to admit them; but the doctrine is confined to declarations which related to the boundaries of land, and does not extend to the names by which natural objects are designated and known. The names of mountains, creeks, swamps, and other physical objects upon the earth's surface are acquired by reputation, and (193) consequently may be proved by reputation. This is the most usual method of proof. The evidence simply fits the name of the thing named, and can not be excluded, because by reason of its being called for in a deed it may ascertain and fix a boundary of land. *Dobson v. Finley,* 53 N. C., 495.

Among other exceptions of the defendants is one to the effect that the referee did not find, and upon the evidence ought to have found, the true locality of the head of the creek to be at the fork marked D. G., in the plat, and this exception is sustained by the Court. The Court therefore finds as a fact that there was a place known as the head of Speller's creek, and that it was at the point claimed by the defendants. This is established upon the weight of the evidence, and in this Court must be considered as conclusively settled. The Judge may review the report of the referee, and set aside, modify, or confirm the same, in whole, or in part, C. C. P., sec. 247; and his action determines the facts when this Court is called on to review his deductions of law. *Green v. Castlebury,* 70 N. C., 20.

If the line is then run from the river to the head of the creek, the land upon which the alleged trespasses were committed is excluded from the Jordan grant. We have then a conceded starting point on

the river, and a definitely ascertained natural object, at or near which, by the calls of the grant, the lines must run and terminate; and we have the divergent and longer line by course and distance, and the question is,—which must control. I think this question has been settled by repeated adjudications, and in case of such conflict the call of natural objects must prevail. *Cherry v. Slade,* 7 N. C., 82; *Tatem v. Paine,* 11 N. C., 64; *Brooks v. Britt,* 15 N. C., 481; *Patton v. Alexander,* 52 N. C., 603; *Nash v. R. R. Co.,* 67 N. C., 413. Nor can a plat or mathematical diagram attached to the grant whereon no natural objects are laid down, control the calls of the deed. (194) *Literary Board v. Clark,* 31 N. C., 58. I am therefore of opinion that the judgment should be affirmed.

Per Curiam. Judgment reversed.

Cited: Brown v. House, 116 N. C., 865; *Higdon v. Rice,* 119 N. C., 639; *Rumbough v. Sackett,* 141 N. C., 498; *Wells v. Harrell,* 152 N. C., 219; *Lumber Co. v. Hutton, Ib.,* 542; *Lumber Co. v. Hutton,* 159 N. C., 450, 451; *Ipock v. Gaskins,* 161 N. C., 678.

Re-affirmed on re-hearing, 82 N. C., 1.
Dist.: Brown v. House, 118 N. C., 873.

W. N. McKEE v. THOMAS L. VAIL.

Parol Agreement Concerning Land—Statute of Frauds.

1. Parol agreement between A and B, that A will buy B's land at execution sale and that B may subsequently have the land at the price bid with interest, is void under the statute of frauds, in the absence of any equitable element in B's favor.
2. In such case B cannot complain that A acted as deputy sheriff in the appointment of appraisers of his land before the sale there being no allegation of fraud.

Appeal at Fall Term, 1877, of Mecklenburg, before *Kerr, J.*

It was alleged, among other things, that in 1868, one Davis recovered a judgment against the plaintiff, upon which an execution issued and was levied by the sheriff on the land of plaintiff; that defendant, being aware of the plaintiffs' embarrassments and desiring to aid him, agreed to buy the land at sheriff's sale, and hold the same for plaintiff's benefit and recovery to him on payment of the purchase money and interest; that it was thereafter bought at said sale by defendant, and the plaintiff remained in possession under the alleged agreement until he was ejected

by proceedings instituted by defendant; wherefore judgment was demanded that defendant be declared a trustee for plaintiff, (195) and for an account, etc. The defendant denied the material allegations of the complaint, in respect of the said agreement and alleged that the plaintiff's occupancy after the sale was by virtue of a contract of tenancy entered into between them, and that he subsequently did offer, voluntarily and by parol, to let plaintiff repurchase the land on payment of the purchase money, together with other claims he held against him, but denied that plaintiff ever complied therewith.

The issues raised by the pleadings were submitted to the jury, and with their findings thereon, are as follows:—

1. Did defendant before the sale agree with plaintiff to buy the land provided it did not sell for too high a price, and reconvey to plaintiff on being reimbursed the purchase money and six per cent. interest thereon? Ans.—No.

2. Did plaintiff offer within a reasonable time to pay defendant the purchase money with interest, and was he then able to have paid the same? Ans.—Yes.

3. Was the conduct of defendant calculated to suppress bidding at the sale and prevent the land from bringing a fair price? Ans.—No.

4. Did defendant act as deputy sheriff in the appointment of appraisers of the plaintiff's land; if so, did he act with or without the knowledge or consent of plaintiff, or did defendant merely take the order at the request of the sheriff? Ans.—Without the knowledge of plaintiff.

And thereupon His Honor gave judgment in favor of the defendant and the plaintiff appealed.

Messrs. Jones & Johnston, for plaintiff.
Messrs. Wilson & Son and *R. Barringer,* for defendant.

Reade, J. The action is founded upon the idea that the defendant promised plaintiff that when plaintiff's land should be sold under execution, he, the defendant, would buy it if it did not go too (196) high, and that plaintiff might subsequently have the land at the price bid and interest. And that the defendant did buy the land at the sale and took a deed from the sheriff, and subsequently the plaintiff offered to pay the defendant the amount he paid for the land and the interest on the amount, and demanded a deed which the defendant refused.

Suppose the facts were as alleged, still the plaintiff would not be entitled to recover. The statute of frauds requires contracts for the con-

veyance of lands to be in writing. Here is no writing and no equitable element to supply the place. The plaintiff did not furnish the money to pay for the land, nor was there any contrivance by which the bidding was suppressed and the defendant enabled to get the plaintiff's land at an undervalue. The defendant paid his own money and the sale was fair. But the finding of the jury by which the Court is bound cuts up the plaintiff's claim by the roots—the jury find that the defendant made the plaintiff no promise whatever in regard to buying the land.

There is an allegation supported by the finding of the jury that the defendant acted as the friend of the sheriff in delivering a summons to the persons who appraised the land, and that at the request of the sheriff he filled a blank in the summons with the name of a person of his own choosing, in the place of one designated by the sheriff, who could not serve. But there is nothing beyond the simple fact that he did so, and no finding of fraud, and therefore there is nothing of which the plaintiff could complain.

PER CURIAM. Judgment affirmed.

Dist.: *Mulholland v. York,* 82 N. C., 515.

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(197)

ALEXANDER WISEMAN v. M. P. PENLAND and ADEN A. WISEMAN.

Action to Recover Land—Evidence—Judgment—Judge's Charge.

1. On the trial of an action to recover land, it appeared that a tenant of the plaintiff had been dispossessed by one of the defendants; *Held,* that evidence that defendant informed the tenant at the time that he was acting as sheriff, was immaterial.
2. A judgment, in the absence of proper proof of fraud, must be presumed to have been fairly and regularly taken.
3. On the trial of an action to recover land, the plaintiff, to show its value at the time of a certain execution sale, offered to prove who was in possession at a certain time; the Court below admitted the testimony as evidence of possession; *Held,* not to be error.
4. The failure of a Judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated.

ACTION commenced in Mitchell and removed to and tried at December Specal Term, 1877, of MCDOWELL, before *McKoy, J.*

This action was brought to recover a tract of land, and the material facts relating to the claims of the plaintiff and defendants to the possession are stated in the opinion of this Court.

The following is the evidence to which the defendants' exceptions apply: 1. One W. A. Wiseman testified that he was in possession of and cultivating the land in dispute as the tenant of the plaintiff, and that he was put out of possession by A. A. Wiseman, who entered and held the same for his codefendant. Upon cross-examination the defendants' counsel proposed to ask this witness a question to show that said defendant in ousting him from the possession was acting as sheriff and performing an official duty. His Honor refused to admit the evidence upon the ground that it was secondary, and that if he was so acting he should show the precept authorizing it. Defendants (198) excepted.

2. On the examination of one of defendants' witnesses, it was proposed to prove (after the witness had answered the plaintiffs' question that the judgment in a certain ejectment suit since the war was taken by default) under what circumstances said judgment was taken, and whether taken fairly or not, without introducing the papers or record in the case. This was also excluded, the Court saying that in the absence of proper proof the presumption was that the judgment was fairly taken. Defendants excepted.

3. To show the value of the land at the time of sale the plaintiff asked a witness, who was in possession of the tract at a certain time? The defendants objected, for that, naked possession would not be evidence of the value, but the question was allowed on the ground that it was at least evidence of possession, if not of title. Defendants excepted.

4. The Court refused to interrupt counsel on account of an alleged incorrect statement of material evidence in the argument of the case to the jury, remarking that it would be corrected by a recital of the testimony from the notes taken by the Court; and when about to commence the charge to the jury the Court asked if the counsel desired the evidence to be repeated to the jury, and it was expressly agreed by counsel on both sides that it need not be recapitulated. For this nonrecital of the testimony the defendants excepted.

Under the instructions of His Honor the jury rendered a verdict for plaintiff. Judgment. Appeal by the defendants.

Messrs. W. H. Malone and *A. C. Avery,* for plaintiffs.
Mr. J. H. Merrimon, for defendants.

RODMAN, J. Bedford Wiseman was seized of the *locus in quo* and on 1 January, 1850, and by a voluntary deed conveyed it to his son, Ensor C. Wiseman. This deed was not proved until June Term, (199) 1867, of Mitchell County Court, when it was proved and regis-

tered. Ensor, in 1850, was only twelve years of age. There was evidence tending to prove that soon after the date of the deed he took possession of the land and cultivated it upon his own account for several years; while there was also evidence that it remained under the control and substantially in the possession of his father. In March, 1871, Ensor sold the land for value to the plaintiff.

The defendant claims as purchaser at an execution sale in September, 1859, under a judgment recovered by one Cowles at Spring Term, 1859, of Mitchell County Court, upon a note given by Bedford Wiseman on 7 May, 1858. The defendant contended that the deed from Bedford Wiseman in 1850 was fraudulent and void as to his creditors; but there was evidence to prove that Bedford did not owe any debt in 1850, and retained property worth $800 or thereabout; and there was no evidence that he ever owed any debt except this one to Cowles contracted in 1858. The long delay in registering the deed was certainly evidence of a secret trust for himself; but it is only evidence tending to prove a fraud, and not conclusive; and the Judge left the whole question of *bona fides* in making the deed, fairly and clearly to the jury, and they found that the deed from Bedford Wiseman was not made with any fraudulent intent. This rendered any finding as to the purchase by the plaintiff immaterial.

The defendant entered several exceptions to the ruling of the Judge as to the competency of evidence:

1. The defendant offered to prove that Aden A. Wiseman, one of the defendants, when dispossessing the plaintiff, said that he was acting as sheriff. It does not otherwise appear that Wiseman was sheriff, or that he had any execution in his hands. If that had appeared, any declaration of his that he was acting as sheriff was superfluous; and if
(200) that did not appear, such a declaration, though evidence of the character in which he was professing to act, would not be evidence of his power. In any point of view so far as appears from the case, it was immaterial. Exception overruled.

2. The manner in which judgment was taken was immaterial. Exception overruled.

3. Exception overruled for the reason given by the Judge.

4. Exception overruled. The recital of the testimony by the Judge was expressly waived by the parties.

The defendant filed ten exceptions to the instructions of the Judge to the jury. It would be tedious and unprofitable to consider them in detail. We are clearly of opinion that none of them can be sustained. The instructions were full, fair and correct.

The objection that the complaint is defective, in that it does not posi-

tively allege that defendants are in possession, but only that "they withhold" the land, was taken for the first time in this Court. It is unnecessary to say whether it would have been good on demurrer, or not. If it had been taken in that way the complaint might have been amended; certainly it is cured by the verdict. The objection to the probate of the deed from Ensor Wiseman, that it does not appear to have been acknowledged by him, seems to be incorrect in part. At all events it was not taken below and must be disregarded.

PER CURIAM. Judgment affirmed.

Cited: Fraley v. Kelly, 88 N. C., 227; *White v. Morris,* 107 N. C., 102.

(201)

McWILLIAM YOUNG and others v. J. O. GRIFFITH and another.

Action to Recover Land—Agreement to Convey Land—Power of Executors—Evidence.

1. On the trial of an action to recover land, it appeared that in 1841, J and R agreed in writing to convey to W, upon the payment of the purchase money, certain lands, the boundaries of the same as set out in the agreement being definite; afterwards, upon the payment of the purchase money, J and the executors of R (then deceased) executed a deed to W; the *locus in quo* was embraced in the deed but it was disputed as to whether or not it was embraced in the agreement; *Held,*
   (1) That the agreement to convey was the joint contract of J and R.
   (2) That the executors of R had no power to convey his estate in any land not embraced in the agreement.
   (3) That admission in writing of J as to what boundaries were intended to be conveyed by the agreement were not admissable as evidence against the representatives of R.
2. In such action the provisions of the Code do not prevent the plaintiff from demanding a specific performance of the agreement on the part of the representatives of R, notwithstanding the action was instituted prior to 1868.

ACTION to recover possession of land, commenced in Buncombe and removed to and tried at Fall Term, 1876, of MADISON, before *Henry, J.*

The facts embodied in the opinion of this Court by Mr. Justice RODMAN are deemed sufficient to present the points decided. See s.c., 71 N. C., 335. Verdict and judgment for plaintiffs. Appeal by defendants.

Messrs. W. H. Malone and *Busbee & Busbee,* for plaintiffs.
Mr. J. H. Merrimon, for defendants.

RODMAN, J. On 13 October, 1841, Robert Love and James R. (202) Love were seized in fee of a large body of land in Buncombe and other counties, and agreed in writing with Wesley Young (whom the plaintiffs represent) to sell and convey a certain piece of land at fifty cents per acre to be paid in hogs at or about Christmas, in 1842. The boundaries of the land to be conveyed appear on the face of the agreement to be indefinite, although perhaps they may be shown to be certain by a survey. The number of acres included in the boundaries given was evidently unknown to the parties, and it must have been contemplated that it should afterwards be ascertained by a survey.

From a recital in a deed made on 29 September, 1859, from James R. Love, and the executors of Robert Love, who was then deceased, it appears or is admitted that on 25 December, 1842, Young had paid $1,025, and as far as can be gathered from the deed this was the whole price. After the death of Robert Love, James R. Love, the surviving partner, recovered a judgment against Wesley Young upon the agreement, which was paid. In the view we take of this case, it is not material whether the whole price was paid before the death of Robert Love or not.

It was admitted that this deed of 1859 embraced within its boundaries the land in dispute, but it was contended by the defendants that the agreement of 1841 did not; and that the executors of Robert Love had no power under the act, Rev. Code, ch. 46, sec. 37, to convey his estate in any land not embraced in the agreement.

For the purpose as must be supposed of defining more clearly what lands were intended to be covered by the agreement of 1841, the plaintiffs offered in evidence a writing without date, signed by J. R. Love, and professing to state his recollection of the boundaries of the land intended to be conveyed by the agreement. The description of the bounderies of the land given in this writing differs in terms from (203) that of the agreement, but whether it covers other land or only the same land, we are unable to say. We must assume, however, for this description that it enlarged or in some way varied the location of the land to the advantage of the plaintiff, as otherwise he could have had no motive for offering it in evidence. It was admitted to be read after objection, and the defendant excepted.

The question of its admissibility is a somewhat nice one. The general rules as to the reception of admissions are familiar. When several persons are *jointly* interested in the subject matter of the suit, the admissions of one respecting it are evidence against all. Taylor Ev., sec. 647; *Whitcomb v. Whiting,* 1 Smith L. C., 555. So of joint contractors.

Taylor Evi., secs. 680, 681; *Rowland v. Rowland,* 24 N. C., 61; *Carter v. Beaman,* 51 N. C., 44.

But in general the admissions of one part-owner or cotenant of property will not be evidence against the others. Taylor Ev., sec. 680; Wharton Ev., *Fox v. Waters,* 12 A. and E., 43.

In the present case James R. and Robert Love were tenants in common, having equal shares, and not joint tenants of the land, which they contracted to sell; and if this had been recited in the agreement it would probably not be held a joint contract for the performance of which in its entirety each was bound, but as the several contract of each to convey his undivided share in the common land. But it does not appear in the agreement what share or estate each claimed; each agrees to convey the whole. On the authorities and on reason we are required to consider the contract of the Loves with Young as their joint contract.

But this does not settle the question as to the competency of the admissions of J. R. Love. The evidence was competent against J. R. Love, and a Court of Equity would enforce against him a specific performance of the agreement as varied by his written admission (204) of its intent, but although it is probable that each of the cotenants intended by the agreement to convey his share in the same land, yet it may be that they understood the description differently, and that Robert would not have executed it if he had understood it in the sense in which James admits he did. The admissions of one person can never bind another unless he is actually or presumptively the agent of the other to make the admission.

One tenant in common can not sell the land of another, and if it follows that he has no authority to make an admission, the effect of which if received in evidence against the other, will be to enlarge or vary the boundaries of a piece of land which they had previously sold, and thus in effect to sell land without authority in writing. This case must be considered an exception to the rule that one person jointly interested may bind another by his admissions. This argument supposes Robert to have been alive when the admission was made. If it was made after his death it would be still less competent, for the joint interest was then severed. Taylor Ev., sec. 681. We think this exception must be sustained.

This ruling alone would entitle the defendant to a new trial. But we think it is not the duty of a Court of Appeals to put its decision entirely on some small error of the Court below, and thereupon send the case back for a new trial, protracting litigation. But we think it may, when

it is possible to pass on some vital question and arrest the litigation, or where that is not possible, it may explain what are the decisive questions in the cause, so that the parties may direct their attention to these. We were invited by counsel to do this, and all the questions which apparently can arise were ably and laboriously discussed.

The plaintiff Young's claim to the share of Robert Love is founded entirely on the agreement of 1841. Under that he became en-
(205) titled to an equitable estate in the land covered by it. It is said, however, for the defendant, that even if it were admitted that this agreement covered the land in dispute, yet under the decision in *Gaither v. Gibson*, 63 N. C., 93, the plaintiff could not recover, as this action was begun before 1868. That case may be distinguished from the present, in this, that it had been heard upon an equitable defence attempted to be set up at the trial, and this Court said that the defendant could not avail himself of it in that way, but must bring his action for specific performance, and he might obtain an injunction in the meantime. In the present case when it goes back there is nothing to prevent the plaintiff from filing a supplemental complaint for specific performance in the present action, and if he shall make a proper case the Superior Court will direct a conveyance from the representatives of the estate of Robert Love, and enjoin all persons having or claiming the legal title in privity with him from setting it up against the plaintiff. This doctrine is not opposed to *Gaither v. Gibson,* but is apparently the doctrine of that case applied to one where the equitable owner is the plaintiff, and if the plaintiff can not have that remedy he may find material difficulties in any other.

Suppose the plaintiff to have put himself in a condition to avail himself of his equitable estate as a cause of action, the material question would arise for finding, viz., in what land did the plaintiff have an equitable estate. For the legal estate which the Court would recognize as existing in him by virtue of the agreement of 1841, and at the date of that agreement, would be as to Robert Love exactly that described in the agreement.

It has been seen that the admission of James R. Love was not competent as against the representatives of Robert Love. The deed of 1859 could not operate to convey any land of Robert Love which he had not contracted to convey, because the act empowers executors to con-
(206) vey only such land.

Nor could this deed convey the estate of James R. Love in any land not covered by the agreement, because all his lands not sold prior

to the equity suit in Buncombe county had been sold under the decree in that suit before 1859.

If these views be correct, as we think they are, the only question in controversy is seen to be this—were defendants at the commencement of this action in possession of any land covered by the agreement of 1841, as explained and located by any evidence which may be proper for that purpose? The affirmative of this proposition is on the plaintiff. The Judge erred in not requiring proof of it from him, and in excluding evidence offered by the defendant to the contrary.

It is unnecessary to say that plaintiff can not recover on proof of a co-tenancy in the *locus in quo*, for there is no evidence of an actual ouster.

Judgment reversed and *venire de novo*. Case remanded to be proceeded in according to law. Let this opinion be certified.

PER CURIAM. Judgment accordingly.

Cited: Young v. Griffith, 84 N. C., 719.

(207)

B. F. POWELL v. J. W. HEPTINSTALL.

Deed—Recital—Fraud.

1. The rule, that the recital in a deed, that the purchase money for the land conveyed has been received, is conclusive and can not be contracted by *parol* evidence, has no application to cases of fraud.
2. Where plaintiff and defendant compromised certain disputed matters for a definite sum to be paid by plaintiff in land at a fixed price per acre; and plaintiff's brother and the defendant fixed up the papers, including the deed, in plaintiff's absence, who signed the deed when presented to him, the receipt of the purchase money being therein acknowledged; and afterwards plaintiff ascertained that his brother and defendant had fraudulently included in the deed land worth fifty dollars more than the compromise debt; *It was held*, that plaintiff was entitled to recover of the defendant the amount overpaid.

APPEAL from a Justice of the Peace and tried at January Special Term, 1878, of HALIFAX, before *Schenck, J.*

The plaintiff demanded payment of a balance alleged to be due on the purchase of a tract of land, and for money overpaid in settlement of an action which was compromised between plaintiff and defendant, the facts relating to which are sufficiently stated in the opinion. Judgment for plaintiff. Appeal by defendant.

Messrs. T. N. Hill, J. B. Batchelor and *Walter Clark,* for plaintiff.
Mr. R. O. Burton, Jr., for defendant.

FAIRCLOTH, J. The plaintiff and defendant compromised certain matters in dispute for a definite sum, and it was agreed that plaintiff should pay the amount in land at $5 per acre. The plaintiff's brother, J. M. Powell, and the defendant fixed up the papers, including the deed, and arranged the details of the matter in plaintiff's absence, who signed the deed as presented to him, in which deed the receipt of the purchase money by the bargainor was acknowledged. Afterwards it was ascertained by plaintiff that his brother and defendant had by agreement included in the deed, land worth $50 more than the compromised debt, dis-
(208) charged to the plaintiff. It was agreed by these parties to do this, and keep it a secret from the bargainor, and divide the $50 between themselves, which was paid to J. M. Powell, by the defendant. This discovery was made after J. M. Powell and the defendant "fell out," and this case verifies the common saying that "when thieves fall out, honest men get their dues."

The defence is that the recital in the deed, that the purchase money for the land, therein conveyed has been received, is conclusive, and can not be controverted or contradicted by parol evidence. This is a technical, and often an inequitable defence, as it is in this case; but it has no application to cases of fraud, and the evidence offered and received to show the real transaction was competent. Parol evidence is admissible in a case of mistake, accident or fraud to correct any written instrument executed thereby, and to show the truth of the transaction.

The plaintiff had his election to have the deed corrected in a Court of Equity, or to ratify it and sue for the purchase price in a Court of Law. He preferred the latter course, and as the jury have expressly found that J. M. Powell was not his agent to receive the money, he, the plaintiff, is entitled to recover. Let judgment be entered in this Court for the plaintiff.

PER CURIAM. Judgment affirmed.

Cited: McLeod v. Bullard, 84 N. C., 515; *Gwaltney v. Assurance Society,* 132 N. C., 928.

(209)

JOHN T. LAWRENCE, Trustee, v. MARY H. HYMAN.

Deed—Latent Ambiguity—Witness—Party in Interest—Evidence—Practice—Report of Referee.

1. A call in a deed for a line "beginning at the north corner of R's store," where the store stands squarely east and west and has two north corners, is a latent ambiguity to be explained by *parol* testimony.
2. Where the land in dispute was conveyed in trust for use, as the site of of a church, "so that the congregation of said church may at all times enjoy the privilege of divine worship therein, etc.," *It wds held* that a member of the congregation was not such a party in interest in an action affecting the title to the land as to be debarred, under C. C. P., sec. 343, from testifying to the declarations of a deceased person.
3. In such case, the declarations of the grantor in said deed of trust as to the true corner, are not admissible in evidence on behalf of the plaintiff (trustee in said deed) the defendant not claiming through him, and not being present when the declarations were made.
4. Nor, in such case, is the plaintiff trustee a competent witness (under C. C. P., sec. 343) to prove a communication made to him by a person at the time of trial deceased.
5. A report of a referee, in reference under the Code, is not in the nature of a special verdict and conclusive as to the facts, but is reviewable on exceptions.

ACTION, to recover land, tried at Spring Term, 1878, of HALIFAX, before *Seymour, J.*

The case was referred, and the report of the referee states that on 2 October, 1860, one C. M. Clark conveyed the land in dispute to the plaintiff, and described it as "beginning at the north corner of A. M. Riddick's store," etc. The defendant is the widow of Samuel B. Hyman, deceased, and is in possession of the land as part of her dower, her husband having bought the same of one John H. Hyman. The material facts applicable to the points decided by this Court are (210) embodied in its opinion. Judgment for plaintiff. Appeal by defendant.

Messrs. Gilliam & Gatling, for plaintiff.
Mr. T. N. Hill, for defendant.

BYNUM, J. The plaintiff's deed calls: "Beginning at the north corner of A. M. Riddick's store." From the map which is made a part of the case, we find that the store house stands squarely east and west, and that there are therefore two north corners which equally fill the call. It is a case of latent ambiguity where parol proof must be resorted to

to show which of the two corners was meant, as in the case where testator gives "his white horse" to his son A, and he has two white horses. Which was the true corner was a question of fact and not of law. The referee found that the beginning corner was at A, which was the corner of the porch. Upon the trial before the referee, the plaintiff introduced as witnesses Noah Biggs, J. B. Crumpler, and himself. Their testimony tended to establish C, the other north corner of the store, as the true corner, from the declarations of S. B. Hyman, then dead, and under whom the defendant claimed. This proof of the declarations of Hyman was objected to by the defendant upon the ground, which was admitted, that the witnesses were at the time of testifying, members of the Baptist church congregation, for whose use and benefit the deed was executed to the plaintiff. The said trust is conveyed by the deed in these words: "In special trust and confidence nevertheless that the said John T. Lawrence, his heirs and assigns shall and will hold the said lot and parcel of land for the sole and exclusive use, purpose and intent, that it may be used as the site of the Missionary Baptist church called
(211) Zion, now in process of erection in the village, county and State aforesaid, so that the society or congregation of said church may at all times enjoy the privileges of divine worship therein, and for no other use, purpose or intent whatsoever." The evidence of the witnesses is made a part of the case, but was excluded from consideration by the referee upon the ground that it was inadmissible under C. C. P., sec. 343. Whether this evidence was properly excluded as to the declarations of the dead man depends upon whether the witnesses, Biggs and Crumpler, had a legal or equitable interest in the action which could be affected by the event of the action. The general rule of admissibility is that members or stockholders in institutions created for private emolument, though not parties to the record, are not admissible as witnesses. But members of charitable and religious societies having no personal or private interest in the property holden by the corporation, are competent witnesses in any suit in which the corporation is a party. 1 Greenl. Ev., sec. 333; 1 Stark. Ev., 131, 132. To render them incompetent, their interest, in the event of the action, should be direct, certain or legal. *Blum v. Stafford,* 49 N. C., 94.

The interest which is secured to the witnesses by the deed is that as members of the congregation of Zion church. "they may at all times enjoy the privilege of worship therein." The license is altogether dependent upon and lasts only during membership, and when that is lost by removal or otherwise, the personal privilege is lost. We do not think such an uncertain and fluctuating religious and charitable privilege pro-

vided for in the deed constitutes such an "equitable or legal interest" in the action as to exclude their testimony in regard to "transactions or communications" with the deceased, under C. C. P., sec. 343. The referee therefore erred in rejecting the evidence of the two witnesses, Biggs and Crumpler, who testified to the declarations of Hyman tending to establish C as the true corner called for in the deed. (212)

His Honor below so ruled on exceptions taken by the plaintiff to the exclusion of this evidence by the referee. But His Honor further held that the evidence of the plaintiff, Lawrence, was admissible, though it had been objected to by the defendant. Lawrence testified that John H. Hyman and C. M. Clark, his bargainor, both a day or two after the survey of the land in controversy was made, and at the time the deed was delivered to him, pointed out the corner of Riddick's store nearest the church (C), and said that was the beginning corner; and that in the spring before S. B. Hyman's death, he admitted to the witness that he (Hyman) had about 20 feet of plaintiff's land in possession, but would give it up when the crop was made.

There are two fatal objections to the admissibility of this testimony. One is that the declarations of Clark were admitted as to the true corner, when the defendant does not claim title under or through him, and was not present when the declarations were made. The defendant does not claim under John H. Hyman, and he being dead, his declarations as to the boundaries under the circumstances stated, were competent; but Clark was a stranger to the defendant's title, and so far as appears, is alive and able to testify. 1 Whart. Ev., sec. 191. But, secondly, by the express words of the statute, C. C. P., sec. 343, a party to the action is excluded from testifying to any communication between himself and S. B. Hyman, now deceased. It was error, therefore, in His Honor in revising the finding of the referee to consider that portion of the evidence wherein the plaintiff states the admissions of S. B. Hyman made to him, that he was in possession of the land of the plaintiff, which is in controversy, and promising to surrender it.

It is true that the defendant introduced as a witness in his behalf one Wesley Peebles, who testified to a conversation and transaction between himself and Hyman, since dead, wherein Hyman asserted (213) his claim to the corner of the porch (A), as the beginning corner. This evidence, however, was objected to by the plaintiff. It does not appear at what stage of the investigation this evidence was offered, nor does it appear that its admission was considered either by the referee or the parties, as a waiver of the defendant's objections to the admissibility of the evidence of the plaintiff testifying to the same thing; on the con-

trary, the parties stood to their exceptions to the testimony, and the referee excluded the evidence of Biggs, Crumpler and the plaintiff. His Honor below on exceptions to the report of the referee overruled him and admitted the testimony. His decision was correct, and is sustained as to the two witnesses, Biggs and Crumpler, but was erroneous as to the witness, Lawrence, the plaintiff in the action. Of that error the defendant complains by her appeal, and for it she is entitled to a new trial.

It was insisted here that the reference having been made under the Code, the finding of the referee was in the nature of a special verdict, and is conclusive of the facts, and not reviewable on exceptions. We consider this question settled adversely to this contention, by the cases of *Green v. Castlebury,* 70 N. C., 20, and *Armfield v. Brown,* 70 N. C., 27.

PER CURIAM. *Venire de novo.*

Cited: Jones v. Emry, 115 N. C., 164; *McGowan v. Davenport,* 134 N. C., 528.

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(214)

J. W. GIDNEY, Trustee, v. B. F. LOGAN and others.

Deed of Trust—Competency of Witness—Evidence—Declarations of Trustor—Issues—Judge's Charge.

1. In an action involving the validity of a deed of trust, where the trustor is dead and *his estate insolvent,* the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under C. C. P., sec. 343 is removed by the insolvency of his father's estate.
2. The declarations of a trustor at the time of making the deed and just prior thereto and in contemplation thereof, are admissible in evidence; and also his declarations after the deed and while the property was in his possession are admissible to prove and qualify the fact and purpose of such possession.
3. On the trial of an action involving the validity of a deed of trust only as to certain personal property therein conveyed, when the deed included both real and personal property: *It was Held* to be error to submit to the jury an issue as to its validity in regard to the real estate.
5. In such case, the Court below should have excluded from its charge to the jury, all consideration of any provision in the deed affecting the real estate.

ACTION, removed from Cleveland and tried at Spring Term, 1878, of GASTON, before *Cox, J.*

The plaintiff alleged that he was ir possession of a stock of goods by

virtue of a deed of trust executed to him by James W. Ware for the benefit of his creditors, and that he was endeavoring to carry out the purpose of the trust in good faith; that said goods so possessed by him were wrongfully seized by the defendants and converted to their own use. The plaintiff claimed damages for the alleged trespass. The defendants answered that said possession was by virtue of a pretended assignment of said Ware, who was largely indebted to them; and that said assignment was made for his benefit and to defraud (215) his creditors; that defendant Logan at the time of the alleged seizure was sheriff of Cleveland County, and took possession of the goods by virtue of executions issued upon judgments obtained against said Ware.

The said deed of trust conveyed both real and personal property, and the following issues were submitted to the jury and found in favor of the defendants: 1. Was the deed fraudulent as to the real estate? 2. Was it fraudulent as to the personal estate? 3. What was the value of the personal property at the time of the alleged seizure? 4. What damage, if any, has the plaintiff sustained?

The defendants introduced as a witness John Ware, the son of said James Ware, and proposed to prove by him the declarations of his father previous to the execution of the deed and in contemplation thereof, and at the time of execution and while in possession of the property in controversy. The plaintiff objected to the evidence, for that the witness was interested in the event of the action—his father being dead; upon a preliminary examination, however, he stated that he was not a party to the suit and had no interest therein; that his father's estate was insolvent, etc.; the exception was overruled and the witness testified, among other things, that on the day the deed was made his father told him he was advised to make it to enable him to keep off the executions, and sell his property and pay his debts; that he was to attend to the store for fifteen months and pay the amount received to the trustee.

A. B. Ware was then examined by defendants as to the declarations of the trustor while in possession of the property, and testified (the plaintiff objecting) that he was a son of the trustor; that his father said by keeping the store for fifteen months he would be able to compromise his debts and save something for himself. Judgment for defendants. Appeal by plaintiff. (216)

Messrs. Jones & Johnston, J. F. Hoke and *J. W. Hinsdale,* for plaintiff.

Messrs. Wilson & Son, for defendants.

FAIRCLOTH, J. 1. Is John Ware, son, heir-at-law and distributee of the trustor, a competent witness for the creditor to impeach the deed after his father's death, it being established that the estate of his father, the trustor, is insolvent? At common law one who had a direct legal interest in the event of a suit was thereby disqualified as a witness on the side of his interest. Under this rule a child whilst his father is living is a competent witness on either side in regard to his father's estate, because his interest therein is a mere expectancy, and could not be enforced in a Court of Law or Equity. But upon the father's death the child as an heir at law, distributee, or devisee after the will is established, has a certain vested interest, and is incompetent to testify on the side of his interest in any action affecting such estate. By our statute, however, no person offered as a witness shall be excluded by reason of his interest in the event of the action, C. C. P., sec. 342, except by the proviso in sec. 343, which disqualifies any person who has a "legal or equitable interest" which may be affected by the event of the action, from testifying in regard to any transaction with a person then deceased, etc. Under this provision the son after his father's death would be incompetent, and would in the present case be excluded, but for the fact that his father's estate is insolvent. This we think removes the disqualification which would otherwise exist. The controversy is between creditors claiming through the trustee and creditors claiming under judgment and execution; and as between them the children of the deceased debtor are presumed to be indifferent. There is nothing for them in any event of the action. They are not interested, and if
(217) they were, it seems from the facts they are equally interested on both sides and therefore stand indifferent, and in that view would be competent. *Carraway v. Cox,* 30 N. C., 79. This exception is therefore overruled.

2. The declarations of the trustor were offered by defendant and admitted by the Court, to which plaintiff excepted. His declarations at the time of making the deed and just prior thereto and in contemplation thereof, could not be seriously objected to. It is well settled that a vendor's declarations made after the sale and after he has parted with the possession of the property are not evidence against his vendee to establish fraud in the sale. It is also clear that possession of the property after the sale by the vendor, retained by consent of the vendee, is a circumstance to be considered by the jury on a question of fraud, and that the declarations and acts of the vendor whilst so in possession are competent to prove and qualify the fact and purpose of the posses-

sion. *Kirby v. Masten,* 70 N. C., 540. These declarations were properly admitted, and this exception is overruled.

3. The other exception was to the charge of His Honor to the jury, which in the main was correct. We are, however, of opinion that the manner in which the case was submitted to the jury, coupled with a portion of the charge, was well calculated to confuse and mislead the jury in making up their verdict. Nothing is in dispute in this action except the personal property conveyed in the deed, and nothing else should have been left to the jury, and yet two distinct issues,—one in regard to the realty and one in regard to the personal property,—were submitted to, and passed on by them, and the charge of His Honor was addressed as much to the one issue as the other.

Assuming, for the sake of the discussion merely, that the deed was void as to the land on account of the delay provided for, still only one issue should have gone to the jury, and the Court should have (218) instructed them exclusively on the second issue except as to damages, etc.

His Honor told the jury that if from all the circumstances and evidence they believed the grantor intended to postpone the sale of his property for fifteen months and thereby gain an advantage for himself or family, then the deed was fraudulent. This applied equally to both kinds of property, and the jury were probably more impressed in regard to the land by this charge than the other property, because there was such a specific provision in the deed in regard to the land only.

His Honor told the jury that the provision for fifteen month's delay in the sale of the land was *prima facie* fraud in the deed, and that any badge of fraud on the face of the deed was notice to the grantee of a fraudulent intent on the part of the grantor. This the jury might well refer to both species of property, whereas there was no such provision in regard to the personal property in the deed. His Honor should have pointed his charge, and directed the minds of the jury to the single issue in regard to the property in controversy, and excluded all consideration of any provision in the deed relating to the land. As he did not, and the jury were probably thereby misled, this exception is sustained and a new trial ordered.

PER CURIAM. *Venire de novo.*

Cited: Perry v. Jackson, 84 N. C., 230.

(219)

L. P. HENDERSON and wife and others v. V. A. McBEE, Adm'r of J. A. Caldwell.

Trust Annexed to Land—Agreement Contemporaneous with Deed—Evidence —Land in another State—Jurisdiction.

H conveyed certain real estate in Alabama to her son J in fee and a contemporaneous paper writing (not under seal) was executed by them to the effect that said real estate was J's "to be disposed of as he sees proper; and said lands or the proceeds if sold to be his during his life, and at his death the said lands, or if sold the proceeds, to belong and to be given by him to W, etc;" J sold certain of the real estate and thereafter died; in an action by W against the administrator of J; *It was held,*

(1) That the paper writing, executed by H and J, created a trust in favor of W which attached to the conveyance of the lands to J.

(2) That the trust is to be ascertained *from the paper writing* independent of parol testimony.

(3) That the locality of the lands in another State does not deprive the Courts of this State of their jurisdiction to compel execution of the trust.

(4) That the plaintiff is entitled to recover out of the personal estate of J, in the hands of his administrator in this State, the proceeds of the land sold by J.

APPEAL from Spring Term, 1878, of LINCOLN, before *Cox, J.*

On 4 September, 1874, H. P. R. Caldwell, who owned certain lands in Autauga County, Alabama, for natural love and affection and a nominal pecuniary consideration, conveyed them to her son James A. Caldwell in fee with covenant of title. At the same time and as part of the same transaction, they entered into the following written
(220) agreement:—

NORTH CAROLINA,
Burke County.

The deed made by Hannah P. R. Caldwell of said county and State, to James A. Caldwell of Lincoln County in said State, on 4 September, 1874, for 255 acres, 50 acres and 800 acres, known as the Woodburn tract on Autauga creek, and 77 acres of land in Autauga County, State of Alabama, lying on Bear creek swamp, the first of these tracts being lands devised to her by Tod Robinson, the last being a tract purchased by her from Neil Robinson, is made with the understanding that the same is to be his, to be disposed of as he sees proper. And said lands,

or the proceeds if sold to be his during his life, and at his death the said lands, or if sold the proceeds, to belong and to be given by him to William Cornelia Henderson, and in case she be dead, then to be given to her children, that is, the children born of her body.

Witness: H. P. R. CALDWELL,
JOHN D. SHAW. J. A. CALDWELL.

The deed and agreement have both been proved by the same subscribing witness and registered in Autauga county where the lands lie. In his life time James A. Caldwell sold a portion of the lands for the sum of sixteen hundred dollars (of which the feme plaintiff has received two hundred dollars), and died intestate in March, 1876. The defendant has administered on his estate. This action is to enforce the trust and compel payment of the residue of the sum for which the land was sold, out of the personal estate of the intestate in the hands of the defendant.

The Court gave judgment for the plaintiffs and the defendant appealed.

Mr. J. F. Hoke, for plaintiffs.
Messrs. Shipp & Bailey, for defendant.

SMITH, C. J. (After stating the case as above.) It is quite apparent that title was made to the intestate to enable him to (221) retain and use the lands, or at his election to convert them or any part of them by a sale into money, and in such case to have the interest or profit of the principal during life, and at his death the unsold lands and the money received for such as may have been sold to go to feme plaintiff or her children. The conveyance is made upon this express trust, declared in a contemporary writing by the grantor, and assented to and agreed to be performed by the grantee, in its execution by both of them. The estate is accepted on the terms that it shall be held and disposed of as specified in the contract.

It has been repeatedly held in this Court that trusts annexed to lands are not within the statute of frauds and may be proved by parol with corroborating facts, and enforced. Some of the cases only will be referred to. A deed absolute on its face, on such proof, was declared to convey the estate in trust for another, *Taylor v. Taylor,* 54 N. C., 246. Where one paid the purchase money and title was made to another, on an agreement that the latter should hold for the benefit of the first, if not done to delay or defraud creditors, a valid trust is created. *Turner v. Elford,* 58 N. C., 106.

In the case of *Thompson v. Newlin,* 38 N. C., 338, the facts summarily were these: The testatrix Sarah Freeman bequeathed her slaves to John Newlin whom she also made her executor with the understanding and intention that they should not be held as property, and for the benefit of the legatee, but that they should be set free. The object of the bill was to have the trust declared illegal and the slaves held by the legatee for the next of kin of the testatrix. In delivering the opinion, RUFFIN, C. J. says: "It would be a clear fraud on the testatrix to suffer her to suppose that the defendant who understood her
(222) wishes would carry them out without her inserting the directions in her will, and then to set up the will as an absolute gift, not coupled with any trust whatever." In the same opinion referring to *Cook v. Redman,* 37 N. C., 623, he says "We held that a private promise made to the testator by a legatee to hold in trust for another person was binding and would be enforced, and indeed that a promise was not necessary, but that a silent assent to the known wishes of the testator was sufficient to raise the trust." Here the trust is set out in a written memorial authenticated by the signatures of each and is no to be ascertained through the uncertain and erring memory of witnesses.

These authorities abundantly show the validity of the trust attached to the conveyance of the lands to the intestate and the obligation resting on him to give it full effect. We have not deemed it necessary to consider the matters mainly discussed at the bar, nor to inquire how far a deed unconditional in terms may be modified by a writing made at the same time and operating as a defeasance. There is no mistake as to the terms of the deed and no correction is asked. The title vests and was so intended in the intestate and he could convey the same to his vendee. But the legal estate before such sale, and the purchase money of any that may be sold are charged with the trusts declared in the agreement, and the plaintiffs have the right to enforce their discharge and compel payment by the defendant out of the personal estate in his hands, so far as he has funds applicable to the claim.

The locality of the lands in another State does not deprive the Court of its jurisdiction to compel execution of the trust by acting upon the person of the defenddant and the assets of the intestate which have come into his hands. There is no suggestion that they
(223) are deficient and reference has been asked to ascertain their amount.

PER CURIAM. Judgment affirmed.

MARY H. HODGES v. JERRE W. SPICER and others.

Deeds of Gift—Re-execution of Lost Deed—Validity against Creditors—Evidence—Reservation of Life Estate—Specific Performance—Estoppel.

1. Where A executed deeds of gift to B and C, his two sons and the deed to B was lost before registration, and afterwards by arrangement C conveyed his land to B, and A executed a deed to C for the land originally conveyed to B and in substitution for the first deed, reserving to himself a life estate therein: *It was held*, that if the original deeds to B and C were valid as to creditors when made, no subsequent exchange between them would affect the rights of creditors; *and, further*, that the deed to C relates back to the date of the deed to B which was lost, notwithstanding the reservation therein of a life estate by A.
2. In such case, upon an issue as to the validity of the deeds against creditors, the inquiry as to whether or not the grantor reserved property sufficient and available for the satisfaction of his debts, should be confined to the date of the original deeds.
3. In such case, creditors of A can not complain of the reservation of a life estate by him in the second deed.
4. The rule that equity will not compel a specific performance of a contract not founded on a valuable consideration, is confined to executory contracts or promises which rest *in fieri*.
5. A reservation in a deed that the grantor "is to retain possession of the above described lands during his natural life *or so long as he may desire it* for his own use and benefit" confers a life estate (224) on the grantor.
6. The declaration of a grantor, made at a time subsequent to the execution of the deed, is not evidence against the grantee.
7. Where the grantees under a deed of gift were present at a sale of the land under execution against the grantor and made no claim to the land: *It was held*, that they are not thereby estopped from asserting their title.

ACTION to recover Land, tried at Spring Term, 1877, of ONSLOW, before *Seymour, J.*

The material facts are embodied in the opinion of this Court. The jury rendered a verdict in favor of defendants and His Honor upon a question of law reserved gave judgment for the plaintiff and the defendants appealed.

Messrs. A. G. Hubbard and *H. R. Kornegay,* for plaintiff.
Messrs. W. A. Allen and *D. L. Russell,* for defendants.

BYNUM, J. By a family arrangement and for the purpose of advancing his children in life, on 13 February, 1863, John F. Spicer,

the father, by deeds duly executed, conveyed to his son John D. Spicer the eastern half of the land in controversy, and to Jere W. Spicer, another one, the western half. After the return of Jere from the army in 1865, the brothers exchanged their lots and John D. conveyed his eastern half to Jere by deed, and the deed to the western half made by the father to Jere having been lost before registration, by another arrangement of all parties and in pursuance of the contract of exchange, John F. Spicer, the father, executed another deed for the western half of the land to John D. Spicer. This latter deed was made 14 October, 1865, and was intended by the parties as a substitution for the lost deed of 1863.

At the time these deeds of 1863 and 1865 were executed, the (225) bargainor, John F. Spicer, was indebted to the plaintiff as the surety of one Sanders for the sum of three thousand dollars or thereabout; which debt was reduced to judgment against the principal and surety in 1869, and in 1871 a levy on and sale of all the land so conveyed and alleged to be the land of John F. Spicer, was made by the sheriff and a deed therefor was executed to the purchaser who is the plaintiff in the action and brings this suit for the recovery of the same.

On the trial it was conceded by the defendants that their deeds could not be supported as conveyances for valuable consideration, but they alleged that they were prepared to show that at the time of making them in 1863 John F. Spicer retained property fully sufficient and available for the satisfaction of his then creditors. Bat. Rev., ch. 50, sec. 3. Two issues were thereupon submitted to the jury, first, did the bargainor, when he executed the deeds, retain property fully sufficient and available for the satisfaction of his debts, and second, if so did he execute said deeds in good faith or with an intent to delay, hinder or defraud his creditors, or to gain some ease or advantage for himself.

The defendants' evidence upon the first issue was confined to the value of the bargainor's property at the time of the execution of the deeds of February, 1863; while the plaintiff contended that the inquiry should be confined to the date of the last deed—October, 1865—upon the ground, first, that the latter deed was a new contract and could have no relation back to the date of the lost deed, because it conveyed a different estate and to a different person, the lost deed being made to Jere, while the substituted one was made to John D. Spicer, and while the lost deed contained no reservation, and the substituted

deed contained a reservation of an estate to the grantor. The Court admitted the evidence and that is the ground of one exception.

1. If the deeds of 1863 to the two sons were valid as to creditors when made, no subsequent exchange between the sons of (226) the parts conveyed could affect their creditors, and if the substituted deed of 1865, reserved an estate to the grantor, clearly the creditors can not complain, for the estate so reserved became liable to execution, and instead of diminishing increased the assets of the debtor. If one of the sons consented to yield back a part of the estate originally conveyed, the creditors have no cause of complaint for that which is for their benefit.

The principal question then recurs,—does the deed of 1865 relate back for the purpose of this case to the date of the lost deed? If the grantee in the lost deed had the right in a Court of Equity to set up the lost deed and compel the grantor to execute another in its place, the grantor thereby had the right to do voluntarily what a Court of Equity would compel him to do. The general rule is that equity will not compel a specific performance of a contract not founded on a valuable consideration. But a distinction is drawn between executory contracts or promises which rest *in fieri,* and those agreements which are executed, the one class being enforceable only when founded on a valuable consideration, and the other requiring no consideration or only a meritorious one, as a provision for children for example. "If," says Adams, 79, 80, "the donor has perfected his gift in the way which he intended so that there is nothing left for him to do and nothing which he has authority to countermand, the donee's right is enforceable as a trust and the consideration is immaterial. Such for instance is the case where an instrument of gift has been fully executed although retained in the donor's possession." These principles we think govern our case, and authorize a Court of Equity to compel the grantor in a voluntary deed, to whom it was after execution redelivered for safe keeping, and by whom it was lost, (which is our case) to execute another of the same import. The parties have done themselves what equity would have compelled them to do under its powers (227) to enforce specific performance. *Plummer v. Baskerville,* 36 N. C., 262; *McCain v. Hill,* 37 N. C., 176; *Hodges v. Hodges,* 22 N. C., 72. The deed in this case has relation back to that of 1863.

2. The deed of 1865 from John F. to John D. Spicer, contained this clause: "It is understood and agreed that the said John F. Spicer is to retain possession of the above described lands and premises during his natural life, or so long as he may desire it for his own use and

benefit." This clause was added after the execution at the same time and with the same formalities as the deed, and must have the same effect as if it had been incorporated in the deed at its proper place. We have before seen that if the effect of this reseervation is to give a legal estate to the grantor, it is for the advantage of his creditors, and the plaintiff has no cause of complaint. But the defendants insist that it has no such legal operation at least to the extent of giving a life estate to the grantor. As, however, the defendants accepted the deed and, as the proof is, assented to all its provisions, they must be content with such estate as the deed by a proper construction conveyed to John D. Spicer. The hitch is upon the alternative words used in the reservation "during his natural life, *or so long* as he may desire it," the defendants contending that this language at most gives the grantor only an estate at will, which is not the subject of execution sale. A freehold for life is defined to be,—"An estate in possession, remainder or reversion in corporeal or incorporeal hereditaments, held for life, or for some uncertain interest created by will or by some mode of conveyance capable of tansferring an estate of freehold, which may last the life of the devisee or grantee, or some other person." Uncertainty of duration is thus seen to be, though not an essential, yet a common property of a freehold estate. If for instance an (228) estate is granted to a woman *dum sola fuit,* or *durante viduitate,* or *quamdiu se bene gesserit,* or to a man and woman during coverture, or as long as the grantee will dwell in such a house, or so long as he pay a certain sum of money, or for any like uncertain time—*tempus indeterminatum,* as Bracton calls it—in all these cases, if it be of lands or tenements in judgment of law, the lessee has an estate for life because possibly they might and probably would be coextensive with the life of the grantee, thus constituting a distinction among estates for life, which are divisible into estates for life absolute, and estates for life determinable. Wharton Conveyancing, 41; Co. Litt. 42 (a); 1 Cruise by Greenl. 102; 2 Bl., ch. 8; *Terrell v. Terrell,* 69 N. C., 56.

Upon authority therefore the grantor had a life estate in the western half of the lands conveyed to John D. Spicer by the deed of 1865, and so the Court held upon the question of law reserved, and to that extent gave judgment against the defendants, and from that judgment the defendants appealed to this Court. The issues of fact were found in favor of the defendants, and the exceptions of the plaintiff taken during the progress of the trial will be disposed of in the next case, which is here upon her appeal.

PER CURIAM. *Judgment affirmed.*

BYNUM, J. In the previous case between the same parties decided at this term upon the defendants' appeal, the main question involved in the action was disposed of, and it was there held that John F. Spicer under the deed of 1865 retained a life estate in the one-half of the land in dispute, and that for the purpose of this (229) action that deed was to be considered as having been executed as of the date of the lost deed, for which it was intended to be a substitute. The inquiry for the jury was therefore properly directed to the value of the grantor's estate retained at the date of the execution of the deeds of 1863, and the good faith with which he made these deeds.

Upon the trial the plaintiff attempted to show that John F. Spicer, the grantor, was in possession of the Bermuda Island (being a part of the land in suit) in 1867 or 1868, by evidence that he received some rent from that place in these years, though he himself did not occupy the land. He then put this question to the witness: Did you hear John F. Spicer at any time in 1867 or '68, say for what purpose he had made the sale of land in question? The counsel stated his purpose to be to show that the grantor retained an interest in the Bermuda Island. Upon objection the question was ruled out. The declarations of a person who has executed a deed at a time subsequent to such execution are not evidence against the grantee. *Ward v. Saunders,* 28 N. C., 382; *Williams v. Clayton,* 29 N. C., 442. Moreover the grantor as we have decided did retain a life estate in one-half the Island, and had the right both to receive rent for it or to reside upon the Island.

2. The counsel for the plaintiff asked the Court to charge the jury that by being present at the execution sale under which the plaintiff purchased, and not making any claim to the land, the defendants were estopped from asserting any title. The Court decided, first, that there was no evidence that the defendants were present at the sale, and second, that if they had been, they were not so estopped. That ruling certainly gives the plaintiff the benefit of the point. The law is with his Honor. *West v. Tilghman,* 31 N. C., 163. The verdict of the (230) jury was for the defendants.

PER CURIAM. Judgment affirmed.

Cited: Hilliard v. Phillips, 81 N. C., 99; *Phifer v. Barnhardt,* 88 N. C., 333; *Savage v. Lee,* 90 N. C., 320; *Edwards v. Dickinson,* 102 N. C., 519; *Gudger v. White,* 141 N. C., 519.

*W. C. WHITSETT v. W. J. FOREHAND, and wife.

Deed—Probate and Registration—Contract—Damages.

1. The "Cherokee Nation" is a territory within the meaning of the statute, (Bat. Rev., ch. 35, sec. 8.)
2. The certificate of the "Chief of the Cherokee Nation," under its great seal, that a Judge, before whom the probate of a deed is taken, is such Judge, etc., is sufficient to entitle the deed to probate and registration in this State. The word "Governor" in the statute must be taken to mean the Chief Executive Officer of a State or Territory, having its great seal.
3. In an action on a note for a certain sum solvable in cotton at a certain price per pound, the plaintiff is entitled to recover as damages for the non-delivery of the cotton, the market value of the quantity of cotton delivered under the contract at the time the same ought to have been delivered.

ACTION to foreclose a Mortgage heard at January Special Term, 1878, of WAYNE, before *Eure, J.*

The plaintiff and his wife contracted to sell to W. J. Forehand a tract of land, and delivered him a deed therefor, which deed it was alleged was never properly acknowledged and proved. The title to the land was in the plaintiff's wife. On 4 July, 1872, the de-
(231) fendants executed three notes for $261 each, payable in cotton at sixteen cents per pound, due respectively, 1 December, 1873, '74, '75, for the land, and secured the payment by a mortgage thereon. When the first note fell due the defendants refused to pay because of the alleged defect in the title as aforesaid, and on 8 September, 1874; the plaintiff brought this action to foreclose the mortgage.

The defendants answered alleging as a defense and counter claim, that they were damaged by reason of said defective deed, and demanded judgment,—that the said notes and mortgage be surrended for cancellation, if the plaintiff and his wife should fail to make and acknowledge a proper deed; that the plaintiff and wife do make such deed; and for five hundred dollars damages.

The plaintiff filed no reply, but prepared a deed which he and his wife signed and acknowledged before Samuel M. Taylor, who was certified by William P. Ross, Chief of the Cherokee Nation, to be a Judge of the Circuit Court for the Southern Judicial Circuit of the Cherokee Nation, it being a Court of Law of Superior Jurisdiction at the time of taking said acknowledgment. The private examination

*Faircloth, J., having been of counsel did not sit on the hearing of this case.

of the wife is in the usual form. [The plaintiff was a resident of Missouri at the time the contract was made, but is now living in some other western State.] The deed was sent the plaintiff's attorney by mail, and after its receipt by him filed among the papers in this action, —the defendants refusing to accept it, for that, it was not properly proved.

His Honor being of the opinion that the probate of the deed was sufficient, ordered it to be registered, and gave judgment for the plaintiff for the amount of the note and interest, and directed the clerk to sell the land in satisfaction thereof, from which ruling the defendants appealed.

Mr. S. W. Isler, for plaintiff. (232)
Mr. H. F. Grainger, for defendants.

READE, J. The deed in question was acknowledged by the makers, husband and wife, before a Judge of the Superior Courts in the Cherokee Nation, where they resided, and the wife's private examination taken, and the probate and private examination properly certified by him. No question is made about that. But the proof that he was such Judge, instead of being the certificate of the Governor of the territory, is the certificate of the "Chief of the Cherokee Nation," under the great seal of the Cherokee Nation.

The question is, whether that is sufficient to admit the deed to probate and registration in this State in the county where the land lies. Our statute provides that "when any deed concerning lands in this State * * * shall have been executed, and it may be desired to take the acknowledgment or probate thereof out of the State, but within the United States, it shall be lawful for any Judge of a Supreme, Superior or Circuit Court within the State or territory where the parties may be, to take the probate * * *. And the certificate of such Judge with the certificate of the Governor of the State or territory annexed to such deed," etc., that he was such Judge shall be sufficient to admit the deed to probate and registration in this State. Bat. Rev., ch. 35, sec. 8.

It was discussed before us whether the Cherokee Nation is to be considered a State or a territory or a foreign nation. Its status is anomalous. It is certainly not a foreign nation, but is a part of the United States territory, using territory in its general sense. It is not a State in the sense in which the other States are called. Nor yet is it an organized territory as the organized territories are. And yet it

is a territory of the United States set apart for the Cherokee Nation with an organized government, legislative, executive and judi-
(233) cial under the protection of the United States government, and under its tutelage and guardianship. And for the purposes now under consideration it must be considered a "territory" "within the United States."

Taking it to be a "territory" within the sense of our statute, still it is objected that the certificate is not by the "Governor" of the territory. It is the proceeding before the Judge and his certificate that constitutes the probate. The only object of the Governor's certificate is to prove to our Courts here that he was a Judge. That can best be done by the chief executive officer of a State or territory who carries its great seal, and such officer in the United States called *Governor,* except in the Cherokee Nation where he is called *Chief.* He is, however, the Governor of the "Nation," and carries its seal. The Governors of the States are frequently called chief executive officer, chief magistrate, commander-in-chief. And so we say, king, sovereign, monarch, designating the same officer and office.

Giving to our statute a liberal and useful construction, it means the chief executive officer in the State or territory bearing the great seal. There is no officer in the Cherokee Nation called Governor, so far as we know. And the "Chief" discharges the duties which usually pertain to the office of Governor. The "Chief" is therefore for our purposes Governor.

2. The bond in question dated 4 July, 1872, and payable December, 1873, together with two others like it, except that they were payable December, 1874, and December, 1875, were given as the price of the land in question. It will be observed that they are not solvable in money, but at cotton at sixteen cents a pound. The undertaking is that as each of the bonds fall due, the defendants are not to pay the plaintiff $261, but so much cotton as at sixteen cents a pound will amount to that sum—say 1631 pounds. It matters not what
(234) might be the *market* price of cotton, the contract price must govern.

When, therefore, the bond in question fell due in December, 1873, it was the duty of the defendant to deliver to the plaintiff, say 1631 pounds of cotton, and on failure to do so, to pay him such damage as he sustained, viz., the market value of the cotton at the time when he ought to have delivered it. Whether the market value of the cotton at that time was more or less than sixteen cents was an *accident* to enure to the advantage of one or the other as the case might be. And

this was evidently the understanding of the parties, because they could not have supposed that the market price of cotton would be precisely the same in December of three successive years.

But the defendants offer as an excuse for not delivering the cotton at the time when the bond fell due, December, 1873, that the plaintiff had not made or tendered them a good and sufficient title to the land. That was a good excuse, if true. And it seems to have been true up to the time when the deed now in question was tendered. That time is not stated. Its date is 12 May, 1875. The judgment below was for the amount in the face of the bond. In this there was error. Its should have been for the damages sustained for the breach of the contract at the time of the breach and interest thereon.

There is error. Judgment reversed, and the case remanded to be proceeded in according to law.

PER CURIAM. Judgment reversed.

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*TODD, SCHENCK & CO. v. E. R. OUTLAW.

Mortgage—Defective Registration—Notice—Practice—Plea of Lis Pendens—Mortgage to Secure Future Advancements.

(235)

1. The registration of a mortgage deed executed without the State, the execution whereof is not proved according to law, (Bat. Rev., ch. 25, secs. 7, 8) is eneffectual to pass title against creditors or subsequent purchasers for value.
2. Such regstration does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value.
3. A mortgage deed, defectively registered, does not create an equity in the mortgage which follows a deed from him and attaches itself to the legal estate in a subsequent purchaser from the mortgagor.
4. A party to an action who desires to claim the protection of a notice by *lis pendens*, must in his pleadings specifically set forth and claim the benefit of such plea.
5. A mortgagee is a purchaser for value, and whether the consideration is adequate or not will not affect the legal title; *Therefore*, where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B, the defendant's grantor, defectively registered; *It was held*, that if after the execution of plaintiff's mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with notice of defendant's equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment.

*Smith, C. J., did not sit on the hearing of this case.

TODD *v.* OUTLAW.

ACTION to recover Land, tried at Spring Term, 1877, of (236) BERTIE, before *Eure, J.*

The plaintiffs claim under a mortgage executed to them by one Vernoy, to secure adances for agricultural purposes on 2 March, 1874, and duly recorded on the 10th of that month. The defendant claims as a purchaser under a decree of foreclosure of a mortgage of the same land executed by said Vernoy and wife on 16 February, 1866, to one Bond (vendor and mortgagee) to secure the unpaid balance of the purchase money of the land. The execution of this latter mortgage was acknowledged before one John J. Hornbeck, a Justice of the Peace of Ulster county, New York, as certified by N. Williams, the clerk of said county. At the May Term, 1866, of the Court of Pleas and Quarter Sessions of Bertie County, North Carolina, where the land is located, the following proceedings were had in relation to the mortgage:—

STATE OF NORTH CAROLINA, Bertie County. } May Term, 1866.

This mortgage from Milford Vernoy and wife Martha, to Lewis T. Bond, was exhibited in open Court and ordered to be registered together with the certificate of John J. Hornbeck, a Justice of the Peace of Ulster county, New York, and of N. Williams, clerk of Ulster county, New York.

W. P. GURLEY, Probate Judge.

Upon this certificate and order, the mortgage was registered in May, 1866.

It was insisted by the defendants, that this registration, though not regular in form, was sufficient to pass the title, and that if the probate and registration were defective for that purpose, yet the registration was notice to all the world of the existence of the incumbrance, and that the plaintiffs therefore purchased subject to the lien.

His Honor being of opinion with defendant, gave judgment accordingly, and the plaintiffs appealed.

(237) *Messrs. D. A. Barnes* and *J. B. Batchelor,* for plaintiffs.
Messrs. P. H. Winston and *Gilliam & Gatling,* for defendant.

BYNUM, J. (After stating the case as above.) 1. The statute provides that "no need of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or pur-

chasers for a valuable consideration, from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth." Bat. Rev., ch. 35, sec. 12. How mortgages executed without the State, for lands lying within the State, shall be proved without the State before they can be duly registered, is prescribed by statute, Bat. Rev., ch. 35, secs. 7, 8, and it is sufficient to say the mortgage from Vernoy to Bond has not been probated as the law directs, and that upon such probate it was not entitled to registration. Until a deed is proved in the manner prescribed by the statute the public register has no authority to put it on his book; the probate is his warrant and his only warrant for doing so. *Williams v. Griffin,* 49 N. C., 31; *Burnett v. Thompson,* 48 N. C., 113; *Lambert v. Lambert,* 33 N. C., 162; *Carrier v. Hampton,* 33 N. C., 307. Not having been duly proved, the registration was ineffectual to pass the title as against creditors or purchasers. *Robinson v. Willoughby,* 70 N. C., 358; *Fleming v. Burgin,* 37 N. C., 584; *DeCourcy v. Barr,* 45 N. C., 181.

2. Does such a registration as this have the effect of notice to the world of the mortgage from Vernoy to Bond, so as to affect a subsequent purchaser?

The mortgage from Vernoy to the plaintiffs had the effect of passing the legal title, and in the registration of the mortgage to Bond did not impart notice to the plaintiff they will hold the land discharged of any prior equity. *Polk v. Gallant,* 22 N. C., 395; *Winborn v. Gorrell,* 38 N. C., 117. It is in cases where actual notice is so clearly established as to make it fraudulent in the purchaser to take and register a conveyance in prejudice of the known title of an- (238) other, that the registered deed will be permitted to be affected. With this limitation it is only a duly registered mortgage that will affect the subsequent purchaser with notice. *Fleming v. Burgin,* 37 N. C., 584; *Leggett v. Bullock,* 44 N. C., 283; *Robinson v. Willoughby,* 70 N. C., 358. It is not pretended that the plaintiffs had any such, or other notice than that which might have been derived from the imperfect registration of the prior mortgage. That a mortgage registered in a manner not authorized by law is neither actual nor constructive notice, is decided in *DeCourcy v. Barr,* 45 N. C., 181. Barr executed three mortgages. The third mortgagee sought to redeem the first and avoid the second mortgage upon the ground that though registered prior to his own, it was upon an insufficient probate, and therefore inoperative as to him. The defect of probate consisted only in this, that though taken in regular form before a duly appointed com-

missioner for the State, resident in New York, the deed proved, was the deed of a *resident* of this State, for land in this State, whereas the statute only authorized the commissioner to take probate of deeds of *non-residents.* It was insisted in that case, as it has been here, that this mortgage was spread upon the record, and for all useful purposes had the same notoriety as if it had been duly proven, so that it was urged the objection was merely technical. But the Court said that what was not done in due form was not done at all in contemplation of law, and that the plaintiff therefore might stand on legal rights and seize a plank in a shipwreck. It was also held that the adjudication of the clerk that the deed was duly proved, will not aid, where the certificate of the commissioner is annexed to the deed and shows that he was incompetent to take the probate. The same rule as to actual and constructive notice prevails in those States where registry laws are similar to ours; their Courts holding that express notice of an unre-
(239) corded mortgage will not invalidate one which is duly recorded. *Stansell v. Roberts,* 13 Ohio, 148; *Mayham v. Coombs,* 14 Ohio, 428; *LeNeve v. LeNeve,* 1 Smith L. C. (American notes); Coote Mortgages, 370, and notes to page 384.

3. The defendant insists that the instrument reconveying the land from Vernoy to Bond by its registration, though it may be defectively registered had the effect of creating an equity in Bond, the vendor, which followed the deed and attached to the legal estate transmitted to the plaintiffs, and will be protected and enforced, and for this position he cites *Derr v. Dellinger,* 75 N. C., 300. That was not the case of a mortgage, and it stands altogether upon different grounds. Derr purchased and acquired the legal title with express notice of an outstanding bond for title to another party who had contracted to purchase the same land. A contract to sell land is not required to be registered and take affect only from registration like a mortgage, but like a deed when registered it relates back to the date of the contract. Bat. Rev., ch. 35, sec. 24. Derr therefore having had notice of the bond for title took the legal estate subject to the prior equity. Had he purchased without notice the Court clearly intimate that the equitable estate would have been annihilated. We are not called upon to say how that would be. Derr purchased with, while the plaintiffs purchased without notice.

4. The defendant again insists that the plaintiffs had notice by *lis pendens,* in that, they purchased during the pendency of an action by Bond against Vernoy to foreclose the mortgage upon the land now in controversy. The principle of *lis pendens* is that the specific property

must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the tendency of such suit duly prosecuted is notice to purchaser so as to bind his interest. Adams Eq. 157, and notes. As the law was prior to the adoption of our Code, and as it was in England prior to 2 Victoria, an action (240) for land so prosecuted and pending would have been notice to the world, and the purchase of the land by the plaintiffs after the institution of the action and before the decree of sale, would have been disregarded and treated as a nullity. *Baird v. Baird,* 62 N. C., 317; 2 Vict., ch. 11, sec. 7; Sugd. Vendors, 458; Adams Eq., 157. But the law of *lis pendens* has been greatly modified and restricted by C. C. P., sec. 90. That section provides that in an action affecting a title to real property, the plaintiff at the time of filing his complaint or at any time afterwards, or a defendant when he sets up affirmative relief at the time of filing his answer, or at any time afterwards, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property affected thereby; and if the action shall be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same.

From the time of filling only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or recorded, shall be deemed a subsquent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action.

This statute is in substance a copy of 2 Victoria, which has received a construction by the English Courts. It is there held that no *lis pendens,* of which a purchaser has not express notice, will now bind him unless it be duly registered. Before that statute, a purchaser *pendente lite,* though for a valuable consideration, and without express notice, was bound by the decree whether interlocutory or (241) final. And such was the law here. But since that statute, *lis pendens* does not affect a purchaser or mortgagee without express notice, until a memorandum containing the particulars described in the act, is left to be registered with the senior master of the Common Pleas. Coote Mortgages, 383, Adams Eq., 157. The provision of the New York Code (sec. 132) for the filing of *lis pendens,* is similar to ours, and has

received there the same construction as the English statute. *Lamont v. Cheshire,* 65 N. Y., 30.

It would seem that the purpose of our statute was to assimilate the law of *lis pendens* to the registration laws and the docketing of judgments, and to produce consistency and certainty in the doctrine of constructive notice. There is certainly a great incongruity in the law where the pendency of an action binds a party dealing with the property, though he have no actual notice of the suit, while the same party is unaffected by express notice of an unregistered mortgage, or one defectively registered. While therefore I am of opinion that the policy of the statute would be the better carried out by following the English and New York construction, and holding that *lis pendens* is constructive notice only where the notice has been duly registered in *every* county where the benefit of it is claimed, a different construction has been put upon C. C. P., sec. 90, by two recent decisions of this Court, from which I do not feel at liberty to dissent. *Badger v. Daniel,* 77 N. C., 251; *Rollins v. Henry,* 78 N. C., 342.

It is there held that when the action is pending in the county where the property is situate, it has the force and effect of *lis pendens,* and dispenses with the statute requirement, or rather, that the statute does not apply to such case. It remains to be seen then whether the defendant has placed himself in the condition to claim the protection (242) of *lis pendens.* He certainly has not, unless he has in the pleadings specifically set forth and claimed the benefit of such a plea. That he has not done. All that is said in answer bearing upon this matter is in these words: "That the said Vernoy failed to pay the purchase money secured by said mortgage as it became due, and on the—day of ———, 1878, the said lands were by judgment of the Supreme Court of the State sold to pay said purchase money, and were purchased by one Dennis Simmons, the sale reported to and confirmed by said Court, and a deed to the same executed to him, and that the defendant is in possession of said lands by purchase for value from said Simmons." It is thus seen that the answer of the defendant contains allegation of the pendency of an action for foreclosure at the time of the execution of the mortgage to the plaintiffs, and we are not at liberty to go outside of the record and the defence made in the pleadings to ascertain how the matter was in point of fact.

5. It is further insisted that the mortgage from Vernoy to the plaintiffs was executed to secure advancements to be *thereafter* made, and is therefore inoperative by reason of our registration laws, the object of

these laws being to give notoriety as well to the *extent* as to the existence of mortgages and deeds of trust. This question has been raised twice—*Decourcy v. Barr,* 45 N. C., 181, and *Small v. Small,* 74 N. C., 16. The mortgage is in the form of an agricultural lien upon the crop to be made to secure advances for making it; and then, as a further security for repayment at the time stipulated, of the sum to be advanced, not exceeding sixteen hundred dollars, the mortgage upon the land was executed. Upon this contract the plaintiffs advanced the sum agreed on, over one thousand dollars of which is yet unpaid, and can be collected only by resorting to the mortgage. It is settled that a mortgagee is a purchaser for valuable consideration, and whether the consideration is adequate or not, will not affect the legal title. It was immaterial whether the future payments were secured in the deed (243) or by promissory notes, as they were equally unforceable; and to the extent of the payments made by the plaintiffs before notice of the defendant's equity, the legal title acquired by them will protect and secure them. If after the execution of the mortgage to the plaintiffs and before they had made any part of, or all the advancements stipulated, they had been fixed with notice of the defendant's equity, any advancements subsequently made by them would have been made at their peril; for a naked legal title without an equity arising from being something out of pocket would not have prevailed against the equity of the defendant. But as the plaintiffs were unaffected with notice before they paid out their money, the legal title must prevail as a security for repayment.

6. The case, so far as the plaintiffs are the actors, is the ordinary one of purchasers for valuable consideration without notice, who, having obtained the legal estate at the time of their purchase, are entitled to priority according to the maxim, "where equities are equal the law shall prevail." But from the character of the defense, the action is more like one wherein the defendant is the actor, and seeks to set aside the legal title of the plaintiffs, or to have them declared trustees for his benefit. To succeed in this, however, it was incumbent upon him to do two things,—first, to allege and show that the plaintiffs purchased and acquired the legal title with notice of his equity; and second, to show on his part *an actual purchase for value, fully completed by payment of the purchase money.* He has done neither. His equity is derived through Bond, his vendor, whose unrecorded mortgage we have seen does not operate as notice. His purchase is not fully complete, for he has not paid the purchase money; and having bought under a degree of Court, that tribunal will not require him to pay the pur-

chase money, unless a good title can be made. So in fact the (244) defendant is out nothing and has sustained no injury in legal contemplation. *Basset v. Nosworthy,* 1 Smith, L. C., 1, and notes; *Le Neve v. Le Neve,* 1 S. L. C., 21, and notes.

There is error; judgment reversed, and judgment here according to the case agreed, for the plaintiffs.

PER CURIAM. Judgment reversed.

Cited: Dancey v. Duncan, 96 N. C., 111; *Evans v. Etheridge,* 99 N. C., 43; *Weaver v. Chunn, Ib.,* 431; *Spencer v. Credle,* 102 N. C., 68; *Killebrew v. Hines,* 104 N. C., 182; *White v. Connolly,* 105 N. C., 65; *Duke v. Markham, Ib.,* 131; *Collingwood v. Brown,* 106 N. C., 362; *Southerland v. Fremont,* 107 N. C., 565; *Long v. Crews,* 113 N. C., 257; *Williams v. Kerr, Ib.,* 309; *Wallace v. Cohen,* 111 N. C., 107; *Quinnerly v. Quinnerly,* 114 N. C., 147; *Perry v. Bragg, Ib.,* 164; *Barrett v. Barrett,* 120 N. C., 129; *Blalock v. Strain,* 122 N. C., 285; *Bernhadt v. Brown, Ib.,* 591; *Hatcher v. Hatcher,* 127 N. C., 201; *R. R. v. Stroud,* 132 N. C., 415; *Morgan v. Bostic, Ib.,* 750; *Lance v. Painter,* 137 N. C., 250; *Wood v. Tinsley,* 138 N. C., 510; *Allen v. Burch,* 142 N. C., 527; *Johnson v. Lumber Co.,* 147 N. C., 250; *Cozad v. McAden,* 148 N. C., 13; *Piano Co. v. Spruill,* 150 N. C., 169; *Timber Co. v. Wilson,* 151 N. C., 157; *Smith v. Fuller,* 152 N. C., 13; *Bank v. Flippen,* 158 N. C., 335.

Dist: Hinton v. Leigh, 102 N. C., 28; *Gordon v. Collett,* 107 N. C., 362.

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*JOHN L. BROWN, Trustee, v. MERCHANTS & FARMERS NATIONAL BANK, and others.

Debt Secured by Separate Deeds of Trust—Right to Distributive Shares.

1. A debt secured by separate deeds of trust, executed at different times, by persons liable therefor, is entitled to share *pro rata* on the full amount of the debt as it existed when such securities were given, in the distribution of the money arising therefrom, until the debt is satisfied.
2. In such case the debtors are alike bound to the creditor for the entire amount of the debt and their relations with each other as principal and surety can not impair the essential right of the creditor to be paid out of the assigned estates.

ACTION, tried at Fall Term, 1877, of MECKLENBURG, before *Kerr, J.* This action was brought by the plaintiff as trustee of McMurray &

*BYNUM, J., did not sit on the hearing of this case.

Davis against the Merchants & Farmers, the Traders, and the First National banks of Charlotte, asking the Court to direct (245) the proper distribution of funds in his hands among the trustors' creditors.

The complaint sets out in substance that on 7 June, 1875, McMurray & Davis being unable to meet their liabilities made a conveyance of all their partnership effects to the plaintiff in trust for the benefit of all their creditors who should prove their debts and accept the provisions of the trust, and in pursance thereof, debts were proved to the amount of about $150,000.

Among the creditors who proved their debts was the defendant, the Merchants & Farmers bank, to which the trustors had on 28 December, 1874, executed a note for $3,000 at 60 days, with Grier & Alexander as sureties, which note was discounted by the bank and became its property. On 8 March, 1875, Grier & Alexander made an assignment for the benefit of their creditors, *pro rata,* which was accepted by said bank, with the understanding that the bank was not to release McMurray & Davis from liability upon said debt, or Grier & Alexander from the liability growing out of their relation as sureties on the same, and was not to look to any subsequently acquired property for payment. In pursuance of said agreement the assignee of Grier & Alexander paid to said bank forty-five and a quarter per cent. of said debt, amounting in the aggregate to $1,357.50.

The facts in reference to the Traders bank, also creditors of said trustors, were, that Grier & Alexander executed three notes amounting to $8,000 which were endorsed by McMurray & Davis and discounted by said bank and became its property. And the assignees of Grier & Alexander under the assignment aforesaid paid on said debt the said per centage, amounting in the aggregate to $3,620, which was accepted by the bank with the understanding and agreement between it and Grier & Alexander and McMurray & Davis, that said payment was to operate as a discharge of the debt so far as Grier & Alex- (246) ander were concerned, but should not in any way affect the liability of McMurray & Davis on the same.

The trustee has received about $65,000 of the trust fund, of which he has paid to all the creditors proving claims a dividened of 45 per cent., except the defendants, the Merchants & Farmers and the Traders' banks, who now set up their claim against the plaintiff for the payment of a like dividend on the total amount of their debts, regardless of the payment by the assignee of Grier & Alexander as aforesaid. The assertion of said claim was resisted by the defendant, the First

National bank (upon proof of whose claim, it was recognized by the plaintiff as one of the trustors' creditors), and all the other creditors of the firm of McMurray & Davis in like interest with it.

By reason of these conflicting interests and complications growing out of the same, the plaintiff submits to the direction of the Court, and asks for such order as may enable him to disburse the trust funds according to law.

His Honor held that the Merchants & Farmers, and the Traders bank were entitled to a *pro rata* distribution of the fund on the whole amount of their respective claims against McMurray & Davis, and directed the plaintiff to disburse accordingly, from which ruling the First National bank appealed.

Mr. A. Burwell, for plaintiff.

Messrs. Wilson & Son, Shipp & Bailey, C. Dowd, J. E. Brown, and *R. Barringer,* for defendants.

SMITH, C. J. On 8 March, 1875, Grier & Alexander made an assignment of their property in trust to secure *pro rata* all their creditors. The deed contains a provision that the creditors thus secured should accept the appropriation and not look to any future acquisi-
(247) tions of the firm for further payments, but their liability should remain unimpaired for the enforcement of a debt due by McMurray & Davis on which they were bound as sureties. On 7 June following, McMurray & Davis becoming insolvent also conveyed their partnership effects to the plaintiff for the benefit of such of their creditors as should prove their debts and accept the provisions made in their behalf. Both assignments were accepted by the creditors on the terms set out in the respective deeds. There are two debts secured in both assignments, in one of which one firm is principal and the other endorser, and in the other their relations are reversed. The debts are: (1) A note executed 28 December, 1874, at 60 days, for $3,000 by McMurray & Davis, and endorsed by Grier & Alexander to the defendant, the Merchants' & Farmers' National Bank of Charlotte. (2) Three notes in the aggregate sum of $8,000 made by Grier & Alexander, and endorsed by McMurray & Davis to the defendant, the Traders' National Bank of Charlotte. The assignees of Grier & Alexander in distributing the trust funds have paid to the Traders' National Bank the sum of $3,620, a dividend of forty-five and a quarter per centum on the debt, and this money was received with the express understanding that the bank should not thereby be prejudiced in its claim against McMurray & Davis, nor in any remedy it might pursue against them. No payments were made

from any source upon the debts provided for in the assignment of 8 March, 1875, before the assignment of McMurray & Davis was made, and the dividend was long afterwards.

The question upon which the advice and direction of the Court are asked is this: Shall the two debts secured in both deeds share for their full amount in the distribution of the trust funds of McMurray & Davis, or shall they be reduced by the sums received from the (248) assignees of Grier & Alexander, and the residue only draw its ratable part?

The complication which might grow out of the peculiar and exceptional provisions contained in the deeds are waived by the parties and need not enter into our consideration. We have been aided by the arguments and researches of counsel to the results of which our own investigations have contributed but little, and cases cited are mostly to be found in the reports of our sister State of Pennsylvania. With the instruction furnished by them, and under the guidance of acknowledged principles of equity, we proceed to examine the question.

Divested of unnecessary surroundings the case is simply this: Debts are secured by separate assignments made by different persons liable for them. The trust funds together are sufficient to pay a certain per centum on the whole amount. Shall the creditors receive their full dividents, or does the law *instanter* upon the execution of the first assignment apply their share of the estate conveyed, when afterwards ascertained in value, to a part payment of the debts, and the unpaid residue become the debt provided for in the second assignment? It is plain if the assignments were made at the same moment, no such consequences would follow. Is the rule for distribution changed when they are executed at different dates? The equitable principle by which a creditor, secured in the funds, may be compelled by a creditor secured in one only to seek satisfaction first out of that fund on which the latter has no claims, is but a method of more effectively appropriating the debtor's property to the payment of his own debts, and does not apply when the funds are provided by different debtors. The creditors here have a double security for the same debts, and we know of no principle by which they can be restrained from resorting to either and to both and taking full *pro rata* dividends from each until their debts have been paid. (249) To sustain this right of the creditor we will refer to some of the adjudications on the subject.

In *Morris v. Olivine,* 22 Penn. St. (1860) 441, it is held that a creditor having a bond and notes secured by mortgage may, nevertheless, in the first instance seek satisfaction of his debts out of the personal estate

of the debtor which has been assigned for the benefit of all his creditors, and it is declared that if he had proceeded under his mortgage and collected part of his claim, he would have been still entitled to a dividend out of the assigned estate on the whole unreduced debt until it was paid in full. So in *Miller's appeal*, 31 Penn. St., 481, it was decided that when the debtor made a general assignment of his estate for the benefit of his creditors, and, became afterwards entitled to a legacy which was attached and recovered by a creditor he was nevertheless entitled to a full share of the assigned estate without reduction by reason of an appropriated legacy. In this case STRONG, J., now an Associate Justice of the Supreme Court of the United States, says: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors and each creditor owned such a proportionate part of the whole, as the debt due him was of the aggregate debts;" and that "the reduction of the debt after the creation of the trust and after the ownership had become vested it would seem, must be unimpaired."

In *Bair and Shank's appeal*, 69 Penn. St., 272, it is decided that when a debtor conveys his property for the benefit of his creditors and becomes insolvent, a surety who afterwards pays one of the debts is subrogated to the rights of the creditors, and may recover a full dividend from his principal's estate. In *Brough's case*, 71 Penn. St., 460 (1872) Brough being indebted to Hinchman gave him a note with an endorser, and deposited at the same time a note of one Gobley as collateral security for (250) the debt. Brough afterwards made an assignment for the benefit of his creditors, and the endorser made several payments on his note. In the distribution of Brough's estate, Hinchman was declared to be entitled to a dividend on the entire debt, and until he was paid the endorser could get nothing. "Hinchman," says the Court, "became equitable owner of a portion of the assigned estate under the assignment which could not be dismissed by payment of the collaterals. He had two funds or securities for the payment of his claim—the assigned estate, and the notes transferred to him as collateral—and he has a right to exhaust both if necessary to satisfy his debt against Brough."

The doctrine deduced from the cases is that a creditor may have many securities for the same debt, and yet the debt remain undiminished in amount, and that the possession of one security is not a reduction of the demand. But in *Miller's estate*, 82 Penn. St., 113 (1876) the very question before us was decided. The facts of this case were these: John Miller executed a note which Amos Miller endorsed to Bair and Shank for $3,000. John Miller afterwards made a conveyance of his property

to secure his creditors, and still later on 24 October, 1872, Amos Miller made a similar assignment. The Court below held that in distributing the estate of Amos Miller, the surety, the debt of John Miller, the principal, must be reduced by the value of the share of his estate applicable to the debt. This judgment was reversed on appeal, and WOODWARD, J., delivering the opinion, says: "Upon authority the rights of appellant would seem clear. They would seem clear also in view of a principle so simple and palpable as to be obvious to the plainest comprehension. If the estates of the two debtors had been adequate to the purpose, the appellants had a right to demand payment of their debt in full, that is, if each estate had been large enough to pay a dividend of fifty per cent, the dividend from both if apportioned to it, would have (251) satisfied the claim. By the rule which was adopted by the Court below, if John Miller's estate had paid fifty per cent., and a dividend of fifty per cent. had been subsequently declared on Amos Miller's estate, the appellants would have been confined to a *pro rata* distribution on the balance remaining due, and one full quarter of their claim would have been left unpaid. Surely a rule that would so divert funds admittedly adequate as to make the satisfaction of an uncontested debt impossible, would be neither safe, nor sound, nor just." Not dissimilar is the doctrine enunciated in the *Warrant Finance Co.'s case,* in 1869, 5 Ch. Appeal Cases, 86.

The Warrant Finance Co. held unpaid bills of exchange of large amount drawn upon and accepted by the Contract Corporation and endorsed by the Joint Stock Discount Company. The Contract Corporation and Joint Stock Discount Company were in process of liquidation, and the Warrant Finance Co. proved its debt for the full amount against both. It had already received from the estate of the acceptor to the amount of 4s. 6d. on the pound, and from that of the endorser 15s. 6d. on the pound. It was proposed to continue to prove against the estate of the Joint Stock Discount Company until certain arrears of interest were paid. It was decided that the Warrant Finance Company had a right to receive dividends on its full debt until it was paid.

"When a creditor," says STORY, "has a right to resort to two persons who are his joint and several debtors, he is not compellable to yield up his remedy against either, since he has a right to stand upon the letter and spirit of his contract, unless some supervening equity changes or modifies his rights." 1 Story Eq., sec. 645. To the same effect is *Thompson v. Spittle,* 102 Mass., 211. It is therefore manifest that successive securities for the same debt from one or from several

(252) persons do not diminish its amount, and it is entitled to share in the distribution of the moneys derived from either of them, as it existed when such security was given. An assignment vests in the creditor as an equitable owner, a share of the estate assigned, corresponding with his claim, and this share is not subject to reduction by subsequent appropriations or payments, when the estate or its proceeds are to be divided.

Let us examine and see what would be the practical operation of the contrary doctrine applied to the facts of this case. It is clear that the $3,000 note due the Farmers' and Merchants' bank, on which Grier & Alexander are sureties only, if paid out of their effects, would nevertheless come in for a full share of the estate of McMurray & Davis, the principal debtors. The surety whose estate pays, is at once subrogated to the rights of the creditor as to the sum paid, and thus the unpaid part would remain the property of the bank, and the part paid would belong to the surety. But as both principal and surety owe the entire debt to the creditor, he would be entitled also to receive the part accruing to the surety as well as to himself out of the principal debtors' estate. The surety can take no part of this estate while the debt itself remains unpaid, and is allowed afterwards, as the substituted creditor for the sum paid, to share in the general distribution. The bank would therefore in this case take a dividend upon the entire debt from such estate, while the $8,000 debt due by Grier & Alexander themselves would be diminished by the sum received from their estate, and the residue only be permitted to participate in the division of the estate of McMurray & Davis. In consequence, the two creditor banks holding claims against the *same debtors* and equally secured in the *same deeds,* would not receive proportionate shares of their respective debts out of the common fund, an injustice forcibly pointed out in the illustration in *Miller's* case of the practical working of such a rule. Such a construction

(253) is entirely inadmissible in giving effect to instruments whose professed purpose is to make an equal and undiscriminating provision for all the assignor's debts. The debts are alike bound to the debtors for the entire amount of the debts, and their relations with each other, as principal and surety, can not impair the essential rights of the former to be paid out of the assigned estates. Both upon reason and authority then we hold that the trust funds in the plaintiff's hands must be distributed among the secured creditors according to the amounts due at the date of the assignment to each creditor, and no under-claim be made by reason of payments made, or which ought to be made, from the estate of Grier & Alexander. Upon this expression of our opinion,

we suppose the settlement can be, more conveniently to the parties, made in the Court below, and we therefore affirm the judgment and remand the cause for further proceedings therein.

PER CURIAM. Judgment affirmed and case remanded.

Dist.: Bank v. Alexander, 85 N. C., 352; *Winston v. Biggs,* 117 N. C., 207; *Voorhees v. Porter,* 134 N. C., 600; *Chemical Co. v. Edwards,* 136 N. C., 77; *McIver v. Hardware Co.,* 144 N. C., 491.

STEPHEN H. MORRIS v. AMOS PEARSON.

Trust Deed—Consideration—Fraud.

(254)

A deed in trust made to secure several debts of which one is feigned and fraudulent and the others valid, will be sustained for the benefit of the true creditors, but is inoperative as to the fraudulent claim: *Provided,* that neither the trustee nor the true creditors have connived at the insertion in the deed of such fraudulent debt.

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

The case states that in January, 1866, one Robert Williams executed to the plaintiff, who was his brother-in-law, a deed in trust conveying the land in dispute to secure the debts therein mentioned, to wit, one debt of $2,000 to Polly Morgan, the mother of the grantor, one note for $500 in favor of S. H. Morris, one for $625 in favor of John Morris, being the purchase money for the land, and other small claims amounting to about $80. It appeared from the evidence that the debt secured in favor of Polly Morgan was feigned and without consideration. The validity of the other debts was not questioned. There was no evidence of any combination or collusion between the persons holding the valid debts and Polly Morgan; or between them and the grantor for the benefit of the grantor or for any other purpose; or that the trustee or any of the parties interested had any knowledge of the intention of said Williams to make a deed in trust until after the execution thereof; nor was there any evidence of any agreement between the grantor and Polly Morgan, or that she knew of the execution of the deed. The deed was registered in January, 1866, but was not signed by the trustee, nor was he present at the time it was written.

And in June, 1866, the said Williams executed a second deed in trust to James W. Davis conveying said land to secure the debts therein set

forth, to said Davis and others, the validity of which was not questioned, and also one of $200 to said Morgan, which was feigned
(255) and fraudulent. This deed was registered in July, 1866.

The trustee, Davis, sold the land in December, 1866, to Henry Harris, and by successive deeds of conveyance the title came to the defendant, against whom the plaintiff brought this action to recover possession.

The Court charged the jury that if the debt to Polly Morgan secured in the deed to plaintiff was fraudulent, the deed was void as to creditors, notwithstanding there were *bona fide* debts included. Plaintiff excepted.

The defendant's counsel requested the Court to charge that where there are two fraudulent grantees, the one in possession is entitled to retain possession as against the other; which was given, and the plaintiff excepted.

The plaintiff's counsel then asked the Court to charge, that even admitting the debt in favor of Morgan to be feigned and fraudulent, still if the other debts were valid and there was no combination or connection between the creditors to whom the true debts were due and the grantor or person for whose benefit the freigned debts was intended, or between the grantor and trustee, the deed would not be fraudulent, and the plaintiff would be entitled to recover; which was refused and the plaintiff excepted.

Under the ruling of the Court the jury rendered a verdict for the defendant. Judgment. Appeal by plaintiff.

Messrs. Connor & Woodard and *Busbee & Busbee,* for plaintiff.
Mr. E. G. Haywood, for defendant.

RODMAN, J. The only question which it is necessary to decide in this case is this: Whether the deed made by Williams to the plaintiff was void because it attempted to secure a fictitious debt to Polly Morgan, the other debts secured being valid and *bona fide* and when neither the trustee (the plaintiff) nor any of the creditors provided for, par-
(256) ticipated in, or had any knowledge of the fraudulent purpose of the grantor?

The defendant purchased for value, but he can not say that he purchased without notice, for the registration of the deed to the plaintiff was notice. That is the principal purpose and policy of the registration acts. As the question is of practical importance and likely often

to occur, and there is a difference among the authorities, it is necessary to consider them with some care.

The first case in this State that is usually cited as bearing on it is that of *Hafner v. Erwin,* 23 N. C., 490. (June, 1841.)

It is said in the head note to decide that if a part of the consideration of a deed is fraudulent as to creditors, the whole deed is void. No doubt that is a correct statement of the law, but it is not an accurate deduction from the case. And the case has sometimes been supposed to decide that if any one of the debts secured in a deed is fraudulent as to creditors, the whole deed is void. It will be seen on an examination of the case that nothing of that sort could have been, or was decided, and there is not even a dictum to that effect.

Dwight made a deed in trust to secure debts, all of which were *bona fide.* There were circumstances in evidence tending to prove that the deed was not made *bona fide* to secure the debts provided for, but for the purpose of hindering and delaying the collection both of those and other debts.

The case was tried before *Pearson, J.,* whose instructions to the jury were as his always were—lucid and to the point. He left the question of fraud to the jury, who found for the plaintiff, thereby negativing any fraud in fact. The opinion of this Court was given by GASTON, J., and a new trial was ordered upon the ground that the Court below had erred in refusing to instruct the jury as requested by the defendant, "that if there was an understanding between Dwight (the (257) grantor) and the plaintiff (the trustee) that the deed should be kept secret and not registered unless the other creditors made a fuss, the deed would be fraudulent," and in saying "that such an understanding would not make the deed fraudulent, for until it was registered it created no lien, and could not be in the way of others." In reference to this, GASTON, J., says that the principle of the decision of the Court is, that the *whole purpose* of the parties to the conveyance must be the devotion of the property *bona fide* to the satisfaction of the preferred creditors, and no part of that *purpose,* the hindering and delaying of creditors except so far as it is the unavoidable result of the preference given; and that an agreement to keep the deed secret and not register it, etc., was evidence of a fraudulent purpose. This was the only point decided in the case.

The next case was *Brannock v. Brannock,* 32 N. C., 428, in 1849. Ejectment. The plaintiff purchased the land at a sheriff's sale upon execution against one Thompson; the defendant claimed under a deed made to him by Thompson in trust to secure debts, some of which were

usurious and others *bona fide* and just. The Court affirmed the judgment below for the defendant; PEARSON, J., delivering the opinion of the Court, refers to *Shober v. Hauser,* 20 N. C., 91, in which it had been held that deed to secure a single usurious debt (no other debt being secured) was *void,* and that an innocent purchaser from the trustee acquired no title, and says:—

"If a contract be made on *several considerations,* one of which is illegal, the whole contract will be void." Just above the sentence quoted he says: "If a bond secures the performance of several *convenants or conditions,* some of which are legal and the others void, it is valid so far as respects the conditions which are legal, provided they may be be separated from and are not dependent on the illegal." He (258) further says:

"Here the consideration which raised the use for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals, and in no way connected with or dependent on one another. The deed is valid, so far as respects the good debts."

The question decided in the above case came again before the Court in June, 1850, in *Harris v. DeGraffenreid,* 33 N. C., 89. It differed from *Brannock v. Brannock,* in this, that whereas in that case one of the debts was void for usury, in this case one of the debts secured in the deed was in part fictitious, and was inserted by an arrangement between the grantor and creditor with a view to save the land for the grantor's family. The plaintiff was a purchaser for value and *bona fide* from the grantor after the registration of the deed in trust. The Court affirmed the judgment of the Court below for the defendant, who purchased at the sale by the trustee.

It is assumed that there is no difference affecting the question between a debt void for usury, and one void as to creditors, etc., as being voluntary. *Brannock v. Brannock* is cited as controlling the decision. One observation of RUFFIN, J., who delivered the opinion of the Court, is worth noting in connection with our case; it is to the effect that the plaintiff might recover the price he paid, out of the sum raised by the trustee on his sale, to the extent of the fictitious part of the debt secured to Perry.

The next case in order of time is *Stone v. Marshall,* 52 N. C., 300. December Term, 1859. The plaintiff claimed certain slaves and other personal property under a deed made to him by one Stoker to secure debts, some of which were just and others fictitious, and inserted for the purpose of benefiting the grantor. But the trustee had no knowledge of such intent, or of the fictitious character of the debts. The de-

fendant was a sheriff and claimed the property under a levy (259) made by him under a judgment recovered after the registration of the deed in trust. A jury in the Court below on the instruction of the presiding Judge found for the plaintiff, and this Court reversed the judgment. The learned Judge who delivered the opinion of this Court, after stating correctly the effect of one illegal or fraudulent consideration as vitiating the whole deed, proceeds to say: *"In the assignment to pay debts, the debts secured form the consideration for the deed."* And again: "Every conveyance with the *intent* to delay, etc., is void by the statute. The *intention* of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covenous, the *intent* is necessarily so." If these propositions can be maintained as law, the decision is right, and *Brannock v. Brannock,* and *Harris v. DeGraffenreid,* are wrong. In support of them His Honor cited *Hafner v. Erwin,* 23 N. C., 490; *Flynn v. Williams,* 29 N. C., 32, and *Rathburn v. Platner,* 18 Barb. (N. Y.), 272.

It has been seen how far *Hafner v. Erwin* applies. In *Flynn v. Williams* but one debt was secured, and that was found to be fraudulent, and the deed was admitted to be void, as to the life estate which the grantor had at the execution of the deed, but the plaintiff contended that it was not void as to the fee which afterwards came to the grantor. In the case from New York all the debts secured were *bona fide,* and it seems to have been proved by facts *dehors* the deed, that it was made with a fraudulent intent by the grantor, and the question discussed by the Court, was, whether this fraudulent intent in the grantor, although not participated in by the trustee or the secured creditors, vitiated the deed; and the decision was that it did. None of these cases resemble the present, or *Stone v. Marshall,* in the important fact that some of the secured debts are good, and some bad.

If we examine the proposition of the learned Judge, we think it will appear that he has confounded the *consideration* of a (260) deed, with the intend or *purpose of making it.* The latter is sometimes, especially in works on equity, spoken of as if it was the consideration, but in accurate technical language, the consideration is the immediate present compensation which the grantor receives, be it real or nominal, and which is necessary in deeds of bargain and sale to raise an use; and not the remote purpose which the bargainor may have in mind which is manifested by the uses or trusts declared. This distinction appears in 2 Shepherds Touchstone, 510, 511, and even more expressly in *Jackson v. Hampton,* 30 N. C., 457 (August Term, 1848), where it was held that a deed to secure valid debts, if no other

consideration appeared, was void; in other words, that the purpose of the deed as declared, was not such a consideration as was necessary to support it. See also *Springs v. Hanks,* 27 N. C., 30, and *Blount v. Blount,* 4 N. C., 389, in which a grantor had undertaken to convey land to an illegitimate child, yet as no valuable or good consideration appeared, the deed was held insufficient. These cases are not cited to show that a consideration is *now* necessary to a deed. The contrary was decided in *Hogan v. Strayhorn,* 65 N. C., 279. But they do establish that in the opinion of this Court at least up to 1859, the purpose of a deed, as to pay the debt of the grantor, etc., can not properly be spoken of or regarded as the consideration of the deed.

In this respect and as to this proposition the cases of *Brannock v. Brannock,* and the others coinciding with it, are irreconcilable with *Stone v. Marshall.* And the proposition as to which of the cases contradict each other is not in either of them a *dictum,* but is in each the proposition on which the decision depends, or as it is called the *ratio decidendi.*

Since *Stone v. Marshall,* several cases have been decided in this Court, involving more or less directly the question decided in (261) that. It is unnecessary to do more than merely to cite some of these. *Carter v. Cocke,* 64 N. C., 239; *McNeill v. Riddle,* 66 N. C., 290; *Trustees v. Satchwell,* 71 N. C., 111.

In this conflict between the decisions of this Court, which merely as decisions are equally entitled to our following, we are obliged to look to the opinions of learned authors and the decisions of other Courts, and with the exceptions of some decisions in New York which I have found referred to, but have not been able to examine, they will be found unanimously to support our cases of *Brannock v. Brannock; Harris v. DeGraffenreid,* and *Jackson v. Hampton.*

The doctrine is fully and clearly discussed, and the older cases cited, in Metcalf on Contracts 246; and I may be pardoned for a somewhat long citation from a book of such eminent merit:—

"It has heretofore been mentioned that if one of two considerations of a promise be *void* merely, the other will support the promise; but that if one of two considerations be unlawful, the promise is void. When, however, the illegality of a contract is in the act to be done, and not in the consideration, the law is different. If, for a legal consideration, a party undertakes to do two or more acts, and part of them are unlawful, the contract is good for as much as is lawful, and void for the residue.

Wherever the unlawful part of a contract can be separated from the rest, it will be rejected and the remainder established. * * *

But it was asserted until it became a maxim, that if any part of an agreement be contrary to a statute, the whole is void. This distinction seems to stand on no sound principle, and upon examination will not be found as a general rule to be supported by authority." The cases cited fully sustain the author. 2 Chitty Contr., 973, 11th American edition, is to the same effect.

In 1 Jones Mortgages, sec. 620, it is said: "Where the consideration of a mortgage is made up of several distinct trans- 262) actions, some of which are legal and others are not, and the one can be separated with certainty from the others, the mortgage may be upheld for such part of the consideration as was free from the taint of illegality."

In Bump Fraud. Conveyances, 385, under the heading of *Fictitious Debts:* "An appropriation of the property to the payment of debts not owing by the assignor, and not contracted on his account, or for a larger sum than is due, to the prejudice of his creditors is evidence of fraud. This will not, however, make the assignment void, unless the assignee participates in the fraud."

In *Hardcortee v. Fisher,* 24 Mo. 70: (1856) "We think it pretty well settled by the course of decisions in this State in reference to a voluntary assignment, that the fraud of one or more of the creditors does not defeat it altogether, and render it wholly ineffectual in favor of the others and we are not disposed after reconsidering the matter to change the course of adjudications on this subject. The Courts of Virginia, North Carolina and Alabama have taken the same view," citing *Brannock v. Brannock,* and *Harris v. DeGraffenreid.*

In *McIntosh v. Corner,* 33 Md. 598, 607: But it by no means follows that because some of the perferred debts may be fraudulent, and therefore void, that the assignment itself should be declared a nullity. Some of the debts claiming priority of payment may be founded in fraud, and still the general assignment be good as to all debts that are *bona fide." Fedman v. Gamble,* 26 N. J., Eq. 494; *Careton v. Woods,* 28 N. H., 290.

In the present case we think the deed to the plaintiff was not void by reason that it secured a fraudulent debt. Although the trustee can not appropriate any part of the fund to the payment of that debt, yet the deed is a valid security for the good debts (263)

There is error in the ruling of the Judge below.

PER CURIAM. *Venire de novo.*

Cited: Savage v. Knight, 92 N. C., 493; *Woodruff v. Bowles,* 104 N. C., 197; *Blair v. Brown,* 116 N. C., 644; *Ballard v. Green,* 118

N. C., 392; *Commission Co. v. Porter,* 122 N. C., 698; *Jordan v. Newsome,* 126 N. C., 556; *Sutton v. Bessent,* 133 N. C., 563; *St. James v. Bagley,* 138 N. C., 389.

STATE, on relation of ELIJAH HEWLETT v. HENRY NUTT.

Tax Upon Suits—Failure of Clerk to Account—Liability of Surety on Official Bond—Action for Penalty—Statute of Limitations—Parties.

1. The tax prescribed by Rev. Code, ch. 28, sec. 4, on indictments, civil suits, etc., is not a tax within the meaning of the revenue act of 1858-'9, which repealed all taxes not therein imposed; nor is it a tax within the meaning of the Constitution, Art. V, sec. 3, which requires taxes to be equal and uniform.
2. Such tax is not in violation of the Constitution, Art. I, sec. 35.
3. A Superior Court clerk, who collects taxes upon suits, to an amount unauthorized by law, is nevertheless bound to account for the same to the proper county officer; and a surety upon his official bond is liable for his failure to do so.
4. An action against a clerk for the penalty of $500, prescribed by Rev. Code, ch. 28, sec. 7, if not brought within one year, is barred by the statute of limitations under C. C. P., sec. 55.
5. The county treasurer is the proper plaintiff in an action on the bond of a Superior Court clerk to recover money collected by him as taxes on suits.

APPEAL at Spring Term, 1878, of NEW HANOVER, from *Eure, J.*

This action was brought by the relator as treasurer of New Hanover county, against the defendant as surety upon the bond of (264) one James C. Mann, clerk of said Court. It was alleged that said clerk had failed to account to plaintiff in a certain sum due as a tax on sundry judgments rendered in civil actions in said Court. The material allegations in the complaint were denied, and the defendant pleaded the statute of limitations. The case was subsequently referred for an account, and the referee reported, that Mann was clerk of said Court from August, 1869, to September, 1874, and as such, during that period, in eighty civil actions, he taxed in the bill of costs, and collected the sum of two dollars in each case, and the same was received by him for the county treasurer, but not paid over to him.

Upon the pleadings and the facts as found, the Court gave judgment for the defendant, and the plaintiff appealed.

Mr. D. L. Russell, for plaintiff.

Messrs. Merrimon, Fuller & Ashe, for defendant.

READE, J. "On every indictment or civil suit * * * the parties convicted or cast shall pay a tax of one dollar, and in every suit in equity, a tax of two dollars." Rev. Code, ch. 28, sec. 4. By the same statute, "all fines, amercements, forfeitures and taxes on suits," are appropriated for the purpose of defraying the cost of State prosecutions, and the contingent expenses of the county. And it is made the duty of the clerk to report all such taxes, fines, forfeitures and amercements, and to account and pay them over to the proper officer. Under this statute the clerk collected the amount of taxes on civil suits reported, and failed to account for or pay it over.

The defendant, who is surety for the clerk on his official bond, objects to paying the taxes on civil suits collected by the clerk:—

1. Because the statute under which he collected them had been repealed, so that he did not collect them by virtue or under color of his office, or by authority of law. The foundation for their de- (265) fense is the general revenue act of 1858-'59, which repeals all taxes not therein imposed; and this being a tax on suits, it is repealed. This defense will not avail the defendant, because the tax on suits is not the kind of taxes embraced in that revenue act. Indeed it is not a tax at all in the sense that public taxes are understood. It is a part of the bill of costs taxed by the clerk to be paid by the unsuccessful party in every suit to pay the expenses of the Court, the aid of which he has wrongfully invoked at the public expense. The fact that it is called a *tax* makes no difference. Tax is a familiar and appropriate term in judicial proceedings. The fees of clerks, sheriffs, witnesses, referees, lawyers, are all taxes upon the losing party, and are "taxed" by the clerk as the costs. The Court orders the costs to be *"taxed"* by the clerk, and to be paid as taxed. A motion to retax a bill of costs is common. The statute directs costs to be *taxed* by the clerk. "The prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements to be *taxed* according to law." Bat. Rev., ch. 17, sec. 287. So an attorney's fee is taxed, and if an attorney take a larger "tax-fee" than allowed by law, he shall be indicted, etc. In the very case before us His Honor directed the plaintiff to pay the costs to be "taxed by the clerk." And one of the definitions of "tax" in Webster is,—"to assess, fix, or determine judicially, as the amount of costs on actions in Court; as the Court taxes bills of costs." We are of the opinion that the revenue act of 1858-'59, or any like act, does not embrace the tax in question on suits, unless specially mentioned.

2. The second ground of defense is that the statute in question is

made void by our present constitution which requires taxes to be equal and uniform. The answer is as above, that this is not the kind
(266) of tax embraced in the constitution.

3. The third ground of defense is that the constitution requires that the Courts shall be open to suitors, and that its spirit is, that suits shall not be burdened; but that the power of tax is the power to destroy. This is an extreme position and if allowed would forbid any costs in suits at all. And besides, it is not a tax on suits, but upon the losing party in a suit, and is not an unreasonable *penalty* for his false clamor. It will be observed that it is classed in the statute with fines, penalties and amercements.

4. The fourth ground of defense is that the tax on suits being without authority of law, the clerk collected them in his own wrong, and not by virtue or color of his office, and therefore the defendant, his surety, is not bound. This is answered by what we have said, that the statute authorizing the tax is in full force. But if it were not, the Courts would not patiently hear the defendant controvert the authority of a statute which he assumed to be in force, and under which he received money for the public, and refused to pay it over.

5. The fifth ground of defense is that the $500 penalty for not paying over is barred by the statute of limitations—one year. We are of opinion that this objection is well taken. C. C. P., sec. 35.

6. The sixth ground of defense is that the clerk collected two dollars tax on each suit, whereas he ought only to have collected one dollar. We suppose this was done upon the idea that all actions are now "equity suits," upon which the tax was two dollars. How this is, we will not stop to inquire. The defendant clerk, *as clerk*, collected the tax by virtue of his office under a not unreasonable construction, which he put upon the statute, and it is just that the defendant should pay it.

7. The seventh ground of defense is that the county treasurer is not the proper person to sue. The statute expressly provides
(267) that the money shall be paid to him, and that he shall account for it. Bat. Rev., ch. 30, sec. 8. And the rule is that he to whom money is payable, may sue for it to compel payment. It is true that there is also a provision, sec. 9, that if the county officers who are required to pay the treasurer will not do so when he calls on them, which he is required to do at least twice a year, the treasurer shall report the facts to the board of commissioners, and they may sue. But this does not oust the treasurer of the right to sue if he chooses to do so.

The clerk of this Court will make the calculations from the report

of the referee and report, and there will be judgment here accordingly for the plaintiff. Clerk allowed $5.

PER CURIAM. Judgment reversed.

Cited: Clifton v. Wynne, 80 N. C., 145; *Bray v. Barnard,* 109 N. C., 48.

JOHN BUIE and others v. THE COMMISSIONERS OF FAYETTEVILLE and others.

Taxation—Shares in National Banks.

1. Shares in national banks owned by residents of the State may be assessed for taxation either at the place where the owners reside, or at the place where the bank is located, as the legislature of the State may elect.
2. Under the existing laws such shares must be taxed at the place where the owner or person required to list them resides.

MOTION for an Injunction heard on 27 February, 1878, at CARTHAGE, before *Moore, J.* (268)

The plaintiffs are citizens and residents of this State, and owners of a certain number of shares of stock in the Peoples National Bank of Fayetteville, but are not residents of the town of Fayetteville, nor do they carry on any business in said town. They allege among other things that the defendant assessed their shares of said stock for municipal taxation, and had authorized the town tax collector, the defendant Mallett, to proceed to collect the same—after his term of office expired—under the tax list for 1876, who had levied upon certain personal property to secure payment of the same, and had advertised it for sale; and upon their application an order was granted by *Buxton, J.,* restraining the defendant corporation from further proceeding.

The defendants alleged among other things that under their charter they had the power to tax for municipal purposes all such subjects of taxation as are taxed by the State, and that their tax collector had the same powers, and was subject to the same penalities in collecting the town taxes, as was the sheriff in collecting State taxes, and that the amount of tax levied upon the plaintiffs' shares of stock is uniform with the tax upon similar property owned by citizens of the town, and is the same as that made by the township board of trustees.

Upon the hearing, His Honor was of opinion that the assessment of the bank stock of the plaintiffs made by the authorities of the town of

Fayetteville, and all the proceedings had thereon were without authority of law, and granted the motion for an injunction, from which ruling the defendants appealed.

Mr. B. Fuller, for plaintiffs.
Messrs. Guthrie & Carr, and *W. F. Campbell,* for defendants.

SMITH, C. J. In *Kyle v. Comm'rs.,* 75 N. C., 445, it is de- (269) cided that the shares of stock held by non-residents in a national bank can only be taxed in the city or town wherein the bank is located. The decision rests upon the provision in the State constitution by which all property, except such as may be exempted, is required to be taxed, and upon a clause in the act of Congress under which they are formed, permitting the State to impose upon the shares of stock a tax which shall not exceed that levied upon other moneyed capital in the hands of its own citizens, and restricting the tax on non-resident share holders to the town or district in which the bank is located. A State cannot impose a tax upon these corporations as such, nor upon the property and interest of the share holder therein, unless authorized by Congress, and then only in the manner and to the extent allowed. The effect of the act for purposes of taxation is to sever the stock as property from the person of the owner, and to impart to it a new legal *situs,* that of the bank itself. Unless the shares of non-residents are taxed at the place where the corporation is formed, and their dividends intercepted and applied to the payment of the tax, they would be beyond the reach of the taxing power altogether. But by affixing to the property of the non-resident share holder the *situs* of the bank itself, of whose capital his shares represent a part, his interest is subjected to the exercise of the taxing power, and through the corporation, as his trustee, the payment of his tax enforced out of his part of distributed funds.

But another and different question is now presented, not disposed of in the decision of that case. The plaintiffs here are citizens and residents of the State, some of them living in Cumberland, and others in Robeson county, and none of them residing or doing business within the town, so as to subject their persons to its corporate jurisdiction.

They are all liable to State and county taxation on their prop- (270) erty of every kind except lands and farming utensils and other articles used in their cultivation at the places of their actual residence under the laws of the State.

The inquiry now is,—whether the shares of resident stockholders can be assessed and taxed like those of non-residents in the town where

the bank is located and carries on its business. The question will be first considered as affected or controlled by the legislation of Congress:

Soon after the passage of the national bank act, a controversy arose as to the true meaning of the clause which permitted shares to be taxed under State authority "at the place where the bank is located and not elsewhere." In some of the States it was held that the restriction confined the exercise of the taxing power to the town or district in which the corporation conducted its business, while in others it was decided to apply to the State and not to any of its territorial divisions, and that such tax could be assessed upon a resident stock holder at the place of his residence wherever it might be within the State. Burroughs on Taxation, 127, 128; *Austin v. Aldermen of Boston,* 14 Allen 359; *Clapp v. Bushington,* 42 Ver., 579.

The controversy was solved by an amendatory act passed in 1864, declaring the word *"place"* to mean the *"State"* wherein the bank is located. The only restraints imposed upon a State in the exercise of its taxing power over shares in national banks are:—

1. That such tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of its individual citizens.

2. That the tax on shares of non-resident owners shall be imposed in the city or town where the bank is located.

Subject to these limitations, it is left to the legislature of a State to "determine and direct the manner and place of taxing all the shares" of banking associations within its limits. U. S. Rev. Stat., sec. 5219. It follows therefore that a State may prescribe and regulate under the restraints mentioned, as well the place as the manner (271) of making its assessments upon this kind of property according to its own discretion. A reference to some adjudged class will support this view.

In *Bank v. Commonwealth,* 9 Wall. 353, the State of Kentucky levied a tax "on bank stock, or stock in any moneyed corporation of loan or discount, of fifty cents on each share thereof equal to one hundred dollars," and required the cashier of the corporation to pay the tax, and the Court held the enactment to be valid, and said: "If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding in which the bank could be attached or garnisheed and made to pay the debt out of the means of the shareholder under its control. This is in effect what the law of Kentucky does in regard to the tax of the State on bank shares." And the Court further de-

clared that "while Congress intended to limit State taxation to the *shares* of the bank as distinguished from its *capital,* and to provide against discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations and with other moneyed capital, it did not intend *to prescribe to the State the mode* in which the tax should be collected.

In *Tappan v. Bank,* 19 Wall. 490, the validity of an act of Illinois passed in June, 1867, was called in question. That act levied a tax on stockholders in banks formed under the authority of the United States or of that State, "in the county, town or district where such bank or banking association is located and not elsewhere, whether such stockholder reside in such county, town or district, or not." Chief Justice WAITE delivering the opinion says: "The State within which a national bank is situated has jurisdiction for the purposes of taxation *of all the shareholders* of the bank, *both resident and non-resi-*
(272) *dent, and of all its shares,* and may legislate accordingly." The question then before the Court was whether such property was not so annexed to and identified with the person of the owner as to exist only in contemplation of law where the owner was, and (except in case of non-residents expressly provided for in the act) could be made liable to public burdens at any other place. It was decided that a State might tax the stock of its own citizens, as the stock of non-residents was taxed, at the *situs* of the bank; and the Court declined to give an opinion as to whether such tax could be assessed elsewhere in the State.

In *Adams v. Nashville,* 95 U. S. 19, the construction of this clause again came before the Supreme Court, and it was alleged that an exemption, resulting from a statute of Tennessee which declared that no tax should be put on the capital of any bank, state or national, operated to impose a burden upon stock holders in national banks which was not put upon other moneyed capital belonging to individuals, and was in conflict with the provisions of the law. The Court say: "That the act of Congress was not intended to control the State power on the subject of taxation," and that its plain intention "was to protect corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing powers."

The law does not itself require the assessment of any tax upon shares in these associations. It places them under the taxing power of a State which may choose to exercise it, protected however against adverse discriminating legislation. There is no obligation to charge this species of property with the public burden imposed in the act, and if it exists, it

is by virtue of our own constitution and laws which require all property to be taxed, and upon a uniform rule. This brings us to the consideration of our own legislation on the subject. The provisions of the revenue act (Laws 1874-'75, ch. 184) by which the facts of this case are governed, if not inconsistent with the constitu- (273) tion, definitely determine the dispute. Some of these will be cited:—

Sec. 6 requires land and personal property on farms used in cultivating them to be given in in the township wherein the land lies. Sec. 7 requires all other personal property whatever, "including moneys on hand or on deposit, credits, investments in bonds, *stocks in National, State, and private banks,*" etc., to be given in *the township in which the person so charged resides* on the first day of April." Sec. 9 declares that the list of taxable properly shall include (par. 6) "stocks in national and private banks, etc., and their estimated value." So in sec. 11 the cashier of each bank or banking association, whether State or National, is directed to give in to the "board of assessors for the township in which such bank or banking association is situated, all shares of stock composing their corporation, as agent for and in the name of the owners of said shares of stock who may be non-residents, and the desposits of all non-residents."

It is thus apparent that the General Assembly has provided for the taxation of non-resident share holders in national banks at the place of location of the bank, and is not only silent in regard to resident share holders in that connection, but in preceding sections requires all stock of the latter to be listed and taxed at the owner's domicile. As more clearly indicative of the legislative will, the last revenue act directs such cashiers to forward a list of stock holders resident in the several counties to the commissioners of the respective counties in order that this property may not escape taxation.

But it was urged in the argument of defendants' counsel that this method of taxing is not uniform inasmuch as the shares of resident and non-resident stock holders are taxed at different places and necessarily at different *ad valorem* sums, but this is a misconception of the uniformity prescribed. Absolute equality is unattainable in (274) any system of raising revenue. "All persons," in the language of Chief Justice WAITE, in *Tappan v. Merchants' Nat. Bank,* "owning the same kind of property are taxed as he (the complaining share holder) is taxed." It is difficult to see how a tax upon all stock (except that of the non-resident which unless taxed through the association could not be taxed at all) levied and collected at the owner's residence

can be unequal or wanting in uniformity, which, as the Chief Justice in the case cited declares, is but another name for equality. Shares in national banks are assessed upon the same *ad valorem* principle, and pay the same tax as shares in every other moneyed association, and indeed as other forms of property whose locality is that of the owners. The exceptional fact is the addition of property, belonging to non-residents to the volume of taxable property, which in this mode only can be brought within reach of the taxing power. But this does not disturb the uniformity of the system prescribed by the constitution, and under which every person is taxed alike, upon land and such articles as are used in farming at the place where they are; upon other personal estate where the owner resides.

We have examined the cases cited by the defendants' counsel,—*Bank of Columbus v. Hines,* 3 Ohio 1, and *Township, etc., v. Talcott,* 19 Wall. 666,—and do not find them at all in conflict with our opinion as to the uniformity intended in the constitution, but rather in its support. Substantially the same views are expressed in both cases, and we will only refer to what is said in one of them:—

In discussing a clause in the constitution of Michigan directing its legislature to provide a uniform rule of taxation, Mr. Justice SWAYNE uses this language: "The object of this provision was to prevent unjust discrimination. It prevents property from being classified, and taxed as classified by different rules. All kinds of property (275) must be taxed uniformly or be exempt. The uniformity must be co-extensive with the territory to which the tax applies. If a tax, it must be uniform throughout such county or city." Our revenue system is in entire harmony with these views.

We have discussed the subject of State and county taxation because the charter of the town of Fayetteville confers upon its municipal authorities the same powers of taxation, and on the same subjects of taxation within its jurisdictional limits, which the State itself possesses. Nor do we find it necessary to consider the extent of the powers of the defendant, Mallett, as town tax collector, after the expiration of his term of office, to proceed with the collection of taxes.

We are therefore of opinion and so declare, that the shares in National banks owned by residents of this State may be assessed under the act of Congress, either at the place where such owners reside or at the place where the bank is located, as the legislature of a State may elect; and that under existing laws, such shares must be taxed, and can be taxed only at the place where the owner or person who is required to list them, resides. The tax attempted to be enforced against the plain-

tiffs is imposed without authority of law, and is void; and the plaintiffs are entitled to relief by injunction.

PER CURIAM. Judgment affirmed.

Cited: Moore v. Com'rs, 80 N. C., 154; *Belo v. Com'rs,* 82 N. C., 417; *R. R. v. Com'rs,* 91 N. C., 454; *Winston v. Taylor,* 99 N. C., 210; *Wiley v. Com'rs,* 111 N. C., 404; *Com'rs v. Tob. Co.,* 116 N. C., 446.

(276)

J. M. MULFORD v. W. J. SUTTON.

Taxes and Taxation.

An action to recover back an amount of taxes paid under protest, will not lie against a sheriff who collected the same by virtue of a list delivered to him by the register of deeds under the revenue act of 1876-'77, ch. 156, sec. 12, schedule B. Such list has the force and effect of a judgment and execution.

APPEAL from a Justice's Court, heard at Chambers, on 27 October, 1877, in Wilmington, before *Moore, J.*

This was an action by the plaintiff to recover the amount of a certain tax paid under protest to the defendant, sheriff of Bladen county, and the following are the facts agreed upon: The plaintiff is a retail liquor dealer, having been regularly licensed as such by the proper authorities in said county. He bought liquors between 1 January, 1877, and 10 March following (the date of ratification of the revenue act) to the amount of $106.80; and between said last mentioned date and 1 July following, he bought liquor to the amount of $246.57. These purchases were made of wholesale liquor dealers in this State, who had paid the tax required by them as such, upon the liquor sold to plaintiff. The plaintiff listed his purchases before the register of deeds in pursuance of the revenue act of 1876-'77, the register of deeds delivered said list to the defendant sheriff, who collected the amount assessed against the plaintiff upon the whole of said purchases, he paying under protest, and insisting that he was not liable, because the tax had been paid by said wholesale dealers; and that if liable at all, it was only on the amount of purchases made since the ratification of said act. Upon these facts, the Justice gave judgment in favor of the plaintiff for the sum of $10.60 paid the sheriff on the purchases made before 10 March, 1877; but the plaintiff demand- (277) ing judgment for the whole amount paid as aforesaid, appealed

from the ruling of the Justice to the Judge of the district who affirmed the judgment, and the plaintiff appealed to this Court.

Mr. N. A. Steadman, for plaintiff.

Attorney General, for the State, and *Mr. C. C. Lyon,* for the county of Bladen.

FAIRCLOTH, J. There have been numerous discussions and decisions in regard to the right of a tax payer to have the collection of taxes restrained, on the ground that the law authorizing it is illegal, or that the assessments have been illegally or fraudulently made, and the like reasons. In such cases when public policy does not forbid it, and the reasons are manifest and clear, a Court of Equity does often interfere and stop the collection. It became well settled, however, that not even a preliminary injunction to stay the collection of taxes would be granted, until it is made to appear that all the taxes conceded to be due, or which the Court could see ought to be paid, have been paid or tendered without demanding a receipt in full. *Rail Road Tax Cases,* 92 U. S., 575, 617.

It will be observed that the case before us does not belong to the foregoing class of cases. Here, the tax has been paid to the proper collecting officer, and the plaintiff has instituted this action against him to recover back such money as he supposes has been illegally collected.

Under the provisions of Laws 1876-'77, ch. 156, the plaintiff listed his purchases under oath before the register of deeds, who furnished the sheriff, defendant, with said list. The sheriff is required by said act (sec. 12) "to collect from every person on the list furnished (278) him by the register of deeds, the taxes embraced therein."

The plaintiff paid said taxes under protest, and now seeks to recover them from the sheriff, "as money had and received." The principle which governs this case was first established in this State in *Huggins v. Hinson,* 61 N. C., 126. The distinction then made was between taxes collected by virtue of a tax list, and those collected without it. It was held in the former case no action could be maintained against the sheriff for tax money paid under protest, whether the taxes had been legally or illegally assessed and collected; whereas in the latter case such action could be maintained against the collecting officer. This was giving to the tax list the force and effect of an execution in the hands of the sheriff. It became his warrant which he could not disobey, and he was compelled to settle with the State and county

treasurer the amount called for in the list, copies of which were filed in those offices.

Since that decision our several revenue acts have expressly provided that such tax list endorsed by the clerk shall have the force and effect of a judgment and execution against the property of the person charged in such list. Sec. 22. We think the mode *now* prescribed for making up the list is in its effect, as to the defendant, the same as then. Some of the inconveniences of a different rule are noticed in the case above cited, and others will readily occur to any one. The broad door for collusion and delay would stand wide open, and the public service might and probably would be seriously imperiled.

Taxes paid under protest and not collected by virtue of such list, may be recovered back from the sheriff if improperly collected, because he has no authority for collecting any more than is due. He proceeds upon his own understanding of the law, with notice of the protest, and must look to the consequences. (279)

The revenue act provides the modes of relief for the tax payer, in case of mistake or wrong, both before and after the list has been made out and delivered to the sheriff. The plaintiff's relief is through those provisions, and not by this action.

We do not consider the other question discussed here, for the reason that a decision thereon could not benefit the plaintiff nor any one else in this form of proceeding. There is error. The defendant will have judgment in this Court for his cost.

PER CURIAM. Judgment reversed.

Cited: R. R. v. Lewis, 99 N. C., 62; *Davie v. Blackburn,* 117 N. C., 385.

JOHN A. COLLINS v. THE FARMVILLE INSURANCE AND BANKING COMPANY.

Fire Insurance—Construction of Policy—Additional Insurance—Waiver.

1. Where a policy of fire insurance covered a stock of "drugs and medicines," and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fire works, *saltpetre, etc.*": *It was held,* that the prohibition was not against keeping saltpetre as a drug, but only in such manner or quantity or for such purpose as would increase the risk.
2. Where in such case saltpetre was on hand as a part of the stock of drugs at the time the policy issued, being an article usually kept in drug

stores, it was as a part of the stock insured, and although specially prohibited by the terms of the policy, the policy was not there avoided.

3. Where, in an action to recover on a policy of fire insurance, it appeared that at the time of the issuing of defendant"s policy, additional
(280) insurance upon the property was taken out by the plaintiff with the same agent in another company, the consent of defendant being endorsed upon its policy; and thereafter another company was substituted by the same agent in place of the second insurer; and that such substitution was known to defendant, and that no complaint was made against it either at the time or after the fire when defendant was attempting to effect an adjustment of the loss: *It was held*, that the fact that the substitution was made by defendant's agent with defendant's knowledge and without objection by defendant, constituted a waiver of the stipulation in its policy that no additional insurance should be placed upon the property insured, unless the consent of the company was endorsed upon its policy.

APPEAL at Spring Term, 1878, of HALIFAX, before *Seymour, J.*

This action was brought to recover the amount of a fire insurance policy issued to plaintiff by defendant company upon a stock of drugs and medicines which were afterwards destroyed by fire. The facts applicable to the point decided by this Court appear in its opinion. Under the instructions of His Honor the jury found for the plaintiff. Judgment. Appeal by defendant.

Messrs. Gilliam & Gatling and *T. P. Devereux,* for plaintiff.
Messrs. S. Whitaker and *A. W. Haywood,* for defendant.

READE, J. The plaintiff was a druggist in Enfield, N. C., and the defendant insured him $1,200 on his stock of drugs and medicines in a one story building, etc., with concurrent insurance on the same by the Alexandria Insurance Company of $1,800. This was in 1874, and the same was annually renewed up to 1877, when the store was destroyed by fire. During these years and several transactions there was a good understanding and a becoming liberality between the parties. Upon its coming to the attention of the plaintiff that he had not informed the defendant that he kept paints and oils, he informed the president of the company by letter of his omission, and the presi-
(281) dent wrote to him a liberal letter saying that the omission might technically have made the policy void, but the president thought the company would not take advantage of an inadvertence of that sort, but to put the matter beyond dispute, the president gave the plaintiff written permission to keep the articles.

It appears that while the plaintiff's principal business was that of a druggist, yet as is common with druggists in small towns, he kept various other articles. Nearly one half of his stock was other than drugs and medicines strictly speaking, but in common parlance it

would be called a stock of drugs and medicines. After the fire this seems to have been the first trouble—the plaintiff supposing that his stock in the store was insured, while the defendants insisted that only the "drugs and medicines" were insured. And such is the language of the policy.

What then are "drugs and medicines?" This is not easily answered. Webster defines drugs to be "substances used in the composition of medicines;" and again, "used in dyeing or in chemical operation." It is clear that the defendant in the careful preparation of the policy ought not to have left a matter of that sort at large as a trap in which the plaintiff might be caught. This matter is however brought forward for the following specific purpose:—

1. The policy, even by the defendant's admissions does insure the plaintiff's "stock of drugs and medicines in the house," etc. Well, is saltpetre a drug? Yes, it is admitted to be. Was it a part of the stock as a drug? Yes, admitted to have been. Then it was specifically insured in the written and governing part of the policy. But in the *small* print of the policy it is provided that if the "assured shall keep gun powder, fire works, nitro-glycerine, phosphorus, saltpetre, etc., the policy shall be void."

Now the above articles are not necessarily drugs and medicines. The prohibition therefore is not against keeping them (282) *as* drugs and medicines where a pound of saltpetre would be as harmless as a pound of alum, but against keeping them as articles of danger. With this construction the policy contract is just and reasonable; otherwise the policy insures saltpetre, and yet forbids the keeping of it. There is no allegation that it was kept otherwise than as a drug, and no objection is made to the quantity, and no pretence that any harm resulted from it. If the president of the defendant company had written after the fire as he did before, that his company would not insist upon technicalities or take advantage of inadvertences where no harm had resulted, it would have been doing gracefully what the Courts will compel to be done, whether or no. A substantial compliance with a contract is all that is required in any case. Where there has been a substantial compliance and good faith, technicalities will be disregarded by the Courts. The saltpetre which was in the stock as a drug, kept and sold as a drug, was insured; it was forbidden to be kept or used otherwise than as a drug, and in such manner, or quantity, or for such purpose as would increase the risk.

Wood Insurance, p. 840, is express authority for what I have said. "Where a policy is issued upon a stock of goods, such as are usually

kept in a country store, it is held that all such goods as usually form a part of such a stock may be kept, although prohibited to be kept by the printed terms of the policy. * * * And when a policy covers a stock of merchandise which is in fact kept in a country store, although the words, *such as are usually kept in a country store,* are not used, the policy will not be invalidated by the keeping of articles embraced under the list of hazards, if the articles so kept are *usually* kept in such stores, though in the printed provisions of such policy, the keeping of such articles is especially prohibited."

(283) In our case saltpetre was on hand as a part of the stock of drugs at the time the policy issued; it is usually kept in drug stores, and it was always kept on hand in small quantities for retail as a drug; the stock of drugs was insured; therefore the saltpetre as a part of the stock was insured; and although it was specially prohibited in the printed terms, it does not avoid the policy according to the authority just quoted, for which he cites a number of cases.

2. As already stated, at the same time that the defendant issued its policy for $1,200, the Alexandria company issued its policy for $1,800 to the plaintiff, with the consent of the defendant endorsed on its policy. Indeed both policies were effected by the defendant's agent, who was also the agent of the Alexandria company. And the annual renewals were all made in the same way by both companies, with the concurrence of both, until the Alexandria company retired from business in North Carolina, when another company, "The Commercial," was substituted in its place by the same agent. There was evidence tending to show that the defendant knew of the substitution of one company for the other by its agent, and there was no complaint against it, and when the defendant was endeavoring to adjust the loss with the plaintiff, the substitution was well known and no objection made; and the only objection now made is the technical one that the change was not actually endorsed upon the policy. We do not mean to say that double insurance, as it is called, or increased insurance is a technical matter, quite the contrary. It is very important not only to the insurer whose risk is thereby increased, but to the public, as an over-insurance is a temptation to incendiarism; but here there was no over-insurance and no increase of the amount, but simply the substitution of one company for another with the knowledge of the defendant, and the only objection is that it was not entered on the policy. *That is technical.* And

(284) we are of the opinion that the facts that the substitution was made by defendant's agent with defendant's knowledge, and no

objection upon the attempted adjustment or before action brought, are a waiver of the objection that it was not entered on the policy.

In Wood Insurance, sec. 496, it is said: "When the insurer knowing the facts does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance; and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement. * * * And such waiver may be implied from what is said or done by the insurer. So the breach of any condition in the policy as against an increase of risk or the keeping of certain hazardous goods, * * * or indeed the violation of any of the conditions of the policy may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken." So again, sec. 497: "When other insurance is required to be endorsed upon the policy, if notice thereof is given to the insurer or his agent, and consent is not endorsed, nor the policy canceled, further compliance is treated as waived and the insurer is estopped from setting up such other insurance to defeat its liability upon the policy, and the same is true when the *same* agent issues both policies, although consent is not endorsed on either policy."

That is precisely our case. And the author is well supported by authority. And withal it is so just and reasonable that we would lay down the same doctrine even if it were of the first impression.

There were several other objections taken below by the defendant, and while they were not abandoned, they were very properly not pressed in this Court by the counsel who presented the defendant's case with great force. We have examined them, however, and find (285) no error.

PER CURIAM. Judgment affirmed.

Cited: Argall v. Ins. Co., 84 N. C., 355; *Hornthall v. Ins. Co.*, 88 N. C., 71; *Follette v. Accident Asso.*, 107 N. C., 240; *Grubbs v. Ins. Co.*, 108 N. C., 484; *Horton v. Ins. Co.*, 122 N. C., 504; *Modlin v. Ins. Co.*, 151 N. C., 43; *Ins. Co. v. Ins. Co.*, 161 N. C., 489.

CHARLES T. WILLIS v. THE GERMANIA & HANOVER FIRE INSURANCE COMPANIES.

Fire-Policy—Conditions—Conduct of Assured.

1. Where the holder of a policy of insurance against fire complies substantially with all the requirements of the contract between himself and the insurers, immaterial variations will not vitiate it.
2. Where a fire-policy forbids the keeping by the assured of benzine, camphine "or any explosive," it is a question of fact for the jury whether or not certain alcohol kept in the store of the policyholder was an explosive under the particular circumstances of the case. At any rate, it can not be so considered in the absence of finding to that effect.
3. If such a policy authorize the keeping of kerosene of a certain quality, it will rest upon the insurers in case of a loss to show: (1) that the kerosene was not of that quality, and (2) that the fire originated or was influenced by the kerosene kept.
4. An instruction by a policyholder to his agents not to interfere in case of fire unless the entire stock could be saved, in order that no dispute might occur with the insurers as to the amount of a loss will not stand in the way of a recovery where it affiramtively appears that no efforts of the assured or his agents could have averted the loss.

APPEAL at December Special Term, 1877, of ROBESON, from *Cox, J.* This action was brought to recover the amount of a policy of fire insurance issued by the defendant companies at the instance (286) of the plaintiff, to indemnify him against the loss by fire of his store house and stock of goods. The facts embodied in the opinion delivered by Mr. Justice READE are deemed sufficient to an understanding of the case. Upon issues submitted and under the instructions of His Honor the jury rendered a verdict for plaintiff. Judgment. Appeal by defendant.

Messrs. G. Leitch and *McNeill & McNeill,* for plaintiff.

Messrs. W. F. French, J. W. Hinsdale and *P. D. Walker,* for defendant.

READE, J. The plaintiff upon beginning mercantile business, to guard against the danger of ruin to himself and probably to his creditors, insured his store house and goods in the defendant company against fire. His store and goods were burned, and instead of the safety which he sought and paid for he finds himself involved in a three years law suit with the defendant. There could be no objection to this if the plaintiff had provoked it by any misconduct, or if the defendant had

any substantial defence; but the findings of the jury are, (1) that the plaintiff owned the property absolutely, (2) that its value was as much as he represented it to be at the time of its insurance, and that it was still more at the time of the fire, (3) that the representations upon which the policy was based were true, and (4) that he had performed all the conditions and requirements on his part contained in the policy. What more could he have done? The defenses are frivolous, and as found by the jury untruthful. They are:—

1. That the plaintiff was not the absolute owner of the property insured, in the particular, that in his stock of goods there was a barrel of wine worth some $60 or $80 which he had to sell on commission. Grant that to be so, still there were goods enough besides that to fill the demand of the application and the policy. The policy secured only $1,050 value of goods. That is three-fourths of $1,400. (287) There was more than $1,400 value of goods at the time of insurance and $1,700 at the time of the fire, leaving out the wine. But, however that may be, the verdict of the jury is, that the plaintiff was the absolute owner of the goods, and they make no exception as to the wine.

2. That the plaintiff did not give immediate notice of the fire to the general agent of the defendant in New York. The facts in detail upon that point are, that the plaintiff within a few days gave notice to the local agent of the defendant in Wilmington, N. C., and the local agent gave the notice to the general agent in New York, and thereupon the defendant sent an agent to the plaintiff to examine the matter. His Honor left these facts to the jury from which they might infer an acceptance of the notice given as sufficient. We think His Honor might have gone further and charged the jury that these facts being true there was notice. At any rate the jury found notice. There was substantial compliance which was accepted and acted on by the defendant.

3. That the plaintiff had not furnished the specific proof of the amount of loss. The facts in regard to this are, that the plaintiff's bills and invoices of goods were burned so that he could not furnish the agent that evidence. But by mutual consent the settlement was postponed until the plaintiff could get duplicates of his purchases. At the time agreed on they again met, when, being unable to agree, they separated, and the agent returned to New York. We are not informed as to the particulars of their disagreement, and it does not appear that any other evidence of loss was demanded, or that the precise evidence mentioned in the policy was insisted on. It does appear that by consent duplicates

of purchases were resorted to, and it does not appear that the agent required any particular proof which was refused. And it would seem that while they were attempting to treat about the loss, and the
(288) plaintiff offered such evidence as was in his power, and it was unsatisfactory to the agent, he ought to have said in what it was unsatisfactory. Indeed we are to take it that the objections which he made then are the same as made now, and that they were frivolous. The finding of the jury is that the plaintiff complied with all the conditions and requirements of the policy.

4. That there was evidence that the plaintiff had on hand in his store, alcohol, and that alcohol was an explosive. It is forbidden in the policy that the plaintiff should keep benzine, camphine, or any explosive. Alcohol is not named. There was no evidence as to whether alcohol is an explosive. Whether it is or not as a fact depends probably upon circumstances, as its strength, exposure, etc. Whether *the* alcohol in question was explosive or not was certainly not a question of law, as there was no evidence of its quality, and therefore His Honor could not charge that it was an explosive as the defendant requested him to do. And there being no evidence that it was he had the right to assume that it was not explosive, forbidden in the policy. There was no evidence that the fire originated or was in any way influenced by the alcohol, and then again there is the verdict of the jury that the plaintiff had complied with all the conditions of the policy.

5. That the plaintiff was authorized to keep kerosene oil of standard quality, 110 degrees, and there was no evidence that the kerosene kept was of that quality. There is no evidence that it was not of that quality, and again the jury find that it was, and there is no pretence that the fire originated from or was influenced by the kerosene. It was impossible to apply any test to the kerosene after its destruction.

6. That the plaintiff did not save what might have been saved at the fire. The facts are that the fire occurred at night, and when
(289) discovered it had progressed so far that it was impossible to save anything. Of course he was not required to perform impossibilities. The only ground for this defense is that the plaintiff had given general instructions to his agent that if a fire occurred, not to interfere unless he could save all, to prevent disputes as to what was consumed. This was wrong, but it worked no wrong, because with the contrary instruction nothing could have been saved.

Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made neces-

sary to prevent the frauds of bad men. But on the other hand the insured are generally plain men without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is that they are to pay the insurers so much money, and if they are burnt out the insurers pay them so much. Where therefore there has been good faith on the part of the insured and a *substantial* compliance with the contract on their part, the Courts will require nothing more.

It is said in 2 Parson on Contracts, 461, on fire insurance, that policies frequently contain express provisions as to notice of loss, and proof and adjustments, and there must be a substantial compliance with all these requirements, and such a compliance is sufficient. If the notice or preliminary proofs are imperfect or informal, all objections may be waived by the insurers, and they will be held to have made the waiver by any act which authorized the insured to believe that the insurers were satisfied with the proofs they had received, and desired nothing more.

And again he says, page 426: "It may be said generally that warranties, restrictions, or declaration of this kind are construed somewhat liberally towards the insured, and somewhat strictly (290) towards the insurers. It would be reason enough for this that the insurers frame the policy as they choose, and may make the language as strict as they think proper."

There is no error. Judgment affirmed and judgment here.

Affirmed.

Cited: Argall v. Ins. Co., 84 N. C., 355; *Horton v. Ins. Co.*, 122 N. C., 506.

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*G. P. H. JONES and others v. N. J. REDDICK and others.

Marriage—Evidence.

1. In the absence of proof to the contrary, the rules of the common law relative to marriage are presumed to obtain in all Christian countries and especially in the States of the American Union.
2. By the law of North Carolina, which is in conformity to the common law, reputation, cohabitation, and the declarations and conduct of the parties are competent evidence of marriage in questions of inheritance.

APPEAL at Spring Term, 1878, of GATES, from *Furches, J.*

This was an action for the recovery of land, and the plaintiffs' right

*SMITH, C. J., did not sit on the hearing of this case.

of recovery turns upon the question,—whether they are the "lawful children" of Alfred E. Jones, the son of Frederick Jones, the testator. Upon the trial of this issue before the jury, one E. T. Jones testified that he was a brother of Alfred E. Jones, and remembered that his brother left this State in 1850, removed first to Florida, and thence to Georgia; that he visited him in Savannah, Georgia, during the
(291) war, and he was then married and had three children; that his wife's name was Sarah, and the names of his children Georgiana, Virginia, and George Paul Harrison; that he had no personal knowledge of the marriage, but that he lived in his brother Alfred's family eleven months, in Savannah, and that he was then living with a woman named Sarah who appeared to be his wife, sat at the head of the table and was the mother of the children named; that he corresponded with the family since, and heard that Georgiana had died, and another child named Emily had since been born, and that when he was there during the war as aforesaid, the eldest child was six or seven years old.

The plaintiffs next introduced the deposition of R. W. Russell, an attorney at law, residing in Savannah, Georgia, who testified that he knew the plaintiffs, and that they are the children of Alfred E. Jones and Sarah A. Jones, his wife; that he had known Alfred 22 years, and that he died in Savannah on 15 December, 1874.

The plaintiffs then produced and read in evidence a duly certified copy of a marriage license of Alfred E. Jones and Sarah A. Dill, taken from the records of the Court of Ordinary of Chatham County, Georgia, and of a certificate that they were duly married on 22 May, 1850, signed by the Rev. James E. Godfrey, the minister who performed the ceremony of marriage.

All the foregoing evidence was admitted without objection, but upon it, the defendants asked the Court to instruct the jury that it was not sufficient to warrant them in finding that Alfred E. Jones had been legally married, and that the plaintiffs are his lawful children. His Honor refused the instruction, and the jury found the issue in favor of the plaintiffs. Judgment. Appeal by defendants.

No counsel for plaintiffs.

(292) *Messrs. Gilliam & Gatling,* for defendants.

BYNUM, J. (After stating the case as above.) No actual marriage was shown, nor was it shown or offered to be shown, what would constitute a valid marriage by the laws of Georgia, where the marriage was alleged to have been celebrated. But in all Christian States, especially in the States of the American Union, which, although in some respects

foreign to each other, have a common origin, and in other respects, a constitutional community of rights and interests, it is presumed that the common law prevails, and that the same proofs which are sufficient to establish the fact of marriage in one State will be likewise sufficient to establish the same fact in another State. *Brown v. Pratt,* 56 N. C., 202; *Griffin v. Carter,* 40 N. C., 413.

By the common law it is held to be a general rule of universal application in civil cases, except in actions for criminal conversation, that reputation, cohabitation, the declarations and conduct of the parties, are competent evidence of marriage between them. *Archer v. Haithcock,* 51 N. C., 421; *Weaver v. Cryer,* 12 N. C., 337; Wharton Ev., secs. 84, 1297; 1 Starkie Ev., 297, 200; 2 Greenl. Ev., 762; 1 Doug., 170; 4 T. R., 458.

As such evidence would have been competent to establish marriage in this State by the common law, by the same law it must be held to be competent to establish that the parties were legally married according to the laws of Georgia. There was not only sufficient but plenary evidence of the marriage.

Affirmed.

Cited: Spaugh v. Hartman, 150 N. C., 456; *Walker v. Walker,* 151 N. C., 166; *Forbes v. Burgess,* 158 N. C., 132.

(293)

CAROLINE A. MANNING v. L. B. MANNING.

Husband and Wife—Wife's Separate Estate—Action of Ejectment against Husband.

1. A wife is entitled to the possession and control of her separate estate, to manage the same and receive the income arising therefrom, free from the control or interference of her husband.
2. In an action by a wife against her husband to recover the possession of her lands of all which he had taken possession and control and was cultivating solely for his own use, and damages for withholding the same; *It was held,* that the action would lie and that the plaintiff was entitled to the relief demanded.
3. But in such case, the husband's marital right of occupancy can not be impaired; his right of ingress and egress to the dwelling and society of his wife continues; and a writ of possession following a judgment must be so framed as to put the wife in possession without putting the husband out.

APPEAL at January Special Term, 1878, of HALIFAX, from *Schenck, J.*

The case is sufficiently stated in the opinion. The defendant demurred to the complaint and assigned as cause, (1) that the plaintiff and defendant were man and wife; (2) the possession of defendant was not adverse to plaintiff; (3) the defendant by law is entitled to possession of the premises, and (4) that the defendant is entitled during coverture to the rents and profits of the land. The judgment of the Court was that plaintiff recover of defendant the land mentioned in the complaint, and an order for a writ of possession granted; from which the defendant appealed.

Mr. Spier Whitaker, for plaintiff.
Messrs. T. N. Hill and *Walter Clark,* for defendant.

BYNUM, J. This case is before us upon complaint and demurrer. The complaint alleges a marriage between the parties, on 15 (294) October, 1873, and that at that time and prior thereto, the plaintiff was seized in fee and to her sole and separate use of a large real estate in the county of Halifax, consisting of three tracts of land which are fully described by metes and bounds, one of which is the home place, having upon it the family mansion where she and her husband, the defendant, live together as man and wife. We say they live together because there is no allegation that they live separate and apart, and the law implies that they do live together. The complaint further alleges that since their marriage the husband has taken charge and possession of her said lands which are of great value, and has cultivated and used them solely for his own use and benefit, not appropriating any of the benefit thereof to her comfort and support. That she is now 52 years of age and by the defendant has had no issue, and finding that her husband was wasting and appropriating to his sole use the profits realized out of the lands and leaving her dependent upon other resources for support, she did, prior to the commencement of this suit, demand of him the possession of her said lands, offering to provide for his comfort and support. That he has failed and refused to comply with her demand; wherefore she demands judgment for the possession of the said lands and for two thousand dollars damages for withholding the same.

In the argument the counsel for both parties treated the action as an action of ejectment under the old system, and so we are asked to treat it, and in that view it presents the first instance in North Carolina where a wife becoming discontented with him, among other things, seeks a judicial separation from her husband by an action of ejectment. For the relief in such an action consists not only in putting the plaintiff in possession, but also in expelling the intruding husband, bag and bag-

gage, if he has any, from her dwelling and premises. If the wife is entitled to recover as claimed, the writ of possession following (295) the judgment will be under her control, and if she prefers it she may be content with ejecting the husband from the lands only, and as to the dwelling house concede him the privilege of ingress and egress, but as a matter of favor and not of right. If she beholds her husband with a sinister eye, however, and prefers to forsake him and cleave unto her property, she may direct the sheriff to use only so much force as is necessary to remove his body from her bed and board, and put it down in the public highway. Unless the Court can undertake to control the judgment and writ of possession in such cases, which it has never heretofore done, the consequences which we have pointed out are inevitable.

It may be and has been said that the wife by law is entitled to the exclusive possession of her property as much so as if she were a *feme sole* or a man, and therefore must necessarily have the same remedies for acquiring the exclusive possession and enjoyment of her property, and that the use of such remedies only affect the property and not the social relations between husband and wife established by the contract of marriage. It is true that this action may have been instituted to enable the wife to obtain the control of her estate, but it is a two-edged sword and may as well have been instituted to get rid of the husband and is equally efficacious for either purpose.

The effect of a recovery as contended for would be to leave the husband at the mercy of the wife, as well in respect of his conjugal right, as in respect of the property. He would be a tenant at sufferance as to both. Such results could hardly have been contemplated by our legislators and people in adopting Art. X, sec. 6 of the Constitution, and ch. 39 of Battle's Revisal, defining the rights of married women in respect to their property. The law prescribes for what misconduct of the husband the wife may apply for and obtain a divorce, absolute (296) or partial, and it would be wholly inconsistent with this law and the obligations of the marital relation if the wife could for other grievances, real or imaginary, or for no cause other than her own will, expel her husband from her bed and banish him from her presence. He would still be liable for her torts and crimes without the opportunity and power of control over her person or giving her his advice. By the matrimonial contract the husband and wife are to live together, and the law, divine as well as human, has, whether wisely or unwisely, made him the ruler of the household; and the well understood and well defined legal duties, relations, and obligations of the marriage compact can not be abridged or changed at the will of either, or otherwise, or for other

causes than are prescribed in the statute in relation to divorce and alimony. Bat. Rev., ch. 37.

It may be and perhaps must be conceded that as to the property of the wife, real and personal, and the rents, issues, and profits of it, she is independent of her husband, to the extent that she may reduce it into her possession, and for that purpose she can, in her own name, resort to any proper action. The gravamen of this action is that the husband is receiving the rents and profits of the lands to his own exclusive use. In doing this he in some respects occupies the position of a stranger, and is amenable to the plaintiff in like manner. The wife has the undoubted right to assume control of her lands, to make her own contracts of lease, of not more than three years duration, and hold to account her husband or other tenants in the occupation of her property. Bat. Rev., ch. 69, sec. 26.

Without ejecting him from her dwelling house, if he should persist against her will in possessing himself of the rents of the land under claim and color of authority as her husband and agent, it is entirely competent and a proper occasion for a Court of Equity to inter-
(297) fere by injunction and restrain him from all interference with and control over the property or its income. In this regular action of the law, the plaintiff could obtain all the relief she seeks and is clearly entitled to, without resorting to this innovating and questionable dispossessory action against the husband. I can find but a single instance where a wife has maintained an action of ejectment against her husband. *Minier v. Minier,* 4 Lansing, 421, and there the husband and wife lived apart, and the land in question was not the homestead, but an outlying lot and parcel of land. The decision in that case was not by a Court of the highest jurisdiction and has not met with favor, and perhaps was justified only by the more absolute and exclusive power given to the wife over her separate estate in New York than in North Carolina and many of the other States. *Walker v. Reaney,* 12 Casey, 410; *Schindel v. Schindel,* 12 Md., 121; *Cole v. Van Riper,* 44 Ill., 58; 2 Bish. Married Women, sec. 24.

It seems now to be generally settled after great confusion in the decisions growing out of the conflicting statutes of the several States, that a married woman is invested with the legal title to her property, and may maintain in her own name any appropriate action to preserve and secure it to her own use. *Miller v. Bannister,* 109 Mass., 289; 10 Kan., 56; 19 Iowa, 236; 2 Bish. Married Women, secs. 130, 131, where the authorities on both sides of the question are cited.

In this State, by statute, the wife may sue alone in two cases,—first,

where the action concerns her separate property, and second, where the action is between herself and her husband; in all other cases where she is a party her husband must be joined with her. C. C. P., sec. 56. No difficulty is therefore presented as to the parties to the action. The demurrer admits the facts set forth in the com- (298) plaint and the single question is,—do they present a cause of action? The relief demanded is,—first, the possession of the land, and second, damages for withholding the rents and profits. We think the plaintiff is entitled to both,—to be let into the possession, and to damages against the husband for appropriating to his own use against her consent, the rents and profits.

The possession of the wife is not exclusive of the occupation of the husband. As man and wife their joint possession is not antagonistic or adverse, the one to the other. Nor does the complaint so allege. The only distinct charge is that the defendant has "used and occupied the land for his own use and benefit, not appropriating any of the profits thereof to her comfort or support." The relief she seeks and is entitled to, is not that the husband shall be expelled, but that she shall be let into the possession and control of the property and the receipt of the rents and income. That relief the Court under the powers conferred upon it by the Code as well as its general equity jurisdiction can give, without encountering a proposition fraught as I conceive with the most dangerous consequences to society, to wit, that a wife may under the forms and with the sanction of law at her own will and without cause, eject her husband from her dwelling and society because the house is her separate property. I can never agree that either husband or wife can, without committing those offences which the law designates as causes of divorce or separation, invoke the aid of the Courts to render a judgment, the unavoidable consequences of which would be a separation of man and wife. Nothing less than an express and positive statute to that effect can control or destroy that highest of all the obligations imposed in the marriage relation—that man and wife shall live together.

Any decision of the Courts, the direct or incidental result of which is to destroy the sanctity of marriage in that particular, can but weaken and undermine the surest foundation upon which the (299) structure of society, and through it, our political institutions, rest and command our confidence. While the recent innovations in the law of property may not be questioned by the Judge, he may not in the spirit of rash adventure push its construction beyond the letter, and perhaps to an extreme never contemplated by the legislator. The

demands of the case should be met fairly and conscientiously as they are presented in the complaint, but when treading upon unexplored and maybe dangerous ground, we have no warrant for advancing a single step beyond the exigencies of the case before us.

The plaintiff is entitled to be let into the possession of her lands, and in a legal sense, the sole and exclusive possession. That will not impair the husband's marital right of occupancy, the right of ingress and egress to her dwelling and society, to live with her and to tread upon her domains. She is entitled to be put in possession, if she has been excluded, but not by expelling him. The possession of the husband is not like that of a stranger, adverse to the wife, but in law consists with it; and if the bad conduct of the husband has disturbed that relation, the law steps in, not to destroy, by his expulsion, but to restore harmony and unity of the relation to the *status* established by marriage. The wife is also entitled to the control as well as possession of her property; to lease, manage and receive the rents and profits without the interference of the husband. This right she has always had, and if she has not exercised it, it must have been through ignorance or timidity—by a silent and unresisiting acquiescence, not in a superior right, but a stronger will.

The deprivation of the rents and profits is the ground of the complaint, and being against her consent, is the only infraction of the rights of the wife, contemplated by the law, and for which she (300) is entitled to redress and a preventive remedy. Expulsion would be no remedy, or ineffectual; for if the husband is ejected, he has by law the right to take his wife with him. He has the right to select the domicile, and there the wife must follow him. The adequate remedy and the main one consistent with his marital rights, is by the process of injunction to restrain the husband from receiving the rents and profits, and from all interference with her exclusive control over the property. The allegations of the complaint unanswered, we think warrant the demand of such relief. If upon the coming in of the answer, and upon the trial it should appear that the plaintiff is entitled to a judgment and a writ of possession, the writ should be so framed as to put the wife in possession, without putting the husband out. Such a judgment and writ with the ancillary process of injunction, if the husband should persist in claiming and exercising the right of control under the color of being the husband of the plaintiff, and in her right entitled to manage the estate and receive the income, will be ample protection to the wife, and is all that the complaint demands. The demurrer must be over-

ruled, and the defendant have leave to answer. Demurrer overruled and case remanded.

PER CURIAM. Cause remanded.

Cited: Cecil v. Smith, 81 N. C., 285; *Young v. Greenlee,* 82 N. C., 346; *S. v. Lanier,* 89 N. C., 517; *Taylor v. Apple,* 90 N. C., 343; *S. v. Edens,* 95 N. C., 693; *Osborne v. Wilkes,* 108 N. C., 673; *Thompson v. Wiggins,* 109 N. C., 510; *Walker v. Long, Ib.,* 513; *Taylor v. Taylor,* 112 N. C., 137; *Robinson v. Robinson,* 123 N. C., 137; *Jennings v. Hinton,* 126 N. C., 53; *S. v. Jones,* 132 N. C., 1044; *Perkins v. Brinkley,* 133 N. C., 159; *Graves v. Howard,* 159 N. C., 598; *Lipe v. Herman,* 161 N. C., 111.

L. B. MANNING v. CAROLINE A. MANNING and others.

Husband and Wife—Wife's Separate Estate.

1. An action can not be maintained by a husband against his wife and her agent, for an account of the dealings of the agent in the management of the wife's separate estate.
2. A wife (whether a free-trader or not) is entitled under the constitution (Art. X, sec. 6, and Bat. Rev., ch. 69, sec. 29) to recover and hold to her own use, her separate property and also the income de- (301) rived from it; and agents appointed by her, whether before or after marriage, must account with and pay to *her*, what they have received either before or after her marriage.

APPEAL at January Special Term, 1878, of HALIFAX, from *Schenck, J.*

The plaintiff alleged that subsequent to his marriage with defendant, Caroline, she became a free trader in pursuance of Bat. Rev., ch. 69; that prior to and since said marriage she was seized of a considerable estate which has yielded a large income; that the other defendant, Garabaldi, was the agent of his co-defendant, had managed her business prior to said marriage, and has acted as such since that time, managing her whole estate and collecting moneys to a large amount; that said Garabaldi has refused to account to the plaintiff; wherefore the plaintiff demands judgment against the said defendant for an account of his dealings as agent aforesaid. The defendant Caroline answering, stated that she had had a full and fair settlement with her co-defendant, and that it was ascertained he was due her the sum of $1,470.58, only a small part of which had actually been paid; that the plaintiff had taken sole control and possession of all her property (except that in the hands of her co-defendant) against her will, and used the rents and

profits arising therefrom for his own benefit, and had failed to provide for her support; wherefore she demands judgment against her co-defendants for the amount due her. The defendant, Garabaldi, also filed an answer stating the manner in which said business had been managed by him, and the plaintiff replied. Verdict and judgment for defendants. Appeal by plaintiff.

Mr. T. N. Hill, for plaintiff.

Messrs. Mullen & Moore, S. Whitaker, and *A. W. Haywood,* for defendants.

BYNUM, J. This action can not be maintained by the husband. (302) The wife is entitled to recover and hold to her own use her separate property, real and personal, and also the rents, issues and profits derived from it. Agents appointed by her, whether before or subsequent to marriage must account with and pay to her what they have received, wether the income and profits accrued before or since the marriage. If this proposition did not sufficiently appear from the constitutional provision, it certainly does from the act entitled, "marriage, and marriage contracts," Bat. Rev., ch. 69, sec. 29 of which is in these words: "The savings from the income of the separate estate of the wife, are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of summons issued against him in an action for such income, or next preceding her death." It is thus seen that the husband is liable to an action and account at the suit of his wife even when the income has been received by him without objection by her, provided the action is begun and prosecuted as spcified in the section.

The plaintiff alleges that his wife has in due form of law (Bat. Rev., ch. 69, secs. 18, 19, 20), become a free trader. How that fact can help the plaintiff's case, it is difficult to see. By a proper construction of sec. 29, before cited, where the wife is not a free trader, the husband's liability is limited, but where she is a free trader, his liability to account for her income received by him is unlimited except by the general law applicable to agents and others persons. If the wife has the right to make the husband account, he can not make her agents account to him and pay into his hands, income which she may immediately sue for and recover from the husband. The plaintiff (303) therefore has no concern with the judgment which the wife ob-

tained in the action against her agent, Garabaldi. As the latter does not object, no other person can. See the other case of *Manning v. Manning, ante,* 293.

Affirmed.

Cited: S. v. Lanier, 89 N. C., 521; *Thompson v. Wiggins,* 109 N. C., 510.

FANNIE CONIGLAND and others v. CHARLES S. SMITH, Adm'r.

Right of Surviving Husband to Insurance Money Due Wife.

Where a father insures his life for the benefit of his children, one of whom (a daughter) marries and dies without issue, the husband of the deceased daughter is entitled, as her administrator, to her share of the money arising from the policy of insurance upon the death of the father.

CONTROVERSY submitted without action under C. C. P., sec. 315, at Spring Term, 1878, of HALIFAX, before *Seymour, J.*

On 5 February, 1869, Edward Conigland insured his life in the sum of $3,000, and held a policy of insurance for that amount in which it was recited that the insurance was "for the benefit of his children." On said 5 February, said Conigland had four children then living—the intestate of defendant and plaintiffs, who are the wards of Henry J. Hervey. In May, 1872, Mary, the said intestate, married the defendant Charles S. Smith, and died without issue on 18 October, 1875. The policy of insurance was continued in force until the death of said Conigland in December, 1877, he paying the annual premiums thereon as they fell due. In May, 1878, the insurance company paid the amount due under the policy,—$1,908.81—to said guardian of plaintiffs and $636.27 to the defendant—the said guardian and defendant administrator having been duly appointed to their respective offices (304) and qualified for the discharge of their duties.

The guardian claims that by a proper construction of the policy, his wards are entitled to the amount paid to the defendant, and the defendant claims the same as administrator of his wife. His Honor being of opinion with plaintiffs, gave judgment against the defendant for said sum, and the defendant appealed.

Messrs. Gilliam & Gatling and *R. O. Burton, Jr.,* for plaintiffs.

Mr. T. N. Hill, for defendant.

RODMAN, J. When a father insures his life "for the benefit of his children," his manifest intention is to provide for them after his death; it is a gift to his children to take effect in possession upon his death. To ascertain the meaning and effect of those words in prescribing the rights of the children *inter se* upon such a gift, it is natural and reasonable to apply to them the meaning and effect which they have been held to have in gifts by will where the purpose in view is the same.

It is settled by numerous decisions that upon a bequest to A for life, with remainder to the children of A, the children *in esse* at the death of the testator take vested estate which open, however, and let in any after-born during the life of the life tenant. If any in being at the death of the testator die during the life tenancy, their shares being vested go to their personal representatives. *Chambers v. Payne,* 59 N. C., 276; *Newkirk v. Hawes,* 58 N. C., 265; *Myers v. Williams, Ib.,* 362.

Regarding Conigland (the father and the assured), as being analogous to a testator, the gift is closely analogous and identical in principle with a gift to his children in remainder after his life. The policy was a contract between the company and the assured; he might at his (305) pleasure have forfeited or surrendered it, just as a testator may revoke his will while he lives, but the sum to be paid under it was a gift to his children which vested in interest when the policy was delivered, and the policy being in force at his death vested in possession then.

In this opinion we are supported by May Insurance, sec. 397 (page 477), and he cites *Chapin v. Fellows,* 36 Conn., 133; *Fraternal Mut. Life Ins. Co. v. Applegate,* 7 Ohio, 292; *Gould v. Emerson,* 99 Mass., 154. We think the defendant is entitled to retain the money he received from the insurance company. Judgment below reversed and judgment for the defendant in this Court.

Reversed.

Cited: Simmons v. Biggs, 99 N. C., 236; *Hooker v. Sugg,* 102 N. C., 115; *Pippen v. Ins. Co.,* 130 N. C., 25; *Scull v. Ins. Co.,* 132 N. C., 33; *Duckworth v. Jordan,* 138 N. C., 528.

SALLIE A. COOK v. JOHN T. SEXTON, Adm'r.

Year's Support—Adultery—Statute of Limitations.

1. A widow is not barred of her right to a year's support, under Act 1871-'72, ch. 193, sec. 44, by reason of adultery committed prior to the passage of the act.
2. An application for year's support made after the expiration of twelve months from the death of the husband, is barred by the statute of limitations, Battle's Revisal, ch. 117, sec. 18.

(In sec. 26, ch. 117, Bat. Rev., the first sentence ends with the word "prescribed"; the word "without" is the first word in the next sentence and should be spelt with a capital "W.")

PETITION for year's support, commenced in the Probate Court and heard on appeal at Spring Term, 1878, of NASH, before *Seymour, J.*

Case Agreed: The plaintiff is the widow of C. L. Cook who died intestate in 1872. Letters of administration were granted to the defendant, who qualified on 7 December, 1872, and entered (306) upon the discharge of his duties as administrator; and within twelve months thereafter the widow applied to him to have her year's support allotted according to law, which the defendant refused upon the ground,—that in the life time of her husband the plaintiff was guilty of adultery, and at the time of his death an action for divorce was pending in Northampton Superior Court in favor of said intestate and against the plaintiff; and also for the reason that he has been advised that plaintiff can not recover in this action, for that it was not brought within twelve months after the defendant qualified as administrator. The summons in this case was issued on 1 October, 1877, and served on the defendant on 12 October. The plaintiff was guilty of the adultery in 1864 or '65, and as soon thereafter as the said intestate ascertained the facts to be true, he separated from her and never received her as his wife again, but in 1872 brought the said action for divorce. The plaintiff has received no part of the personal estate of the intestate for the support of herself and three children, all of whom are under the age of fifteen years and are living with her. The said personal estate is not and never has been worth $2,000, but there is now in the hands of the defendant about $600, out of which the plaintiff is entitled to her year's support, if entitled at all.

The Probate Judge decided that the plaintiff was not entitled to recover, His Honor affirmed the judgment and dismissed the proceeding, from which ruling the plaintiff appealed.

Mr. W. C. Bowen, for plaintiff.
No counsel for defendant.

RODMAN, J. Several objections are made to the plaintiff's recovery:

1. In 1864 she committed adultery, whereupon her husband
(307) separated from her and they have not lived together since. It was held in *Walters v. Jordan,* 34 N. C., 170, that under the Rev. Code, ch. 118, secs. 11, 18, a widow did not forfeit her right to a year's provisions by her adultery as she did her dower.

The law was amended in this respect by Laws 1871-'72, ch. 193, sec. 44, by which adultery was made to cause a forfeiture of her year's provisions and distributive share as well as her dower. This act does not apply in the present case, because the adultery was committed before its enactment. The language of the act is prospective,—"if any married woman *shall* elope with an adulterer," etc. It does not appear whether the husband died before the ratification of this act on 12 Febrary, 1872, or not, probably afterwards. But she had at least a contingent right to a year's provisions in case of her surviving him, which the legislature might have taken away; but apparently it did not intend to do so, and we are not justified in putting a construction on the words beyond their apparent meaning when the effect would be to take away even an incoherent right.

2. The plaintiff within a year after the decease of her husband applied to the administrator to assign her a year's provisions. He however refused or neglected to do so, and this action was brought in October, 1877, more than five years after the husband's death. It is objected that it can not be maintained because not brought within a year. And such is our opinion.

There must be some term of time applicable to the claim of every right within which it must be sued for. The policy of the law will not permit any demand to exist in perpetuity or indefinitely, unless legally asserted. In the present case that term of limitation must be one of three,—either that of one year from the origin of the right by the death of the husband, or of two years, at the end of which the ad-
ministrator is required to settle the estate and pay to the dis-
(308) tributees, or ten years after which all claims (in general) are presumed to have been satisfied or abandoned. We think that the act of 1868-'69, ch. 93 (Bat. Rev., ch. 117) clearly fixes the first of these. Sec. 14 gives a year's provision to a widow. Secs. 16-25, fix the amount where the personal estate does not exceed $2,000, at $300, etc. Sec. 18 makes it the duty of an administrator, on application in

writing by the widow, *within one year after the decease of the husband,* to assign her year's provisions in the manner and to the value prescribed. Secs. 26, 28, provide that when the estate is solvent and the personalty exceeds $2,000, the widow is not confined to obtaining her year's provision by applying to the administrator under sec. 18, but she may, without such application, or, after having upon such application received the sum allowed upon it, apply to the Probate Court to have a year's provision, either original or additional; *but she must do so within one year after the decease of her husband.* (Note.—In sec. 26, as printed in Bat. Rev., there is a serious misprint which mars the sense. The first sentence, properly, and in the original act, ends with the word "prescribed," and the word "without" is the first word in the next sentence, and should be spelt with a capital "W.")

It is seen that there is no direct statement of the time in which an action must be begun, when the administrator refuses to assign upon the demand of a widow any time short of ten years (long before anticipated by the legislature.

It is impossible to infer, from the mere omission of the legislature expressly to prescribe a limitation for a case so unlikely to occur, that it intended to allow a widow any time short of ten years, (long before the expiration of which the estate is required to be and generally is, settled up) within which to bring her action to compel the administrator to do his duty.

Unless this was the intent, the limitation of the plaintiff's action must be either one year or two, and in either case, she (309) is barred.

We think, however, that the intention of the act may be inferred with reasonable certainty to limit the widow to one year for commencing any action to recover her year's provision. In every case which the legislature anticipated and expressly provided for, the limit is one year. The evident intent of the allowance is to provide for the widow and her family, a support for the *first* year after her husband's death, as nearly as that can conveniently be done. The administrator is required within one year to ascertain, as nearly as he can, all the liabilities of the estate, which includes this. If an estate be able to pay all its liabilities, the administrator may do so at once without any proceeding in the Probate Court, yet the solvency or insolvency of the estate may depend on the legality of the widow's claim. It is impossible not to see that if a widow can keep her claim alive for more than one year without commencing an action, the administrator will be seriously embarrassed in his management of the estate. By the end of two years

the administrator is required if practicable to have paid off all the liabilities of the estate, and to pay over to the distributees their shares. This would be impracticable if the widow has any time short of two years to bring suit in. He could not protect himself from her claim, or protect her by a refunding bond, for this only covers *debts of the intestate,* of which the widow's claim is not one. The claim is barred by the statute of limitations.

Judgment affirmed.

Cited: Leonard v. Leonard, 107 N. C., 171; *Perkins v. Brinkley,* 133 N. C., 87.

(310)

T. J. SHINN v. W. A. SMITH.

Interlocutory Order—Wife's Separate Estate.

1. An interloctutory order is always under the control of the Court, pending the action in which it is made.
2. Where husband and wife join in mortgage of lands consisting in part of the wife's separate estate to secure the husband's individual debts, a judgment creditor of the husband in no way connected with the mortgages is not entitled to an order of Court, directing a sale of the wife's land in the first instance, to satisfy the mortgage creditor, thereby exonerating the husband's land and leaving it open for the satisfaction of outside debts.

APPEAL from an order continuing an Injunction, made at Chambers on 9 April, 1878, by *Cox, J.*

On 17 January, 1872, the defendant and his wife executed a mortgage deed to Elam King, to secure a debt the defendant owed King, with power of sale in default of payment at a certain time, and on 3 March, 1873, they executed a similar deed to Joel Reed to secure defendant's debt to him. The deed to King conveyed a tract of land in and near the town of Concord in Cabarrus county, and the deed to Reed conveyed the defendant's equity of redemption therein.

The plaintiff, having obtained a judgment against the defendant on a debt due him, had an execution issued which was returned unsatisfied, and thereupon he brought an action against the defendant and said mortgagees for a foreclosure of the mortgages and a sale of the land to pay his debt; and at Fall Term, 1877, of CABARRUS, before *Kerr, J.,* an order was made appointing a commissioner to sell the same for the purpose aforesaid.

The affidavit of Mrs. Smith, wife of defendant, upon which the in-

junction was granted, states that up to the time of the rendition of said order she was not a party to the action, but subsequently (311) filed her complaint and moved to be made a party to protect her equities as surety of her husband, in that, said order authorized the sale of a house and lot which was her separate property; and at Chambers on 18 January, 1878, before *Schenck, J.*, the said order was modified, and the commissioner directed to first sell the property of the defendant, and if by such sale a sufficient sum was not realized to pay the debts mentioned, then to sell the separate property of Mrs. Smith and disburse the fund according to the former order (and in the meantime granted a restraining order); in pursuance thereof the commissioner sold the land which was the property of the husband (defendant) and conveyed by said deeds, the proceeds of which proved to be sufficient not only to pay the debts secured by the mortgages, but left an excess of several hundred dollars, without resorting to a sale of the separate estate owned by the affiant. In this connection the affiant stated that she did not owe the creditors of her husband; that the indebtedness secured by the mortgages arose from the individual contract of her husband, and her separate property was conveyed with his, as additional security for its payment; and that the debt of the plaintiff is also an individual debt of her husband. The affiant is advised that as the debts secured in the mortgages have been satisfied as aforesaid, her separate property is discharged from any further lien in respect to the execution of said deeds; that notwithstanding the facts herein stated, the said commissioner has advertised her separate property, said house and lot, for sale to satisfy the plaintiff's judgment for the payment of which she is in no way liable; and she therefore asks that the plaintiff, the commissioner, etc., be enjoined from selling her said separate property. His Honor granted the order and the plaintiff appealed.

Messrs. P. B. Means and *J. W. Hinsdale,* for plaintiff. (312)
Messrs. Wilson & Son, for defendant.

READE, J. The husband, defendant Smith, owed debts and executed mortgages on his lands to secure them. His wife joined him in the mortgages and included a house and lot which was her separate property. The plaintiff was an outside creditor of the husband Smith, and brought this action against the mortgagees to compel them to foreclose the mortgages so that he could have the surplus of the proceeds of the sale applied to his debt. At Fall Term, 1877, of the Court below, an order was made to sell the lands in the mortgage for the purpose named above, and that the land of the wife be sold first.

The manifest purpose of the plaintiff in this order was to have the wife's land sold to pay her husband's debts named in the mortgage, and leave the husband's land named in the mortgage to pay the outside debts of the plaintiff Shinn.

This was hard measure for the wife, as she was in no way connected with the debts of her husband, and the order can be accounted for only upon the ground that the wife was not made a party in the action, and it does not appear from the pleadings or from the mortgages, or in any other way, that the wife had any *separate* property in the land or any interest except her dower right, which is expressly named in the mortgage, whilst her separate land is not described as hers, but as the house and lot on which Smith, her husband, lived. There was nothing therefore to direct the attention of the Court to the fact that it was ordering the sale of the wife's land for the payment of the husband's debts, when his own lands were amply sufficient for that purpose. Whether this was by design or accident, it only needed that the error and injustice should be subsequently called to the attention of the Court to induce the Court to set aside the interlocutory order of sale, an inter-
(313) locutory order being always under the control of the Court during the pending of the action. *Ashe v. Moore,* 6 N. C., 383; *Worth v. Gray,* 59 N. C., 4.

Accordingly the wife, as soon as she learned that such an order had been made, filed a petition in the cause asking to be made a party, and that the order might be modified so as to require the husband's lands to be sold first. This was a clear equity to which she was entitled, and it was promptly granted by the Court, and the former order was modified accordingly.

Under the modified order the husband's lands were sold for more than enough to satisfy the mortgages, and discharged the mortgages on the lands of the husband, principal, and of course discharged the mortgages on the land of the wife, surety. And thereafter the wife and her land stood entirely exonerated from any debt of the husband, whether to the plaintiff Shinn, or other person. Yet strangely enough the plaintiff Shinn insisted that inasmuch as he had failed to make his debt out of the land of the husband who alone owed him, he had the right to make it out of the separate property of the wife who did not owe him. And the commissioner appointed to sell the husband's lands under the modified order agreeing with plaintiff, Shinn, was proceeding to sell the wife's land to pay the plaintiff's debt when the restraining order was obtained from His Honor, *Judge Cox.*

It is true that the modified order gives some color for selling the

wife's land to pay the plaintiff's debt, in this, that it directed the commissioner to sell the husband's land first, and if that was not sufficient to pay off the debts mentioned in the first order, then to sell the wife's land and distribute the proceeds to the satisfaction of the debts mentioned in the first order. And the plaintiff says that his debt is mentioned in the first order; so it is, but then it is not one of the debts mentioned in the first order to be paid out of the wife's land, but (314) out of the husband's land. It would not have availed the wife anything to have her lands exonerated from the sale for the mortgage debts for which she was bound as surety, and have it sold to pay the plaintiff's debt for which she was not bound at all. It is not to be supposed that the Court would have made such order with knowledge of the facts, and the order can be reconciled with the equity of the case by construing, "the debts named in the former order," to mean *the mortgage* debts named in the former order. And then the modified order would read, —sell the husband's lands first to pay the mortgage debts, and if there be a surplus, apply it to pay the plaintiff Shinn's debt. And if the husband's land shall not sell for enough to pay the mortgage debt, then sell the wife's land to pay the *mortgage* debt, but in no event is the wife's land to be sold to pay the plaintiff's debt, for which she is in no way bound.

But if it were otherwise, as if the modified order in unmistakable terms directed the sale of the wife's land to pay the plaintiff's debt, for which neither she nor the land was bound, it would have been erroneous, and ought to be corrected.

It was objected by the plaintiff that the wife ought to have sought relief by a motion in the original action of Shinn against the mortgagees, and not by a new action. That is just what she has done. Her motion for relief and the modified order intended for her relief were in the original action, and the restraining order, and then the order continuing the restraining order until the hearing from which the appeal was taken, are all in the original action. It is true that His Honor does direct the wife to put her motion in the form of a complaint, and directs the plaintiff Shinn to answer, all of which was probably unnecessary; but it was matter of which the wife had more right to complain than Shinn, for as the case then stood the wife was (315) clearly entitled to relief, and any further proceedings could only enure to the benefit of Shinn by allowing him to show some liability on the part of the wife, which did not appear.

There was no necessity for the formal summons and complaint which have been filed in this case by the wife, nor for the formal answer of

the plaintiff Shinn, which is required, if the purpose be to give the proceedings the form of a new action. All the rights of the parties can and ought to be administered in this, which is the original action of Shinn against the mortgagees.

There is no error in the order continuing the injunction until the hearing, which is the order appealed from.

Judgment affirmed.

Cited: Mebane v. Mebane, 80 N. C., 34; *Newhart v. Peters, Ib.,* 166; *Miller v. Justice,* 86 N. C., 26; *Welch v. Kingsland,* 89 N. C., 179; *Maxwell v. Blair,* 95 N. C., 317; *Davis v. Lassiter,* 112 N. C., 130; *Weil v. Thomas,* 114 N. C., 201; *In re Freeman,* 116 N. C., 200; *McGowan v. Davenport,* 134 N. C., 528; *Harrington v. Rawls,* 136 N. C., 67.

WILLIAM B. HOLLIDAY, Adm'r, v. ANDREW McMILLAN and another.

Separate Estate of Married Women.

Where a marriage took place prior to the adoption of the constitution of 1868, and in 1871 the wife acquired certain personal property, it vested in her as her separate estate, free from "the debts, obligations or engagements of her husband."

RODMAN, J., concurring, remarks upon the decision in *Sutton v. Askew,* and suggests that it be overruled.

APPEAL at Fall Term, 1877, of RICHMOND, from *Seymour, J.*

This action was originally brought by the wife of the plaintiff against the defendants, for the possession of certain personal property taken by them under an execution against her husband, and she having died, the plaintiff administered on her estate and made himself party plaintiff. The plaintiff and his late wife intermarried before 1868.

(316) The property seized under the execution was given to plaintiff's intestate by her father in 1871, and they were living together and using said property at the time it was seized.

The Court charged the jury that the husband, having married before 1868, had a right to his wife's personal property, even though afterwards acquired, and it was not divested by the provisions of the constitution of 1868, and that therefore the property seized under the execution was the property of the defendant in the execution. Under these instructions the jury rendered a verdict for the defendants. Afterwards the plaintiff moved for a new trial, which His Honor granted on the ground of misdirection in law in his charge as above set forth, and ordered the verdict to be set aside, and the defendants appealed.

Messrs. J. D. Shaw, N. McKay and *J. W. Hinsdale,* for plaintiff.

Messrs. W. H. Bailey, J. Devereux, Jr., Dowd & Walker and *G. M. Smedes,* for defendants.

READE, J. Prior to 1868-'69 a widow was entitled to dower in the land of which her husband died, seized and possessed, and not as at common law of all the land of which he had been seized at any time during coverture. The act of 1868-'69 restored the common law right of dower. In *Sutton v. Askew,* 66 N. C., 172, it was held that the act of 1868-'69 did not operate to give the wife an inchoate right of dower where the marriage was before the statute, and the husband owned the land at the time of the marriage or before the statute, but that in such case the husband had the right to dispose of the land by sale free of any dower right of the wife at any time during his life. How it would be where the marriage was before the act and the land acquired after the act, was left an open question, with a slight intimation that in such case the dower right would attach.

Our constitution of 1868 secures to the wife's separate use all the property which she should acquire. In *Kirkman v. Bank,* (317) 77 N. C., 394, it was held that where the marriage was before the constitution and the wife acquired property after the constitution, she had the right to receive it independently of her husband. It is true that the question then was as to the wife's right to receive into her possession, without the concurrence of her husband, a distributive share of her ancestor's estate, but the decision could not have been arrived at without deciding that she had in it a separate property.

In the case before us the marriage was before the constitution and the property acquired after the constitution. And the question is, whether by the marriage the husband acquired a vested right, not only in all the personal property which the wife had at the time of the marriage, but in all the property which she might acquire during coverture. The argument for the defendants is that the marriage contract was that the husband should have all the property which the wife then had or should thereafter acquire, and that that contract could not be impaired by legislation or by the constitution; that he had a *vested right* in property which the wife might acquire *after* the marriage, as well as in property which she had at the *time* of the marriage, and that subsequent legislation could not deprive him of his *vested* rights.

It is too well settled to require either argument or authority, that *vested rights* can not be disturbed, but it is error to suppose that a mere expectancy, or a possibility of future acquisitions, is a *vested right.*

The following proposition is well supported by Cooley Const. Lim., 360-1-2, and by numerous authorities which he cites: At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed.

These rights became vested rights at once, and any subsequent
(318) alteration in the law could not take them away. But other interests were merely in expectancy. And while these interests remainded in expectancy the legislature had full power to modify or even to abolish them. They are subject to any changes in the law made before the rights became invested by acquisition.

That is conclusive of this case. The property in dispute was acquired after the marriage, and before it was acquired the constitution provided that all after acquired property by the wife should be her separate property. His Honor charged the jury contrary to this doctrine, and there was a verdict for the defendants. Becoming convinced of his mistake he set aside the verdict and ordered a new trial, so that there is no verdict upon which we can give judgment here. We must therefore affirm the order for a new trial.

It is insisted by the defendant that there is no use in allowing the plaintiff to recover, because if he do, the property will be immediately subject to the satisfaction of the defendant's debt against the plaintiff —the plaintiff being the administrator of his deceased wife in whose name the suit was originally brought. That may or may not be so. He must however recover the property, to be administered according to law. We do not know what may be the liabilities of the wife's estate, and we cannot administer it in this action. The claims of the defendants are not against the wife's estate, but against the husband plaintiff in his individual capacity. And they are neither set-off nor counter-claims in this action.

There is no error. The order below setting aside the verdict and granting a new trial is affirmed.

RODMAN, J., *concurring:* I concur in the decision in this case, but my reasons are so different from those of the Court as stated by my

brother READE, that I think I ought to give mine, lest his rea-
(319) soning should be taken for a part of the decision, and thus apparently give the sanction of the Court to the affirmation of a case cited, which I think is erroneous, and ought to be reviewed at the earliest opportunity. If the doctrine upon which *Sutton v. Askew,* 66 N. C., 172, is founded, and by which it must be supported, if it can be supported at all, is correct, then this case is decided wrongly. This doctrine is that a wife during her husband's life has a *vested estate* in

his land by way of dower which the legislature cannot enlarge, abridge, or alter without his consent, or with his consent as against his creditors, by any act passed after the marriage. If the estate of the wife in that case be vested and beyond the legislative power, it seems clear that the right of the husband to possess as his own the acquisition of personal property by his wife during the marriage, is equally a vested right beyond the power of the legislature, and that his creditors may subject it to execution for his debts. The mutual rights of the husband and wife are precisely analogous in both cases; they arise by act and operation of law out of the marriage relation; if they are *vested* rights, they could not be altered or affected by the acts of 1868-'69 restoring to widows their dower at common law, or by the constitution of 1868 and act of 1871-'72 giving to wives separate estates in their future acquisition of personal property, and the decision in the present case is wrong; if not vested, they were both subject to legislative enactment, and *Sutton v. Askew* is wrong.

I shall endeavor to show that they were not vested, and that the decision in *Sutton v. Askew* was founded on a mistaken view of what constitutes a vested right.

The facts of that case as taken from the printed report are in brief these: Askew and wife were married before January, 1867. In 1870 he was the owner of certain land, when he acquired it does not appear. He proposed to borrow $2,000 of one Holly, who refused to lend unless Askew's wife would join in a mortgage of the land. She (320) consented to do so in consideration of an agreement by her husband that she should have to her separate use all that the land should sell for above the debt to Holly, and the mortgage was made. Afterwards the land was sold for $3,400, all of which, except a note of the purchaser for $500, was applied to paying the mortgage debt and other debts of the husband. After the mortgage the plaintiff recovered a judgment against Askew—the date of his debt, whether before the marriage or before the act of 1868-'69, or not, does not appear—and instituted a supplemental proceeding to subject the note for $500, held and claimed by Mrs. Askew, as the property of her husband.

It was assumed by this Court, without any authority so far as appears in the statement of the case by the Reporter, that the husband acquired the land before 1868. It was also assumed in the like absence of apparent authority that the plaintiff's debt accrued before 1868. On these assumptions (which may perhaps be justified by the unprinted record on file) the Court concluded that the act of 1868-'69, restoring to married women their dower at common law, was void as to the hus-

band, and although he did not oppose but consented to the wife's claim, was void as to his creditors; that the act was valid only as to marriages contracted after its passage, and that the wife's right of dower was even during her husband's life time a vested estate, or at least a vested interest which the legislature could not constitutionally enlarge, abridge, or alter.

If we consider the case as a controversy between the husband and wife on the one side, and the creditors of the husband on the other, as it really was, no reason can be assigned why the principle of *Hill v. Kesler,* 63 N. C., 437, should not have controlled the decision. It was there held that the legislature might constitutionally exempt a debtor's land to the value of $1,000, and his personal property to the
(321) value of $500, from liability for his debts previously incurred, and secure the land to him as a homestead against his creditors. Why could not the legislature by virtue of the same power enlarge the dower right of a wife against her husband's creditors? Passing this by, however, and taking the case to be as the Court assumed it, a controversy between the husband and wife, in which he denied the power of the legislature to enlarge the right of his wife to dower, on the ground that it was a vested right in him, that it should not be enlarged in her, that it should not be diminished, and in both, that it should not be in any wise altered during the coverture, and the Court held that by reason of this vested right the husband might sell his lands without the consent of his wife, free from the incumbrance of her dower, notwithstanding the act of 1868-'69, that the wife had no interest, the release of which was a valuable consideration to support the agreement of her husband that she should have the $500, as she should have had if her right to dower had been as at common law, and that the agreement was void as to his creditors. Such I understand to be the conclusion and reasoning of the Court in *Sutton v. Askew.*

I conceive that the right of a wife to dower during her husband's life can in no just sense of the words be called a vested estate or a vested right. In Bouvier Law Dict. under the word "Vest," says, "an estate is vested in possession when there exists a right of present enjoyment," and, "an estate is vested in interest when there is a present fixed right of future enjoyment." For these definitions he cites many acknowledged authorities, to which I will add a few, more recent:

In *Johnson v. Van Dyke,* 6 McLean, 422, cited in 1 Scribner on Dower, MCLEAN, J., speaking of an inchoate right to dower, says:

"Until the death of the husband the right—if it may be called
(322) a right—is shadowy and fictitious, and like all rights which are

contingent, may never become vested." See also *Moore v. New York,* 4 *Seld.,* 110, cited 1 Scribner Dower 6. Bishop (1 Married Women, sec. 348), says that the wife's right to dower during her husband's life "is a mere possibility. Not only it is no estate, but the right itself is a mere contingent possible thing," and he cites *Maguire v. Riggin,* 44 Mo., 512. It certainly seems a plain misuse of terms to call a right *vested,* which may never exist as an estate, which may be forfeited by the misconduct of the wife, and is contingent upon her survivorship. A vested right may be sold, but a wife, though she may *release* her right to dower during her husband's life can not assign it, neither can it be taken in execution for her debts.

I have not seen the reason anywhere stated definitely and tangibly why this right should be regarded as vested, or if not strictly and technically vested, yet partaking so far of the nature of a technical vested right as to be incapable of change by the Legislature, or why it should be less within the control of that department of the government than any of the other rights and duties which arise directly and indirectly from marriage. It may be true as suggested that if it be a vested right in the sense used above, it is immaterial for what reasons it is so. But when the question is, is it a vested right? is it beyond legislative action?—it is very material to know the reasons for which it is supposed to be so. If we attempt to put in clear and definite language the reasons which are hinted or suggested in Scribner, and elsewhere, they will be seen to take one of the following shapes:

1. The rights, etc., arising from marriage are those which are embraced in the words of the ceremony of marriage. It is clear that this can not be so. No formula of marriage used by any Christian minister or officer pretends to contain or provide for the whole or the hundredth part of those rights, etc. In the formula of one (323) church and perhaps of many, the groom under the direction of the priest, says to the bride: "With all my worldly goods I thee endow," when it was notorious that until the Constitution of 1868 he did not give her any goods, but got every dollar which she possessed, which he might squander or his creditors might seize as he left the church.

2. That the law at the date of the marriage controls, and that rights accrued under and by force of that law, which although not technically vested, and left by the law uncertain and contingent, were yet so far vested as to be beyond the power of change. This merely confuses all distinctions between rights which are vested and those which are not, and would make any immediate change in *any* law impossible. No doubt most persons marry with the expectation that the law governing

their matrimonial relations will continue indefinitely without substantial change. But the public interest will not permit expectations to arrest the progress of society.

3. These two propositions being separately too untenable to be defended, they may be combined into the third, and perhaps in union find strength. Thus combined the reasoning is expressed thus:

Marriage is the result of contract, whatever else it may be, or may result in; in that contract is contained, by necessary or rightful implication, that the respective rights and duties of the parties *inter se,* personal and pecuniary, direct and indirect, shall remain unchanged by any change in the law during the coverture. Or if any advocate for the doctrine of *Sutton v. Askew* prefers it, I will narrow the proposition so as to include only this particular right to dower, although I can not see any reason why if it includes one incident of the marriage it should not include all; or why if it includes the direct incidents of the marriage such as the mutual rights of the parties in each other's property
(324) while living and the succession of the property after the death of one, it should not equally include the rules for its succession by inheritance upon divorce, etc.

A slight examination of the legislative and judicial annals of North Carolina, from the earliest period at which our printed records begin, will show that this State by successive legislatures has always regarded marriage not merely as a contract but as a social institution, and has asserted its control for the public welfare over all rights, duties, and incidents directly or indirectly resulting from it, including the whole law of succession, by which I mean the devolution of property by act and operation of law upon the death of an owner, with the sole restriction that it did not claim a right to interfere with vested interests. This claim was always upheld by the Courts wherever it was brought before them.

Our ancestors brought with them from England the common law of that country which included all such acts of parliament as from age had come to be regarded as part of it, and which were not positively inapplicable among us. This common law included all laws regulating marriage, inheritance, and the succession to property in general, and remained unaltered, so far as our printed statutes show, until 1784. Estates descended to the oldest son, they might be entailed, dower was of all lands of which the husband was seized and possessed at any time during the coverture, there was no dower of trust estates, divorces could be obtained of the Legislature only, estates in joint-tenancy went to the survivor. In most of these subjects the act of 1784 changed the law,

children inherited equally, estates tail were converted into fee simple, the heir apparent in tail being deprived of his expectancy, dower was limited to lands whereof the husband *died* seized, joint-tenancy was changed into tenancy in common. All of these subjects were claimed by the Legislature as its just domain, and its claim was (325) disputed by nobody except the heirs apparent of entailed estates whose reasonable expectations and those of their creditors were destroyed. This part of the law met with violent opposition from all who retained English aristocratic ideas. In 1798 an action was tried in the Circuit Court of the United States before IREDELL and SITGREAVES, JJ., between David Minge claiming as heir in tail of his father, against Gilmour and Hendrie, to whom his father had sold the land in 1779. For the plaintiff it was urged that he had a vested right which the act of 1784 could not deprive him of, and every argument existed in his favor that was used for the plaintiff in *Sutton v. Askew*. But the Court held against him. The same case seems to have been tried in the State Court and was decided in the same way. *Minge v. Gilmore,* 2 N. C., 279. It was also held that a remainder dependent upon an estate tail was destroyed by the act. *Lane v. Davis,* 2 N. C., 277. In 1808 the Legislature made material changes in the law of descents, and its power was not questioned. Space will not allow me to do more than allude to the introduction of an allowance of a year's provision to widows which was first given in 1796, or to the changes which the Legislature has made from time to time in the distribution of the personal estates of intestates. The history of these may mostly be traced in the Revised Statutes.

Among the most important of the laws which govern the personal rights of married persons *inter se* are those which prescribe the causes of divorce. Until 1814 the Courts had no jurisdiction to decree a divorce; they were granted by the Legislature without any rule but its own caprice. In that year the Courts were allowed to divorce for stated causes. Yet it was never supposed that this law did not act on antecedent marriages. As to dower, we have seen how the act of 1784 abridged it (unless some act lost had previously done so). In 1828 the Legislature enlarged it by giving it in trusts and equities of re- (326) demption. On 2 March, 1867 (Laws 1866-'67, ch. 54), the Legislature restored to married women their common law right of dower, and provided that it might be laid off in the husband's life time, and in *Rose v. Rose,* 63 N. C., 391 (1869) this Court held the act to be valid as against the husband of an existing marriage, and persons claiming in privity with him; how it would be against prior creditors of the

husband was left undecided, but was afterwards decided in principle in *Hill v. Kesler.* In 1869 (Laws 1868-'69, Bat. Rev.), the Legislature continued in force so much of the act of 1867 as gave to wives their right to dower as at common law, and this is the act which it was held in *Sutton v. Askew* was unconstitutional as applied to existing marriages, because it altered what in that case and in this is called a vested right.

It has been seen that the decision in that case was a new departure, that if consistently applied it would have deferred for many years the general operation of many of the most important laws made at various times for nearly 100 years, during all which time the idea on which that decision proceeds never occurred to any one; but such legislation whenever questioned was sustained by the Courts. I think the introduction of such a novel doctrine into the law of North Carolina would have justified a glance behind and before, at how much that was old, and had stood unquestioned, it overthrew; and at how much that was untried, it introduced. I think this Court ought to hesitate long before it incorporates into the law of the State a principle so destructive of the power of the Legislature, and if consistently applied, bound to result in such manifold inconvenience.

If the law existing at the date of a marriage is to be deemed a part of the contract so as to be unalterable, then the wife's inchoate right
(327) of dower which by every definition and by every authority without an exception is a mere expectancy, is to be deemend a *quasi* vested right, or a right so far vested as to be beyond legislative change. That is the doctrine of *Sutton v. Askew,* and if that doctrine be law, I admit that case was rightly decided. But if that doctrine is law it must equally apply to any other legal expectancy, as in this case, to the right of a husband to possess himself to his own use of any property which may come to his wife during coverture, which right existed at the date of marriage (before 1868) and was taken away from the husband, and the property made the separate estate of the wife by the Constitution of 1868. No difference in principle can be suggested between a wife's inchoate right of dower and husband's right to legacies or gifts to his wife after the marriage.

In *Johnson v. Fletcher,* 54 Miss., 628 (Oct., 1877) the case was that defendant in 1872 recovered a judgment against one Dale; in 1875 an act of the Legislature exempted from execution property to a certain value; in 1876 Dale acquired a horse which in that year he sold to plaintiff; the defendant levied on the horse, contending that the exemption was void as to the prior debts of Dale. It was admitted that

it was so as to any property possessed by Dale at the date of the act (1875) but it was contended that the act was valid as to property acquired after the act (which is the opinion of the Court in this case) but the Court held that the creditor's right to subject the property of his debtor to his judgment extended not only to the property owned by the debtor at the date of his judgment, but to all that the debtor might acquire afterwards.

The application of the doctrine of this decision to the present case is this: McMillan (the defendant) had a right to make his debt out of the future acquisitions of Holliday; if Holliday by the law existing at his marriage acquired a vested right to the future acquisitions of his wife which no subsequent legislation could deprive him of, (328) according to the principle of *Sutton v. Askew,* this right was vested in him for the benefit of his creditors, and as soon as he reduced the property into possession, it might be lawfully seized by his creditors.

If the law be that the laws existing at the marriage can not be altered, we will have in this State very numerous groups of husbands and wives with different rights and duties, depending on the dates of their marriage. A widow married before 1784 if now living would be entitled to her dower as at common law, while she could have no dower in a trust estate and no year's provisions.

I might carry on at any length this picture of the results of the doctrine of *Sutton v. Askew,* if it shall be consistently applied. Such a diversity among citizens supposed to live under one law in their most important rights and duties, and all depending on the dates of their marriages, has never existed in any State. And what is to govern the domestic relations of those who immigrate to this State having been married abroad? If the existing law or the domicile is a part of the contract, it must like any other contract follow the parties and fix their personal and pecuniary rights here. Do they bring with them the laws of Germany and England, the Louisiana law of communal property, and the Illinois law of divorce for incompatibility of temper? *S. v. Barnhard,* in Hurd on Hab. Corp., 26. If it be said that they are governed by the law of this State, the doctrine that the law at the date of the marriage, which must mean at the domicile of the parties, is a part of the contract, must be given up. But the doctrine will not be consistently applied as this case shows. It will stop with the special case; widows married before 1868 (unless the decision shall be plainly reversed, as I think it ought to be) may not be allowed their right of dower as the legislature declared they should be, the injury may be circumscribed to that particular right, but I think no Court (329)

will refuse to a wife married before 1868 the benefit of that clause in the constitution which secures to her a separate estate in the property which she may acquire after marriage, nor will any Court deny to any wife the beneficent provisions of the act of 1871-'72. (Bat. Rev.)

No authority is cited in *Sutton v. Askew,* except an opinion of Mr. Scribner in his work on Dower, vol. 1, ch. 1, sec. 7. He admits (sec. 13) that a majority of the cases are opposed to his view, but cites three which he thinks directly support it. *Johnson v. Van Dyke,* 6 McLean, 422; (C. C.), *Royston v. Royston,* 21 Georgia, 161; and *Moreau v. Detchmendy,* 18 Mo., 522. He says in note to sec. 12 that MCLEAN, J., who sat in the first case, was inclined to think that an inchoate right of dower might be divested by the Legislature, which leaves that case to stand upon the authority of WILKINS, J., alone. The Georgia case is not accessible to me. In the case from Missouri the circumstances were peculiar, and I do not think it supports Scribner's view. After these (sec. 20) he relies upon the case in Kernan, already cited, which is not a direct, if any, authority as to dower, but is directly opposed to the decision in the present case.

Against these few and uncertain authorities he cites the following cases which, it seems to me, are clear and convincing. *Jackson v. Edwards,* 22 Wend., 498-519 (N. Y.); *Moore v. New York,* 4 Sandf., 456; S.c., 4 Seld., 110; *Merrill v. Shellburne,* 1 N. H., 199, 214; *Melozet's Appeal,* 17 Pa. St., 449; *Weaver v. Gregg,* 6 Ohio, 548; *Noel v. Ewing,* 9 Ind., 37; *Strong v. Clem,* 12 Ind., 37; *Lucas v. Sawyer,* 17 Iowa, 517. To which may be added *Ware v. Owens,* 42 Ala., 212.

It is thus seen that this Court stands almost if not quite alone, in its denial of the legislative power over inchoate rights of dower. It is because I thought that an inchoate right of dower is not a vested (330) right, that I dissented from *Sutton v. Askew,* and it is because I think that the husband's right to reduce into his possession the future acquisitions of his wife is not a vested right, that I concur in the decision in this case.

PER CURIAM. Judgment affirmed.

Cited: O'Connor v. Harris, 81 N. C., 279; *Jenkins v. Jenkins,* 82 N. C., 208; *Currie v. McNeill,* 83 N. C., 176; *Morris v. Morris,* 94 N. C., 613; *Carr v. Askew, Ib.,* 194; *Hallyburton v. Slagle,* 132 N. C., 948.

H. T. JEFFREES and another v. S. T. GREEN and wife.

Married Women—Deed of Trust.

Where a married woman purchases certain real estate, taking title to herself, and borrowed money with which to pay the purchase money, and to defray necessary family expenses and for carrying on her farming operations on other lands, and to secure the sum borrowed executed with her husband a deed of trust on certain land of her separate estate: *It was held*, that such deed of trust was valid.

CONTROVERSY submitted without action under C. C. P., sec. 315, at Spring Term, 1878, of WARREN, before *Seymour, J.*

The facts appear in the opinion. His Honor held that the deed of trust was valid, and the defendant appealed.

Messrs. Mèrrimon, Fuller & Ashe, for plaintiffs.

No counsel in this Court for defendants.

FAIRCLOTH, J. The case is this: The *feme* defendant purchased a house and lot and took title to herself, and borrowed money with which to pay the purchase price, and to defray necessary family expenses, and for "carrying on her farming operations upon her several tracts of land," and she and her husband conveyed, by deed and privy examination duly taken, one of her several tracts of land in trust to secure the payment of said borrowed money. Is the land thus (331) conveyed liable for the debt?

We can scarcely see any room for argumentation except on the theory that a *feme* covert can not sell or charge her separate estate for her own benefit, or the improvement of her own property. This would go much beyond the purpose of the liberal legislation of the State in favor of married women, and would be highly judicial to their material interests.

The cases to which we were referred—*Purvis v. Carstaphan,* 73 N. C., 575; *Pippen v. Wesson,* 74 N. C., 437; and *Atkinson v. Richardson, Ib.,* 455—were contracts for the benefit of the husband, or her estate was not charged. In the latter case there was no express charge on the land, and it was sought to be charged by implication, but this was not allowed. It was there said that "a married woman may purchase property for ready money, but not on credit; and she may contract debts for the benefit of separate property which she already owns, as for building a house on the premises, etc."

Let it be certified that there is no error, and let the sale proceed according to the agreement of the parties.

Affirmed.

Cited: Newhart v. Green, 80 N. C., 166; *In re Freeman,* 116 N. C., 201; *Loan Asso. v. Black,* 119 N. C., 327.

SOLOMON HILL v. GRIFFIN OXENDINE.

Bankruptcy—Homestead—Judgment.

1. This Court will assume that the date of a judgment is the date of the beginning of the debt upon which it is rendered, when there is nothing in the record to the contrary.
2. In an action to recover land, it appeared that in 1869 G obtained a judgment against F; that in 1873 F conveyed the *locus in quo* to defendant the same having been regularly assigned to him as a homestead;
(332) that thereafter F went into bankruptcy and the *locus in quo* was assigned to him as a homestead by the assignee, and the reversionary interest therein was purchased by the defendant at assignee's sale; that after the adjudication of F as a bankrupt, the plaintiff purchased the *locus in quo* at a sheriff's sale under execution on G's judgment: *Held,* that plaintiff was not entitled to recover.

ACTION to recover land, tried at December Special Term, 1877, of ROBESON, before *Cox, J.*

The facts are these: In 1869 Sarah Grimsley recovered judgment against Giles P. Floyd. On 18 January, 1873, Floyd conveyed the *locus in quo* to the defendant by deed. Before said sale the *locus in quo* was regularly assigned to said Floyd under the statute as his homestead. Afterwards, said Floyd was adjudicated a bankrupt, and his assignee in bankruptcy assigned the same premises to him as his homestead, and on 25 February, 1875, he, the assignee, sold the reversionary interest in the same, and the defendant Oxendine became the purchaser. After said adjudication an execution issued on said judgment and the sheriff sold the same land, and the plaintiff became the purchaser, and now sues for possession. His Honor gave judgment against the plaintiff upon the verdict, and he appealed.

Mr. N. McLean, for plaintiff.

Mr. Giles Leitch, for defendant.

FAIRCLOTH, J. (After stating the case as above.) The plaintiff claims title on the theory that the homestead was not in his way. This is the

pivotal point in the case. On the closest inspection of the record we are unable to ascertain when the debt for which the judgment was rendered was contracted, or how, or for what it was contracted.

The first and only evidence of the existence of this debt is the judgment rendered in 1869. We must therefore assume this to be the date of the beginning of the debt. We can not presume its existence at any prior time. This being so, the homestead guaranteed by (333) the Constitution of 1868 is valid as against the plaintiff's judgment, and being regularly assigned at the instance of the defendant, it was not the subject of sale under the plaintiff's execution, and he acquired no title by the sheriff's sale. He did not even get the reversionary interest, because that could not be sold under an execution until after the termination of the homestead interest itself. Bat. Rev., ch. 55, sec. 26.

Again, the question is affected by the proceedings in bankruptcy. The assignee set apart the same premises to the bankrupt Floyd as his homestead, and although this was after Floyd had sold to the defendant, this fact can not help the plaintiff. If by this assignment in any view Floyd acquired any interest, of course it was protected by the provisions of the bankrupt act, and if the defendant's title was not already complete, this newly acquired estate would have fed the estoppel between Floyd and the defendant, which coupled with defendant's purchase of the reversionary interest, made his a good title to the absolute estate. The homestead being valid according to our State laws, it is expressly secured and protected against any and all liens or incumbrances by sec. 5045, Revised Statutes (U. S.).

The plaintiff's deed ordered by His Honor to be surrendered for cancellation is not found in the record, and we can not say whether it is valuable for any other purpose to him or not, but its cancellation is not essential or important to the defendant's rights, and that portion of the order is reversed, and with this modification the judgment below is affirmed. The defendant will recover costs in this Court and the action be dismissed.

PER CURIAM. Judgment modified and affirmed.

Cited: Mebane v. Layton, 89 N. C., 396; *Buie v. Scott,* 107 N. C., 181; *Vanstory v. Thornton,* 112 N. C., 208.

(334)

ABNER DAWSON v. J. C. HARTSFIELD.

Bankruptcy—Discharge—Judgment after Adjudication on Existing Debt—Practice.

1. A discharge in bankruptcy operates to discharge a debt in existence at the time of the adjudication in bankruptcy and upon which a *judgment is thereafter obtained.*
2. In such case, the discharge can be pleaded upon a motion for leave to issue execution, whatever length of time may have elapsed since it was granted.

FAIRCLOTH, J., dissenting.

MOTION for leave to issue execution under C. C. P., sec. 256, heard on appeal at Chambers in 1878, before *Seymour, J.*

The plaintiff on 5 March, 1868, commenced his action against the defendant and one Parrott for a debt due on their sealed promissory note, and in March, 1869, at Spring Term of LENOIR Superior Court, recovered judgment by default against both. The defendant filed his petition in bankruptcy on 17 April, 1868, and on 14 April, 1869, obtained his discharge. Execution issued on the judgment 14 May, 1869, on which the sheriff made return that no property could be found. No further action was taken in the cause until 31 May, 1878, when an affidavit was made and notice given by the plaintiff to the defendant of a motion for leave to issue execution under C. C. P., sec. 256. On the hearing of the motion before the Judge the defendant pleaded his discharge in bankruptcy, which the Court held to be a valid defence and denied the motion, and the plaintiff appealed.

Messrs. Busbee & Busbee, and *Merrimon, Fuller & Ashe,* for
(335) plaintiff.

Mr. H. F. Grainger, for defendant.

SMITH, C. J. (After stating the case as above.) Two objections are offered to the defence, which will be successively considered:

1. It is argued that debts existing at the commencement of the bankrupt proceeding alone are private against the bankrupt's estate, and that the plaintiff's debt being merged in the judgment subsequently rendered, is neither itself provable nor affected by the discharge.

It is true the bankrupt proceedings all have relation to the time of filing the petition, and as of that date, the bankrupt's estate is apportioned among his creditors. His future acquisitions and liabilities are in no manner involved.

Several cases have been called to our attention to show that the effect of this merger is to create a new debt which can not participate in the distribution of the estate, and is not discharged by the final decree. It is so declared by the Supreme Court of Massachusetts in *Bradford v. Rich,* 102 Mass., 472, and by the District Court of the United States, *In re Gallison,* 5 Bank., Reg., 353, and in other cases. In the last mentioned case, after referring to numerous and conflicting decisions, the District Judge, LORING, says: "I am of the opinion that a judgment obtained after the adjudication in bankruptcy, creates a new debt which can not be proved in bankruptcy, because the judgment is a merger, and creates a new debt."

In *Mizell v. Moore,* 29 N. C., 255, this Court held that where the defendant pleaded a set off of certain bonds, which he afterwards reduced to judgment, the plea was defeated because the set off did not exist in the form in which it was pleaded, nor could the judgment be made available in its stead, for the reason that it did not meet the specifications of the plea, and moreover, did not exist when the plea was (336) put in.

These decisions all proceed upon the niceties of legal pleading and rest entirely upon technical rules. They fail to recognize the spirit and purpose of the act of Congress, and the reasoning by which they are applied to cases in bankruptcy is not at all satisfactory to our minds. This will appear from an examination of the provisions of the act itself:

"No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity," etc. Rev. Stat., U. S., sec. 5105.

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing under oath and signed by the deponent setting forth the demand, the consideration thereof, and whether any and what securties are held therefor, and whether any and what payments have been made thereon. *Ibid.,* sec. 5077. The form of proof is in strict accord with the law, and no claim will be allowed without the necessary oath. It is required not less to support the debt where evidenced by the bond of the bankrupt and where reduced to a judgment even, than where it rests on parol proof of the contract on which it is founded. It is the debt itself, not the form it may wear, which shares in the division of the estate, and which is affected by the discharge. The debt when once created remains one and the same through all the changes it may undergo in the evidence to support it. It is the relation of debtor and creditors on which the bankrupt act operates, taking the estate of the one and appropriating it to the

demands of the other, and putting an end to the relation itself. It is not a different debt because previous to the judgment the evidence of it consisted in the debtor's bond, but the judgment simply and con-
(337) clusively establishes its legal obligation. The bankrupt law in its practical operation is an equitable system, and as a Court of Equity, regards the indebtedness as the essential element to be considered, and not the form in which it may appear. The technical rules of pleading, and the evidence applicable thereto would in a great measure defeat the beneficent purpose of the law, if allowed to control its operation, and are obviously not within the scope of its provisions.

It may be further suggested as an answer to the argument that the old debt becomes extinct and a new debt is created by the judgment, that if this were so, it would be difficult to see how a voluntary assignment of property could be successfully assailed by a creditor. As the assignment is valid except as to existing creditors, or unless made with an actual fraudulent intent, the very act of prosecuting his claim to judgment in order to subject the conveyed property to his debt, would defeat the purpose by extinguishing the debt itself. Equally unreasonable is it, to hold a debt to be destroyed by the judgment which conclusively ascertains and establishes its existence and obligation.

We do not assent to the reasoning contained in the cases cited, but concur in the numerous adjudications in which a contrary doctrine is maintained. We will refer to some of them:

In *Hyman v. Devereux,* 65 N. C., 588, this Court decided that the identity of the debt described and secured in a mortgage was not destroyed by the taking of a new bond, unless such was the intent of the parties, and that it still retained its mortgage security.

In *Dresser v. Brooks,* 3 Barb. (N. Y.) 429, a similar provision in the bankrupt act of 1841 came under review, and the subject was elaborately discussed. After a full and careful examination of the English and American authorities, the Court arrived at a conclusion
(338) which it announces in these words: "We are of the opinion, independently of the authorities to which we have adverted, that a sound construction of the provision in the bankrupt act declaring the effect of a discharge when duly granted, requires us to hold the certificate to be a bar to a debt existing when the petition was filed, nowithstanding such debt has passed into judgment. It was provable under the act, and the plaintiff was entitled to receive upon it his dividend of the bankrupt's estate. It was therefore precisely such a debt as the policy and spirit of the act intended should be discharged." And it is added: "The consequence of adopting the strict and narrow construc-

tion of holding a judgment exempt from the operation of a discharge, because the debt exists in a different form and under a different name, would in the case of a bankrupt whose debts were numerous, utterly defeat the benign object of the act, and leave the unfortunate bankrupt subject to a great portion of his debts after every dollar of his estate had been faithfully devoted to their payment."

In Bump Bankruptcy (6 Ed.) at p. 411, the principle is stated with great force and clearness and supported by numerous citations: "A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy may be proved. The *debt is not extinguished.* The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation on which it is built. The debt was founded on contract; it is now founded on judgment; but it is the same debt. A judgment operates to extinguished a debt only when it produces the fruit of a judgment. It is a security of a higher nature. It is still but a security for the original cause of action. The theory that the debt is so merged as to be extinguished, has no applicability under the (339) banrupt act.

Concurring in these views we are content to rest our decision upon the clear and forcible reasoning by which they are supported. We do not wish however to be understood as holding that the voluntary execution of a note in place of a previous liability, would not exclude the claim from the class of provable debts, as well as exempt it from the operation of the discharge. This being the substitution of a new security by the act of both parties, such would undoubtedly be the result. Our opinion is confined to the case of a debt reduced to judgment, and the facts before us. It will not be denied that the release obtained after judgment, may be pleaded in opposition to the plaintiff's motion, or indeed any good and sufficient cause growing out of matters since its rendition, shown why execution should not issue. We do not see why the present defense may not be set up for the same reason. If the debt has been discharged, surely a Court will not lend its aid to enforce it.

Difficulties have presented themselves in the attempt to get the benefit of the discharge, in cases where judgments had before been recovered and execution could be taken out, in consequence of there being no opportunity to plead it. In New York, the Court suggests that a remedy may be had by application to the Court wherein the judgment was rendered for an order to stay execution perpetually, or to stay it until the plaintiff bring a new action on his judgment, and give the defendant

an opportunity to plead. But it is unnecessary to consider this, because here the plaintiff is compelled to come into Court and ask leave to issue his execution, and the defendant thus has opportunity afforded him to show cause in opposition. We are therefore relieved of any difficulty of this kind. As the discharge does operate upon the debt
(340) ascertained by the judgment, it is in our opinion competent for the defendant to avail himself of it in this way.

But a more serious aspect of the matter arises out of the long delay following the defendant's neglect to take advantage of the terms of the act in obtaining relief, and it is insisted that this laches should deprive him of the benefit of the discharge. Eight years have elapsed since the judgment was entered up, and if the defendant has delayed in seeking his release, the plaintiff has also waited and made no attempt meanwhile to enforce his judgment. *Positive* action was necessary on the part of the plaintiff, for without it no opportunity was given him. He may have supposed that the plaintiff, by his long acquiescence, was assenting to the efficient operation of the discharge in working out its proper results, and therefore no movement on his part was required. Why should there be needless litigation—and why should defendant believe the plaintiff ever intended to enforce his debt? His conduct was reconcilable only with the idea of a silent self-adjustment, without the intervention of pleading or of process. But as soon as the plaintiff wakes up and shows his intent to enforce his demand, he puts in operation the very machinery which lets in the defence.

In *Pugh v. York,* 74 N. C., 383, the defendant was allowed to plead his discharge two years after it was granted, and the Court in answer to the objection of the long delay said: "Apt time sometimes depends upon lapse of time, as when a thing is required to be done at the first term, or within a given time, it can not be done afterwards. But it more usually refers to the *order of proceedings as fit* or *suitable. No time* is prescribed within which a discharge in bankruptcy is to be pleaded."

So in *Falkner v. Hunt,* 76 N. C., 202, the defendant was allowed to plead his discharge more than six years afterwards, and this Court affirmed the order, declaring that the Judge had power to make
(341) it, and that there was "nothing to show, and it certainly is not to be presumed that he exercised an arbitrary or capricious discretion."

In the present case the defence is interpreted at the first moment when it could be done, except by action initiated by the defendant himself, and this was not required so long as the plaintiff himself permitted

the matter to rest. We are therefore of opinion that the discharge may be pleaded and bars the plaintiff's right to have execution.

Judgment affirmed.

Cited: Paschall v. Bullock, 80 N. C., 329; *Simpson v. Simpson, Ib.,* 332; *Sanderson v. Daily,* 83 N. C., 67; *Balk v. Harris,* 130 N. C., 384.

W. B. WITHERS, Ex'r, v. G. W. STINSON.

Discharge in Bankruptcy—Prior Judgment.

1. A discharge in bankruptcy is a final discharge from all preceding debts, then provable.
2. Where the plaintiff recovered judgment (which was duly docketed) against defendant in 1871 upon a debt contracted before 1860 and execution thereon was returned unsatisfied, the defendant's real estate being assigned to him as a homestead; and thereafter the defendant obtained a discharge in bankruptcy, his homestead having been also assigned by his assignee, the plaintiff not proving his judgment debt against the defendant's estate in bankruptcy: *It was held,* that the bankruptcy of defendant discharged the judgment, and that it was error in the Court below to grant the plaintiff leave to re-issue execution.

MOTION for leave to issue execution under C. C. P., sec. 256, heard on appeal at Spring Term, 1878, of MECKLENBURG, before *Cox, J.*

The case agreed states: That the plaintiff recovered a judgment against defendant Stinson, in Mecklenburg Superior Court, on 24 July, 1871, upon a debt contracted before 1860, which judgment was duly docketed. Execution was issued (the homestead of defendant (342) being assigned) and returned *nulla bona* to Spring Term, 1872; and in August following the defendant filed his petition in bankruptcy and obtained his discharge (which is set up as a defence). The defendant is still the owner and in possession of the property assigned as aforesaid. The real estate was also assigned to him as a homestead by his assignee in bankruptcy, the allotment confirmed, and the reversionary interest therein conveyed to him by the assignee. The plaintiff had not proved the said judgment in bankruptcy against the defendant's estate. Upon these facts, the motion was refused by the clerk, and on appeal His Honor reversed the judgment and gave an order for execution to issue, from which the defendant appealed to this Court.

Messrs. Jones & Johnston, and *Dowd & Walker,* for plaintiff.
Messrs. Shipp & Bailey, for defendant.

BYNUM, J. It was admitted by the counsel for the plaintiff that *Blum v. Ellis,* 73 N. C., 293, was a decisive authority against him, but he seeks in a well prepared and considered argument to induce the Court to reconsider and reverse that decision. *Blum v. Ellis* was a well considered case upon a review of the conflicting decisions of other Courts up to that time. The importance of adhering to decisions once solemnly made, and thus preserving a uniformity in the law, can not be overestimated; and nothing less than a clear conviction that the decisions are erroneous and ought to be overruled, will justify a departure from them. Such a conviction has not been produced upon our minds by the able argument and the authorities of the plaintiff's counsel. Nor can the Court, other things being equal, lose sight of a train of evils which must follow a reversal of that decision,—evils which could not (343) well be foreseen by debtors or creditors, who alike supposed, and had the right to suppose, that a discharge in the Court of Bankruptcy was a final discharge from all preceding debts, then provable. There is error. Judgment reversed and proceedings dismissed.

Judgment reversed.

Cited: Dixon v. Dixon, 81 N. C., 325; *Sumrow v. Black,* 87 N. C., 103; *Windley v. Tankard,* 88 N. C., 223; *Parker v. Grant,* 91 N. C., 338.

JOHN B. GREEN and others v. GEORGE J. GREEN.

Sale by Assignee in Bankruptcy—What Passes.

A sale by an assignee in bankruptcy of land held in trust by the bankrupt to secure debts due himself, passes to the purchaser the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid.

ACTION commenced in Union and removed to and tried at Fall Term, 1877, of CABARRUS, before *Kerr, J.*

This action was originally brought by Tilman Green to recover a tract of land, and after his death, the present plaintiffs, devisees under his will, were made parties and continue to prosecute the action. See S. c., 69 N. C., 294. The facts found upon the former trial, before *Buxton, J.,* were substantially as follows: The defendant originally owned the land in dispute which was sold at an execution sale and bid off by one Henry Long, at $1,000, under an arrangement with the defendant that he was to be allowed to redeem, and Long took the sheriff's

deed with this understanding. The defendant set up this equity as a defence to the action, and upon a disagreement as to the amount to be paid by defendant to entitle him to a conveyance of the land, the case was referred and an account of the dealings between Long and defendant stated, in which the referee reported a balance of $2,603.95 due Long. The defendant filed no exceptions to this report and (344) it was confirmed.

Subsequent to said purchase, Henry Long went into bankruptcy and returned said land in his schedule with the statement that it was subject to redemption by defendant, but did not include in such schedule any of the claims he held against the defendant; he did however deliver them to his assignee to be used in a settlement between the assignee and the defendant. The land was sold by the assignee as the property of Long with notice to the purchaser on the day of sale, that he should have the benefit of said claims against the defendant, they not being sold by the assignee. Tilman Green bought the land at said assignee's sale, for $600 and the assignee made him a deed in fee for the same. The defendant remained in possession of the premises.

The plaintiffs insisted that they were entitled to a decree against the defendant for the said sum of $2,603.95 and interest, and that the land be sold and the proceeds applied to its payment, and execution issued for the balance, if the defendant shall fail to pay the same in a certain time, in which event the defendant is to retain possession of the land and the plaintiffs to execute a deed to him.

The defendant insisted that he had already over-paid the incumbrance upon the land and was entitled to a decree for title without further payment. But the Court adjudged that the plaintiffs could only claim the amount of the purchase money, $600, as being a charge upon the land in their favor, and ordered its sale to satisfy the same.

Upon a second trial in the Court below, before His Honor the following issue was submitted to the jury,—"Did the assignee in bankruptcy of Long sell and assign title to Tilman Green to the debts owing by the defendant to Long, at the time when he sold the land mentioned in the pleadings?" Answer—"He did." There was an appeal by both parties from the ruling of His Honor upon the evidence touching this issue, but as he was affirmed as to that part of the case in (345) this Court and the decision rests upon another point, it is deemed unnecessary to set it out.

Messrs. Wilson & Son and *Battle & Mordecai,* for plaintiffs.
Messrs. W. H. Bailey and *R. Barringer,* for defendant.

RODMAN, J. None of the facts of this case as stated by *Buxton, J.*, seem to be in dispute, until we get to the sale by the assignee in bankruptcy of Long. As to that it is admitted that the assignee sold the land claimed in the complaint, and that it was purchased by the original plaintiff, Tilman Green, at the price of $600. The plaintiffs contended, that as a matter of fact, the assignee sold with the land certain evidences of debt, which Long held against the defendant and the defendant denied that he did. Upon the facts reported by the referee, *Buxton, J.*, held that only the estate of Long in the land was sold, and not the debts owing to him from the defendant, and for which he held the land as a security. When the case came to this Court by an appeal from the judgment of the Judge, it was ordered that an issue be submitted to a jury whether the assignee sold and plaintiff purchased the debt as well as the land. Upon the trial of this issue the jury found for the plaintiff; thus finding the fact in question differently from what it had been found by the Judge, and thus materially differentiating the question before us from that which was before the Judge.

The issue was tried before *Kerr, J.* Instructions were asked for by the defendant and exceptions taken to those which the Judge gave to the jury. We consider it unnecessary to examine the exceptions in detail. The instructions asked for, were either immaterial or were given in substance by the Judge. We see no error in the proceedings before him. We may now consider the case as it stands upon the ap-
(346) peal from the judgment of *Buxton, J.*, with the change made by the finding of the jury.

If a mortgagee assigns the debt secured in the mortgage and does no more, an *equitable* estate in the mortgaged land passes to the assignee, for the land under mortgage is regarded in equity as a mere appendage to the debt. 1, Jones Mortgages, sec. 817.

But if the mortgagee assigns the land without also assigning expressly or impliedly the mortgage debt, as he may do, the assignee takes the legal estate, but he is a mere naked trustee for whoever may own the debt. This doctrine is founded in reason, for by it the conveyance of the mortgaged land (or other property only) the assignee acquired also the mortgaged debt while the mortgagee retained in his possession the notes, bonds, or other evidences of the debts, he could receive payment of them, or assign them fraudulently to an innocent purchaser. It also follows directly from the well settled doctrine that the debt is the principal thing, and the mortgage an incident or appendage only. It is established by many authorities. 1 Jones Mortgages, secs. 804 to 810; *Thayer v. Henning,* 9 Mo., 280; *Johnson v. Cornett,* 29 Ind., 59.

As an assignee merely of the mortgaged property gets nothing of value, very little evidence will suffice to prove an intent to assign also the secured debts. The payment of some value upon such an assignment and the co-temporaneous delivery to the assignee of the evidences of the debt would in the absence of countervailing evidence be conclusive of an intent to assign the debts.

This is the law deduced from the authorities upon an assignment between private individuals. In the case of a sale of mortgaged property by an assignee in bankruptcy of the mortgagee, it must *necessarily* be understood to be of the debts secured, and of the land only as an incident and appendage to the debts. An assignee in bankruptcy does not take property which is vested in the bankrupt as a naked (347) trustee without any beneficial interest. Bankrupt act, sec. 14. As he could not take, he could not sell any such legal estate, and such a sale if professed to be made, would be simply void. He had no right to sever the legal estate in the land from the beneficial interest arising from the ownership of the debts. He took the land only as an appendage to the debts, and could sell it only as such.

That he delivered the evidences of the debts to the purchaser of the land, is conclusive proof that the debts were the principal which he sold, and the land passed as an incident. The finding of the jury was fully supported by the evidence, and a contrary finding would have been set aside. It is not material that the debts were not scheduled by the bankrupt, formally as such. If they had been omitted altogether, either fraudulently or negligently, they would have passed to his assignee who takes all the property of the bankrupt, except his exemptions. But the land is scheduled as being a security for certain debts, and this was in effect a schedule of the debts; plainly such was the intent and meaning of the bankrupt.

We think that Tilman Green by his purchase acquired the estate in the land which the bankrupt Long had, and stood in respect to it, in Long's shoes. His executor is entitled to demand payment of the debts which it was agreed between the defendant and Long that the land should be held as a security for, and upon the payment of such debts, the defendant is entitled to redeem the land and to have a release from the devisees or heirs of Tilman Green. The $600 which Tilman Green paid was the price of the debts. It is not to be added to the debts.

There does not appear to be any exception to the report of the referee as to the amount of the mortgage debt, but, as in the view which the Judge took of the case, it was not necessary for him to pass on the report, and he did not. The case will be remanded in order (348)

that the amount of the debt for which Long held the land as a security, and which was sold by his assignee to Tilman Green, may be ascertained.

Judgment reversed, and case remanded for the purpose aforesaid, and that the case may be further proceeded in according to law.

Reversed and remanded.

JESSE E. FRALEY v. JAMES A. KELLY.

New Promise by Bankrupt.

The defendant, who had been adjudged a bankrupt but not discharged, said to the plaintiff, to whom he was indebted before his bankruptcy: "Your debt I will pay if I live"; and again,—"Count the interest on the note and add the principal, and send it to me at Raleigh, and I will make a draw and send you the money for the note": *Held*, that the jury were justified in finding thereupon a new and unconditional assumption of the old debt, entitling the plaintiff to recover, notwithstanding the bankruptcy.

CIVIL ACTION tried at January Special Term, 1878, of ROWAN, before *Kerr, J.*

The facts are sufficiently stated in the opinion. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Mr. W. H. Bailey, for plaintiff.

Messrs. J. E. Brown, and *J. M. Clement,* for defendant.

FAIRCLOTH, J. The defendant being indebted to the plaintiff was adjudged a bankrupt, and the plaintiff brings this action for (349) the same debt, and declares on a new promise. The plaintiff testified that after the adjudication in bankruptcy he presented his note to defendant and he said: "Your debt and Mose Wagoner's I will pay if I live." He also testified that on another occasion defendant said to him: "Count the interest on the note and add the principal and send it to me at Raleigh, and I will make a draw and send you the money for the note." There were some other conversations between them, and it was in evidence that the defendant was solvent before the commencement of this action.

This issue was submitted to the jury: "Did the defendant, after he went into bankruptcy and before he obtained his discharge, make an unconditional and unequivocal promise to pay the debt he owed the plaintiff?" to which the jury responded, "Yes."

This finding would seem to leave no question in dispute. We have said several times that the defendant is liable on the new promise under such circumstances. *Fraley v. Kelly,* 67 N. C., 78; *Hornthal v. McRae, Ib.,* 21; *Henly v. Lanier,* 75 N. C., 172; *Randidge v. Lyman,* 124 Mass., 361.

Affirmed.

Cited: Fraley v. Kelly, 88 N. C., 227.

JAMES WILSON v. JEFFERSON JAMES.

Landlord and Tenant—Contract—Estoppel.

1. One, at the time under a disablity to contract, who enters upon land by permission of another claiming and acknowledged to be the owner, must return the possession to such owner as a condition precedent to denying his title.
2. Where, in an action under the Landlord and Tenant Act, it appeared that the defendant, a slave, in 1863 entered into possession of the *locus in quo* as the tenant of plaintiff, and in 1865 refused to (350) pay further rent and disclaimed being the plaintiff's tenant: *It was held,* that he was estopped to deny the plaintiff's title, and that plaintiff was entitled to recover.

PROCEEDING, under the landlord and tenant act, commenced before a Justice of the Peace, and heard on appeal at Spring Term, 1878, of NEW HANOVER, before *Eure, J.*

In 1868 the plaintiff purchased from one Bettencourt the land now sought to be recovered, which is a lot in the city of Wilmington. At his purchase the defendant, then a slave, was living on the lot; whether he was the slave of Bettencourt, or of some one else, and under whose permission he was living on the lot, do not appear. The defendant applied to the plaintiff to rent the premises; plaintiff did not rent them to the defendant, who continued in possession and paid rent until the entry of the Federal army into Wilmington in February, 1865, when he refused to make any further payment, and disclaimed being the tenant of the plaintiff. This action is to recover the possession of the land.

The defendant contended that inasmuch as he was a slave in 1863, when he attorned and paid rent to the plaintiff, and was incapable in law of making any contract, he is not estopped by such acknowledgment of the plaintiff's title from now denying it, and putting him to

the proof of it. His Honor did not assent to this proposition, but charged the jury that it was only for them to consider whether the defendant had been shown to be the tenant of plaintiff, and that it made no difference whether defendant was a slave or not, and that they must disregard that question altogether. Under the instructions given, the jury found for the plaintiff. Judgment. Appeal by defendant.

(351) *Messrs. W. S. & D. J. Devane,* for plaintiff.
Mr. D. L. Russell, for defendant.

RODMAN, J. (After stating the case as above.) The doctrine of estoppel as applied between landlord and tenant, does not arise so conclusively out of a contract, that it can not be applied to one who is incapable of binding himself by a contract. If one enter upon land by permission of another, claiming and acknowledged to be the owner, the duty to return the possession to the owner as a condition precedent to denying his title, is one which the law imposes upon principles of good faith and to prevent fraud. Its violation is essentially a tort and a fraud. The same rule applies between a bailor and bailee of goods; the latter can not, except under peculiar and exceptional circumstances, set up the right of a third party against the bailor, but must return the possession of the goods, and put the bailor *in statu quo.* This doctrine has received frequent illustration in the case of infants. Kent, 2, vol. 240, says: "Infancy is not permitted to protect fraudulent acts, and therefore if an infant take an estate and agree to pay rent, he can not protect himself from the rent by the pretence of infancy, after enjoying the estate, when of age. If he receive rents, he can not demand them again when of age, according to the doctrine as now understood. If an infant pay money on his contract and enjoy the benefit of it, and then avoid it when he comes of age, he can not recover back the consideration paid. On the other hand, if he avoid an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword." These general principles are clearly just and reasonable, and are fully supported by the authorities cited in the notes to Kent, to which I add *Skinner v. Maxwell,* 66 N. C., 45.

It can not be doubted that an infant lessee of land, or bailee (352) of goods, notwithstanding he may avoid the contract, so far as to escape the payment of rent or hire, is yet bound to return the land or goods to the person from whom he received them. To enter upon land or to receive the possession of goods by permission, and upon a contract express or implied to restore the possession, creates a rela-

tion between the parties upon which the law declares their rights and duties; and although the contract out of which the relation arose may be void or voidable, yet the relation exists as a fact with its duties and obligations, and can only be put an end to by the restoration of the parties to their *statu quo*.

In *King v. Murray,* 82 N. C., 62, where it was contended that the lease, under which the defendant had entered, was void for usury, the Court said that was not material; he was still estopped to deny the title of the person under whom he entered. It is on the same principle that privies in estate with the tenant, but who have themselves made no contract at all, are estopped; as in the case of a widow who continues the possession of her husband. *Bufferlow v. Newsom,* 12 N. C., 208; *Gorham v. Brenon,* 13 N. C., 174.

Because the defendant could not contract while a slave, is no reason why he should be allowed to commit a fraud since he is free. If the defendant be not estopped, and can put the plaintiff to proof of his title against the world, as he could do if his possession in the beginning had been adverse instead of permissive, every slave who at his emancipation was in the occupation of a dwelling on the land of his owner, and who refused after emancipation to give up his possession, might in like manner put his former master, under whose authority his occupation began, to proof of his title; and in case he could not make out a title against all the world, might hold the land.

Besides, the proposition that a slave was incapable of making any contract, is too broad. The *executed* contracts of a slave were not void, although perhaps voidable at the pleasure of his owner. (353) We all know that every slave had his "peculium," his money and goods, which although in the theory of the law, the property of his owner, yet were in fact his, and dealt with at his pleasure, except in the case of certain sorts of goods, the ownership of which by a slave, even with the consent of his owner, was specially forbidden by statute on grounds of public policy.

If a merchant in 1860 had sold and delivered to a slave a pair of shoes and received the price, could the merchant lawfully have taken back the shoes without returning the price? or could the owner of the slave have recovered the money from the merchant without returning the shoes? If an executed contract be disaffirmed by a party under a disability to contract, he must in general put the other party *in statu quo* and this is not by force of the invalid contract, or from any implied contract between the parties which would be equally invalid, but because equity imposes a duty, the breach of which is a fraud, and no

one can avail himself of a disability to contract to protect himself in a fraud. There are rules of right and justice which are binding on all human beings and which the law imposes on all for the general good.

In this case no damages are claimed for use and occupation since the emancipation of the defendant, but only the possession of the land. There is no error in the judgment below, and it is affirmed.

Affirmed.

Cited: S. v. Boyce, 109 N. C., 755.

(354)

JAMES KRIDER v. A. R. RAMSAY.

Landlord and Tenant—Sub-letting—Jurisdiction.

1. If there are no covenants in a lease against sub-letting, the lessee may underlease, and if the under-tenant commits no breach of the convenants between the lessor and the lessee which would work a forfeiture of the lease and authorize an entry and dispossession of him by the lessor, an entry upon the land demised to the under-tenant and a dispossession of him by the lessor is a trespass.
2. Where a tenant for years, after sub-letting to a third party, and before the underlease has expired, surrenders to the landlord, the latter is guilty of a trespass in entering upon the sub-lessee.
3. In cases of sub-letting such as above, there is no privity of estate or contract between the lessor and the under-tenant; and *therefore,* no action in substance *ex contractu* can be maintained for a wrongful entry by the landlord.
4. Prior to Laws 1876-'77, ch. 251, a Justice of the Peace had no jurisdiction in cases of tort.

APPEAL from J. P., tried at January Special Term, 1878, of ROWAN, before *Kerr, J.*

The plaintiff brought this action on 25 September, 1878, before a Justice of the Peace to recover an account alleged to be due for work and labor done on the defendant's land, upon an implied contract; but the defendant denied his right to recover on the ground that he had made no contract with the plaintiff authorizing him to occupy the premises.

The plaintiff was a resident of Rowan county, and the defendant of Iredell county. The defendant's land on which the work was done is situated in Rowan. The Justice's summons, with a certificate and seal of the clerk of said Court as to his authority to act, commanding the defendant to appear in Salisbury and answer, etc., was sent to the sheriff

of Iredell and duly served by him. The summons was not endorsed by a Justice in Iredell. The defendant however appeared, there was a trial before the Justice who issued the summons, and from (355) the judgment therein an appeal was taken to the Superior Court.

Evidence. The plaintiff testified that about Christmas, 1875, one William Dyson, who was living on said land, told him he had leased it in writing from the defendant for a term of five years, at an annual money rental of $150, and proposed to rent a portion of the land to the plaintiff for one year on certain terms, to which the plaintiff agreed, and thereupon entered upon the premises. One James Erwin, a witness for plaintiff, testified that some time in 1875, he heard the defendant tell Dyson that he had leased the land to him for 5 years; but there was no evidence that this conversation was ever reported to defendant.

The defendant in his evidence positively contradicted the statement of the last witness, and said that he had not leased the land to Dyson at all; that some time in December, 1875, Dyson proposed to lease it for said term and to pay said rent, and that pending the negotiations in respect thereto he permitted Dyson to occupy one of the houses on the land; that the proposed lease was never perfected nor reduced to writing; that he expressly told Dyson if he leased the premises to him, he should not permit him to sub-let to any one, nor did he ratify the contract made by plaintiff with Dyson, nor did he know that plaintiff was occupying the land until the very day he gave him notice to quit.

It was also in evidence that in March, 1876, Dyson went to plaintiff's house and told him that he had surrendered the premises to defendant; and defendant then told plaintiff that if he wished to remain he must make a contract with him, which the plaintiff declined to do. The defendant then told plaintiff he must leave the premises by a certain time, to which he made no objection, and accordingly did leave, as did also Dyson, a short time afterwards. (356)

The jury rendered a verdict in favor of the plaintiff, which His Honor set aside, being of the opinion, that a Justice of the Peace had no jurisdiction of the action, from which ruling the plaintiff appealed.

Mr. W. H. Bailey, for plaintiff.
Mr. J. S. Henderson, for defendant.

BYNUM, J. In the view most favorable to the plaintiff the case is this: The lessee of a term of 5 years made an underlease of a portion of the premises to the plaintiff, for one year, who entered and occupied. Afterwards and before the expiration of the term of either lessee or under tenant, the lessee surrendered his lease to the lessor, who thereupon

entered and ejected the under-tenant. The sub-tenant has brought this action against the lessor before a Justice of the Peace, and declares in contract for work and labor done upon the premises so leased to him.

Where there are no covenants in a lease against subletting, the lessee may underlease, and if the undertenant commits no breach of the covenants between the lessor and lessee which would work a fortfeiture of the lease and authorize an entry and dispossession by the lessor, (357) an entry upon the land demised to the undertenant and a dispossession of him by the lessor is a trespass, and subjects him to an action. There being here no covenant against subletting, the plaintiff by his contract with Dyson, the lessee, acquired a valid term in the premises for the time agreed on, subject only to be defeated by the reentry of the lessor or lessee for some condition of the demise broken.

Where a lessee for a term of years parts with his whole term to a third party, it is called an assignment, and the assignee thereby becomes the tenant of the original lessor and subject to all the covenants in the lease, which run with the land, just as the lessee was. The privity of estate and privity of contract still subsist between the lessor and assignee, as it did between the lessor and lessee. Taylor's Landlord and Tenant, secs. 436-37. But when a tenant makes a lease for a less number of years than his own term, it is not an assignment, but is called an underlease; and it is well settled that as between the original lessor and the undertenant there is neither privity of estate nor contract, so that between these parties no advantage can be taken of the covenants in the lease, and therefore the lessor can not sue an undertenant upon the lessee's covenant to pay rent, nor can he maintain an action for use and occupation against the undertenant unless under an agreement, as the relation of landlord and tenant does not subsist between them. *Holford v. Hatch,* Doug. 183; *Crusoe v. Bugby,* 3 Wils., 234; Strange 405; Style, 483; Taylor Landlord and Tenant, secs. 108, 448, and note, Com., Dig., Cov. (e. 3.) *Kennedy v. Cope,* Doug. 56.

As the plaintiff committed no breach of the terms of his lease from Dyson, or of the lease from Ramsay to Dyson, it is clear that while those leases and terms subsisted, neither the lessor nor lessee had a right to enter and dispossess the undertenant. How were the rights and relations of the parties affected by the surrender of the lease by the lessee to the lessor? Did the lessee thereby squeeze out and extinguish (358) the term of the undertenant? By the sublease the plaintiff acquired a right or estate in the land for one year, and Dyson, the lessee, could not sell, give up, or surrender anything which did not belong to him; he could not destroy rights which had become vested in

the undertenant even by a surrender of his estate in the premises to the lessor. Taylor Landlord and Tenant, sec. 111.

The material distinction between an assignment of a term and an underlease of a part of the term is, that while the assignee is liable to the original lessor for all the obligations of the lessee by virtue of the privity of estate between them, no action lies by the lessor against an undertenant upon any covenant in the lease, because there is no privity of contract or estate between the lessor and the sublessee. After much confusion in the cases, this seems now the settled doctrine both in this country and in England. See note 4 to sec. 16, Taylor Landlord and Tenant.

When Dyson surrendered his lease to the lessor the legal effect was to merge the lesser interest into the greater, and as far as he was concerned, to end and destroy the term; but this could not effect the rights acquired by the undertenant; his interests and term continued as if no surrender had been made. A surrender is never allowed to operate injuriously upon the rights of third parties, or to affect the estate of the underlessee. Shep. Touch., 301. Such an effect even is given to a surrender that although a tenant who has made an underlease can not by a surrender prejudice the subtenant's interest, yet he will himself lose the rent he had reserved upon the underlease; for since rent is an incident to the reversion, the surrenderor can not collect it, because he has parted with his reversion to the lessor; nor can the lessor collect it, because although the reversion to which rent was incident has been conveyed to him, yet as soon as it was conveyed, it merged in the greater reversion of which he was already possessed, and the consequence is that the underlessee holds without the payment of any rent, (359) except where otherwise it may be provided by statute. Smith Landlord and Tenant, 232.

It was the fault of the lessor in making the lease to Dyson that he did not insert a covenant against the underletting, and in accepting the surender of the lease; it was again his fault that he made no provision to meet a contingency like this. In neither case is an innocent undertenant to suffer who is in no fault.

After the surrender the lessor refused to allow the undertenant to occupy for his term, unless he would accept new terms and a new lease for him. This the undertenant refused, and had the right to refuse, and he was therefore expelled from the premises before his term had expired. So that in no point of view had the relation of landlord and tenant ever existed between them, or any contract expressed or implied by law. He was in by a lawful title, the lessor had no right of entry,

and the forcible dispossession of the plaintiff was a trespass for which he had an action. *Eten v. Leeyster,* 60 N. C., 252; *Adams v. Godard,* 48 Maine, 212. The undertenant was therefore entitled by a proper action to recover such damages as were the direct consequence of the act of the defendant in ejecting him, but he has misconceived his action and the forum having jurisdiction. At the time this action was begun, a Justice of the Peace had no jurisdiction in cases of trespass *quaere clausum fregit* or other torts. *Nance v. R. R.,* 76 N. C., 9.

The opinion of the Court proceeds upon the fact assumed, rather than established, that the original lease from the defendant to Dyson was a valid lease executed in conformity to the statute. Bat. Rev., ch. 64, sec. 2. How this fact was, is left in doubt in the case as stated. If the lease was not made in writing as the law prescribes, it was void, and so was the sublease as a necessary consequence. In such case the plaintiff's remedy, if he has any cause of action, would be (360) against Dyson, his immediate lessor.

PER CURIAM. Judgment affirmed.

Cited: Alexander v. Hoskins, 120 N. C., 454; *Malloy v. Fayetteville,* 122 N. C., 484.

Dist.: Pate v. Oliver, 104 N. C., 458.

ALVIS KING and others v. THE FALLS OF NEUSE MANUFACTURING COMPANY and others.

Arbitrators—Award.

1. The duty of arbitrators is best discharged by a simple announcement of the result of their investigation. They are not bound to decide according to law, but may decide according to their own notions of right without giving any reason therefor.
2. If they undertake to decide according to law, and it appears upon the face of the award that they have misconceived any principle of law applicable to the case, the award will be set aside.

APPEAL at Spring Term, 1878, of ALAMANCE, from *McKoy, J.*

The principal facts appear in the opinion. The parties agreed in writing to refer all questions involved in the cause to arbitrators whose award should be entered as the judgment of the Court, and in accordance therewith, *Cox. J.,* made the order of reference. Two of the arbitrators submitted a report, the third dissenting thereto; and that portion

of the report which is the subject of the plaintiff's exception is as follows: We determine and award that the purchases by the Falls of Neuse Manufacturing Company and P. R. Harden, of W. J. & Albert Murray, respectively, shall be held and taken to be valid, free and discharged of all trusts in favor of said creditors, but the said creditors shall participate in the following funds (naming them) in lieu of the property purchased of Murray; to which the plaintiffs except and insist that while the arbitrators undertook to decide the questions of (361) law involved, it is apparent that the conclusion of the majority of them is erroneous. 1st—In holding as a matter of law that the purchasers from Albert Murray of his interest in the joint property, after the dissolution of the firm with notice thereof, and with notice of outstanding debts, shall be taken to be valid, and free and discharged from all liability to the joint creditors; 2d—In holding that the joint creditors, as a matter of law were only entitled to a portion of the funds in respect of the purchase from Albert Murray, instead of holding that they were entitled to a sale of the property purchased and the proceeds thereof, and 3d—That the award was not made in accordance with the terms of submission.

Upon the hearing His Honor overruled the exceptions and ordered judgment to be entered according to the award from which ruling the plaintiffs appealed.

Messrs. Scott & Caldwell, for plaintiffs.
Mr. J. E. Boyd, for defendants.

FAIRCLOTH, J. The plaintiffs suing as creditors of the partnership of W. J. & A. Murray seek to have certain property in the possession of the defendant applied in payment of their claims. They allege that said property was the property of said partnership and that it was sold to the defendant company after the dissolution of the said partnership, with notice of indebtedness of said firm, and that the sale was made to hinder and defraud the payment of the partnership debts. These and other allegations, are denied by the defendant, thus raising many issues. These issues however have been determined by a tribunal selected by the parties for that purpose, and are therefore not before us. By the written agreement of the parties to this action filed with the record, "all and every question of issue, whether of law, equity or fact involved between them, as well as all such questions and issues (362) as may exist between the defendants themselves arising out of the sale of the firm property," etc., were referred by order of Court for award and decision, with the further agreement that the award of the

referees or a majority of them shall be final between the parties, and that judgment shall be entered accordingly. The referees heard and determined the matters referred to them and filed their award. The plaintiffs filed exceptions to the referees' report, and say that they decided certain questions contrary to law. It is not alleged that they considered any matter not referred to them, or that they failed to consider anything involved in the action; nor is there any suggestion that the referees were governed by any improper motives.

It is well settled that arbitrators are no more bound to go into particulars and assign reasons for their award, than a jury is for their verdict. The duty is best discharged by a simple announcement of the result of their investigations. It is equally well settled that they are not bound to decide according to law, for they are a law unto themselves, and may decide according to their notions of right and without giving any reasons. If however they undertake to decide according to law, and it appears from the face of the award that they have misconceived any principle of law applicable to the case, then the award is void. *Patton v. Baird,* 42 N. C., 255; *Leach v. Harris,* 69 N. C., 532; Morse Arbitration and Award, ch. 10, p 293.

Looking then at the face of the award alone, which seems to have been made in view of the above principles, we find a simple announcement of conclusions arrived at, without any reasons, and without disclosing whether they decided the questions according to any principle of law or equity, or according to "their own law," which is, as before stated, their own notions of justice in the matter before them.

From the terms of submission it appears that full authority (363) was given the referees to dispose of all issues and questions, as they have done; and as no mistake is apparent on the face of their report, and as we can not see that they have not done precisely what they intended to do, we are unable to perceive any reason why the award should be disregarded, and not made conclusive, as seems to have been the intention of all interested parties when the reference was made. Let final judgment be entered in this Court according to the award.

PER CURIAM. Judgment affirmed.

Cited: Osborne v. Calvert, 83 N. C., 365; *Miller v. Bryan,* 86 N. C., 167; *Clanton v. Price,* 90 N. C., 96; *Patton v. Garrett,* 116 N. C., 856; *Henry v. Hilliard,* 120 N. C., 487; *Mayberry v. Mayberry,* 121 N. C., 250.

R. M. NORMENT v. W. J. BROWN, Executor, and others.

Referee—Scale—Evidence.

1. Where the report of a referee does not state fully and distinctly his findings on the facts, so that his conclusions of law may be reviewed by the Court, the case will be remanded, in order that the defect may be supplied.
2. Payments on a note in Confederate money are to be credited at the nominal value of the currency paid, regardless of the fact that such payments were not endorsed on the note at the time.
3. Where it appeared that A who was indebted by note to B paid off and discharged, at the request of the latter, a debt due by him to C, it should have been found as a fact by the jury (or referee) whether or not the transaction was intended by the parties as an extinguishment *pro tanto* of the debt from A to B. The fact of the payment to C is in itself some evidence of such an intent.

APPEAL at Fall Term, 1877, of ROBESON, from *Seymour, J.*

This action is brought on a note not under seal, given by Reuben King, the testator of defendant, to W. R. Bryan, for $803.04, on 2 January, 1856, payable one day after date, and as a second (364) cause of action, upon a bond made by King to Bryan on 14 February, 1857, for $1,000, payable one day after date. The defendant answered, (1) Both the note and bond have been paid. (2) As to the note not under seal, it is barred by the statute of limitations. (3) That he has counter-claims to both the note and the bond, which are described and numbered from 1 to 60, in a schedule attached to the answer. The plaintiff replied: The counter-claims are barred by the statute of limitations.

The case was by consent referred, the findings of the referee as to facts to be conclusive. The referee made a report in which he finds among other things not material to be here stated, (1) That the two notes sued on were made by King at their respective dates, and are as described. (2) That at the commencement of the action on 16 September, 1873, they were the property of the plaintiff, though he does not find at what date they were assigned to him. (3) That "there is no evidence of payment either on the bond or note sued on." By which we understand him to mean merely that no payments are endorsed on them, as there certainly is evidence from which payments might be inferred as will be seen. (4) Of the counter-claims pleaded, the referee finds that No. 54, which is a note for $4.74, dated 27 Sept., 1856, is barred by the statute of limitations. (5) No. 55, which he describes as "a payment by defendant Brown's testator of $100 to W. B. Bryan, on 10 July,

1863, "is *scaled* and allowed." (6) No. 56, which he in like manner describes as a payment of $25 made on 9 July, 1863, is *scaled* and allowed. (7) The counterclaim No. 60 is described as a judgment recovered at Spring Term, 1870, of Robeson, in favor of D. F. Edmond
to the use of *R. King v. B. Bryan and John Moore* for $322.
(365) It does not distinctly appear whether the referee finds this to be a good counterclaim or not. Apparently he does not deduct it from the sum which he finds owing by defendant independent of all counterclaims, while he does deduct Nos. 55 and 56 after scaling them. Why he declined to allow it, if he did decline, we can only conjecture. (8) The rest of the matters pleaded as counterclaims, consist of payments made by King of debts owing by Bryan to sundry persons, at the request of Bryan. The payments were made while Bryan held the notes sued on and it is said before April, 1869; but they must have been made before March, 1869, as King died early in that month, and his will was proved on 10 March.

The referee finds as conclusions of law: (1) That the note not under seal is barred by the statute of limitations. (2) That the counterclaims, except Nos. 54, 55, 56, and 60, are barred by the statute of limitations. (3) How he found as to counterclaims Nos. 54, 55, 56, and 60 has been stated above.

The defendant excepted to the report of the referee (1) because he found that the counterclaims (except Nos. 54, 55, 56, and 60) were barred by the statute of limitations; whereas they had in fact been paid by King as the agent of Bryan; (2) because the referee erred in finding that defendant was liable to judgment for any sum whatever.

The Judge overruled the first exception and "allowed" (sustained) the second, and referred the case back to the referee. He expressed the opinion that the matter pleaded as counter-claims (except as aforesaid) were not counterclaims, but payments, and consequently not affected by the statute of limitations. The plaintiff appealed from this judgment.

(366) *Messrs. W. F. French* and *N. McLean,* for plaintiff.
Mr. Giles Leitch, for defendants.

RODMAN, J. (After stating the facts above.) In considering the questions which have been raised, it will be necessary to treat them in order; and it will be convenient to examine first the counterclaims excepted from the mass, and standing on their particular grounds:

As to No. 54. If this is to be considered as a counterclaim, or more properly, a setoff, it is clearly barred by the statute; and as it is stated,

and without any evidence other than the note itself furnishes tending to show that in the transaction in which it was given it was expressly or impliedly agreed that it was to be a payment on King's indebtedness, it is a setoff, and not a payment. On this point we agree with the referee. Though as will be seen, we think there is evidence upon which he might find it to be a payment.

Nos. 55 and 56 are similar, and may be dealt with together. The referee allowed these as payments, but *scaled* them, they having been made in 1863. If they had been endorsed on the notes the decisions are that they were not subject to be scaled. *Hall v. Craige,* 65 N. C., 51; *Walkup v. Houston,* 65 N. C., 501; *Mercer v. Wiggins,* 74 N. C., 48; *Berry v. Ballows,* 30 Ark., 198.

We can see no reason why their not being endorsed, but only evidenced by a receipt on a paper not attached to the notes—but it must be supposed in some way referring to them—can make any difference. If $100 in Confederate money was accepted as a payment of that sum it was presumptively made a payment of *that sum* by the agreement of the parties, unless it appeared in some way that it was agreed that it should be taken only for its then value in gold. If these payments were properly allowed at all they should have been allowed to the full amounts paid.

3. As to No. 60. We see no reason why the referee did not allow this judgment as a setoff. We may suppose, however, that (367) it was because the judgment was recovered in 1870, after Bryan had sold his interest in the notes sued on to the plaintiff. But the judgment does not show that the debt did not exist before it was rendered. In fact as the action was brought to the use of King, who died in March, 1869, he must have owned the debt sued for, while Bryan held the notes sued on in this action, which seems to have been until about April, 1869. As has been heretofore stated, however, the report does not expressly show what the referee did decide as to this claim, and we only gather his decision inferentially. The report is either defective or erroneous. Some part of it has apparently been omitted from the transcript to this Court.

4. The most important exception to the report is in respect to the manner in which the referee dealt with the other matters stated in the schedule. The answer alleged a payment of the notes sued on; and although the defendant afterwards scheduled the debts of Bryan which King had paid at Bryan's request, as counterclaims, we think he was not thereby precluded from insisting before the referee that they were in fact payments upon the notes, or one of them, which Bryan then held

against King. It does not appear that this view was presented to the referee. He considers these payments for Bryan as counterclaims, and as such, out of date, but does not except as may be inferred pass upon the question whether the payments *for* Bryan were or not intended, and agreed to be considered as payments *to* him. Of such an *express* agreement there was no evidence. But from the evidence before the referee, stated by him as facts, he *might* reasonably, though he need not necessarily, have inferred such an agreement, and the *fact* that the payments were payments on the debt sued on. Such an inference is not one of law
which a Court can draw, but of fact which a jury, and conse-
(368) quently a referee, acting instead of a jury, might draw or not, and was obliged to draw or reject, in finding on the issue of payment. For this doctrine *McDowell v. Tate,* 12 N. C., 249, is authority. To an action on a bond payable to plaintiff, the defendant offered in support of his plea to setoff, an account against the plaintiff for $78, which the Judge held barred by the statute of limitations. The case came to this Court and it was held that the Judge below should have left it to the jury as evidence of a payment. HENDERSON, J., in an able opinion showed that the inference of payment was a reasonable one which the jury would have been justified in making from the nature of the transaction and the relation between the parties. To the same effect is *Dodge v. Swazey,* 35 Me., 535, where the Court having the power to find the fact, drew an inference of payment from facts similar to those in *McDowell v. Tate.* Had the referee found that there had been no payment on the notes sued on we should have taken his finding as final. But he has not distinctly so found and does not seem to have passed on that question, as the jury did not in *McDowell v. Tate.* In that case for the omission of the Judge to inform the jury that the evidence of the debt to the defendant might be considered in support of the plea of payment, a new trial was granted. In *Earp v. Richardson,* 75 N. C., 84, the finding of facts by the referee was so vague and scant that the Court could not intelligently review his conclusions of law, and the case was remanded in order that he might amend his report. We think that in this case the report should be remanded in order that the referee may pass distinctly on the question whether King paid during his life any part, and if any how much, of the debt sued on, and that he may correct his report in respect to the payments made in July, 1863, which he scaled.

If the referee shall find that the payments made by King at the re-
quest of Bryan were in fact payments upon the notes sued on, it
(369) is easy to see that interesting questions will arise as to the

appropriations of the payments, and in their effect in repelling the bar of the statute. It is not our duty to anticipate these.

The order of the Judge below is affirmed, and the case remanded to the referee with directions to amend his report by finding such additional facts as will enable the Superior Court to decide intelligently upon his conclusions of law.

Affirmed and remanded.

Cited: McRae v. Malloy, 87 N. C., 196; *Fertilizer Co. v. Reams,* 105 N. C., 283.

J. C. SANDERSON v. THOMAS L. and JOHN SANDERSON, Guardians.

Removal of Guardian.

An order by a Superior Court clerk in a cause pending before him for the removal of a testamentary guardian, where it is not alleged nor found as a fact by the clerk that the estate of the ward has been wasted, nor that the guardian is insolvent, so that the ward should be unable to recover the balance due on a final settlement, is improperly made, and will be set aside upon proceedings properly instituted to that end.

PETITION to remove a guardian commenced in the Probate Court, and heard on appeal at Spring Term, 1878, of TYRRELL, before *Furches, J.*

The petition of the plaintiff, a minor, by her next friend, shows that her father died in 1858, leaving a last will and testament in which the defendants were appointed her testamentary guardians, and as such took charge of her estate. And the petitioner avers that the estate has been mismanaged, the guardians have failed to make returns according to law, have kept no separate accounts, and have neglected to educate their ward in a suitable manner, and asks that they be removed from their office and some discreet and competent person be ap- (370) pointed in their stead.

The defendants deny that they have mismanaged the estate of the plaintiff and allege, among other things, that they have educated their ward as fully as her estate would allow and have made regular returns of the same, except during the period of the late war, and that they are solvent and fully able to pay all such damages as may be awarded for the alleged mismanagement.

Upon the hearing before the Probate Judge, he found the following facts: That Jesse Sanderson, the father of the plaintiff, died in 1858,

and by his will appointed the defendants testamentary guardians of the plaintiff; that both defendants are non-residents of this State, and that they have mismanaged the estate, and have made no returns thereof according to law; wherefore it was adjudged that they be removed from their office as guardians of the plaintiff, from which ruling the defendants appealed, insisting that issues of fact were raised by the pleadings which, under the act of assembly, should be transferred to the Superior Court and tried in term time. And upon argument before His Honor the judgment below was affirmed, and the defendants appealed to this Court.

Messrs. Mullen & Moore and *J. B. Batchelor,* for plaintiff.
Messrs. Gilliam & Gatling and *P. H. Winston,* for defendants.

FAIRCLOTH, J. The single object of this action is the removal of the defendants from their office as testamentary guardians of the plaintiff, now over twenty years of age. Some questions of practice were raised and discussed before us, but we do not think it important to consider them. We think the interest of both parties will be better subserved by considering the merits of the case.

Taking the allegations, facts and evidence as they appear on (371) the record, we are of opinion that the order of removal was improperly made.

It is not alleged or found as a fact by the clerk that the estate has been wasted, or that the defendants are insolvent, or that the plaintiff would be unable to recover the whole of her estate on a final settlement; on the contrary the defendants aver their ability to satisfy any amount due the petitioner.

Mismanagement in general terms is alleged and found as a fact by the clerk, but in what respect it occurred, does not appear, nor is any evidence furnished in support of the charge. It is alleged and admitted that defendants have not made their guardian returns "according to law." This is negligence, and is probably what is meant by mismanagement in the present instance. For this omission to make their quarterly and annual returns, it was the duty of the Judge of Probate to require them to be made, and on failure to do so to attach and remove the defendants from their office. Bat. Rev., ch. 53, secs. 14, 15, 55, 56.

The omission of the defendants, however, does not necessarily show they are neglecting the substantial condition of the estate, or that the plaintiff is likely to be damaged thereby. Something like this should appear before the defendants are removed against the will of the testator.

Judgment reversed.

(372)

*R. C. BADGER, wife and others v. W. A. DANIEL, Guardian, and others.

Guardian and Ward—Settlement of Estates—Refunding Bond—Purchaser—Surety and Principal.

1. A judgment obtained against a guardian in 1871 in favor of his ward, is *conclusive* evidence against him and the sureties upon his bond of the amount of his indebtedness to the ward at that time.
2. Where, in pursuance of a decree, upon final settlement of a testator's estate and more than two years after his death, an executor paid legacies to parties entitled without notice of any outstanding debt of his testator and took good and sufficient refunding bonds from the legatees: *It was held*, in an action upon a guardian bond to which the testator was surety, that the executor was not liable.

   Held, further, that the acceptance of a legacy, in such case, does not operate to discharge the testator's estate from a liability incurred by his suretyship on the bond of the guardian of such legatee, to the extent of sums received by the guardian *as guardian;* but the value of the legacy so received and such other sums as may be made out of other legatees must be applied to its discharge, before subjecting lands in possession of devisees of the estate.

   Held further, 1st—That the act (Rev. Code, ch. 46, sec. 24) in reference to refunding bonds is intended only for the benefit of creditors. 2d—Where the agrregate penalties of such bonds are sufficient in the discretion of the executor to meet debts probably outstanding, *it seems*, that he has fulfilled the requirement of the statute. 3d—Where the distribution of a decedent's estate is decreed in a proper proceeding for that purpose the Court should fix the amount of penalties of such bonds.
3. Where a legatee (and devisee) executed a refunding bond upon receipt of his legacy, and sold and conveyed land devised to him within two years after the testator's death: *Held*, (1) That his surety was liable primarily (to the extent of the terms of such bond) as between him and the purchaser of the land, for an outstanding debt of the testator, whether evidenced by judgment or not. (2) Such purchaser holds the land as the devisee did; *and, therefore*, the conveyance to him is void and the land liable as assets for the payment of the debt; and if he or the devisee sell, after the two years, his vendee (373) (without notice of the debt and for a valuable consideration) acquires an unincumbered estate, but the same liability attaches to the price paid him, as did to the land. (Bat. Rev., ch. 45, sec. 156.)
4. Each devisee or heir is liable for the debt of his devisor or ancestor in proportion to the respective values of the land; and the whole debt to an amount not exceeding the value of the devise to one, may be made out of him, he being entitled to contribution from the others, which may be decreed in an action where they are all parties.
5. And each devise, heir, etc., is a surety (to the extent of what he receives) for the other sharers in the estate, to the creditors thereof.

*Smith, C. J., did not sit on the hearing of the case.

6. An executor is not chargeable with the value of slaves destroyed as property by emancipation while in his possession; nor is a legatee, to whom they were delivered and retained.

7. Where a guardian sold land which was devised to his ward to J. for $10,000, and afterwards bought it back from J, paying for it with his ward's money; and the land was subsequently sold under a decree to reimburse the ward, and the ward became the purchaser at $8,000: *Held*, that the price bid by the ward was a proper credit to the guardian upon the charge made against him for the original price.

8. The liability of a devisee for the payment of the devisor's debt is contingent upon the insufficiency of the personal estate; and *it was held*, in an action to subject the devised land and before such insufficiency was ascertained, that the plea of the statute of limitations was no defense.

BYNUM, J., *concurring:* Remarks upon the decision in *Brown v. Pike*, and reaffirms the ruling therein made.

ACTION brought upon a Guardian Bond and heard on exceptions to the report of a referee at Fall Term, 1877, of HALIFAX, before *McKoy, J.*

This action was brought on 9 October, 1871, against the defendant, guardian of the *feme* plaintiff, and the sureties upon his bond; and it was alleged among other things that in consequence of the failure of the guardian to account, the plaintiffs recovered a judgment for $20,690.44 against him at Fall Term, 1871, and now seek to subject certain funds and lands in possession of the other defendants to its payment.

(374) Answers were filed by defendants setting up their respective defences, and during the progress of the cause it was referred to Thomas N. Hill, whose report and exceptions thereto, necessary to an understanding of the case, are as follows:

The defendant was appointed guardian of plaintiffs in 1855, and executed a bond with sureties. The defendant and his sureties are insolvent, except Andrew Joyner, surety, who died in September, 1856, leaving a last will and testament, appointing defendant B. F. Moore and another, executors (Moore being now sole executor), and devising lands and bequeathing personal property to his son Henry Joyner, to his daughter Mrs. Austin and her children (the *femes* plaintiff), to his daughters Mrs. Eppes and Mrs. Daniel, and to Robert O. Burton and his children (who are the grandchildren of testator, and upon the death of either before arriving at the age of twenty-one years, or without issue, it was provided that his share should be equally divided among the survivors). He made certain advancements of personalty during his life time; and in respect to the slaves in his possession for distribution he provided in his will that the rates of valuation fixed in a schedule annexed thereto, should be observed; and upon a petition filed by his legatees in November, 1856, for a division of the slaves, the executor delivered them over

to the parties entitled, in pursuance of the order of the Court; and they were retained by the legatees until they were emancipated. In November, 1858, the legatees filed a petition against the executor for a final settlement of the estate, and he distributed the same under a decree made 1 February, 1859, paying to said Daniel as guardian of plaintiffs, and to the other legatees, or their guardians, considerable sums of money, and taking from each a good and sufficient refunding bond conditioned that in case any debts truly owing by said Andrew Joyner be sued for, or otherwise duly made to appear, each party should refund a ratable part of the same out of his or her share of the estate; (375) Henry Joyner executing one of these bonds with the defendant, H. J. Hervey as surety, who is now solvent. Said Henry is now deceased and the defendant, W. H. Day, is administrator.

For about twenty years previous to the death of Andrew Joyner the defendant Moore (executor) was his attorney, and their relations were of a friendly and social character, and said defendant had ample means of knowing and in fact did know his habits of business. The said testator was regarded by the public, and by said defendant was known to be a man of unusual prudence in the management of his financial affairs. At the time of the settlement of the estate as aforesaid, the defendant executor had no knowledge or cause to believe that his testator was surety on said guardian bond, or in any other manner; the defendant guardian at that time was the owner of a large real and personal estate, and solvent. After the qualification of the defendant, as executor, he advertised for creditors as required by statute (Rev. Code, ch. 46, sec. 22) and in his answer he claims all the protection to which he is entitled by reason of such advertisement.

The plaintiffs in their complaint demanded judgment against the defendant executor for the amount of the said judgment; and that the land devised to the said grandchildren (Burton's) be sold, and the proceeds thereof together with the amount which may be recovered against the defendant Hervey as surety to the refunding bond of Henry Joyner, deceased, be applied to the *pro rata* payment of said judgment, etc.

By eliminating the additional facts and conclusions of law as found by the referee, and arranging them in the order in which they are discussed in the opinion, they are as follows:

1. At Fall Term, 1871, upon the report of a commissioner theretofore made, filed and confirmed, it was adjudged by the Court that the defendant, W. A. Daniel, was indebted to the plaintiffs (376) (in various sums) being the proceeds of lands of his wards sold by him as their guardian, and not converted by said wards into per-

sonalty; and it was further adjudged, upon application of the plaintiffs to the Court for that purpose, that the sums bid by the plaintiffs (they being the purchasers at said guardian sale) should be invested in the purchase of said land, and that deeds be executed by said commissioner to the plaintiffs, according to their respective shares in the fund; and after crediting the sums so paid there was judgment against the guardian for other large amounts in favor of the plaintiffs.

Upon these facts the referee held that said judgment concluded all of the defendants as to the debt and default of the defendant guardian; but so much thereof as was rendered on account of the purchase money for the land, was extinguished by the election of plaintiffs to follow the land, leaving a balance of $12,916.53, to which the plaintiffs are entitled according to their respective interests therein. Defendants excepted.

2. The refunding bonds executed by the legatees to the executor were, when taken, 23 February, 1859, good and sufficient as to the amount of the penalties thereof, and the sureties thereto; and the referee held that the plaintiffs were not entitled to recover against the executor. Defendants Burton and Whitfield excepted, for that the referee exonerates the executor from all liability; whereas by reason of his failure to take proper measures to lessen the liability of his testator as surety upon said guardian bond, and by reason of his paying over to the plaintiffs while said liability existed, he is chargeable with any debt to the plaintiffs arising from said suretyship.

3. The defendant, H. J. Hervey, was surety upon the refunding bond of the legatee, Henry Joyner; and the referee held that he was
(377) liable for a certain proportionate part of said judgment, but was not liable on account of the distribution of the slaves retained by the legatee until emancipation, except for the ratable portion of the value of one, sold by his principal. Defendant Burton excepted.

4. The said Henry Joyner, during his life time, conveyed the land, devised to him by the will, to the defendant Whitfield on 1 March, 1857, less than two years after the testator's death; and the referee held that the conveyance was void, and the land liable as assets in the hands of its proprietor to the claim of the plaintiffs. Defendant Whitfield excepted.

5. The defendant Burton excepted (2) because the referee did not hold that the devisees and bequests to plaintiffs by the testator, and their acceptance of the same, constituted a release of all liability of the testator by reason of his said suretyship.

6. The defendant Burton in exception insisted that the referee erred in including in said balance alleged to be due plaintiffs, the funds re-

ceived by the guardian after the marriage, or arriving at full age, of the *femes* plaintiff; whereas said guardianship terminated on the dates of marriage, etc., and defendants are not liable for any default of the guardian thereafter.

7. Exceptions 3, 4, 5, of Burton—for that the referee did not credit the amount due by the guardian to his wards with the amount of real and personal property received by the wards from the estate of Andrew Jayner; for that, in the sum as fixed by said judgment, is included the personal property derived by the *femes* plaintiff from said estate; and for that, the referee erred in not taking an account of said estate and charging the plaintiffs with what came into their hands with compound interest, in exoneration *pro tanto* of said Joyner's estate.

8. Defendant Burton in exception 12 insisted that the ruling of the referee was erroneous upon his finding as follows: That a judgment was recovered at Fall Term, 1871, against defendant Bur- (378) ton for a foreclosure and sale of that portion of the lands of the testator, Andrew Joyner, which was devised to him, and which he had conveyed (in 1870) to secure a certain debt. Upon the sale by the sheriff, the land was conveyed to the purchaser, and the proceeds credited on the debt. The mortgagee (the defendant, Bockover), who was also the purchaser at said sale, was subsequently made a party to this action. There was no evidence that Bockover ever had actual notice of plaintiff's claim; but his attorney in his suit against Burton, knew of said claim by reason of being also the attorney of another party defendant in this action. The defendant Bockover was a *bona fide* purchaser for value, after the expiration of two years from the testator's death, and has a valid title to the land bought as aforesaid without notice of the claim of plaintiffs; whereas as the defendant contended, said deed was made to secure an antecedent debt, and after notice to the mortgagee by his attorney.

9. Exception 14 of defendant Burton,—for that the referee has not credited the debt found by him to be due the plaintiffs with the sum of $15,000 found by him to be the value of the "Graham tract" of land in 1871, at the time of the purchase by plainaiffs. The facts in respect to this transaction are embodied in the opinion. See also paragraph 1, *supra.*

10. The defendant Burton excepted (13) for that the referee held that the plea of the statute of limitations was not a good defence.

The report of the referee was modified and sustained, and a decree made declaring the respective amounts due plaintiffs, and the respective liabilities of defendants, and appointing a commissioner to sell the land

devised to certain devisees; and the cause was retained for further orders. From which judgment the defendants appealed. (See (379) S.c., 77 N. C., 251.)

Messrs. J. M. Mullen and *Walter Clark,* for plaintiffs.

Messrs. R. O. Burton, Jr., S. Whitaker, J. B. Batchelor, and *Gilliam & Gatling,* for defendants.

RODMAN, J. 1. The first exception to the report of the referee is joined in by all the defendants; it is that he admitted the judgment recovered against the guardian Daniel in the Court of Equity for Halifax County at Fall Term, 1871, as *conclusive* evidence of the amounts then owing by the guardian to his several wards and excluded evidence tending to impeach it as erroneous.

By the terms of the reference the referee was authorized to state the indebtedness of the guardian to his several wards "as it may appear upon any judicial proceedings theretofore had between them (obviously alluding to the judgment aforesaid); *or* upon a statement of the guardian account without reference to such judicial proceedings." The referee being of opinion that the judgment was conclusive did not state an account independently of that. He probably felt bound by the decision in *Brown v. Pike,* 74 N. C., 531, as did the Judge who confirmed his report in this respect.

The decision was earnestly questioned by *Mr. Batchelor* for the defendants, and we were requested to reconsider it. We have done so, and the majority of the Court are of opinion that the decision was right. Individually, I think otherwise, and that the words "in like manner," do not mean "with the same force and effect," but are surplusage. This exception is overruled. While the exceptions of Burton and Whitfield respectively raise the same questions, or nearly so, they do so in a different order and without regard to any dependence of the questions on each other. It will be more convenient, therefore, in- (380) stead of taking the questions up in the order adopted by either of them, to take them as nearly as is convenient in what would seem to be something like their natural succession.

2. (Exception 8 of Burton and 2 of Whitfield) Moore, the executor of Joyner, is liable for the debt to plaintiffs because having paid off all debts of his testator except the present one, after the expiration of two years from his qualification, he delivered to the several legatees their slaves, without taking any refunding bonds; and their other personal legacies, taking refunding bonds in penalties less than the value of the legacies, but in the aggregate exceeding the amount of the plaintiff's

claim. It is admitted that except as to the amount of penalty the bonds were sufficient.

The act (Rev. Code, ch. 46, sec. 24) requires an executor at the end of two years, etc., to pay over to the legatees the sums properly payable to them, taking from them bonds with two or more able sureties, conditioned, etc. The amount of the bond is not prescribed, but is apparently left to the discretion of the executor. As this act is intended only for the benefit of creditors and is to stand in the place of the property which the legatee receives, the discretion of the executor can have no guide except the amount of debts which are probably outstanding, and if the aggregate penalties of the bonds are sufficient to meet these he would seem to have done all that the law requires of him. He was not bound, in the interest of the creditors and even less in the interest of others who might be incidentally affected, to anticipate the insolvency of the legatees and of the sureties to all the bonds but one. The Court which decreed the payment of the legacies might have fixed the penalties of the refunding bonds. It would be an unnecessary inconvenience if a legatee should be required to give a bond in a penalty equal to the value of his legacy, and in many cases it could not be complied with; (381) certainly the legatees and those in privity with them are not entitled to complain. *Stack v. Williams,* 56 N. C., 13, sustains these views. This exception is overruled.

3. (Exception 10 of the Burtons). The liability of Hervey, surety to the refunding bond of Henry Joyner. Joyner received a legacy and was also devisee of certain lands which he sold to Whitfield on 1 March, 1857, which was less than two years after the death of the testator, in September, 1856. The referee holds that Hervey is liable primarily as between him and the purchaser of the land from Henry Joyner, and in this opinion we concur. It is no defence for Hervey that no judgment ascertaining the debt has been heretofore recovered against the executor of Andrew Joyner. The executor is a defendant in this action, one object of which is to establish the debt against him, and all interested in contesting the debt have an opportunity of doing so.

As to the extent of Hervey's liability. By the terms of his bond it is confined to a ratable portion of the plaintiff's debt, supposing all the other legatees responsible for their respective portions. Their insolvency can not extend his liability beyond the terms of his bond. This exception is overruled. It will be in place to say here that we agree with the referee that Hervey is liable for his ratable portion of the value of the slave sold by H. Joyner. The exception to that charge is overruled.

4. (Exception 4 of Whitfield.) It is of course conceded that the sale

by Henry Joyner of the lands devised to him, to Whitfield, having been made within two years after the death of Andrew Joyner, was void as to the plaintiffs. Whitfield held the land as Henry Joyner did, and sales by Whitfield after the two years, passed unincumbered estates to his vendees, Whitfield holding the price paid him in lieu of the land and subject to its liabilities. Those to whom he sold within the two
(382) years held as he did, and if their lands should be taken they must look to him for redress. Each devisee or heir is liable for the debt of the devisor or ancestor to the value of the land devised or inherited and in proportion to their respective values. The whole debt to an amount not exceeding that value may be made out of any one of them and one who pays beyond his due proportion is entitled to contribution from the others. This was held at a very early period as to heirs who were bound by the cognizance of their ancestor, or by his bond in which they were bound as obligors under the style of his heirs. *Harbert's case,* 3 Rep., 11 b. and notes; *Jefferson v. Morton;* 2 Williams' Sounders, 6 n. 10; Petersdoff's Abridgement, Title, *Heirs.*

The liability of an heir for the debts of his ancestor by reason of assets by descent, does not seem to have been essentially changed since the time of Coke, three hundred years ago, but the method by which the creditor enforces it, has been very much changed. As all the devisees are parties to this action, contribution between them will be provided for in the decree. Those, if any, who sold their land after two years and have become and are now insolvent, are liable to judgments in favor of all devisees who by consequence of such insolvency shall be compelled to pay more than what would otherwise have been their ratable portions.

It is a consequence of this doctrine that each legatee, or distributee, or devisee, or heir, is, to the extent of what he receives either in personalty or land from the testator or intestate, a surety to all credtors of the testator or intestate, for all the other sharers in the estate; so that if one of two distributees of heirs squanders his property, the other is bound to make the debt good, although it may take every dollar he has received from the common ancestor. To some, this may seem harsh and inequitable, but we take it to be the established law for over 300 years;
(383) and if it shall seem to the Legislature to be inequitable, they have the power to change the law. If I may be permitted to express my individual opinion on what is a question not of present law but of legislation, I would say that the time within which a creditor of a deceased person should be permitted to commence an action against his distributees, heirs, etc., might be safely limited to two years from the death

of the intestate, etc., when the creditor had actual notice of the death, and when his debt could be sued on before that time. This would require some provision by which holders of debts not due, and of contingent and uncertain debts, would be enabled to sue for and recover the present value of their debts, as I believe has been done in England, especially as to bonds securing annuities, and what would be more difficult, some just and adequate provision for debts to persons under disabilities.

5. (Exception 2 of Burton.) The legacies to the *femes* plaintiff were clearly not intended in satisfaction of the debt by the testator, Andrew Joyner, now sued on. (1) It does not appear that the testator knew of his indebtedness to the plaintiffs by reason of his suretyship for Daniel, which was contingent, and in fact most of it arose after his death. (2) He provides by his will for the payment of all his debts. 2 Williams Executors 1167. This exception is overruled.

6. (Exception 6 of Burton.) If the referee has charged Joyner as surety of Daniel with any sums received by Daniel, after his guardianship as to any of the wards ceased, by their arrival at full age or marriage, we think he erred. Such sums were properly chargeable against Daniel, but the surety is only liable for what the guardian received as guardian. This exception *seems* to be founded in fact and is therefore sustained.

7. (Exceptions 3, 4, 5, of Burton.) If we understand these exceptions they present this question: Whether the plaintiffs are not bound to apply all the personal estate which came to them under (348) the will of Andrew Joyner to the payment of his debt to them before having recourse to the lands devised?

The general rule certainly is that the personal estate of a testator is to be applied to the payment of his debts in preference to his lands. If the executor had paid this debt he would have paid it out of the personal estate and diminished *pro tanto* each legacy. 2 Williams Executors, 1532, 1526, n. 2; *Hinton v. Whitehurst,* 68 N. C., 316. We see nothing in this case to take it out of the general principle. If all the legatees had remained solvent, each would have contributed *pro rata* to make up the plaintiff's debt, and the plaintiffs would have lost only their *pro rata* share; and they are now entitled to personal judgments against all of such legatees who have not some special defence, and they may make such judgments available if they can. But they are not entitled to go upon the lands of the testator as in the hands of his devisees by special execution to make any portion of his debt, until they have applied to the payment of that debt the value of the legacies to them (excepting

the slaves), and such other sums as they may be able to make out of the other legatees. The reason for excepting the slaves will be mentioned presently. Passing them by, the rule has been long settled. An heir sued on the bond of his ancestor can not plead that there are personal assets in the hands of an administrator, but if he pay the bond debt he may come on the personal assets for indemnity. 2 Williams Executors, 1532, notes n and o.

As to the slaves: It seems that with the exception of one sold by Henry Joyner, they were all kept by the legatees until they were lost by emancipation. It is settled law, that if this destruction of them as property by *vis major* had happened while they were in the hands of the executor, he would not be charged with them as assets. 2 Williams Exe-
(385) cutors, 1508. It was held in *Hinton v. Whitehurst, supra,* that this principle applied after they have been delivered to the legatees, if they remain in their hands unconverted. The peculiarity of the case compelled such an extension of the doctrine to that class of property; most inequitable results would have followed a refusal to do so. It is not probable, however, that any other class of cases will hereafter arise which can stand upon the same necessity.

It may be said of this rule, as was said above of a similar rule applied to devisees or heirs of land, it makes each, to a certain extent, a surety for all the others, so that the misfortune or extravagance of one legatee may cause another to lose perhaps his whole legacy. The only remedy for such a hardship, if it be one, is as was there suggested. This exception is sustained.

8. (Exception 12 of Burton.) We are of opinion that the sale to Bockover was *bona fide,* and upon a valuable consideration, and having been made more than two years after the death of the testator, he holds free from any liability for the plaintiff's debt.

9. (Exception 14 of Burton.) In respect to the Graham land: This land was devised to the plaintiffs and sold by their guardian to Henry Joyner for about $10,000 (the sum is not intended to be accurate). Afterwards the guardian purchased it from Joyner, taking a deed to himself, and paid for it mostly with money (or notes) belonging to his wards. After this the plaintiffs filed a bill in equity, and obtained a decree declaring their guardian a trustee of the land for them to the extent that he had used their money in the purchase, and directing the land to be sold and the proceeds applied as far as might be necessary to reimbursing the plaintiffs. It was sold under this decree and purchased by the plaintiffs for, say $8,000 (this sum is not stated as accurate) which, by order of the Court, was credited to the guardian upon

the charge made against him for the original price of the land, (386) and the referee in the present case, if I understand it correctly, states his account accordingly. It is clear that the guardian ought to be charged with the sum for which he sold the land to Henry Joyner with interest from the time he received it. It is equally clear that as the plaintiffs have since got the land from the guardian, they must be charged, or what is the same thing in effect, he must be credited with the sum at which they purchased it. There is no ground for saying that the plaintiffs inequitably have both the land and the price of it. They have the sum it was sold for to H. Joyner under the will, and they have the land because they bought and paid for it. If the guardian were not credited with the sum at which plaintiffs bid off the land, there would be ground for the complaint. This exception is sustained.

10. (Exception 13 of Burton.) But for the act suspending the statute of limitations, it is probable that some of the plaintiffs would be barred. On that act we concur with the referee. As to Whitfield, he was made a party in 1875, and the action against him was begun only at that date. But as his liability did not or does not accrue until a failure of the personal estate derived from the testator to pay the plaintiffs' debt, he is not protected by the statute.

Judgment reversed and case remanded to be proceeded in according to law.

BYNUM, J.—*Concurring.* The decision of this Court in *Brown v. Pike,* 74 N. C., 531, was earnestly called in question upon the argument. Since it was made, the legislature has once met and adjourned without regarding it as of such injurious consequence as to call for its interference. The act of 1844, Bat. Rev., ch. 43, sec. 10, had never received a construction before *Brown v. Pike,* and has never been directly referred to in previous decisions. It has never been decided that a judgment against the administrator was *not* conclusive of (387) assets against the sureties in an action against them, as is perfectly clear from *Bond v. Billups,* 53 N. C., 423, decided as late as June Term, 1862. For in that case the Court said: "That the judgment against the administrator is conclusive, appears as well from that case (*Armistead v. Harramond,* 11 N. C., 339) as from the recent one of *Strickland v. Murphy,* 52 N. C., 242. *Whether it was so as against the sureties,* we need not inquire, as they are not parties to the record in the Superior Court." The question therefore came directly before the Court for the first time in *Brown v. Pike,* and as it was then fully argued, and was the only point in the case, it necessarily received the attention and consideration of the whole Court. Whether the act was

wise or unwise can not affect its construction. We are not at liberty to violate the plain letter of the act, and resort to any refinement of construction to make the act accord with our preconceived ideas of what the law should be. If the enactment had been "that all evidence admissible to prove the default of the principal, shall be admissible and competent against his sureties," there would have been some ground for the construction now contended for. That would have been the natural, plain and direct way of communicating the legislative will. But this is not the language used. Other words are added—"shall *in like manner be* admissible, etc.,"—and as they are totally unnecessary to convey the meaning contended for, we have no right to ignore them or distort their proper effect in the construction of the act. Webster defines "like" to be primarily "equal in quantity, quality or degree, exactly corresponding," by which we are certainly not to understand that when a judgment is conclusive of assets against the principal, it shall *"in like manner" not* be conclusive against the surety! The words do not import discrimination and a graduated scale of legal effect, conclusive as to
(388) one, inconclusive as to the other, absolute verity as to the principal, but simply admissible against the surety; and to give such a construction to the words "in like manner," is to do violence to their plain straight-forward meaning of equality, and exact correspondence, both as to the admissibility and legal effect of evidence. I know of no warrant for treating as surplusage, any word or expression of a statute susceptible of meaning and a judicial construction. Such a liberty taken by the Courts would be a dangerous encroachment upon the legislative department of the government. Nor do I think the construction we have put upon the words "in like manner," at all incompatible with the legislative intent or good policy. The surety is bound for the honesty and fair dealing of his principal, and there is such a privity between them, that a judgment against the former in a manner touching the administration can not, except in a restricted sense, be said to be without the knowledge and consent of the latter. To hold the principal and surety upon the administration bond equally affected by the same evidence, will facilitate and better secure the prompt and watchful settlement of the estates of dead men. With this explanation, I concur in the opinion of the Court.

Judgment reversed and case remanded.

Cited: Murchison v. Whitted, 87 N. C., 465; *Morgan v. Smith,* 95 N. C., 396; *Moore v. Alexander,* 96 N. C., 34; *Davis v. Perry, Ib.,* 260; *Andres v. Powell,* 97 N. C., 155; *Davenport v. McKee,* 98 N. C., 500;

Glover v. Flowers, 101 N. C., 134; *Holden v. Strickland,* 116 N. C., 190; *Bunn v. Todd,* 115 N. C., 141; *Hooker v. Yellowby,* 128 N. C., 301.

Dist.: Syme v. Badger, 96 N. C., 197.

W. J. WINFIELD v. R. O. BURTON, Jr., Adm'r and another.

Devisee—Sale of Land After Two Years—Rights of Purchaser—Creditors' Lien.

One Joyner by his will devised a certain lot of land to M. D., and upon her death the lot was sold in 1863 by order of Court, and the purchaser failing to pay, it was resold in 1871 and bought by defendant's intestate, who executed two notes with defendant H as surety for the purchase money and the sale was confirmed; the notes were delivered to G as receiver of the estate of J. J. D. and W. A. D., Jr., heirs of F. D.; in 1876, G, by order of Court transferred the notes to the survivor (389) J. J. D., who was also administrator of W. A. D., Jr., and he endorsed them to the plaintiff for value. In 1871 one B and wife and others brought suit against Joyner as surety on the guardian bond of one Daniel, all the devisees of Joyner being at different times made parties; in 1877, the Court below adjudged that the proceeds of the sale of the land devised to M. D., was real estate in the hands of J. J. D. and he took no part as administrator of W. A. D., Jr., and that it was assets liable to the claim of B and wife and others, who recovered a large judgment; the plaintiff had no notice of the existence of this action when he purchased the notes: *Held,*

(1) That the defendant's intestate acquired by his purchase a right to have the land conveyed on payment of the purchase money.

(2) That J. J. D., as representing the devisee M. D., is liable to a personal judgment against him for the value of the land, in favor of any creditor of Joyner who can not get payment out of personal assets.

(3) That the *quasi* lien of a creditor of an estate on the land of the decedent is destroyed by a sale after two years, leaving him only a personal claim on the heir, and the notes given for the purchase money are not subject to the *quasi* lien that the land was.

(4) That J. J. D. was not a trustee for the creditors of Joyner, and the notes in his hands could not have been seized, and much less in the hands of his assignee, whether he bought with notice of the creditor's claims or not, and therefore that the plaintiff is entitled to recover.

APPEAL at January Special Term, 1878, of HALIFAX, from *Schenck, J.*

The plaintiff alleged that on 6 November, 1871, the defendant's intestate (Edward Conigland) and H. J. Hervey executed to John T. Gregory, receiver, etc., two notes for $330 each, and payable on 6 November, 1872 and '73 respectively; that before this action was brought they were by order of the Court assigned to one J. J. Daniel, who for value

assigned them to the plaintiff, and that no part thereof has been paid; wherefore the plaintiff demands judgment, etc.

The defendants' answering, admit the execution of the notes,
(390) and for defence say: that in 1871, R. C. Badger and wife and others commenced an action in said Court against W. A. Daniel (the former guardian of the feme plaintiff) and the executors of Andrew Joyner; and one of the femes plaintiff in the action died, leaving an only child, whose guardian was made a party to the suit; that said Joyner was a surety upon said Daniel's guardian bond, and died leaving a large personal and real estate which he disposed of by will; and at different times thereafter, all the devisees and legatees of said Joyner, and those claiming under them, were made parties to said action. Daniel and his sureties, except Joyner, were insolvent, and the action was brought to subject the estate of said Joyner to the payment of the indebtedness of said guardian to his said wards.

The defendants further alleged that Andrew Joyner devised to Mary C. Daniel a certain lot in the town of Halifax, and upon her death, the lot was sold by an order of Court on 15 March, 1863, to one McMahon, who failing to pay the purchase money, it was resold on 6 November, 1871, and bought by Edward Conigland, the intestate of defendant, at $700, for which, except a small cash payment, he executed two notes with defendant Hervey as surety for $315 each, and the sale was confirmed. The notes were delievered to said Gregory, who had been appointed receiver of the estate of J. J. and W. A. Daniel, Jr., the children and representatives of the estate of said Mary C. Daniel, and who were also made parties to said suit; and upon the death of said W. A., Jr., the said J. J. Daniel qualified as his administrator, and as such and in his own right, applied on 11 August, 1876, to the Court for an order on said receiver to turn over the said notes to him, and *Watts, J.*, granted the order.

The defendants alleged that during the summer of 1876, the said J. J. Daniel came to the store of the plaintiff, Winfield, and after re-
(391) ferring to said notes, asked for advances in money and goods, and promised that the notes should be assigned to plaintiff as collateral security for the same, and on the faith of such representation the plaintiff made advances to said Daniel to a considerable amount; and the defendants are advised that at this time the plaintiff had implied or legal notice that a suit was pending in reference to these notes which were fully described in the complaint filed in the action against said former guardian and the sureties upon his bond and the devisees of said Joyner; that after said arrangement with the plaintiff for the advances,

Daniel, without plaintiff's knowledge, deposited said notes with Battle, Bunn & Co., of Norfolk, as collateral security for a $400 debt he owed them; and to secure his debt from Daniel, the plaintiff was forced to assume Daniel's debt to Battle, Bunn & Co., which he did by giving his own note, and the said notes were thereupon assigned to plaintiff as his property; that at the time of assuming said debt, the plaintiff had actual notice of the suit as aforesaid. See *Badger v. Daniel,* 77 N. C., 251, and also preceding case.

The defendants also alleged that upon coming in of a report of a referee to whom said suit had been referred, the Court at Fall Term, 1877, adjudged among other things that the proceeds of sale of land devised to said Mary C. Daniel, when paid over to said J. J. Daniel, was real estate, and no part thereof went into his hands as administrator of said W. A. Daniel, Jr., and that certain rents for said lot which were paid him, were assets liable to the plaintiff's claim; and that the plaintiffs therein did recover of the defendants therein a large amount.

The defendants in this action therefore insist that a title to said land can not be made, and they are not liable on said notes, nor is the plaintiff here, the person entitled to receive the money on the notes, but that the other devisees of Joyner have an interest in them, against said J. J. Daniel, and that the plaintiff had full notice of the same.

The case being submitted on the complaint, answer and the (392) certificate of the opinion in the case of *Badger v. Daniel, supra,* the Court gave judgment for the plaintiff, and the defendants appealed.

Messrs. Gilliam & Gatling, and *Walter Clark, for plaintiff.*
Mr. T. N. Hill, for defendants.

RODMAN, J. At common law the lands of a deceased ancestor in the hands of his heir could not be subjected to the payment of the simple contract debts of the deceased. If however the ancestor had bound himself and his heirs in a bond, the heir might have been sued thereon; and if he had assets by descent, judgment might have been recovered against him to the value of the assets which he had by descent. This judgment might authorize either a general execution against the defendant as upon his personal debt, or a special execution against the land descended, in which case that alone was liable. An heir could immediately upon the death of the ancestor or at any time thereafter before judgment and award of special execution, sell the land descended and the purchaser acquire a title free from the incumbrance of the ancestral debt. The heir however was held bound to the creditors, in equity at least, to the

value of the land. This general summary of the ancient law is abbreviated from Petersdoff's Abridgement, Title, *Heir*.

The liability of the lands of a deceased debtor has been extended to include all his debts, and the mode of enforcing it has been very much changed in modern times, but the principle of the liability has not been essentially changed, and reference to the old law may aid us in ascertaining what the present law is in a case not directly affected by legislation.

In order to prevent frauds upon creditors of a deceased an-
(393) cestor, it was long ago enacted in this State that conveyances by an heir of lands descended, made within two years after the death of the ancestor, should be void as to the creditors of the ancestor. Conveyances made after two years were left as at common law, that is, the estate passed to the purchaser free from incumbrance.

In the present case the sale to Conigland was much more than two years after the death of Joyner, and it can not be doubted that he acquired an equitable title to the land, that is a right to have a legal estate conveyed to him on payment of the purchase money. It is equally clear that the children of Mary Daniel (the devisees of the land) and those who have succeeded to their liabilities, are liable to a personal judgment against them to the value of the land in favor of any creditor of Joyner, who can not get payment out of his personal assets.

The defendant in the present case does not deny that he owes the debt to some one. His defence is that Badger and others, creditors of Joyner, had an equitable lien upon the notes sued on while in the hands of Daniel, to the amount of their debts; and that upon their failure to obtain payment from the personal assets of Joyner, and under the circumstances, this lien followed the notes in the hands of the plaintiff; so that defendant is liable to Badger and others and not to the plaintiff.

It may be observed here that under the decision of *Lord v. Beard, ante* 5, the present claim should regularly have been made by motion in the suit for partition among the Daniel children. This irregularity however is one which may be waived, and it has been; we pass it therefore without further notice. Also, the defendant under C. C. P., secs. 61, 65, might have required Badger and the other creditors of Joyner, named in the answer, to have been made parties to this action so as to have them bound by the decision. But he has not thought proper to
(394) do so, and has asked us to decide the case in their absence. As to the effect of our decision upon their rights, we express no opinion. There being no replication to the new matter set forth in the answer, its truth was apparently admitted, and on the facts thus pre-

sented and assumed by the parties and the Court as true, the Judge gave judgment for the plaintiff, from which defendant appealed.

The question presented is,—have Badger, etc., any lien upon these notes? No authority has been cited to us in favor of their right, and we have not found any either under the old precedure or the modern. If a creditor of a deceased person has a right to follow specifically the proceeds of the sale of his lands in the hands of the heir and of an assignee of the heir, it is certainly surprising that not only no decision can be anywhere found in favor of such a right, but no case in which the right appears to have been claimed, or supposed to exist. We think it clear upon general principles that no such right exists. The creditor has a *quasi* lien, if I may so call what is not a lien at all, on the land for two years, that is, he may under prescribed circumstances subject it to his debt, notwithstanding a sale by the heir within that time. He never had a *property* in the land and his *quasi* lien was destroyed by a sale after two years, leaving him a mere personal claim on the heir. Because the notes of Conigland are the proceeds of the sale of the land, I do not think it follows that they can be said to *represent* the land even in the hands of the Daniels, and to be subject to the *quasi* lien that the land was.

The sale was a conversion lawful for them to make, subject to their assuming a personal liability. I know of no process by which the notes in their hands could be seized, and of no precedent for any, still less does any *quasi* lien exist against the assignee. Whether he bought with notice of the facts and of the claims of creditors or not, it appears to me to make no difference. The idea of following property when (395) it is converted into another form of property is derived from the law of trusts, and I believe is peculiar to that law.

If a guardian invests the money of his ward in land and sells the land to another with notice, the ward may hold the vendee a trustee for him, and so of any subsenquent vendee with notice. If one take goods by a trespass, or by theft and sell them to another, the true owner may reclaim his goods from the vendee whether he knew of the want of title in his vendor or not; but I know of no authority which says that if the trespasser or the thief sells the goods, and converts the proceeds into other goods, the true owner has any property in, or any specific lien, or lien of any sort, on these last goods. *Campbell v. Drake,* 39 N. C., 94.

There can be no ground for saying that Daniel was a trustee for the creditors of Joyner. And if it be that the true owner has no specific claim to goods into which his goods have been converted wrongfully by

a trespasser or a thief, *a fortiori,* must it be true that there can be no *lien* upon the proceeds of a sale of land which was permitted by law? The law permits the sale and substitutes for the land the personal liability of the heir. If the notes did represent the land in the hands of W. A. Daniel, it would seem, that he could sell and make a good title to them just as he could to the land. We concur with the Judge below, and judgment is affirmed.

Judgment affirmed.

Cited: Renan v. Banks, 83 N. C., 483; *Hawkins v. Hughes,* 87 N. C., 118; *Lackey v. Pearson,* 101 N. C., 655; *Bunn v. Todd,* 115 N. C., 141.

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(396)

State on relation of HILL HUMPHREY v. HENRY W. HUMPHREY, Adm'r, and others.

Guardian and Ward—Action by Ward on Bond of Deceased Guardian.

In an action by a ward against the surety on the bond of his deceased guardian, it is no defense for the defendant that assets came into the hands of the administrator of the guardian sufficient to pay the amount due the plaintiff which were wasted by him, and that he and the sureties on his administratrion bond are insolvent..

APPEAL at Spring Term, 1878, of ONSLOW, from *Eure, J.*

This action was brought by the plaintiff soon after he arrived at full age against the defendant as administrator with the will annexed of John Humphrey, his former guardian, and the defendants, Harvey Cox and Franklin Thompson, sureties upon the bond of said guardian. He demanded payment of his distributive share of his father's estate, which came into the hands of his said guardian. John Humphrey, the guardian, died in 1868, the plaintiff being a minor, and the defendant administrator took charge of his estate. At Fall Term, 1877, of said Court, the plaintiff entered a *nol. pros.* as to the said administrator and Harvey Cox. The said administrator and the sureties on his bond have become insolvent since letters were granted to him. During the progress of this action, a reference was had for an account of the estate of defendant's testator, John Humphrey, with his ward, the plaintiff; and it was ascertained that said administrator was indebted to the estate of his testator in the sum of $1,209.03, and also that there was due the plaintiff from his said guardian the sum of $892.15.

The defendant, Thompson, insisted that as assets of the guardian

came into the hands of his administrator sufficient to pay the amount due the plaintiff, he was not liable on the guardian bond, (397) although said administrator wasted the assets and he and his sureties are insolvent. His Honor held otherwise, and gave judgment for plaintiff against defendant as surety on said bond, and the defendant appealed.

Mr. H. R. Bryan, for plaintiff.
Mr. W. A. Allen, for defendant.

READE, J. Suppose the guardian were alive, would it avail the defendant his surety, to show that the guardian was solvent and able to pay his ward, the plaintiff? Of course not. The guardian being dead, would it avail the defendant surety to prove that his estate is solvent and able to pay? Of course not, any more than if he were alive and able to pay. How then can it avail the defendant to prove that the guardian is dead and his estate insolvent and unable to pay? The defendant puts his defence upon the ground that the estate of the guardian which went into the hands of his administrator was sufficient to pay the ward, and that the administrator has wasted it, and that he and the sureties on his administration bond are insolvent.

This makes it unfortunate for the defendant, but then his undertaking when he signed the guardian bond as surety, was that he would suffer before the ward should. And he is now only performing that undertaking. If he had performed it earlier, he might have saved himself out of the estate of the guardian in the hands of the administrator.

Affirmed.

(398)

A. H. SUDDRETH, Guard., v. R. D. MCCOMBS and another, Adm'rs.

Guardian—Confederate Money—Negligence—Duress.

1. The conversion by a guardian into Confederate currency of the bank bills and solvent notes of his ward, which came into his hands before the war, requires explanation, without which it will be deemed to import negligence.
2. The pressure of public opinion unaccompanied by peril of life, limb, or great bodily harm, is not such *duress* as will excuse the conversion by a guardian of his ward's estate into depreciated currency or securities.

APPEAL at Spring Term, 1875, of CHEROKEE, before *Cannon, J.*

The Court found the following facts: Abram Sudderth, the defend-

ant's intestate and the guardian of the minor heirs of Abram Harshaw, received, as such guardian, of the executor of said Harshaw $7,705.50 in notes and bonds in June, 1859; and a number of slaves and a large amount of real estate and other property belonging to his wards went into his possession. After the death of said Abram Sudderth in 1868, the plaintiff was appointed guardian and brought this action against his estate for the sum received as aforesaid, and for an account and settlement. The former guardian kept the funds of his wards with his own, but had the packages marked so that one could be distinguished from the other. From the year 1862 until the close of the war, prudent business men sought an opportunity to, and did, when they could, pay their debts in Confederate money, it being the principal currency in use. The state of the country was such, during that period, that a refusal to accept Confederate money in payment of debts would have subjected a creditor to personal danger, and the defendants' intestate received payment of notes due him as guardian aforesaid, under protest.

(399) There was an account stated and returned to a former term of the Court, and among other exceptions to the report of the referee, was the following of the defendants: "No. 1—Defendants except, for that they are not allowed a credit of $3,400, the amount invested for plaintiff's wards in Confederate bonds, in April, 1863;" which upon the hearing at said term, in 1873, before *Cloud, J.*, was overruled, and from the ruling upon this and other exceptions (not necessary to be stated as they are not involved in the decision now made) both parties appealed to this Court, and the case was remanded to have the facts found.

Messrs. Battle & Mordecai, for plaintiff.
Messrs. Merrimon, Fuller & Ashe, for defendants.

RODMAN, J. The doctrines affecting the liability of guardians for investing the money of their wards in Confederate currency or securities have been stated in so many cases in this Court that it is unnecessary to repeat them here.

At different times from 1859 to early in 1861 the guardian of the infant plaintiffs received from the administrator of their father in bank bills then at par with gold, or nearly so, over $5,000. He also received in 1859 $2,000 or thereabout in solvent notes, or in those which he accepted as such. This appears in the testimony of Harshaw. His duty as guardian was to loan out this money on bond with good security and to retain the solvent notes or to exchange them for others equally safe. What he did with this money and these notes does not appear.

The next fact in the case which the evidence discloses is that on or about April, 1863, he had about those sums in Confederate money which he said belonged to his wards and which he converted into certificates of Confederate indebtedness. No blame is imputed to (400) him in respect to this conversion; the one security was equal to the other. What needs explanation is his failure to invest the money which he received, as the law required him to do. His administrator fails to show any excuse or justification for the conversion of the bank bills and solvent notes into Confederate currency. Indeed there is no evidence except the declaration of his guardian during his life time, that it was the ward's money which was converted into Confederate currency. The connection between the ward's property received in 1859 and the Confederate currency invested in 1863, is not traced.

Supposing however that it was the ward's money which had been converted into Confederate currency, the excuse which seems to be offered is that in that part of the State there was a general public opinion hostile to all who refused to receive Confederate money in payment of debts, which amounted to duress. But there is no evidence of any special personal duress on the guardian, and certainly there could have been no coercion on him which should have terrified a man of ordinary courage and fortitude into betraying his trust. To constitute duress there must have been danger to life or limb or some great bodily harm. The apprehension of unpopularity is not duress. The duty which a guardian owes to his ward in the preservation of his estate is equally high with that which a lawyer owes to his client or a Judge to the State, fearlessly to administer justice, yet how contemptible and criminal would either be who should fashion his action to suit public opinion.

It is *possible* that if the guardian were living he might show something in exoneration of himself. Some time ago this case was remanded in order to give his administrator an opportunity of doing so if he could, but the case is sent back to us without material change, and we are forced to conclude that no explanation can now be made. We can not longer delay to give to the plaintiffs what appears to be their right, upon a mere possibility that it may be made to appear that (401) it is not.

The first exception of the defendant covers the question above discussed, and we concur with the Judge in overruling it.

Exception 3 was allowed by agreement of counsel and the others were withdrawn. It is referred to the clerk of this Court to ascertain and report the sum due by defendant after altering the account of the referee as required by the allowance of exception 3 and by reason that the

1st exception of plaintiffs is sustained. In all other respects the judgment of the Court below is affirmed, and a judgment may be drawn in conformity to this opinion.

Affirmed.

Cited: Sudderth v. McCombs, 82 N. C., 535; *Robertson v. Wall,* 85 N. C., 283.

MARY A. BARNES and others v. W. J. BROWN, Executor.

Removal of Executor—Jurisdiction.

1. The Probate Court has orginal jurisdiction of a proceeding to remove an executor.
2. When, in the course of such a proceeding, it appears inferentially that the executor has become a bankrupt since the death of his testator, and when it is clearly shown that he is the owner of no property above his exemptions, that he has neglected for six years to file in the proper Court an inventory or return of any sort, and has failed to convert the personal property into money for the payment of debts, it is the duty of the Probate Court, upon the application of judgment creditors, to require such executor to give bond for the faithful discharge of his duties, and, in default of such bond, to remove him from his office.

PETITION for the Removal of an Executor, filed 24 November, 1875, in the Probate Court of ROBESON, and heard on appeal at Chambers, before *McKoy, J.*

The petition states in substance that Reuben King died in (402) March, 1869, leaving a last will and testament appointing the defendant his executor, who qualified in said month; his estate was amply sufficient to pay his debts; the executor assented to and delivered legacies to the legatees; the plaintiffs recovered judgments against the executor upon claims due them by the testator, which the defendant has refused to pay; the defendant filed his petition and obtained his discharge in bankruptcy, and has no property except a homestead and personal property exemption, and has given no bond for the faithful discharge of his duties as executor, nor made any report of receipts and disbursements; wherefore the plaintiffs asked that the defendant be required to file a sufficient bond, or be removed from his office as executor.

In his answer the defendant says that the personal property of his testator has been expended in the payment of debts, as will appear from his annual report on file; that there are a number of suits involving

large amounts now pending against the estate; he admits he has given no bond, for that, being a trust reposed in him by the testator, the law did not require it; denies the allegation in regard to his financial condition, and says that he has already advanced largely of his own means in paying the debts of his testator, but has no funds on hand to pay the judgment alleged to be due the plaintiffs; he further says that as there are large outstanding debts, and claims in litigation against the estate, and in the event of a recovery, there would not be a sufficiency of assets to pay them all, the plaintiffs would only be entitled to their pro rata share.

The plaintiffs demurred to the answer and assigned as cause: 1st. Having qualified as executor prior to 1 July, 1869, the defendant was required to pay the debts according to their dignity and not pro rata as he claims to have done. 2. The plaintiffs having judgments against him, he was required by law to pay them in preference to those he did pay. 3d. He committed a devastavit in paying the (403) $2,000 which he claims to have paid subsequent to January, 1873, the date of plaintiffs' judgment.

Upon the hearing before the Probate Judge, the demurrer was overruled and the petition dismissed, and on appeal His Honor reversed the judgment and remanded the case with directions to the Probate Judge to proceed according to law to administer the rights between the parties, from which ruling the defendant appealed.

Messrs. W. F. French and *N. McLean,* for plaintiffs.
Messrs. Giles Leitch and *A. Rowland,* for defendant.

RODMAN, J. The plaintiffs are creditors of Reuben King who since his death have recovered several judgments against the defendant as his executor.

They petitioned in the Probate Court for the removal of the defendant from his office as executor, and for the appointment of an administrator *debonis non, cum test. annex.*

The grounds of their application are briefly these: 1st. The testator died in March, 1869, and in the same month the defendant proved his will and qualified as executor. 2d. The executor has assented to and paid legacies, while debts were outstanding and unpaid. 3d. Defendant is a bankrupt and has no property beyond his homestead and personal property exemption. 4th. He has made no return of the estate of his testator or of his dealings with the same. In reply to these allegations:

1. The defendant does not *expressly* deny that he has assented to and

paid legacies, but he refers to and makes part of his answer an account filed in the Probate Court shortly after the filing of the petition, viz, on 15 December, 1875, professing to be an account of all monies received and expended by him up to that date, from which it appears that he had received $22,319.45, and had paid out upon the debts
(404) of his testator $25,125.54. As this account apparently does not set forth the payment of any legacies, it is a fair inference that the defendant means to deny that he had paid any, and as this allegation is not otherwise proved, we consider it as out of the case.

2. There is however this to be noted about defendant's return, that it does not profess to be a return of *all* of the personal property of the testator which had come to the hands of the defendant, as it ought to have been; and althought he says he has no funds wherewith to pay the plaintiffs, yet it is consistent with his answer that he has personal property of the testator, not returned, and not converted into money; and this view is strengthened by the fact, that by his pleading in the actions of the plaintiffs, he admitted assets to satisfy their claims.

3. The defendant does not deny his bankruptcy, neither does he say that he was a bankrupt at the death of the testator, and that the same was known to him, but contents himself with denying the allegation that he has no property beyond what is exempted, and does not say that he has property enough to pay the debts of the plaintiffs who are entitled to execution *de bonis propriis*.

4. The return is further defective in this; it does not set forth the nature or dignity of the debts paid by him, or the dates at which he paid them, that is, whether before or after the judgments of plaintiffs. It does not appear that the defendant filed his vouchers with the return, so as to enable the Probate Judge to pass on them, or that he has passed on them.

On these pleadings the Probate Judge overruled the demurrer, which was assumed to have been filed to the answer and dismissed the action, from which judgment the plaintiffs appealed. The Judge in the Superior Court reversed the order of the Probate Judge, and remanded the case to him to proceed therein according to law, without
(405) however giving any particular direction as to how he should proceed. From this judgment the defendant appealed to this Court. The facts which appear to us upon the pleadings may be summarily stated:

The defendant qualified as executor in March, 1869; he delayed for over six years, and until after this action was brought against him, to make any inventory or return of any sort, and then makes an imperfect

and uncertain one. He impliedly admits that he has personal property of the testator which he has not returned, and that his own property is not sufficient to pay the debts upon which the plaintiffs have recovered judgments, and for which he is personally liable.

While property or even insolvency is not of itself a sufficient ground for removing an executor, especially when the insolvency existed, and may be supposed to have been known to the testator at the making of the will, or before his death, yet insolvency, whether known to the testator or not, coupled with a continued disregard of duty, even if not fraudulent, but merely ignorant or negligent, certainly shows that the trustee is unfit for his office, that the interests of his *cestuis que trust* are not safe in his hands, and that he ought to be removed or at least required to give such bond as will fully protect the interests of all having interests in the property in his hands. We concur with the Judge of the Superior Court in reversing the order of the Probate Judge, but think he should have given the latter particular directions how to proceed upon the matter immediately in controversy.

There remains one question which we ought to pass on, which, as it is not made in the pleadings and was not so distinctly presented on the argument as to attract our attention, might have escaped it, if we had not been reminded of it by counsel afterwards; it is as to the jurisdiction of the Probate Judge in the premises. Laws 1868-'69, ch. 113, sec. 90, (Bat. Rev., ch. 45, sec. 141) authorizes any surety on (406) the bond of an executor, etc., who is in danger of sustaining loss, to petition in the Probate Court for the removal of the executor, etc. But there is no act of assembly that I am aware of which expressly gives the Probate Judge power to remove an executor, etc., on the application of any other person such as a legatee or creditor, etc.

Before the constitution of 1868, the Courts of Equity alone had that jurisdiction. If the Probate Courts now have it, it can only be as contained in the grant of the power to grant letters testamentary, etc., and to audit the accounts of executors, etc., in the constitution of 1868 (Art. IV, sec. 17) or as it may be implied from the act of 1868-'9 above cited.

If the question were entirely *res nova* it might admit of some doubt. The power to grant letters testamentary does not *necessarily* imply the power to revoke them. The two powers may be and have often if not usually been assigned to distinct Courts. It is however a reasonable, if not a necessary implication; and the right of a legatee or a creditor to apply for revocation stands in reason and convenience upon the same footing with that expressly given to a surety of an executor by the act of 1868-'9. The opinion of the Court in *Hunt v. Sneed,* 64 N. C., 180,,

delivered by DICK, J., does not clearly state the point or the reason for the decision. It seems to put the jurisdiction in this particular case upon the ground that it is implied from the jurisdiction given by the constitution (Art. IV, sec. 17). The *decision* however was positively in point.

The printed report of the case does not show in what character the plaintiff sought to require an additional bond from the defendant, or his removal. We have examined the transcript of the record filed in this Court, and it appears that the plaintiff was not a surety of the defendant (who had married the feme executrix of Bullock, and had given
(407) bond as required by the act of 1868-'9, Bat. Rev., ch. 45, sec. 137), but was a legatee under the will of Bullock, the testator of defendants. The question of the jurisdiction of the Probate Judge in such a case was squarely raised, and it was the only question in the case.

The opinion of the Court says: "The proceedings against the defendant, etc., were properly commenced before said Judge of Probate. His powers in this respect are derived from the Constitution *and* the Code of Civil Procedure, and the act of 1868-'9 only sets forth the forms of proceeding," etc. Before the passing of said act he (the Probate Judge) had the power to require the defendants to * * * give a new bond with sufficient sureties, or be removed from office, etc.

The Court affirmed the judgment requiring the defendant to give bond or to be removed, thus directly affirming the original jurisdiction of the Probate Judge. The only other case bearing on this point that I am aware of is *Neighbors v. Hamlin,* 78 N. C., 42. That was an application to a Probate Judge by a creditor as in this case, to require an executor to give bond or be removed. The question of jurisdiction was not made. The Court in its opinion assumed that it had been settled in *Hunt v. Sneed,* and we take it that it has been settled by the decision and the acquiescence of the profession in favor of the jurisdiction of the Probate Judge.

The judgment of the Superior Court is affirmed with this addition,—the Probate Judge is directed to require that the defendant shall within reasonable time to be fixed by the Probate Judge give a bond with sureties, in a sufficient amount, conditioned for the proper administration of the estate of the testator, King, or on default by defendant to give such bond, shall revoke his letters testamentary, and appoint an administration *de bonis non, cum testamento annexo,* and require
(408) from him a proper bond. The case is remanded.

Affirmed.

Cited: McFadyen v. Council, 81 N. C., 195; *Simpson v. Jones,* 82 N. C., 323; *Edwards v. Cobb,* 95 N. C., 4; *In re Knowles,* 148 N. C., 464.

W. B. FURR and others v. ALFRED BROWER, Adm'r, and others.

Administrator—Negligence—Confederate Money.

1. It is not negligence in an administrator to sell slaves for division in March, 1861, under an order of Court in an *ex parte* proceeding instituted to that end by the administrator and distributees.
2. Where, after such a sale, the guardian of the distributees, who were infants, commenced a suit against the administrator for the funds arising therefrom, and in April, 1863, obtained a judgment, the administrator was justified in collecting the purchase money in confederate currency, such being the only circulating medium; and the receipt of the guardian for the same after its payment into Court, is a complete discharge of the administrator.

ACTION on an Administration Bond, tried at Fall Term, 1877, of MOORE, before *Seymour, J.*

The parties waived a jury trial and under the Court found the facts: The defendant, Brower, administered upon the estate of Upshur Furr who died intestate in 1858, and executed a bond with the other defendants as sureties. The plaintiffs are the next of kin and distributees of the intestate whose estate was worth $4,500 according to the inventory of the defendant. The administrator sold the personal property, except the slaves, on 23 November, 1858, the proceeds of which paid the debts of his intestate. On 2 March, 1861, he sold the slaves for $2,040, upon six months credit by virtue of an order obtained in an *ex parte* petition of the administrator and the distributees, the plaintiffs, who were minors and represented by a guardian *ad litem,* for the purpose of a division; and at July Term, 1862, of the County Court, Noah Richardson was appointed guardian of the plaintiffs and filed (409) a petition against the defendant for an account and settlement. An account was taken and the sum of $1,754.13 found to be due the plaintiffs, and a report of the same was confirmed and judgment entered, at April Term, 1863, of said Court. On 28 April, 1863, the following entry was made on the execution docket of said Superior Court, in the case of Richardson, guardian, etc., against Brower, administrator, etc.,—"Paid into office in Confederate money" (the amount due the plaintiffs) and on 9 May, 1863, the following entry: "Received by A. N. McNeill, clerk (the sum) in Confederate money in full of the amount paid in

by the administrator," signed by the guardian; which sum was actually paid in by the administrator and received from the clerk by the guardian according to said entries. The defendant sometime previous to 28 April, 1863, collected the notes due him as administrator in Confederate money; and was allowed to retain $80.27 of the said amount found due to meet some outstanding claim, which sum not having been used by him was paid into the clerk's office in November, 1875, for the use of the plaintiffs.

His Honor held that the administrator was not chargeable with any fault or negligence in selling the slaves in 1861, and that he acted properly in collecting the notes taken for the payment of the slaves, especially in view of the fact that a suit was pending against him by the guardian of plaintiffs for an account and settlement, and that he was accountable only for the Confederate money actually received by him. He further held that the judgment, payment into Court, and the receipt of Confederate money by the guardian in May, 1863, were a complete discharge of the administrator and his sureties. Judgment. Appeal by plaintiffs.

Mr. John Manning, for plaintiffs.

(410) *Messrs. N. McKay* and *Merrimon, Fuller & Ashe,* for defendants.

RODMAN, J. The plaintiffs contend that the defendant was negligent in this:

1. That on 2 March, 1861, he sold the two slaves which he held as administrator of their father in trust for them. We attach no importance to the fact that the sale was made under an order of the County Court; such orders were almost of course on the petition of an administrator; nor to the fact that the plaintiffs, then infants, represented by their guardian appointed by the Court *ad litem* were co-petitioners with the administrator. In those days and perhaps now, guardians *ad litem* were the mere nominees of the administrator and gave no real protection to their wards. The suit was but a form, and if the administrator so pleased, a form to cover a fraud. There is however no appearance of any fraudulent purpose in this case. Supposing the sale to have been altogether the act of the administrator, it does not appear to have been imprudent, much less negligent or fraudulent. It was not inconsistent with a fair purpose and honest judgment to suppose it advisable even as early as March, 1861, to sell slaves.

2. That the administrator, some time before 28 April, 1863, collected the notes given for the slaves which fell due on 2 September, 1861. Per-

haps this unexplained might be considered a culpable imprudence. It would depend on the circumstances. At July Term, 1862, of Moore County Court, Richardson became guardian of plaintiffs, and shortly thereafter commenced a suit against the administrator for the fund in his hands. At April Term, 1863, he recovered a judgment, and on 28 April the administrator paid into Court the amount recovered (except a small sum retained for a special purpose by leave of the Court and afterwards paid) which the guardian received and receipted (411) for.

This suit explains and justifies the collection of the notes in Confederate currency. It does not appear that the guardian offered to accept the notes. If his petition was in the usual form, he demanded payment of what was due in money, and thus compelled the administrator to collect in the only money which was then in circulation.

This case differs from *Purvis v. Jackson,* 69 N. C., 474, in this: There, the plaintiff refused to ratify the act of the clerk in receiving Confederate money, and immediately on being informed of it repudiated it. Here, the guardian of plaintiffs received the money without objection, and thereby ratified its receipt by the clerk.

As to the sum retained to meet certain contingent costs, as it has been paid, it is unnecessary to say anything. We concur in all respects with the Judge below.

PER CURIAM. Affirmed.

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*CHARLES H. WILLIAMS v. ALEXANDER and GREEN WILLIAMS, Adm'r's.

Distributive Share—Note—Illegality of Consideration—Settlement of Estate—Confederate Currency.

1. A note, executed by a distributee to the administrator of an estate and expressed on its face to be for money loaned, but which was in truth executed to secure money *advanced in part payment of his distributive share,* is not rendered illegal by the fact that the money was applied to the purchase of a substitute with the knowledge of the administrator.
2. Where, in the settlement of an estate, the administrator disbursed a much larger sum during the war in Confederate currency than he received during that time, (nearly the whole amount of receipts being before and since the war), and no explanation is given as (412) to why or how he had in his hands $1,000 in Confederate currency in 1874, which he advanced plaintiff as part of his distriubtive share: *It was held,* that in the settlement of his account the admin-

*SMITH, C. J., and READE, J., did not sit on the hearing of this case.

istrator should only be credited with the actual value of the Confederate currency so advanced.

Held further, that in such settlement the plaintiff (distributee) should be charged only with the value of such Confederate currency in good money as of the date of said advancement.

SPECIAL PROCEEDING for an Account and Settlement commenced in the Probate Court and heard on appeal at Spring Term, 1877, of PERSON, before *Cox, J.*

The main facts appear in the opinion. In the account stated, the plaintiff was charged with the amount of a note executed to the defendants in 1864, and to which among other items he filed an exception, and insisted that the money was borrowed to pay for a substitute in the Confederate service, and that the consideration was therefore illegal, and that defendants knew this was the purpose for which the money was used. His Honor overruled the exception, being of opinion that the note did not show that a loan was intended, but that the plaintiff received the amount as part payment or an advancement on his distributive share of the testator of Haywood Williams deceased, and as he chose to take Confederate money, it was a good payment and the scale did not apply. From which ruling the plaintiff appealed.

Messrs. Merrimon, Fuller & Ashe, for plaintiff.
Messrs. J. W. Graham and *L. C. Edwards,* for defendant.

BYNUM, J. This case under various phrases has been before us several times. See 70 N. C., 665; 71 N. C., 427; 74 N. C., 1. An account had been stated between the parties, and a judgment thereon had been rendered against the defendants. Upon affidavits filed, that (413) certain payments made by the administrators to the plaintiff on account of his distributive share had not been taken into the account, the judgment was set aside and the account re-opened to the extent of letting in those omitted payments and the other just credits specified in the affidavits. 74 N. C., 1. In restating the acocunt for that purpose, among other things, the clerk allowed the defendants, as a credit at its face value, a note of the following tenor: "One day after date I promise to pay A. and G. Williams, administrators of Haywood Williams, deceased, the just and full sum of one thousand dollars, being money loaned from the estate of Haywood Williams. Witness my hand and seal, this 29th of February, 1864. Charles H. Williams, seal."

The plaintiff alleged that the money was borrowed to pay for a "substitute" in the Confederate Army, which fact was at the time well known to the defendants; and that the contract of loan was therefore

illegal, and the money could not be recovered or allowed as a part payment of his distributive share of the estate. He further alleged that the money was to be repaid in the same currency, and therefore that the note was subject to scale.

The defendants denied both propositions, and upon proofs submitted by the parties, the clerk found that the money was not a loan, but was received as an advancement on the plaintiff's share of the estate. In that we concur. But the clerk also decided that the note was not subject to scale. In that we do not concur. For by reference to the account stated by the defendants in the course of these proceedings to settle the estate of Haywood Williams in their hands, it is seen, that of $95,000 collected, all except less than $5,000 was collected either before or after the war—most of it before the war and of course in good money—and that of the disbursements, over $20,000 was paid out during the war—the larger part in 1863 and of course in Confederate money. Having received so little and paid out so much Confederate currency, (414) no explanation is given, why or how the defendants had in hand still $1,000 more of Confederate money in 1864 to advance to the plaintiff on his distributive share. It is not shown that this sum advanced was a part of the identical money, or the same currency collected for, and belonging to the estate. And if the estate had been faithfully administered, we do not think it could have been the same.

For these reasons, and the gross mismanagement of the estate of the intestate throughout, as is sufficiently apparent, we think the defendants should be credited with only the actual value of the Confederate money so advanced to the plaintiff. This will be ascertained by applying the legislative scale. The exception of the plaintiff is allowed, to the extent that he is chargeable only with the value of the Confederate bond, in good money as of its date. The other exceptions were not insisted on in this Court.

The clerk of this Court will reform the report in conformity to this opinion and the other exceptions which were allowed by His Honor in the Court below, and judgment will be rendered accordingly. The clerk will be allowed five dollars for reforming the report. The plaintiff having sustained the main exception will recover his costs. Judgment is reversed, modified and rendered here for the plaintiff.

PER CURIAM. Judgment accordingly.

Cited: Shields v. Ins. Co., 119 N. C., 385.

JOHN D. WILLIAMS and others v. E. W. WOOTEN, Adm'r.

Administrator—Settlement of Estate—Evidence.

Upon the trial of an issue as to whether an administrator had certain notes and accounts against the estate of his intestate at the time he rendered his account, and whether the fund in his hands was applied
(415) to their payment: *Held*, that the testimony of a witness that "he had seen the notes and accounts due the administrator but they are not on file," was not admissible, the notes and accounts not being produced and there being no evidence of their loss or destruction or that search had been made for them.

APPEAL at Spring Term, 1878, of BLADEN, from *Eure, J.*

In 1866 Isaac Wright died and in or about the same year H. A. Monroe became his administrator, and gave bond with the plaintiffs as his sureties. In the fall of 1874 Monroe died and the defendant became his administrator. Before the death of Monroe, viz., on 21 March, 1874, he returned to the Probate Court an account of his administration of Wright's estate in which he charged himself with $709.80 received from the estate, and credited himself with disbursements and commissions to the amount of $432.15, thus apparently admitting himself a debtor to the estate in $277.65. On the same day however, and probably at the same time, he filed in the office of the Probate Court a statement to the effect that certain debts had been presented to him as administrator, which remained unpaid in consequence of his having no assets applicable to them. The debts are described as: (1) Judgment in favor of, etc., $8,201.93; (2) Judgment in favor of, etc., $610.00; (3) Account due George Tait, $29.05; (4) Note due N. & C., $—, on which suit has been entered. $1,000 on accounts and notes due H. A. Monroe."

After the death of Monroe, one Whitted qualified as administrator *de bonis non* of Wright, and upon his threatening to sue the plaintiffs as sureties upon the administration bond of Monroe, they paid him the sum of $277.65 apparently owing by him to the estate of Wright. This action is brought to recover that sum with interest from the estate of Monroe. At the trial by consent of parties, the only issue submitted to the jury was: "Did Monroe have notes and accounts against
(416) the estate of Wright to the amount of $277.65 at the time he rendered his accounts, and was that sum applied to pay them?"

To prove that Monroe had such notes, etc., the defendant introduced R. H. Lyon as a witness who testified, "that he had seen the notes and accounts due Monroe, but they are not on file." The plaintiff objected to this testimony, but it was received and the jury found in the affirma-

tive upon the issue, and the Court gave judgment against the plaintiffs, from which they appealed.

Mr. T. H. Sutton, for plaintiffs.
Messrs. C. C. Lyon and *J. W. Hinsdale,* for defendant.

RODMAN, J. (After stating the case as above.) The fourth item in the paper filed by Monroe with his accounts and which is the clause relied on by the defendant is unintelligible or equivocal in the transcript of the record sent to us. But taking it most favorably for the defendant, and in connection with the evidence of Lyon, it is not sufficient to prove that there were debts owing to Monroe by Wright to which he might lawfully apply the sum in his hands. Taking it—which is the natural and most favorable construction for the defendants—that the judgments spoken of were recovered against Wright in his life time, the assets in Monroe's hands were applicable to those judgments and not to the notes which Monroe held, if he held any, and the administrator *de bonis non* of Wright was entitled to recover the assets in Monroe's hands for the purpose of applying them in that way. The evidence of Lyon as to the notes and accounts was incompetent; they were not produced and there was no evidence of their loss or destruction, or that any search had been made for them. Lyon does not say that he knew the handwriting of Wright, or that the notes were in fact signed by him; the utmost that can be fairly inferred from his testimony is that he saw certain writings purporting to be notes (417) of Wright, but the amounts he does not state; and that he saw certain writings purporting to be accounts against Wright, but he does not say that they were in fact owing by Wright, or to whom they were owing if to any one.

As the defendant became the administrator of Monroe after July, 1869, the only effect of a judgment against him would be to ascertain the debt. There was error in the proceedings below, the judgment is reversed and there will be a

Venire de novo.

*W. H. WILLIAMS and others v. ALEXANDER and GREEN WILLIAMS, Adm'rs.

Administrators—Negligence.

As a legal proposition, it is not the duty of an administrator here to take out letters of administration in another State in all cases where a debt there may be due the intestate; but his duties, as those of all other trustees, must be determined by the exigencies of each case; and where no attempt of any kind was made to collect a bond on a solvent non-resident living in an adjoining county in Virginia about a day's journey, by private conveyance, from the residence of the administrator, and where no excuse except the non-residence of the debtor is given for such delinquency by the administrator, he is guilty of such negligence as will render him liable for the uncollected portion of the debt.

SPECIAL PROCEEDING heard on appeal at Fall Term, 1877, (418) of PERSON, before *Buxton, J.*

The facts necessary to an understanding of the points decided are embodied in the opinion of this Court.

Messrs. Merrimon, Fuller & Ashe, for plaintiff.
Mr. L. C. Edwards, for defendant.

BYNUM, J. This was a special proceeding begun in the Probate Court of Person county by the next of kin and distributees of Haywood Williams, deceased, against the administrators of the estate for an account and settlement. It was referred to John W. Cunningham, Esq., to take and state the account, and the case comes up upon the ruling of His Honor below, upon exceptions to the report of the referee, taken by the defendants.

First Exception: The referee charged the defendants with the sum of $8,217.99 principal money, being a balance on account of bonds turned over to them by G. D. Satterfield, surviving partner of Satterfield & Williams. It was alledged by the plaintiffs that the firm of Satterfield & Williams was indebted to the intestate in the sum of $18,360.06 and that the defendants, instead of collecting the money, received in satisfaction of the debt $18,360.06 in bonds and notes, of which $10,142.07 has been collected, leaving the above allowed balance of $8,217.99 uncollected. It was denied by the defendants that they received the notes and bonds in satisfaction of the debt, and it was alleged by them that they received the said evidences of debt, as the

*SMITH, C. J., and READE, J., did not sit on the hearing of this case.

agents of the surviving partner of the company, to aid him in collecting, and to apply in the extinguishment of the debt, so much thereof as they could collect. Upon this issue each party produced evidence before the referee, and his finding thereon was as above indicated. This finding was affirmed by the Judge on appeal and the exception disallowed. We have reviewed the evidence and are satisfied, as (419) the referee and Judge were, that the administrators received the notes and bonds in discharge of the debt, and are properly chargeable with the sum of $8,217.99 principal, with interest thereon as reported by the referee. This exception is therefore disallowed.

Second Exception: The referee charged the defendants with the sum of $809 and interest on account of an uncollected note due the estate of the intestate by William & James Robertson. Upon this exception the facts found, are, that there came into the hands of the administrators a bond for $1,088 belonging to their intestate, Haywood Williams, which he derived by the sale of a tract of land to William Robertson. On this bond, the said William was principal, and his father, James Roberton, was surety. At the death of the intestate the principal was insolvent, but the surety was good, though he resided in Halifax county, Virginia, and remained solvent until the emancipation of the slaves. The administrators obtained judgment against William Robertson and sold the land for which the note was given for $271.00, but made no effort to collect the debt out of the surety in Virginia. The referee charged the administrators with the uncollected balance of the note, but upon appeal the Judge disallowed this charge, upon the ground that the debtor being non-resident, though solvent, in law the administrators were not chargeable; and he allowed this exception. This was error.

An administrator is certainly bound to as much diligence in collecting the assets of his intestate which came to his hands in this State, as a prudent and careful person would exercise in the management of his own business, and this, whether the debtor lives in one State or another. Mere nonresidence of the debtor, of itself, is not a discharge from liability; and that is all that is here alleged in excuse. Geographically, we know that Halifax, Virginia, is an adjoining county to Person, the residence of the administrators, and but a short distance off; (420) yet the bond was not even presented for payment, to the only solvent obligor, and no attempt of any kind was made to collect the debt from him. It is not alleged that the debt could not be collected without suit. If it could have been collected without suit, it was the duty of the administrators to collect it. Supposing it could not be so

collected, it is not alleged that the defendants tried, or were unable to give bond and take out letters of administration in Virginia. It is no defence to say, it was as much the duty of one of the next of kin to administer in Halifax, Virginia, as of the defendants. It does not appear that the next of kin knew of the existence of the bond, and there is no evidence that it was tendered to them for that purpose.

Whether administrators in this State should take out letters of administration, or try to do so, in the State of a nonresident debtor, must depend upon the circumstances of each case. In *Helme v. Saunders,* 10 N. C., 563, it was held to be the duty of an executor in this State to take out letters testamentary in another State, for the purpose of suing for a debt due there, if the interests of the estate which he represented required it; and in determining this latter point the magnitude of the debt, the solvency of the debtor, the distance and probable expense, were to be considered. An omission to do so when necessary was held to be a *devastavit.*

The same rule of diligence and good faith applies to administrators as to executors, notwithstanding the somewhat fanciful, rather than reasonable distinction, which has sometimes been drawn between the duties of executors and administrators in this respect. In point of fact we know that the will of a resident of one State will not be admitted to probate and letters testamentary be granted in another State, unless the executor will give there an administration bond, just as administrators (421) are required to do. So that there can ordinarily be no more difficulty in the way of an administrator collecting a debt of the intestate in another State than of an executor.

Plummer v. Brandon, 40 N. C., 199; *Governor v. Williams,* 25 N. C., 152, and *Sanders v. Jones,* 43 N. C., 246, have been cited as opposed to our decision in this case, but they are not so. The bond in question came into the hands of the administrators as part of the intestate's assets here, at the place of his domicile. The legal title to it was vested in the administrators, and imposed upon them a trust, which could be discharged only by reasonable diligence and discretion in collecting and disposing of the effects of the estate. Their endorsement would have conveyed the legal title to the endorsee, either for the purpose of collecting for the estate, or for the benefit of the purchaser (*Riddick v. Moore,* 65 N. C., 382) as it came into their hands long prior to the adoption of the Code, and its exposition in *Abrams v. Cureton,* 74 N. C., 523, as to the right of an assignee to bring a suit in his own name.

As a legal proposition it is not the duty of an administrator here to take out letters of administration in another State, in all cases, where a

debt there may be due the intestate; but his duties, as those of other trustees, must be determined by the exigencies of each case. As no attempt of any kind was made to collect this bond on the solvent nonresident, although he resided in an adjoining county in Virginia, probably not more than a day's journey by private conveyance, and as no excuse other than his nonresidence has been given for the delinquency, the administrators are chargeable for so much of the bond as is uncollected.

The last exception which we have been discussing comes before us on the appeal of the plaintiffs, and more properly should be disposed of in the next case between the same parties, but we have found it (422) most convenient to decide it in connection with the exception of the defendants hereinbefore disposed of.

His Honor erred in allowing the last exception; and in that he is reversed. The report of the referee is confirmed in all things, and judgment will be rendered here accordingly.

PER CURIAM. Judgment accordingly.

PLAINTIFFS' APPEAL.

BYNUM, J. This case is the appeal of the plaintiffs to the ruling of the Court below allowing an exception taken by the defendants to the report of the referee to take and state an account of the estate of Haywood Williams, deceased, which went into the hands of the defendants. The referee charges the administrators with the uncollected balance of a note of $1,088, which the intestate held upon William and James Robertson, upon exception by the defendants. His Honor below allowed the exception and the plaintiffs appealed to this Court. We have discussed and passed upon this exception in the other branch of this case at the present term of the Court and for the reasons there stated we disallow the exception and confirm the report of the referee. His Honor erred in allowing it, and his judgment thereon is reversed and judgment is here given according to the report.

Reversed.

Cited: Grant v. Reese, 94 N. C., 720.

(423)

State ex rel S. E. BRATTON and others v. E. C. DAVIDSON and others.

Settlement of Estates—Jurisdiction.

1. Under the constitution, Art. IV, sec. 12, and the acts of 1876-'7, ch. 241, sec. 6, the Superior Court in term time has original jurisdiction to hear complaints against executors and administrators, demanding an account of their dealings and a settlement with the legatees or distributees.
2. Where an administrator fails to exhibit in Court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond to a regular term of the Superior Court, alleging such failure as a breach, and calling for an account, without first seeking the account in the Probate Court.

APPEAL at Spring Term, 1878, of MECKLENBURG, from *Cox, J.*

This was an action upon an administration bond, in which a breach of the bond was alleged by reason of a failure on the part of defendant administrator to exhibit his final account in the Probate Court of the administration of his intestate's estate, although more than two years had elapsed since his qualification as such; and of his failure to pay over to plaintiffs the portion of said estate due them. The demand was for an account, and for judgment upon the bond for the amount ascertained to be due. The defendant demurred to the complaint and assigned as cause—that the Probate Court had exclusive original jurisdiction of the proceedings, and the complaint did not allege that defendant failed to execute the trust and obey the lawful orders of said Court or any other Court touching the administration of said estate. His Honor overruled the demurrer with leave to answer over, and referred the case to the clerk to state an account, etc., from which ruling the

(424) defendant appealed.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Shipp & Bailey, for defendants.

BYNUM, J. By sec. 12, Art. IV, of the Constitution as amemded by the Convention of 1875, a new distribution of the judicial powers of the Courts is provided for, and it is there declared that the "General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court, among the other Courts prescribed in this Constitution, or which may be established by law, in such a manner as it may deem best." This amendment has wrought the most important change in the Constitution, as it relates to

the judiciary system, and puts all the Courts inferior to the Supreme Court without the pale of its protection, and makes them the creatures of the will of the Legislature. As it is now competent for the Legislature to abolish all such existing Courts and to create new ones, it is certainly competent for that body to redistribute the powers and jurisdiction of the Courts as established, and such is the express provision of the amendment cited above. Accordingly the General Assembly by an act ratified 9 March, 1877 (Laws 1876-'77, ch. 241, sec. 6), has enacted "that in addition to the remedy by special proceedings as now provided by law, actions against executors, administrators, collectors and guardians, may be brought originally to the Superior Court at term time," and that it shall be competent to that Court to order accounts to be taken, and to adjudge the application and distribution of the fraud, or grant other relief as the nature of the case may require.

This action is upon the administration bond of the defendant, and the prayer of the complaint is that the defendant account and pay over to the complainants, who are the next of kin and distribu- (425) tees, the amount that may be due them. The defendant insists that no action lies upon his bond until a final account of his administration is taken in the Probate Court, or in the Superior Court exercising the probate powers conferred upon the Court by the act of March, 1877, cited above; because until such an accounting it can not be seen that there has been a breach of the bond. We think otherwise. The conditions of the administration bond are "that he do make a true and perfect account of his administration within two years thereafter, and that he pay over and deliver to the parties thereto the balance found due upon said account, and that in all things he do faithfully execute the trust reposed in him according to law." It is not pretended that these conditions were complied with in the time prescribed, or at all, before the beginning of this suit. This default was a breach of the bond which will sustain the action. It is not reasonable or consistent with the economy of the new Code, that distributees should be required, first to pursue the administrator alone, by having an account of his administration taken and stated in the Probate Court or elswhere, and then to institute another action upon the bond to recover such sum as may be found due in the first proceeding. This would be taking two bites at a cherry when one would answer, and would indefinitely prolong the settlement of deceased persons' estates; and by the probable failure or fraud of the administrator or sureties, render an ultimate recovery more precarious. Even before the adoption of the amendment to the Constitution and the subsequent act of the Legislature conferring the probate jurisdiction

upon the Superior Courts as before described, it was competent for the parties in such cases as this to institute an action upon the administration bond, after two years and a failure to account and pay over, (426) without having first resorted to the Probate Court for a final account, etc.

The Court therefore had jurisdiction, and the demurrer of the defendant can not be sustained. *Heilig v. Foard,* 64 N. C., 710; *Rowland v. Thompson,* 65 N. C., 110.

Affirmed.

Cited: Pegram v. Armstrong, 82 N. C., 326; *Houston v. Howie,* 84 N. C., 349; *Goodwin v. Watford,* 107 N. C., 168; *Oldham v. Rieger,* 145 N. C., 257.

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*JACOB FRONEBERGER, Adm'r, v. JOHN G. LEWIS, Adm'r.

Purchase by Administrator at Sale for Assets—Constructive Fraud.

1. Where, upon the petition of an administrator, the land of his intestate is sold for assets by a commissioner appointed by the Court, and the administrator purchases for his own use and benefit, the heirs and other persons interested in the disposition of the realty have their election to treat the sale as a nullity, or to hold the administrator responsible for the actual value of the land.
2. To the general rule that a trustee is not permitted to purchase at his own sale there are the following exceptions:—

Where the trustee has a personal interest in the property, he may if necessary, bid it in to protect that interest. But even then, it is proper, if not indispensable, that his bidding should be sanctioned by the previous permit or subsequent confirmation of the Court, upon a full disclosure of all the facts.

And where the *cestuis que trust* consent to the purchase or ratify with full knowledge of the facts.

ACTION commenced in Gaston and removed and heard on exceptions to the report of a referee at Fall Term, 1877, of CATAWBA, before *Cloud, J.*

The plaintiff brought this action upon a note due his intestate (427) from the defendant's intestate, and the case was referred by consent to obtain an account of the estate, and it was found that the defendant filed a petition in the County Court of Gaston in 1866 to sell the lands of his intestate to pay debts, and that the same was sold by J. B. White, commissioner, and the defendant became the purchaser at

*BYNUM, J., did not sit on the hearing of this case.

$705. The value of the land at the time of sale was $2,000. A report of sale was made and confirmed by the Court, and a deed executed to the defendant. Among the exceptions filed was one by the plaintiff—that the referee did not charge the defendant with the value of the land purchased at his own sale as aforesaid. This exception was sustained at Fall Term, 1873, of GASTON and upon the defendant's appeal the case was remanded. See S.c., 70 N. C., 456. And at Spring Term, 1875, upon the plaintiff's motion, it was removed to Catawba, and His Honor upon defendant's application referred the case to the clerk to ascertain whether said sale was made by White as commissioner appointed by the Court, or as agent of the defendant; and to report the actual value of the land, and whether the defendant in the purchase of the same was guilty of any collusion with White. From this order of re-reference and refusing judgment for the value of the land the plaintiff appealed, and from the judgment overruling the exceptions of defendant he appealed.

Messrs. J. F. Hoke and *M. L. McCorkle,* for plaintiff.
Messrs. G. N. Folk and *R. F. Armfield,* for defendant.

READE, J. We are of the same opinion with His Honor in his rulings upon all the exceptions on both sides, except in re-referring the matter of charging the defendant with the difference between what he bid for the land, $705, and its value at the time of sale, $2,000. That matter was *res adjudicata,* having been passed upon at a former (428) term of the Court below, and affirmed by this Court on appeal. 70 N. C., 456.

That a trustee or other fiduciary can not purchase at his own sale is an iron rule *at law:* nor indeed can any one else, because in every sale there must of necessity be two persons—a vender and vendee. It is equally true that where there are two persons, a vendor and vendee, as where a second person is substituted to sell or buy, the sale is valid *at law,* but *in equity* the substitution of a second person makes no difference; the validity or invalidity of the sale being determined by other considerations.

This is so well established that we could scarcely be excused for encumbering the case with authorities, except to show how general is the rule and how few the exceptions.

The earliest case in our Reports is *Ryden v. Jones,* 8 N. C., 497, elaborately argued by *Hogg, Hawks* and *Gaston;* opinion by TAYLOR, C. J.: Executor sold at public auction, sale necessary, fair, full price, all persons interested present and assenting, except a *feme* covert; purchased by

a third person for the executor; twenty years thereafter sale declared void.

The next case is *Gordon v. Finley,* 10 N. C., 299: The widow and one of the sons were administrators. It was agreed by the son and all the distributees who were of age that the widow should pay off debts to the value of one of the slaves, and take him as her property, which she did. Many years thereafter her title held to be bad, HENDERSON, C. J., saying: "No act of hers could be valid where her duty and interest were in opposition. In the sale of the negro it was her duty to get the best price, at least his value; it was her interest if she became the purchaser that she should obtain him on the lowest possible terms. Nor is it an answer to show that in this particular case, full value was given. For wise (429) purposes the rule of law is general and makes no exceptions. A trustee can not purchase at his own sale, that is of himself. The rule may at times produce individual hardships and inconveniences, but its general operation is beneficial. Lead us not into temptation came from the lips of Him to whom error can not be imputed. To implore it would not disgrace the most honest and pious among us. To make exceptions from the rule in particular cases because full value had been paid, would produce litigation. And who is there to show full value * * *. I therefore think that the rule should not be departed from. I will not say in any instance, but I must say in any that I can call to mind. * * * I believe all the assertions made in this opinion are to be found in the commonplace books, and therefore I have not cited authorities."

The next case is *Gordon v. Finley,* 10 N. C., 299: The widow and one and sold property at acution. His two brothers bought for themselves and him. RUFFIN, C. J., said: "A sale thus conducted can not be supported in this Court. * * * Such conduct amounts to a flagrant breach of trust, and subjects the trustee to the payment of the full value of the property sold, and in that way Edwin would be charged here if necessary, and Gideon also who participated with him in conducting the sale and gaining an interest under it. But as the slaves have got back into the hands of those who did the wrong, the plaintiff has the right to them specifically. * * * The plaintiff is therefore entitled to an account * * * for the full value of the property sold, other than the slaves, and to a reconveyance."

Observe that here the trustee was held liable, not for what the property was bid off at, nor for what he subsequently sold it at, if he had sold it, but for its full value. And so he was liable for the full value of the slaves, but as the slaves had got back into his possession and

the *cestuis que trust* preferring it, he was compelled to surrender (430) them specifically.

So in *Boyd v. Hawkins,* 17 N. C., 105, RUFFIN, C. J., says: "The well established principle of equity in this State is that a trustee can not purchase the trust property, directly or indirectly, at a sale made by himself; either privately or at auction. It is founded on the notion that it exposes him to temptation, and the *cestui que trust* to imposition. Although no actual fraud be proved, the contract is invalid by reason of the danger of fraud."

So in *West v. Sloan,* 56 N. C., 102: The executor sold slaves at auction and a third person bid them off for him. Twenty years thereafter he was compelled to surrender such as were on hand and to account for their hire, and note, to pay full value for those that he had sold, not what he gave for them at public sale, nor yet what he sold them for, but for their full value,—opinion by NASH, C. J.

So in *Patton v. Thompson,* 55 N. C., 285: The guardian of a lunatic filed a petition in the Court of Equity for the sale of his ward's land. The Court appointed the clerk and master to make the sale, the guardian procured another to buy the land, the sale was reported fair and full, and was confirmed and title made, and then the guardian took a deed from the purchaser. The only thing he had to do with the sale was to act as crier and clerk. PEARSON, J.: "It is an inflexible rule that where a trustee buys at his own sale, even though he gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity, not because *there is,* but because there may be fraud. * * * The allegations tending to show *actual* fraud, as that the sale was not duly advertised, competition was suppressed, etc., are not sustained by the proof and must be put out of the case. * * * The position taken for the defendant, that this being a sale by order of a Court of Equity, and the sale being confirmed by the Court, makes no exception to the general rule above mentioned, and is to be considered *res adjudicata,* does not apply to this case, for here the Court had no notice that the (431) guardian was in fact the purchaser. We are not at liberty therefore to express an opinion whether such an exception can be allowed, but we will say this—if it is allowed at all it should be with extreme caution and only under very peculiar circumstances. Who but the guardian can be relied on to show the property to persons wishing to buy, and to take the necessary steps to make it bring a fair price? Who but the guardian can the Court look to for information as to whether the matters have been conducted in such way as to bring the property to sale under the most advantageous terms, and that in fact it did sell for a fair price? It

must be declared that the guardian holds the property in trust and there must be an account for rents, etc.

Observe that here is a strong intimation, supported by cogent reasons that although the sale was necessary, fair and full, and made by order of a Court of Equity, by its own officer, and confirmed with full knowledge that the glardian had bought, yet except under very peculiar circumstances he ought not to be permitted to hold against the will of the *cestui que trust.*

So in *Brothers v. Brothers,* 42 N. C., 150: The trustee sold land and slaves at auction and a third person bid them off, and he made title and took a reconveyance, and subsequently sold the land for the same it was bid off at. PEARSON, J.—"It is an inflexible rule that where a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity. * * * It must be declared to be the opinion of the Court that the plaintiff is entitled to have the personal property resold, and to have the land resold unless the subsequent sale by the defendant was *bona fide* and for a fair price. There must be a reference to inquire whether the land was sold by the defendant, and if so, for what price, and the value of the land at the (432) date of the sale."

Here observe that it mattered not what the trustee gave for the land, nor yet what he sold it for, except that if he had sold it to a *bona fide* purchaser they would not disturb the purchaser, otherwise they would at the election of the *cestui que trust;* but the reference was to ascertain the value of the land at the time of the sale so as to charge the trustee with that value, if he had sold the land. And that is precisely what was done in the case before us, so that that case is precisely in point.

In *Roberts v. Roberts,* 65 N. C., 27, the Court say: "We are satisfied that the administrator contrived to have the land of the estate sold by himself as administrator and commissioner to make the proceeds assets, for the purpose of buying the land himself. In the petition for the order of sale he overstated the amount of the debts of the estate by nearly double, and he described the lands so as to conceal from the Court their value. * * * The authorities cited in brief of plaintiff clearly show that a trustee can not buy at his own sale, either by himself or through another. Indeed it is common learning. There are some qualifications of the general rule, as where he does so without fraud and with the consent of the *cestui que trust,* or their subsequent sanction."

In that case the sale was declared void although made and confirmed by order of Court and title made to a third person. It is however cited

mainly to show how easy it is for an administrator to impose upon the Court in getting the order and having it confirmed. And to corroborate what was said by Judge PEARSON, *supra,* that the Court was obliged in such cases to reply upon the trustee for information.

In 23 N. J. Eq. 106 and 302, it is said, that a trustee can never be the purchaser of the trust property without the consent of all the *cestuis que trust.* In 27 Ark., 637, and in 116 Mass. the same is held, and that if he does, he shall be charged with the full value. And (433) in one of those cases the administrator, who had sold lands for assets at an under value and purchased them himself and the sale was declared void, insisted that he had the right to hold the lands by accounting for their full value, but it was held to be at the election of the *cestuis que trust.*

I have not the case before me, but I have read it in connection with this investigation, and I think I state it correctly.

In addition to those *cases* the common place books, as said by HENDERSON, C. J., teach no other doctrine. Thus it will be seen that we have a train of decisions with opinions by TAYLOR, C. J.; HENDERSON, C. J.; RUFFIN, C. J.; NASH, C. J.; PEARSON, C. J.; all to the same effect, that a trustee can not buy the trust property either directly or indirectly. And if he does so, he may be charged with the full value, or the sale may be declared void at the election of the *cestui que trust,* and this, without regard to the question of fraud, public policy forbidding it.

In unison with those decisions is our statute that "at any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, etc., for the benefit of the estate, when in his opinion this is necessary to prevent loss to the estate."

So that when a sale is made whether by himself or by an appointee of the Court or other preson, it is his duty to see that the property is not sacrified. But in opposition to that just and sensible provision, and to the inflexible general principle, it is insisted that if the sale be made by a third person he may buy for himself, notwithstanding the temptation and danger which public policy guards against. Not in one case in a thousand would a trustee who designs an advantage, take it straight by himself. He will contrive a confederate to sell, or a confederate to buy, and all the better if he can get the color of an order (434) of Court. In *Stilly v. Rice,* 67 N. C., 178, the executor sold land and personal property at auction and had it bid in by his wife and others, and some of the personal property he secreted and did not sell. The Court set aside the sale of the land and ordered a resale, and di-

rected that in taking the account the executor should be charged with the full value of the personal property that was bought in for him, without regard to what it was bid off at, and that he should be charged with the full value of the property that was not sold,—PEARSON, C. J., delivering the opinion.

This is cited to show that he may be charged with the value without a resale. It is however insisted by the defendant that *Simmons v. Hassell,* 68 N. C., 213, is an authority against what we have said. In that case, Simmons, the husband of the widow and guardian of the children filed a petition to sell land belonging to the widow and wards, and the clerk and master sold, and Simmons, whose bid Hassell took, purchased the land, and subsequently the ward sold the land and his vendee brought an action of ejectment against Hassell, alleging that his deed from the clerk and master was void. Observe that this was an action at law, where of course the legal title only could be looked to, and that was clearly in Hassell. BOYDEN, J., delivering the opinion said: "His Honor was mistaken in holding that the sale of the clerk and master could be attacked in this collateral way." This is an action of ejectment under our old system brought to try the legal title and not any equitable claim to the premises. The deed of the clerk and master passed the legal title to the purchaser, and this title can only be attached by some proceeding in the nature of a bill in equity, and not by an action of ejectment. This puts the plaintiff out of Court."

It will be seen that that decision does not touch this case. But Judge BOYDEN does go on to say outside of the case, that the husband of
(435) the widow and guardian of the children could purchase at the the clerk and master's sale, because his wife had dower which was included in the sale, and he was also guardian of the children, and it was his right and duty to see that the land brought a fair price. And he says further that there is no objection to a guardian's bidding where the sale is made by a commissioner, etc. If he means that no objection can be taken *at law,* it is just what he had said before, and is true. But if he means that no objection can be taken in equity, it is contrary to what he said before. Although the greater respect is due to any thing that fell from that learned Judge, yet it would be doing him injustice to strain his words farther than the case warranted. The same may be said of *Lee v. Howell,* 69 N. C., 200. And it may be as well to say just here, that wherever a case is found to militate at all against the general doctrine, it has been influenced by the *legal* as distinguished from the *equitable* aspects of the question.

At law a trustee can not buy at his own sale, because to constitute a

sale, there must be two persons, a vendor and a vendee. So *at law* when there are two persons, that is, when a second person is substituted to make the sale or to buy, the legal requirement is supplied and the sale is valid. And therefore it is that a trustee designing a personal advantage substitutes or procures to be substituted such second person, when, like the ostrich, having hid his own head, he thinks he can not be seen. But equity is clear sighted and looks at the substance, and the substitution of the second person makes not the slightest difference, although it does make the sale valid *at law*.

There are a class of cases which have to be distinguished from the general rule as follows: Wherever the trustee has a personal interest in the trust property, there of course he must have the right to protect it, and if to bid for and buy it be necessary to protect it, he must be allowed to do it *for that purpose*. The case stated by Judge (436) BOYDEN was an instance of this. There, the trust property, land, belonging not to the wards alone, but to the wife of the guardian, and as Judge BOYDEN says, he had the right to bid to keep the land from being sacrified. The same is true where a mortgagee sells land to pay his debt, and the property is likely to be insufficient, and he will lose his debt unless he bid for the property. In these cases, and the like, it is usual and perhaps necessary for "the trustee and beneficiary to obtain leave of the Court to bid, or else to have a confirmation with full knowledge of all the facts appearing."

The only other exceptions are where the *cestuis que* trust consent or ratify with full knowledge of all the facts. In the case before us there is not a single favorable circumstance for the defendant. No necessity is shown for having a third party to make the sale. No reason why the officer of the Court was not appointed. No evidence as to what was reported to the Court, or that it was made known that the administrator had bought. The price was one third of the value. No offer to surrender the land or to account for its value. It is suggested that the defendant ought to be allowed to surrender the land instead of being charged with its value. Doubtless that is usual at the election of the *cestuis que trust*. But there is nothing to show the condition of the land. It may have been spoiled, or it may have been improved. There can be no injustice to the defendant in making him pay the simple value of the land with interest, especially as he has never offered to surrender. Indeed his motion is to hold the land, not at the value already ascertained, but at a value to be ascertained by a reference.

If a proper foundation had been made for a re-valuation, as that the former valuation by mistake had been made excessive, it may be

(437) that this Court where the judgment was affirmed might have afforded relief. But that has not been done. It is evidently the desire and the purpose of the defendant to keep the land. Indeed I think it was stated on the argument that he had his homestead laid off on it. His object seems to be to have it revalued. He also asks a reference to ascertain whether he had collusion with the commissioner who conducted the sale. That inquiry is unnecessary, for concede that there was no actual fraud, yet the grossly inadequate price—one third the value—supplies the place of fraud. It is unjust to hold the land at that price however acquired, without the consent of the beneficiaries. This will be certified.

Reversed.

NOTE.—READE, J. In the appeal of the plaintiff, this being the appeal of the defendant in the same case at this term, the principles governing this case are decided.

Affirmed.

Cited: Stradley v. King, 84 N. C., 635; *Dawkins v. Patterson,* 87 N. C., 384; *Bruner v. Threadgill,* 88 N. C., 367; *Sumner v. Sessoms,* 94 N. C., 371; *Gibson v. Barbour,* 100 N. C., 192; *Tayloe v. Tayloe,* 108 N. C., 73; *Maxwell v. Barringer,* 110 N. C., 83; *Cole v. Stokes,* 113 N. C., 273; *Jones v. Pullen,* 115 N. C., 471; *Russell v. Roberts,* 121 N. C., 325; *Austin v. Stewart,* 126 N. C., 527; *Dunn v. Oettinger,* 148 N. C., 281; *Rich v. Morisey,* 149 N. C., 46; *McFarland v. Cornwell.* 151 N. C., 431; *Smith v. Fuller,* 152 N. C., 15; *Credle v. Baugham, Ib.,* 20.

J. M. HECK and others v. CATHARINE WILLIAMS, Adm'x, and others.

Proceeding to Make Real Estate Assets—Land Sold by Deceased in his Life-time.

Under Bat. Rev., ch. 45, sec. 71, only the interest of a deceased debtor in land possessed by him, or which he may have conveyed for the purpose of defrauding creditors, is subject to sale by an administrator for assets:

Therefore, where the plaintiff instituted proceedings in the Probate Court, alleging that he had obtained and docketed a judgment against defendant's intestate during his life-time, and that thereafter the intestate had sold certain real estate to the other defendants for value, and asked that a reference be had to ascertain the value of the lands so sold, that he recover of the defendants an amount in proportion to

the value of the respective tracts, and on their failure to pay that the administrator proceeded to sell, etc.: *It was held*, that a (438) demurrer to the complaint was properly sustained.

SPECIAL PROCEEDING commenced in the Probate Court and tried on appeal at Fall Term, 1877, of HARNETT, before *Seymour, J.*

The plaintiff on behalf of himself and other creditors brought this action against the defendant,—Catherine Williams, administratrix of B. C. Williams; Davis Abernathy, and the Cape Fear Iron and Steel Company. It was alleged among other things that the personal estate of the intestate of defendant had been sold and proved insufficient to pay his debts; that the plaintiff, Heck, was the assignee of a certain docketed judgment obtained against the intestate during his life, which was a lien on his real estate; that the intestate owned an interest, to the plaintiffs unknown, in the minerals in the "Chalmers tract" of land on Deep river, and also other tracts of land (describing them) one of which he sold for value to defendant Abernathy, and another, to defendant company, said sales being made after said judgment was docketed; wherefore the plaintiffs demand that an account of the said personal property be taken, and if the same shall be insufficient to pay said judgment, then the administratrix be ordered to sell the Chalmers tract for assets, and if the proceeds arising therefrom shall also be insufficient to pay the debt, that then a reference be had to the clerk to ascertain the respective values of the lands sold to the co-defendants as aforesaid, that said judgment may be a charge on the same, and the plaintiff may recover of said defendants an account in proportion to the value of their tracts, and on failure to pay, that said tracts be sold by said administratrix to satisfy the judgment aforesaid, and for other and further relief, etc.

The defendants Abernathy and the company demurred to the complaint and assigned as cause: (439)

1. That the Probate Court had no jurisdiction where the proceeding was to enforce a lien acquired by docketing a judgment in intestate's lifetime on lands he afterwards conveyed to defendants.

2. That intestate did not die seized and possessed of the lands so conveyed, and therefore the said Court has no power to order a sale thereof.

The defendant Catherine in her answer to the complaint stated that her year's support had been laid off out of the personal property, except the choses in action which were considered valueless; and that she knew her intestate owned five acres of land at Cokesberry church, but as to the other allegations in the complaint she knew nothing of her own knowledge.

The demurred was sustained in the Probate Court and on plaintiff's appeal His Honor affirmed the judgment and dismissed the case as to the defendants demurring, and remanded it for further proceedings according to law as to the other defendant. From which ruling the plaintiffs appealed.

Mr. John Manning, for plaintiffs.
Mr. Neil McKay, for defendants.

BYNUM, J. The only respect in which this case differs from that of *Paschall v. Harris,* 74 N. C., 335, is, that there, the judgment debtor executed a mortgage with a power of sale, under which the mortgagee sold and conveyed to the purchaser; while here, the judgment debtor sold and conveyed directly to the purchaser. Of course this difference is immaterial, and the decision in the former case must govern this.

It was held in that case that "the right of the intestate and of his heirs and of the administrator, was divested by the sale. Whether (440) the mortgagee and the purchaser under the power of sale, are subject to the lien of the docketed judgment, or whether they can get rid of the lien of the judgment, as purchasers for value and without notice, by reason of the *laches* of the judgment creditors in delaying to sue out execution for more than three years, are questions into which the plaintiff has no concern. If the creditors who have docketed judgments wish to make the question, it must be done by some proceeding on their part, for instance, let them issue executions and sell the land; then the purchaser under the execution, and the purchaser under the power of sale in the mortgage, can have a 'fair fight' and the question be put on its merits."

The act, Bat. Rev., ch. 45, sec. 71, only authorizes a sale by the administrator, of all the interest of a deceased debtor in land possessed by him, whether legal or equitable, and any land which the intestate may have conveyed for the purpose of defrauding creditors. It is not alleged in the complaint that the lands of the intestate were sold and conveyed by him with an intent to defraud his creditors, and the case of *Paschall v. Harris* decides that no such fraudulent intent is implied in law, where a debtor by docketed judgment, executes a mortgage to secure a loan of money. In our case the land was sold by the intestate for its value, according to the express allegation of the complaint. The sale however did not disturb existing liens, but did divest the intestate of all title, legal or equitable, in the land sold, and it follows that the administratrix, as to that, is *functus officio.*

The case is here only upon the demurrer of the defendants, Aber-

nathy and the Cape Fear Iron and Steel Company. The judgment below was that the demurrer be sustained and the proceeding as to them be dismissed. The administratrix answered the complaint, admitting that her intestate left no personal property beyond her year's allowance, and that he owned a small tract of land near Cokesbury church. The complaint also alleged that the intestate owned a mineral (441) interest in the Chambers land on Deep river. As the Judge below remanded the case to the Probate Court for further proceedings, if desired, against the administratrix, and no appeal was taken from that order, nothing is before us but the action of His Honor upon the demurrer. As to that, there is no error.

Judgment affirmed.

Cited: Tuck v. Walker, 106 N. C., 285; *Egerton v. Jones,* 107 N. C., 284; *McCaskill v. Graham,* 121 N. C., 191; *Webb v. Atkinson,* 122 N. C., 687; *Harrington v. Hatton,* 129 N. C., 147; *Hobbs v. Cashwell,* 152 N. C., 190.

R. C. PERKINS, Adm'r, v. H. P. R. CALDWELL and others.

Will—Legacy—Executor—Commissions.

A testator, who in his life-time had made unequal advancements to his children, by his will bequeathed certain amounts to them, with a (442) view to equality, payable in cash or property at the election of the executor, without stating when they should be paid; the remainder of his estate was given to his wife for life and at her death the residue was to be divided into as many shares as he might have children then living; at the time of his death the testator had sufficient personal property including slaves to pay his debts and legacies, but the solvent credits and monies belonging to the estate were exhausted in payment of debts and expenses, except certain shares of bank stock bequeathed to the executor (a child and legatee) but charged with the payment of $710 into the residuary fund; the slaves at his death were worth much more than the amount of the legacies; after his death the slaves and other personal property remained in the possession of the widow *with the approval of the legatees,* until the slaves were emancipated; the executor (now deceased) offered to pay the legacy to one of the legatees, which was declined, and to another he paid a part; no effort was made by the legatees to compel a payment of the legacies until after the slaves were emancipated: *Held:*

(1) That the legacies are not a charge upon the land of the testator;
(2) That the estate of the executor is not liable for legacies;
(3) That the estate of the executor is liable for $710, with interest from the death of the widow, to be paid into the residuary fund;
(4) That the executor is entitled to commissions, it being found that he acted in good faith.

CONSTRUCTION of a Will heard at Spring Term, 1878, of BURKE, before *Cloud, J.*

The principal question decided by this Court is whether the legacies provided for in the will are a charge upon the lands embraced in the residuary clause, and the facts material to the same are embodied in the opinion. See S. c. 77 N. C., 433. The testator bequeathed to T. R. Caldwell his stock in the bank of Cape Fear, stating that as said legatee had been advanced, he in consideration thereof should pay. $710 into the residuary fund. This was provided for to produce equality among the legatees, and the payment of said sum was the condition upon which he should take the bank stock.

His Honor held that the lands were charged with the payment of the legacies and gave judgment accordingly from which the defendants appealed.

No counsel for plaintiff.

Messrs. A. C. Avery and *G. N. Folk,* for defendants.

FAIRCLOTH, J. The plaintiff prays for a construction of the will of John Caldwell and for direction in the administration of the assets of the estate. When the case was before us heretofore we were compelled to remand it for the ascertainment of important facts which have been found by the referee and the Court, and we will now decide the main questions presented with such general instructions as we can give, and remand it to the Court below where the calculations can be made and the details carried out. Without attempting to use the language of the will, we will state the substance of those facts material to the questions presented and such facts as are now before us.

(443) The testator died in 1857, leaving surviving him his wife Hannah and four children, namely, James, Cornelia, Jane, and the late Tod R. Caldwell, who were his only legatees and devisees. The last named was his executor, who died in 1874 without any final settlement of the estate, and during the life of the widow. The testator left personal property amply sufficient including his slaves to pay his debts and all the legacies; the solvent credits and money were however, exhausted in payment of debts and necessary expenses, except certain shares of bank stock bequeathed to the executor. He had made several unequal advancements to his children, and with a view to equality directed his executor to pay specified amounts to his children, either in cash or in property at the election of the executor without saying when they should be paid. He then devised and bequeathed "all the residue of my (his) estate both real and personal" to his wife during

her life and directs that at her death the *residuum* or *balance* be divided into as many shares "as I (he) may have children then living."

The testator had advanced in his life time to his son James $6,500, and this was made the basis of equality to be arrived at by giving such amounts to the other children as would, added to their advancements, equal that sum. James having died during the life time of his mother, and never having married, his interest in the residuary fund lapsed, and according to the express provision in the residuary clause, that fund at the termination of the life estate will be divided into three equal shares among the other children, so that the provision giving the interest of the said James in the event of his marriage and death without leaving children to the heirs of his son Tod, is nugatory.

The principal question submitted is,—whether these legacies are a charge upon the lands embraced in the residuum? Of course any other property belonging to the estate is liable to these legacies except any property specifically bequeathed, as for example, the shares of bank stock given to the executor. To determine this question it is (444) proper to look at the condition of the testator's family and the nature of his estate. *Lassiter v. Wood,* 63 N. C., 360. For this case it is not necessary to consider whether a pecuniary legacy becomes a charge on the realty by construction and legal operation, or by express language, as the latter is not the case here. The condition of the family sufficiently appears from what has already been said, and the report shows that at the time of the testator's death his solvent credits and money were sufficient to pay all his debts and that his slave property was worth more than three times the amount of all the legacies chargeable thereon. It is therefore not a violent inference that the testator did not expect and intend these legacies to be satisfied from this fund. But it further appears from the findings of His Honor that the slaves remained undivided and unsold and with the other personal property, stock and farming tools, etc., remained as they were, in the possession of the widow and on the plantation until the slaves were emancipated, and that this was with the "approval of all the legatees." It is further stated by the Court that "this disposition of the property seems to have been a family arrangement acquiesced in by all."

Again it is admitted by the legatee, Jane, that the executor offered to pay her legacy, and that she declined to take it, and told him she did not want it during her mother's life time. It is admitted that he paid Cornelia a part of the amount due her, and it appears that he could not have paid the balance without selling slaves, and she *now* says if he

had concluded to sell slaves for the purpose of paying her, she does not know that she would have consented to the sale.

We know these legatees could have compelled payment of the amounts due them, but it does not appear that they ever made any effort (445) to do so at any time before emancipation. We therefore think these legacies are not a charge on the land. For these reasons we think the estate of Tod R. Caldwell is not liable for the legacies. We see no reason why it should be. That would be a hard measure resulting from subsequent events which neither party could *then* foresee. His failure to pay them certainly was no greater negligence than their failure to collect when they had a right to do so.

We think however his estate is liable to pay $710 into the residuum with interest from the death of the widow, that being the time pointed out for its division. The payment of this sum was the express condition upon which he was to receive the bank stock which he collected and used. This amount will be accounted for in the final settlement with his administrator.

It is stated by His Honor that the executor acted in good faith and with strict integrity, and as we see nothing to the contrary, we see no reason why commissions should be withheld from him. The fact that no inventory of the property which came to his hands can be found is not satisfactory proof that it was not filed, because it also appears how it may have been destroyed. There is no exception to the amount allowed, but we will not say whether it is excessive or not, but leave that matter for the Court below to consider when the account is revised.

The judgment is therefore erroneous, and the case is remanded.

The cost of this Court will be paid equally by the parties.

Reversed.

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(446)

W. D. PRUDEN v. W. C. PAXTON and others.

Will—Construction of.

1. In expounding a will the grammatical construction must prevail, unless a contrary intention plainly appears.
2. A testator, by the first item of his will, devised to his wife real property exceeding in value a life estate in all his property of that character. In the residuary clause of said will he devised as follows:—"I give, devise and bequeath all my other property of every description to my beloved wife and dear children, to be divided among them according to law"; *Held*, that a farm included in such residuary clause passed to the wife and children as tenants in common of the fee.

PRUDEN *v.* PAXTON.

APPEAL at Spring Term, 1878, of CHOWAN, before *Henry, J.*

Richard Paxton died in 1865, leaving a last will and testament appointing his wife executrix. Besides the property specially devised in the will he was seized in fee simple at his death of a certain plantation known as the "Paxton farm" in Chowan county, which was devised by the residuary clause as follows: "I give, devise and bequeath all my other property of every description to my beloved wife and dear children to be divided among them according to law." The interest in the house and lot in Edenton given to his widow, Mrs. E. B. Paxton, for life by the first item of the will largely exceeds in value a life interest in one third of all the real estate owned by the testator, and she never claimed or had alloted to her any dower interest in the Paxton farm. In pursuance of a judgment and execution in favor of F. L. Roberts and others, the sheriff levied upon her interest in said farm and sold the same in satisfaction thereof, when the plaintiff became the purchaser, took a deed and brought this action to recover possession of the (447) land. His Honor held that Mrs. Paxon was entitled to a dower interest in said land only, and that having failed to claim that interest before the sale to the plaintiff, he acquired no estate in the same by virtue of his deed from the sheriff. Judgment accordingly and appeal by plaintiff.

Messrs. Gilliam & Gatling, for plaintiff.
No counsel in this Court for defendants.

BYNUM, J. This is an action for the recovery of land, and the right of the plaintiff to recover depends upon the construction of the last will and testament of Richard Paxton.

The testator first devises and bequeaths to his wife, Elizabeth, his dwelling house and lot in the town of Edenton for her life and then to be disposed of among the children at her death as she may think best. It is conceded that this devise exceeds in value her dower right in all the real estate of the testator. After bequests, follows the clause of the will we are called upon to construe, to wit, "Item—I give, devise and bequeath all my other property of every description to my dear wife and beloved children, to be divided among them according to law." And the wife is appointed executrix. The residue of the estate embraced by this clause of the will consisted of some personal property and a tract of land, known as the "Paxton farm." After the testator's death the interest of the widow in this land was sold under an execution against her for debt, and purchased by the plaintiff who brings this action to re-

cover possession of such interest in the land as she derived under the aforesaid clause of the will. The defendants are the other devisees and those claiming under them. Their defence to the action is, that by the proper construction of the will, the widow is only en-
(448) titled to dower in the land, or such an estate as the law would give her, had the husband died intestate; and that inasmuch as she never applied for dower or had it assigned to her, she was seized of no estate in the land which was the subject of levy and sale.

In expounding a will the grammatical construction must prevail unless a contrary intent plainly appears. *Jones v. Posten,* 23 N. C., 166. Applying this rule, the devise here conveys the fee to all as tenants in common unless it is limited as to the wife by the words, "to be divided according to law." The will nowhere shows any intent of the testator that the wife should have only a life estate in the Paxton farm; on the contrary the intent would rather seem the other way, because in a former clause the testator had devised his dwelling house and premises to his wife, and expressly limited the estate to her for life, manifestly in lieu and satisfaction of her right of dower, while in respect of the devise of the residue of his land, no such limitation is made; but on the contrary the wife is put upon the exact footing of the children. No contrary intent therefore plainly appearing, the rules of grammar must determine the construction, and applying these, the will first conveys the fee simple to all the devisees—wife and children—and second, prescribes a division of the land and how it shall be made: Thus, 1st—"I give, devise and bequeath all my other property of every description to my beloved wife and dear children." This language unquestionably conveys the fee to all. Then the testator adds, 2nd—"to be divided among them according to law." This langauge is simply declaratory, not of the quantity of the estate conveyed, but of how the devisees shall hold it, to wit, in severalty, by a division to be made in the mode prescribed by law. The clause in question first creates the estate and then directs a partition in severalty.

This case is unlike that of *Brown v. Brown,* 37 N. C., 309 and *Bost v.* *Bost,* 56 N. C., 484. In the first case there was a residue of real
(449) and personal property as here, but the testator wills it "to be disposed of as the law directs." It was held that the personalty passed to the next of kin according to the statute of distributions, and the realty went to the heirs according to the law of descents, because in both cases they were the persons whom the law would direct to take if the testator had died intestate. *Bost v. Bost* was also a case of the construction of a residuary clause in the following words,—"I will that

all the balance of my estate, real and personal, be disposed of as the law directs." It was held that the widow should have her dower assigned in the mode directed by law in cases of intestacy.

The distinction between these two cases and the one at bar is manifest and illustrates the correctness of our construction. In the cases cited the *law* is invoked to designate who shall have the estate, while in our case the testator himself designates the objects of his bounty and *devises the estate directly to them;* the law is called upon to divide the estate in severalty. The former are cases of intestacy *quoad* the residue, while the latter is a case of the devise of the residue, where the testator did not, and did not intend to die intestate as to any of his property. If the testator had devised the "Paxton farm" to A and her children to be divided among them according to law, there could have been not a doubt but that A would have taken the same estate as the children. It is not seen how the case is altered because A happened to be the wife of the testator, and the children, his childen.

We are therefore of opinion that by the devise the wife became a tenant in fee in common with the children, of an equal part of the land with each of them, and that the plaintiff is entitled to recover accordingly. The Court below having held otherwise, there is (450) error. Judgment reversed and

PER CURIAM. *Venire de novo.*

HENRY WHITEHEAD and others v. EDWARD THOMPSON and others.

Will—Construction of—Lapsed Legacy.

A testator by his will devised certain lands to his sons J and H, "on the following conditions, provided that they each pay" certain amounts to three other of his sons, infants, when they severally attain the age of twenty-one years; by the residuary clause of the will he gave all his remaining property, not before disposed of, to four daughters; the three sons died in infancy and without issue, during the testator's life-time: *Held*, that the legacies lapsed and J and H took the lands devised to them without charge.

CONTROVERSY submitted without action under C. C. P., sec. 315, for the Construction of a Will, heard at Spring Term, 1878, of CHATHAM, before *Kerr, J.*

The facts are as follows: Arthur Whitehead died in 1876, having on 30 June preceding made a will and therein appointed the plaintiffs, William B. Carter and John Whitehead, his executors, who shortly thereafter proved the will and qualified as executors. The material

provisions of the will necessary to a proper understanding of the controversy are these:

Item 3. I will and devise to my two sons, John and Henry, all that tract of land lying on the waters of Rocky river together with all my mill property thereon situated, one-half interest to each on the following conditions, provided that the said John and Henry each pay to my three sons, William G. and Durant H., and my infant son, not (451) yet named, the following sums,—John to pay $1,450, and Henry to pay $750, that the said John and Henry shall pay over the said amount in equal shares to my said three sons, when they severally attain the age of 21 years, at the rate of 6 per cent interest.

In the next two items the testator devises another tract of land, one-half to his son Newton Whitehead, and $100 in money in addition, and the other half to his daughter Elizabeth E. Fogleman on her paying fifty dollars into his estate. Some few other articles are given, and then follows the residuary clause (Item 7) in which he directs all his remaining property of every description not before disposed of in the will, to be sold, and the proceeds with such debts as the executors may be able to collect and any money in hand, and the amount thus realized to be paid in equal shares to his four daughters Matilda Thompson, Rachael A. Clapp, Sarah E. Moran and Rosa V. Whitehead, they accounting for what they may severally owe the testator. In item 8 he appoints his son John Whitehead guardian of his minor children and of their estate, and also entrusts him with the care and management of the estate given his wife. The legatees and devisees living are all parties to this action. The three minor children mentioned in item 3 died without issue after making of the will and before the testator's death.

His Honor held that by item 3 the land was devised to the testator's sons, John and Henry, upon condition that they were to pay the sums of money mentioned, to be equally divided among the next of kin; that item 7 provided for a special bequest of certain effects to the four persons named, upon condition, that they account for what they owed the testator on making the settlement; that on failure of the personal property to pay debts and legacies, the deficiency must be made up (452) out of the legacies which would have gone to the three minor sons who died in the testator's lifetime, and whose legacies lapsed by their death, and that there was no *pro rata* abatement of legacies. From which ruling the plaintiffs appealed.

Mr. J. H. Headen, for plaintiffs.

Mr. John Manning, for defendants.

SMITH, C. J. (After stating the case as above.) The only question submitted which we are called on to answer is as to the legacies given the three deceased children, and charged upon the mill property devised in item 3 to his sons, John and Henry. Are they lapsed and extinguished or are they still to be paid and go into the residuum disposed of in item 7? We find little difficulty in solving this question.

The testator gives to his three infant sons a sum of money, and charges its payment upon the land devised to his sons John and Henry. Although he uses the words "on the following conditions," he explains his meaning by adding immediately, "providing that the said John and Henry pay," etc. There can be but three possible interpretations given to this clause of the will. (1) The payment of the legacies is so annexed to the devises as to defeat them altogether by the death in the testator's life time of the infant legatees, or (2) The legacies are preserved and fall into the residuum disposed of in item 7 of the will, or (3) The legacies lapse and the devises are free from the charge.

The first construction which would defeat the devises altogether is clearly inadmissible, since the testators intention that John and Henry shall have the land, is as manifest as that William and his brothers shall have the money. The devise must therefore be upheld whether the devisees are required to make payment or not, The infant legatees were the special objects of their father's bounty, and for (453) their personal benefit the provision in the will is made. Their death during his life time intercepts and defeats his purpose and the bequests fail. Had they left issue the legacies would have vested in such issue under the statute made to meet the contingency. Bat. Rev., ch. 45, sec. 3.

Nor is this the case of an attempted and ineffectual disposition of property which is absorbed into the general estate and passes under the residuary clause, as decided in the cases to which we have been referred in the brief of counsel. There is here no undisposed of property of the testator, but a personal obligation imposed on two of his children in behalf of three others, and secured by being charged upon his land. The point is, shall this obligation now be enforced, and not what shall become of the money when paid. The principle in those cases does not apply.

The only remaining construction then must prevail which frees the devised land from the charge. For this we are not left without authority. "If the charge upon the land in terms depends upon a contingency which fails and the estate is thereby defeated, the *charge sinks*

for the benefit of the devisee or whoever may be entitled to the principal estate." 2 Redfield Wills 502; O'Hara Wills, 419.

In *Woods v. Woods,* 44 N. C., 290; Joseph Woods devised a tract of land in these words: "I give to Lambert Woods, my grandson, the tract of land, etc., provided the said Lambert Woods shall pay my grandson Eli Woods, son of John Woods deceased, the sum of $300." Eli Woods died before the testator and it was held that his legacy lapsed and the devisee took the land relieved of the charge. "This construction," say the Court, "is made manifest by the fact that there is no devise of the land over to a third person, if Lambert Woods should refuse to pay the $300, but it is an absolute devise to him. Upon the death of Eli without issue in the life time of the testator, his legacy
(454) lapsed. If however its *payment was a condition* its performance became impossible by the act of God."

This case seems decisive of that now before us and renders further discussion useless.

But our attention is called to *Lassiter v. Wood,* 63 N. C., 360, and *Macon v. Macon,* 75 N. C., 376, as establishing the doctrine that special provisions in a will may be modified when necessary to give effect to a general controlling intent apparent in the will, to make an equal division of the testator's estate among the objects of his bounty. These cases are peculiar and the construction adopted was deemed necessary to present the clear dominant purpose of the testator from being defeated altogether, and the special directions in the will were made to yield, to avoid a total disruption of the testator's general plan of disposing of his estate. This is not our case. We can not undertake to avert consequences against which the testator has not provided, and which he may not have foreseen. Our duty is to interpret his will and ascertain his intentions, not to change or modify them. So far as they are consistent with the principles of law we must give them effect, and we can neither supply his omissions nor disregard his directions.

There are other questions presented, but except in so far as they find a solution in what has been already said, we can not undertake to give an answer. There are no facts stated to which the advice may apply with any practical result. The condition of the estate is not set out, nor any estimate of the value of the fund created under the residuary clause, nor the amount of the liabilities of the estate. The inquiries are consequently speculative, and it is not in accord with the usages of a Court of Equity to give advice except upon submitted facts and where the advice can be enforced. *Horah v. Horah,* 60 N. C., 650.

There is error in the opinion of the Court below that the legacies to

the deceased infant children are preserved and fall into the residue disposed of in item 7. (455)

The cause will be remanded to the end that further proceedings may be had in the Court below in accordance with this opinion.

Reversed and remanded.

Cited: Burleyson v. Whitley, 97 N. C., 295; *Allen v. Allen,* 121 N. C., 334.

Dist.: Tilley v. King, 109 N. C., 463.

GEORGE H. and ADELAIDE SMITH by their guardian v. R. H. and W. H. SMITH, Executors.

Will—Legacy in Lieu of Dower—Liability of Executor—Commissioner—Insolvency of Estate—Liability of Legatees to Refund.

1. Where a will gave certain legacies and devises to a widow in lieu of dower, which amounted to less in value than her dower: *It was held,* that such legacies and devises were not assets liable for the debts of the testator.
2. Where cotton belonging to an estate was shipped by the executors to a firm of commission merchants in good repute, who preferred claims against the proceeds arising out of their transactions with the testator and also with testator's widow, and while the matter was still unsettled the firm failed: *Held,* that the executors are not liable to the creditors of the estate for the loss.
3. But if while the demands of the firm are being resisted by the executors and are still unadjusted, the executors ship other cotton to the same firm, which is not then notoriously insolvent, and the proceeds are lost: *Held,* that their previous dealings should have put the executors on their guard and they are liable to the creditors for the loss.
4. For effecting an arrangement whereby the creditors of an estate took $49,500 worth of land in payment of their claims, the executors were allowed two and one-half per cent. commissions.
5. Where all the devisees under a will, including the plaintiffs and one of the executors, took the lands devised to them and for two years received the rents and profits, and the estate proving insolvent, then surrendered the same: *Held,* that as between the plaintiffs and said executor, the executor was not chargeable with the rents.
6. Where a testator was a prudent business man and his indebtedness (456) was apparently small as compared with his estate, and the will set aside enough property in his judgment to pay his debts, and where the devises were specific (farms) and already in possession of the devisees; and when the value of testator's estate was so greatly impaired by the effects of a financial crisis and an inability to collect debts due

the estate, that it proved insolvent: *Held*, that the executors have a right to call upon the legatees under the will to refund.

7. Where, the plaintiff having received a legacy of stock, etc., sold the same to defendant H, and received in part payment a note of the testator and sued upon it, and the executors answer, for the reasons stated above, that they have nothing to pay with except the plaintiff's legacy: *Held*, that the equity of the executors to compel the plaintiff to refund the legacy is a good counter-claim to the plaintiff's demand.

EXCEPTIONS to a referee's report heard at Spring Term, 1878, of HALIFAX, before *Seymour, J.*

The plaintiffs by their guardian, W. H. McRary, brought this action to recover $763.96, the amount of a bond, which was made by W. R. Smith, the testator of defendants, to one John R. Herring, and transferred by him to said guardian; and demanded payment of the same of the executors of W. R. Smith, and of Herring, the endorser.

The defence set up was a counter claim, the material allegations in reference thereto are as follows: The testator devised to plaintiffs, his grandchildren, a certain tract of land, and personal property, and upon the death of the testator, the father of plaintiffs took charge of the same together with the personal property thereon under the provisions of the will, the said Herring having previously been in possession thereof. The executors assented to the legacy of the stock, etc., and to the delivering the same to the guardian, by the father; and the guardian sold a portion to Herring for an amount about equal to the sum demanded, and received in part payment, the bond declared on. The executors took no refunding bond from the guardian, but were induced to pay the (457) legacy, by the fact, that the testator owned a very large estate, and was a prudent business man; and had directed his executors to sell certain lands, including his interest in the "Chatham county lands and the academy lot," and if the proceeds thereof should be insufficient to pay his individual debts, they should supply the deficiency by disposing of the devises and legacies, other than those to his wife. That the testator never had a title to the academy lot, and it was not conveyed by his will; that the will provided that the "river farm" in possession of Peter E. Smith should go to him upon his discharging a certain debt to which the testator was security, and the "cypress swamp" tract of another devisee upon like terms; that in addition to the lands devised, the testator at the time of his death was seized of the "Edward's Ferry" and other tracts, worth about $65,000; and of undisposed of personal property valued at $4,000, and notes, etc., to the amount of about $65,000, (scaled value) from which the executors expected to realize at least $10,000, but owing to the insolvency of some of the

debtors, they succeeding in collecting only about $5,500. The sum realized from the crop of 1872, which went into the hands of the executors, was about $8,000. The testator's debts, which were known to the executors at the time of their assent to said legacy amounted to about $25,000, but they believed that the property set apart by the testator would be sufficient to discharge the same. The deficit was caused however by the application of the proceeds of sale of crop by commission merchants, to certain debts due them, of which the executors had no notice; and also by the inability of the executors to sell certain other lands; but they have individually become responsible for the balance of their testator's debts. That the lands have depreciated since the financial crisis of 1873, and the estate is insolvent. And the defendants insist that the personal property delivered by them to the plaintiffs as aforesaid has discharged the said bond sue on. And the (458) plaintiffs in their reply among other things allege that the defendants were guilty of laches.

At January Special Term, 1878, the case was referred by *Schenck, J.*, to J. M. Mullen, Esq., for an account, who reported substantially as follows: That said testator died in June, 1872, and the defendants duly qualified as executors to his will; that prior to his death he put certain devisees in possession of lands devised to them, and they used and enjoyed the same without charge, and were in possession at his death; that in February, 1854, he conveyed to defendant, W. H. Smith, a tract of land of which he took possession and has claimed it by virtue of the deed—the said tract was also devised to him by the will, and the inventory returned by the executors includes said tract among the lands of the testator; that on 1 January, 1873, having ascertained that the debts of Peters E. Smith to which their testator was surety exceeded the value of the land devised to him, the executors took possession of it, and being unable to get a fair price, bid it in for the benefit of the estate and have charged themselves with the rents accuing therefrom; that other devisees were permitted to remain in possession of their respective tracts, the part used by the widow not being worth as much as her dower interest would have been; that in January, 1873, the executors directed the father of the plaintiffs to retain possession of the property devised and bepeathed to them, but it did not appear whether he took possession as agent of the guardian or not; that in March following, the guardian, who lives in Wilmington, visited the premises with the executors and with their consent took possession of all the property of his wards, and sold some of the personal property to said Herring for the sum of $985 in presence of and with the consent of the executors,

and rented the land to said Herring for a certain number of
(459) pounds of lint cotton, and shipped $200 worth of cattle to Wilmington; and on 1 January, 1875, the executors took possession of said premises.

The referee further finds that Herring in part payment of the property sold him as aforesaid endorsed and delivered the bond sued on, to the guardian; that at the time said personal property was turned over to and sold by the guardian, the executors valued the property set apart in the will to pay debts, including net value of the crop of 1872, at $24,010, and had no notice at the time the account of sales was rendered, of an amount ($2,204.65) claimed by B. N. & S., commission merchants in Norfolk, but had notice of individual debts of their testator amounting to about $25,000, and of debts for which he was surety, principally for his sons, amounting to $15,000 to $18,000; and at that time they valued the other property of the testator, including the "Edward's Ferry Farm," at about $42,000; that a great many of the notes, etc., proved to be worthless, and the lands depreciated in value in 1873; that other lands besides those above mentioned were sold and bid in by the executors and the rents applied to the payment of debts; that on 1 January, 1876, finding that they could not sell the lands to an advantage, the executors agreed with the creditors of the estate, that W. H. Smith should take a part of the Edward's Ferry tract, subject to the rights of the widow, at $12,000, and assume debts of testator to that amount, (and other devisees took other tracts at certain prices upon like terms); that the prices so agreed upon were fair and the arrangement advantageous to the estate; that the other part of the Edward's Ferry tract had been previously disposed of, at $5,000, and the tract devised to the plaintiffs, at $7,000, which were fair prices; that the proceeds of the sale of these lands have been used to pay debts, which were unpaid on 1 January,
1876, except a small sum due by W. H. Smith on his purchase;
(460) that all the other estate (except the land in Chatham county and that devised to the widow, and the personal property delivered to the plaintiffs as aforesaid) has been disposed of by the executors and applied to the payment of debts, and that the unpaid debts, including the note sued on, amount to $3,549.58.

The referee says that the executors have made no attempt to dispose of the "home place" of W. H. Smith for the benefit of the estate, and that they have not disposed of the "academy lot" for the reason that the title was in Peter E. Smith, that the executors are not chargeable with the proceeds of cotton shipped in 1873 to Baker, Neal and Sheppard, but while the proceeds of the cotton was held by them, they failed,

and the executors recovered judgment against them after their failure, but never collected the money; nor are they to be charged with cotton shipped to said merchants in January, 1875; that the executors had an intimation of said failure a week or so before it took place in February, 1875, but not in time to protect the estate; that they did not take the funds out of said merchants' hands as they kept an account with them; and that the executors are not chargeable with the rents received by the devisees during the years 1873-'74.

The exceptions to this report which are sufficiently set out in the opinion were heard before His Honor and overruled, and the plaintiffs appealed. Upon the facts found by the referee, His Honor gave judgment for plaintiffs for amount demanded, and the defendants appealed, and both appeals were heard together.

Mr. R. O. Burton, Jr., for plaintiffs.
Messrs. T. N. Hill and *Busbee & Busbee,* for defendants.

READE, J. The action is upon a bond to pay money executed by the testator of the defendants, and nothing more appearing they would be entitled to recover the amount out of the defendant (461) executors as a matter of course. But the defendants say that they have no assets with which to pay it. And it being referred for an account, it appears from the account reported by the referee that that defence is true,—that not only have the executors no assets, but having exhausted the assets, the estate is in their debt for disbursements and commissions more than $5,000.

For the purpose however of fixing the executors with assets, the plaintiffs file exceptions to the account reported. There are twenty exceptions and the papers are very voluminous. We have carefully examined the whole of them in detail, and there are few of them involving important principles, so as to make it necessary or proper that we should consider them elaborately; and therefore we agree with His Honor in overruling them except as hereinafter stated:

1. The first exception that the executors are not charged with the value of legacies and devises to widow is overruled, because the will provides that they shall not be charged until all the other property is exhausted, and because they do not amount to more than her dower at law.

2. The second exception, that the executors are not charged with the value of the W. H. Smith "home place" is overruled because it was not of the estate of their testator.

3. The third exception as to the academy lot is overruled for the same reason.

4. The fourth exception is that executors are not charged with the proceeds of cotton shipped to Baker, Neal & Sheppard in 1874 is overruled, because they were in good repute and failed.

5. The fifth execption, that executors are not charged with cotton shipped to the same firm as above in 1875 is allowed, because al-
(462) though they had not then notoriously failed, yet their unfair dealing with the shipment of 1874 was sufficient to put the executors on their guard.

6. The sixth exception, that the executors are allowed five per cent. on the value of the lands (49,500) which the devisees and others took under an arrangement with the creditors, the devisees accounting to the creditors for their value, is allowed, because five per cent. is too much. Two and a half per cent. is enough.

7. The seventh exception, that executors are not charged with $2,-204.20 retained by Baker, Neal & Sheppard out of shipment of cotton to them is not allowed, because the testator owed them that amount which was to be paid in that way.

8. The eighth exception, that executors are not charged with $6,200 retained by W. H. Smith, one of the executors, out of his purchase of the Edward's Ferry place under the aforesaid agreement with the creditors, is not allowed, because the testator owed him that amount. It is true this allows to said W. H. Smith the whole of his debt, whereas under the statute now existing he is only entitled to a ratable part with other creditors, and if it were not true that the plaintiff has also been paid the whole amount of his debt, the exception with the proper modification would have to be allowed, but from the view which we shall hereafter present, it is probable that the exception will not avail the plaintiff.

9. The ninth exception, that the defendants are not charged with the rents of cypress swamp for 1873 and '74 is not allowed, because it is one of the tracts devised by the testator to his children respectively, and which were delivered over to them by the executors at the close of 1872, under the impression that they would not be needed to pay debts, and were held by the devisees for the years 1873 and '74 without accounting for rent. Of course the executors are accountable to the creditors
(463) for these rents until all the debts are paid, and if the plaintiffs' debt has not been paid, then they are accountable to the plaintiffs for these rents and profits; but as already said it will probably turn out that the plaintiffs' debt has been paid. And furthermore just as W. H.

Smith and other devisees held the lands devised to them without rent, so the plaintiffs held lands devised to them for the same years without rent, and if W. H. Smith and the other devisees must account for the rents of their lands for the years 1873 and '74, so must the plaintiffs account for the rents of the lands devised to them.

10. The twentieth exception, that the executors are not charged with the academy lot is not allowed, because it was not of the estate of the testator.

From the tenth to the nineteenth exceptions inclusive are intended to present such a state of facts as will charge the executors with negligence in delivering over the legacies and devises before the debts were paid, and thereby defeat their equity to have the property restored, or an account for its value. And as in our opinion there was no negligence on the part of the executors the said objections are overruled.

The facts relied on to show negligence on the part of the executors the substantially these: The testator was a man of large estate. The credits due him had a face value of more than $130,000, with an estimated value of $10,000. He had also considerable personal estate. The crops were estimated at $10,000 to $12,000. His landed estate was very large, a portion of which was directed to pay debts, and the remainder consisting of a number of valuable farms were devised to his children, and one of the farms was devised to the plaintiffs who are his grandchildren. The estator was supposed to owe some $25,000 and to be surety for some $15,000 more, principally and where he was surety for his children he charged their legacies with the debt. (464) The testator was a prudent business man and was reasonably supposed to know the state of his affiairs. Under this state of affairs the executors, one of whom is his son and the other his brother, at the close of the year 1872, some six months after the death of the testator, delivered over all the specific legacies and devises to the persons entitled under the will, supposing that enough was retained to pay the debts. Indeed the lands were already in the possession of the devisees, placed there by the testator in his life time, and the executors did not disturb their possession until it was found necessary to take them to pay debts. One of the farms aforesaid with all the personal property upon it was devised to the plaintiffs, and they were allowed to retain both the land and the personal property.

The plaintiffs now complain that this makes out a case of negligence against the executors, and that they can not call upon the legatees to refund.

It is well settled that an administrator or executor must look well to

his business, and not deliver over distributive shares or legacies until he has paid the debts. And that the distributees and legatees have the right to consider the property delivered over to them as theirs, and can never be called upon by the administrator or executor to refund unless some mistake or accident establishes an equity. Here we think there was such mistake and accident. The business habits and good sense of the testator, the small amount of his indebtedness, apparently, as compared with his estate, his setting aside enough property in his judgment to pay his debts, not unreasonably induced the executors to believe that they might assent to the legacies. The fact that the devises were specific—farms—in possession of the devisees, made it advisable that they should be delivered over as soon as possible. And the pecuniary crisis which followed and the inability to collect debts
(465) and the depreciation of property were an *accident* against which the executors could not provide. Appreciating this, it seems that every one of the legatees and devisees has refunded except the plaintiffs, and they are minors.

The case before us is this: the plaintiffs sold the personal property bequeathed to them upon their farm to the defendant Herring for a note which he held against the testator. And then the plaintiffs sue the executors upon this note, and the executors answer that they have nothing to pay the note with except the legacy which was given to the plaintiffs; that if the plaintiffs would refund to them the legacy, then they could pay the note out of the legacy. As that is not done, then the executors insist that their equity to have the plaintiffs refund the legacy, is a good counter-claim against the plaintiffs' note sued on. And such is our opinion.

Of course if there are assets in the executors' hands to pay the debts of the estate, this note included, without calling upon the plaintiffs to refund, then the executors must pay. And as the land in Chatham is unsold, and as we have sustained some of the plaintiffs exceptions, they will be entitled, if they think it worth while, to have the land sold and the account reformed. If desired, the clerk of this Court will reform the account.

If the plaintiffs shall not move, then the judgment will be reversed, and judgment here for the defendants.

PER CURIAM. Judgment accordingly.

PLAINTIFFS' APPEAL.

READE, J. The facts in this case are the same as in the case between the same parties at this term, and the principles decided are the same,—

both parties having appealed. The judgment in this case will abide the judgment in that. Defendants will recover costs.

(466)

ARTHUR SPRUILL and wife v. JOHN and T. L. SANDERSON, Executors.

Statute of Limitations.

An action of proceeding to reopen an account stated and readjust a settlement made under the supervision of a Court of competent jurisdiction, and sanctioned by a decree of the Court, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a Court of Law.

SPECIAL PROCEEDING commenced in the Probate Court and heard on appeal at Spring Term, 1878, of TYRRELL, before *Furches, J.*

The main facts appear in the opinion. The plaintiffs asked for an account and settlement of the estate of the defendant's testator, and an order therefor was made by the Probate Judge, from which the defendants appealed; and upon its appearing that the defendants had instituted a proceeding in the proper Court against the feme plaintiff and the other heirs of the defendants' testator for a settlement of his estate, and a question of fact being raised as to whether the feme plaintiff was of full age when said proceeding was commenced and a final decree therein rendered,—in March, 1871,—*Eure, J.*, directed the issue to be submitted to a jury in term time; and at Fall Term, 1877, of said Court, before *Henry, J.*, it was found that the feme plaintiff was born 19 September, 1849, and was of full age at the commencement of said proceeding against her for a settlement as aforesaid. The summons in the present case was issued 21 September, 1876, and the defendants insist that the statute of limitations is a bar to the relief sought, but His Honor being of a different opinion, adjudged that the de- (467) fendant be required to account, etc., from which ruling the defendants appealed.

Messrs. Mullen & Moore and *J. B. Batchelor,* for plaintiffs.
Messrs. P. H. Winston and *Gilliam & Gatling,* for defendants.

SMITH, C. J. This action is against the defendants as executors and testamentary guardians under the will of Jesse Sanderson, deceased, for

an account and settlement of the testator's estate. The testator died in August, 1868, leaving a wife and four children, of whom the *feme* plaintiff is one, to whom he devised and bequeathed his estate. The present suit was commenced 21 September, 1876, in the Probate Court of Tyrell county, and the plaintiffs in their complaint charge the defendants with mismanagement and waste, with a failure to make returns of their administration as required by law, and allege further that the defendants caused certain proceedings to be instituted in the name of the *feme* plaintiff and the other legatees, her sisters and brother, who were then all infants, against them in the late County Court of Tyrrell, in which and by means of false and fraudulent accounts rendered, the defendants procured to be entered at October Term, 1860, of that Court, a final decree, declaring to be due the defendants, upon their administration account, for charges and disbursements in excess of receipts, the sum of seven hundred and fifty-three dollars and sixty-four cents, and demand a full account of the administration. These allegations are denied in the answer and the defendants say they have honestly and faithfully discharged their trusts and exercised the large discretion given them in the will for the benefit of the estate and the interest of those entitled thereto. The defendants further
(468) declare that after the feme plaintiff arrived at full age, they instituted an action for the settlement of their administration account, against the four children of the testator and the husbands of two of them, Ann E. and Mary C., and one A. A. Combs and wife, creditors of the testator, all of whom were made parties by service or admission of service of summons and complaint, and that in September, 1871, seven months thereafter a final decree was made by the Probate Judge, as follows:

"This cause coming on to be heard and it appearing to the Court that all the defendants have been duly served with summons, as required by law, being the next of kin, heirs at law, legatees, devisees, and creditors of Jesse Sanderson, deceased, and that the petitioners have filed their final account for the settlement of the estate of the said Jesse Sanderson, deceased, showing a balance due the petitioners, after the settlement of the estate, of twenty-eight dollars; and upon the examination of the account and vouchers the same appears to be correct in all respects; it is thereupon adjudged that the defendants take nothing, and that petitioners pay costs of suit."

The defendants rely on this adjudication and the lapse of time thereafter, the space of five years, before the institution of the suit, as a bar to an action for an account. This defence is met by a replication which

avers that at that date the feme plaintiff then unmarried, was an inmate and member of the family of the defendant, John Sanderson, her uncle, and under his influence, and that she signed the written admission of services of the summons and complaint, at his instance and in entire ignorance of her own rights and of the legal effects of the act, and in consequence of her belief from repeated representations made by him, that nothing was coming to her from her father's estate.

The case agreed and submitted to the Judge of the Court below sets out many omissions and irregularities of the defendants in (469) making their returns, and states that no account is found in the record on which the decree professes to be based. But in the view we have taken of the case, it is not necessary to state more in detail the facts admitted on the trial. The executors do not seek protection under the proceedings instituted in 1860, and mentioned in the complaint, but rest their defence upon the decree rendered in September, 1871, and the long acquiescence of the feme plaintiff therein, as a bar to her claim to re-open the account. The plaintiffs in their complaint do not undertake to impeach this adjudication, nor do they make any references to the proceedings of which it was the result. Its operation and force when brought out in the answer, are denied only by an averment in the replication of its invalidity by reason of the improper influences exercised by her uncle on the feme plaintiff, which induced her to become a party and prevented her from vindicating her own rights. While we do not admit that a decree regularly made according to the due course of the Court, in a cause properly constituted therein, and in which the feme plaintiff was a party, can be assailed, and its force and operation, while unimpeached by a direct proceeding be collaterally questioned by her, it is sufficient for our present purpose to say, she is not allowed an indefinite time to do so, and to re-open an account thus adjusted and determined. We propose to consider as decisive of the action the effect upon the plaintiff's right of her long delay in calling for an account.

In *Whedbee v. Whedbee*, 58 N. C., 392, the Court declares that closed trusts, as contra-distinguished from open and unperformed trusts are within the operations of the statute of limitations applicable to the action of acount. In this case the bill alleged that the defendant's testator, who was the plaintiff's guardian, had settled with his ward, soon after he attained his majority, upon an account submitted by the (470) guardian, with examination by the ward, and a full release executed. It is also alleged that the guardian was a relative, without children, had repeatedly assured plaintiff of his intentions to make him sole heir of his estate, and had in fact prepared and signed a will to this

effect; and that the plaintiff under these representations and influences had delayed bringing suit. The bill also specified particulars of errors and false charge and asked that the release be set aside and account ordered. The defendant relied upon the release and subsequent lapse of time as a bar to relief. In delivering the opinion MANLY, J., says:— "It (the bill) was filed nine years after the ward had arrived at full age, and eight years after he had had a settlement with his guardian, payment in full according to the account then rendered, and a release. We think it was too late to demand a re-adjustment of the guardian accounts. A release taken by a guardian from his ward upon a settlement soon after the ward arrived at age is looked upon with some suspicion in a Court of Equity, and would not be regarded as conclusive provided the ward make his appeal to the Court in proper time. The parties to such a settlement bear relations to one another of control and dependence respectively, which make it unfit that it should be conclusive. But it would be equally hard on the other hand, after the guardian had tendered and make a prompt settlement, that there should be a right in equity indefinite in time, to call him into Court and re-open the accounts. We think that time must be limited, and as a bill for an account is similar to, and in many respects a substitute for the old action of account, we limit the term *to three years from the period when the trust was closed.*"

The facts in our case can not be distinguished favorably for the plaintiffs, from those then before the Court of Equity. Here (471) has been an adversary suit conducted in the proper Court to a final decree, wherein the feme plaintiff and the other legatees, and the husbands of two of them, as well as a creditor of the testator, are voluntary parties; the decree acquiesced in by the plaintiffs for five years, and so far as appears still submitted to by the others who have similar interests, and unquestioned. These facts certainly impart as high sanction to a settlement made by the direct action of a competent Court, vested with full jurisdiction to make it, as can be asked for a settlement made privately between guardian and ward, and in which upon averments of undue influence and fraud quite as strong, relief was denied.

In *Barham v. Lomax,* 73 N. C., 78, where an action was brought to cancel a receipt and release given by a ward to his guardian, RODMAN, J., says: "It seems to us under the authorities that the present case falls clearly within the rule applicable to those in which Courts of Law and Equity have concurrent jurisdiction of the subject matter of the action and of the relief demanded and in which the statute is applied."

So in the recent case of *Batts v. Winstead,* 77 N. C., 238, where a proceeding in a Court of Equity relied on as a bar to an account was impeached, the Court say,—"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."

If the case is to be considered as controlled by the statute of limitations prescribed in C. C. P. and commencing to run only from the date of the decree, as must be held upon the principle acted on in *Whedbee v. Whedbee,* the result would be equally fatal to the action, as the bar is now applied, not to the mode in which relief is sought, but to the relief itself. C. C. P., sec. 34. Nor can the plaintiffs derive any advantage from par. 9 of sec. 34, by which in case of fraud heretofore *solely cognizable by Courts of Equity,* the operation of the (472) statute is suspended "until the discovery by the aggrieved party of the facts constituting the fraud." If the remedy under the former law and practice could only be sought in a Court of Equity, there is no suggestion of newly discovered evidence of fraud or that all the facts, from which it is deduced, have not been fully known ever since the adjudication. The conclusion reached finds some support from the expression of the legislative will in paragraph 6 of the section which discharges the sureties to the bonds of executors, administrators and guardians from liability, unless the action to enforce it is brought within three years next after the breach of the bond. The judgment of the Superior Court must be reversed and judgment entered here that the defendants go without day and recover their costs.

Reversed.

Cited: Eure v. Paxton, 80 N. C., 17; *Briggs v. Smith,* 83 N. C., 306; *Hughes v. Whitaker,* 84 N. C., 640; *Timberlake v. Green, Ib.,* 658; *Slaughter v. Cannon,* 94 N. C., 189; *Syme v. Badger,* 96 N. C., 197; *Woody v. Brooks,* 102 N. C., 344; *Jaffray v. Bear,* 103 N. C., 165; *Wyrick v. Wyrick,* 106 N. C., 84.

W. D. PEARSALL, Trustee, v. OWEN R. KENAN.

Statute of Limitation—Legislative Power.

The legislature has the power to repeal or suspend the effect of a statute of limitation or presumption before it operates, and to give such repeal or suspension a retroactive effect.

PEARSALL *v.* KENAN.

APPEAL at Spring Term, 1877, of DUPLIN, *from Seymour, J.*

The plaintiff as trustee of the "Dickson fund" brought this action against the defendant as surety upon a note of John J. Whitehead, principal, made on 1 January, 1858, for $1,000. The exe-
(473) cution of the note was admitted, and the defence set up was the statute of limitations, the defendant's counsel insisting that he had a vested right to the period which elapsed between the making of the note and 10 February, 1863 (Laws 1863, ch. 34) the date of the first act suspending the statute of presumptions of payment, which with the lapse of time from 1 January, 1870, and the commencement of the action, constituted a bar to the plaintiff's recovery, and that the legislature had no power to suspend the statute of limitations retrospectively. His Honor held otherwise, and gave judgment for plaintiff, from which the defendant appealed.

Messrs. J. N. Stallings and *Merrimon, Fuller & Ashe,* for plaintiff.
Mr. W. A. Allen, for defendant.

READE, J. After an action is barred or presumption of payment has arisen by lapse of time under a statute,—whether the legislature has the power to prevent a defendant from availing himself of the defence, seems not to be settled by the authorities. In Cooley Const. Lim., pp. 365, 369, it is said that the legislature has not the power, and in a note there is a reference to quite a number of decided cases which I have not verified. In *Johnson v. Winslow,* 63 N. C., 552, what is said in Cooley is cited *arguendo,* but the point was not before the Court, and no additional force is given to it. In *Hinton v. Hinton,* 61 N. C., 410, without any reference to Cooley, it is intimated that the legislature has the power. But the point is not now before us, and therefore nothing that we could say upon it would have the force of a decision. We notice it only because it was in the argument before us.

The point in this case is not whether the legislature has the power to destroy the effect of a statute of limitation or presumption
(474) after it has operated by lapse of time, but whether it can repeal or suspend it before it operates. To repeal, is a universally recognized power; to suspend, is a kindred and lesser power; and so far as we know has never been doubted. Cooley Const. Lim., 391. And at page 365, note 1: "The statute of limitations may be suspended for a period as to demands not already barred. *Wardlaw v. Buzzard,* 15 Rich., 158." And the statutes now under consideration have been held valid by this Court in a number of cases too tedious to mention. *Ed-*

wards v. Jarvis, 74 N. C., 315; *Hawkins v. Savage,* 75 N. C., 133; *Neely v. Craige,* 61 N. C., 187; *Morris v. Avery, Ib.,* 238; *Benbow v. Robbins,* 71 N. C., 338, and the cases before cited.

It is insisted for the defendant that he had a vested right when the statute of 1863 was passed, and that the statute destroyed that right. What was his vested right? He owed the debt; it was due; if he had been sued on it, he had no defence. There was no statute of limitation or presumption that would have availed him. The most that he had was an expectancy that the plaintiff would forbear to sue him until the presumption would arise that he had paid it; and the legislature, because it had deprived the plaintiff of the right to sue, or had at least restricted the right for the ease of the defendant, deprived the defendant of the privilege of reaping any advantage from the restrictions which had been put upon the plaintiff. That is all, and it is nothing of which the defendant had the right to complain.

The three years statute does not avail the defendant, because the cause of action was prior to the Code, sec. 16. The Clerk of this Court will deduct the credits and calculate the interest, and report, and there will be judgment here accordingly; for which the clerk will be allowed $5.

PER CURIAM. Judgment accordingly.

Cited: Whitehurst v. Dey, 90 N. C., 542.

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(475)

CHARLES H. JOHNSON v. W. H. PARKER and others.

Statute of Limitations—Adverse Possession—Color of Title.

1. The provisions of the Rev., Code, ch. 65, sec. 1, relative to the time of commencing actions, govern all cases where the cause of action accrued prior to the adoption of the C. C. P., Title IV.
2. Seven years exclusive adverse possession of land under color of title will protect the occupant from the claim of the true owner, unless such owner be under some disability, and in that event, his right must be asserted within three years from the removal of the disability.

ACTION to recover Possession of Land tried at Spring Term, 1877, of PITT, before *Eure, J.*

Previous to 1826, Howell Hearne owned a tract of land in Pitt county, and in that year conveyed it to John A. Atkinson in trust to secure debts due to B. A. Atkinson, but remainded in possession thereof; and in 1833, he conveyed it in fee to said B. A. Atkinson, but continued

to remain in possession; and in the same year Atkinson conveyed to Charles Johnson, the father of plaintiff, who married the daughter of Hearne, and he and Hearne lived together on said land until 15 August, 1835, when Johnson died leaving him, surviving, a widow—Hearne's daughter—who two days after her husband's death gave birth to the present plaintiff, his only heir at law. About a month thereafter Hearne died, leaving surviving him Violetta Johnson—mother of plaintiff—Rufus Hearne and Alumina, then the wife of H. G. Parker and the mother of the defendants. The additional facts appear in the opinion. His Honor held that the plaintiff's right of action was barred by the statute of limitations and upon this point the case turns in this Court. Judgment. Appeal by plaintiff.

(476) *Messrs. Gilliam & Gatling,* for plaintiff.
Messrs. Jarvis & Sugg and *D. M. Carter,* for defendants.

BYNUM, J. All the exceptions taken during the progress of the trial in the Court below were decided in favor of the plaintiff, except one, and as the judgment was in favor of the defendants, only the plaintiff's exception which was overruled is the subject of review; and while we think that exception was decided correctly, it is unnecessary to dwell upon it as in our view of the case it becomes immaterial.

In 1837, or '38, the three heirs-at-law of Howell Hearne who had no color of title himself, took possession of the land in controversy and made an actual division of it into three equal parts by metes and bounds, each one taking possession of and occupying adversely his or her share. Violetta, one of the said heirs, conveyed her share by deed reciting the divison to one Robertson, and from him it came to Parker, the husband and father of the defendants, who are his widow and children, in December, 1848, by mesne conveyances. Rufus, another heir, sold and conveyed his share to the said Parker in 1841, by deed with the like recital. Alumina, the remaining heir, and wife of Parker, died, leaving three children, her heirs at law, all of whom conveyed by deed the share derived from their mother to the said Parker,—one of them on 28 April, 1859, a second on 29 July, 1859, and the third on 26 April, 1860. Parker claiming under these deeds remained in the exclusive adverse possession of the land from their respective dates until his death, in 1872, and those from whom he derived title occupied and held the land exclusively and adversely from the said division in 1837 or '38, until they conveyed to Parker as we have just stated.

The plaintiff claims as the sole heir-at-law of his father, Charles

Johnson, who claimed by mesne conveyances from Howell Hearne, dated in 1833, under whom the defendants also claim. (477) Charles Johnson, the father of the plaintiff, died on 15 August, 1835, and the plaintiff was born two days thereafter, to wit, 17 August, 1835, and became of age 16 August, 1856.

This action was begun on 14 October, 1872, and the defendants rely upon the statute of limitations as a bar thereto; Rev. Code, ch. 65, sec. 1; this being a case where the right of action having accrued prior to the adoption of C. C. P., is not governed by its provisions, though they do not as affecting this case materially vary from the provision of the Revised Code.

The title of the plaintiff accrued to him at his birth, 17 August, 1835, being thirty seven years before the commencement of the action. He arrived at age on 16 August, 1856, or sixteen years before this action was begun. Deducting the time of the plaintiff's disability of infancy and the time of the suspension of the statute of limitations, to wit, from 20 May, 1861, to 1 January, 1870, more than seven years remained after the removal of his disabilities and the counting out of the period of the suspension of the statute, before he commenced this action.

The statute of limitations applied to this state of facts declares that the action shall be commenced within three years next after full age, or the plaintiff "in default thereof shall be utterly excluded and disabled from any entry or claim thereafter to be made." The plaintiff's right of action was therefore barred as the Court below held.

Affirmed.

Cited: White v. Beaman, 85 N. C., 3; *Christenbury v. King, Ib.,* 229; *Amis v. Stephens,* 111 N. C., 174.

(478)

MARGARET A. NEELY and others v. JULIUS A. NEELY and others.

Tenants in Common—Adverse Possession.

The possession of one tenant in common being the possession of all, nothing less than a sole possession of twenty years by a co-tenant, without any demand or claim of another co-tenant to rents, profits or possession, he being under no disability during the time, will raise a presumption in law that such sole possession is rightful, and protect it.

SPECIAL PROCEEDING commenced on 7 September, 1874, in the Probate Court and transferred to and heard at January Special Term, 1878, of ROWAN, before *Kerr, J.*

The plaintiffs filed a petition for partition of real estate, alleging that they and the defendants were tenants in common of the same. The defendants denied the tenancy in common and pleaded adverse possession for twenty years, sole seizin, and statute of limitations. The facts are as follows:

In 1831, Alexander Neely being the owner in fee of the land in controversy died leaving a last will and testament in which he devised said land to two of his children, Julius and Euphemia; the latter died in August, 1843, at the age of about 12 years, leaving as her only heirs at law the said Julius Neely, and Nathan and Franklin Neely, who were her brothers. The land was rented by the guardian of the said children of the testator after the death of his widow, and the rents collected by the guardian and divided among the children entitled, up to 8 March, 1849.

The said Julius became of age on 28 February, 1849, and was in possession of the land from the said 8 March until his death in 1874,
(479) during which period he paid taxes upon the same, and received the rents without accounting to any one; and it was admitted that during his life time he bought the interest of his brother Nathan in said land.

The said Franklin died in 1858, devising his lands to his three children, the plaintiffs in this suit, who now claim the interest of their ancestors in the land which descended to him as one of the heirs at law of the said Euphemia, and insist that they are tenants in common with the defendants (who are in possession as the heirs at law of the said Julius) and are therefore entitled to one-sixth of the land.

There was no evidence showing a demand upon Julius by Franklin Neely during his life time or by the guardian of his children after his death, for the rents of the land or any part thereof; nor was there any evidence of a refusal on the part of Julius Neely to account for the same.

Upon these facts His Honor was of the opinion that the defendants had failed to sustain their pleas, and adjudged that they were not sole seized but tenants in common with the plaintiffs of the land in controversy, and ordered the case to be remanded to the end that a writ of partition may issue, from which ruling the defendants appealed.

Messrs. J. S. Henderson and *W. H. Bailey,* for plaintiffs.
Mr. Kerr Craige, for defendants.

BYNUM, J. As there was no evidence of an adverse holding by the defendants, and those under whom they claim, and as the plaintiffs and defendants are tenants in common of the premises in question, and as such the possession of one party is the possession of the other, nothing less than a sole possession of twenty years by a co-tenant (480) without any demand or claim by another co-tenant to rents, profits, or possession, he being under no disability during the time, will raise a presumption in law that such sole possession is a rightful one and protect it. This has been decided by numerous cases of which it is necessary only to cite two recent ones, *Covington v. Stewart,* 77 N. C., 148; *Linker v. Benson,* 67 N. C., 150. Eliminating the time of the suspension of the statute, no such possession appears or is alleged here. Plaintiff's brief cites all the cases.

Affirmed.

Cited: Caldwell v. Neely; 81 N. C., 114; *Jones v. Cohen,* 82 N. C., 75; *Ward v. Southerland,* 92 N. C., 93; *Roscoe v. Lumber Co.,* 124 N. C., 47; *Woodlief v. Woodlief,* 136 N. C., 137; *Bullin v. Hancock,* 138 N. C., 202; *Dobbins v. Dobbins,* 141 N. C., 217; *Rhea v. Craig, Ib.,* 611; *Worth v. Wrenn,* 144 N. C., 662.

JAMES PARKER and others v. MARY A. BANKS.

Adverse Possession—Mortgage Sale—Notice.

1. Adverse possession is an actual, visible and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action.
2. As the law never presumes a wrong, he who asserts an adverse possession against the better title must prove it, as well as allege it.
3. A mortgagor in possession being the tenant of the mortgagee, his possession is not adverse to the mortgagee.
4. A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate.
5. Registration of a mortgage is notice to all purchasers from the mortgagor subsequent to such registration.
6. Where a mortgage is given to secure several notes falling due at different times, the possession of the mortgagor or his assignee (481) is not to be deemed hostile to the mortgagee until the maturity of the last note.

7. Mere knowledge on the part of the mortgagee, that the mortgagor has conveyed an absolute estate in the mortgaged property to a third party, does not estop the mortgagee from asserting at any time his legal rights against such third party.
8. While it is a general rule that a power of sale under a mortgage deed must be executed by the mortgagee in person, yet if such sale be conducted by the attorney of the mortgagee, who subsequently ratifies the same by making the necessary deed for the property, the mere fact that the sale was conducted by the attorney in the absence of the mortgagee will not invalidate the title derived thereby.
9. Where a mortgage deed directs a cash sale upon default of the mortgagor he can not be heard to complain that the mortgagee sold on credit and made title to the purchaser, as such sale and conveyance extinguish the mortgage debt to the extent of the purchaser's bid.

APPEAL at Spring Term, 1878, of PERQUIMANS, before *Furches, J.*

This action was brought on 2 July, 1877, to recover possession of a tract of land, and the facts stated in the case agreed are as follows:

Previous to 1868, T. F. Banks was seized in fee and in actual possession of a tract of land in Perquimans county containing 960 acres. On 10 January, 1868, David Parker became the owner of the same by purchase at execution sale and took a deed from the sheriff. On 16 December, 1868, Parker at the request of Banks sold the land to C. C. Pool, and took a deed of trust to secure the payment of the notes for the purchase money,—one for $600 and three for $1,000 each due severally on 1 January, 1870,-'71-'72-'73, with power of sale in default of payment of either at maturity. Pool paid the first note in June, 1870, and the second, in December, 1871, and made no other payment, but conveyed to Banks 220 acres of the land by metes and bounds, of which con-
(482) veyance Parker had notice. Banks remained in possession under Parker after the sheriff's deed and the trust deed of Pool were executed, and accepted said deed for 220 acres from Pool, the mortgagor, and lived thereon until his death in 1873.

In June, 1872, Pool made a second deed of trust to Parker by which he conveyed the larger part of said land (740 acres) to secure other debts; and also other real and personal property, with power of sale in default of payment of the debts secured.

On 10 February, 1875, Parker sold the whole tract (960 acres) after advertising as provided in the deeds, and Joseph Parker, one of his sons, bid off the land for the plaintiffs, who are also his sons. The sale was made by the attorney of Parker, and no money was paid to the attorney on the day of sale, but Parker directed him to prepare a deed for him to execute to the plaintiffs for the land; Parker died soon thereafter without having executed the deed, and upon proceedings instituted to which the defendant and Pool were parties, one White was appointed

trustee under said deeds, and by a judgment of the Court therein, said trustee executed a deed to the plaintiffs, but no money was paid to the trustee. Neither the defendant nor Pool had actual notice of said sale. All of the land conveyed by the second deed has not been sold, and it is insufficient to pay the debts secured.

The plaintiffs are the devisees and legatees of said Parker, and brought this action to recover the said 220 acres, and the defendant is the widow of said Banks, and has been in possession of the same since her husband's death. His Honor upon the case agreed gave judgment for the defendant and the plaintiffs appealed.

Messrs. Gilliam & Gatling, for plaintiffs.
Mr. J. W. Alberston, for defendant.

BYNUM, J. The mortgagor in possession sold and conveyed to his tenant, also in possession, the mortgage having been duly registered prior to the sale by the mortgagor. It is insisted that the (483) purchaser having continued in possession for seven years after his purchase before the beginning of this action is protected by the statute of limitations against this action by the assignee of the mortgagee.

It is well settled that the mortgagor is the tenant of the mortgagee, and therefore that his possession is not hostile or adverse to the mortgagee; nor can the mortgagor make any lease or contract respecting the mortgaged premises effectual to bind the mortgagee or prejudical to his title; neither can the assignee of the mortgagor hold possession adverse to the mortgagee, unless the assignee has taken a conveyance without notice.

But where a *bona fide* purchaser from the mortgagor entered without notice of the mortgage (which was not registered till after the commencement of the ejectment suit) and he and those claiming under him had been in the continual possession of the premises claiming under color of title for more than the time limited by statute, it was held in this State sufficient to bar the mortgagee or any claiming under him. *Baker v. Evans,* 4 N. C., 417. And such is the general doctrine. *Perkins v. Pitts,* 11 Mass., 125; *Newman v. Chapman,* 2 Rand., (Va.) 93; Angel on Limitations, 554; *Wellborn v. Finley,* 52 N. C., 228. Apply these principles to our case:

It was virtually decided in *Flemming v. Burgin,* 37 N. C., 584, that a registered mortgage is notice to a subsequent purchaser from the mortgagor. This decision has been approved and affirmed in *Leggett v. Bullock,* 44 N. C., 283, and in *McLennan v. McLeod,* 70 N. C., 364, and

such being the obvious policy and purpose of our registration laws, as well as the convenience and good sense of the thing, it may now be considered as settled in this State, that the purchaser from the mortgagor or the mortgagee, after a mortgage duly registered, is a pur-
(484) chaser with notice. Adams Eq., 152; 2 Kent, 172.

The intestate of the defendant, then, purchased with notice of the mortgage and took only such title as the mortgagor had, and subject to all the stipulations contained in the mortgage deed. He simply took the place of the mortgagor, and as the mortgagor can not claim adversely to the mortgagee, neither can his assignee with notice. The right of the purchaser can in no case go beyond his own title, and whatever appears in the registered mortgage is as much an integral part of his title as if it had been inserted in his deed from the mortgagor. Such notice therefore is of the most conclusive nature and is insusceptible of being rebutted or explained away. 2 White & Tudor Eq. Cases, 21 *LeNeve v. LeNeve,* and notes.

The defendant acquired by the purchase only that which the mortgagor could rightfully convey, to wit, the equity of redemption in the land; and nothing short of the payment and discharge of the mortgage debt, will change his relations with the mortgagee. Adams Eq., 110. It follows that the deed from Pool to Banks, a purchaser with notice, conveyed the equity of redemption only, and that such title is not that *colorable title,* a possession under which for seven years will bar the mortgagee's right of action. The only limitation upon the mortgagee's right of action in this case is contained in C. C. P., sec. 31 (3) which prescribes that where the mortgagor has been in possession, the action for foreclosure or sale shall be brought by the mortgagee within ten years after forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the debt. Such time has not elapsed in this case.

Take another view of this action: Even assuming that Pool's deed to Banks was a colorable title, it has been long settled that the possession under it, to bar an action under the statute, must be an ad-
(485) verse possession. The constructive possession was in the mortgagee, and that continued until an adverse possession commenced, and that adverse possession must have continued seven years before the right of possession of the first grantee could be lost. *Slade v. Smith,* 2 N. C., 248. But the law never presumes a wrong; hence he who alleges an adverse possession against the better title, must show it, as well as allege it.

What is an adverse possession? The term "adverse possession" says Angel Lim., 467, "is familiar in the modern common law as denoting

disseizin upon which an adverse title is founded; the old term 'disseizin' being expressive of any act, the necessary effect of which is to divest the estate of the former owner." Preston Abstracts of Title, 383; 2 Ld. Raym., 829. A disseizin is where one enters, intending to usurp possession, and to oust another of his freehold; and to constitute an actual disseizin, or one in fact, there must be a tortious entry and an explusion. Coke on Litt., 153; *Bradstreet v. Huntingdon,* 5 Pet., 440, and cases cited. Mr. Angel again says "that the clearest and most comprehensive definition of a disseizin and adverse possession, is, an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right,"—the claim must be adverse, and accompanied by such an invasion of the rights of the opposite party, as to give him a cause of action. It is the occupation with an *intent* to claim, against the true owner, which renders the entry and possession adverse; and it is the settled doctrine that this question of adverse possession, as one of intention, ought to be found by the jury, or in some other way ascertained as an essential fact, without which the quality of the possession can not be determined. *Taylor v. Horde,* 1 Burr. 60; *Smith v. Burtis,* 9 *Johns,* 180; 5 Pet. 402; Angel Lim., 476.

Apply these principles to the facts in the case agreed: Pool was the mortgagor, Parker the mortgagee, and Banks the tenant in possession. Banks was already in possession as the tenant of (486) Parker when he received the deed from Pool; therefore he made no *entry* expulsion under a claim of right. It is not stated as a fact, nor is there any evidence warranting such a conclusion, that after the deed to him by Pool, Banks changed his relations as tenant of the mortgagee and occupied the land *adversely* to him. Nor is it agreed as a fact, that subsequent to the execution of the deed, the occupation of Banks was with the *intention* to claim title adverse to that of the mortgagee. Indeed the case agreed states no facts accompanying the possession of Banks tending to repudiate the title of Parker. The only facts relied on are that Banks while in possession under Parker received a deed from Pool, the mortgagor, and continued to reside on the place as he had done theretofore, until his death, after which his wife, the defendant, continued the possession until this action was begun. It is not stated that Banks while in possession either disavowed the title of Parker or his tenancy under him, or that he claimed the land as his own, as by refusing to pay rent, by returning it for taxation, or by acting in any other manner in hostility with his relations as tenant of the mortgagee. The deed from Pool does not profess upon its face to convey the legal title, or any interest adverse to the title of Parker, but only such estate as a mortgagor could rightfully convey. We have be-

fore seen that having bought with notice of the trust, Banks acquired only the equity of redemption, and stood in the same relation to the mortgagee as if he himself had executed the mortgage to Parker. He therefore could not have been misled to suppose that he got title for anything more than the right to redeem on payment of the money secured in the mortgage.

The several deeds are filed as a part of the case, and the operative words of the one in question, are,—"have granted and sold, and (487) by these presents do hereby sell and convey to the said T. F. Banks and his heirs, all our *right, title and interest* in a certain tract of land * * * to have and to hold the above described land and premises," etc. Such a deed is but a *quit claim* and well adapted to convey the equity of redemption only; and though it might operate as color of title to a purchaser without notice, we find no authority that it has such effect against the mortgagee, where the purchase is with notice and by the tenant in possession. The defendant therefore must fail upon this part of the case, for whether the deed operates as color of title or not, no adverse possession is shown by the case agreed, or can be fairly inferred from the facts stated.

There is still another view of this case, even assuming that the deed to Banks was color of title, and his possession under it was adverse to the mortgagee: From what point of time does the statute of limitations begin to run against the mortgagor or his assignee, the plaintiff? This must be determined by the provisions of the mortgage. The notes were given by Pool to Parker for the purchase money of the land mortgaged, and fell due respectively on 1 January, 1870-'71-'72-'73; and the conditions of the trust are "to secure the payment to the said Parker of the notes aforesaid, and all interest that may accrue upon them; and the said Parker shall have the right and option at any time after the falling due of one of the first, or any one or more of the notes aforesaid, if the said Pool shall fail to pay the same and interest, to advertise," etc. The first note, due 1 January, 1870, was paid in June, 1870, and the note due January, 1871, was paid in December, 1871, within less than seven years from the beginning of this suit, which was begun in July, 1877. The condition of the mortgage was a continuing one,—to pay in installments, at several times—and the mortgagee could await the maturity of the last note before an entry and sale, or elect to treat the non-payment of the first, or any subsequent note at maturity as a forfeiture of the (488) mortgage. Certainly, Pool on the regular payment of the notes had the legal right of redemption, until the non-payment of the last note when it fell due; and no reason is perceived why he had not the same right when the note of 1872 fell due, after the mortgagee

elected to waive the forfeiture of the mortgage by receiving payment of the two notes of 1870 and 1871 after maturity.

This doctrine of election to waive or enforce a forfeiture is discussed in *Fowle v. Ayer,* 8 N. H., 67; and in Angel Limitations, 470, and notes. The exercise of the right of election was a matter within the sound discretion of the mortgagee, to be determined by a prudent consideration of the interests of the parties to the trust, and his action is binding upon a mere volunteer claiming as a purchaser with full notice.

Two other objections have been urged against the recovery of the plaintiff: The first is, that Parker, the mortgagee, had notice of the conveyance from Pool to Banks, and is therefore estopped by matter *in pais* from disputing his title. The facts upon which we are to act are thus stated in the case agreed: "In December, 1869, Pool conveyed to Banks 220 acres of the land by metes and bounds of which Parker had notice." When or how did he receive notice? and did he assent to the sale? He received no part of the purchase money, and no part of the mortgage debt was discharged, and there is no evidence that the mortgaged land exceeded in value the debt secured. There is no ingredient of an estoppel in the case, and nothing of an acquittance or release in writing under the statute of frauds from the mortgagee, is shown.

The last objection is thus stated in the case agreed: "The sale was made by the attorney of Parker, and no money was paid to the attorney on the day of sale, but Parker directed his attorney to prepare a deed for him to execute to the plaintiffs for the land." Parker died soon thereafter without having executed the deed. It is gen- (489) erally true that a mortgagee with power of sale can not execute the power by attorney and in the absence of the trustee. But it has also been held that when a sale under a mortgage is conducted by the attorney of the mortgagee in his absence, and the mortgagee, in whom the legal title as well as the power of sale coupled with an interest is vested by the mortgage, subsequently ratifies the sale by making the necessary deed for the property, the mere fact that the sale is conducted by the attorney in the absence of the mortgagee will not render the title derived therefrom, void. *Munn v. Burgess,* 70 Ill., 604.

Though no deed was actually executed by the mortgagee in our case, it sufficiently appears that he afterwards ratified the sale, and was only prevented by death from making the deed. We think that was sufficient here. It is not at all material whether the purchase money was paid or not, as the mortgagee's debt was extinguished to the amount of the bid, and the payment was a matter between him and the purchaser which does not affect this action. The power of the substituted trustee to execute the deed if the sale was valid is not disputed. Upon the case

agreed therefore we hold that the statute of limitations does not bar the action and that the plaintiff is entitled to recover. There is error. Judgment reversed and judgment here for the plaintiff upon the case agreed.

PER CURIAM. Judgment reversed.

Cited: Banks v. Parker, 80 N. C., 157; *Keathly v. Branch,* 84 N. C., 202; *Wharton v. Moore, Ib.,* 479; *Simmons v. Ballard,* 102 N. C., 105; *Overman v. Jackson,* 104 N. C., 4; *Woody v. Jones,* 113 N. C., 255; *Williams v. Kerr, Ib.,* 311; *Bank v. Adrian,* 116 N. C., 549; *Cone v. Hyatt,* 132 N. C., 816; *Stancill v. Spain,* 133 N. C., 81; *Woodlief v. Wester,* 136 N. C., 165; *Monk v. Wilmington,* 137 N. C., 326; *Bunn v. Braswell,* 139 N. C., 139; *Davis v. Keen,* 142 N. C., 505; *Conley v. Sutton,* 150 N. C., 330; *McFarland v. Cornwell,* 151 N. C., 431; *Cathey v. Lumber Co., Ib.,* 596; *Snowden v. Bell,* 159 N. C., 500.

(490)

THOMAS C. DICKENS v. EVELINE BARNES.

Description of Land—Color of Title—Parol Evidence.

A deed conveying land and describing it as "one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres more or less," does not constitute color of title, and possession under it is not adverse. Such description is insufficient and cannot be aided by parol proof.

ACTION, to recover Land, tried at Spring Term, 1878, of HALIFAX, before *Seymour, J.*

The referee to whom the case was referred reported as follows: It is admitted that unless the defendant can show seven years adverse possession under known and visible boundaries and under colorable title, the plaintiff is entitled to recover the possession of the land in dispute. The facts found are,—that defendant has been in adverse possession under known and visible boundaries since 20 March, 1863; that the summons was issued on 27 September, 1877; that the colorable title under which defendant claims, is a deed to her from one John J. Phelps, dated in said month of March, 1863, and in which the land is described as follows,—"one tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres more or less." The referee held that the defendant's possession was not under colorable title and that the plaintiff was entitled to recover, to which conclusion of law the defendant excepted.

His Honor sustained the exception and gave judgment for defendant for costs, and the plaintiff appealed.

Mr. T. N. Hill, for plaintiff.
No counsel in this Court for defendant.

FAIRCLOTH, J. It is conceded that plaintiff can recover unless the defendant has acquired the right of possession under the (491) provision of C. C. P., sec. 20, which declares that seven years possession of real property under known and visible lines and boundaries and under colorable title, shall perpetually bar an entry or action against such possessor. And it is conceded that defendant has been in adverse possession of the *locus in quo,* under known and visible lines and boundaries more than seven years, but colorable title is denied. The question depends on the description in a deed from John J. Phelps to the defendant, conveying "one tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres more or less." There is nothing else in the deed or in the record to aid this description, and its construction is alone for the Court.

The general rule of law is that the possession must commence under a claim or color of title which *purports* to be valid. If the claim of the party be invalid on its face, or if the deed under which he claims be void, or insufficient in form to pass title, or the description therein be fatally defective, in such cases the possession is not adverse under our statute; because the party acquiring possession must be presumed to known the law and to see that in such cases there is no color of title, and therefore he is presumed not to have the *animo domini* which is always essential in an adverse possession. "Colorable title" then in appearance is title, but in fact is not, or may not be any title at all. It is immaterial whether the conveyance actually passes the title to property, for that is not the inquiry. Does it appear to do so, is the test; and any claim asserted under the provisions of such a conveyance is a claim under color of title, and will attract the protection of the statute of limitations to the possession of the grantee if the other requisites are performed.

Turning then to the description in the matter before us, is it sufficient? Tried by the above rules and by our decisions, we (492) are compelled to say that it is not. It fails to identify or to furnish the means of identifying, under the maxim, *id certum est quod certum reddi potest,* the land in possession of the defendant, the *locus in quo.* It gives neither course nor distance of a single line, nor a single

point, stake or corner any where to begin at. Does the tract lie on the north, south, east or west side of the lands of Phelps and Pender? What course would the surveyor take if he had a beginning point? These questions can not be answered by the aid of facts *dehors* the deed, established by parol proof, because it is a patent ambiguity, a question of law for the Court and not one of fact for the jury.

In *Capps v. Holt,* 58 N. C., 153, the call was for "a tract of 150 acres lying on watery branch in Johnson county;" and that was held to be too vague. In *Hinchey v. Nichols,* 72 N. C., 66, the land was described as lying on "a big branch of Luke Lee's creek," and it was held fatally defective and incapable of help by parol evidence. These cases we think dispose of this case.

In *Brown v. Coble,* 76 N. C., 391, this Court held the description was susceptible of explanation and was therefore sufficient. It was "a tract of land in said county on the waters of 'Stinking Quarter,' adjoining the lands of ——, of which Brown died *seized* and *possessed.*"

Nothing is described in the present case; and to establish a corner by proof, would be to make a corner instead of finding one, and fitting the description to it. There is error. Let judgment be entered for the plaintiff.

Judgment reversed.

Cited: Farmer v. Batts, 83 N. C., 387; *Wharton v. Eborn,* 88 N. C., 344; *Radford v. Edwards, Ib.,* 347; *Harrell v. Butler,* 92 N. C., 20; *Reed v. Reed,* 93 N. C., 462; *Blow v. Vaughan,* 105 N. C., 198; *Perry v. Scott,* 109 N. C., 380; *Barker v. R. R.,* 125 N. C., 599; *Greenleaf v. Bartlett,* 146 N. C., 502.

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(493)

W. P. MATTHEWS v. W. S. COPELAND and WM. BARROW.

Rents—Husband and Wife—Official Bond.

1. The rents of a wife's land (prior to the adoption of the Constitution of 1868) accruing in the life-time of the wife, or of the husband surviving her and having an estate by the courtesy for life, belong to the husband and not to the heir of the wife; he is entitled to the land at the death of the husband:

Therefore, where land was sold by a clerk and master in 1853 under a decree for partition among tenants in common, the husband and wife being entitled to a share in right of the wife; and the wife died in January, 1868, and the husband in December, 1873, without having received said share: *It was held,* in an action by the heir of the wife

upon the bond of said clerk, that he was entitled to recover his share of the principal money, realized by said sale, with interest from the death of the husband—the proceeds of sale standing as and for the land and the interest thereon as and for the rent.

2. In an action for breach of an official bond, where it appeared that the officer, being reappointed to the office, had renewed his bond in the same amount and with the same sureties, and the paintiff declared upon and alleged a breach of both bonds, and the defendant demurred for a misjoinder of causes of action: *Held*, that the demurrer was properly overruled.

APPEAL at Spring Term, 1878, of NORTHAMPTON, from *Seymour, J*

This action was brought against the defendants as sureties upon the official bonds of John Randolph who was appointed clerk and master in equity of Northampton county in 1850, and re-appointed in 1854. He executed two bonds and the defendants were sureties upon each; and he died before action was brought. Certain lands which were held by the father and mother of plaintiff and others as tenants in common were sold by said clerk and master under a decree in 1853 upon a petition for partition. The plaintiff's father was entitled to a life estate in his wife's share of the land, as tenant by the courtesy. And (494) it was alleged that the purchase money was collected in 1854 and 1855, and no part thereof had been paid. The father and mother of plaintiff are both dead (the mother dying in January, 1868, and the father in December, 1873), and the plaintiff is the only child and heir at law, and claims the right to receive said share of the purchase money as heir of his mother, and brought this action for its recovery. The defendants demurred to the complaint, for that, there was a misjoinder of causes of action in declaring upon the two bonds of said clerk, and insisted that separate actions should be brought. Upon the hearing before *McKoy, J.*, the demurrer was sustained, and leave granted to plaintiff to amend complaint. The complaint was accordingly amended and the defendants again demurred, assigning as cause, among others, the one above stated, which was overruled by His Honor, and judgment given for plaintiff, from which the defendants appealed.

Messrs. R. B. Peebles, T. N. Hill and *Busbee & Busbee,* for plaintiff.
Messrs. W. C. Bowen and *Mullen & Moore,* for defendants.

BYNUM, J. 1. In *King v. Little,* 77 N. C., 138, it was determined as to the wife's land, what would be her right as to accrued and accruing rents where she survives her husband; we are now to determine how it is, where the husband survives the wife.

The case before us is simplified, if we assume that the land has not been sold, but remains as to the title just where it was at the death,

first, of the wife, and second, of the husband. Marriage is only a qualified gift to the husband of the wife's choses in action, that is, upon condition that he reduce them into possession during its continuance.

If he die without having reduced such property into possession
(495) and before his wife, she and not his executors will be entitled to it; but if the husband survive the wife and he take out letters of administration upon her estate, he will be entitled, as such administrator, to all her personal estate which continued in action and unrecovered at her death; and if he die before taking out letters, or after, and before her choses in action have been by him reduced into possession, such property can not be recovered by his representatives, but administration to the wife *de bonis non* must be sued out.

Such administrator however in equity is considered as the trustee of what he receives, for the personal representative of the husband. 1 Williams Executors, 778-9. Property falling under the description of *choses in action* of the wife, are debts owing to her on bond or otherwise, *arrears of rent,* legacies, trust funds, or other property recoverable by suit. So that all rent which had accrued to the wife and was uncollected by the husband at her death, belonged in the manner we have described to the personal representative of the husband. Upon the death of the wife, the husband became the tenant of the courtesy consummate, and had a life estate in the land. All the rents and profits which afterwards accrued during his life of course belonged to him; and if not recovered by him in his life time, they devolved upon his personal representative. *Ib.,* 779, 784 and authorities there cited.

It is thus seen that none of the rents which accrued in the life time of the wife, or in the life time of the husband surviving her and having an estate by the courtesy for life, belong to the heir at law of the wife. He is entitled to the land at the death of the husband, and nothing more. The proceeds of the sale of the land stand, as and for the land; and the interest thereon stands, as and for the rent. The plaintiff as the heir at law of his mother is entitled to his share of the principal money realized by the sale for partition, with interest from the
(496) time the estate would have devolved upon him, to wit, from the death of the husband, 9 December, 1873.

2. The land was sold for partition on 20 June, 1853, by John Randolph, clerk and master of the Court of Equity of Northampton county, under a decree for that purpose. In 1854 and 1855, he collected the purchase money, the principal of which was $1,395, to one-fourth of which the plaintiff was entitled on the death of the tenant by the courtesy. Randolph was first appointed clerk and master in 1850 for four years, and was reappointed in 1854 for four years longer, giving

bond on each appointment in the sum of $10,000 with the same sureties upon each bond. The plaintiff declared upon a breach of both bonds, and that is excepted to by demurrer. As the defendants are the only sureties upon both bonds, their liability is the same, whether the breach was of the one or the other. In respect of their liability they stand in no better condition than if instead of giving two bonds for four years each, they had only executed one bond for eight years.

As a demand before suit was made upon the executor of John Randolph, the clerk and master, and perhaps without such demand as it is admitted that his estate is wholly insolvent, the plaintiff is entitled under the statute to twelve per cent interest on his share of the estate from the time it became due, to wit, from 9 December, 1873.

It will be observed that the rights of the parties in this action arose under the law as it existed prior to the recent constitutional and legislative changes of the law in respect of the property of married women, and are not affected by those changes.

There is error. Judgment reversed and judgment will be rendered here in accordance with this opinion.

Reversed.

Cited: Matthews v. Copeland, 80 N. C., 31; *Syme v. Bunting,* 86 N. C., 175; *Benbow v. Moore,* 114 N. C., 273.

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(497)

P. A. DUNN & CO. v. CHARLES P. TILLERY and wife.

Mortgagor and Mortgagee—Lessor and Lessee—Rents.

A mortgagor of land left in possession (or his assignee) has the right to appropriate the profits arising therefrom to his own use, or to lease to another and take the accruing rent; and this right remains until divested by some positive interference of the mortgagee:

Therefore, where the plaintiff (assignee) agreed to sell said land to the defendant who was let into possession, and upon default of payment of the purchase money the plaintiff elected to treat the defendant as a tenant at a certain sum for rent, as provided in the contract of sale; and afterwards, the mortgagee sold and conveyed the land under a power in the deed to pay the original debt secured thereby:

(1) *It was held*, in an action for the rent, that defendant's occupation by the election of plaintiff was changed from that of vendee to that of lessee, and that the plaintiff was entitled to recover.

(2) *Held further*, that the incapacity of plaintiff to make title to the land exonerated defendant from the payment of the purchase money.

APPEAL at Spring Term, 1878, of HALIFAX, from *Seymour, J.*

R. P. Spiers was indebted in a large sum to H. J. Hervey, and to

secure the same, on 1 January, 1875, conveyed to him by deed of mortgage a valuable tract of land. The debt consisted of two equal installments of $2,995 each, payable respectively with interest at one and two years from that date. The deed contained a clause conferring a power of sale on the mortgagee in default of payment of each of the installments as it fell due. Thereafter and before the first payment became due, the mortgagor sold and conveyed his interest and right of redemption in the land to the plaintiffs.

On 11 February, 1876, an agreement was entered into between the plaintiffs and the defendant, reciting the purchase of the said
(498) land by the defendant Annie F. Tillery from the plaintiffs at the price of $5,250, and her execution of five several notes for equal parts thereof, payable respectively in five successive years, and stipulating that on payment of the purchase money, title to the land should be made free of all incumbrance. The agreement also authorized a sale by the plaintiffs if the vendee should fail to pay any of the installments.

It was further provided that the vendee should take and keep possession without molestation from the plaintiffs until the first payment became due, and in case of default therein the plaintiffs might at their election treat the vendee's possession as that of a tenant, and receive the sum of $550 as rent for the preceding year's occupation, and this sum to be credited on the note—the contract of purchase remaining in full force against her. The crops were also pledged to the payment of the rent. On 10 March, 1876, the parties entered into another contract for supplies to be advanced by the plaintiffs to enable the defendants to carry on their farming operations, and to secure such advances the latter gave an agricultural lien under the statute on the crops to be raised on the land, subordinate to the prior lien for rent, and conveyed several mules on condition that unless the moneys advanced were repaid before 1 December, 1876, the plaintiffs might take possession and sell for their reimbursement.

The debt secured in the mortgage not being paid, the land was sold by H. J. Hervey under the power conferred in the mortgage for $2,100, and conveyed to the purchaser on 12 February, 1877. The defendants did not provide for the payment of the first installment of the purchase money, and the plaintiffs made their election under the agreement to treat the defendants occupation as a tenancy, and required payment of the rent money due therefor.

The action is to recover the unpaid residue for advances and
(499) rent. The defendants resist the demand for rent on the ground of the plaintiffs' incapacity, in consequence of the sale under the

mortgage, to execute their contract; and say that the plaintiffs have funds more than sufficient to pay for the advances received from the defendants.

Upon these facts His Honor gave judgment for the defendants, and the plaintiffs appealed.

Messrs. R. O. Burton, Jr., and *Gilliam & Gatling*, for plaintiffs.
Mr. T. N. Hill, for defendants.

SMITH, C. J. The only question before us is as to the sufficiency of the defence, and whether the defendants are exonerated from their obligation to pay rent.

A mortgagor left in possession has an undoubted right to appropriate the land and all the profits arising from its occupancy to his own use, and has a like right to lease to another and take the accruing rent. The right remains until, by some positive act, the mortgagee interferes and claims possession, or that the tenant shall account to him for the profits or for rent. The plaintiffs succeed to all the rights of the mortgagor, and may do whatever he could have done. The defendants' occupation by the plaintiffs' election was changed from that of vendee to that of lessee, with the correspondent obligation to pay the stipulated rent therefor. It is true that vendor (whom a mortgagee very much resembles in his legal relations to the other contracting party) who permits his vendee to go into possession, may resume his possession; or, on notice given those who are in possession, require rent to be paid to him, as was held in *Hook v. Fentress*, 62 N. C., 229; or, if such claim was asserted against a tenant by the real owner, he would be at liberty to show such paramount title in another, by whom he was held liable for the use and occupation of the premises, as a defence or counter claim (500) to the action of the lessor. *McKesson v. Mendenhall*, 64 N. C., 286. But nothing of the kind exists here. No claim has been made if indeed it could be made by the mortgagee, of the defendants for rent or otherwise. The express obligation to pay rent to the plaintiffs remains in force undisturbed by any conflicting claims from others. Unless this contract can be enforced by the plaintiffs it can be by no one else, and the defendnats will have had the gratuitious use of the land under a promise to pay rent, freed from all obligations to do so. The very acquiescence of the mortgagee is an implied assent to the lease, confirmed by his inaction since.

The opposition to the plaintiffs' recovery however is based mainly on their inability to make title, and thus perform their part of the contract of sale. Their incapacity does exonerate the defendants from

making payment of the purchase money, and as was held in *Nichols v. Freeman,* 33 N. C., 99, is itself a breach of contract for which an action lies. But we do not see how, when the defendants have had undisturbed possession for the year of the leased premises, for which they expressly agreed on the contingency which has occurred to pay a specific rent, they can retain the benefits of their occupation and use of the land, and at the same time escape their correlative and assumed obligation to pay.

We are relieved from any inquiry into details, inasmuch as in the case agreed the parties specify what judgment shall be entered up and the relief to be given in case of our holding that the plaintiffs can recover. The judgment below is reversed, and judgment should be entered according to the case agreed, and the cause is remanded to be further proceeded with in the Court below.

Reversed.

Cited: Killebrew v. Hines, 104 N. C., 182; *James v. R. R.,* 121 N. C., 526.

(501)

BURBANK & GALLAGHER v. S. H. WILEY and others.

Partnership—Mortgage—Evidence.

1. Where one partner executes a mortgage on a stock of goods to secure payment of his share in the purchase of the same, and upon a subsequent dissolution of the firm and sale of its effects by a receiver, the purchaser acquires title subject to the right of the mortgagee to his proportionate share of the assets. The mortgagor is also a creditor of the firm as to any amount advanced by him after the date of the mortgage.
2. The declarations of a mortgagor after the execution of the deed are not admissible to prove an alleged fraud between him and the mortgagee, in an action wherein the mortgagee is plaintiff and a third party is defendant (involving the rights of the plaintiff under the deed).
3. Such declarations are only evidence against the mortgagor himself in a proceeding between him and such third party.

BILL IN EQUITY heard at December Special Term, 1877, of BEAUFORT, before *Schenck, J.*

This was a suit instituted in 1867, in the late Court of Equity and subsequently referred to E. S. Hoyt who found that the plaintiffs and one Morris were engaged in the sale of drugs and medicines. In March, 1866, they sold their entire stock to Henry C. Morris, A. J. Mock and S. H. Wiley for $6,000. Morris bought one-half of the goods and gave plaintiffs a note and mortgage on his share of the stock to secure half

of said sum. Mock and Wiley bought one-fourth each of the goods and paid plaintiffs the other half of said sum in cash. The purchasers then entered into partnership to carry on the business for five years under the firm name of H. C. Morris & Co., sharing in the profits and losses in proportion to the amount of stock owned, and Morris conducting the business at an annual salary of $1,000. They dissolved in about six months and D. A. Davis was appointed receiver to settle the partnership affairs, and he sold the stock to Roberts & Co. by consent of the late partners, but not with the consent of the plaintiffs. (502) After paying the debts of the firm, Davis had in his hands for distribution among the parties the sum of $2,045.25, all of which he paid to defendants, less about $200 which he paid to plaintiffs.

The bill was filed to obtain an account and a proper distribution of these assets. The defendants answered that the plaintiffs had been guilty of fraud by representing the stock to be greatly in excess of its real value at the time of sale, and relied upon this in bar to an account, and upon a trial at Fall Term, 1870, before *Jones, J.*, a decree was rendered for plaintiffs. From this judgment the defendants appealed and the case was remanded in order that issues of fact might be found. 66 N. C., 58. At the succeeding term of the Superior Court, the defendants obtained leave to file a plea supported by answer setting up the report and action of said Davis as an award, and upon a trial at Spring Term, 1873, before *Moore, J.*, the plea was overruled,—the replication showing that the plaintiffs, the mortgagees, had not consented to the agreement under which Davis acted,—leave given to defendants to answer over, and an account ordered to be taken. From this judgment the defendants appealed, and the judgment below affirmed at June Term, 1873, of this Court—Opinion by SETTLE, J., but not reported.

Afterwards all the matters in controversy were referred to said Hoyt, who reported to the effect that there was no fraudulent representation, that the stock sold was as much as defendants claimed plaintiffs to have represented it to be; that there was due plaintiffs the sum of $3,140.73—including interest, Morris' salary, and money advanced by him to the firm.

To this report the defendants excepted: That no sufficient notice for taking the account was given, that the books from which the referee derived materials for his report were not exhibited, nor (503) did he report separately the accounts of the partnership, and the individual members thereof, that the pleadings did not show that defendant Morris filed any answer or in any way made any claim upon his co-defendants, and any report of balance due by them to him was

void and does not warrant judgment thereon, and that he does not set out the articles of co-parnership upon which he bases his report. Exceptions overruled.

The defendants offered to prove the declarations of Morris, made after the execution of the mortgage, as tending to show fraud on his and plaintiffs' part in the sale of the stock of goods, which was ruled out. Defendants excepted. Judgment for plaintiffs according to report. Appeal by defendants.

Messrs. J. E. Shepherd and *Mullen & Moore,* for plaintiffs.
Mr. D. M. Carter, for defendants.

READE, J. Without entering into the consideration of the question as to the operation of the mortgage deed of Morris upon the effects of the partnership of Morris & Co. acquired *after* the execution of the deed, in regard to which the facts are not ascertained, it may be declared that the effect of the deed was to convey to the plaintiffs all the interest of Morris, in the effects of the partnership of Morris & Co., as one of the partners at the time of the conveyance, and at the subsequent sale of the effects of Morris & Co. to Roberts & Co. Take that to be so, then one-half of the net amount of the sale of the effects by Morris & Co. to Roberts & Co. (less so much thereof as was paid to plaintiffs) belonged to the plaintiffs.

The referee, Hoyt, reports the net amount realized after paying the liabilities of the partnership, at $2,045.25. One-half of this
(504) amount, less the amount which was paid to plaintiffs, is the amount to which they are entitled without interest.

One-half of the amount which shall be found to be due the plaintiffs shall be paid by the defendant, Mock, and the other half by the defendant, Wiley.

The plaintiffs are not entitled to the amount which Morris is reported to have advanced to the firm, nor to the amount due him for wages after the date of the mortgage deed,—in regard to which he is a creditor of the firm, as any one else would have been.

The clerk of this Court will make the calculations and report, and there will be judgment here accordingly. The clerk of this Court will be allowed for this service $10. The costs in this Court and in the Court below will be equally divided between the parties.

The majority of the Court are of the opinion that the declarations of Morris after he made the mortgage deed to plaintiffs, are not evidence to prove the alleged fraud by the plaintiffs and Morris, in the sale

by them to the defendants; that Morris' declarations are only evidence against himself if he shall pursue the defendants.

PER CURIAM. Modified and affirmed.

Cited: Hilliard v. Phillips, 81 N. C., 99; *Daniel v. Crowell,* 125 N. C., 521.

JOHN H. PASCHAL v. H. F. BRANDON, Admr., and others.

Parties—Action for Purchase Money of Land.

1. A vendor of land can not maintain a suit for the purchase money without first tendering a good and sufficient title to the vendee.
2. If the vendee die before payment of the purchase money, the deed should be tendered to the heirs, and they should be parties defendant to a suit for the price of the land.

APPEAL at Fall Term, 1877, of CASWELL, from *Buxton, J.*

The plaintiff brought this action to recover the purchase (505) money for land alleged to be due him by the defendants, Elisha Paschal, the intestate of defendant, and Elisha Sartain. It was admitted that defendant's intestate had paid the plaitiff the sum he was due him on acount of the purchase, but had received no deed for his part of the land; and it was alleged that the defendant Elisha Sartain had not paid the sum due for his part thereof, the defendants being joint purchasers. After the death of Sartain, Brandon was also appointed his administrator, and the case was referred and an award made. Upon the coming in of the report of the referee, the heirs at law of said Sartain were made parties defendant, and the award vacated. The heirs of Elisha Paschal were already defendants in this action. The Court held also that the plaintiff was not entitled to recover unless he made a proper deed for the land, and the plaintiff appealed. The case was argued in this Court.

Mr. J. W. Graham, for plaintiff.
Mr. Thomas Ruffin, for defendants.

READE, J. It is too plain to need either argument or authority that the vendor of land is not entitled to recover the price until he tenders a good and sufficient title to the vendee. And whether the title tendered is good and sufficient is a question which the vendee has the right to contest with the vendor.

Elisha Sartain the vendee in the case before us is dead, and the

vendor plaintiff sues the administrator of Elisha Sartain for the price. The plaintiff can not recover without tendering title. The title when tendered must be, not to the administrator, but to the heirs at law of Elisha Sartain. And of course they must be parties.

This is the only question before us, for it follows that the reference and award made when the heirs were not parties must be set
(506) aside. When the heirs are made parties, if the administrator will not put in the proper defences to protect their rights, they must be permitted to do so.

When we had separate Courts of Law and Equity, if the plaintiff had sued at law for his claim, it would have required the intervention of the Court of Equity on the part of the heirs, but now all the rights of both parties both legal and equitable can be administered in this action. *Hutchinson v. Smith,* 68 N. C., 354.

Affirmed.

M. L. BEARD and others v. JACK HALL and others.

Parties—Judgment.

Where a defendant in a civil action dies after verdict and before judgment, the plaintiff is entitled to a judgment without waiting to make the personal representatives or heirs of the defendant, as the case may be, parties to the action.

MOTION in the cause by the plaintiffs heard at Chambers in Winston on 21 May, 1878, before *Cloud, J.*

The action in which this motion was made was originally brought in Rowan to subject certain real estate sold by virtue of a decree in equity to the payment of the purchase money. The plaintiffs moved for judgment in accordance with the verdict of the jury therefore rendered. It was admitted that since the trial of the action the defendant Hall had died, and his personal representative had not been made a party defendant. His Honor held that the personal representative was a necessary party and refused the motion, from which ruling the plaintiffs appealed.

Messrs. Jones & Johnston and *W. H. Bailey,* for plaintiffs.
Messrs. J. S. Henderson and *J. M. McCorkle,* for defendants.

FAIRCLOTH, J. After the trial and verdict in favor of the
(507) plaintiff and before judgment entered, the defendants or one of them, died. His Honor refused plaintiff's motion for judgment

on the ground that the personal representative of the deceased was a necessary party. In this there was error. A judgment is the legal conclusion upon facts found or admitted by the parties in the course of the action, to which the party (plaintiff in this instance) is entitled as a matter of course as soon as the facts are so established. This is the rule of the common law, and we have found no statute enacting otherwise. 2 Tidd Pr., 932; 2 Daniel Ch. Pr., 1017; *Davies v. Davies*, 9 Vesey, 461; *Campbell v. Mesier*, 4 Johns, 341.

If after verdict the Court should take time to consider as for argument, or on a motion in arrest, or for a new trial, etc., and meanwhile the party died, judgment will be entered in vacation, or at a subsequent term, *nunc pro tunc*. If this were not allowed, then a party would be prejudiced and possibly damaged by the act of the Court. If by consent of parties, judgment is not entered but is delayed for a reasonable cause, the same rule would be applied if invoked within a reasonable time. It can work no harm to the interested parties as it would not affect any payments, or other cause or discharge arising after the time when the verdict was rendered. This must be the rule between the parties and their representatives. The question as to the effect of judgments entered in this way upon purchasers or third parties is not presented in the record or considered by this Court.

Reversed.

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(508)

W. C. MONROE, Adm'r, v. T. S. WHITTED, Adm'r.

Irreguar Judgment—Motion to Set Aside.

On a motion to set aside a judgment, where it appeared that the original summons was not signed; that no pleadings were filed and no evidence of debt exhibited; that no jury were empaneled and no issue tried at the term when judgment was taken; that the entries upon the summons docket and minute docket conflicted, and no attorney was marked for defendant: *It was held*, that the judgment was *irregular* and should be set aside, although there was no allegation of fraud and although the motion was not made within one year.

MOTION, to set aside a Judgment, heard at Spring Term, 1878, of BLADEN, before *Eure, J.*

The case states: The plaintiff had served notice on the defendant to make him a party to a certain judgment for $600 obtained at Spring Term, 1874, in favor of plaintiff's intestate. The defendant answered the notice alleging that the judgment was irregular and asked that it

be set aside. The summons in the original action was not signed by the clerk or any other person, and it was endorsed "service accepted." No complaint, answer, bond, account, or other evidence of debt is among the papers as constituting a part of the judgment roll. No jury were impaneled and no issue tried in said action at the term when the judgment was had. The following entries in the case appear on the summons docket of said term,—"complaint filed," "this entry by the clerk," "answer no assets," "judgment according to specialty filed." The clerk testified that the entry "complaint filed" was in his handwriting, but did not recollect whether he saw the complaint, and did not know in whose handwriting the other entries were, except "specialty filed," but did not recollect having seen the evidence of debt.
(509) The minute docket at said term shows the following,—"complaint filed, judgment by consent according to complaint" which was made by the clerk, who testified that the plaintiff's attorney had had told him since the rendition of the judgment, that it was for services rendered, etc. The name of no attorney was marked on the docket for defendant. There was no allegation or proof that the judgment was obtained by fraud. Upon these facts His Honor refused the motion, and the defendant appealed.

Messrs. C. C. Lyon and *J. W. Hinsdale,* for plaintiff.
Mr. T. H. Sutton, for defendant.

BYNUM, J. Admit that the defendant was in Court, because he confessed service of an irregular summons. He was summoned to answer the complaint of the plaintiff with a notice that if he failed to answer, the plaintiff would apply at the appearance term for the relief demanded in the complaint. We are satisfied that no complaint was ever filed. As the summons stated no cause of action and no complaint was filed, there was nothing before the Court or on the record, upon which the Court could grant a judgment against the defendant for $600. It was a judgment without allegation, pleadings, or proof. There was no appearance by the defendant, in person, or by attorney; no jury was impaneled, and no bond, account, or claim exhibited.

The appearance docket conflicts with the minute docket,—one showing a judgment by default, the other, a judgment by consent,—the consent of whom? for the record does not show any appearance by the defendant. We are satisfied from the evidence of the clerk that no pleadings were actually filed, and that the entries on the docket were made by or under the direction of the plaintiff, and that in point of fact no judgment was ever rendered by the knowledge or sanction of the Judge

presiding. It was irregular and ought to be set aside. It is not a case falling under sec. 133 of The Code, where the motion (510) must be made in one year from the rendition of the judgment. An irregular judgment may be set aside at any time. *Mabry v. Erwin,* 78 N. C., 46; *Cowles v. Hayes,* 69 N. C., 406; *Keaton v. Banks,* 32 N. C., 381.

The motion should have been granted, and the parties allowed to plead.

Reversed.

Cited: Vick v. Pope, 81 N. C., 22.

THOMAS J. JONES v. GEORGE W. SWEPSON.

Motion to Vacate Judgment—Practice.

Upon a motion to vacate a judgment, it is the duty of the Court below to find the facts upon which its judgment is grounded, and on appeal to this Court to set them forth upon the record.

MOTION by defendant to vacate a judgment under C. C. P., sec. 133, heard at Spring Term, 1878, of CUMBERLAND, before *Moore, J.*

The motion was allowed and the plaintiff appealed.

Mr. J. W. Hinsdale, for plaintiff.

Messrs. Merrimon, Fuller & Ashe, for defendant.

BYNUM, J. This is an application to the Judge below to vacate a judgment under C. C. P., sec. 133, for excusable neglect. As the affidavit of the defendant is contradicted in some material particulars by the affidavit of the plaintiff, it was the duty of the Judge to find and set forth upon the record the facts upon which he grounded his judgment. Whether a given state of facts constitutes excusable neglect is a question of law. This Court has no jurisdiction to find the facts from the testimony contained in the affidavits when they (511) are conflicting. That is the peculiar province of the Court below. This is as well settled as any proposition can be, by many concurring decisions of this Court. *Clegg v. Soap Stone Co.,* 66 N. C., 391; *Hudgins v. White,* 65 N. C., 393; *Powell v. Weith,* 66 N. C., 423.

Reversed.

Cited: Ashby v. Page, 108 N. C., 8; *Finlayson v. Accident Co.,* 109 N. C., 199.

*HYMAN & DANCY v. ALANSON CAPEHART.

Motion to set Aside Judgment—Excusable Neglect.

Where a defendant in a civil action wrote to his regular attorney who lived in Northampton County, and notified him that he was summoned to appear at Fall Term, 1876, of Wayne Superior Court, but did not request him to attend to the case and took no further notice of it himself; his attorney did not attend the Courts in Wayne or reply to defendant's letter, but overlooked the matter; and judgment by default was regularly entered, of which the defendant had actual notice in January, 1877:

It was held, that he was not entitled on a motion made in December, 1877, to have the judgment set aside on the ground of surprise, inadvertence or excusable neglect under C. C. P., sec. 133.

MOTION to set aside a judgment heard at Chambers, before *Seymour, J.*

The facts appear in the opinion. His Honor refused the motion and the defendant appealed.

Messrs. G. M. and *A. K. Smedes,* for plaintiffs.
Messrs. W. T. Dortch & Son, for defendant.

FAIRCLOTH, J. Motion to set aside a judgment on the ground of "mistake, inadvertence, suprise or excusable neglect" under C. C. P.,
(512) sec. 133. His Honor finds these facts: Summons returnable to Fall Term, 1876, of Wayne Superior Court when judgment by default was regularly entered. Defendant had actual notice thereof in January, 1877, and made his motion to set it aside in December, 1877. Defendant wrote a letter to his regular attorney in Northampton county, who did not practice in Wayne county, informing him of the action but did not request him to defend it or send him a retainer. The defendant received no reply to this letter and took no further steps in regard to the action. The attorney in question received the letter but overlooked the matter and no defence was made. Upon these facts His Honor held that they did not present a case of surprise, inadvertence or excusable neglect, and in this opinion we concur. The defendant did not attend Court himself or write to an attorney of the Court in which the action was, or even ascertain that his letter was received or that his regular attorney would undertake to attend to the case. This was not such attention as men of ordinary prudence usually give to important business.

*SMITH, C. J., did not sit on the hearing of this case.

In *Griel v. Vernon,* 65 N. C., 76, the motion to set aside was allowed on the ground that the defendant had actually employed an attorney, and his failure to plead was a surprise to his client, who had done all that could be reasonable required of him.

Burke v. Stokely, 65 N. C., 569, is very much like, and governs the present case. There, an attorney was not employed and therein differs from the case above cited, but a letter merely was sent and it did not appear whether it was received or not.

The burden of showing proper grounds for relief is always on the party seeking to vacate the judgment.

Affirmed.

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(513)

*WILLIAM GRANT, Adm'r, v. S. E. BURGWYN and another.

Attachment—Sufficiency of Affidavit—Service by Publication.

Where, in a proceeding by attachment, it appears from the *whole* record, that the provisions of the statute have been substantially complied with, the action will not be dismissed or the attachment dissolved.

MOTION to dismiss the action heard at Spring Term, 1878, of NORTHAMPTON, before *Seymour, J.*

The plaintiff as adiministrator with the will annexed of Edmund Jacobs, deceased, brought this action for a money demand, and the defendant moved to dismiss upon the ground that the summons which issued 18 June, 1877, returnable to Fall Term of said Court, was not served, and no *alias* was issued. His Honor found as a fact from the evidence that service had been made by publication. The defendants also moved to dissolve an attachment which had theretofore issued upon an affidavit made on 18 June, 1877, in which the plaintiff stated that a summons had been issued and returned not served—defendant not to be found, etc.—; that defendant was a non-resident but had property in this State, and was indebted to plaintiff's testator in a certain amount for which a cause of action exists, etc. His Honor refused the motion and the defendants appealed.

Messrs. W. Bagley, J. B. Batchelor and *Mullen & Moore,* for plaintiff.

Messrs. W. C. Bowen and *T. N. Hill,* for defendants.

*SMITH, C. J., did not sit on the hearing of this case.

FAIRCLOTH, J. The defendants entered a special appearance and moved: (1) To dismiss the action because there was no (514) service of the summons returnable to Fall Term, 1877, and no alias issued. (2) To dissolve the attachment for want of sufficient affidavits. The attachment issued before said Fall Term. In regard to the first motion His Honor after setting out the evidence finds as a fact, that service was had by publication, and on examination of the *whole* record we think his finding was correct and his refusal of the motion is sustained. In regard to the second motion we are of the same opinion. The affidavit of 18 June, is in the very words of the statute and that must be sufficient. In looking at the whole record it appears that the statute on this subject has been substantially complied with.

Affirmed.

Cited: Best v. Mortgage Co., 128 N. C., 352; *Page v. McDonald*, 159 N. C., 41.

LEWIS and LUCY LAFOUNTAIN v. THE SOUTHERN UNDERWRITERS' ASSOCIATION.

Supplemental Proceedings—Private Corporation—Parties.

1. Proceedings supplemental to execution lie against a private corporation created by a special act of the Legislature and organized for purposes of the private gain of its shareholders.
2. A creditor of such corporation, when the same is insolvent, is not compelled to pursue the remedy provided in Bat. Rev., ch. 26, sec. 22. (Whether the provisions of that section are mandatory in regard to corporations created under the general law—*Quere?)*
3. Creditors not parties to a supplemental proceeding are not entitled to share in any of the benefits arising therefrom.

MOTION by defendant to dismiss proceedings supplemental to execution, heard at Spring Term, 1878, of WAKE, before *Seymour, J.*

The plaintiffs obtained a judgment against the defendant company for $270.30, and execution issued thereon, and was returned un- (515) satisfied, and thereupon the plaintiffs instituted supplemental proceedings, alleging that the treasurer and managing agent of the company had choses in action and other property which should be subjected to the payment of the judgment. The defendant company was formed and organized under the laws of this State, and had its principal place of business in the city of Raleigh. Upon the hearing of the motion, His Honor gave judgment in favor of defendant and dismissed the proceedings, from which the plaintiffs appealed.

Messrs. J. W. Hinsdale and *R. G. Lewis,* for plaintiffs.
Messrs. Merrimon, Fuller & Ashe and *R. C. Badger,* for defendant.

Bynum, J. The question is,—do proceedings supplemental to execution lie against private corporations created by special acts of the legislature, and organized for purposes of the private gain of its shareholders?

It has been the uniform course and purpose of legislation in creating and regulating such bodies, to assimilate their rights and liabilities to those of *persons,* and it would be a strange oversight if they have not been subjected to as stringent processes of the law, to reach their assets for the satisfaction of their debts. By C. C. P., a corporation or any officer or member thereof may be compelled in supplemental proceedings to answer whether such corporation, officer or member thereof has any property of, or is indebted to, a judgment debtor; and it can hardly be contended that while such corporation or officer of it is thus compellable to disclose the effects and debts due and owing to the debtors of other judgment creditors, it is at the same time exempt from, in like manner, disclosing its property and effects for the benefit of its creditors, and that its debtors are exempt from accounting for what they owe the corporation for the benefit of its creditors. Supplemental pro- (516) ceedings are analogous to, and in fact in most aspects, a substitute for the process of garnishment, where an attachment had been sued out under our former system, prior to the Code. There, proceedings in garnishment could be maintained when the judgment debtor was a corporation, and an officer of the company could be garnisheed for money or property in his hands belonging or due to the corporation. *Everdell v. R. R.* 41 Wis., 395. There is no difference in this respect between natural persons and corporations. *Toledo R. R. v. Reynolds,* 72 Ill., 487.

Our attention has been called to Battle's Rev., chapter 26, which provides for the formation of private corporations by a general law, sec. 22, of which provides, that on the insolvency of the corporation ascertained by the return of an execution against it, unsatisfied and the filing of a complaint by the judgment creditor suggesting the insolvency of such corporation, it may be adjudged to be dissolved and suspended, and its effects applied *pro rata* to the payment of its debts. Without deciding that this section of the act is mandatory and the only remedy for creditors of corporations organized under that act, we do not think the creditor of a corporation created, not under that act, but by a special act of the legislature (Laws, 1874-'75, ch. 92) is compelled to pursue that remedy. In *Righton v. Pruden,* 73 N. C., 61, this Court

held that those creditors only, are entitled to the benefit of supplemental proceedings under the Code, who bring themselves within the provisions of the statute by instituting such proceedings. We do not think therefore that creditors of the corporation not parties to this proceeding will be entitled to participate with the plaintiffs in any of the benefits or losses which may result from it.

Reversed.

(517)

W. H. SHIELDS and others v. A. H. SMITH and others.

Witness—Party in Interest.

Under sec. 343, C. C. P., a party to an action is a competent witness as to a transaction between himself and a person at the time of such examination deceased, when the representative of such deceased person is not a party to the action.

APPEAL at January Special Term, 1878, of HALIFAX, from *Schenck, J.*

His Honor overruled the objection to the testimony of the witness upon the facts set out in the opinion of this Court. Verdict and judgment for defendants and appeal by plaintiffs.

Mr. T. N. Hill, for plaintiffs.

Messrs. Gilliam & Gatling and *Busbee & Busbee,* for defendants.

READE, J. The question being whether a transaction between Hyman and Smith and Briggs was *bona fide,* the said Smith, one of the defendants, was allowed to testify as a witness to a conversation between himself and said Hyman as to the very transaction while it was in process of arrangement—the said Hyman being dead at the time of the trial. This would be in conflict with C. C. P., sec. 43, which provides that no party to the action * * * shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, where the representative of such deceased person is a party. But here the representative of Hyman, the deceased person, is not a party and therefore the exclusion does not apply and the testimony was competent. This is the only question of importance, because the jury find the transaction *bona fide.*

Affirmed.

Cited: Hawkins v. Carpenter, 85 N. C., 482; *Morgan v. Bunting,* 86 N. C., 66; *Gidney v. Moore, Ib.,* 484; *Ledbetter v. Graham,* 122 N. C., 754; *McGowan v. Davenport,* 134 N. C., 530.

RICHARD TEN'BROECK v. WILLIAM H. ORCHARD and others.

Peading—Amendment—Practice.

It is not the province of a Judge to order the reformation of pleadings to remove defects, though upon application he may permit it to be done: *Therefore*, where on the trial of an action the Court below declared that the defenses were inconsistent and contradictory, and directed the defendant to elect on which one he would rely and amend his answer accordingly: *Held*, to be error.

(See *Tankard v. Tankard, ante*, 54.)

APPEAL at July Special Term, 1878, of CABARRUS, from *Cox, J.*

The plaintiff in his complaint claims a right to the possession of a tract of land known as the Phœnix gold mine, and alleges that the defendant, has tenant, refuses to surrender the premises. He further states that the defendant, as his tenant and agent, has for many years managed the property, collecting rents and other profits and disposing of some of the materials used in the business, and refuses to render any account thereof. The prayer is for a restitution of the possession, an account of the agency, and for damages.

The defendant, Orchard, denies these charges and says that the Phœnix gold mine company owned the land, and to carry on its mining operations borrowed money and issued bonds to a large amount, and to secure them conveyed the property by a deed in trust to one Joseph Jackson, then the secretary, in New York, who subsequently died, and James F. Stagg was substituted as trustee in his stead; that the defendant became the owner of the bonds, and, the company not being prosperous in their business or able to provide for their debts, the property was on 13 May, 1856, sold by the trustee and bought by the plaintiff as agent of and for the benefit of the bondholders and other creditors, and especially for the benefit of the defendant; that since the sale the plaintiff has repeatedly promised to pay de- (519) fendant's claim, and that his agent on 1 July, 1856, executed to him a note for $1,000, not in discharge, but as collateral security for debts, the evidence of which he had surrendered to the plaintiff.

The defendant further alleges in his answer that in March, 1858, he met the plaintiff in New York, and an agreement was entered into between them whereby the defendant was to be paid $5,000 for his interest, and he was to release to the plaintiff all claim in the property and the company; new machinery was to be put up by the plaintiff for the more effectual working of the mine, and the defendant was to remain

in charge and manage the business for a compensation of one-fourth of the earnings; and the plaintiff promised to have a written contract prepared embodying all these terms; that a written contract was prepared accordingly, omitting altogether the $5,000 to be paid to defendant, and that the defendant without reading the paper or hearing it read, through the false and fraudulent representations of the plaintiff, was induced to sign the same; that as soon as he made the discovery of the fraud he complained to the plaintiff, who promised as he did at the execution of the writing to correct any departure from their parol agreement.

The defendant further says that he originally acquired possession of the land as agent of said company, and has continued so to act since the sale, and is entitled to be paid for his services. The prayer is for a decree to enforce the trust under which the plaintiff holds the property, to annul the alleged fraudulent contract and set up the parol agreement preceding it; and for a general account and a sale of the property.

Other creditors have been made defendants also, and have filed answers not materially differing from that of their codefendant. The plaintiff replies denying the allegations and setting up a de-
(520) fence under the statute of limitations. The foregoing is a summary of what is contained in the answer and sufficient for the proper understanding of the ruling of the Court.

The cause coming on for trial the plaintiff tendered issues for the jury and the defendant proposed others, when the Judge remarked that he would settle the issues after the evidence was heard, and to this no objection was made. While the trial was in progress the Court declared that the defences were inconsistent and contradictory, and the defendants must elect on which one they would rely, and the answers would be amended accordingly. Thereupon a juror was withdrawn and a mistrial ordered, from which ruling the defendants appealed.

Messrs. Wilson & Son, for plaintiff.
Mr. W. H. Bailey, for defendants.

SMITH, C. J. (After stating the case as above.) On examining the answer we do not perceive such repugnancy in the defences as seems to have attracted the animadversion of the Court. The allegations all point to the necessity of an account, and the controverted facts are mostly if not altogether connected with, and necessary to be settled in order to the proper taking of the account and the ascertainment of the equities involved in it. But if such repugnancy is to be found in the answer, we know of no principle or rule of law which authorizes an

order for its reformation. Pleadings are prepared by counsel, and upon him rests the responsibility for imperfections which may render them unserviceable to the client. It is not the province of the Judge to order a correction of errors or the removal of defects, though on application he may permit this to be done. But inconsistent defences in an answer are not obnoxious to criticism when properly and distinctly set out. Incompatible pleas were admissible under our former system, and a defendant could deny the plaintiff's claim (521) and at the same time insist on its being paid, or the bar of the statute of limitations; so now, he may by the express words of the statute, "set forth by answer as many defences and counterclaims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both." C. C. P., sec. 102.

We presume the absence of previously prepared and clearly defined issues introduced confusion at the trial, to remove which the order was inadvertently made. There is error in the ruling of the Court, and the cause is remanded to the end that further proceedings be had in the Superior Court according to law.

Judgment reversed and cause remanded.

Cited: Reed v. Reed, 93 N. C., 465; *Johnson v. Lumber Co.,* 147 N. C., 252.

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*JAMES M. WHEDBEE, Ex'r., v. JAMES D. REDDICK.

Pleading—Counter-Claim.

1. The assignee of a note past due takes it subject to all counter-claims in favor of the maker and against the payee accruing before notice of the assignment.
2. Where a legatee borrows from executors the money of their testator and gives his note for its repayment, he may set up as a counter-claim agaist such note, the amount due him from the estate of the deceased, and is entitled to an account to ascertain that amount.

APPEAL at Spring Term, 1878, of HERTFORD, from *Henry, J.*

The plaintiff alleged that on 16 January, 1874, the defendant executed his promissory note under seal, payable to Samuel Winborn and George Cowper, executors of Abram Reddick, and upon the same day the defendant and his wife made a mortgage conveying cer- (522) tain lands to said executors to secure the payment of the note on or before 1 Febrruary, 1876; that on 16 April, 1877, said note was

*SMITH, C. J., did not sit on the hearing of this case.

assigned to the plaintiff, and that no part of the same has been paid. Judgment is demanded for the amount of the note, and a decree of sale of the mortgaged premises to satisfy the same.

The defendant answering says that the note was given for money paid to him by the executors of his father, Abram Reddick, and that a large part, if not all of it, was due him as one of the legatees under his father's will, and that according to an account filed by said executors it was shown that they were indebted to the estate in a considerable sum; but since 1 August, 1876, they have filed no account, and the defendant believes they have received amounts in excess of disbursements since that time; and in the ninth article of his answer he alleged "that he is entitled under said will to one-fourth of the sum admitted to be due on said 1 August, and to one-third of one-fourth as heir of his sister Emily, and one-third of the whole amount with interest, which he expressly sets up as a counterclaim to plaintiff's demand," and asked that the said executors be made parties to this action and an account be ordered and the share of this defendant be entered as a credit on the note.

The plaintiff in his reply alleges that the money for which the note was given was loaned to defendant by said executors with the distinct understanding that it was to be returned to them if needed for the purpose of administration; and demurs to article nine of the answer for that "the defendant has no ground of action because his alleged interest in said estate is a contingent one, dependent on the payment of debts and preferred legacies, and that his interest not being now due (523) can not be pleaded as a counterclaim."

Upon the hearing His Honor sustained the demurrer and gave judgment for plaintiff, and the defendant appealed.

Messrs. Merrimon, Fuller & Ashe, for plaintiff.
Messrs. Gilliam & Gatling, for defendant.

RODMAN, J. As the note was assigned to the plaintiff after it became due, he took it subject to all counterclaims of the defendant which accrued to him before notice of the assignment. The note is payable to Winborn and Cowper, executors of Abram Reddick, and the money loaned to the defendant is admitted to have been a part of the estate of Abram Reddick. It is alleged by the defendant and denied by the plaintiff, that at the making of the note it was expressly agreed in effect that the defendant might offset it by any sum which might be due him as one of the legatees of Abram Reddick. Independent of any express agreement to that effect we think that any sum which upon the

settlement of the estate of Abram Reddick shall be found payable to the defendant will constitute an equitable counterclaim. The demurrer to article nine of defendant's answer is therefore overruled. We think that the Judge below should have directed an account to be taken of the estate of Abram Reddick, and of the dealings of his executors therewith, in order to ascertain how much, if anything, is owing to defendant from that estate. The executors would be proper parties to the taking of this account, otherwise they would not be bound by it. We think also that if the executors so choose they are entitled to have all persons interested in the estate made parties so that all may be bound. The Superior Court (in term) has thus incidentally jurisdiction to take the administration account. Judgment reversed and case remanded to be proceeded in in conformity to this opinion. (524)

PER CURIAM. Judgment accordingly.

Cited: Rogers v. Gooch, 87 N. C., 442; *Reed v. Reed,* 93 N. C., 462; *Rountree v. Britt,* 94 N. C., 104; *Horne v. Bank,* 108 N. C., 120.

State on relation of THE COMMISSIONERS OF PENDER v. JAMES B. MCPHERSON and others.

Pleading—Suit by Commissioners.

A complaint by the board of commissioners upon the official bond of a county tax collector, alleging a default of payment to the county treasurer is demurrable if it fails to set forth directly and positively, and not by way of recital merely, that the treasurer improperly neglects or refuses to sue.

ACTION on an official bond tried at Fall Term, 1877, of PENDER, before *Moore, J.*

The facts applicable to the point decided by this Court appear in the opinion. His Honor sustained the demurrer to the complaint and the plaintiff appealed.

Messrs. Edw. Cantwell and *Bruce Williams,* for plaintiff.
Mr. D. L. Russell, for defendants.

RODMAN, J. This action is brought in the name of the State on the relation of the board of commissioners of Pender County against McPherson and his sureties upon a bond given by them upon his appointment as tax collector for that county. The breaches assigned are that McPherson collected sundry taxes and failed to pay the same to

the county treasurer upon demand by him, and also that he and his sureties by such failure became liable to certain penalties and interest which they have failed to pay. After stating the facts of which (525) the above is a summary, the complaint proceeds, "and that the said chairman of the board of commissioners by virtue of his and their said office, and upon the failure and refusal of the county treasurer of said county to institute this suit, has and have in conseqquence of that refusal and neglect of the county treasurer the right to institute this action in the name of the State on said official bond * * * and said action is brought by the present acting chairman of the board of commissioners of said county for the recovery of the sum of $2,840.48 and interest as aforesaid, and the penalties aforesaid as required by law." Wherefore the plaintiff demands judgment, etc.

Defendants demurred to the complaint and assigned for cause: "1st. That the action can be maintained only in the name and at the instance of the county treasurer and not by the board of commissioners." The second cause assigned was waived in this Court. The demurrer does not mean to say as a proposition of law (as it was contended for the plaintiff that it did) that in no case can an action on the bond of a tax collector be brought on the relation of the county commissioners, but only that an action so brought can not be maintained upon the facts set forth in this complaint.

The question made by the demurrer is whether upon the facts alleged in the complaint, the action can be maintained, being upon the relation of the county commissioners and not of the county treasurer.

In *Commissioners v. Clarke,* 73 N. C., 255, it was held that no action upon the bond of a sheriff for a failure to pay taxes could be brought on the relation of the commissioners except on the failure or refusal of the county treasurer to bring the action. Bat. Rev., ch. 102, secs. 39, 41.

Sec. 93, C. C. P., say the complaint shall contain: "2. A *plain* and concise statement of the *facts* constituting a cause of action," etc. That must mean a statement of *all* the facts necessary to enable the plaintiff to recover. By a "plain" statement we understand to be meant (526) a direct and positive averment of the fact, which does not leave the existence of the fact to be inferred merely from the existence of some other fact. This constitutes rules 3 and 5 in Stephen Pleading, 384, 388. Now it seems to us that the complaint in this case does not anywhere *directly* aver as a fact that the county treasurer had failed or refused to bring suit. It says "that the chairman, etc., *upon* the failure, etc., of the county treasurer, etc., has in consequence of that refusal the right to institute this action," etc., which is not the state-

ment of a fact but of a proposition of law. The complaint continues, "and the action is brought by the chairman, etc., as required by law," which also is the statement of a proposition of law; or to take the most favorable view of it, it is a statement that all the facts which the law requires to enable the plaintiff to recover, exist, which would certainly be too general a way of stating them. Perhaps the defect would have been cured by verdict. But the defendant pointed out the defect by his demurrer and the plaintiff by refusing to amend accepted the issue of the sufficiency of his complaint in form. The demurrer must be sustained.

Affirmed.

J. W. ALSPAUGH v. W. H. WINSTEAD and another.

Complaint—Answer—Verification.

Where a plaintiff filed his complaint in an action at the appearance term with a verification substantially in the form prescribed by C. C. P., sec. 117, and the defendant filed an answer thereto without such verification: *Held*, that the plaintiff on motion was entitled to judgment, as for want of an answer.

MOTION for judgment for want of an answer, heard at Spring Term, 1878, of FORSYTH, before *Buxton, J.*

The plaintiff filed his complaint at the appearance term with (527) a verification in the following words: J. W. Alspaugh being duly sworn, says that the facts set forth in the foregoing complaint of his own knowledge are true, except as to those matters stated upon information and belief, and as to those matters he believes it to be true. J. W. Alspaugh. Sworn to and subscribed before me this 15 May, 1878. C. S. Hauser, C. S. C.

The defendants filed separate unverified answers. At the close of the term the plaintiff demanded judgment upon his complaint, as for want of an answer, which was refused by the Court, on the ground of the insufficiency of the plaintiff's affidavit, and he appealed.

Mr. J. C. Buxton, for plaintiff.
Mr. A. W. Tourgee, for defendants.

SMITH, C. J. (After stating the case as above.) The only question before us is as to the form of the verification to the complaint, and its compliance with the requirements of the Code: The complaint shall contain a plain and concise statement of the facts constituting a cause

of action, without unnecessary repetition, and each material allegation shall be distinctly numbered. C. C. P., sec. 93 (2). The verification must be to the effect that the same (the pleading) is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true. *Ib.*, sec. 117.

These seem to be the only provisions of the Code applicable to the subject. The plaintiff swears that the facts set out in his complaint, except, etc., are true, that is, that they are truly stated—an expression equivalent to an averment of the truth of the complaint itself. We do not concur with the defendants' counsel in his criticism put upon (528) the words of the statute, and in the distinction he drew between a statement of facts and the facts themselves. The argument was that facts are truths, and that to say a fact is true, is but asserting that truth is true—a meaningless proposition. The form of the verification in our opinion admits no such absurd interpretation of its words, and their fair and reasonable meaning is that the facts, as stated, are correctly and truly stated; and this is all the Code requires. Besides, the Code is not rigid in exacting strict compliance with its very words. It prescribes the oath and gives the formula for it, but other words, substantially the same, will do. The Code only requires that they should "be to the same effect." We have been referred to no adjudication, and we presume none can be found to sustain the defendants' exception to the form of expression used in this case. In our opinion the complaint was properly verified, and the plaintiff was entitled to judgment according to his complaint. As it is, final judgment will be rendered here as it ought to have been rendered in the Court below.

PER CURIAM. Judgment accordingly.

Cited: Bank v. Hutchinson, 87 N. C., 22; *Alford v. McCormac,* 90 N. C., 151; *Griffin v. Light Co.,* 111 N. C., 438; *Kruger v. Bank,* 123 N. C., 18; *Phifer v. Ins. Co., Ib.,* 414; *Cole v. Boyd,* 125 N. C., 498; *Payne v. Boyd, Ib.,* 502; *Cook v. Bank,* 130 N. C., 184; *Corporation Commission v. R. R.,* 137 N. C., 21.

J. E. BOYETT v. THADDEUS VAUGHAN.

Pleading—Counter-claim—Reply.

1. Under C. C. P., sec. 105, a plaintiff may not only *reply* to a counter-claim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counter-

claim, the requirement being that it shall not be inconsistent with the compaint.

2. The plaintiff brought suit before a Justice for $105, due by account; the defendant pleaded a counter-claim for $200, due by note for part of the purchase money for a tract of land; judgment was rendered for defendant from which plaintiff appealed; in the Superior Court plaintiff was permitted to reply to the counter-claim, alleging an indebtedness of defendant of $332, upon a *parol* contract to pay (529) plaintiff so much per acre for what the land should fall short of its estimated quantity; and plaintiff obtained judgment for $200, having remitted the excess of his claim above that amount; *Held*, not to be error.

(SMITH, C. J., and BYNUM, J., *Dissenting.*)

APPEAL from a Justice's Court, tried at January Special Term, 1878, of HALIFAX, before *Schenck, J.*

The plaintiff in his complaint before the Justice of the Peace claimed that the defendant was indebted to him in the sum of $105 for lumber, and the defendant denied the debt and pleaded a counterclaim due by note from the plaintiff to him for $200. The Justice gave judgment in favor of defendant for $69.13, the excess of his counterclaim, and plaintiff appealed. When the case came on for trial in the Superior Court the defendant moved for judgment because there was no replication denying the counterclaim. The Court refused the motion and allowed the plaintiff then to put in his replication.

The plaintiff's replication alleged that the note was for part of the purchase money for land sold and conveyed to him by defendant, and that there was a parol agreement at the time of sale that the defendant should pay him $4 per acre for every acre the land might fall short of its estimated quantity of 400 acres, and that the deficiency was 83 acres, for which at that rate he set up a counterclaim. The counterclaim was denied by defendant.

Issues were submitted to the jury and they found that defendant did agree to pay for the deficiency in the land, and that the deficiency was 83 acres as alleged by the plaintiff. The land was conveyed to plaintiff by deed in January, 1874, and about a year thereafter reconveyed by him to defendant to secure the said note and other debts he owed the defendant. The defendant moved for judgment notwith- (530) standing the verdict which the Court denied and caused the following entry to be made: "Upon suggestion of a diminution of the record as shown by the transcript of the Justice, the plaintiff is permitted by the Court to file his replication and counterclaim to the answer and counterclaim of the defendant, and the transcript is ordered to be amended accordingly." The plaintiff was also allowed to remit $57.06 of his claim on account of the deficiency in the land, to which

defendant excepted, and thereupon judgment was rendered for plaintiff against defendant for $200 and interest from 21 January, 1878, and costs, and the defendant appealed.

Messrs. Mullen & Moore, for plaintiff.
Mr. T. N. Hill, for defendant.

READE, J. The question is as to what defense a plaintiff may make to a counterclaim on the part of the defendant. C. C. P., sec. 105, provides that "when the answer contains new matter constituting a counterclaim the plaintiff may * * * reply to such new matter, * * * and he may allege * * * any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer."

It is insisted that the plaintiff can not allege new matter to the counterclaim, but is confined to a reply to the counterclaim, or by denying it altogether, or by confessing and avoiding it. That is error, however, and grows probably out of considering that sec. 101 governs it. But sec. 101 relates only to the *answer.* Sec. 105, which relates to the *reply* governs it, and provides expressly that the plaintiff may not only reply to the defendant's counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint, or the new matter alleged in the answer, the only restriction being
(531) that it shall not be inconsistent with the complaint—"any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer."

It is not necessary that we should give a reason for this because a statute is arbitrary and is good without a reason; but it would be inconvenient and unjust if it were otherwise. Before C. C. P. a defendant could plead a setoff to plaintiff's claim and defeat the plaintiff's recovering in whole or in part as the case might be, but the defendant could not recover his setoff and have judgment against the plaintiff; but under C. C. P. he may not only defeat the plaintiff, but have judgment against the plaintiff for the excess of his counterclaim. And it would be manifestly unjust to deprive the plaintiff of a defense to the counterclaim which is set up not only to defeat his action but to subject him to a judgment upon the counterclaim.

In our case the plaintiff claims a lumber bill against the defendant. Very well, says the defendant, I owe it, but you owe me a balance for a tract of land you bought of me. Very well, says the plaintiff, I owe it, but you owe me on account of that same land transaction. It was certainly contemplated by the C. C. P. that all these matters might be settled in the same suit.

We do not think that there is any force in the defendant's objection that the plaintiff can not prove his new matter by *parol,* because he does not seek by parol to contradict the written contract about the land. The contract by parol which he sets up is consistent with the written contract and is outside of it. Judgment affirmed and judgment here.

SMITH, C. J., *Dissenting.*—In my opinion there was error in permitting the plaintiff to put in his replication and in the judgment which was rendered:

A setoff is but a defense to the action, and its office is to make an appropriation of money which the plaintiff owes the defendant to the discharge in whole or in part of the demand asserted in (532) the suit. It can go no further than to defeat the action. It differs from a counterclaim only in the disposition made of the excess, if there be an excess, of the counterclaim over the sum due the plaintiff, and in allowing the defendant to have judgment for such excess. They are essentially alike in the rules of pleading which are applicable to them. I think it clear from the authorities and upon sound reasoning that the defendant alone can set up the defense. Some of them will be referred to. In *Ulrich v. Berger,* 4 Watts & Sergt. (Penn.) 19, the Court thus lays down the doctrine: Setoff is a creature of positive law and exists only when it is allowed by law. Our act allows it only *in favor of the defendant,* and there consequently can not be such a thing as a setoff against a setoff. A law suit might become very inconveniently complicated were it otherwise, as the contest might in the end be shifted from the original ground and the plaintiff *recover a different and greater* demand than the one laid in the declaration. The same doctrine was declared in *Gable v. Perry,* 13 Penn., 181. So in *Hall v. Cook,* 1 Ala., 629, the Court says: Where a defendant proves a setoff to a greater amount than the demand sued on, the statute of setoff will not allow the plaintiff to rebut the defendant's proof by showing that the latter is indebted to him in a large sum which is not in suit. The plaintiff is permitted to show that the setoff is not admissible or that it is a debt which he is not bound by the law to pay, but beyond this he can not go, in his replication or proof;—citing 3 Starkie Ev., 1317. And this is affirmed in the subsequent case of *Hudwell v. Scott,* 2 Ala., 569. The rule as collected from the adjudged cases is thus laid down by a recent writer on the law of setoff: The plaintiff can not avail himself of a setoff against a setoff, but is restricted to showing that the setoff is inadmissible, or is a debt which he is not bound to pay. Waterman on Setoff, sec. 595.

The force of the reasoning can not be successfully resisted.
(533) It is obvious that if the plaintiff could reply a setoff, then equally could the defendant set up a defense to the new claim, and the pleading instead of tending to a single issue might expand and branch out into numerous issues. In the present case, instead of trying two actions, which the plea of setoff itself involves, there were three tried; and there might have been an indefinite number upon the principle that permitted the third. When the plaintiff brings his suit upon any particular demand he makes his election, and, unless under our liberal system of amendment, can not enforce in that action any other.

The new system of pleading and practice has not changed the rule. The counterclaim defined in the Code is a defense which the defendant and no one else can set up. It declares that the answer of the defendant must contain a general or specific denial, etc., or "a statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition." Sec. 100. And the counterclaim itself is described in the next section—"it must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." No other replication is required of plaintiff than to controvert the counterclaim or to defend himself against it. Sec. 105.

In *Williams v. Jones,* 1 Bush, 627, the very point now under discussion was decided in Kentucky. "It is also insisted," says the Court, "that under the pleadings and proofs, the account exhibited with the plaintiff's reply should not have been allowed to extinguish or discharge so much of the debt pleaded as a setoff by the appellant Davis; but although the account is not and *could not have been pleaded in reply as a setoff,* because as suggested a reply is restricted by the Civil Code, sec. 133, to statements constituting a defense to the setoff or counterclaim of the defendant, it was proper to suggest in reply as a defense to the setoff of Davis that the goods for which he claims were sold
(534) and delivered in payment of the appellee's account, and we think the facts proved authorized the presumption that such was the case."

There is another insuperable objection to the allowance of the plaintiff's counterclaim: In amount it was for a sum in excess of a Justice's jurisdiction; one or the other of two consequences follow—either the replication was inadmissible or it destroyed the jurisdiction. The plaintiff's counterclaim was for $332 and unless it could have been originally sued on before a Justice, could not in this way be brought under his jurisdiction. That jurisdiction is limited to claims not exceeding $200 and the mandates of the constitution and statute can not in this or any

other way be evaded. The condition of the cause produced by the ruling of the Court was substantially to make the claim of the plaintiff $437, consisting of his account for the lumber sold and for deficiency in land, and that of the defendant's setoff of $200. These respective claims are adjusted at their full amount, and the balance thus ascertained reduced to the sum of $200. It is true the action as originally instituted was within the jurisdiction of a Justice, but that jurisdiction would have been ousted by an increase above $200 of the plaintiff's claim through an amendment of the complaint, and he would have been compelled to dismiss the suit. This effect conclusively proves this want of power to make the amendment, or which is the same thing, increase the demand by a new counterclaim, and thus defeat an action rightfully begun. If the plaintiff asks this, it was in substance assenting to a nonsuit or dismissal, for the Justice could not allow the amendment and take cognizance of the cause. The like result must follow a similar action of the Court, because the Superior Court alone has jurisdiction of a cause brought before it on appeal when the Justice himself had it. Any change which would have defeated the jurisdiction of the Justice, if allowed when the cause was depending before him, will have the same effect, if allowed in the appellate Court. (535)

It is to be further remarked that there is a variance in the sum demanded in the complaint and that adjudged in the Superior Court. This the rules of pleading and practice do not allow, as the judgment would be reversed on a writ of error where that mode of proceeding prevails, it can not be sustained on our review of it on the appeal. *Singleton v. Kennedy,* 1 R. C., 629.

I am therefore of opinion that the Court erred in allowing the plaintiff's replication of a counterclaim, and in adjudging to the plaintiff a sum in excess of his original demand.

BYNUM, J. I concur in the dissenting opinion of the Chief Justice.

PER CURIAM. Judgment affirmed.

Overruled: Boyett v. Vaughan, 85 N. C., 363.

Cited: Boyett v. Vaughan, 86 N. C., 725; *Houston v. Sledge,* 101 N. C., 640; *Heyser v. Gunter,* 118 N. C., 967.

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

Pleading—Complaint—Demurrer.

1. A complaint (or declaration) which merely states a conclusion of law, and not the facts from which that conclusion is derived, is demurrable both at common law and under the C. C. P.: *Hence,* a complaint which simply alleges that the defendant is indebted to the plaintiff and that the debt has not been paid, is subject to demurrer as not stating a sufficient cause of action.
2. If a declaration (or complaint) in debt be upon simple contract, the *consideration* must be set forth with the other facts. If it be upon a specialty, the specialty must be set forth and that imports a consideration.

APPEAL at Spring Term, 1878, of CHOWAN, from *Furches, J.*

The plaintiff complains:

1. That the defendants are indebted to him in the sum of $488.70 at 8 per cent interest per annum from 1 December, 1875.

(536) 2. That no part of said debt has been paid.

3. Therefore the plaintiff demands judgment against the defendants (for said sum) and costs.

The defendants demur:

Because the facts stated in said complaint are insufficient to constitute a cause of action, in that it does not contain a plain and concise statement of the facts constituting the plaintiff's cause of action.

The Court overruled the demurrer and offered to allow the defendants to answer, which they refused to do. Thereupon judgment was rendered upon the complaint in favor of the plaintiff for the sum demanded, and the defendants appealed.

Messrs. Mullen & Moore and *J. B. Batchelor,* for plaintiff.

Messrs. Gilliam & Gatling, for defendants.

READE, J. "A declaration is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's cause of action." 1 Chitty, Pl. 240. Observe, that it is not to state that there is a cause of action, but the *"circumstances"* which constitute the cause of action. "The general requisites or qualities of a declaration are, * * *. Second, that it contain a statement of *all the facts* necessary in point of law to sustain the action, and no more; third, that these circumstances be set forth with certainty and truth." 1 Chitty, Pl. 244. Observe again, that *"all the facts* are to be set forth. If a declaration in debt be upon *simple contract,* the *consideration* must be set forth with the other facts. If it be upon a *specialty,* the specialty must be set

forth, and that imports a consideration." Chitty, Pl., 362, 363. The form of a declaration on *simple contract* is as follows: A B, the plaintiff in this suit * * * complains of C D, the defendant in this suit * * * for that, whereas the defendant on — was (537) indebted to the plaintiff in $— for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, etc., or for the price and value of work then done, etc., or for money lent, etc. Arch. N. P., 297. The form of a declaration on specialty is as follows: A B, the plaintiff, etc., complains, etc. Whereas, the defendant, etc., by his certain writing obligatory sealed with his seal, and now shown to the Court, etc., acknowledged himself to be held and firmly bound unto the plaintiff in the sum of $—, etc., Arch. N. P., 304. A defect in the declaration appearing on the face of it could be taken advantage of by demurrer.

It is plain therefore that under the former mode of pleading the declaration in this case is fatally defective. It states a *cause of action,* viz., indebtedness; but it states not one single *"circumstance"* or "fact" constituting the cause. But then it is said "that all the forms of pleading heretofore existing are abolished." C. C. P., sec. 91. True, but still, *all form* is not abolished, for the same C. C. P., secs. 91, 92, prescribes "that the complaint shall contain a plain and concise statement of the facts constituting the cause of action without unnecessary repetition, and each material allegation shall be distinctly numbered."

Observe that in the new, as in the old form, *the facts* constituting the cause of action must be stated, with this addition in the new over the old, that each material fact shall be separately numbered. The object of the declaration in the old forms was to inform the defendant fully as to the facts, so that he might make his defense both by the proper pleas and by proofs, and that the jury and the Court might see what they had to try and to decide. This was not a matter of mere form, but of substance. And there has been no relaxation of the requisite in the new form, and no alteration from the old, except to require the greater particularity of separately numbering every material fact. Why require them to be numbered if they are (538) not required to be stated?

There is not in this case a single fact stated to show whether the complaint is on a simple contract for goods sold and delivered, or for work and labor, or for money lent, or for any like matter, or whether it is upon a bond or other specialty, or whether it be not for some alleged tort. The fault in the complaint seems not to have been inadvertent, for we clearly intimated it when the case was before us heretofore, 77 N. C., 65, and suggested an amendment. When the case was before us

heretofore it was upon the demurrer of the defendants that the Court had no jurisdiction because of the nonresidence of the parties. But the fact not appearing upon the face of the complaint, the demurrer was overruled and judgment given below for the plaintiff. We held that there was no error in overruling the demurrer, but that there was error in giving judgment for the plaintiff, because upon overruling a demurrer the judgment is not for the plaintiff, but *respondeat ouster*. So that we sent the case back with direction to allow the defendants to answer, if they would, and if not, there would be judgment for the plaintiff, as for want of an answer. But then we called attention to what might be held to be a defect in the complaint which had not been pointed out by the defendants, but which might nevertheless prevent a judgment for the plaintiff, viz., that no facts sufficient to constitute a cause of action were stated in the complaint, and we suggested that if so it could be remedied by an amendment, with leave. And now the case is before us upon demurrer to that fault in the complaint which we then suggested, but which was not formally before us for decision. In sustaining the demurrer as we now do, the ordinary course would be to reverse the judgment below which was for the plaintiff, and give judgment here for defendants; but that might work a hardship (539) upon the plaintiff, as that might defeat his right altogether, if he has one, and as we think His Honor must have been misled by what we said in the case before, viz., that if the defendant refused to answer, then there would be judgment for the plaintiff, we will not give the defendant a judgment here now except for the costs; and will remand the case to the end that the plaintiff may move to amend, if so advised, and if leave be had and the amendment made, then the case shall proceed as if upon the first filing of the complaint, with leave to the defendants to plead or demur as they may be advised. If the plaintiff shall not amend, then judgment will be entered below for the defendants as upon a demurrer sustained.

Reversed and remanded; the plaintiff to pay, and the defendants to recover costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Greensboro v. Scott, 94 N. C., 184; *Knight v. Killebrew,* 86 N. C., 400, 403; *Pope v. Andrews,* 90 N. C., 401; *Rountree v. Brinson,* 98 N. C., 107; *Boyden v. Achenbach, post* 542; *Skinner v. Terry,* 107 N. C., 103; *Burbage v. Windley,* 108 N. C., 360; *Lassiter v. Roper,* 114 N. C., 202; *Burton v. Mfg. Co.,* 132 N. C., 19.

A. H. BOYDEN v. ACHENBACH.

Roads—Presumption of Dedication to Public Use.

1. The mere user of a footpath or neighborhood road however long the time, will not raise a presumption of its dedication to public use, in the absence of accompanying cimcumstances (as if it had an overseer, etc.,) from which such dedication might be presumed.
2. In an action to enforce a right of way, the complaint should set out *how* the plaintiff acquired such right.
3. A private action does not lie for obstructing a public way except for a special injury sustained by the paintiff.

APPEAL at January Special Term, 1878, of ROWAN, from *Kerr, J.*

The plaintiff claimed that he was entitled to a right-of-way and had acquired an easement over the land of the defendant, (540) and that defendant had obstructed the same. The defendant in his answer denied the plaintiff's allegation and insisted that if he ever possessed such right it was lost by operation of the statute of limitations. The plaintiff introduced evidence tending to show that he and those under whom he claimed had peaceably and of right, and adversely to all persons for forty years, so used the right-of-way. The evidence offered by defendant tended to show that he purchased the land in the year 1873, and for more than three years before the commencement of this action had closed said way and refused to allow the plaintiff or any other person to use it, although the plaintiff always claimed the right to do so. The defendant insisted that if plaintiff had ever acquired an easement it was barred by the statute. Under the instructions of the Court the jury found for the plaintiff and an order was made in accordance with the demand in the complaint, commanding the defendant to remove the obstructions, etc. From this judgment the defendant appealed.

Mr. J. S. Henderson, for plaintiff.
Messrs. J. McCorkle and *W. H. Bailey,* for defendant.

READE, J. In England there were three kinds of public ways, one called *"iter"* over which the public passed on foot; another called *"actus"* over which they passed on foot and on horseback; and a third called *"via"* over which they passed on foot and on horseback and in vehicles with wheels. *S. v. Johnson,* 61 N. C., 140. Coke Litt., 56 a, b, Bacon, Ab. "Highways, A." In that old and thickly populated country where lands were of great value, the rights of the public and of indi-

viduals were sharply defined, and all of these roads were im-
(541) portant. The *"via,"* however, was most important and by pre-
eminence was called *the highway.* And to the highway the robbery acts were confined.

Distinguished from these was the incorporeal hereditament, easement, or right-of-way which one acquired over the land of another in which the public had no interest whatever. This right-of-way was acquired either by prescription, being used for a time whereof the memory of man runneth not to the contrary, or by grant. If by grant the grant itself was the proof, or the grant being lost, twenty years user raised a presumption that it once existed. In our new country the "highways" alone were of much public importance. These were laid off and established by order of Court and kept up at the public charge. To the highways were added "cartways" for persons who occupied land to which there was no public highway. These were also laid off and established by order of Court, and when established they were for public use as well as for the use of the individuals at whose instance they were ordered. See Rev. Code and Bat. Rev., title *Roads,* etc. We have also a late act allowing roads to be laid off to places of public worship. Rev., ch. 104, sec. 45.

We have no other kinds of public roads in this State. The "footpaths" and "neighborhood roads" have never had that importance. They are understood to be used by leave, and they are closed when the owners of the lands desire to put them under cultivation or to enclose them. Their use can not be claimed by prescription, and a grant will not be presumed from any length of use under such circumstances. It is not, however, intended to be denied that where the public has used a way as a public road or cartway just as if it had been laid off by order of Court—as if it has had an overseer and hands and been worked and kept in order—for more than twenty years, it will be presumed
that it was so laid off; or that the owner of the land had dedi-
(542) cated it to the public; but the mere user of footpaths and neighborhood roads without such accompanying circumstances will raise no such presumption, however long the time. In *S. v. McDaniel,* 53 N. C., 284, the jury found a special verdict that the road had been used by the neighborhood for sixty years in going to church, to mill, and to public highways on foot, on horseback, and in vehicles; and yet it was held not to be a public road which it was indictable to obstruct. In this country where land can not be cultivated without being enclosed, it would be a burden which farmers could not bear, if they had to make lanes of every pathway which has been used over their lands for twenty years. And the burden would be scarcely less upon the

public, for every highway must have an overseer and hands to work, and bridges, and be kept in good repair, or the public authorities are indictable.

So much has been said because it is uncertain from the record what sort of way or road is contemplated in this case. The complaint sets out that plaintiff is cultivating a tract of land from which he had a right of way over the adjoining lands to a highway. We infer that he means over the defendant's lands, but he does not say so. Nor does he say *how* he acquired the right. And we have said in *Moore v. Hobbs ante,* 535, that it was not sufficient that the complaint should state that the defendant was indebted to the plaintiff, but that it must state *how* he was indebted,—the facts and circumstances. So here the complaint ought to have stated *how* he had the right of way,—is it a highway? or a cart-way? Or did he claim by prescription? or by grant? While we would infer from the complaint that probably the plaintiff had in his mind a right of way, an incorporeal hereditament, yet the issue and verdict are upon a totally different idea. The issue and the only issue was: "Has the *public* had the use of the road mentioned for forty years?" Verdict: "Yes." That clearly indicates not a private way or incorporeal hereditament, but a (543) public highway, or at least a cart-way. There is certainly no finding to the effect that the plaintiff is entitled to a *private way;* but the most that can be made of it, is, that he is entitled as one of the public to a public way. And for obstructing a public way he is not entitled to a private action except for a special injury—as for throwing a log, over which he stumbles, or a pit into which he falls, and is injured. The answer fully denied the complaint, and both sides offered evidence. The case states that the plaintiff offered evidence tending to support his claim. And thereupon His Honor, instead of leaving the testimony to the jury, instructed them the plaintiff was entitled to their verdict. This of course was error.

We cannot satisfactorily decide as to the statute of limitation, because it is uncertain what the action is intended to involve. If the right of way is claimed as an incorporeal hereditament, as is probable, then six years is the statute. C. C. P. Probably upon leave had, the pleading may be amended.

Venire de novo.

Cited: Boyden v. Achenbach, 86 N. C., 398; *State v. Purifoy, Ib.,* 681; *Kennedy v. Williams,* 87 N. C., 6; *Pope v. Andrews,* 90 N. C., 401; *State v. Stewart,* 91 N. C., 566; *Stewart v. Frink,* 94 N. C., 487; *Rountree v. Brinson,* 98 N. C., 107; *State v. Wolf,* 112 N. C., 894;

State v. Fisher, 117 N. C., 739; *Collins v. Patterson,* 119 N. C., 603; *Wiseman v. Green,* 123 N. C., 396; *S. v. Lucas,* 124 N. C., 806; *Milliken v. Denny,* 141 N. C., 227; *Tise v. Whitaker,* 146 N. C., 376; *Bailliere v. Shingle Co.,* 150 N. C., 633; *Snowden v. Bell,* 159 N. C., 500.

E. C. CHASTAIN v. NATHAN COWARD.

Exceptions—Consideration—Practice.

1. Where the decision of all questions both of law and fact is left to the Judge below under the provisions of C. C. P., sec. 240, his findings and conclusions will not be reviewed by this Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out.
2. Where one agrees to take a judgment against a third party in satisfaction of a debt, all inquiry as to the amount realized on such judgment is irrelevant in a suit for the recovery of the original debt.

APPEAL at Fall Term, 1877, of JACKSON, from *Furches, J.*

(544) By consent of parties a jury trial was waived and His Honor found the following facts: In 1872 or '73, the plaintiff agreed to sell defendant a tract of land in Jackson county for $2,300; and in 1872 the defendant contracted to sell to one J. G. Chastain and others a tract of land in Clay county, and executed to them a bond for title, they paying part cash and giving their notes for the balance of the purchase money, and upon failure to pay the notes, the defendant recovered judgment against them at Fall Term, 1874, of said Court for the amount due thereon, and decree for the land to be sold for its payment.

The agreement between plaintiff and defendant as aforesaid was not reduced to writing until 10 March, 1875, and upon entering into settlement of the balance due the plaintiff, the defendant having previously paid a part of the price, it was ascertained that it was about the same amount as that recovered in the judgment in favor of defendant against said J. G. Chastain and others. And thereupon the defendant made an assignment of said judgment to the plaintiff, and the plaintiff executed to him a bond for title to the land in Jackson county, and from that time took control of the judgment against said parties, and after indulging them for some time, he directed the sheriff of Clay county to sell the land for its payment, attended the sale and bought the land at $100, one Thomas Chastain being present and forbidding the sale under a claim of title in himself. It was in evidence that the land unincumbered was worth about $1,500, and that doubts as to the title prevented it from bringing a better price at the sale. The testimony

as to the value of the land was objected to by plaintiff, and the objection overruled. The plaintiff now claims title to the land in Clay county.

Upon these facts it was contended by the plaintiff that the assignment of 10 March as aforesaid, was only for the proceeds or what might be recovered on said judgment, and insisted that the (545) defendant owed him a balance upon their original contract and demanded judgment in this action for the same; but the defendant insisted that the plaintiff took the assignment of the judgment in full satisfaction of the balance due him for the land in Jackson county; and His Honor being of opinion with defendant adjudged that plaintiff execute a deed to him conveying the said land in Jackson county, from which ruling the plaintiff appealed.

Messrs. Busbee & Busbee, for plaintiff.
Mr. J. H. Merrimon, for defendant.

FAIRCLOTH, J. The principal fact controverted in this case was the payment of the balance of the purchase money for the land. That turned on the inquiry whether the asignment of the proceeds of a judgment, referred to in the case, was in full satisfaction of said balance. By consent of parties all issues were referred to His Honor, and the finding of fact was in the affirmative. Upon his finding of facts the judgment of the Court was that plaintiff make title by a deed of conveyance to the defendant. No exceptions to the admission of evidence, nor to the conduct of the trial below, were made, and we see none that could be made here, and the judgment was proper according to the facts found. If the allegation of the plaintiff had been sustained by the finding of the facts in regard to the assignment of the proceeds of the judgment, then he would have been declared to hold the land purchased under said judgment, in trust for the defendant. This position he disclaims, and insists that the land purchased belongs to him, which is not denied by the defendant. As no judgment was rendered on the counter claim below, we do not consider it. Let final judgment be entered here.

Affirmed.

Cited: Currier v. McNeill, 83 N. C., 176; *Bryant v. Fisher,* 85 N. C., 69; *Mining Co. v. Smelting Co.,* 99 N. C., 445.

(546)

J. C. MEEKINS v. C. E. TATEM.

Exceptions—Practice.

1. In order to obtain a review by this Court of proceedings in the inferior tribunals, the exceptions taken in the Courts below must be distinctly pointed out, together with the facts upon which they depend. This Court will not search for error through obscure and voluminous records.
2. The only exceptions to this rule in civil causes are where there is a want of jurisdiction, or where, upon the whole case, it is apparent that the plaintiff is entitled to no relief.

PROCEEDINGS instituted under Bat. Rev., ch. 91, for processioning land, heard on appeal at Spring Term, 1878, of TYRRELL, before *Furches, J.*

The processioner while running one of the lines was forbidden by the defendant to proceed further, and thereupon he desisted and made report to the Probate Judge. The Probate Judge appointed five freeholders to appear with the processioner on the premises and establish the disputed boundary. This was done, report made and confirmed, and defendant appealed to the Superior Court. On the hearing of the cause the plaintiff moved that the defendant be required to file his exceptions, which motion the Court refused, and then reversed the judgment of the Probate Judge and remanded the case. From this the plaintiff appealed to this Court.

Messrs. J. B. Batchelor and *Mullen & Moore,* for plaintiff.
No counsel for defendant.

SMITH, C. J. (After stating the case as above.) The appellant "shall cause to be prepared a concise statement of the case, embodying the instructions of the Judge as signed by him, if there be any exception thereto, and the requests of the counsel for instructions, if
(547) there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged." C. C. P., sec. 301. Instead of this we have a meagre and unsatisfactory recapitulation of the several proceedings which constitute the record itself. No exceptions are taken, no errors pointed out, and no concise statement of facts to enable us to pass upon the correctness of the rulings of the Judge. All that the record discloses is the refusal of the Court to grant the plaintiff's motion, the reversal of the judgment of the Probate Judge, and the order remanding the cause.

Why this was done, and whether there were sufficient grounds to warrant the order, do not appear. It may be that some of the proceedings were not in conformity to the requirements of the act, as interpreted by him, to give such conclusive effect in determining the title to land. We are left to grope our way though a voluminous record, and examine each part of it, and ascertain if every thing was regularly and legally done. We shall not enter upon this task. The well settled practice of this Court repeatedly announced is to pass only upon such exceptions as were taken in the Court below, and therewith the facts upon which they depend must be distinctly presented. The only exception in civil causes is where there is a want of jurisdiction, or where upon the whole case it is apparent that the plaintiff is entitled to no relief. We must therefore and for these reasons affirm the judgment.

Affirmed.

Cited: Bank v. Creditors, 80 N. C., 9; *Melvin v. Stephens,* 82 N. C., 283; *Bank v. Graham, Ib.,* 489; *Corbin v. Berry,* 83 N. C., 27; *Wellons v. Jordan, Ib.,* 371; *Green v. Dawson,* 92 N. C., 61; *Harper v. Dail, Ib.,* 394; *Halstead v. Mullen,* 93 N. C., 252; *Worthy v. Brower, Ib.,* 344; *Davis v. Council, Ib.,* 725; *Mfg. Co. v. Simmons,* 97 N. C., 89; *Dupree v. Tuten, Ib.,* 94.

(548)

ISABELLA BURNETT and others v. THOMAS W. NICHOLSON and others.

Damages—Restraining Order.

The defendant under an injunction or restraining order can only recover damages upon the dissolution of the one or the vacation of the other, by showing want of probable cause for the plaintiff's action, or malice in its legal acceptance as applicable to such cases.

MOTION by defendants heard at January Special Term, 1878, of HALIFAX, before *Schenck, J.*

The material facts appear in the opinion. The defendants moved to have the damages alleged to have been sustained by them, by reason of the issuing of a restraining order, assessed by a jury; which motion was refused by His Honor, who held that if they were entitled to damages, their remedy was by an action for malicious prosecution which would not lie until final judgment in this cause, from which ruling the defendants appealed.

Messrs. Spier Whitaker and *J. B. Batchelor, for* plaintiffs.
Messrs. Mullen & Moore and *Walter Clark,* for defendants.

SMITH, C. J. The plaintiffs were the owners of a public grist mill on the waters of Fishing creek and brought their action to restrain the defendants from constructing a dam and erecting another mill on the same stream about eleven hundred yards below, on the ground that the water would be ponded back and interfere with or obstruct the operations of their mill and that the public health would be also endangered. On application to the Judge for an injunction he appointed a time and place, of which notice was to be given the defendants
(549) where he would hear the motion, and meanwhile he issued a restraining order and suspended all further work on the dam. On hearing the motion and numerous conflicting affidavits as to the effect upon the plaintiff's mill of the proposed dam, the Judge refused the motion, discharged the restraining order, and directed a reference to the clerk to ascertain the injury done to the defendants by the restraining order under which they were compelled to discontinue their work.

On appeal this ruling was affirmed in the Supreme Court at January Term, 1875. At Fall Term, 1876, the referee made his report ascertaining the defendant's damages to be seven hundred and eighty-three dollars. To this exception was made and a jury trial demanded by plaintiffs. At January Term, 1878, on the defendants' motion to have their damages arising from the restraining order assessed by a jury, the Court adjudged that the defendants were not entitled to recover their alleged damages, at least at this stage of the case and in this mode of proceeding, and that they go without day and recover their costs.

To the refusal of the Court to allow them to proceed and assess their damages before the jury, the defendants except and appeal. This is the only point now before us and we are of opinion that there is no error in the ruling of the Court.

When an order granting an injunction is made, it is necessary that the party applying to the clerk to issue it shall first give a written undertaking with sufficient sureties to the effect that the plaintiff will pay to the person enjoined such damages not exceeding a sum to be specified "as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto." C. C. P., sec. 192. The Court may however postpone acting upon the application until the persons to be effected can be heard, and in the mean-
(550) time restrain the defendant. Sec. 193. In the latter case no such indemity is required.

We are not prepared to say that in a proper case the defendant may not seek redress for an injury done by such temporary restraining order as well as by an injunction. Both operate in the same way and produce the same results in a greater or less degree. The undertaking re-

quired by the statute in one case does not impose any new liability upon the plaintiff, but simply provides an additional security for that which already exists. But in neither case can damages be recovered by a defendant for loss incurred through an action *bona fide* brought and prosecuted by a plaintiff for his relief. The right of a defendant to sue does not depend solely upon the result of the action, but upon the want of probable cause and of good faith in its prosecution. In this respect actions in which an injunction may issue stand upon the same footing as others. There can not indeed be any action in which inconvenience and loss are not sustained by the defendant, but the penalty imposed on the plaintiff is only the payment of the costs of the suit. This will appear from an examination of adjudicated cases.

In *Williams v. Hunter,* 10 N. C., 545, the action was brought to recover damages for suing out an attachment wrongfully, and levying on the plaintiff's mare, and TAYLOR, C. J., said: "I can not distinguish the case from an action for maliciously holding a party to bail or suing out a writ when nothing was due, in which case the action is malice and want of a probable cause. For although the plaintiff in the first action should fail to recover, yet unless it was brought with a view *to oppress the defendant and with a knowledge that he had no sufficient cause of action,* it will not give the injured party a right to sue."

In *Kirkman v. Coe,* 46 N. C., 423, the doctrine in the above case is so far modified as not to require to be shown the element of malice, and it is said, as the attachment bond required is to indemnify against wrongfully suing out an attachment, the idea (551) of malice as an essential ingredient of the action is negatived. In delivering the opinion, PEARSON, J., thus states the law: "To maintain an action like the present it is sufficient to show a want of proboble cause. To maintain an action for slander it is sufficient to show malice. To maintain an action for malicious presecution both a want of probable cause and malice must be shown."

In *Davis v. Gully,* 19 N. C., 360, the plaintiff brought his action on a bond given by the defendant upon suing out a writ to sequester certain slaves in the plaintiff's hands and failed. GASTON, J., in the opinion says: "The words 'for wrongfully bringing suit in the Court of Equity' must be interpreted as the analogous words in the condition of an attachment bond, have been interpreted—the bringing of a suit maliciously and without probable cause," and he concluded thus: "The purpose of the bond in the case was to secure the plaintiff against the insufficiency of the common law remedy if the complaints in the suit in equity should be unable to respond in damages."

So in *Falls v. McAffee,* 24 N. C., 236, the action was upon a bond to

indemnity the plaintiffs "for all damages they might sustain by reason of the wrongful suing out of an injunction" by defendants to stop the working of a gold mine. It was proved that in consequence of the injunction the working of the mine had been stopped for three years and by reason thereof the pits had caved in, the ditch filled up, and the work and other implements injured, and that if not restrained the plaintiff would have made during the interval after deducting all expenses a profit of three thousand four hundred dollars per annum. Evidence was offered to show a want of probable cause and malice in the defendant which the Court thought insufficient, but the Court reserved this question, allowed the jury to assess the damages, as they did at two thousand and ninety-four dollars. The Judge afterwards set aside the verdict and (552) ordered a nonsuit from which there was an appeal. The Court, RUFFIN, C. J., delivering the opinion says: "The counsel for the plaintiff has not contended that the Superior Court erred in its opinion as to the nature of this action, but admitted that *it can only be maintained by showing a want of probable cause for the former suit and also in a legal sense malice in bringing it.*" He then proceeds: "Thus taking it that the ingredient of malice is absolutely negatived, and the present defendants, instead of having brought a groundless suit for the purpose of oppressing the present plaintiffs and subjecting them to losses, appear only to have honestly sought from the preventive justice of the Court a remedy against impending injury to their rights, or supposed rights, until that right could be investigated and established. It has turned out indeed that these parties had not the right they then believed they had, and that the present plaintiffs have sustained a heavy loss from the operation of the process against them. But much as that is to be regretted it can not be repaired in the present action, as the defendants prosecuted that litigation from sound motives, just as much so as the present plaintiffs are now prosecuting their suit."

The principle thus announced is decisive of our case, for surely, if the defendants were not liable upon such a bond, neither can they be when no bond is given for damages, which it was the very purpose of the bond to secure when the plaintiffs were entitled to recover them. We therefore affirm the judgment.

Affirmed.

Cited: Ely v. Davis, 111 N. C., 26; *Timber Co. v. Rountree,* 122 N. C., 50; *Mahoney v. Tyler,* 136 N. C., 43.

(553)

JOHN S. MANIX, Adm'r, v. THOMAS S. HOWARD.

Claim and Delivery—Damages.

The title to property seized under the provisional remedy of claim and delivery, can not be drawn into question upon an inquisition to ascertain the damage to the defendant where the seizure was irregular.

INQUIRY to assess Damages instituted at Spring Term, 1878, of CRAVEN, before *Kerr, J.*

On 10 October, 1874, Nancy Folk, the intestate of plaintiff and trustee of S. A. Burnett, issued a summons to the defendant returnable to Fall Term, 1874, of Craven Superior Court on 4th Monday after 2d Monday in September. On the same day, 10 October, the *cestui que trust* Burnett made the affidavit required by C. C. P., sec. 177 and obtained a requisition on the sheriff to take four mules from the defendant and deliver them to the plaintiff (sec. 178), and the sheriff thereupon took the mules and afterwards delivered them to the plaintiff. On said 10 October, Burnett executed an undertaking in $600 "that the plaintiff shall prosecute this action, return the said property to the defendant if return shall be adjudged, and pay him such sum as may for any cause be recorded (evidently meaning recovered) against the plaintiff in this action." On the return of the summons at Fall Term, 1874, the defendants moved to dismiss the action on the ground that it has been issued within ten days before the next ensuing term of the Court. The Judge refused the motion and the defendant appealed to this Court. At January Term, 1875,—72 N. C., 527—this Court thought itself bound by the act suspending the Code (Laws 1870-'71, ch. 40, sec. 2, brought forward in Bat. Rev., ch. 18, sec. 2) to dismiss the action.

At Spring Term, 1878, of CRAVEN, "a jury were impaneled to assess the damages sustained by the defendant by reason of the wrongful taking of the said mules." The defendant offered evi- (554) dence of the value of the mules. The plaintiff offered to prove by said Burnitt (the *cestui que trust* of plaintiff) that she was the owner of the mules when the action was begun, and after objection was allowed to testify to that effect. The Judge charged the jury that if they believed that the mules belonged to Burnett, the defendant could recover only nominal damages, to which instruction the defendant excepted. The jury returned a verdict for six pence in favor of defendant, and the Judge gave judgment on the undertaking for that sum and costs, and the defendant appealed.

No counsel in this Court for plaintiff.
Messrs. Green & Stevenson, for defendant.

RODMAN, J. (After stating the case as above.) The only question presented on this record is—whether the plaintiff (and the nominal plaintiff and his *cestui que trust* must be considered one) could legally be allowed to prove title to the mules notwithstanding the action had been dismissed?

A few observations it seems to us will suffice to show, that the decision of the Judge in favor of the right of the plaintiff to do so can not be sustained. If, notwithstanding the dismissal of the action for irregularity in the summons, the plaintiff can go on and give evidence of his title just as if the action was still pending in Court for his benefit, the dismissal was a vain thing and without any effect. Such a decision nullifies the act of assembly by which in effect it was forbidden to issue a summons within ten days of the next ensuing term of the Superior Court of the county. Perhaps the act was in this respect indiscreet and thoughtless; and it has since been altered. Laws 1876-'77, ch. 85. But no Court can rightfully, upon its opionion of the wisdom of an act, decline to obey it. When the summons was declared
(555) irregular and the action dismissed, the plaintiff was out of Court as to his power to prosecute his right. A jury can only try issues of fact made by the pleadings. In this case no complaint or answer had been filed, and no issue as to the right of property in the mules had been or could be joined. The Judge in submitting that question to the jury submitted one not in issue, and not pertinent to anything legally in controversy between the parties in the condition of the case. If the Judge was right in submitting the question of property to the jury, their finding upon that question in favor of the plaintiff, entitled him to a verdict for damages, and to a judgment against the defendant for the damages found and costs; whereas under the instructions of the Judge, the jury found a verdict for six pence damages in favor of the defendant, and the Judge gave judgment in his favor against the plaintiff. The inconsistency of the two rulings is evident. The result is that the plaintiff is compelled to pay damages and costs for taking his own property from the defendant by process of law. We think the evidence of Burnett was irrelevant, and therefore incompetent.

These observations we think dispose of the only question presented in the present stage of the case, and with which this Court can now deal. When the case shall again come up for action in the Superior Court, other questions as to the proceedings proper to be taken will arise. But it is not our duty to express any opinion on these by anticipation. The

judgment is reversed and the case remanded to be proceeded in according to law.

Remanded.

Cited: Manix v. Howard, 82 N. C., 126; *Horton v. Horne,* 99 N. C., 219.

(556)

H. T. BAHNSEN, Adm'r of O. A. KEEHLN, v. E. T. CLEMMONS.

Money Received to Another's Use.

On the trial below, it appeared that plaintiff's intestate, a postmaster, in June, 1861, had in his hands a certain sum of money belonging to the United States and paid it to the defendant to whom the United States Government was indebted for services as mail carrier, in part discharge of the debt; after the war the defendant collected from the United States payment in full for all his services up to June, 1861, and the plaintiff's intestate was compelled to account for and pay to the United States the amount paid by him to defendant: *Held,* that plaintiff was entitled to recover.

APPEAL at Spring Term, 1878, of FORSYTH, from *Buxton, J.*

The case is sufficiently stated by THE CHIEF JUSTICE in delivering the opinion of this Court. There was judgment for plaintiff and the defendant appealed.

Mr. J. M. Clement, for plaintiff.
Mr. W. H. Bailey, for defendant.

SMITH, C. J. The plaintiff's intestate, O. A. Keehln, for several years prior and up to 1 June, 1861, held the office of postmaster at Salem, and as such had received and then held the sum of three hundred and thirty dollars and twenty-two cents, moneys belonging to the government of the United States. The defendant had entered into divers contracts for carrying the mails, under which there was a much larger sum due him from the post office department.

The balance in the intestate's hands had been from time to time under orders of the department, paid over to the defendant and his receipts taken therefor. The defendant applied to the intestate to pay over this sum to him, and the intestate refused to do so unless directed by the post-office department of the newly formed government of the Confederate States which had then assumed and was exer- (557) cising control over the mails and post-offices in this State. The

defendant procured the required order and on presenting it the entire amount was in the spring of 1862 paid over to him by the intestate. After the close of the war and the restoration of the authority of the United States, the defendant made demand and collected from the post-office department payment in full for all his services as mail carrier up to 1 June, 1861, no deduction being made for the sum paid him by the intestate. The intestate has also been compelled to account for the same money and has paid it to the United States. This action is instituted to recover the amount paid to the defendant, as paid without consideration, and in breach of the defendant's contract to apply the same to the debt due him from the United States, and in exoneration of the intestate's liability therefor.

The defendant has thus twice received payment for his services in part, once from the intestate and again from the United States. The intestate has twice paid the money, once to the defendant and next under compulsion to the United States. It is as inequitable for the one to receive and retain the double payment, as it is wrong that the other who has twice paid his money should lose it and be without remedy. The inequality will be corrected and the balance adjusted by the defendant's refunding what he has received and improperly diverted to his own use. This result, in itself so reasonable and just, can be attained upon well settled principles of law applicable to an action for money had and received.

"When the defendant," says Mr. Greenleaf, "is proved to have in his hands the money of the plaintiff which *ex equo et bono, he ought to refund, the law conclusively presumes that he has promised so to do,*

(558) and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved." 2 Greenl. Ev., sec. 104. "The count for money had and received which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff which in equity and good conscience he ought to pay over to the plaintiff." *Ib.*, sec. 117.

The plaintiff's right to recover is resisted on two grounds,—that the payment was voluntary, and that the transaction was itself illegal and the law refuses its aid to either.

It is true the intestate paid the money of his own record, but he did so at the instance of the defendant, and it was to be applied to the discharge *pro tanto* of his claim against the United States. Had the defendant thus applied the money, and this he should have done or offered to do in the settlement of his claims, the intestate would have been re-

lieved of his own liability. By failing to give the credit and collecting his whole debt, he left the plaintiff exposed to the demand of the government, which he was again compelled to pay. This was a breach of the agreement and such a misuse of the fund as entitled the plaintiff to maintain his present action.

We are not able to see any force in the objection founded upon an alleged illegality in the transaction. The intestate simply undertakes to appropriate moneys in hand belonging to the United States to the payment of a recognized debt due by the United States. The act may have been and indeed was unauthorized, but we can discover no trace of illegality in it. The indebtedness was incurred under the regular operations of the government in the administration of the mail service, and an attempted though unwarranted adjustment between these parties can in no just sense be affected by the civil commotions in the midst of which it occurred. The plaintiff is in our opinion entitled to recover. (559)

Affirmed.

Cited: Egerton v. Logan, 81 N. C., 172; *Davison v. Land Co.,* 126 N. C., 711.

R. J. GREGORY and others v. W. G. MORISEY and others.

Clerk and Master—Liability of Sureties on Official Bond—Commissions.

1. Where a clerk and master sold certain land under decree of a Court of Equity and had collected only a part of the purchase money, when in 1868, under C. C. P., sec. 142, he delivered to his successor in office (the clerk of the Superior Court) all the papers, etc., in the case; and thereupon, by consent of the parties, the papers, etc., were redelivered to him to be proceeded with and collected: *It was held,* that upon his delivery of the papers, etc., to the Superior Court clerk, his official duties, powers and liabilities ceased, and the sureties on his official bond were not liable for anything thereafter done by him.
2. Where, in such case, gold bonds had been taken for the purchase money and the clerk and master had collected a portion of them, part in currency and part in gold by consent of parties, who received from him whatever he collected, whether currency or gold: *It was held,* that from the whole amount of his receipts while clerk and master should be deducted the amount of his commissions and his disbursements during that time; that the sureties on his bond were liable for the amount of the balance due (with twelve per cent interest from date of the summons) in currency, with the addition of the present premium on gold, on that part of the said balance due on his gold collections and disbursements.
3. In such case, the clerk and master will be liable for the amount due from the sureties as above, and also for his subsequent collections, less the

amount of his disbursements and commissions with twelve per cent. interest from date of summons.

(560) 4. The rule that a dishonest agent should not be allowed commissions is too rigid for application in this case, there being no facts stated which would make such rule applicable.

ACTION, on an Official Bond, tried at Spring Term, 1878, of WAYNE, before *Kerr, J.*

This action was brought upon the official bond of the defendant, Morisey, as clerk and master of the late Court of Equity, in which it was alleged that he collected certain moneys, the proceeds of sale of real estate, and failed to pay the same to the parties interested, and the defendant sureties insisted that they were not liable for such default. The case was referred to F. A. Woodard, Esq., who reported as follows:

That in February, 1866, the defendant, Morisey, was duly appointed clerk and master in equity for Wayne county, and executed a bond with the other defendants as sureties; that at Fall Term, 1866, a bill in equity was filed by the plaintiffs against John B. Griswold and others to sell real estate belonging to the parties thereto, and a decree was made directing said Morisy to sell the same upon a credit of six, twelve and eighteen months for gold bonds for the purchase money. The sale was accordingly made on 1 January, 1867, for $33,750 in gold, his report was confirmed, and he was directed to collect the money and pay over to the parties to said suit; that up to 31 October, 1868, he collected $29,873.66 in currency and paid to said parties $29,015.30 thereof; and up to same date, he collected $1,200 in gold and paid to said parties $1,180 thereof; that after his office was abolished in 1868, he delivered to the clerk of the Superior Court of said county all the papers belonging to the office, including the papers in the cause in which R. J. Gregory and others were plaintiffs and John B. Griswold and others were defendants; and that at the written request of the attorneys for the parties to said cause, the clerk of the Superior Court rede-

(561) livered the papers therein to Morisey, and at the ensuing term of the Court the said attorneys, when said cause was called, informed the presiding Judge that they had agreed for Morisey to retain the papers and finish the duties, with which he had been charged in respect thereto, to which arrangement the Court assented; and that after the papers were re-delivered to Morisey, he collected in currency the balance due on the bonds, amounting to $17,724.58,—the first collection being made 1 February, 1869, and the last, 2 December, 1869—and paid to said parties the sum of $14,267.80.

Upon these facts the referee found as conclusions of law: That the defendant sureties were liable for the gold value of the currency in the

hands of Morisey, on 31 October, 1868, the date of his last collection before delivering the papers to the clerk of the Superior Court, less the sum of $330 allowed as commissions, but that they are not liable for any sum collected by Morisey after the delivery of the papers to the clerk as aforesaid; and that Morisey is liable for the whole amount of currency collected by him, less the amounts paid to said parties and the sum of $507 commissions for making the sale and collection.

To the conclusions of law the plaintiffs filed exceptions and insisted that the sureties were liable for the full amount of the currency collected and twelve per cent damages, instead of the gold value as held by the referee; that Morisey was not entitled to commissions because he wasted the money of the plaintiffs; that the sureties were not discharged from their liability by any act of the Court or of the attorneys on the facts found; and in any event they insist that judgment for the full amount of currency collected by Morisey up to 31 October, 1868, and interest at twelve per cent should be rendered in their favor. Upon the hearing in the Court below the plaintiffs' exceptions were sustaind and the referee's report reformed in accordance therewith. Judgment. Appeal by defendants.

Messrs. Gilliam & Gatling, for plaintiffs.
Messrs. H. F. Grainger and *A. K. Smedes,* for defendants. (562)

READE, J. Our statute made it the duty of the defendant clerk, Morisey, immediately upon the qualification of his successor, to deliver to him "all the records, books, papers, moneys and property" of his office, and made his failure to do so a misdemeanor. Bat. Rev., ch. 17, sec. 142. This the said defendant did on or before 31 October, 1868. It did not require the consent of parties, or the order or consent of the Court to authorize him to do it. It was his independent official duty. As soon as done, his official duties, powers and liabilities ceased; except his liability for what was in the past. And it follows that the liabilities of the defendants his sureties ceased also.

It is however insisted that inasmuch as the parties directed the defendant's *successor* to redeliver the papers in controversy back to the defendant Morisey and he did redeliver them back with the sanction of the Court to be proceeded with and collected, as he would have done if his term had not expired, that fact *quo ad hoc* reinstated the defendant Morisey and his sureties in their liabilities as if he had never delivered the papers at all. Suppose that were so, suppose that defendant Morisey never had delivered the papers to his successor, still his sureties would not be liable for what he did after his term of office expired.

They would only be liable for the damage sustained by his *failure* to deliver to his successor. And in fixing that damage it may be that it would be proper to consider the value of the papers, their collectibility, and that he did in fact collect them. But the action of the parties and of the Court and of the successor Morisey in redelivering the papers to him had no such effect. The effect was to make him a *new man* with whom the defendant's sureties had no connection. Their liability was for him as clerk and master; and after he had ceased to be such,
(563) neither the consent of the parties, nor the sanction of the Court, nor the act of his successor in redelivering, nor all combined, could make him clerk and master again.

The effect of the action of the parties in having the papers redelivered to Morisey was to make him their agent; and the effect of the sanction of the Court, if it had any force at all, may have been to make him a commissioner of the Court; but the defendant's sureties were not affected at all. It is indeed insisted that there was no "delivery" and "redelivery" at all, but that the acts were concurrent and colorable, not for the purpose of complying with the law, but for evading it. And therefore the defendant's sureties remained bound. There is not the slightest foundation for this. The facts are clearly found that there was a delivery of all the effects of his office by Morisey to his successor, and a redelivery by his successor to him by direction of the parties. The defendant's sureties are in no way bound for anything done after the delivery by Morisey to his successor.

We are next to consider the liabilities of defendant Morisey and sureties before and at the time of his delievering up his office to his successor. From account "A" reported by referee, it appears that up to 31 October, 1868, he had collected $29,873.66 in currency and $1,200.00 in gold, and that he had paid out $29,015.30 in currency and $1,180.00 in gold. And the referee allows him $330 for commissions. Add the commissions to the expenditures and deduct the whole amount from the whole amount of receipts, without regard to gold and currency, and the remainder with twelve per cent interest from the date of summons up to this time and it will show the amount due at this time, which may be satisfied in currency with the premium on $20 of gold at this time added. This will cover all the liabilities of the defendant's sureties. It will not however cover all the liabilities of the defend-
(564) ant Morisey. He will be liable for this amount, and for all his subsequent collections in the amounts as collected without regard to any difference between gold and currency at the time of collection. And he will be credited with the amounts paid out in the same way, and the amount allowed by the referee for his commissions. And the

remainder with twelve per cent interest from the date of summons will be the amount now due in currency.

The contract was solvable in gold, but it seems that by consent of parties the defendant Morisey collected eitther gold or currency, and whatever he received, gold or currency, the creditor received from him. We suppose that when currency was received it was at its then depreciation, so that more than the nominal amount of the debt was received in currency. And as currency has appreciated as compared with gold, the defendant Morisey inists that if he is required to pay the amount in currency *now,* which he received in currency *then,* the creditor will get more than the value of his debt. Grant that to be so, yet who is to profit by the appreciation of the currency? The defendant ought to have paid it over as soon as he collected it. It was not his money, but the creditors'. If it increased in value, the creditor is entitled to the increase. The defendant who held it wrongfully, or even if he held it without positive wrong, is not entitled to make profit out of his principal's money, for his own advantage. And he can not complain if he is required to pay over the very thing which he received.

The plaintiff objects that the defendant ought not to be allowed commissions because he was a dishonest agent. That is the true rule, but it is too rigid to fit this case. The whole amount of commissions allowed amounts to about the sum which he retained when he delivered over the papers to his successor. And if we assume, as is probable that he had knowledge that the parties would engage him to collect the whole amount, as they did so, there may have been no moral (565) delinquency. And his failure to pay over the balance of his subsequent collections may be without other fault than a simple failure to pay. The facts which would make the rigid rule applicable are not stated, if they exist. The clerk of this Court will make the calculations and report, for which he will be allowed $20 and there will be judgment here accordingly. The allowance to the referee below of $100 will be divided between the parties. The costs in this Court will be equally divided between the parties.

PER CURIAM. Judgment modified.

THE COMMISSIONERS OF CURRITUCK COUNTY v. THE COMMISSIONERS OF DARE COUNTY.

New County—Liability for Debt of County out of Which Formed.

1. Where the county of Dare was formed out of parts of Currituck and other counties, and the act of assembly creating the county provided that the portion of its citizens taken from Currituck County should not be released from their portion of the outstanding debt of Currituck: *It was held*, that a judgment obtained against the county of Dare for such proportionate share should be paid by assessment upon *that portion of the territory of Dare taken from Currituck.*
2. In the absence of legislative provision, neither the county of Dare nor that portion taken from Currituck would be liable for any portion of such debt.

MOTION for a Mandamus heard at Spring Term, 1878, DARE, before *Furches, J.*

The plaintiff moved for a mandamus to compel the defendant to levy a uniform tax upon the whole county of Dare to pay a judgment (566) theretofore rendered in favor of the county of Currituck; but the defendant insisted that the tax should be collected only out of that portion of Dare county which was taken from Currituck. His Honor allowed the plaintiff's motion and the defendant appealed.

Messrs. Gilliam & Gatling, for plaintiff.
Mr. J. W. Albertson, for defendant.

SMITH, C. J. The county of Dare was formed out of parts of the counties of Currituck, Tyrrell, and Hyde, under an act of the General Assembly, ratified and taking effect on 3 February, 1870, Laws 1869-'70, ch. 36. Section 17 of the act directs the organization of the county after a popular vote of approval from the electors residing within its proposed limits, and then follows this proviso: "That that portion of the citizens taken from the county of Currituck and attached to the county of Dare shall not be released from their proportion of the outstanding county debt contracted for public improvement before the passage of this act, to be determined by the county commissioners of Currituck and Dare counties." The debt referred to has been adjusted between the counties, and the share alloted to Dare is 15 11-20 per centum, and the commissioners of Currituck have recovered judgment against the commissioners of Dare for five thousand nine hundred and seventy-two dollars, their apportioned part of the ascertained debt of Currituck, reserving the right to prosecute a claim for Dare's ratable share of the disputed debt which may be hereafter adjudged. On the

hearing of the application for a mandamus to compel the levy of the necessary tax to meet the judgment, the plaintiff moved that the order direct an assessment upon all the persons and taxable property within the county of Dare, while the defendant moved that the assessment be confined to that portion of the territory severed from Currituck. The Court refused to restrict the assessment and ordered it to (567) be made upon the persons and taxable property of the whole county, and from this the defendant appeals.

The only point before this Court then is as to the correctness of this judgment requiring an assessment upon the whole county. In the case of the *Commissioners of Granville v. Ballard,* 69 N. C., 18, and *Moore v. Ballard, Ib.,* 21, a portion of Granville had been detached and annexed to Franklin by the act 1872-'73, ch. 143. Two objections were made to the validity of the act. 1st. That the change of boundary disturbed the senatorial districts and violated Art. II., sec. 5 of the constitution. 2nd. That the exemption of the taxable property on the transferred territory diminished the ability of Granville county to pay its debts, and *pro tanto* impaired the security of the creditors for the payment. Both objections were declared untenable because no alteration in the political divisions of the State had been made—the vote being taken as before the dismemberment; and while the boundary lines between the counties were changed for some purposes, they were not changed so as to affect the senatorial districts. And it was further declared that the creditors of Granville county had no such lien on the taxable property therein as prevented its removal, if personalty; or its transfer to another county, if land; and especially was this so, as the act declared that Franklin should assume its proper share of the debt of Granville.

A similar clause is contained in ch. 182, Laws 1871-'72, providing for the apportionment of the debt of Craven county, between it and Pamlico, which was formed entirely out of the territory of the former. In our case the provision is not that Dare county shall bear its *proportional part* of the public debt for internal improvements incurred by Currituck county, but only that the citizens and their *taxable property* on the transferred territory shall continue liable for their share of it, as has since been ascertained. In other words, for the pur- (568) pose of paying this debt they shall remain as if still a part of Currituck, the only change being that this tax must be levied by the new county authorities as the authorities of Currituck would have levied it before the transfer. In our opinion this was equitable and just, and the other parts of Dare county should not be held liable. Indeed it would seem that neither would the new county nor the portion taken from Currituck be liable for any part of this debt in the absence of

legislative provision. The municipal corporation of Currituck retaining its identity would alone possess its corporate property and corporate rights, and alone remain responsible for its corporate obligations. There are numerous authorities to this effect, but we are content to make a single citation:

"So in Massachusetts it has been held that if a new corporation is created out of the territory of an old corporation, or if part of its territory or inhabitants is annexed to another corporation, unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property and be solely answerable for all the liabilities." 1 Dillon Mun. Corp., sec. 128, and numerous cases referred to in note.

And again the author says: "But upon the division of the old corporation and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, the *legislature may provide* for an *equitable appropriation or division* of the property, and impose upon the new corporation or *upon the people* and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts." *Ib.*, sec. 129. The provision suggested is contained in this act for the formation of a new corporation out of the dismembered parts of the three other corporations.

(569) It is contended that the general judgment recovered by Currituck county charges the entire county with the debt, and it is now too late to raise the question. We see no force in the objection. The judgment does indeed ascertain the share which properly belongs to Dare, but how it shall be paid, so that it is paid, is a matter wholly immaterial to the plaintiffs and does not affect their rights. The law does not subject the taxable property of the whole county, but only the transferred part to an assessment to meet the debt, and the Court has no power to command to be done what the defendant has no legal right to do. The mandate should be confined to the enforcement of the exercise of the taxing power lodged in the authorities of Dare, but the mode of doing this is controlled by the law of its own creation, and must be used in accordance with adjudged cases. *Mauney v. Commissioners of Montgomery,* 71 N. C., 486. We therefore declare that there is error in the record, and the judgment below is reversed. This will be certified to the end that the judgment be modified in accordance with this opinion.

Reversed.

Cited: Watson v. Com'rs, 82 N. C., 17; *McCormac v. Com'rs,* 90

N. C., 441; *Com'rs v. Com'rs,* 95 N. C., 189; *Com'rs v. Com'rs,* 107 N. C., 297; *Board Education v. Com'rs,* 111 N. C., 585; *Com'rs v. Com'rs,* 157 N. C., 519.

W. D. SMITH & CO. v. E. J. PIPKIN, Guardian of L. Pipkin, a Lunatic.

Lunatic—Action by Creditor—Jurisdiction.

1. Courts of Probate have no power to provide for the payment of the debts of a lunatic contracted prior to the lunacy.
2. Where the existence of a debt, alleged to be due from a lunatic, is denied, a Court of Probate has no jurisdiction to try the question of debt or no debt.
3. Under Acts 1876-'77, ch. 241, sec. 6, the Superior Courts have concurrent jurisdiction with the Courts of Probate over lunatics and their estates. (570)

SPECIAL PROCEEDING commenced in the Probate Court, and heard on appeal at Spring Term, 1878, of HARNETT, before *Moore, J.*

This proceeding was instituted to compel the defendant guardian of Lewis Pipkin, a lunatic, to sell his ward's real estate to pay a debt alleged to be due the plaintiffs,—an account of $224.65 for necessaries furnished said guardian, and for the sum of $416.41, contracted before the lunacy, and alleged to have been paid by plaintiffs at the request of said guardian. In the Probate Court an issue of facts was raised and the case transferred to the Superior Court for a trial by jury. After a reference to the clerk to take an account of the said necessaries and the coming in of his report, the defendant moved to dismiss the proceeding for want of jurisdiction in the Probate Court, and His Honor held that said Court had no jurisdiction in respect to the debt contracted before the lunacy and directed it to be stricken from the complaint; but as to the account, he held that said Court had jurisdiction, and permitted the plaintiffs to proceed as to that. From which ruling the plaintiffs appealed.

Mr. N. McKay, for Plaintiffs.
Mr. John Manning, for defendant.

BYNUM, J. *Blake v. Respass,* 77 N. C., 193, is conclusive authority that Courts of Probate have no power to provide for the payment of the debts of the lunatic, contracted prior to the launcy, that is, assuming that the debts have been establish against the lunatic. But in this

case the guardian denies the existence of the debt, or that the
(571) lunatic owes the plaintiffs anything, but avers that they, the plaintiffs, are indebted to him. The question of debt or no debt is not a proper one for the determination of the Court of Probate in respect to a lunatic more than in respect to a sane person. It is only where the debt is admitted or established that the jurisdiction of the Court of Probate arises to make provisions for its payment upon the application of the creditor. This principle applies as well to the alleged debt of $224.65 contracted since, as to that of $416.41 contracted prior to the lunacy, both being denied by the guardian.

After the plaintiffs have established their debts in the proper Court, if the lunatic is in debt to them, it remains for their consideration whether they can then obtain the relief they are now demanding. In *re Latham,* 39 N. C., 231, is the leading case upon the subject in this State. There, the debts were admitted and the application was made to the Court by the committee of the lunatic for the sale of his real and personal estate for the payment of his debts, and for the purpose of maintaining him and his family. Speaking for the Court, DANIEL, J., said: "All the lunatic's estate has been converted into money, and only the sum of $942.14 is now within reach of the Court. We think that fund must be retained by the committee, not to pay his balance, or the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the Court must reserve a sufficient maintenance for the lunatic before making an order for payment of debts or allowing the committee sums already applied by him for that purpose, is clear from the nature of the jurisdiction in lunacy, as well as from the decisions. In *Ex Parte Hastings,* 14 Ves. 182, LORD ELDON said, he could not pay a lunatic's debts and leave
him destitute, but must reserve a sufficient maintenance for
(572) him; and in *Tally v. Tally,* 22 N. C., 385, that is cited with approbation by the Court."

As the Court of Probate had no jurisdiction to provide for the payment of the debt contracted prior to the lunacy, but the Superior Court only, the appeal of the plaintiffs from the order of the Court striking that claim from the complaint, can not be sustained. If the defendant had appealed from the refusal of the Judge to dismiss the action for defect of jurisdiction in the Probate Court, we would have felt disposed to sustain the appeal as the case is now presented to us. As it is however we will not dismiss but affirm the judgment of the Court, remanding the case as to the claim of $224.65, to be proceeded in as the plaintiffs may be advised in the Probate Court. They may see their advantage in dismissing the present proceeding and resorting to their

action in the Superior Court, where all the relief can be obtained to which the merits of their case may entitle them, for by Laws 1876-'77, ch. 241, sec. 6, in addition to the jurisdiction over lunatics and their estates inherent in the Courts of Equity, concurrent jurisdiction with the Courts of Probate is conferred upon the Superior Courts.

Affirmed.

Cited: Adams v. Thomas, 81 N. C., 296; S. c., 83 N. C., 521; *McLean v. Breece,* 113 N. C., 392.

JACOB WEBBER v. ROSA WEBBER.

Divorce—Alimony.

Under Bat. Rev., ch. 37, sec. 10, a wife is entitled to alimony *pendente lite* when she is a *party* to an action for divorce: *Therefore,* where the husband plaintiff alleged adultery, and the wife defendant denied the the same and asked for a divorce *a mensa et thoro* alleging cruel and inhuman treatment, and the Court below granted an order for alimony *pendente lite: Held,* not to be error.

ACTION, for Divorce, tried at Spring Term, 1878, of EDGECOMBE, before *Henry, J.* (573)

The plaintiff alleged that defendant was guilty of adultery, which was denied by the defendant who also alleged that plaintiff was guilty of cruel and inhuman treatment towards her, and upon that ground she demanded judgment for a divorce from bed and board; and thereupon she moved for alimony *pendente lite.* This motion was resisted by plaintiff, for that, the Court had no power under the statute to allow defendant a sum of money for alimony and expenses of the action. His Honor held otherwise, and made an order of reference to the clerk to report a reasonable allowance for the same, from which ruling the plaintiff appealed. (See *Miller v. Miller,* 75 N. C., 70.)

Messrs. Battle & Mordecai, for plaintiff.

Mr. Fred Phillips, for defendant.

RODMAN, J. The only question now before this Court is as to the legality of the order made by the Judge in the Superior Court, requiring the plaintiff to pay $40 per month thereafter to be used by the defendant in paying the expenses of her defence and for her subsistence during the pendency of the action or until otherwise ordered.

The claim of a wife to alimony under the circumstances existing in this case depends on the proper construction of sec. 38, ch. 193, Laws 1871-'72 (Bat. Rev., ch. 37, sec. 10.) This section says in brief: If any married woman shall apply to a Court for divorce, and set forth in her complaint such facts as if true will entitle her to it, and it shall appear to the Court that she has not sufficient means whereon to subsist during the prosecution of her suit, and to defray the expenses thereof, the Judge may order the husband to pay her such alimony as shall appear to him just and proper, etc. The act applies by its terms only to an action for divorce brought by the wife, and it is con-
(574) tended by the plaintiff who is the husband, that the Judge has no right to allow the wife alimony when he is the plaintiff, and she the defendant. If the act is limited to its literal construction, of course that is so, for although the wife has applied for a divorce and has set forth facts, etc., yet it is in her *answer* and not in her *complaint* as the statute literally taken requires.

In interpreting an act, it is the duty of a Court to ascertain its intent and meaning and for that purpose, says BLACKSTONE, we must consider the old law, the evil which the act was intended to remedy, and the remedy. And we may well give a liberal interpretation to the remedy when otherwise it would be incomplete and only half accomplish its purpose. It was supposed under the decision in this Court in *Wilson v. Wilson,* 19 N. C., 377 (June, 1837), that upon a petition by a wife for divorce, a Court had no power to give her alimony *pendente lite.* To the legislature this seemed an evil. By the supposed law of that decision a wife was practically compelled to live with her husband, notwithstanding his adultery or cruelty, from the want of means of prosecuting an action, or of subsisting during its pendency. A husband is bound to maintain his wife in a way suited to his means until the marriage is legally dissolved, or unless she deserts him without sufficient cause. But by what was supposed to be the law of that decision, he might by his own misconduct compel her to leave him, and thus relieve himself from the duty of maintaining her, until she could obtain a judgment against him founded on such misconduct. Accordingly the legislature in 1852 passed the act found in Rev. Code, ch. 39, sec. 15, and substantially re-enacted, Laws 1871-'72, above referred to. It had happened that in *Wilson v. Wilson, supra,* the wife had been the plaintiff, and it did not occur to the legislature that she would equally require the means of subsistence while defending an action brought by her husband against her. The justice of giving alimony is as
(575) apparent in the one case as in the other. In both, she is compelled by the husband to leave his house and is deprived of the

support by him to which she is by law entitled during the marriage. Her guilt is not to be presumed merely on his charge; on the contrary, her innocence is presumed. There can be no doubt that if the attention of the legislature had been directed to the possibility that a wife might be a defendant, the act of 1852 would have made the same provision for her as a defendant, as it did for her as a plaintiff. We think we are required to interpret the act as meaning that she may claim alimony *pendente lite,* whenever she is a *party* in an action for divorce. There is a precedent for this interpretation very closely in point. The act of 1756, called the "Book Debt Act," gave to plaintiffs the right to prove book account by their own oath, but did not give to defendants a corresponding right to prove a set off. Yet it was held that under a proper interpretation of the act, they had such right. *Thomeguex v. Bell,* 1 N. C., 38, (1794) and to put the question beyond doubt, the act was afterwards amended to embrace defendants.

The argument of the plaintiff against the right of a wife to alimony when she is a defendant, is this: Before the act of 1852 the wife, even when plaintiff, had no right to alimony *pendente lite* (and for this he cites *Wilson v. Wilson*), and as the act only gave it to her when plaintiff, it impliedly prohibited it to her when a defendant. The conclusion is logical if the premises are correct. It will be seen on examining *Wilson v. Wilson,* that GASTON, J. admits that by the practice of the English Ecclesiastical Courts, the wife might apply for alimony as soon as the Court was informed of the fact of marriage; but he says that that usage had not been introduced by statute into the Court of this State, and consequently did not exist here; and he puts the refusal of the Court to grant alimony on the general absence of that power, as one of the grounds of the decision of the Court. But he also (576) puts it on another ground which was incontestable, viz., that the plaintiff's allegations of cruelty were too indefinite to be acted on. To that it is not certain that the general want of power was the controlling reason on which the decision was made; it might have been merely the opinion of the eminent Judge who delivered the opinion of the Court. However this may be, the doctrine that the practice and usages of the English Ecclesiastical Courts do not prevail here in cases not provided for by statute, has been since distinctly contradicted, and the ecclesiastical law of England declared to be a part of the common law, which became in force as soon as jurisdiction in divorce was given to our Courts. In 1843, when *Crump v. Morgan,* 38 N. C., 91, was decided, no statute expressly gave to any Court jurisdiction to declare the nullity of a marriage by reason that one of the parties was a lunatic when the rite was performed. But the Court took jurisdiction upon the ground stated,

and RUFFIN, J. said: "The canon and civil law, as administered in the Ecclestiatical Courts in England are parts of the common law, were brought here by our ancestors as such, and have been adopted and used here in all cases to which they were applicable and wherever there has been a tribunal exercising a jurisdiction to call for their use." And in *Taylor v. Taylor,* 46 N. C., 528, PEARSON, J. speaks of the practice in cases of divorce as "derived from and suggested by the practice of the Ecclesiastical Courts in England." These two *decisions* substantially overthrow, not the decision in *Wilson v. Wilson,* but one of the arguments of GASTON, J., in support of it. The practice of the English Ecclesiastical Courts undoubtedly was, as stated by GASTON, J., to listen to an application for alimony *pendente lite,* on proof of the marriage, *and indifferently—whether the wife was plaintiff or defendant.* (577) Shelford Mar. & Div., 533, 586; *Bain v. Bain,* 2 Adams Eccl., 252.

We do not think that we have any jurisdiction to change the *amount* of alimony allowed by the Judge, which depends on his discretion, and may be altered or modified by him at any time. But we think we may not improperly call the attention of His Honor to sec. 37, act of 1871-'72 (Bat. Rev., ch. 37, sec. 9) and to 2 Bish. Mar. and Div., sec. 460, as bearing on that subject. Judgment below affirmed. Let this opinion be certified to the end that the case may be proceeded in according to law.

Affirmed.

Cited: Reeves v. Reeves, 82 N. C., 348; *Gordon v. Gordon,* 88 N. C., 45; *Sims v. Sims,* 121 N. C., 299.

C. J. COWLES v. H. W. HARDIN and others.

Restoring Records—Verification—Parties.

1. In a special proceeding under an act of assembly to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute; and where such statute directs that the complaint of the petitioner "shall be sworn to as in other actions," the want of a proper verification is a fatal defect, for which judgment will be arrested.
2. In such a proceeding an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification.
3. *It seems* that all persons whose estates may be affected by a proceeding to restore lost records, should be made parties.

COWLES *v.* HARDIN.

ACTION to recover land, tried at Spring Term, 1878, of WATAUGA, before *Cannon, J.*

This proceeding is instituted under the act of 18 December, 1873, entitled "An act to restore the records of Watauga County," Laws 1873-'74, ch. 19. The summons was served upon the defendants H. W. Hardin and Robert Munday only, at Spring Term, 1877, to which the process was returnable. The plaintiff filed his complaint and therein alleged: (578)

1. That in 1857 John Horton recovered judgment in Watauga County Court against John and Franklin Cousin, sued out execution under which a tract of land belonging to Franklin Cousin was levied on and sold by the sheriff on 11 November to Robert Munday for a sum which paid the debt.

2. That in 1859 J. C. Blair recovered two judgments in the same Court against said Robert Munday and one John Elrod and caused execution to issue thereon under which the land so purchased by Munday was on 16 February, 1860, sold to Calvin J. Cowles for a sum sufficient to discharge both judgments. Deeds were on both sales made and delivered by the sheriff and they have been proved and registered.

3. That all the records of these suits and the papers belonging to them, as also the registry of deeds in said county were in 1872 or '73 destroyed, so that proof of title can not be made for want of them, and the prayer is that said records and papers be restored, as provided in the act.

The complaint is verified in the following form: J. D. Cowles, agent of the plaintiff, makes oath that the facts herein stated are true to the best of his knowledge, information and belief. Sworn to and subscribed, J. D. Cowles, agent, before me, J. H. Hardin, C. S. C. The defendant Hardin demurs to the complaint and assigns as causes of demurrer: The want of service of the summons on the defendant, Francis Pearce and wife, Elizabeth; the omission of the complaint to show any connection between the defendant Hardin and the matters in controversy; that John and Frank Cousin and J. C. Blair and J. Elrod are necessary parties to the action; and that the form of verification of the complaint is insufficient under the statute. The demurrer was overruled and leave having been given to answer and no answer filed the Court gave judgment granting the relief asked, from which (579) the defendants appealed.

Mr. G. N. Folk, for plaintiff.

Messrs. Merrimon, Fuller & Ashe, for defendants.

SMITH, C. J. (After stating the case as above.) It may be that the persons whose lands are alleged to have been sold under the executions and the title to which this proceeding is intended to perfect, ought to be parties, as *"being interested in the subject matter,"* in the words and within the meaning of the act, and we are disposed to think they should be. The complaint seems also obnoxious to the objection of duplicity, in associating distinct and independent causes of action in which there must be defendants having no community interest. *Land Co. v. Beatty,* 69 N. C., 329. But the exception is not taken and we will not further consider it.

The last assigned cause of demurrer, more properly an objection to the rendition of judgment after overruling of the demurrer, must be sustained. The proceeding is special and the essential requirements of the statute must be observed. It directs "that the complaint shall be sworn to as is prescribed in other actions." The Code prescribes how this must be done. Secs. 116, 117. The oath must be to the effect that the complaint or other pleading to be verified "is true to the knowledge of the person making it except as to those matters stated on information and belief and as to those matters he believes it to be true."

The affidavit may be made by an agent or attorney when the action or defense rests "upon a written instrument for the payment of money only" and such instrument is in his hands, or the material allegations lie within his personal knowledge, and in such case the affidavit itself must show the knowledge or the ground of his belief and the reasons why it is not made by the party himself. These requirements are disre-
(580) garded entirely in the present mode of verification, and the form of the oath is such a departure from that prescribed, that it has already been declared insufficient, *Benedict v. Hall,* 76 N. C., 113, and is not warranted by the decision in *Paige v. Price,* 78 N. C., 10. It is unnecessary to notice any other points presented in the record. The Court ought not to have proceeded to final judgment until the complaint was sworn to, and in this there is error. The cause will be remanded to the Superior Court, where application may be made for amendments and further proceedings had therein according to law.

Reversed.

Cited: Hammerslaugh v. Farrior, 95 N. C., 135; *Jones v. Ballou,* 139 N. C., 527.

State on relation, etc., and JESSE RAY v. JOHN CASTLE and others.

Evidence—Business Entries of Deceased Persons—Surveyor's Field Notes.

Business entries of deceased persons (as the field-notes of a surveyor), made in the line of their duty, are only admissible in evidence when they are shown to be *original* and *cotemporaneous* with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves.

APPEAL at Spring Term, 1878, of WATAUGA, from *Cannon, J.*

This action was instituted in 1875 to recover a tract of land, and upon the question arising as to the regularity and priority of the grants issued to the parties, the jury found for the defendants. There was judgment accordingly, and the plaintiff appealed. The facts set out in the opinion are sufficient to an understanding of the case.

Messrs. D. G. Fowle and *J. Devereux, Jr.,* for plaintiff. (581)
Messrs. Folk & Armfield, for defendants.

BYNUM, J. The defendant Castle made his entry 29 October, 1853, had the entry surveyed on 6 September, 1854, and obtained the grant from the State 18 September, 1854. The plaintiff made his entry 10 June, 1854, had it surveyed and located 3 October, 1856, and obtained his grant from the State 22 December, 1856. So that the defendant's entry, survey and grant were prior in time to the entry, survey and grant of the plaintiff, and nothing else appearing he would be entitled to the land covered by his grant. But the plaintiff alleges that the defendant, Castle, after his entry of October, 1853, and before his survey and location of 6 September, 1854, made a first survey and location under his entry, which do not cover the land in dispute, and that having once surveyed and located his entry he is bound by it, and that the grant subsequently obtained on the second survey and location covering the *locus in quo* is fraudulent and void. The defendant denied that he had more than one location of his entry and thereupon this issue was submitted to the jury: "Did the defendant, before his entry was surveyed and located on the land in dispute, cause the same to be surveyed and located as alleged in the complaint, on the Little Elk Knob?"

To establish the affirmative of this issue the plaintiff introduced one Ray as a witness, who testified "that about twenty-four years ago he was on the mountain with Castle, the surveyor, William Horton and one Lookabill, since deceased; that he and Lookabill were chain carriers,

and that the purpose was to run Castle's entry; that for this purpose they made a corner on a birch; that he could recollect only two corners,
but thought they ran around the tract; that the surveyor was
(582) present all the time, and as the chain carrier 'called out' the surveyor took down the calls, but he did not see what he wrote." John Castle was sworn for the defendants and testified that the persons named by Ray had gone upon the mountain to survey a tract of land for Lookabill, and when they had completed it some one proposed that they should survey his entry, to which he assented. That the surveyor ran one line and part of another, or two at most, when he became satisfied that they were on land which had been granted, and directed the surveyor to stop and make no plat; and that some two or three months afterwards he had the same surveyor to survey his entry, and it was located and the grant obtained thereon on 18 September, 1854, as before stated. Then, for the purpose of confirming the witness, Ray, and as substantive testimony, the plaintiff introduced one Horton, a brother of the surveyor, and after proving by him the death of his brother, and that he himself was now the county surveyor and as such received a certain paper which he identified as the one turned over to him as pertaining to his office of surveyor, proposed to show that it was in the handwriting of the deceased surveyor and purported to be notes of a survey of the entry, as stated in the complaint, signed by Horton as county surveyor, and to read it to the jury for the purposes indicated. It did not appear that Horton had made any plat or return upon this alleged first survey. His Honor held the paper to be incompetent evidence.

The proposed evidence falls under the class of *hearsay* testimony, as to which the general rule is that it is inadmissible, to which rule, however, there are several exceptions, of which the present with certain qualifications is one. Business entries of deceased persons when made in the line of their duty are admissible in evidence. This is the rule, but
it is subject to the qualification that such entries to be admissible
(583) must be, first, original; and second, contemporaneous with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves. The field notes of a surveyor since deceased made in the discharge of his official duties and contemporaneous with the survey are admissible, because such entries are made under a sense of business responsibility, and by an officer having no interest to make untrue entries.

It has been held that where an entry has been made against interest, proof of the handwriting of the party and his death is enough to authorize its reception at whatever time it is made; but in the case of entries in the course of business they must be contemporaneous with the trans-

action, and if there is any doubt whether the entries were made at the time of the transaction, they are inadmissible. *Doe v. Turford,* 3 B. & Ad., 890; *Poole v. Dicas,* 1 Bing. (N. C.) 649; 1 Wharton Evidence, sec. 246; *Avery v. Avery,* 49 Ala., 193; *Smith v. Blakely,* L. R., 2 Q. B., 326.

In our case the evidence upon this point is "that as the chain carrier 'called out' the surveyor took down the calls," and it was then proposed to give in evidence a certain paper pertaining to the surveyor's office, which was in the handwriting of Horton, and purported to be notes of a survey of the land, and signed by Horton as county surveyor. Was it the original paper containing the field notes? Were the entries made contemporaneous with the survey, or subsequently? Did it have any date, or was it in any other way identified as the paper containing the original memoranda made during the progress of the survey? Nothing of the kind was shown or offered to be shown. The necessity of such preliminary proof is well illustrated in the leading case of *Price v. Terrington,* 1 Salk 285; 1 Smith L. C., 285. There, the plaintiff being a brewer, brought an action against the Earl of Terrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was that the (584) draymen came every night to the clerk of the brew house and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book. This was held good evidence of a delivery; but it was also held that the shop book itself, singly and without proof showing that the entries were made contemporaneously with the delivery in the regular course of business, and at the time they purported to have been made and verified by the signature of the drayman, would not be competent evidence. So that in our case the paper offered in evidence not having been identified as the original, or as made contemporaneously with the facts recorded, or in the regular course of business, it was inadmissible, either as substantive proof of the alleged survey, or as evidence corroborative of the testimony of the witness, Ray. Wharton Ev., sec. 248. *Free v. James,* 27 Conn., 77; *Mullican v. Williams,* 48 Pa. St., 238; Powell Ev. (4 Ed.), 211.

The jury having found all the issues in favor of the defendants it becomes unnecessary to decide whether this action by a junior against a senior patentee can be maintained at all under the decision of this Court in *Crow v. Holland,* 15 N. C., 417. It was held in that case that a grantee under the act of 1868 can not maintain a *scire facias* to repeal a grant for the same land, when the latter is older than the grant to him.

This proceeding although in the name of the Attorney-General is upon the relation of the plaintiff and for his benefit, and is really an action *enter partes,* and would seem to be governed by *Crow v. Holland.* How far the law may be changed in this respect by the provisions of the Code of Civil Procedure, secs. 367 and 368, prescribing when and how actions may be brought to vacate letters patent, is a question which does
(585) not now arise; now does it become material to inquire how far the rights of the defendants might be affected by the finding of the jury that they are purchasers for value and without notice. The jury having found under proper instructions from the Court that the defendants' grant was regularly obtained upon an entry and location prior to the grant of the plaintiff, it disposes of the case.

Affirmed.

FRED FICKEY & SONS v. B. H. MERRIMON.

Expression of Opinion by Judge—Nudum Pactum—Practice.

1. Plaintiffs alleged that defendant owed them a certain amount for goods sold and delivered. Defendant answered denying the debt and setting up a compromise between them and the plaintiff's counsel by which defendant was to pay plaintiffs fifty per cent. of the alleged indebtedness on condition that it should be "established." The plaintiffs replied, reaffirming the contract and alleging that the debt was to be "established" by an affidavit made before a proper officer, with which condition the plaintiffs had complied: *Held,* that under such pleadings it was not improper to submit to a jury an issue as to the validity of the original debt unaffected by the compromise, especially where the counsel on both sides assented to the framing of the issue.
2. Plaintiffs alleged a sale to defendant in person, which defendant denied. On trial plaintiffs' counsel, upon suggesting that the sale was good, whether made to defendant or his agent, was interrupted by the defendant's attorney who insisted that the plaintiff's witness testified to a sale direct to the defendant; whereupon the Judge inquired,—"Does the record show this?" Upon plaintiffs' counsel's assent, the Judge demanded, "How then do you agree that they were delivered to an agent?" Counsel replied, "The deposition of S. G. M. will fix that," upon which His Honor said, "Very well; proceed": *Held,* that the transaction was not an intimation of an opinion by the judge under the act of 1796
(586) forbidding the expression of an opinion by him upon the facts of the case.
3. An agreement to take part of a debt in payment of the whole was *nudum pactum* before the Act of 1874-'5, ch. 178, and where one pays a certain sum upon a contested debt in comproimse thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him.
4. Where counsel on both sides agree that the clerk may take the verdict

of a jury, and afterwards such agreement is rescinded with notice to the clerk but not to the presiding Judge, a judgment of the Court, rendered in ignorance of such rescision, is not irregular.

APPEAL at Fall Term, 1877, of BUNCOMBE, from *Schenck, J.*

The plaintiffs brought this action to recover a certain sum of money alleged to be due by defendant, and the facts necessary to an understanding of the opinion are stated by THE CHIEF JUSTICE. There was a verdict and judgment for defendant, and an appeal by plaintiffs.

Messrs. Battle & Mordecai, for plaintiffs.
Mr. J. H. Merrimon, for defendant.

SMITH, C. J. The action was for goods alleged to have been sold and delivered by the plaintiffs to the defendant in November, 1860. In his answer the defendant denied the debt and said that he had entered into a contract of compromise with the plaintiffs' counsel whereby he agreed to pay fifty per cent of the claim, on condition that it should be established, and had paid $150 to the attorney which he was not to remit but retain in his own hands until the condition was fulfilled. The plaintiffs in their replication reaffirm the validity of their demand, admit the payment of $140 to their attorney, under a contract of compromise at fifty per centum on condition that the claim should be supported by affidavit made before a competent officer, and that such affidavit (587) had been made and shown to defendant before the action was commenced.

Issues made by the Court and consented to by counsel were then submitted to the jury as follows:

Did the defendant when this suit began owe the plaintiffs $307.37, with interest from May, 1861, for goods sold and delivered?

Did the defendant and counsel for plaintiffs agree in 1871 to compromise this debt at fifty cents in the dollar, if the plaintiffs should establish their debt?

The jury responded in the negative to the first issue and in the affirmative to the second. The evidence as to the sale and delivery of the goods was conflicting, one of the plaintiffs and another witness swearing positively to the sale to the defendant in person at Baltimore on 1 November, 1860, and the defendant testifying that he was never in that city until since the war. During the argument of plaintiff's counsel before the jury he insisted that the defendant was liable whether the goods were sold to him in person or sent on his order. He was interrupted by defendant's counsel, who suggested that plaintiff's witnesses testified to a sale direct to defendant when the Judge said, "does the deposition show

this?" Upon plaintiff's counsel's assent the Judge remarked, "how then do you argue that they were delivered to an agent?" Counsel replied, "the deposition of S. G. Merrimon will fix that," and thereupon the Judge added, "very well, proceed."

The Court charged the jury that if the goods were sold and delivered to the defendant or his authorized agent, or to his order, or were delivered to him or on his order, and accepted, they should find the first issue for the plaintiffs; that the words "if he should establish his debt, meant if he should establish it by judicial determination, and with re-
(588) gard to this suit, if he should establish it in this action."

On the retirement of the jury the Court inquired of counsel if they were willing to let the clerk take the verdict, and both gave their consent. Shortly after, the plaintiff's counsel told the defendant's counsel that he perferred to be present, and this withdrawal of consent was made known to the clerk, but not communicated to the Court. The verdict was rendered to the clerk in the presence of the Judge, and while the counsel were absent. The record is very voluminous, and the plaintiff's exceptions numerous, but the foregoing facts are deemed sufficient to a proper understanding of their force. They will be noticed successively in their proper order:

The objection to the form of the first issue is untenable. It is quite obvious from its own words and the charge of the Court that the jury understood they were to inquire into the validity of the debt, the matter in dispute as it existed originally unaffected by the deposit made on the compromise. They find that the defendant owed no part of the account. Besides the plaintiffs' counsel assented to the framing of the issue, and if not satisfied should have asked for a modification before the rendering of the verdict.

The remark of the Court at the interruption of the course of argument pursued by counsel evidently proceeded from a desire to correctly understand the testimony and the facts found, and this is manifest from his concluding words, "Very well, proceed." This does not violate the act of 1796, and could not have tended so far as we can see to prejudice the plaintiffs' case.

The construction given by the Court to the expression "if he" (the plaintiff) "should establish his debt." The second issue looking to the scaling of the debt under the compromise contract became entirely immaterial upon the findings on the first issue, that there was no debt to be scaled. Moreover the agreement to take part in satisfaction of
(589) an established debt, was inoperative even after payment for want of a consideration to support it. *McKenzie v. Culbreth,* 66 N.

C., 534; *Bryan v. Foy,* 69 N. C., 45. It is otherwise now under the act 17 March, 1875. Laws 1874-'75, ch. 178.

Judgment should have been given the plaintiffs for the sum $140 paid over by defendant to their attorney.

We do not see how the defendant can be adjudged to pay money to the plaintiffs, after a verdict declaring he never had the goods and did not owe them. The fund in the hands of their counsel does not belong to them but to the defendant.

The rendering of the verdict in open Court and when the Judge was present, was regular and proper, more especially after the agreement that the clerk alone might take it. The Judge would undoubtedly have sent for the cousel had their wish to be present been known to him. But he was not informed of the subsequent withdrawal of consent and had a right to assume its continuance. The complaint comes too late after an adverse verdict. We have considered the various exceptions of plaintiffs and in our view they are untenable.

Affirmed.

Cited: Koonce v. Russell, 103 N. C., 179; *Williams v. Lumber Co.,* 118 N. C., 939; *Holden v. Warren, Ib.,* 327.

JULIA A. COBLE and others v. DAVID COBLE, Adm'r.

Privilege of Counsel—Address to Jury.

1. It is not within the privilege of counsel in argument to a jury, to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and bystanders, particularly when he has not been impeached.

2. Where, on the trial below, a witness for plaintiff had been impeached by the testimony of defendant and plaintiff's counsel said in addressing the jury "that no man who lived in defendant's neigh- (509) borhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him": *Held,* that the defendant was entitled to a new trial.

APPEAL at Spring Term, 1878, of GUILFORD, from *McKoy, J.*

The facts appear in the opinion. There was judgment for the plaintiffs in the Court below and the defendant appealed.

Mr. Thomas Ruffin, for plaintiff.

Messrs. Scott & Caldwell, for defendant.

BYNUM, J. The argument and exhaustive brief of *Mr. Ruffin* have convinced us that the law and merits of the case are probably with the plaintiffs, and it is with reluctance that we are compelled to withhold an affirmation of the judgment rendered below, and to award a *venire de novo*. But in the conduct of the trial before the jury, there has been such a gross abuse of the privileges of an attorney to the manifest prejudice of the defendant, that we can not refuse him a new trial without a clear departure from a well considered line of decisions of this Court.

We extract from the case so much of it as is necessary to present the question to be determined: "Plaintiffs' counsel in his concluding speech to the jury commented on the character of the defendant in language of denunciation; among other things, in speaking of the character of plaintiff's witness, D. S. Coble, who had been impeached by the testimony of the defendant, he said, 'that no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant polluted every thing near him, or that he touched; that he was like
(591) the upas tree, shedding pestilence and corruption all around him.'

The defendant's counsel objected during these utterances to these comments, upon the ground that the character of defendant had not been impeached, and that he had not been offered as a witness except by the *plaintiffs,"* who had used his written testimony in their own behalf.

Upon the argument here it was admitted that this was irregular, but it was insisted that it would not entitle the defendant to a new trial, unless it clearly appeared that his cause was thereby prejudiced, and that it was impossible such could have been the case because there was but a single issue that was left finally to the jury, to wit, whether the Shaw land was purchased with the plaintiffs' money, and as to that one the defendant was not examined, nor did his written evidence relate thereto, and could have had no weight one way or the other with the jury in determining the single issue submitted. This is the excuse. To use it seems an aggravation of the offence, for it admits that there was not and could not have been a single ground for the derogatory assault upon the defendant. It was therefore unprovoked and wanton, and could have been resorted to for the single purpose only of prejudicing his cause before the jury,—the verdict must be carried by denouncing the man—and it was carried. Some allowance should be made for the zeal of counsel and the heat of debate, but here, the language and meaning of counsel were to humiliate and degrade the defendant in the eyes of the jury and bystanders—a defendant who had not been impeached by witnesses, by his answer to the complaint, or by his conduct of the defence, as it appears of record. Such an assault is no part of the privilege of counsel and was well calculated to influence the verdict of the jury. The

defendant's counsel interposed his objection in apt time and upon the instant, but they met with no response from the Court, and for this error there must be a *venire de novo*. *S. v. Smith,* 75 N. C., (592) 306; *Devries v. Phillips,* 63 N. C., 53; *Jenkins v. Ore Co.,* 65 N. C., 563; *S. v. Williams,* 65 N. C., 505; *S. v. Underwood,* 77 N. C., 502.

Venire de novo.

Cited: Hopkins v. Hopkins, 132 N. C., 28.

JOSEPH H. HOFF and others v. G. A. CRAFTON and others.

Separate Action—Sale of Land Under Decree—Mortgage—Issues—Practice.

1. Where land was sold under decree of a Probate Court and notes secured by mortgage on the land taken to secure the deferred payments, the only remedy for their collection is by motion in their cause in the Probate Court; and independent action on the notes can not be sustained.
2. In such case an order by the Probate Court to collect the notes by a sale of the mortgaged premises is not in any sense a proceeding to foreclose a mortgage; it is simply an order directed to its commissioner to proceed under the mortgage deed and convert the property into money to pay the debts secured.
3. In such case, the terms of sale prescribed in the mortgage deed can not be changed by the Court without the consent of all parties interested.
4. Where, in such case, there was a conflict in the Probate Court as to the ownership of the notes and issues in regard thereto were ordered to be made up and sent to the Superior Court for trial, and thereupon the case was carried by appeal to the Superior Court: *It was held,* to be error for the Superior Court to remand the case to the Probate Court without trying such issues; they should have been passed on and decided and then the cause should have been remanded to the Probate Court to be proceeded with and closed.

SPECIAL PROCEEDING commenced in the Probate Court and heard on appeal at Spring Term, 1878, of MARTIN, before (593) *Henry, J.*

The plaintiffs filed their petition against the defendants in the Probate Court for partition and sale of lands devised by John Barden, and of which they were tenants in common. The lands were decreed to be sold on the terms that four hundred dollars of the purchase money be paid at the sale and notes taken for the residue in four equal installments, payable at one, two, three and four years; that the land should be at once conveyed to the purchaser and reconveyed by him by way of mort-

age to secure the deferred payments; and Joseph T. Waldo was appointed commissioner to make the sale. The lands were sold under this order to George L. Roebuck, who complied with the conditions of sale, and report thereof was made, and on 3 April, 1874, confirmed by the Court. The mortgage contained a clause by which, by default of the mortgagor, in making any of his stipulated payments, the commissioner Waldo was authorized to sell the lands at public sale for cash and pay the notes.

The case states that after deducting for costs, the funds (both money and notes) were on 7 May, 1874, delivered to the parties in interest. On 12 September, 1877, the commissioner reported further to the Court that three of the notes were outstanding,—one in possession of W. E. Best who claimed to be the owner, while by others it was alleged to have been paid; and another held by Hornthall & Bro., whose right thereto was denied by Nancy E. Hoff, from whom the firm received it; that at the instance of the parties interested he had attempted to make sale of the premises under the mortgage, but had failed by reason of the bidder's non-compliance with the terms of sale, and he had now advertised them again; that in his opinion the lands if sold for cash would not command a price adequate to discharge the secured debts, and recommend-
(594) ing that they be sold on credit. Hornthal & Bro., and Best were, by notice served on them, made parties to the proceeding.

On the hearing of the matter, the Court ordered a sale for one-fourth cash and on a credit of one and two years for the residue of the purchase money, and title to be retained until full payment, and directed certain issues touching the payment of the note held by Best, and his right thereto, and the right of Hornthall & Bro. to the note in their possession, to be made up and sent to the Superior Court for trial in term time. These issues were accordingly drawn up. At the same time in behalf of Hornthall & Bro. and Best, a motion was made to dismiss the proceedings, which was overruled and they appealed. On the hearing before the Judge of the Superior Court, he affirmed the ruling of the Probate Judge, and ordered the cause to be remanded, and they appealed to this Court.

Messrs. Mullen & Moore and *G. H. Brown, Jr.*, for plaintiffs.
Mr. P. H. Winston, for defendants.

SMITH, C. J. (After stating the case as above.) The appellants in the argument here insist: 1. That the action had terminated in the Probate Court and the Probate Judge had no further jurisdiction to proceed in the case. 2. That the present proceeding was in substance if not in fact to foreclose a mortgage which a Probate Court had not

cognizance to hear and determine. 3. That the mortgagor George E. Roebuck was a necessary party. 4. That if sold the land must be sold according to the terms of the mortgage and for cash only. We propose to notice these several objections successively.

The action is not ended as long as any thing remains to be done. Here, the notes were unpaid and the security for their payment was in the hands of an officer of the Court. We have decided at (595) this term, in *Lord v. Beard, ante,* 5, that where a clerk and master who was also guardian to the infant whose lands were sold by a decree of the Court of Equity, took the note payable to himself as guardian from the purchaser, the only remedy for its payment was a motion in the cause and an independent action on the note could not be sustained. To same effect are *Council v. Rivers,* 65 N. C., 54, and *Mauney v. Pemberton,* 75 N. C., 219.

The second objection rests upon an entire misconception of the facts of this case. It is not in any sense a proceeding to foreclose a mortgage, nor indeed any independent judicial action. It is simply an order directed to its commissioner having control of a security, to proceed under his deed and convert the property into money to pay the debts secured. The commissioner is an appointee of the Court—acting under its authority and by its sanction—and remains subject to its control until the whole matter is adjusted and closed. Suppose the purchaser had conveyed other real estate to secure the purchase money, could not the Court compel the commissioner to exercise the power of sale conferred on him in order to cover the payment of the debt? This case does not differ from the one supposed. The Court issues its mandate to the commissioner to proceed to make the money—and this it clearly had the right, and it was its duty to do.

The third exception is disposed of in what has been already said. The commissioner is acting so far as the mortgagor is concerned, as any other mortgagee under a power of sale, and not asking the aid of any Court in its exercise.

The fourth exception is well founded. The terms of the sale as prescribed in the mortgage can not be changed by the Court without the consent of all parties interested. The mortgage is a contract and is inviolable as well against the action of the Court as any one else. The Court could only order its commissioner to proceed under it according to its provisions, and no inconvenience or loss likely to be incurred by a sale for cash, can authorize a sale on any other terms (596) by the commissioner. We are not now referring to a judicial proceeding to foreclose, but to the facts of our own case. The departure from the requirements of the mortgage is unauthorized, and the order

in this particular erroneous. Nor should the case have been remanded until the issues of fact sent up were tried. It was the duty of the Judge to proceed to have these issues passed on and decided first; and then, after correcting the error of the Probate Court in so far as its order varied the terms of sale prescribed in the mortgage, to remand the cause to be proceeded with and closed. In this respect there is error in the judgment below, and the cause will be remanded to be proceeded with in conformity to this opinion.

Judgment reversed and case remanded.

Cited: Capps v. Capps, 85 N. C., 408; *Thompson v. Shamwell,* 89 N. C., 283; *In re Propst,* 144 N. C., 567.

ELISHA PORTER v. D. T. DURHAM and BRYAN BROWN.

Costs—Witness Fees—Practice.

Where, in an action to recover damages resulting from cutting a ditch, the title to the land came in controversy and on motion of plaintiff a survey was ordered and made, and on the trial the surveyors were summoned as witnesses for plaintiff but were not introduced by him or tendered to defendant, nor was the plat put in evidence, but the defendant examined them and introduced the plat: *It was held,* the plaintiff having obtained a verdict, that the costs of the survey and the witness fees of the surveyors should be taxed against the defendant.

ACTION removed from Pender and tried at Fall Term, 1876, of DUPLIN, before *McKoy, J.*

The question presented by the record and decided by this Court was one of costs which were incurred as follows: The action was
(597) brought to recover damages alleged to have resulted from cutting a ditch upon certain lands, and the title thereto coming in controversy, the Superior Court of Pender upon motion of the plaintiff ordered a survey to be made, which motion was resisted by the defendants. In pursance of the order a survey was made and a plat returned to Court and filed with the papers in the case. On the trial of the action, the surveyors were summoned as witnesses by the plaintiff, but were not introduced or examined by him, nor the plat put in evidence. The defendants introduced the plat and the surveyors and examined them. The plaintiff closed his case without stating that he tendered the plat or witnesses to the defendants. Upon these facts His Honor considering that plaintiff had incurred useless expense, and had summoned unnecessary

witnessess, decreed, that the costs of the survey and the witness fees of the surveyors be paid by plaintiff. There was judgment in the case for plaintiff, and he appealed from so much thereof as taxed him with the said costs.

Messrs. W. S. & D. J. Devane, W. A. Allen and *D. L. Russell,* for plaintiff.

Messrs. J. N. Stallings and *Merrimon, Fuller & Ashe,* for defendants.

READE, J. We are of the opinion that under C. C. P., sec. 276, the plaintiff is entitled to recover costs. But of course he is not entitled to recover unnecessary costs. So the question is whether the survey and the attendance at the trial of the surveyors, they being summoned, were proper or necessary costs. The survey was ordered by the Court upon motion of the plaintiff it is true, and that was an adjudication that a survey was proper. That it was useful was shown by the fact that it was ordered by the Court and used upon the trial by the defendant himself. Surely then he can not complain that it was (598) useless or unnecessary.

What has been said of the survey may be said of the surveyors. It was prudent in the plaintiff to summon them, as they would probably be needed to explain the survey. They were examined as witnesses by the defendant, and therefore it is not for the defendant to say that they were useless. It often happens that a party prepares testimony which will probably be necessary, but which turns out not to be so for him upon the trial; and then he will not be allowed to have them taxed in the costs, unless their materiality is shown, which is usually done by tendering them to the other side who may examine them to show that they were not material. Here the surveyors were not sworn or examined by the plaintiff or tendered to the defendant; but then that was made unnecessary by reason that the defendants examined them as witnesses of their own accord.

There is error. There would be judgment here for the plaintiff for full costs of the survey and of the surveyors as witnesses, but the fees of the witnesses do not appear of record, and therefore this will be certified to the Court below, and the case remanded to the end that there may be judgment for the plaintiff below in accordance with this opinion.

Reversed.

*Cited*s *Porter v. Armstrong,* 129 N. C., 103; *Plymouth v. Cooper,* 135 N. C., 7; *Sitton v. Lumber Co., Ib.,* 541; *Chadwick v. Ins. Co.,* 158 N. C., 383.

SUPREME COURT CLERK'S OFFICE v. THE COMMISSIONERS of RICHMOND.

Fees of Supreme Court Clerk.

The clerk of the Supreme Court is not embraced in the provisions of ch. 247, Laws 1874-'75, directing the payment of half fees in certain cases. He is entitled to full fees when the defendant in a criminal action appeals to this Court.

RULE on the Board of Commissioners of RICHMOND to show
(599) cause why an attachment shall not issue for their refusal to pay the costs adjudged against the board and due the clerk's office, in *S. v. Bullard* and *S. v. Covington,* heretofore decided by this Court. The commissioners answer and say they are advised by their counsel that the county is bound for half fees only, for which provision has been made, and they are ready and willing to pay full fees if this Court shall so determine. *Mr. J. D. Shaw* appeared in this Court for the commissioners.

SMITH, C. J. (After stating the case as above.) We are of opinion that the clerk of this Court is not embraced in the provision for the payment of half fees in certain cases, and is entitled to full costs. In the Revised Code the fees of the County Court Clerk are prescribed in ch. 102, sec. 17, and those of the Superior Court clerk in the succeeding section. Sec. 19 applies to both clerks and disallows a fee for issuing a *capias ad respondendum* during term time and returnable *instanter,* unless it shall have been executed. Then follows sec. 20, which is substantially re-enacted by the act of 1875. Laws 1874-'75, ch. 247.

The last act directs the costs inclusive of witness fees in certain cases to be paid by the prosecutor in all criminal actions terminating in an acquittal, an entry of *nolle prosequi,* or arrest of judgment, whenever the Judge or Justice trying the same shall certify "that there was not reasonable ground for the prosecution, and that it was not required by the public interest." The act further declares that "if there be no prosecutor, and the defendant is acquitted or convicted, and unable to pay the costs, or a *nolle prosequi* be entered, or judgment arrested, the county shall pay the *clerk, sheriffs, constables* and *witnesses* their half fees only, except in capital felonies and prosecutions for forgery, perjury and conspiracy, when they shall receive full fees." This act is but a
(600) substitute and in nearly the same words as sec. 20, ch. 102 of the Revised Code, and must be interpreted upon the same principle. The liability of the county is made to depend on the manner of termination of the class of criminal actions to which the statute applies, and

as to such of them as end in a *nolle prosequi* or verdict of acquittal and can not be reviewed in the Court, no further costs will be incurred.

It will also be noticed that county officers, clerks, sheriffs and constables, are grouped together where fees with the fees of witnesses attached to trials in the Superior Court and to antecedent proceedings, and the association strongly points to the legislative intention to refer only to clerks of the Superior Court. It would be a strained construction of the word to extend it to the clerk of this Court, and in our opinion this is not its proper meaning and effect. We therefore declare the clerk of this Court is entitled to full fees. In view of the expressed willingness of the commissioners to pay their costs, if in the judgment of this Court the county is chargeable therefor, we presume no further proceeding under the rule is necessary.

The clerk will send to the commissioners a certified copy of this opinion. The county commissioners will pay the costs of the rule.

PER CURIAM. Judgment accordingly.

Overruled: Clerk's Office v. Com'rs, 121 N. C., 30.

The People, etc., on relation of GEORGE W. PRICE, Jr. v. HENRY C. BROCK.

Election—Power to Declare Result.

Under the Private Laws of 1868-69, ch. 5, sec. 9, it is the exclusive province of the board of aldermen of the city of Wilmnigton to declare the result of a ballot for chief of police for said city.

APPEAL at June Special Term, 1877, of NEW HANOVER, before *Seymour, J.* (601)

The plaintiff alleged that in June, 1877, the board of aldermen, ten in number, of the city of Wilmington proceeded in pursuance of law to elect a chief of police for the city, and that upon the sixth ballot he received five votes and the defendant four votes, and that one ballot was blank; that the clerk of the board announced that as but nine votes were cast and the plaintiff having received a majority thereof, he was duly elected; that nothwithstanding this result, the board decided to have another ballot, when the defendant received six votes and was declared elected (and was inducted into office under the protest of the plaintiff), and has since been exercising the duties of the office withholding the same from the plaintiff contrary to law.

The defendant in his answer says that immediately after the clerk

announced the vote as alleged, Mr. Vollers, a member of the board, stated that he had cast the blank ballot by mistake, and asked to be allowed to correct the same; that thereupon the board reconsidered the vote and proceeded to ballot again, and on the seventh ballot the defendant received six votes being a majority of all the board of alderman, and afterwards said board declared that the defendant was duly elected; whereupon he qualified and entered upon the discharge of his duties as chief of police, and denies that the plaintiff was appointed by the board or a majority thereof.

Upon the trial it was agreed by counsel that the case should be heard upon the complaint and answer, and that all laws in regard to the charter of said city should be considered in evidence, and that the account of said balloting as contained in a transcript from the minutes of the board should be admitted as true. His Honor held that the defendant was entitled to the office and the plaintiff appealed.

(602) *Mr. D. L. Russell,* for plaintiff.
Messrs. A. T. & J. London, for defendant.

FAIRCLOTH, J. The question in this case arises under an act for the government of the city of Willmington. Private Laws, 1868-'9, ch. 5, sec. 9.

We find it unnecessary to decide the questions discussed at bar, to wit, whether the majority of a quorum are competent to make an election and whether the last ballot could operate under said section as a removal of one who might have been elected by a previous ballot. The board of aldermen consists of ten members, and all of them were present when the sixth ballot was taken, under which the plaintiff asserts his title.

The clerk counted the ballots and announced that the plaintiff having received a majority of the votes cast, was elected. Some of the aldermen immediately expressed the opinion that the plaintiff was elected and *should be so declared,* but others differing with them contended that there had been no election. It was then proposed to strike out the ballot just taken and vote again, which proposition was adopted by the board. No result of the sixth ballot was declared by the *board,* and for this reason we think the plaintiff was not elected, and would not have been even if each member had voted for him. The board could ascertain the result and declare the party elected, either by doing so themselves or by adopting the result declared by their clerk. This they did not do. but declined to do so.

Affirmed.

(603)

STATE v. JONAH DAVIS.

Abandonment of Wife and Child—Statute of Limitations—Duress.

1. Where one abandons his wife and child in August, 1873, an indictment found against him in November, 1877, under Bat. Rev., ch. 32, secs. 119, 120, is barred by the statute of limitations, though the separation be continued up to that time.
2. If a warrant be issued against the husband and father in September, 1877, for such abandonment, and, upon the trial of the same, he agrees to support the wife and child, and does so for two weeks, but thereafter fails to comply with his engagement, such failure constitutes a fresh abandonment, and will sustain an indictment found in November, 1877.
3. Duress can not be predicated of compulsion to discharge a legal duty.

INDICTMENT for a Misdemeanor under Bat. Rev., ch. 32, secs. 119, 120, tried at January Term, 1878, of WAKE Criminal Court, before *Strong, J.*

The defendant was charged with wilful abandonment of his wife Laura without having provided adequate support for her and a child which he had begotten upon her. The indictment was found at November Term, 1877. It was admitted that the defendant and his wife were married on 28 April, 1873, and lived together until August of that year, when he abandoned her. It was in evidence that on account of said abandonment, a warrant was issued against the defendant on 21 September, 1877, and upon the trial of the same, his wife offered to live with him if he would support her and her child, which offer he declined; but an arrangement was made between them that he should pay her a certain sum per week for her support, which sum was paid for two consecutive weeks, and then the defendant refused to contribute any further to her support. The defendant introduced in evidence the record of an action for breach of promise of marriage and seduction, brought by said Laura against him; and there was also evidence tending (604) to show that he was under arrest (by virtue of an order made in said action) at the time the marriage was solemnized; and the defendant proposed to prove his declarations in the absence of said Laura, for the purpose of showing that said marriage was contracted under duress. This evidence was objected to by the State, and ruled out by the Court.

The defendant's counsel asked the Court to charge the jury that the abandonment having taken place in 1873, was barred by the statute of limitations. His Honor assented to this propostion, but said, that if the jury should find from the evidence that in 1877, the said Laura had offered to live with defendant as his wife, if he would support her, and

that he declined to do so, and that the said arrangement for her support was not complied with by defendant as aforesaid, that these facts would constitute a new abandonment which would not be barred by the statute. The jury returned a verdict of guilty. Judgment. Appeal by defendant.

Attorney General and *D. G. Fowle,* for the State.
Messrs. T. R. Purnell and *Armistead Jones,* for the defendant.

READE, J. We are of the same opinion with His Honor in all his rulings, only one of which requires any elaboration. It is the act of abandonment and failure to support, that constitute the offence. The first offence was in 1873, and is barred by the statute of limitations. It is not a continuing offence by reason of the continued separation; so that the question is whether there was a second offence in the latter part of the year 1877. The parties were together treating as to what should be their future relations. The wife proposed a complete restora-
(605) tion of their marriage relations which the husband declined, but he agreed to suppore her and did support her for two weeks, when he refused to support her any longer. Being already separated this refusal completed the second offence.

Much stress was laid by the defendant's counsel upon the duress under which the defendant was alleged to have contracted the marriage. But the duress was not made out. It is true he was sued by the feme for a breach of promise of marriage and seduction, and was under arrest, but the arrest was lawful. A promises to pay B a hundred dollars, and B sues him for a breach of promise and compels him to pay; that is *compulsion,* but is not *duress.* And his declaration that he did not want to comply was no evidence of duress.

No error.

STATE v. ISAAC SHELTON and ALFRED FRANKLIN.

Assault and Battery—Arrest of Fugitive from Another State.

No one has authority, without process legally issued in this State, to arrest a person charged with crime in another State and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery.

INDICTMENT for an Assault and Battery tried at Spring Term, 1878, of MADISON, before *Cloud, J.*

The defendants and two others, Larkin Stanton and Solomon Stanton, were indicted jointly for an assault and battery on one Peter Howard.

Larkin Stanton was not taken, and the other three defendants were put on trial. The jury acquitted Solomon Stanton and found the other defendants guilty, and from the judgment thereon they appealed to this Court. (606)

The facts so far as necessary to show the defence relied on are these: The prosecutor, Howard, who resided in Madison county in this State had been committed on a charge for larceny in Tennessee and had escaped from custody and returned home. Larkin Stanton and Alfred Franklin came to prosecutor's house and informed him that they had come to arrest him and carry him to Tennessee. Howard replied that he would not be taken unless they had a paper from the Governor. Other conversation passed and the parties left. Thereupon the prosecutor loaded his musket with duck shot and carrying it with him went to the house of a Justice of the Peace to witness a trial. At its conclusion he started home and passed the house of one Chandler, saw all four defendants sitting in the porch. When he had gone about one hundred and fifty yards from the house, he heard some one call out "halt." Prosecutor stopped, resting his gun on the ground, and looking back saw all four pursuing and about forty yards distant. Larkin Stanton immediately fired at prosecutor, the ball passing through the side of his neck. Prosecutor returned the fire but without effect, when they all ran up, and Isaac Shelton discharged his pistol three times at prosecutor, wounding him in the shoulder, and Alfred Franklin struck the side of his head with a stone and felled him to the earth. They then left him and went off. None of them had any warrant for prosecutor's arrest, nor had any official authority.

The Court was asked to charge the jury that if the defendants were making an effort to arrest the prosecutor, in good faith, with intent to convey him to Tennessee for trial although they had no process, they would be justified unless the force used was excessive. The Court refused to give the instruction and told the jury that the defendants had no right to arrest without legal progress. Verdict of guilty, (607) Judgment. Appeal by defendants.

Attorney General, for the State.

No counsel for defendants.

SMITH, C. J. (After stating the case as above.) In our opinion the Court was correct both in refusing to give the instruction asked and in that given. There were no facts in evidence from which the jury could reasonably infer that the defendants honestly intended arrest and removal, and that their acts were directed to that end. The assault was

with a deadly weapon, made while the prosecutor at their command stopped and was awaiting their approach, without any demonstration on his part of an intended attack on them. When twice wounded with shot and smitten to the ground and entirely without ability to resist further, they leave him and go off. If this evidence was believed it did not warrant the charge requested. The assault was violent and excessive, putting life in imminent peril and far overstepping the limits of any supposed authority in private persons to arrest a felon and bring him to trial.

In *Brockway v. Crawford,* 48 N. C., 433, it is held that a private person may arrest a suspected person without warrant in order to carry him before an examining magistrate, when done without malice and on proof of probable cause.

In the more recent case of *S. v. Bryant,* 65 N. C., 327, the Court say, such arrest may be justified when necessary for want of an officer or otherwise to prevent an escape. But where this authority is attempted to be exercised by one person over the liberty of another, and especially without process, the means employed must be reasonably appropriate to the end to be accomplished, and accompanied with no excessive violence. This can not be said of the conduct of the defendants. But this learning has no application to the facts of the case. No criminal vio-
(608) lation of the laws of this State has been committed by the prosecutor, and it is only when they are to be vindicated that this unusual power is delegated to a private person. For the arrest of fugitives from other States wherein the offence has been committed, we have a positive and express statutory provision, as follows:

Any Justice of the Supreme Court, or any Judge of the Superior Court, or of any Special Criminal Court, or any Justice of the Peace, or Mayor of any city or chief magistrate of any incorporated town on satisfactory information laid before him that any fugitive in the State has committed, out of the State and within the United States, any offence which by the laws of the State in which the offence was committed, is punishable either capitally or by imprisonment for one year or upwards in any State prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the State for the space of six months unless sooner demanded by the public authorities of the State wherein the offence may have been committed, agreebly to the act of Congress in that case made and provided. Bat. Rev., ch. 33, sec. 42.

This act prescribes the manner in which criminals escaping from other States may be restored to that having jurisdiction of the offence, and its directions can not be disregarded. It provides fully a method by

which the crime may be punished, and at the same time guards and preserves the personal security of the citizen from lawless invasion.

No error.

Cited: S. v. Campbell, 107 N. C., 953.

(609)

STATE v. R. W. A. ROGERS.

Bastardy—Evidence—Judge's Charge.

On the trial of an issue of bastardy, the Court below charged the jury that "the written examination of the woman was presumptive evidence that the defendant was the father of the child, and that it devolved on him by a preponderance of evidence to show that he was not; and that if taking all the evidence into consideration, both sides were evenly balanced, the State was entitled to a verdict": *Held,* not to be error.

PROCEEDING in Bastardy heard at Spring Term, 1878, of UNION, before *Moore, J.*

On the trial of the issues as to the paternity of the child, the examination of the mother taken before the Justice was read to the jury, and the Solicitor then rested his case. Thereupon the defendant introduced himself and other witnesses to show that he was not the father; and to rebut this, the State introduced the mother and others to prove that he was the father of the bastard child.

The Court charged the jury that the written examination of the woman was presumptive evidence that defendant was the father of the child, and that it devolved on him by a preponderance of evidence to show that he was not; and that, if "taking all the evidence into consideration, both sides were evenly balanced, the State was entitled to a verdict." To this instruction the defendant excepted. Verdict for the State. Judgment. Appeal by defendant.

Attorney General, for the State.

Messrs. Covington & Vann and *W. H. Pace,* for the defendant.

SMITH, C. J. (After stating the case as above.) If the Judge in giving the instruction intended to tell the jury that taking the (610) oral testimony delivered by the witnesses into consideration, if their minds were brought to an equipoise, and neither side preponderated, then the force and effect given by the statute to the written examination must turn the scale and give the State a verdict, the correct-

ness of the charge will not admit of question; and such we must suppose to have been the understanding of the jury. If, however, the Court meant that putting the written examination and testimony of witnesses together, and considering the entire evidence, if there was no preponderance either way, the verdict must be against defendant, the correctness of the charge would not be so clear. But even upon this construction of the charge, as some effect must be allowed the examination under the statute beyond its value as mere evidence, we are disposed to concur with the Judge, that it must prevail. *State v. Bennett,* 75 N. C., 305.

No error.

Cited: S. v. Bailey, 88 N. C., 701; *Miller v. Bumgardner,* 109 N. C., 416; *S. v. Williams, Ib.,* 848; *S. v. Burton,* 113 N. C., 664; *S. v. Cagle,* 114 N. C., 839; *S. v. Mitchell,* 119 N. C., 785; *S. v. Rogers, Ib.,* 794; *Mabe v. Mabe,* 122 N. C., 556; *S. v. McDonald,* 152 N. C., 805.

STATE v. J. C. PARISH.

Evidence.

The former statements of a witness, made without the sanction of an oath, and coinciding with those made on the stand, may be admitted in evidence, if he is impeached, to sustain the personal *credibility* of the *witness*, but not for the purpose of confirming his *statement* as to the *facts* sworn to by him on the trial; *A fortiori* such testimony is not admissible to confirm the statement of another witness testifying to the same effect.

INDICTMENT for Larceny tried at May Term, 1878, of WAKE Criminal Court, before *Strong, J.*

It was in evidence that John Jones had lost two sheep between (611) 20 and 28 August, 1876, and that the defendant at that time owned no sheep. One Dick Young, a witness for the State, testified that soon after Jones lost them he saw the sheep shut up in an old out house in possession of defendant, and a short distance from his residence; that when he saw them he was in company with his son, Thomas Young, the witness next introduced, whose testimony corroborated the above, and during whose examination he was ordered by the Court to stop, but failing to do so, was ordered several times by the defendant's counsel in a loud and disrespectful manner, to stop. The State next proposed to prove by one Lewis Jones, in order to confirm the evidence of the two first witnessess, that Thomas Young, shortly after the loss of the sheep

and before the defendant had been accused of the larceny or receiving, etc., had made the same statement to the witness that he had given to the jury. The defendant objected to the evidence, the Court overruled the objection, and the witness said that Young had made the same statement to him.

It was also in evidence that John Jones lived one mile from the defendant and owned a large number of sheep, among them the particular ones alleged to have been stolen by the defendant; that for several months before their loss, they were in the habit of grazing in defendant's field where the out house was situated in which the sheep were seen by the witness as aforesaid; that about the time they were lost, one Crawford bought two sheep of defendant, corresponding in description with them; Crawford at that time was living about eight miles from Raleigh, and while on his way to Raleigh about daylight carrying beef to market, he was overtaken by defendant, also going to Raleigh, with the sheep, and after some conversation in regard to the price, he bought them of defendant in the presence of one Nowell, and left them with one Johnson who lived by the road side to keep for him until his return from Raleigh; that upon Crawford's proposing to put them in an (612) inclosure surrounded by a fence, the defendant said he had better put them in a stable or confine them in some other place, that they were mischievous and might get away; that they were tied and left inside the fence where they could have been seen by passers-by.

It is further in evidence that the defendant since the indictment was found had denied to Crawford that he bought the sheep from him and accused Crawford of stealing them himself; but one Stills, a butcher, testified that about the last of August, 1876, the defendant told him he had two sheep to sell, (described as those in question) and that soon afterwards on asking the defendant where they were, he replied that he had sold them to Crawford.

The defendant's counsel requested the Court to instruct the jury that there was no evidence that defendant had received the sheep knowing them to have been stolen, which was refused, and the defendant excepted. There was a verdict of not guilty of larceny, but guilty of receiving, etc. Judgment. Appeal by the defendant.

Attorney General, D. G. Fowle and *W. H. Pace,* for the State.
Mr. T. M. Argo, for the defendant.

READE, J. It can scarcely be satisfactory to any mind to say that if a witness testifies to a statement today under oath, it strengthens the statement to prove that he said the same thing yesterday when not under

oath. If the proposition were reversed, as if one make a statement today not under oath, it strengthens the statement to show that he said the same yesterday under oath, it would be conceded because of the sanction of the oath. And yet it must be conceded that it is settled by the weight of authority both of text writers and decided cases (613) that when a witness testifies to a statement under oath, and the witness is impeached, he may be supported by proving that on a former occasion he had made the same statement, although not under oath. As first administered the rule was sensible and useful. A witness was called and testified and impeached upon the ground of some new relation to the cause or to the parties, and then other witnesses were called to prove that he had made the same statement prior to such new relation or supposed influence, or where from lapse of time his memory was impeached it was proved that he made the same statement when the memory was fresh. All that was sensible and useful. But the idea that the mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience that a *falsehood* may be repeated as often as the *truth.* Indeed it has never been supposed by any writer or Judge that the repetition had any force as substantive evidence to prove the *facts,* but only to remove an imputation upon the witness. It is like to evidence of character which only affects the *witness.*

For illustration: Thomas Young, one of the witnesses for the State, swore that he saw the stolen property in the possession of the defendant. He was not cross-examined, not contradicted, his character not assailed, nor was he in any way impeached, but stood before the Court as any other witness upon his merits. And the State, lest his story might not be believed, proved by another witness that he had heard him tell the same story before. Now suppose Thomas Young had not been a witness at all, would it have been competent for the State to prove that he had said upon some occasion that he had seen the stolen property in the defendant's possession? Of course not. It would have been nothing but hearsay. If then it would not have been evidence to prove the fact, if Thomas Young had not been a witness, how was it evidence to prove the fact, he being a witness? It was not evidence to prove the *fact* (614) in the one case more than in the other. He being a witness, such testimony would have been competent to remove some imputation upon him if any had been cast, and for that purpose only; and as no imputation had been cast upon him there was no purpose for which it was competent. If he stood before the Court unimpeached, it was unnecessary and mischievous to encumber the Court and oppress the defendant with his garrulousness out of Court and when not on oath.

The rule is, that when the witness is impeached—observe, when the

witness is impeached—it is competent to support the *witness* by proving consistent statements at other times, just as a witness is supported by proving his character, but it must not be considered as substantive evidence of the truth of the *facts* any more than any other hearsay evidence. The fact that supporting a witness who testifies, does indirectly support the facts to which he testifies, does not alter the case. That is incidental. He is supported not by putting a prop under him, but by removing a burden from him, if any has been put upon him. How far proving consistent statements will do that, must depend upon the circumstances of the case. It may amount to much or very little.

The admission of the former declarations of Thomas Young to *"confirm this evidence,"* would have been error even if he had been impeached, but as he was not impeached it would have been error to have admitted it even for the purpose of supporting the *witness.*

But a more palpable error than this was committed. The former declarations of Thomas Young were admitted not only to "confirm his own evidence" but to "confirm the evidence" of another witness, Dick Young. This is without precedent. As well might it be said that to prove one of a dozen witnesses to be of good character is to prove all to be so, or to sustain one is to sustain all. This is put upon the ground that both witnesses testified as to the same facts, and therefore, if one was to be believed, so was the other. Let us see if that (615) is so.

A and B both swore that they were in the city of New York on 4 July last and witnessed the celebrations of the day which they describe. A was in fact there, but it is proved by a dozen witnesses that B was not there but was in Raleigh; would it "confirm the evidence" of B to prove that A had given the same account of the celebration before the trial as upon the trial? Clearly not. No more does the former consistent account of Thomas Young "confirm the evidence" of Dick Young.

It is not necessary for us to decide whether the misbehavior of Dick Young on the trial which neither the Judge nor the counsel could control, impeached his credibility so as to allow him to be supported by his former consistent statement, for no such statement was offered.

Venire de novo.

Cited: Jones v. Jones, 80 N. C., 250; *S. v. Rowe,* 98 N. C., 631; *Burnett v. R. R.,* 120 N. C., 517; *Cuthbertson v. Austin,* 152 N. C., 338.

STATE v. JOSEPH P. PARROTT.

Evidence—Practice.

1. The rule of law (Bat. Rev., ch. 43, sec. 16) disqualifying the wife to testify for or against her husband in criminal proceedings, applies only to cases where the husband has a legal interest in the result, and does not render her incompetent to contradict his testimony for the State upon an indictment against a third party for an assault and battery upon him.
2. The refusal of the Court below to allow counsel to comment on irrelevant matter is not assignable for error, even though the refusal be based upon invalid reasons.

INDICTMENT for Assault and Battery tried at Spring Term, 1878, of LENIOR, before *Kerr, J.*

William White, the only witness for the State, testified that (616) the defendant assaulted him, and that there was no one present except the witness, the defendant, and the defendant's wife. And upon cross-examination he admitted that he also assaulted the defendant and had been previously indicted and convicted for the same. He also stated that defendant's wife was his daughter, and that she witnessed the whole fight, but that he did not offer her as a witness in his behalf on his said trial.

The defendant's counsel in his argument to the jury, insisting that his client was not guilty and that the witness White had not sworn to the truth, stated among other things that the failure of White to offer the defendant's wife as a witness for him on said former trial, was a circumstance tending to prove that White was the only guilty party in respect to the difficulty. Whereupon His Honor remarked and so held that the defendant's wife could not have been a witness on that trial to contradict her husband who was the only witness for the State against White, and did not allow the counsel to comment upon that circumstance to the jury. Verdict of guilty. Judgment. Appeal by defendant. (See *S. v. Davidson,* 77 N. C., 522.)

Attorney General, for the State.

No counsel in this Court for the defendant.

SMITH, C. J. The only exception presented for our consideration is to the remark of the Judge pending the trial, and while the defendant's counsel was addressing the jury, and his arresting the comments of counsel.

The witness, White, who alone was introduced by the State to prove

the defendant's assault on himself on his own examination, stated that he had been, at a former term of the Court, convicted of an assault on the defendant in the same affray, and that the defendant's wife, a daughter of the witness, saw the whole affair, but was not examined in his defence on that trial. (617)

In commenting on the testimony of White, the defendant's counsel impeached his credit, and was proceeding to argue that his failure to call on his daughter as a witness on his own trial was evidence that he alone, and not the defendant, was the guilty party. The Court interposed and arrested this line of argument by the remark that the wife would not have been permitted to testify on that occasion and contradict her husband, and that she was not a competent witness for that purpose.

We do not concur in this opinion. We know no reason why the witness, White, when he was on trial for an asault on the defendant, should be deprived of the testimony of the wife simply because her husband had testified to the same facts, and although the latter was the subject of the inquiry. He was in no legal sense interested in the result of that trial. Nor is the competency of the witness affected by the late act for improving the law of evidence. Bat. Rev., ch. 43, sec. 16. The act declares that the preceding section which removes the disqualifications arising from interest or crime, and permits witnesses to testify notwithstanding they may be interested in the result or have been convicted of crime, provides that this enabling section "shall not in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband," except in case of assault and battery committed by the husband on the wife.

In the former case, White only was charged with an offence, and the criminal proceeding was against him. The defendant was a witness merely to prove the fact charged, and we know of no rule of law which permits him to give evidence and excludes the wife's testimony as to a transaction, known to both, in a case where neither has any legal interest in the result. We therefore hold that the Judge was in (618) error in making the declaration. But we are unable to see how it would tend to mislead the jury or do any harm to the defendant. The matter was irrelevant to the issue of the defendant's guilt. It was proper therefore, though the reason assigned for the interruption may be sufficient, for the Judge to stop counsel in his comments on the incidents of the other trial, and in deducing therefrom inferences wholly unwarranted by any evidence before the jury. The only question for them to decide, was as to the defendant's guilt and the sufficiency of the evidence to

convict. See, as bearing on the question of the wife's competency to testify, *S. v. Mooney,* 64 N. C., 54.

No error.

STATE v. SYKES.

Evidence—Province of Jury.

It is the duty and privilege of the jury to determine what *is* the testimony in a cause as well as its weight and reliability: *Therefore,* when upon the disagreement of counsel as to what was testified by a witness, the Court stated that both the counsel were wrong, and added that he would so recapitulate the testimony that "it would be moral perjury for a juror to accept the statement of defendant's counsel": *Held,* to be an invasion of the province of the jury, and entitles the defendant to a *venire de novo.*

INDICTMENT for Larceny tried at February Term, 1878, of NEW HANOVER Criminal Court, before *Meares, J.*

That part of the case upon which the decision in this Court is based is as follows: "While the Solicitor was submitting his argument to the jury, he was interrupted by defendant's counsel who asserted that he 'was mis-stating the testimony' of a witness, and the defendant's counsel then stated what he understood to be the testimony of the witness. (619) The Court thereupon remarked that neither of the counsel had stated the testimony correctly, and the defendant's counsel immediately replied in a positive manner 'that that was a question for the jury.' The Court then remarked that it was true 'that it was a question for the jury to decide, but that the Court intended to state the testimony of the witness to the jury in such a way, that in the opinion of the Court, it would be moral perjury in a juror to accept the statement of defendant's counsel as the correct one." The defendant excepted. In instructing the jury upon that part of the evidence about which the above colloquy arose, His Honor said, "that counsel had their feelings enlisted in a cause, and were much interested in the result and were frequently subjected to interruptions while a witness was making his statements on the stand. They sometimes misunderstood a witness, and sometimes their memories were at fault, and that he had to discharge the duty of recapitulating the testimony of witnesses with accuracy, and in order to do so, was compelled to give strict attention to the statement of every witness; that he had no interest in the result of the trial, and while the Court in its opinion had as good a memory and could recollect the testimony of witnesses as well as any other person in the court-room, yet out of abundant caution, he was in the habit of taking notes and not un-

frequently writing out testimony in full, so as to enable him to state it with perfect accuracy; at the same time it was true as the defendant's counsel had asserted 'that the jury were to judge as to what was the testimony of a witness.'" He then proceeded to state the testimony of the witness, and submitted the case to the jury who found the defendant guilty. Judgment. Appeal by defendant. (See *Davis v. Hill,* 75 N. C., 228—opinion.)

Attorney General, for the State.
No counsel for the defendant.

READE, J. In all criminal prosecution every man has the right * * * to have counsel for his defence. Const., Art. I, sec. 11. (620) Every person accused of any crime whatever shall be entitled to counsel in all matters which may be necessary for his defence. Bat. Rev., ch. 33, sec. 59. And in jury trials they (counsel) may argue to the jury the whole case as well of law as of fact. Rev. Code, ch. 31, sec. 15. This applies to civil as well as criminal causes.

These constitutional and statutory provisions give to parties and to counsel useful rights and ample powers which may not be denied or abridged. It is easy to see that they may be abused by counsel, in which case they may be controlled or punished by the Court, but while within bounds they must be protected.

When counsel is arguing the facts to the jury he must be permitted to argue as he understands them, subject of course to be controlled for gross misrepresentation or perversion; when therefore the defendant's counsel and the Solicitor differed honestly, as we are to suppose, as to the testimony of a witness and His Honor said that neither was right and that he would state it to the jury in such way as that it would be moral perjury in them to accept the statement of the defendant's counsel as the correct one, this remark of His Honor was so disparaging to the counsel that it was well calculated to impair his efficiency. It was the same as to tell the jury that the statement of the defendant's counsel was so manifestly false that there could be no mistake about it; and that if they acted upon it as true, they would be guilty of moral perjury. If the jury could not accept the statement without corruption, no more could the counsel make it fairly; and an unfair dealing with the testimony necessarily destroys the counsel's weight with the jury. The record shows nothing to justify this severity towards the counsel. When the counsel on both sides differed as to the testimony and His Honor saw that neither was right, the counsel for the defendant said that (621) was a question for the jury. This was clearly right, and His

Honor admitted it to be right. There was nothing therefore in the remark itself to provoke severity or even reproof; and yet it may be that there was something in the *manner* that was rude, but it is not said to be so in the record. The record does say that "the defendant's counsel replied immediately in a positive manner that that was a question for the jury." That "positive manner" may have meant a great deal, but nothing more is stated.

There is another light in which His Honor's remark was equally objectionable. A Judge has no right to state the testimony of a witness to the jury and say, if you do not accept my statement, or if you accept some other statement, you will be guilty of moral perjury. It is his duty to recapitulate the testimony to the jury and to explain its bearing to aid their memories and understanding and to instruct them as to the law, but what the testimony *is* as well as its *weight* and *influence* are questions for the jury. What his Honor said was calculated to intimidate the jury and to prevent a free verdict.

It is true that His Honor told the jury that it was for them to determine what the testimony of the witness was, but at the same time he told them substantially that if they did not accept it as he stated it to be, that they would be guilty of moral perjury.

We are of the opinion that His Honor abridged the rights of counsel and impaired his efficiency, and that he also invaded the province of the jury. These errors were calculated to prejudice the defendant's case, and therefore there must be a *venire de novo.*

Venire de novo.

Cited: McCanless v. Flinchum, 98 N. C., 362.

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(622)

STATE v. JAMES M. LANIER.

Evidence—General Character.

Where a certain state of things is once proved to exist, the law presumes its continuance until a change is shown: *Therefore*, where a witness, called to impeach the character of another witness, offers to speak as to the general character of the witness attacked as it existed some two or three years before the trial, such evidence is not too remote, and its rejection is error.

INDICTMENT for Larceny trial at June Term, 1878, of NEW HANOVER, before *Meares, J.*

The defendant was indicted for larceny alleged to have been committed

in March, 1878, and during the progress of the trial the defendant's counsel offered one Savage as a witness to attack the character of the prosecuting witness, Holloway. It is proved that Holloway had removed from New Hanover to Columbus County, where he had resided for the past three years. Savage stated that he was acquainted with the general character of Holloway when he lived in Wilmington some two or three years ago, but did not know what his character was where he now lived. The Solicitor for the State objected to the witness speaking of the general character of the prosecuting witness when he lived in Wilmington three years ago, and the Court sustained the objection. Defendant excepted. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General, for the State.
No counsel for the defendant.

FAIRCLOTH, J. The law presumes every person to have a good character until the contrary appears. A fact once established is presumed to continue as a fact until the contrary appears. If A was (623) alive two years ago it will be presumed that he still lives, nothing else appearing. If he was a citizen of Virgina two years ago he is presumed to be such citizen still, nothing else appearing. If he had a bad character two years ago that character is presumed to be still the same, nothing else appearing. If he had a good or bad character one week ago, that fact is *some* evidence that his character is still the same. If he had a bad character two or three years ago that fact is *some* evidence that his character is the same, and the weight of the evidence is for the jury. When a state of things is shown once to exist the law presumes that state of things to continue till the contrary shall appear by proof in some way or other, or until a different presumption shall arise from the nature of the case under consideration. How long such presumptions may exist and continue, or how far in the past we can look for evidence to establish a present fact it is not easy to determine, but it is safe to say that the law does not absolutely shut out as immaterial an inquiry into the character of a witness two or three years before the trial.

Witnesses are not and can not in testifying on the subject of general character be limited to the times precisely, when they speak, because reputation depends very greatly on reports which the witness must have heard before he is put on the stand for examination. Then how long before is the question? No doubt, evidence referring to the character of the witness sought to be impeached at a recent period would have

more influence with the jury than evidence at a more remote period, still the evidence in each instance is of the same grade, and we can not say that either would not aid the jury in estimating the value of what has been said by the witness.

Men's characters no doubt change frequently, but in the eye of the law they are not presumed to change suddenly. Reformation may be
(624) shown in reply to the attacking evidence, but the law will not presume it in advance of the proof. The authorities cited by the *Attorney-General* in our own Court fail to hit the point in this case (*Luther v. Skeen,* 53 N. C., 356; *S. v. Speight,* 69 N. C., 72; *S. v. Parks,* 25 N. C., 296; *S. v. O'Neal,* 26 N. C., 88), and do not militate against the view we take. The under-cited cases decide this question and for the above reasons, and upon those authorities we think His Honor committed an error in excluding the evidence of Savage in regard to Holloway's character two or three years years before the trial. I Greenl. Ev., secs. 41, 42. *Com. v. Billings,* 97 Mass., 407; *Rathbun v. Ross,* 46 Barb., 127; *Sleeper v. VanMiddlesworth,* 4 Denio, 431.

Venire de novo.

STATE v. JAMES F. AUSTIN.

False Pretense—Judge's Charge.

1. A charge is erroneous which, in attempting to describe the offense of obtaining a signature by false pretenses, as declared in Bat. Rev., ch. 32, sec. 67, omits to direct attention to the fraudulent intent of the defendant as a necessary ingredient of the crime.
2. While, in the absence of a prayer for instructions from counsel omission of the Judge to charge in a particular way is not assignable for error, yet, if he should undertake to state the law, and in so doing, should neglect to mention an essential constituent of the offense charged, the defendant if convicted is entitled to a new trial.

INDICTMENT for obtaining signature by false pretense, tried at Spring Term, 1878, of UNION, before *Moore, J.*

(625) This indictment was drawn under Bat. Rev., ch. 32, sec. 67, and charged that the defendant procured and induced one Sidney Allen to execute to him a note under seal for $50, dated on 9 December, 1875, and payable on or before 1 October, following, and also a chattel mortgage to secure the same, by falsely and fraudulently representing that he had bought of one J. W. Collins, and was then the owner of a note of $25 and a chattel mortgage to secure it, which had previously been given by Allen to Collins, with intent to cheat and defraud the said Sidney Allen.

On the trial witnesses were examined for the State, to prove the allegations contained in the bill of indictment, and the note and mortgage charged to have been executed under the false and fraudulent representations, were offered in evidence to the jury. To the introduction of these papers the defendant's counsel made objection, and on being asked upon what grounds the objection was made, refused to assign any, and the evidence was admitted.

Collins was examined and denied having sold his claim on Allen to the defendant, and said he had sold it to one Alfred Nance; and Nance testified that he did not sell it to the defendant. The defendant offered in evidence a paper writing purporting to be an assignment from Collins to the defendant of his claim on Sidney Allen. Witnesses were then introduced on both sides as to the genuineness of the signature to the assignment, some of whom were of the opinion that it was the handwriting of Collins, and others that it was forged.

The case states that "the only contested fact was whether Collins had assigned his interest to the defendant."

The Court charged the jury "that the whole matter turned upon the signature to the instrument introduced by the defendant and claimed to be an assignment to him of the Sidney Allen claim; (626) that if said Collins did sign that instrument, the defendant was not guilty; that if they were not satisfied as to whether or not said Collins signed said instrument, they would acquit the defendant." No other part of the charge was objected to; and it is not deemed necessary to notice any other exception taken by the defendant. There was a verdict of guilty. Judgment. Appeal by the defendant.

Attorney-General and *J. F. Payne,* for the State.
Messrs. Covington & Vann and *W. H. Pace,* for the defendant.

SMITH, C. J. (After stating the case as above.) We discover no error in the ruling of the Court in regard to the evidence received, and no reason for excluding it was given to the Judge who tried the cause, and none has been pointed out on the argument here.

But the exceptions to the instructions given to the jury must be sustained. There is a fatal objection to the instructions, in that they fail to call to the attention of the jury an important element in the offence charged—the *fraudulent intent* of the defendant. His guilt does not entirely depend upon the question of the genuineness of the signature to the assignment. If the defendant acted under the belief that Collins executed the assignment and subscribed his name thereto, although in fact he did not, the defense would be complete. The indictment alleges

as well the intent to defraud as the overt act to make it successful, and both must be proved to warrant conviction. The Judge therefore did not correctly state the law, and his charge was calculated to mislead the jury.

Had the judge simply omitted to give an instruction to which the defendant would have been entitled, had he asked it, he would (627) not have any just ground for complaint. It is the duty of counsel to ask for such instruction and give the Judge an opportunity to give or refuse it, and not to take the chances of a verdict, and if unfavorable, object that an unasked instruction was not given. But when the Judge undertakes to state the law he must state it correctly. In defining an offense and the evidence required to establish it an omission of an essential ingredient is a misdescription of the offense itself. The Court must administer the law correctly, and even an admission of counsel will not excuse an error in expounding its principles to the jury. *S. v. O'Neal,* 29 N. C., 251; *S. v. Johnson,* 23 N. C., 354; *Bynum v. Bynum,* 33 N. C., 632. Without adverting to other points presented in the argument, for the error in the charge the verdict must be set aside and a *venire de novo* awarded.

Venire de novo.

Cited: Burton v. R. R., 84 N. C., 198; *S. v. Nicholson,* 85 N. C., 549; *Pollock v. Warwick,* 104 N. C., 641; *S. v. Wolf,* 122 N. C., 1081; *Jarrett v. Trunk Co.,* 144 N. C., 301.

STATE v. JOSEPH BALLARD and SUSAN STANLY.

Fornication and Adultery—Evidence.

1. It is a general rule, applicable alike to criminal and civil causes, that exception to evidence must be taken in apt time on the trial, or its admission is not assignable for error.
2. This rule, however, is subject to an exception (at least in criminal causes) where the evidence is made incompetent by statute. In such cases it is the duty of the Judge, on his own motion, to disallow the evidence.

INDICTMENT for fornication and adultery, tried at Spring Term, 1878, of JONES, before *Kerr, J.*

The defendants were indicted for lewd and lascivious cohabitation under the statute, Bat. Rev., ch. 32, sec. 46. It was proved on the trial

that they were unmarried persons, had lived for five years some 300 yards apart, on land belonging to the male defendant, and (628) were frequently together in the fields; that during this period the woman had given birth to several children, of whom all but one were dead, and that the defendant, Joseph Ballard, had been seen with the living child in his lap caressing it and speaking of it as his child, and on another occasion had been heard to say he believed the others were also his children. To none of the evidence was objection made by either defendant.

The Court instructed the jury that in order to convict they must be satisfied beyond a reasonable doubt that the defendants, within two years before the finding of the bill, had been in lewd and lascivious intercourse, and the woman had been in the habit of surrendering her body to the gratification of the man. The jury found the defendants guilty, and from the judgment thereon they appealed.

Attorney-General, for the State.
No counsel for the defendants.

SMITH, C. J. (After stating the case as above.) No exceptions to the introduction of the evidence or to the charge of the Judge are set out in the record, and the case expressly states that no objection was made to the evidence admitted by either of the defendants. We have repeatedly declared that in civil actions this Court will not pass on exceptions not taken by the appellant in the Court below, and will then require a full statement of the facts out of which they arise. This rule is not entirely applicable to criminal prosecutions, in respect to which it is our duty to see from the record and accompanying statement of what transpired at the trial, that the law was correctly expounded and administered.

The statute under which the indictment was found defines the offense and declares in positive terms "that the *admissions or confessions of one shall not be received as evidence against the other.*" (629) The act of caressing the child and the use of words of endearment while doing so, are manifestations of natural affection which may not fall within the prohibitions of the law. But however this may be, the subsequent declarations of Ballard recognizing his paternal relations towards those that had died, as evidence of the fact of paternity, are undoubtedly admissions within the meaning of the act, and forbidden to be received against the other party. The testimony was competent to prove the fact confessed against him who made the confession, but was inadmissible against her. While, therefore, it could not properly be

rejected it was the duty of the Judge either at its introduction or in his charge to explain to the jury its force and effect, and to tell them it was not to be considered as any evidence against the woman. In failing to do this, and submitting all the evidence to the jury without such explanation, there is error in validating the verdict.

We are not to be understood as expressing or intimating an opinion that in a criminal action a person on trial may be silent and acquiesce in the introduction of any evidence which on objection made in apt time would have been ruled out, and permit it to be heard and acted on by the jury and then complain of its admission. In such case he must abide the result, and can not complain after conviction. Belonging to this class may be mentioned as illustrating the distinction, the admission of secondary in place of original and primary evidence of a fact. But here the statute in direct terms declares that the confessions of one shall not be evidence against the other party, and so the Judge without a prayer to this effect should have instructed the jury. *S. v. Smith,* 61 N. C., 302. For this error there must be a

Venire de novo.

Cited: S. v. Hinson, 82 N. C., 598; *S. v. Crockett, Ib.,* 601; *S. v. Keath,* 83 N. C., 630; *Burton v. R. R.,* 84 N. C., 195; *S. v. Pratt,* 88 N. C., 640; *S. v. Gee,* 92 N. C., 762; *Johnston v. Allen,* 100 N. C., 136; *McKinnon v. Morrison,* 104 N. C., 363; *Taylor v. Plummer,* 105 N. C., 58; *S. v. Powell,* 106 N. C., 638; *S. v. McDuffie,* 107 N. C., 890; *Posey v. Patton,* 109 N. C., 458; *Presnell v. Garrison,* 121 N. C., 368; *Tyner v. Barnes,* 142 N. C., 112; *Gaither v. Carpenter,* 143 N. C., 243.

(630)

STATE v. ROBERT JONES.

Homicide—Mutual Combat.

Where, upon a trial for homicide, the only evidence relied upon by the State to connect the prisoner with the offense, is his own confessions, and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and the deceased: *It was held,* to be error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence.

INDICTMENT for murder, tried at January Special Term, 1878, of EDGECOMBE, before *Henry, J.*

The prisoner was charged with the killing of Rudolph Eaton, which took place near the town of Rocky Mount, in Edgecombe County, and

the facts upon which a new trial was granted by this Court are sufficiently stated in its opinion. There was a verdict of guilty of murder. Judgment. Appeal by the prisoner.

Attorney-General, for the State.
Mr. Fred Phillips, for the prisoner.

FAIRCLOTH, J. The case certified by His Honor consists of the evidence taken at the trial and his rulings on certain requests of the prisoner's counsel. The defendant offered no evidence, and the State introduced no evidence tending to connect the prisoner with the homicide except his confessions. The evidence discloses that on the night of 25 December, 1877, there was a festival near the warehouse, which was 250 or 300 yards from Gay's shelter where the deceased was found. The confessions of the defendant made to Alice and Isaac Sessoms were as follows: He had been to the "festival near the new warehouse, a white man had collared him at the festival." At another time he said "he had been drinking and fighting—had been to the festival (631) and fighting a man near the new warehouse—the man had been imposing on him, had slapped him on the shoulder and put his hands in his collar." Again "he had been fighting the man near Gay's shelter and had struck him *three licks,*" and "he had been fighting (severely) at Gay's corner." Dr. Powell testified that the deceased was striken while lying down, and only *one* blow. His Honor charged the jury that one of the theories of the State was that the fight began at the festival and ended at Gay's but the State had not insisted on this theory, meaning, if we undersand it, that the State abandoned this view after the evidence was developed. He was requested by prisoner's counsel to charge the jury that under that theory they might render a verdict of manslaughter. This was refused and the prisoner excepted. This was plainly error. The evidence, that is the confessions if made as testified and were true, and not controlled by any other evidence, indicated a case of manslaughter, or something better for the defendant. It was the province of the jury to say how it was, and it was the right of the prisoner to have his case submitted to the jury in this or any other aspect presented by the evidence, and it was the duty of the Court so to present it to the jury. The fact that the State did not insist on the theory that the fight began at the fesival and ended at Gay's, can make no difference. It was the sequence of the State's evidence, relied upon for conviction, and whilst the Solicitor might shut his eyes to that view the Court could not, and the law will not.

The rights of the prisoner were involved in it. It was his privilege

to have the State's evidence applied to any theory justified by it, whether it was advanced by one side or the other. This right he demanded in his prayer for instructions, which ought to have been given.

On account of the confused condition of the certified state-
(632) ment, we do not consider any other exception.

Error.

Cited: S. v. Jones, 80 N. C., 415.

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*STATE v. GEORGE W. SWEPSON.

Indictment—Misdemeanor—Acquittal Procured by Fraud.

1. A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and the defendant can be again put on trial for the same offense.
2. The defendant was indicted for cheating the State, and a motion was made in the Court below by defendant's counsel (he not being present and the Solicitor for the State not being ready for trial) upon an allegation that the matter had been compromised, that a verdict of "not guilty" should be entered; His Honor thereupon directed a jury to be impaneled and a verdict of "not guilty" to be entered and refused to permit an appeal to this Court and also refused to permit a statement of the facts to be made part of the record; thereafter His Honor went out of office. Upon a motion in this Court that a mandamus to issue to the Court below to cause inquiry to be made into the truth of the alleged facts, and if true, to cause the defendant to be again put on trial: *It was held,* that this Court has no jurisdiction in the premises; the remedy is in the Court below where the defendant can be again put on trial and the truth of the facts alleged by the State inquired into upon a plea of former acquittal.

INDICTMENT, tried at Spring Term, 1875, of WAKE, before *Watts, J.*

At June Term, 1874, of said Court, the grand jury made a presentment against the defendant and one M. S. Littlefield for an offense committed against the State, and at October Term following a bill of indictment was found, in which it was substantially charged that they

did combine, conspire, confederate and agree together and with
(633) divers other persons to the jurors unknown, by divers false pretenses and subtle means and devices, to obtain and acquire to themselves, and from the State of North Carolina, divers bonds to be issued by the State, with coupons attached, of the value of $1,000 each, known as special tax bonds, to the amount of four millions of

*Smith, C. J., having been of counsel did not sit on the hearing of this case.

dollars, and to cheat and defraud the State of the value thereof. And in pursuance of said conspiracy, on 19 August, 1868, and on 29 January, 1869, they "did incite, procure, obtain and have enacted by the general assembly" an act to amend the charter of the W. N. C. R. R. Co., and that they were appointed commissioners to open books of subscription for the capital stock with authority to receive subscriptions from solvent individuals and corporations, and five per cent of such subscriptions; and on 15 October, 1868, did as commissioners sign, seal and deliver to the board of internal improvements of the State, a certain false and fraudulent certificate, in which it was certified that $308,500 had been duly subscribed to said stock, and afterwards other large sums, and that five per cent thereof had been paid in cash, to construct the western division of said road; whereas in fact and in truth said sum had not been truly and *bona fide* subscribed, nor said percentage paid in cash, which was well known to them when they signed said certificate. The bill further charged that they unlawfully and fraudulently pretended to enter into contracts for the completion of the road, when in fact no real or *bona fide* contract was made, and that the compliance with the charter of the company was merely a formal one to procure the issuance of the bonds of the State in payment of the stock; the said Littlefield had subscribed for a large amount of said stock, and was insolvent and unable to pay the same, and that said per centage thereon had not been paid, and that this was known to the defendant at the time; that by said false pretences and devices they unlawfully and fraudulently obtained from the (634) public treasurer a large amount of said bonds issued by the State in payment of stock in said company, a portion of which they fraudulently appropriated and paid to certain members of the General Assembly of 1868-'69 and other persons, to secure and obtain the enactment of said amendment, and the balance they appropriated to their own use and for their individual purposes. A capias was accordingly issued and returned by the sheriff "not found as to Littlefield; not executed as to Swepson, by order of Solicitor and Smith & Strong, counsel for the State," and the case was continued for the State. At Spring Term, 1875, of said Court, the sheriff returned the capias to the clerk, endorsed "Littlefield not to be found; defendant Swepson sick." Thereupon the Court directed the said endorsement to be entered upon the records, and ordered,—"It appearing to the Court that the Solicitor not having asked for an alias capias or entered a nolle prosequi, it is ordered that the clerk issue an instanter capias for the defendants," which was returned executed as to the defendant, Swepson. A nol. pros. was entered as to Littlefield, and the trial com-

ing on the defendant pleaded not guilty, jury were sworn and impaneled to try the issue, and "under the instructions of the Court the said jury for their verdict say that the defendant is not guilty."

The Solicitor then filed his petition in this Court for a mandamus which is substantially as follows (after giving date of said presentment and indictment as above set forth): That the State was not prepared to try the indictment at the term after it was found by the grand jury, and the petitioner directed the sheriff not to serve the capias upon the defendant, his co-defendant being at that time beyond the limits of the State, and it was therefore returned into Court without execution on either, and for similar reasons the capias issuing from January Term, 1875, of said Court was not executed. He further stated (635) that witnesses had been summoned for the State and many of them were material witnesses but not in attendance, and at the said Spring Term as your petitioner heard and believed, the defendant was sick and unable to be present in Court; that the late Governor Caldwell had employed two other attorneys to aid in the prosecution of the action, and it was then expected and intended to prepare the case and be able to try it at the following term; that in the absence of said counsel and without notice to petitioner, the counsel of defendant moved that a verdict of not guilty should be entered for the defendant, for the reason, that the offence charged had been the subject of an agreement and compromise between the defendant and the proper officers on behalf of the State, as appeared by a copy of proceedings had in Buncombe Superior Court in an indictment there pending, the defendant not being present in Court and unable from sickness to attend. The motion was strenuously resisted by your petitioners, but it was granted, and without plea the presiding Judge ordered the jury to be impaneled and a verdict of not guilty to be entered, which was done; and that soon thereafter he caused the facts which transpired to be written out as follows: "The counsel for defendant—the defendant not being present in Court—moved that a verdict of not guilty be entered as to him on the ground that an indictment for the same offence against him had been theretofore compromised by the State, and a nolle prosequi entered therein, and in support of the motion the counsel read to the Court the transcript of which the following is a copy,—the Solicitor for the State objected to the calling of the cause at this term, or to any motion being heard in reference thereto, because he was not ready for the trial of the same, for the reasons which appeared from the papers in the case; that said defendant had never been arrested till that day in pursuance of an order made on the same day

by the Court without any notice to him. The said Solicitor further objected that the said motion was without precedent (636) or authority in law. The objections were overruled by His Honor who thereupon caused a jury to be impaneled, and there being no plea pleaded or evidence given to the jury, His Honor told the jury that the said indictment against the defendant had been compromised by the State; that he did not intend to allow the honor of the State to be tarnished, and directed said jury to return a verdict of not guilty, which was accordingly done, and the defendant was ordered to be discharged. The above is a true statement of the facts. The petitioner further stated that he did not waive the presence of the defendants, but refused to assent to any proceeding in the case; that an appeal was asked and refused on the ground that it would not lie from a judgment on a verdict of acquittal; that on Saturday of same week one of his associated counsel called upon the Judge and asked that the facts which had transpired in Court relating to the matters aforesaid should be made a part of the record of the term, in order that the action of the Court in the premises might be reviewed in this Court on appeal, or other proper proceeding, and to this end began to read over, and did read a part of the statement as contained in the paper set forth above, when the Judge declined to make any such order, and refused to hear the statement read, with a view to its accuracy of detail and for that purpose only. Your petitioner on behalf of the State avers that said action of the Judge was irregular and without authority of law, and he is without remedy therefor except by the mandatory powers and process of this Court, and he is advised that the said compromise, if itself legal, is no defence to this indictment, and if it were, that the action of the Judge was not the proper and legal way of securing it for defendant. Wherefore the petitioner prays that a writ of mandamus issue to said S. W. Watts, Judge, etc., commanding him to cause the records to be amended so as to truly set forth the proceedings (637) had upon said motion, and that the record when so amended be certified to this Court, to the end that they may be reviewed and annulled, and the indictment may be tried according to law, and for such other and further relief as the case require; and also that a copy of this petition be served on him together with a rule requiring him to show cause why a mandamus shall not issue as prayed for." The petition was sworn to by the Solicitor on 12 August, 1875, and filed in this Court on the 16th of said month. And at January Term, 1878, of this Court, the State moved upon the facts embodied in the above affidavit and petition to remand the case to the Court below to the end that a trial may be had according to law.

Attorney-General, for the State.

Messrs. Merrimon, Fuller & Ashe and *D. G. Fowle,* for the defendant.

RODMAN, J. On 12 August, 1875, the Solicitor of the Sixth Judicial District presented to this Court his petition duly sworn to, in which is set forth in brief as follows: That at October Term, 1874, an indictment for conspiracy and cheating by false pretences was found by the grand jury of Wake County against Littlefield and Swepson, on which writs of capias were issued up to April Term, 1875, none of which had been executed at the commencement of that term. The omission to execute these writs on Swepson was by direction of the Solicitor. Littlefield could not be found. The State had retained counsel to aid the Solicitor in the prosecution. At some time during April aforesaid, in the absence of the counsel as retained, the counsel for Swepson moved that a verdict of not guilty should be entered for him, on the ground that as he alleged the action had been compromised. The defendant had been arrested on that day under an order made on that day (638) by the Judge without the knowledge of the Solicitor, but was not present in Court, and was too sick to be able to be present. The motion was opposed by the Solicitor, but the Judge ordered a jury to be impaneled and a verdict of not guilty to be entered, which was done. The State was not ready for trial and its material witnesses were not present, and no witnesses for the State were examined. An appeal was asked for on behalf of the State, which was refused. The counsel for the State then prepared a statement of the facts above stated, and requested the Judge to have the same made a part of the record, which he also refused. The petitioner prayed that a mandamus issue to the Judge commanding him "to cause the record to be amended so as to truly set forth the proceedings had upon said motion, and that the record when so amended be certified to this Court, to the end that said proceedings be reviewed and annulled, and the said indictment may be tried according to law, and for such other and further relief," etc.

At January Term, 1876, upon the affidavit and motion aforesaid, this Court ordered a certiorari and mandamus to issue. Before any return was made to the mandamus the Judge before whom the case was tried and to whom it was directed, resigned and went out of office.

At January Term, 1877, a mandamus was ordered to be issued to the Judge of Wake Superior Court with a copy of the affidavit, requiring him to inquire into the truth of the facts alleged therein and to report to this Court. This he failed to do, and at the following term it was

moved to direct the Judge who should hold the next term of Wake Superior Court to inquire into the truth of the alleged facts, and if he shall find them to be true substantially as they are alleged, that he cause the defendant to be again arrested and put on his trial on the indictment.

If the facts alleged be true it can not be denied that the Judge before whom the alleged proceedings took place was ignorant or scandalously forgetful of his duties, and that one whom a grand (639) jury had found fit to be tried for a serious offense has escaped a fair trial by management and fraud.

At the last term of this Court we deferred any action on the said motion then made, in the expectation that the Attorney-General, or other learned counsel for the State, would find some precedent or authority to warrant us in granting his motion; but that has not been done, and our own researches have failed to find any, and we should not feel justified in longer delaying our judgment on the motion.

It must be clear that in a case such as is presented by the affidavit—which for the present purpose only, we are obliged to assume to be true—the State *ought* to have some remedy. Guilt can not be allowed to protect itself by fraud and corruption, or else the tribunals of justice become dens of thieves, and law as administered in them is a machine to punish the weak and screen the powerful. But the remedy is not to be had in this Court, and we do not know why the State has sought it here in a proceeding for which no precedent has been found. The jurisdiction of this Court with few exceptions is wholly appellate. It has no original jurisdiction to require a Superior Court to put an acquitted person again on trial, or to inquire whether or not the acquittal was procured by his fraud. The motion must be refused; but this refusal does not imply a failure of justice. There is a remedy not without precedent or authority for its use, plain, and not of infrequent use, laid down in the elementary works on criminal law, and supported by the adjudications of respectable Courts. This remedy is in the Court in which the trial was had, and is independent of any action of this Court. It is asserted in many textbooks and dicta of Judges and supported by some decisions, that a verdict of acquittal on an indictment for a *misdemeanor* procured by the trick or fraud of the defendant, is a nullity, and may be treated as such; and the person acquitted by (640) such means may be tried again for the offense of which he was acquitted. 3 Greenl. Ev., sec. 38; 1 Whar. Cr. Law, sec. 546; 3 *Ib.*, secs. 3221, 3222; 1 Chitty Cr. Law, 657.

In *S. v. Tilghman,* 33 N. C., 513, the defendant was convicted of murder and moved for a new trial, or for a *venire de novo* as on a mis-

trial, because of the improper conduct of the jury in having separated, and having conversed and corresponded by letters with other persons. The Judge below refused the motion and gave judgment against the defendant, which was affirmed on appeal in this Court.

PEARSON, J., in delivering the opinion of the Court, says: That when it is *made to appear on the record* that there has not been a *fair trial* the Court had a right to grant a *venire de novo,* whether the verdict was *for or against the prisoner.* Again he says: "But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor, or of the prisoner, or if they be solicited and advised how their verdict should be, etc., *in all such cases there has in contemplation of law been no trial,* and this Court as a matter of law will direct a trial to be had, whether the former proceeding purports to have *acquitted or convicted the prisoner.*" It will be noted that so much of this opinion as relates to the action of the Court after an *acquittal,* was only a dictum of the Judge, not applicable to the case on trial. The principle that fraud will avoid a verdict in a crimnial action was recognized by this Court in *S. v. Tisdale,* 19 N. C., 159, and in *S. v. Casey,* 44 N. C., 209, though it was not applied, as the Court did not consider the conduct of the defendants fraudulent. Many cases are cited in the textbooks referred to, as sustaining the principle stated. Most of them are not accessible to me. I cite, however, such as I have examined and which appear to be in point:

Com. v. Alderman, 4 Mass., 477; *S. v. Cole,* 48 Mo., 70; *Rex v.* (641) *Bear,* 2 Salk., 646; *S. v. Norvell,* 2 Yerger (Tenn.), 24.

Cases of acquittal procured by fraud of the defendant form an exception to the general rule, that no one shall be twice put in jeopardy for the same offense. This exception, it will be seen, does not apply to capital cases, and perhaps not to felonies in general (unless we accept the dictum of PEARSON, J., above quoted, as law). The *cases* which I have seen are mostly of proceedings before inferior jurisdictions, such as magistrates, etc., though there is no reason why it should be confined to them. The language of the textbooks extends to all misdemeanors in whatever Courts they may be tried.

From these authorities it seems that the Solicitor may with, and perhaps without, the consent of the Judge, cause the defendant to be again arrested and put on trial on the old bill; (see *S. v. Thornton,* 35 N. C., 256; *S. v. Tilletson,* 52 N. C., 114; *S. v. Woody,* 47 N. C., 276; *S. v. Tilghman,* 33 N. C., 513), or if no statute of limitation bars, he may send a new bill to the grand jury, and on its being found, proceed to trial of the defendant as usual disregarding the former verdict and judgment as nullities on account of the fraud in procuring them. In

either case the defendant may plead his former acquittal to which the Solicitor may reply that it was procured by the fraud of the defendant. Thus an issue of fact is raised to be tried by a jury under the instructions of the Judge as other issues are, and any question of law involved may ultimately come regularly before this Court for adjudication. The motion is refused. The indictment can scarcely be considered as having been brought into this Court, but if it is here, it is remanded.

PER CURIAM. Motion refused.

Cited: S. v. Washington, 89 N. C., 536; *S. v. Griffis,* 117 N. C., 713; *S. v. Swepson,* 81 N. C., 571.

(642)

STATE v. BENJAMIN BROWN.

Indictment—Perjury.

1. An indictment against a defendant for perjury assigned in an oath taken by him in a bastardy proceeding entitled, "The State on relation of M v. B," which refers to the same as constituted "between the State and the said B," and as it appeared on the minute docket, sufficiently sets out the substance of the record and identifies the case.
2. In such case where it appeared that the defendant swore he was not the father of the child and had not had sexual intercourse with its mother; whereas, the mother swore that he was the father, and other witnesses proved the defendant's confessions that such intercourse had taken place about five months before the birth of the child: *It was held,* that the false evidence was material, and warranted a verdict of guilty.

INDICTMENT for perjury, tried at February Term, 1878, of NEW HANOVER Criminal Court,, before *Meares, J.*

The defendant was charged with being the father of a bastard child begotten on one Maria Williams, and upon the trial of the issue in the Superior Court of New Hanover, is alleged to have committed the perjury imputed to him in the indictment. Introduced as a witness on his own behalf he there swore that he was not the father of her child and had never had any sexual intercourse with the mother.

On the trial of the indictment and to prove the falsehood of his oath, the mother testified that the defendant was the father of the child, and several other witnesses proved his confessions that criminal intercourse had taken place between them in February, about five months preceding its birth.

The exceptions taken by the defendant (and which are stated in the

opinion) were overruled by His Honor. Verdict of guilty. Judgment. Appeal by the defendant.

Attorney-General, for the State.

No counsel in this Court for the defendant.

SMITH, C. J. (After stating the case as above.) Two excep-
(643) tions which we propose to notice were taken by the defendant:

The transcript of the record of proceedings in the bastardy case does not correspond with the description in the indictment, and is insufficient to sustain its allegations: The indictment refers to the case as constituted "between the State and the said Benjamin Brown," and it is so designated on the minute docket of the Court, while it is insisted the proper title of the cause is "the State upon the relation of *Maria Williams v. Benjamin Brown.*" We do not feel the force of the objection. The substance of the record is properly set out and the case referred to as it appears on the docket, so as to admit of no doubt of its identity.

The second objection is that the false oath was not on a matter material to the issue, to wit, the paternity of the child, inasmuch as the sexual intercourse according to the course of nature must have been more than five months prior to the birth of the child to charge the defendant with being its father.

Perjury is defined to be "the taking of a wilful false oath by one who being lawfully sworn by a competent Court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in question, whether he be believed or not." Hawkins, ch. 69, sec. 1; 2 Whar. Cr. Law, sec. 2198.

The false testimony must relate to matter material to the inquiry, and the falsity must be shown by the testimony of more than a single witness. The additional evidence need not come from another witness who also knows the fact, but may be of strongly corroborating circumstances and the admissions of the defendant. *United States v. Wood,* 14 Peters, 440; *Rex v. Mayhen,* 6 C. & P., 315.

In the present case we have the positive testimony of the mother
contradicting the oath of the defendant as to the paternity of the
(644) child, and we have the supporting confessions made by him to
different persons of his criminal intimacy with her, some months before the child was born. This strongly corroborates the mother, for while she proves a *longer intimacy,* sufficient according to the course of nature for him to be the father, he admits it to have existed at a *later period,* and the jury might reasonably infer from this admission its

commencement at an earlier period. There is then this corroborating evidence to turn the scale and warrant the verdict.

But suppose the false testimony to relate not to the issue of paternity but to the criminal intimacy proved by the mother, denied on the bastardy trial by the defendant, but confessed to the witnesses—is this a material matter within the rule? "Perjury may be committed," says Mr. Wharton, "in swearing falsely to a collateral matter with intent to prop the testimony on some other point"; 2 Whar. Cr. L., sec. 2229, "or in impeaching or sustaining the credit of another witness"; *Ib.*, 2230; and so held in this State, in *Molier's Case*, 12 N. C., 263.

"The matter testified to must have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages or *to induce the jury* or *Judge to give readier credit* to the substantial part of the evidence. But the degree of materiality is of no importance; for if it tends to prove the matter in hand, it is enough though it be but circumstantial." 3 Greenl. Ev., sec. 195.

The rule is thus laid down by Mr. Bishop: "If any material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony, it may turn the scale and warrant a conviction." 2 Bishop's Cr. Proceed., sec. 871.

In *Rex. v. Goddard*, 2 F. & F., 361, it is said that on an assignment of perjury by a defendant in a bastardy case, in that he had never kissed the prosecutrix, the question of maternity was held by WIGHTMAN, J., to be for the jury. 2 Whar. Cr. L., sec. 2229, (645) note S.

"If a witness swears," says LORD DENMAN, C. J., in *Regina v. Schlesinger*, 59 E. C. L. R., 674, "that he *thinks* that a certain fact took place, it may be difficult indeed to show that he committed wilful perjury, but it is certainly possible, and the *averment is properly* a subject of perjury as any other."

But a case still more in point is cited by Mr. Rocoe and thus stated by him: Upon an application for an affiliation order against H, the applicant who had been delivered in March, on cross-examination whether she had not had connection with G in the previous September, she denied that she had. G having been afterwards called to contradict her, swore falsely that he had had connection with her in the month named; *Held*, on an indictment against G for perjury that his conviction was right. For though the evidence was strictly speaking, inadmissible, yet the evidence having been admitted, it had reference to the inquiry and was calculated to mislead. Ros. Cr. Ev., 759. We have not access to the report in which the case is contained and refer to it as stated in this valuable work.

The defendant swore that he had never at any time had sexual intercourse with the woman, and consequently that he was not and could not be the father of the child. It is proved by his own confessions that such intercourse did subsist between them during pregnancy. Had this evidence come out on that trial, would it not have greatly impaired the credit of the defendant, and in a corresponding degree imparted strength to the testimony of the mother in determining the very fact at issue? Would it not have authorized deductions as to the very fact in controversy, since it would have established such intercourse at a period near to that it which the child was begotten?

We are of opinion that the false evidence was material within the meaning of the rule and authorized the verdict of the jury. We (646) have not had the benefit of an argument for the defendant, and have consequently given the record a careful examination; but we are unable to find any just ground of complaint. There is no error. This will be certified to the end that judgment be pronounced on the verdict.

No error. Affirmed.

Cited: S. v. Collins, 85 N. C., 513; *S. v. Peters,* 107 N. C., 882, 883; *Gudger v. Penland,* 108 N. C., 600; *S. v. Hester,* 122 N. C., 1048.

STATE v. DAVID BARHAM.

Indictment—Profane Swearing—Nuisance.

1. An indictment for a nuisance by profanely swearing in a public place should set forth:
   (1) That the offense was committed "in the *presence* and *hearing* of divers persons then and there assembled," and the general conclusion "*ad communem nocumentum*" is not sufficient.
   (2) That "the acts were so repeated in public as to have become an annoyance and inconvenience to the public."
   (3) The profane words alleged to have been used, so that the Court may decide as to their quality.
2. An omission of any of these specifications is a fatal defect in the indictment, for which judgment will be arrested.

INDICTMENT for a nuisance, tried at May Term, 1878, of WAKE Criminal Court, berfore *Strong, J.*

The facts material to the point decided are stated in the opinion. Motion in arrest was not made in the Court below. Verdict of guilty. Judgment. Appeal by the defendant.

Attorney-General, for the State.
Mr. P. M. Briggs, for the defendant.

FAIRCLOTH, J. The bill of indictment alleges that the defendant "in the public streets in the city of Raleigh to the great (647) nuisance of divers of the good people of the State then and there assembled, wilfully and wickedly did curse, swear and blaspheme the name of Almighty God for a great space of time, for the space of one minute, against the peace and dignity of the State." The defendant moves for an arrest of judgment because he says the indictment charges no indictable offense. His Honor told the jury if they believed the evidence the defendant was guilty, and he was convicted. The sufficiency of the indictment then is the only question presented.

From the authorities and a train of our own decisions for more than a half century we are compelled to say that the indictment is fatally defective. In the cases now cited the question has arisen in various aspects and the arguments and reasons are therein exhausted. We will not repeat them here, but content ourselves with a few of the propositions we find well settled:

1. It must be alleged that the offense was committed "in the *presence* and *hearing* of divers persons being then and there assembled."

2. "To the common nuisance of all the good citizens of the State then and there being assembled" will not do.

3. It must be alleged that "the acts were so repeated in public as to have become an annoyance and inconvenience to the public."

4. It is necessary to set out the profane words in order that the Court may decide as to their quality. Neither of the above allegations, *i. e.,* 1, 3, and 4 are found in the bill in the case before us. All the precedents to which we have had access have them. No amount of evidence can supply these defects. The authorities referred to will be found cited in the three principal cases, viz.: *S. v. Jones,* 31 N. C., 38; *S. v. Pepper,* 68 N. C., 259; *S. v. Powell,* 70 N. C., 67. Let (648) this be certified to the end that judgment be arrested.

Error. Judgment arrested.

Cited: S. v. Brewington, 84 N. C., 786; *S. v. Chrisp,* 85 N. C., 532; *S. v. Faulk,* 154 N. C., 640.

STATE v. JOHN EDWARDS.

Infant Witness—Verdict.

1. The questions as to whether or not an infant witness has sufficient mental capacity and sense of moral obligation to testify in a cause, is one of fact to be determined by the Court, and can not be reviewed on appeal.
2. A failure of the Judge to instruct the jury, preparatory to a short adjournment pending the trial of a capital case, that they should not discuss the case among themselves or with third parties during the recess of the Court, is not sufficient cause for a new trial, where it does not affirmatively appear that an improper verdict resulted from such omission, or, at least, that the jury were tampered with.

INDICTMENT for Murder tried at Spring Term, 1878, of JOHNSTON, before *Seymour, J.*

The prisoner was charged with the killing of Kader J. Ballard, and that part of the case applicable to the points decided, is:

The first witness for the State was Ella Ballard, a daughter of the deceased, aged at the time of the trial six and a half years. The presiding Judge examined this witness on the question of competency on the second day of the term, and being then of opinion that she had not sufficient religious instruction, advised the Solicitor not to send her before the grand jury. A true bill was however found upon the evidence of another witness. Upon the trial which took place a few days afterwards, the Judge examined her, and she then gave the (649) ordinary answers to the ordinary questions put in such cases,—such as that God made her, that He would punish her if she told a falsehood, that she was sworn to tell the truth and would be punished if she did not do so. She was further examined in regard to general intelligence, and the Court was of the opinion that she was a child of more than usual intelligence for one of her age, and that she fully understood what was said to her, and the nature of her answers. It appeared that she had received religious instruction from her mother during the week the Court was in session. The prisoner objected to the adminission of her testimony, objection overruled, and prisoner excepted. The witness then testified, that she was six years old, named Ella, her father was dead, John Edwards killed him, her father was pulling fodder in the field when she first saw prisoner getting over the fence, he went where her father was and stopped, her father said to him, "how are your folks," he said her father had cheated him, he had a gun and shot her father with it (describing the manner in which the gun was held) and then went off through the field to the woods. Witness

pointed out prisoner after looking around the court room, and said that she knew him, had seen him often. One Joyner testified that she told him the same story on the day of the homicide, as the one related by her on the trial, and that deceased was found lying in said field, and that tracks led to the woods. Another witness testified that she heard the report of the gun, that witness, Ella, came running to deceased's house, and upon being asked what was the matter, said that John Edwards had killed her father. This was also corroborated by another witness.

After the testimony was closed, the Court adjourned for supper; the jury were kept together, but were not instructed that they should not converse with any one or among themselves about the case; nor was the Court requested to give such instruction, nor was it suggested that any one had communicated with the jury or that they had (650) discussed the case; and for failure to instruct as aforesaid, the prisoner moved for a new trial, which motion was overruled. There was a verdict of guilty. Judgment. Appeal by prisoner.

Attorney General and *Busbee & Busbee,* for the State.

No counsel for the prisoner.

READE, J. Formerly the age at which infants might be examined as witnesses was almost arbitrary. They were not regularly admissible under fourteen, subject to exceptions. At one time it was a general rule that none could be admitted under nine years, very few under ten. Gilb. Ev., 144; 1 Hale P. C., 302; 2 *Ib.,* 278; 1 Phil. Ev. But of late years since the means and opportunities for the early cultivation of the intellect have multiplied, a more reasonable rule has been adopted, and age is not to test, but the degree of understanding which they possess, including their moral and religious culture. 1 Phil. Ev., 1 East P. C. 448; 1 Leach 190; Roscoe Cr. Ev. 106 n. So formerly, deaf and dumb persons were classed with idiots, and were incapable of crime, and incompetent as witnesses; but since the facilities for educating them, the rule is abrogated.

In the case of infants where there was sufficient capacity to understand the transaction and to communicate it, but not sufficient moral and religious impression to comprehend the obligation of an oath, time has been allowed to make the impression and to cultivate the conscience. 1 Leach, 199, 430.

There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly

if not entirely to the discretion of the presiding Judge. *S. v. Manuel,* 64 N. C., 601. It may be stated however that a child of tender
(651) years ought to be admitted with great caution; and where there is doubt it ought to be excluded. The formal answers to the usual question,—who made you? what will become of you if you swear to a lie? and the like, are so easily taught, that much more ought to be required. The capacity of the child may be ascertained not only by examining it, but other persons who have had the care of it.

Although the capacity of the child in this case is not for our consideration, yet it is gratifying to find upon our examination of the testimony, that it was sensible and clear, and that it was corroborated where corroboration could be expected by other evidence. We can not say that there was error in admitting it.

The objection of the defendant,—that His Honor did not caution the jury not to allow themselves to be tampered with during recess, has no force in it. If the jury had been tampered with, it might have vitiated their verdict, whether they had been cautioned or not; but as they were not tampered with, their verdict is good.

Affirmed.

Cited: Smith v. Kron, 96 N. C., 397.

STATE v. J. A. BRYSON and others.

Indictment—Conclusion of.

It is no ground for an arrest of judgment that an indictment charging only a common law offense, concludes "*contra formam statuti,* and against the peace and dignity of the State." The conclusion "against the statute" may be rejected as surplusage.

INDICTMENT for disturbing a Religious Congregation tried at Spring Term, 1878, of HENDERSON, before *Cloud, J.*

There was a verdict of *guilty,* motion in arrest of judgment,
(652) motion overruled, and appeal by defendants.

Attorney General, for the State.
Mr. J. H. Merrimon, for the defendants.

FAIRCLOTH, J. The defendants were indicted for disturbing a religious congregation which is a common law offence, and the indictment concluded *contra formam statuti,* and against the peace and dignity

of the State. After conviction they moved in arrest of judgment on the ground that the indictment concluded against the statute. It has often been held that this part of the conclusion is merely surplusage. *S. v. Lamb,* 65 N. C., 419; *Com. v. Hoxey,* 16 Mass. 385; 2 Leach Cr. Law, 584; 2 Hale, 190. The objection is not sustained.

Affirmed.

Cited: S. v. Harris, 106 N. C., 688.

STATE v. J. C. PICKENS.

Indictment—Disposing of Mortgaged Property.

An indictment for disposing of mortgaged property under Laws 1873-'74, ch. 31, is fatally defective, if it fails to set forth the manner of disposition, and the name of the person receiving it in case of a transfer of possession.

INDICTMENT for a Misdemeanor tried at Spring Term, 1878, of BUNCOMBE, before *Cloud, J.*

The defendant was indicted in the following words: The jurors, etc., present that J. C. Pickens, etc., executed to one G. A. Crooker a chattel mortgage (conveying certain personal property) to secure the payment of a note, etc., and after the execution of the same, and (653) while it was in force, said Perkins did sell and dispose of a part of the property (naming it) embraced in said mortgage, without the consent and against the will of said Crooker, with intent to hinder, delay and defeat the rights of said Crooker under said mortgage, against the form of the statute, etc. The jury found the defendant guilty, and on motion the Court arrested judgment and *Gudger,* Solicitor for the State, appealed.

Attorney General, for the State.
Mr. J. H. Merrimon, for the defendant.

FAIRCLOTH, J. Laws 1873-'74, ch. 31, makes it a misdemeanor to "make any disposition" of any personal property embraced in a chattel mortgage then in force with intent, etc. The bill in this case alleges that defendant did "sell and dispose of" property with intent, etc., *without* alleging to whom he sold it or in what manner he disposed of it, and on this ground he moves in arrest of judgment. The objection is fatal

to the action. The statute is in very broad terms and probably goes beyond the meaning of the legislature, and it is proper in a criminal proceeding under such a statute that the bill of indictment should point with reasonable certainty to the alleged offence. The purpose of such particularity is to identify the particular fact of transaction on which the indictment is founded so that the accused may have the benefit of an acquittal or conviction if accused a second time. *S. v. Angel,* 29 N. C., 27. It will be noticed that the word "sell" is not employed in the statute and may be put out of the question, except so far as it might be one of the modes of disposing of the property as is here alleged. If however that be the particular offence intended to be prosecuted, it is necessary to allege to whom the propery was sold for

(654) the reasons above stated. It has been ruled that a prosecution for selling spiritous liquors unlawfully must set forth the name of the person to whom the liquor was sold, also the name of the slave to whom liquor was sold, or with whom a white man played cards. *S. v. Stamey,* 71 N. C., 202, and cases there cited.

The matter therefore stands on the words "shall make any disposition," etc. The words taken literally would be worse than a drag net, and taken with reference to the subject at hand they might mean disposition, by removing from the county, concealing, selling, or by actual consumption of such as were fit for food, etc. The defendant would have to guard too many points, not knowing from which the attack would come. As a general rule it is sufficient to describe a statutory offence in the words of the statute. It may also be described by words clearly of the same legal import, although they may not be the same words. When all the words of the statute are used in the indictment it can seldom happen that the same words ought to or can be received in a different sense in the two instruments. It is certain they are intended to mean the same, but in a few instances the Courts have established some exceptions. A statute may be so inaccurately drawn that its words extend beyond the sense and meaning of the legislature or they may fail to express the whole meaning it had. In such cases the indictment must aver such other facts and circumstances as will bring the matter within the statute, that is, it must use such words as the legislature would have used, had its precise meaning been expressed. An instance is found in *S. v. Johnson,* 12 N. C., 360, where it was held that besides charging in the words of the act that the prisoner being on board the vessel, concealed the slave therein, the indictment should have charged a connection between the prisoner and the vessel, as that he was a mariner belonging to her, because that was the true construction of the act. So when a statute uses a generic term it may

be necessary to state in the indictment the particular species in respect to which the crime is charged, as upon a statute for killing (655) or stealing "cattle" an indictment using the word only would be insufficient; it ought to set forth the kind of cattle. *Rex v. Chalkeley,* R. & R., 258. Upon these principles we think the indictment insufficient.

Judgment affirmed.

Cited: S. v. Hill, post, 660; *S. v. Burns,* 80 N. C., 376; *S. v. Farmer,* 104 N. C., 889; *S. v. Van Doran,* 109 N. C., 868; *S. v. Holmes,* 120 N. C., 576; *S. v. Tisdale,* 145 N. C., 424.

STATE v. ISAAC PATRICK.

Indictment—Larceny.

An indictment for larceny which describes the property stolen as "one pound of *meat*," *etc.*, is fatally defective.

INDICTMENT for Larceny tried at Fall Term, 1877, of LENOIR, before *Eure, J.*

The defendant was found guilty and judgment pronounced, from which he appealed. And in this Court the defendant's counsel insisted that the bill of indictment was defective in the particular set forth in the opinion.

Attorney General, for the State.

Messrs. G. M. Smedes and *Battle & Mordecai,* for the defendant, relied on *S. v. Morey,* 2 Wis., 362.

FAIRCLOTH, J. The objection in this case is to the sufficiency of the description of the property in the bill of indictment, to wit, "one pound of *meat* of the value of five cents." We find no direct authority in our Reports nor in the text-books. In *S. v. Morey,* 2 Wis. 362, the same question was presented, and the Court held that "in an indictment for larceny, the property which is alleged to have been (656) stolen should be described with reasonable certainty; and a charge of stealing *meat* which applies not only to the flesh of all animals, used for food, but in a general sense, to all kind of provisions, is too vague and uncertain." In this conclusion we concur. Such articles

have more specific names in commerce and in the country, which ought to be employed in criminal proceedings.

We cite the following cases merely as a reference to the several phases in which the question of description of stolen property has been considered: *S. v. Brown,* 12 N. C., 137; *S. v. Godet,* 29 N. C., 210; *S. v. Clark,* 30 N. C., 226; *S. v. Horan,* 61 N. C., 571; *S. v. Campbell,* 76 N. C., 261; *S. v. Krider,* 78 N. C., 481.

In *S. v. Jenkins,* 78 N. C., 478, the word *meat* is used in the syllabus and report of the case. It should have been *bacon,* as appears from the original papers on file, and we refer to it to avoid misconception, the point there decided being different from the one in our case. Let this be certified to the end that judgment be arrested.

Judgment arrested.

Cited: S. v. Hill, 660, *post; S. v. Bragg,* 86 N. C., 691; *S. v. Crumpler,* 88 N. C., 650.

STATE v. CHARLES HILL.

Indictment—Variance—Ownership.

1. Where an indictment for injuring a cow concluded at common law, and failed to charge the offense to have been committed "mischievously or from malice to the owner:" *Held,* to be fatally defective.
2. An indictment for injuring live stock under Bat. Rev., ch. 32, secs. 94, 95, is defective, if it omits to conclude *contra formam statuti,* and to charge an unlawful intent—to drive the stock from the range, or to injure the owner.
3. Upon the trial of an indictment for injury to live stock, *it was held,* to be a variance:—

(657) Where the defendant was charged with injuring a cow, and the proof was that the animal injured was an ox;
Or where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner.

4. In such case it is essentially necessary that there should be an averment describing the thing injured, and proof of ownership thereof.

(SUGGESTION—*Statutory offenses.* It is not always sufficient to follow the words of the statute. The charge should be as specific as the proof adduced in its support must be.)

INDICTMENT for injury to live stock under Bat. Rev., ch. 32, sec. 94, tried at February Term, 1878, of NEW HANOVER Criminal Court, before *Meares, J.*

The indictment contains two counts,—the first count charges that defendant unlawfully, wilfully, and maliciously injured a cow belonging to Lee Samuel, and concludes at common law; the second count charges that he did, unlawfully and on purpose, kill, maim and injure live stock running at large in the range, the property of Lee Samuel, and others whose names are unknown, and concludes as required in statutory offences. The defendant pleaded not guilty, and on the trial the following facts were found by the State:

Lee Samuel owned an ox which got into a cultivated field of the defendant under an insufficient fence, and the defendant was heard to make violent threats against him. The defendant afterwards on two several occasions beat the ox while grazing in the marsh, and gave him numerous heavy blows with a large stick, by reason of which the ox was disabled for work for more than a month. A witness testified that at another time the defendant ran a heifer out of his field and beat her with a stick.

After conviction the defendant moved for a new trial, and also in arrest of judgment, both of which motions were denied, judgment pronounced on the verdict, and the defendant appealed. (658)

Attorney General, for the State.

No counsel in this Court for the defendant.

SMITH, C. J. (After stating the case as above.) There are numerous exceptions taken to the form of indictment and to the sufficiency of the evidence to sustain its allegations:

The first count is fatally defective at common law, in that, it fails to charge the injury to have been done to the cow, mischievously or from malice to the owner. *S. v. Scott,* 19 N. C., 35; *S. v. Helmes,* 27 N. C., 364; *S. v. Jackson,* 34 N. C., 329. Nor can it be sustained under the statute for want of an averment that it was "contrary to the form of the statute."

There was no evidence that any cow was injured, belonging to Lee Samuel, and proof of the maltreatment of his ox does not support an allegation of maltreatment of his cow.

The running a heifer out of the field and beating her with sticks, with no proof of ownership, neither sustains the count nor constitutes a criminal offence.

The second count omits to charge an intent to drive the live stock from the range, or to injure the owner, or to impute any other unlawful intent. *S. v. England,* 78 N. C., 552.

The live stock mentioned as the subject of the injury is alleged to

be the property of Lee Samuel and others, while the testimony is that the ox belonged to Lee Samuel alone. This is a fatal variance, not cured by the provisions of Bat. Rev., ch. 33, sec. 65. This section dispenses with the naming of all but a single owner, and permits, where there are several owners, the others to be designated by the superadded words "and another," or "and others," as there may be one or (659) more of them. If there had been two or more owners besides Lee Samuel, the allegation of property would have been sustained; but the proof of exclusive ownership in Lee Samuel, does not accord with either form of expression. This averment as descriptive of the thing injured must be true *now* as well as before the passage of the act, and the effect of a misdescription is equally fatal. *S. v. Harper,* 64 N. C., 129; *S. v. Haddock,* 3 N. C., 162.

Lest it may be inferred that we have overlooked or intended to overlook it, we will notice briefly the objection to the quality of words used in describing the subject of the alleged injury: The indictment follows the language of the statute, and usually this is sufficient and proper. But the object of all indictments is to inform the person with what he is charged, as well to enable him to make his defence, as to protect him from another prosecution from the same criminal act. It should therefore be reasonably specific and certain in all its material averments. The term "live stock" is of very comprehensive import and includes many kinds of domestic animals, and it seems that the charge should be as specific as the proof adduced in its support must be. It is not always sufficient to pursue the words of the statute. It is made indictable to sell spiritous liquors by less measure than a quart, without license; but an indictment must allege to whom the liquor was sold. *S. v. Faucett,* 20 N. C., 107. So at the present term we have held that an indictment under the act of 20 December, 1873, amended by act of 20 March, 1875, must allege to whom the sale was made. *S. v. Pickens, ante* 652. Again suppose the act which makes it larcency to steal various kinds of growing crops which are particularly mentioned, had instead used the general words "growing crops," it can not be doubted that a charge of stealing growing crops without further description would have been held insufficient to warrant a judgment upon (660) conviction. We have at this term decided that the word "meat" in an indictment for laceny was too indefinite. *S. v. Patrick, ante* 655. But it is not necessary to decide the point, and it is adverted to with these suggestions to avoid misconception.

Venire de novo.

Cited: S. v. Lambeth, 80 N. C., 394; *S. v. Parker,* 81 N. C., 549;

S. v. Baxter, 82 N. C., 606; *S. v. Whitaker,* 85 N. C., 569; *S. v. Watkins,* 101 N. C., 705; *S. v. Martin,* 141 N. C., 838; *S. v. Lewis,* 142 N. C., 636.

STATE v. JAMES A. WILLARD.

Jury—Talesman not Exempt from Service on.

A statute exempting members of a fire company from jury duty in general, does not operate to discharge them from service as *talesmen.* The object of the law is to afford them leisure for the performance of their duty as firemen; and when their presence in Court demonstrates that their services are not required in the line of their employment, the reason of their exemption ceases.

APPEAL from an order made at January Special Term, 1878, of NEW HANOVER, by *Moore, J.*

In the second section of the act incorporating the Wilmington Steam Fire Engine Company (Private Laws 1868-'69, ch. 55) it is provided that the members of it "shall during membership be exempt from all jury and militia duty," and by a subsequent act (Private Laws 1869-'70) it is provided "that the members of all organized fire companies in the city of Wilmington be and they are hereby exempt from serving as jurors on any coroner's inquest, or in the Special or Superior Court."

The defendant was summoned as a tales juror in the Superior Court, and refusing to answer was fined by the Court, *nisi;* and in answer to a notice to show cause why the judgment should not be made absolute he exhibited to the Court his certificate of membership in the Wilmington Steam Fire Engine Company, and by virtue of it claimed exemption from jury duty under the acts which have been re- (661) cited. It was conceded that he was admitted as a member because of having subscribed to the organization of the company, and that it was understood that he and others so subscribing should not be called upon for active duty, and that in fact he was not required to attend the meetings of the company. His Honor being of opinion that defendant was not exempt from duty as tales juror, ordered that the judgment be made absolute, and the defendant appealed.

Attorney-General, for the State.
Mr. C. M. Stedman, for the defendant.

BYNUM, J. (After stating the case as above.) It is not material to inquire whether the defendant was such a fireman as the acts contemplated to be excused; for admitting that he was a regular member in

all respects, we are of opinion that he was not exempt from service as a tales juror.

There have been three decisions bearing upon the case in our State: The first was the *S. v. Hogg,* 6 N. C., 319. There, a commissioner of navigation was exempted from serving on juries by an act of the Legislateure of 1807. He was summoned as a tales juror, and refusing to attend, was fined. Upon appeal to the Supreme Court the judgment below was affirmed on the ground that the act did not extend to tales jurors.

The next was the *S. v. Williams,* 18 N. C., 372. There, an act of Congress of 1825 exempted postmasters from serving on juries; it was held upon appeal from a judgment fining one for refusing to attend as a juror on the regular panel, that he was excused by the act; but it was held, also, *arguendo,* that such decision would not apply to a postmaster who should be called as a bystander to make up a jury, because the fact of his being a bystander furnishes a presumption that the duties of his office leave him at leasure to perform those duties which he owes
(662) the State—to aid her in the administration of justice.

The last case is *S. v. Whitford,* 34 N. C., 99. There the defendant was summoned to serve as a juror on a special venire. He attempted to excuse himself by showing that he was a member of an incorporated fire company in the town of New Berne, and that the act of assembly provided that "the members of the aforesaid fire company, while they continue to act as such, shall be exempt from serving as jurors, either in the County or Superior Courts"; it was held by the Court that the defendant was excused from serving on the special venire; but the decision was put upon the ground of the distinction between tales jurors whose duties only last for the day they are summoned and a special venire which is bound like the regular panel, to attend from day to day until discharged by the Court.

The reason why these acts are held not to extend to tales jurors, is assigned to be, that these exemptions are not intended as privileges or compensations to the party, unless so expressed in the act. So far as serving on a jury does not interfere with their public avocations they are still liable to be called on for that service. "And it is because a talesman must be taken from the bystanders at the Court that he may be summoned, as his being a bystander proves that he was not there on official or professional duties which required his attention." Relying upon these authorities and the reasonableness of the proposition they maintain, we think the defendant was not excused as a tales juror.

Affirmed.

Cited: S. v. Cantwell, 142 N. C., 614.

RULES

ADOPTED BY THE SUPREME COURT.

JUNE TERM, 1878.

I. Appeals to the Supreme Court shall be called at the January Term, 1879, until otherwise provided, in the following order:

1st week—First District (commencing on Wednesday).
2d and 3d weeks—Third, Fourth, and Fifth Districts.
4th and 5th weeks—Sixth, Seventh, and Eighth Districts.
6th and 7th weeks—Ninth and Second Districts.

II. No book in the Supreme Court Library will be allowed to be taken out except by special permission of the clerk for use before some Court in session, or referee; and the North Carolina Reports, Digests and Statutes will not be allowed to be withdrawn at all.

EDWARDS v. KEARZEY.

(96 U. S., 595.)

(74 N. C., 241.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

LEONIDAS C. EDWARDS, Plaintiff in Error. v. ARCHIBALD KEARZEY. } In error to the Supreme Court of the State of North Carolina.

The North Carolina Homestead Provision is Not Valid Against Debts Existing at the Time of its Adoption.

SWAYNE, J. The Constitution of North Carolina of 1868 took effect on 24 April in that year. Sections 1 and 2 of Article X, declare that personal property of any resident of the State, of the value of five hundred dollars, to be selected by such resident, shall be exempt from sale under execution or other final process issued for the collection of any debt; and that every homestead and the buildings used therewith not exceeding in value one thousand dollars, to be selected by the owner, or in lieu thereof, at the option of the owner any lot in a city, town or village, with the buildings used thereon, owned and occupied by any resident of the State, and not exceeding in value one thousand dollars, shall be exempt in like manner from sale for the collection of any debt under final process.

On 22 August, 1868, the Legislature passed an act which prescribed the mode of laying off the homestead and setting off the personal property so exempted by the Constitution. On 7 April, 1869, another act was passed, which repealed the prior act and prescribed a different mode of doing what the prior act provided for. This latter act has not been repealed or modified.

Three several judgments were recovered against the defendant in error—one on 15 December, 1868, upon a bond dated 25 September, 1865; another on 10 October, 1868, upon a bond dated 27 February, 1866; and the third on 7 January, 1868, for a debt due prior to that time. Two of these judgments were docketed and became liens upon the premises in controversy on 16 December, 1868. The other one was docketed and became such lien on 18 January, 1869. When the debts were contracted for which the judgments were rendered the exemption laws in force were the acts of 1 January, 1854, and of 16 February, 1857. The first-named act exempted certain enumerated articles of inconsiderable value and "such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value fifty dollars at cash valuation." By the act of 1859 the exemption was extended to fifty (665) acres of land in the county or two acres in a town, of not greater value than five hundred dollars.

On 22 January, 1869, the premises in controversy were duly set off to the defendant in error as a homestead. He had no other real estate, and the premises did not exceed a thousand dollars in value. On the sixth of March, 1869, the sheriff, under executions issued on the judgments, sold the premises to the plaintiff in error, and thereafter executed to him a deed in due form. The regularity of the sale is not contested.

The act of 22 August, 1868, was then in force. The acts of 1854 and 1859 had been repealed. *Wilson v. Sparks*, 72 N. C. R., 211. No point is made upon these acts by the counsel upon either side. We shall, therefore, pass them by without further remark.

The plaintiff in error brought this action in the Superior Court of Gran-

ville County to recover possession of the premises so sold and conveyed to him. That Court adjudged that the exemption created by the constitution and the act of 1868 protected the property from liability under the judgments, and that the sale and conveyance by the sheriff were, therefore, void. Judgment was given accordingly. The Supreme Court of the State affirmed the judgment. The plaintiff in error thereupon brought the case here for review. The only Federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the constitution of 1868.

The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative view. Our remarks will be confined to this subject.

The Constitution of the United States declares that "no State shall pass any * * * law impairing the obligation of contracts."

A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done.

The lexical definition of *impair* is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate."—Webster's Dic.

Obligation is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract," etc.—Idem.

"The word is derived from the Latin word *obligato*, tying up; and that from the word *obligo*, to bind or tie up; to engage by the ties of promise or oath or form of law; and *obligo* is compounded of the word *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." *Blair v. Williams*, and *Lapsley v. Brashears*, 4 Littel, 65. (666)

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be and falls into the class of those "imperfect obligations," as they are termed, which depend for their fufillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing."—1 Bac. Abr. tit. Actions in General, letter B.

In *Von Hoffman v. Quincy*, 4 Wall., 552, it was said: A statute of frauds embracing preëxisting parol contracts not before required to be in writing would affect its validity. A statute declaring that the word *ton* should, in prior as well as subsequent contracts be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy, would involve its discharge, and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract, would relate to the remedy."

It can not be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.—*Von Hoffman v. Quincey, supra; McCracken v. Haywood*, 2 How., 612.

In *Greene v. Biddle*, 8 *Wheat*, 92, this Court said, touching the point here under consideration: "It is no answer that the acts of Kentucky now in question are *regulations of the remedy* and not of the *right to the lands*. If these acts *so change the nature and extent of existing remedies as materially to impair* the rights and interests of the owner, they are just as

much a violation of the compact as if they *overturned* his rights and interests."

"One of the tests that a contract has been impaired is that *its value has by legislation been diminished.* It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force." *Bank v. Sharp*, 6 How., 327.

It is to be understood that the encroachment thus denounced must be material. If it be not material it will be regarded as of no account.

These rules are axioms in the jurisprudence of this Court. We (667) think they rest upon a solid foundation. Do they not cover this case? and are they not decisive of the question before us?

We will, however, further examine the subject.

It is the established law of North Carolina that stay laws are void, because they are in conflict with the national Constitution. *Jacobs v. Smallwood*, 63 N. C., 112; *Jones v. Crittenden*, 4 N. C., 55, 385; *Barnes v. Barnes*, 53 N. C., 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. But *it does this solely by operating on the remedy.* The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments—one against A, the other against B—each for the sum of fifteen hundred dollars upon a promisory note. Each debtor has property worth the amount of the judgment and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual instalments." At the same time another law is passed which exempts from execution the debtor's property to the amount of fifteen hundred dollars. The Court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it—except in the contingency that the debtor shall acquire more property—a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a State may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property for the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the Constitution, and set at naught the salutary restriction it was intended to impose.

The power to tax involves the power to destroy.—*McCulloch v. Maryland*, 4 Wheat., 430. The power to modify at discretion the remedial part of a contract is the same thing.

But it is said that imprisonment for debt may be abolished in all cases, and that the time prescribed by a statute of limitations may be abridged.

Imprisonment for debt is a relic of ancient barbarism.—Cooper's Justinian, 658; 12 Tables, Tab. 3. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his (668) credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute book.

(But upon the power of a State, even in this class of cases, see the strong dissenting opinion of Washington, J., in *Mason v. Hale*, 12 Wheat. 370).

Statutes of limitations are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle

upon which they proceed. They do not impair the remedy, but only require its applications within the time specified. If the period limited be unreasonably short and designed to defeat the remedy upon preëxisting contracts, which was part of their obligation, we should pronounce the statute void. Otherwise we should abdicate the performance of one of our most important duties. The obligation of a contract cannot be *substantially* impaired in any way by a State law. This restriction is beneficial to those whom it restrains, as well as to others. No community can have any higher pubic interest than in the faithful performance of contracts and the honest administration of justice. The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.

In *Bronson v. Kenzie*, 1 How., 311, the subject of exemption was touched upon, but not discussed. There a mortgage had been executed in Illinois. Subsequently the legislature passed a law giving the mortgagor a year to redeem after sale under a decree, and requiring the land to be appraised, and not to be sold for less than two-thirds of the appraised value. The law was held to be void in both particulars as to preëxisting contracts. What is said as to exemptions is entirely *obiter*, but coming from so high a source, it is entitled to the most respectful consideration. The Court, speaking through Chief Justice Taney, said: A state "may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be executed or not by every sovereignty, according to its own views of policy and humanity." He quotes with approbation the passage which we have quoted from *Greene v. Biddle*. To guard against possible misconstruction, he is careful to say further:

"Whatever belongs merely to the remedy may be altered according
to the will of the State: *Provided the alteration does not impair the* 669)
obligation of the contract. But if that fact is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. *In either case it is prohibited by the Constitution.*"

The learned Chief Justice seems to have had in his mind the maxim "*de minimis*," etc. Upon no other ground can any exemption be justified. Policy and humanity" are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.

Where the facts are undisputed it is always the duty of the Court to pronounce the legal result. *Bank v. Bank*, 10 Wall., 604. Here there is no question of legislative discretion involved. With the Constitutional prohibition, even as expounded by the late Chief Justice, before us on one hand, and on the other the State Constitution of 1868, and the laws passed to carry out its provisions, we can not hesitate to hold that both the latter do seriously impair the obligation of the several contracts here in question. We say, as we said in *Gunn v. Barry*, 15 Wall., 622, that no one can cast his eyes upon the new exemptions thus created without being at once struck with their excessive character and hence their fatal magnitude. The claim for the retrospective efficacy of the Constitution or the laws can not be supported. Their validity as to contracts subsequently made admits of no doubt. *Bronson v. Kenzie, supra.*

The history of the national constitution throws a strong light upon this subject. Between the close of the War of the Revolution and the adoption of that instrument unprecedented pecuniary distress existed throughout the country.

"The discontents and uneasiness, arising in a great measure from the embarassment in which a great number of individuals were involved, continued to become more extensive.

"At length two great parties were formed in every state, which were distinctly marked and which pursued distinct objects with systematic arrangement. 5 Marshall's Life of Washington, 75. One party sought to maintain the inviolability of contracts, the other to impair or destroy them.

"The emission of paper money, *the delay of legal proceedings*, and the suspension of the collection of taxes, were the fruits of the rule of the latter wherever they were completely dominant." *Ibid.*

"The system called justice was in some of the states iniquity reduced to elementary principles." * * * "In some of the states creditors were treated as outlaws. Bankrupts were armed with legal authority to (670) be prosecutors, and by the shock of all confidence society was shaken to its foundations." Fisher Ames's Works (Ed. of 1859), p. 120.

"Evidences of acknowledged claims on the public would not command in the market more than one-fifth of their nominal value. The bonds of solvent men payable at no very distant day could not be negotiated but at a discount of thirty, forty, or fifty per cent per annum. Landed property would rarely command any price; and sales of the most common articles for ready money could only be made at enormous and ruinous depreciation.

"State legislatures in too many instances yielded to the necessities of their constituents and passed laws by which creditors were compelled to wait for the payment of their just demands on the tender of security or to take property at a valuation, or paper money falsely purporting to be the representative of specie." Ramsey's History, U. S., 77.

"The effects of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances insured and aggravated the ruin of the unfortunate debtors, for whose temporary relief they were brought forward." 2 Ramsey's Hist. S. C., 429.

Besides the large issues of continental money, nearly all the states issued their own bills of credit. In many instances the amount was very large. 2 Phillips' His. Amer. Paper Money, 29. The depreciation of both became enormous. Only one per cent of the "continental money" was assumed by the new government. Nothing more was ever paid upon it. Act of August 4, 1790, sec. 4, 1 Stat., 140; 2 Phillips Hist. American Paper Currency, 194. It is needless to trace the history of the omissions by the States.

The treaty of peace with Great Britain declared that "the creditors on either side shall meet with no lawful impediment to the recovery of the full amount in sterling money of all *bona fide* debts heretofore contracted." The British minister complained earnestly to the American Secretary of State of violations of this guaranty. Twenty-two instances of law in conflict with it in different states were specifically named. 1 Amer. State Papers, pp. 195, 196, 199, and 237. In South Carolina "laws were passed in which property of every kind was made a legal tender in payment of debts, although payable according to contract in gold and silver. Other laws installed the debt, so that of sums already due only a third, and afterwards only a fifth, was securable in law." 2 Ramsey's Hist. S. C., *Ibid.* Many other states passed laws of a similar character.

The obligation of the contract was as often invaded after judgment (671) as before. The attacks were quite as common and effective in one way as in the other. To meet these evils in their various phases the national constitution declared that "no State should emit bills of credit, make any thing but gold and silver coin a legal tender in payment of debts, or pass any law * * * impairing the obligation of contracts." All these provisions grew out of previous abuses. 2 Curtis' Const., 366. See, also, the Federalist, Nos. 7 and 44. In the number last mentioned Mr. Madison

said that such laws were not only forbidden by the constitution, but were "contrary to the first principles of the social compact and to every principle of sound legislation."

The treatment of the malady was severe, but the cure was complete.

"No sooner did the new government begin its auspicious course than order seemed to arise out of confusion. Commerce and industry awoke and were cheerful at their labors, for credit and confidence awoke with them. Everywhere was the appearance of prosperity, and the only fear was that its progress was too rapid, to consist with the purity and simplicity of ancient manners." Ames's Sup., 122.

"Public credit was reanimated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract. 2 Ramsey, sup. 433.

Chief Justice Taney, in *Bronson v. Kenzie, sup.*, 218, speaking of the protection of the remedy, said: *"It is this protection which the clause of the Constitution now in question mainly intended to secure."*

The point decided in *Dartmouth College v. Woodward*, 4 Wheat., 518, had not, it is believed, when the Constitution was adopted, occurred to any one. There is no trace of it in the Federalist nor in any other contemporaneous publication. It was first made and judicially decided under the Constitution in that case. Its novelty was admitted by Chief Justice Marshall, but it was met and conclusively answered in his opinion.

We think the views we have expressed carry out the intent of contracts and the intent of the Constitution. The obligation of the former is placed under the safeguard of the latter. No state can invade it and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this Court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance nor misfeasance on our part.

The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived and which will be the ground of our judgment.

The remedy subsisting in a state when and where a contract is made and is to be performed, is a part of its obligation, and any sub- (672) sequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore, void.

The judgment of the Supreme Court of North Carolina is reversed, and the cause will be remanded with directions to proceed in conformity to this opinion.

Reversed.

INDEX

ABANDONMENT OF WIFE:

1. Where one abandons his wife and child in August, 1873, an indictment found against him in November, 1877, under Bat. Rev., ch. 32, secs. 119, 120, is barred by the statute of imitations, though the separation be continued up to that time. *S. v. Davis*, 603.

2. If a warrant be issued against the husband and father in September, 1877, for such abandonment, and upon the trial of the same, he agrees to support the wife and child, and does so for two weeks, but thereafter fails to comply with his engagement, such failure constitutes a fresh abandonment, and will sustain an indictment found in November, 1877. *Ibid.*

ACCOUNT AND SETTLEMENT—See Guardian and Ward 3; Interest 1; Legacy 1; Statute of Limitations 3.

ACTION TO RECOVER LAND:

1. On the trial of an action to recover and, it appeared that a tenant of the plaintiff had been dispossessed by one of the defendants: *Held*, that evidence that the defendant informed the tenant at the time that he was acting as sheriff, was immaterial. *Wiseman v. Penland*, 197.

2. On the trial of an action to recover land, the plaintiff, to show its value at the time of a certain execution sale, offered to prove who was in possession at a certain time; the Court below admitted the testimony as evidence of possession: *Held*, not to be error. *Ibid.*

3. On the trial of an action to recover land, it appeared that in 1841, J and R agreed in writing to convey to W, upon the payment of the purchase money, certain lands, the boundaries of the same as set out in the agreement being definite; afterwards, upon the payment of the purchase money, J and the executors of R (then deceased) executed a deed to W; the *locus in quo* was embraced in the deed but it was disputed as to whether or not it was embraced in the agreement: *Held*, (1) That the agreement to convey was the joint contract of J and R. (2) That the executors of R had no power to convey his estate in any land not embraced in the agreement. (3) That admissions in writing of J as to what boundaries were intended to be conveyed by the agreement were not admissibe as evidence against the representatives of R. *Young v. Griffith*, 201.

4. In such action the provisions of the Code do not prevent the paintiff from demanding a specific performance of the agreement on the part of the representatives of R, notwithstanding the action was instituted prior to 1868. *Ib.*

5. In an action to recover land, it appeared that in 1869 G obtained a judgment against F; that in 1873 F conveyed the *locus in quo* to defendant, the same having been regularly assigned to him as a homestead; that thereafter F went into bankruptcy and the *locus in quo* was assigned to him as a homestead by the assignee, and the revisionary interest therein was purchased by the defendant at

ACTION TO RECOVER LAND—*Continued.*

assignee's sale; that after the adjudication of F as a bankrupt, the plaintiff purchased the *locus in quo* at a sheriff's sale under execution on G's judgment: *Held*, that plaintiff was not entitled to recover. *Hill v. Oxendine*, 331.

See Evidence 7; Husband and Wife 4; Parties 2; Practice 21.

ADULTERY—See Widow 1.

ADVANCEMENTS:

1. The provisions of section 11, of the charter of the Bank of New Hanover (Private Laws 1871-'72, ch. 31) do not include *merchants* and cannot by implication be extended to them. *Bank of New Hanover v. Williams*, 129.
2. Under the provisions of such section the *lien* and *advancements* should be cotemporaneous acts; it was not intended that the bank at any time after making an advancement could take a lien upon all future purchases of the mortgagor for a general balance due on such advancements. *Ib.*

See Mortgage 4.

ADVERSE POSSESSION:

1. The possession of one tenant in common being the possession of all, nothing less than a sole possession of twenty years by a co-tenant, without any demand or claim of another co-tenant to rents, profits or possession, he being under no disability during the time, will raise a presumption in law that such sole possession is rightful, and protect it. *Neely v. Neely*, 478.
2. Adverse possession is an actual, visible and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. *Parker v. Banks*, 480.
3. As the law never presumes a wrong, he who asserts an adverse possession against the better title must prove it, as well as allege it. *Ib.*
4. A mortgagor in possession being the tenant of the mortgagee, his possession is not adverse to the mortgagee. *Ib.*

See Statute of Limitations 6.

AFFIRMATIVE OF ISSUE—See Practice 2, 3.

AGENT AND PRINCIPAL—See Contract 1; Husband and Wife 6; Pleading 8.

AMENDMENT—See Practice 10, 15, 19, 46.

ANSWER—See Counterclaim; Pleading 4; Practice 36.

APPEAL—See Contract 9; Evidence 5; Practice 59; Roads 1, 2.

ARBITRATION AND AWARD:

1. The duty of arbitrators is best discharged by a simple announcement of the result of their investigation. They are not bound to decide

ARBITRATION AND AWARD—*Continued.*

according to law, but may decide according to their own notions of right without giving any reason therefor. *King v. Manufacturing Co.*, 360.

2. If they undertake to decide according to law, and it appears upon the face of the award that they have misconceived any principle of law applicable to the case, the award will be set aside. *Ib.*

ARREST:

No one has authority, without process legally issued in this State, to arrest a person charged with crime in another State and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery. *S. v. Shelton*, 605.

ARREST AND BAIL:

1. An order of arrest issued after final judgment in an action is illegal and void. *Houston v. Walsh*, 35.
2. Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under C. C. P., sec. 268. *Ib.*
3. Such execution is irregular if (1) it does not run in the name of the State and convey its authority to the officer to arrest the defendant, (2) if it is not made returnable to a term of the Court, (3) if it commands the officer "to commit the defendant to jail until he shall pay the judgment," etc., instead of "to have the defendant's body before the Court at its next term." *Ib.*
4. The provisions of sec. 21, ch. 60, Battle's Revisal (Insolvent Debtor's Act), "that after an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue except by trial and verdict or by consent" only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it. *Ib.*

ASSAULT AND BATTERY—See Arrest.

ASSIGNOR AND ASSIGNEE—See Counterclaim 1.

ATTACHMENT:

Where, in a proceeding by attachment, it appears from the *whole* record, that the provisions of the statute have been substantially complied with, the action will not be dismissed, or the attachment dissolved. *Grant v. Burgwyn*, 513.

ATTORNEY—See Mortgage 9.

BANKRUPTCY:

1. A discharge in bankruptcy operates to discharge a debt in existence at the time of the adjudication in bankruptcy and upon which a *judgment is thereafter obtained. Dawson v. Hartsfield*, 334.
2. In such case, the discharge can be pleaded upon a motion for leave to issue execution, whatever length of time may have elapsed since it was granted. *Ib.*

BANKRUPTCY—*Continued.*

3. A discharge in bankruptcy is a final discharge from all preceding debts, then provable. *Withers v. Stinson*, 341.

4. Where the plaintiff recovered judgment (which was duly docketed) against defendant in 1871 upon a debt contracted before 1860 and execution thereon was returned unsatisfied, the defendant's real estate being assigned to him as a homestead; and thereafter the defendant obtained a discharge in bankruptcy, his homestead having been also assigned by his assignee, the plaintiff not proving his judgment debt against the defendant's estate in bankruptcy: *It was held*, that the bankruptcy of defendant discharged the judgment, and that it was error in the Court below to grant the plaintiff leave to reissue execution. *Ib.*

5. A sale by an assignee in bankruptcy of land held in trust by the bankrupt to secure debts due himself, passes to the purchaser of the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid. *Green v. Green*, 343.

6. The defendant, who had been adjudged a bankrupt but not discharged, said to the plaintiff, to whom he was indebted before his bankruptcy: "Your debt I will pay if I live"; and again—"Count the interest on the note and add the principal, and send it to me at Raleigh, and I will make a draw and send you the money for the note": *Held*, that the jury were justified in finding thereupon a new and unconditional assumption of the old debt, entitling the plaintiff to recover, notwithstanding the bankruptcy. *Fraley v. Kelley*, 348.

See Action to Recover Land 5.

BANK OF NEW HANOVER—See Advancements 1, 2; Contract 13.

BASTARDY:

On the trial of an issue of bastardy, the Court below charged the jury that "the written examination of the woman was presumptive evidence that the defendant was the father of the child, and that it devolved on him by a preponderance of evidence to show that he was not; and that if taking all the evidence into consideration, both sides were evenly balanced, the State was entitled to a verdict": *Held*, not to be error. *S. v. Rogers*, 609.

BOND—See Contract 2, 4, 22; Injunction 1.

BOUNDARY:

1. A call in a grant for a line "beginning at the mouth of a gut, *supposed* to be J's bounds, running along his *supposed* line south 300 poles in the pocosin to or near the head of Speller's Creek," etc., indicates that there was no established and known line, and the course and distance being certain in themselves must govern. *Mizell v. Simmons*, 182.

2. In such case the call being from an established corner "south 300 poles in the pocosin *to or near* the head of Speller's Creek," the course and distance must prevail, without being controlled by the words "*to or near* the head of Speller's Creek." *Ib.*

3. In such case, to repel the allegation that there was a mistake in the mathematical call by course and distance or that there was any intention to make the head of the creek the terminus of the line

BOUNDARY—*Continued.*

irrespective of course and distance, it is competent to consider all the calls of the grant and also the diagram made at the time of the entry and survey and referred to in the grant. *Ib.*

4. In such case, it was unnecessary as a matter of fact to ascertain where was the head of Speller's Creek, because as a matter of law the terminus of the line was at the end of the course and distance called for. *Ib.*

5. The Courts will construe "east" to mean "west," in the call for a line in a grant, when the mistake is obvious and fully corrected by the calls and an annexed plat. *Ib.*

See Action to recover Land 3; Deed.

BURDEN OF PROOF—See Contract 3.

BUSINESS ENTRIES—See Evidence 16.

CHEROKEE NATION—See Registration of Deed.

CHIEF OF POLICE, ELECTION OF—See Towns and Cities.

CLAIM AND DELIVERY—See Practice 51.

CLERK—See Salaries and Fees.

CLERK AND MASTER—See Official Bond 2.

COLOR OF TITLE—See Deed 9; Mortgage 5; Statute of Limitations 6.

COMMENTS OF COUNSEL—See Practice 60.

COMMERCIAL USAGE—See Contract 13, 15.

COMMISSIONS—See Executors and Administrators 15, 19; Official Bond 5.

COMMISSIONER TO SELL LAND—See Practice 35, 57.

COMPLAINT—See Counter-claim; Pleading 1, 3, 4, 5, 6, 7; Roads 4.

COMPULSION—See Duress.

CONFEDERATE MONEY:

Payments on a note in Confederate money are to be credited at the nominal value of the currency paid, regardless of the fact that such payments were not endorsed on the note at the time. *Norment v. Brown*, 363.

See Executors and Administrators 9, 10, 11; Guardian and Ward, 5, 6.

CONFESSIONS—See Homicide.

CONFIRMATION—See Practice 25, 26, 28.

CONSENT—See Practice 58.

CONSIDERATION—See Contract 2, 3; Pleading 6; Practice 48; Trusts 4.

CONTINUANCE—See Practice 1.

CONTRACT:

1. Where several persons undertook, in the sum of one hundred dollars each that if a certain mercantile firm should furnish J. L. P., as agent for said firm, "with goods for sale on commission *or otherwise*," in default of his fairly settling and accounting with said firm, they should pay the amounts for which they were respectively bound: *Held*,

   (1) That the obligation was to guaranty *the contract* of J. L. P. and was therefore absolute and unconditional; and that the makers of the paper were not entitled to notice from the firm of the delivery of the goods, nor of the failure of J. L. P. to pay for the same accompanied with a demand on the guarantors.

   (2) That the obligation was not restricted to accountability for the first lot of goods delivered, but was intended to secure the firm from loss in their successive dealings with J. L. P., and provide them a continuing indemnity. *Straus v. Beardsley*, 59.

   Semble, that the obligation bound the makers only for the acts of J. L. P. as agent, and not for absolute purchases made by him. *Ib.*

2. In an action on a note, with or without seal, a recovery can not be defeated or the sum due be lessened by showing a partial failure of consideration. *Evans v. Williamson*, 86.

3. Where a party not himself bound by a contract, because of non-compliance with certain statutory requirements, seeks by action to enforce it against another who is bound, or does not rely on the statute, the latter cannot defend himself by setting up the voidability of the other party's contract against his own legal obligation: *Hence*, where a guardian sold timber on the land of his ward without an order of Court as required in Bat. Rev., ch. 53, sec. 33, and took a note for the purchase money, the maker of such note can not when sued on the same by the guardian and ward (the latter thereby ratifying the contract), set up the failure of the guardian to observe the statutory mandate. *Ib.*

4. Where the seal to a bond is defaced by the obligee, the bond is made void; if the defacement be by a stranger, it has no such effect. *Ib.*

5. Where, on the trial of an action for damages for breach of contract, it appeared that the defendant, a judgment creditor of the plaintiff, had agreed with him that the judgment debt should be liquidated by the plaintiffs grinding a quantity of corn to be furnished by defendant, sufficient to pay off the debt, at eight cents per bushel of meal delivered to defendant, the plaintiff agreeing to grind all corn delivered to him under the contract at that price; and that thereafter the defendant after delivering a portion of the corn had declined to deliver more and had collected the balance of the debt out of the plaintiff under execution: *It was held*, (1) That it was not error for the Court below to refuse to submit an issue to the jury,—"Was getting the payment of the judgment the *sole* inducement for making the alleged contract"? (2) That it was not error to refuse to instruct the jury "that the profits which plaintiff would have made if the contract had been fully carried out, are not the proper measure of damages; that plaintiff is only entitled to actual damges, and having offered no proof of such, is entitled to only nominal damages." (3) Nor was it error to refuse to instruct the jury "that the contract was *nudum pactum*, or at least that it was so, if eight cents per bushel was a fair price for grinding." *Oldham v. Kerchner*, 106.

6. In such case upon an issue as to whether or not the causes of action

CONTRACT—*Continued.*

alleged in the complaint were compromised and settled between the parties upon sufficient consideration, it was not error for the Court to charge "that the jury must say whether plaintiff agreed with defendant's attorney to surrender his right of action for the alleged breach of contract, and if he did so agree in consideration of receiving the forbearance on the execution, as testified to, then this was a sufficient consideration binding on plaintiff, and the jury must find the issue in the affirmative; that a contract is the assent of two minds to the same thing in the same sense, and the jury must consider all the testimony on this point and say whether the plaintiff did so agree; that the plaintiff was not barred from recovering in this action by reason of his agreement in regard to any matter other than the cause of action sued on, and if in the conversation with said attorney, the plaintiff did not understand him as referring to the cause of action sued on, that they must find the issue in the negative. *Ib.*

7. In such case, the true measure of damages is the difference between the cost of grinding and the contract price; that the charge of the Court below to that effect is not erroneous for failing also to charge "that the actual cost sustained by defendant's breach of contract was the true measure of damages, and if the plaintiff after defendant's refusal to deliver corn, did receive from others employment for such part of his machinery as would have been occupied in performing his contract with defendant, or by reasonable effort might have received such employment, the profit that was or might have been thus made must be deducted from the profit he would have made had defendant performed his contract, in order to ascertain the actual damage," there being no evidence to which such a doctrine was applicable. *Ib.*

8. Where in an action for damages for breach of contract, the plaintiff proves a contract, its breach and the loss of certain profit resulting from the breach, the burden is on the defendant to prove anything in diminution of damages. *Ib.*

9. In this Court in a case on appeal the position of the appellee is strictly defensive; the judgment below is assumed to be right unless some specified error is shown: *Therefore*, in this action the plaintiff is not required to show from the case made out on appeal, that his claim was supported by evidence that his mill had not been so employed as to diminish his damages. *Ib.*

10. A vendee who takes a warranty and gives notice that he buys to sell again in another market may include in his damages both the losses he actually sustains by reason of a breach of the warranty, and also the profits he would have made upon resale, had the article been what it was represented to be. *Lewis v. Rountree*, 122.

11. In an action for breach of warranty, where it appeared that the plaintiffs purchased certain rosin from the defendants at Wilson, N. C., to be sold by them in some other market than Wilson, *of which defendants had notice*, and the rosin failed to come within the description warranted: *It was held*, (1) That the contract of defendants was to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble and expense of transportation. (2) That the knowledge of the vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be sustained by a breach of warranty. (3) That in such case the only just measure of damages is the difference between what the

CONTRACT—*Continued.*

rosin would have sold for *in a reasonable time* after its purchase in the market which the plaintiff had by the circumstances of the contract a right to select, and did select (New York), if it had been what it was warranted to be, and the sum it did actually sell for or could have been sold for in that market, being what it was. *Ib.*

12. In such case, the plaintiff is not entitled to interest upon the amount recovered for breach of warranty. *Ib.*

13. On the trial below, it appeared that the plaintiff advanced money to one M for the purchase of rosin, with the understanding that M was to draw a draft upon the rosin to pay for the advancement; M shipped the rosin to defendants in New York and drew upon them in favor of plaintiff, sending a bill of lading to defendants with a letter that he had "drawn on them at 30 days for $2,947.98 in favor of the cashier of plaintiff's bank, *please protect*"; defendants protested the draft for nonacceptance and thereupon plaintiff telegraphed them "we hold registered mortgage on rosin shipped you by M and must follow it if draft is not accepted"; at the time of shipment there was a balance due defendants from M on account of mutual dealings theretofore of more than the value of the rosin; defendants had no notice of agreement between M and plaintiff that the proceeds of rosin should be applied to the payment of the draft; defendants sold the rosin and applied the proceeds to the debt due them from M: *Held*, (1) That the telegram from plaintiff to defendants was evidence that the plaintiff did not claim that its agreement with M constituted an equitable assignment. (2) That an agreement to pay a debt out of a particular fund is not an equitable assignment of the fund; and the agreement between M and plaintiff did not vest in the plaintiff any title, legal or equitable, to the rosin when purchased. (3) That it was properly submitted to the jury as to whether or not the draft and letter constituted an *instruction* to defendants, by commercial usage, to appropriate the proceeds of the rosin to the payment of the draft; and the jury having found in the negative, the plaintiff can not recover. (4) That it was not error to submit to the jury, an issue, that even if such instruction was given, did the long continued dealings between M and defendants, leaving a balance due them, warrant the defendants by the commercial usage in New York in refusing to accept the draft and applying the proceeds of the rosin to their own balance. *Bank v. Williams*, 129.

14. In such case the defendants, not being parties or privies to the agreement between M and plaintiff, were left free to enforce their factor's lien against the proceeds of the rosin consigned to them by M, without liability to plaintiff. *Ib.*

15. Courts, in administering commercial law, have the power and it is proper to submit to a jury as a question of fact, as well what is the meaning of commercial terms, as what was the established commercial usage in respect of a certain course of dealing. *Ib.*

16. On the trial below, it appeared that B and W, partners, executed a certain note in bank, with one P as security, which at maturity was replaced by another note executed by the same parties; that the latter after it became past due was surrendeded to one V in exchange for certain drafts drawn by him upon W and payable to P, which drafts were made for the purpose of *renewing the note*, (B being then sick); that these drafts were afterwards taken up by the plaintiff who executed his own note to the bank; *Held*, that the indebtedness of B upon the original notes was not extinguished by

CONTRACT—*Continued.*

the drafts of V; but V in his relation to the others was their surety and held their note for his own indemnity until relieved by the execution of plaintiff's note. *Dobson v. Chambers*, 142.

17. Where a substituted security is given at the instance and for the benefit of a debtor, the liability of the debtor is not destroyed, but is transferred to him who gives such security. *Ib.*

18. The provisions of the "act concerning inspector of lumber in Wilmington" (Priv. Acts 1874-5, ch. 155) are for the benefit of the vendor; and a sale of timber upon an inspection and measurement not in accordance with the act, the vendor making no objection thereto, is binding upon him. *McNeill v. Chadbourn*, 149.
(Observations by SMITH, C. J., upon the necessity of a "statement of the case" in a record sent up to this Court on appeal.) *Ib.*

19. The defendants directed the agents of the plaintiffs to order certain cotton bagging to Charlotte, with the understanding that the defendants should accept and pay for the same if it suited them in quality and price. The bagging was attached *in transitu* at Portsmouth, Va., by R. & Co., to satisfy a claim held by them against the agent of the plaintiffs. Defendants intervened, by leave of Court, in the attachment proceeding, and claimed the property as theirs. The controversy with R. & Co. was finally settled by their paying to defendants a certain sum for their interest in the property: *Held*, that the transaction amounted to a conversion by defendants of the plaintiff's goods entitling the latter to a recovery. *Sever v. McLaughlin*, 153.
Held, further, that the Court should have so instructed the jury instead of leaving it to them to decide the matter by the testimony of one of the defendants as to what *he* meant by his conduct in representing the firm. *Ib.*

20. A judgment suffered by one of several joint obligors on a sealed instrument for the payment of money maturing before the adoption of the C. C. P., Title IV, being a proceeding *in invitum*, is not such an acknowledgement by the judgment debtor of a *willingness* to pay, notwithstanding the statutory presumption of payment, as will bind his coöbligors. *Lane v. Richardson*, 159.

21. Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Where the contract has been abandoned on both sides the innocent losing party will be driven to a *quantum meruit* or some other form of action founded upon a disaffirmance of the special agreement. *Jones v. Mial*, 164.

22. Where the defendants' intestate endorsed to the plaintiff for value, a bond which had been executed to him by one member of a firm in the name of the firm: *It was held*, in an action on the bond against the administrators of the endorser, that they were *estopped* from setting up any infirmities in the bond. *Henderson v. Lemly*, 169.

23. A *parol* agreement between A and B, that A will buy B's land at execution sale and that B may subsequently have the land at the price bid with interest, is void under the statute of frauds, in the absence of any equitable element in B's favor. *McKee v. Vail*, 194.

24. In such case B can not complain that A acted as deputy sheriff in the appointment of appraisers of his land before the sale, there being no allegation of fraud. *Ib.*

CONTRACT—*Continued.*

25. The rule that equity will not compel a specific performance of a contract not founded on a valuable consideration, is confined to executory contracts or promises which rest in *fieri*. *Hodges v. Spicer*, 223.

26. In an action on a note for a certain sum solvable in cotton at a certain price per pound, the plaintiff is entitled to recover as damages for the non-delivery of the cotton, the market value of the quantity of cotton deliverable under the contract at the time the same ought to have been delivered. *Whitsett v. Forehand*, 230.

27. On the trial below, it appeared that plaintiff's intestate, a postmaster, in June, 1861, had in his hands a certain sum of money belonging to the United States and paid it to the defendant to whom the United States Government was indebted for services as mail carrier, in part discharge of the debt; after the war the defendant collected from the United States payment in full for all his services up to June, 1861, and the plaintiff's intestate was compelled to account for and pay to the United States the amount paid by him to defendant: *Held*, that plaintiff was entitled to recover. *Bahnsen v. Clemmons*, 556.

See Action to recover land 3; Bankruptcy 6; Deed 2; Evidence 6; Guaranty; Interest 1, 2; Landlord and tenant 1; Note 1.

CONTRIBUTION—See Executors 3.

CONVERSION—See Contract 19.

CORPORATIONS—See Supplemental Proceeding.

COSTS:

Where, in an action to recover damages resulting from cutting a ditch, the title to the land came in controversy and on motion of plaintiff a survey was ordered and made, and on the trial the surveors were summoned as witnesses for plaintiff but were not introduced by him or tendered to defendant, nor was the plat put in evidence, but the defendant examined them and introduced the plat: *It was held*, the plaintiff having obtained a verdict, that the costs of the survey and the witness fees of the surveyors should be taxed against the defendant. *Porter v. Durham*, 596.

COUNTERCLAIM:

1. The assignee of a note past due takes it subject to all counterclaims in favor of the maker and against the payee accruing before a notice of the assignment. *Whedbee v. Reddick*, 521.

2. Where a legatee borrows from executors the money of their testator and gives his note for its repayment, he may set up as a counterclaim against such note, the amount due him from the estate of the deceased, and is entitled to an account to ascertain that amount. *Ib.*

3. Under C. C. P., sec. 105, a plaintiff may not only *reply* to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counterclaim, the only requirement being that it shall not be inconsistent with the complaint. *Boyett v. Vaughan*, 528.

4. The plaintiff brought suit before a Justice for $105, due by account; the defendant pleaded a counterclaim for $200, due by note for part of the purchase money for a tract of land; judgment was rendered for defendant from which plaintiff appealed; in the Superior Court plaintiff was permitted to reply to the counterclaim, alleging an in-

COUNTERCLAIM—*Continued.*

debtedness of defendant of $332, upon a *parol contract to pay plaintiff* so much per acre for what the land should fall short of its estimated quantity; and plaintiff obtained judgment for $200, having remitted the excess of his claim above that amount: *Held*, not to be error. *Ib.*

See Executors and Administrators, 22.

COUNTIES AND COUNTY COMMISSIONERS:

1. Where the county of Dare was formed out of parts of Currituck and other counties, and the act of assembly creating the county provided that the portion of its citizens taken from Currituck County should not be released from their portion of the outstanding debt of Currituck: *It was held*, that a judgment obtained against the county of Dare for such proportionate share should be paid by assessment upon *that portion of the territory of Dare taken from Currituck. Com'rs v. Com'rs*, 565.
2. In the absence of legislative provision, neither the county of Dare nor that portion taken from Currituck would be liable for any portion of such debt. *Ib.*

See Roads, 1, 2.

COUNTY TREASURER—See Parties 3; Pleading 3.

COURSE AND DISTANCE—See Boundary.

COVENANTS—See Landlord and Tenant 3.

CREDITOR—See Supplemental Proceeding.

CREDITOR'S BILL—See Jurisdiction 1.

CREDITOR'S LIEN—See Executors 7.

DAMAGES—See Contracts 5, 7, 10, 11, 26; Injunction 3; Practice 16, 17, 51; Roads 5.

DEBT OF COUNTY—See Counties.

DECLARATIONS—See Evidence 8, 10, 11, 12, 14, 15.

DEED:

1. The rule, that the recital in a deed, that the purchase money for the land conveyed has been received, is conclusive and can not be contradicted by *parol* evidence, has no application to cases of fraud. *Powell v. Heptinstall*, 206.
2. Where plaintiff and defendant compromised certain disputed matters for a definite sum to be paid by plaintiff in land at a fixed price per acre; and plaintiff's brother and the defendant fixed up the papers, including the deed, in the plaintiff's absence, who signed the deed when presented to him, the receipt of the purchase money being therein acknowledged; and afterwards plaintiff ascertained that his brother and defendant had fraudulently included in the deed land worth fifty dollars more than the compromised debt: *It was held*, that plaintiff was entitled to recover of the defendant the amount overpaid. *Ib.*
3. A call in a deed for a line "beginning at the north corner of R's store,"

DEED—*Continued.*

where the store stands squarely east and west and has two north corners, is a latent ambiguity to be explained by *parol* testimony. *Lawrence v. Hyman*, 209.

4. Where A executed deeds of gift to B and C, his two sons, and the deed to B was lost before registration, and afterwards by arrangement C conveyed his land to B, and A executed a deed to C for the land originally conveyed to B and in substitution for the first deed, reserving to himself a life estate therein: *It was held*, that if the original deeds to B and C were valid as to creditors when made, no subsequent exchange between them would affect the rights of creditors; *and further*, that the deed to C relates back to the date of the deed to B which was lost, notwithstanding the reservation therein of the life estate by A. *Hodges v. Spicer*, 223.

5. In such case, upon an issue as to the validity of the deeds against creditors, the inquiry as to whether or not the grantor reserved property sufficient and available for the satisfaction of his debts, should be confined to the date of the original deeds. *Ib.*

6. In such case, creditors of A can not complain of the reservation of a life estate by him in the second deed. *Ib.*

7. A reservation in a deed that the grantor "is to retain possession of the above described lands during his natural life *or so long as he may desire it* for his own use and benefit confers a life estate on the grantor. *Ibid.*

8. Where the grantees under a deed of gift were present at a sale of the land under execution against the grantor and made no claim to the land: *It was held*, that they are not thereby estopped from asserting their title. *Ib.*

9. A deed conveying land and describing it as "one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres more or less," does not constitute color of title, and possession under it is not adverse. Such description is insufficient and can not be aided by parol proof. *Dickens v. Barnes*, 490.

See Boundary; Evidence; Husband and Wife, 11; Judge's Charge, 2, 3; Practice, 7; Registration, 2; Trusts.

DEMURRER—See Executors and Administrators, 14; Official Bond, 1; Pleading, 3, 5; Practice, 34.

DESCRIPTION OF LAND—See Boundary; Deed.

DEVISE—See Executors and Administrators, 2, 3, 6, 7, 20, 21.

DISABILITY—See Adverse Possession, 1; Statute of Limitations, 6.

DISCRETIONARY POWER—See Practice, 18, 19.

DISSENTING OPINIONS—

Bank v. Williams.....129
Boyette v. Vaughn.....528
Dawson v. Hartsfield.....334
Haywood v. Haywood..... 42
Jones v. Mial.....164
Mizell v. Simmons.....182
Oldham v. Kerchner.....106
Strauss v. Beardsley..... 59

DISTRIBUTIVE SHARES—See Trusts, 2.

DIVORCE AND ALIMONY:

Under Bat. Rev., ch. 37, sec. 10, a wife is entitled to alimony *pendente lite* when she is a *party* to an action for divorce; *Therefore*, where the husband plaintiff alleged adultery, and the wife defendant denied the same and asked for a divorce *a mensa et thoro* alleging cruel and inhuman treatment, and the Court below granted an order for alimony *pendente lite: Held*, not to be error. *Webber v. Webber*, 572.

DUE DILIGENCE—See Guaranty, 2, 3.

DURESS:

Duress can not be predicated of compulsion to discharge a legal duty. *State v. Davis*, 603.

See Guardian and Ward, 6.

ELECTION—See Landlord and Tenant, 6; Legacy, 1, 2.

ELECTION OF MUNICIPAL OFFICER—See Towns and Cities.

ENDORSER—See Contract, 22.

EQUITABLE ASSIGNMENT—See Contract, 13.

EQUITY OF REDEMPTION—See Mortgage, 5.

ERRONEOUS JUDGMENT—See Practice, 9.

ESTOPPEL—See Contract, 22; Deed, 8; Landlord and Tenant, 2; Mortgage, 8.

EVIDENCE:

1. Where there was a conflict of testimony between two witnesses and it appeared that one (an old person) had had an attack of paralysis: *Held*, that evidence of an expert that "paralysis in old persons has a tendency to impair the mind" was admissible. *Lord v. Beard*, 5.

2. Where there was a conflict of evidence as to whether a certain deed had been executed to the defendant by B, a witness for plaintiff, and a letter from one of the defendant's witnesses was introduced as contradictory of her testimony that such deed had been executed: *Held*, to be error for the Court to charge "that it was for the jury to say whether the letter was inconsistent with any idea that B had made any deed for the premises to the defendant." The only effect the letter could have would be to weaken or discredit the testimony of the witness; it was not admissible as evidence that B had not made a deed to defendant. *Ib.*

3. Testimony which merely raises a conjecture or suspicion of a controverted fact should not be submitted to the consideration of a jury. *March v. Verble*, 19.

4. Where plaintiff sues defendant's intestate for the value of a bull alleged to have been sold by the former to the latter in a certain year, it is competent for the plaintiff to prove by his own oath the value of the bull, and that he had owned but one such animal since the war. This is not evidence of a transaction or communication with a person deceased, but of a substantive and independent fact. *Ib.*

5. On an appeal to the Superior Court from a Justice's judgment, parol evidence is admissible to explain the intent and meaning of an entry on the Justice's docket. *Evans v. Williamson*, 86.

EVIDENCE—*Continued.*

6. To charge one with a liability, positive and direct evidence of a previous request is not always attainable and is not required. *Therefore,* where it appeared that the plaintiff had purchased certain stock from B and W, partners, and it was in evidence that B had said on the day of the sale that "he and W owed a large debt in bank and had a chance to make a large payment in stock"; that the plaintiff and B and W were seen together in conversation and B afterwards said that "he had got $3,000 for his stock"; that afterwards, B being then deceased, the plaintiff took up the note of B and W by executing to the bank his own note, to which W was a surety: *It was held,* in an action against B's administrator, that there was sufficient evidence to warrant the jury in finding that the plaintiff was requested by B and W to take up their note. *Dobson v. Chambers,* 142.

7. Where the land in dispute was conveyed in trust for use, as the site of a church, "so that the congregation of said church may at all times enjoy the privilege of divine worship therein," etc: *It was held,* that a member of the congregation was not such a party in interest in an action affecting the title to the land as to be debarred, under C. C. P., sec. 343, from testifying to the declarations of a deceased person. *Lawrence v. Hyman,* 209.

8. In such case, the declarations of the grantor in said deed of trust as to the true corner, are not admissible in evidence on behalf of the plaintiff (trustee in said deed) the defendant not claiming through him, and not being present when the declarations were made. *Ib.*

9. Nor, in such case, is the plaintiff trustee a competent witness (under C. C. P., sec. 343) to prove a communication made to him by a person at the time of trial deceased. *Ib.*

10. In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under C. C. P., sec. 343, is removed by the insolvency of his father's estate. *Gidney v. Logan,* 214.

11. The declarations of a trustor at the time of making the deed and just prior thereto and in contemplation thereof, are admissible in evidence; and also his declarations after the deed and while the property was in his possession are admissible to prove and qualify the fact and purpose of such possession. *Ib.*

12. The declarations of a grantor, made at a time subsequent to the execution of the deed, are not evidence against the grantee. *Hodges v. Spicer,* 223.

13. Upon the trial of an issue as to whether an administrator had certain notes and accounts against the estate of his intestate at the time he rendered his account, and whether the fund in his hands was applied to their payment: *Held,* that the testtimony of a witness that "he had seen the notes and accounts due the administrator but they are not on file," was not admissible, the notes and accounts not being produced and there being no evidence of their loss or destruction or that search had been made for them. *Williams v. Wooten,* 414.

14. The declarations of a mortgagor after the execution of the deed are not admissible to prove an alleged fraud between him and the mortgagee, in an action wherein the mortgagee is plaintiff and a third party is defendant (involving the rights of the plaintiff under the deed). *Burbank v. Wiley,* 501.

15. Such declarations are only evidence against the mortgagor himself in a proceeding between him and such third party. *Ib.*

EVIDENCE—*Continued.*

16. Business entries of deceased persons (as the field-notes of a surveyor), made in the line of their duty, are only admissible in evidence when they are shown to be *original* and *cotemporaneous* with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves. *Ray v. Castle*, 580.

17. The former statements of a witness, made without the sanction of an oath, and coinciding with those made on the stand, may be admitted in evidence, if he is impeached, to sustain the personal *credibility* of the *witness*, but not for the purpose of confirming his *statement* as to the *facts* sworn to by him on the trial: *A fortiori* such testimony is not admissible to confirm the statement of another witness testifying to the same effect. *S. v. Parish*, 610.

18. Where a certain state of things is once proved to exist, the law presumes its continuance until a change is shown: *Therefore*, where a witness called to impeach the character of another witness offers to speak as to the general character of the witness attacked as it existed some two or three years before the trial, such evidence is not too remote, and its rejection is error. *S. v. Lanier*, 622.

19. It is a general rule, applicable alike to criminal and civil causes that exception to evidence must be taken in apt time on the trial, or its admission is not assignable for error. *S. v. Ballard*, 627.

20. This rule, however, is subject to an exception (at least in criminal causes) where the evidence is made incompetent by statute. In such cases it is the duty of the Judge, on his own motion, to disallow the evidence. *Ib.*

21. The question as to whether or not an infant witness has sufficient mental capacity and sense of moral obligation to testify in a cause, is one of fact to be determined by the Court, and cannot be reviewed on appeal. *S. v. Edwards*, 648.

See Action to recover land, 1, 2, 3; Bastardy; Contract, 8, 13; Guardian and ward, 2; Husband and wife, 1, 2; Judge's Charge, 4; Practice, 24, 48; Trial, 1; Witness.

EXCEPTIONS—See Evidence, 19; Practice, 47, 49, 50.

EXECUTORS AND ADMINISTRATORS:

1. Where, in pursuance of a decree, upon final settlement of a testator's estate and more than two years after his death, an executor paid legacies to parties entitled without notice of any outstanding debt of his testator and took good and sufficient refunding bonds from the legatees: *It was held*, in an action upon a guardian bond to which the testator was surety, that the executor was not liable. *Badger v. Daniel*, 372.

Held, further, that the acceptance of a legacy, in such case does not operate to discharge the testator's estate from a liability incurred by his suretyship on the bond of the guardian of such legatee, to the extent of same received by the guardian *as guardian;* but the value of the legacy so received and such other sums as may be made out of other legatees must be applied to its discharge, before subjecting lands in possession of devisees of the estate. *Ib.*

Held, further, 1st. That the act (Rev. Code, ch. 49, sec. 24) in reference to refunding bonds is intended only for the benefit of creditors. 2d. Where the aggregate penalties of such bonds are sufficient in the

EXECUTORS AND ADMINISTRATORS—*Continued.*

discretion of the executor to meet debts probably outstanding, *it seems*, that he has fulfilled the requirements of the statute. 3d. Where the distribution of a decedent's estate is decreed in a proper proceeding for that purpose, the Court should fix the amount of penalties of such bonds. *Ib.*

2. Where a legatee (and devisee) executed a refunding bond upon receipt of his legacy, and sold and conveyed land devised to him within two years after the testator's death: *Held*, (1) That his surety was liable primarily (to the extent of the terms of such bond) as between him and the purchaser of the land, for an outstanding debt of the testator, whether evidenced by judgment or not. (2) Such purchaser holds the land as the devisee did; *and, therefore*, the conveyance to him is void and the land liable as assets for the payment of the debt; and if he or the devisee sell, after the two years, his vendee (without notice of the debt, and for a valuable consideration) acquires an unincumbered estate, but the same liability attaches to the price paid him, as did to the land. (Bat. Rev., ch. 45, sec. 156.) *Ib.*

3. Each devisee or heir is liable for the debt of his devisor or ancestor in proportion to the respective values of the land; and the whole debt to an amount not exceeding the value of the devise to one, may be made out of him, he being entitled to contribution from the others, which may be decreed in an action where they are all parties. *Ib.*

4. And each devisee, heir, etc., is a surety (to the extent of what he receives) for the other shares in the state, to the creditors thereof. *Ib.*

5. An executor is not chargeable with the value of slaves destroyed as property by emancipation while in his possession; nor is a legatee, to whom they were delivered and retained. *Ib.*

6. The liability of a devisee for the payment of the devisor's debt is contingent upon the insufficiency of the personal estate; and *it was held*, in an action to subject the devised land and before such insufficiency was ascertained, that the plea of the statute of limitations was no defense. *Ib.*

7. One Joyner by his will devised a certain lot of land to M. D. and upon her death the lot was sold in 1863 by order of Court, and the purchaser failing to pay, it was resold in 1871 and bought by defendant's intestate, who executed two notes with defendant H as surety for the purchase money and the sale was confirmed; the notes were delivered to G as receiver of the estate of J. J. D. and W. A. D., Jr., heirs of M. D.; in 1876, G, by order of Court transferred the notes to the survivor J. J. D., who was also administrator of W. A. D., and endorsed them to the plaintiff for value. In 1871 one B and wife and others brought suit against Joyner as surety on the guardian bond of one Daniel, all the devisees of Joyner being at different times made parties; in 1877, the Court below adjudged that the proceeds of the sale of land devised to M. D. was real estate in the hands of J. J. D. and he took no part as administrator of W. A. D., Jr., and that it was assets liable to the claim of B and wife and others, who recovered a large judgment; the plaintiff had no notice of the existence of this action when he purchased the notes: *Held*,

(1) That the defendants intestate acquired by his purchase a right to have the land conveyed on payment of the purchase money. *Winfield v. Burton*, 388.

(2) That J. J. D., as representing the devisee M. D., is liable to a personal judgment against him for the value of the land, in favor

EXECUTORS AND ADMINISTRATORS—*Continued.*

of any creditor of Joyner who can not get payment out of personal assets. *Ib.*

(3) That the *quasi* lien of a creditor of an estate on the land of the decedent is destroyed by a sale after two years, leaving him only a personal claim on the heir, and the notes given for the purchase money are not subject to the *quasi* lien that the land was.

(4) That J. J. D. was not a trustee for the creditors of Joyner, and the notes in his hands could not have been seized, and much less in the hands of his assignee, whether he bought with notice of the creditor's claims or not, and therefore that the plaintiff is entitled to recover. *Ib.*

8. It is not negligence in an administrator to sell slaves fo division in March, 1861, under an order of Court in an *ex parte* proceeding instituted to that end by the administrator and distributees. *Furr v. Brower*, 408.

9. Where, after such a sale, the guardian of the distributees, who were infants, commenced a suit against the administrator for the funds arising therefrom, and in April, 1863, obtained a judgment, the administrator was justified in collecting the purchase money in Confederate currency, such being the only circulating medium; and the receipt of the guardian for the same after its payment into Court, is a complete discharge of the administrator. *Ib.*

10. Where, in the settlement of an estate, the administrator disbursed a much larger sum during the war in Confederate currency than he received during that time, (nearly the whole amount of receipts being before and since the war) and no explanation is given as to why or how he had in his hands $1,000 in Confederate currency in 1874, which he advanced plaintiff as part of his distributive share: *It was held*, that in the settlement of his account the administrator should only be credited with the actual value of the Confederate currency so advanced. *Williams v. Williams*, 411.

11. *Held, further*, that in such settlement the plaintiff (distributee) should be charged only with the value of such Confederate currency in good money as of the date of said advancement. *Ib.*

12. As a legal proposition, it is not the duty of an administrator here to take out letters of administration in another State in all cases where a debt there may be due the intestate; but his duties, as those of all other trustees, must be determined by the exigencies of each; and where no attempt of any kind is made to collect a bond on a solvent non-resident living in an adjoining county in Virginia about a day's journey, by private conveyance, from the residence of the administrator, and where no excuse except the non-residence of the debtor is given for such delinquency by the administrator, he is guilty of such negligence as well render him liable for the uncollected portion of the debt. *Williams v. Williams*, 417.

13. Where, upon the petition of an administrator, the land of his intestate is sold for assets by a commissioner appointed by the Court, and the administrator purchases for his own use and benefit, the heirs and other persons interested in the disposition of the realty have their election to treat the sale as a nullity, or to hold the administrator responsible for the actual value of the land. *Froneberger v. Lewis*, 426.

14. Under Bat. Rev., ch. 45, sec. 71, only the interest of a deceased debtor in land possessed by him, or which he may have conveyed for the purpose of defrauding creditors, is subject to sale by an administrator for assets;

EXECUTORS AND ADMINISTRATORS—*Continued.*

Therefore, where the plaintiff instituted proceedings in the Probate Court, alleging that he had obtained and docketed a judgment against defendant's intestate during his life time, and that thereafter the intestate had sold certain real estate to the other defendants for value, and asked that a reference be had to ascertain the value of the lands so sold, that he recover of the defendants an amount in proportion to the value of the respective tracts, and on their failure to pay that the administrator proceed to sell, etc.: *It was held*, that a demurrer to the complaint was properly sustained. *Heck v. Williams*, 437.

15. A testator, who in his life time had made unequal advancements to his children, by his will bequeathed certain amounts to them with a view to equality, payable in cash or property at the election of the executor, without stating when they should be paid; the remainder of his estate was given to his wife for life, and at her death the residue was to be divided into as many shares as he might have children then living; at the time of his death the testator had sufficient personal property including slaves to pay his debts and legacies, but the solvent credits and monies belonging to the estate were exhausted in payment of debts and expenses, except certain shares of bank stock bequeathed to the executor (a child and legatee) but charged with the payment of $710 into the residuary fund; the slaves at his death were worth much more than the amount of the legacies; after his death the slaves and other personal property remained in the possession of the widow *with the approval of the legatees*, until the slaves were emancipated; the executor (now deceased) offered to pay the legacy to one of the legatees, which was declined, and to another he paid a part; no effort was made by the legatees to compel a payment of the legacies until after the slaves were emancipated *Held*,

(1) That the legacies are not a charge upon the land of the testator;

(2) That the estate of the executor is not liable for legacies;

(3) That the estate of the executor is liable for $710, with interest from the death of the widow, to be paid into the residuary fund;

(4) That the executor is entitled to commissions, it being found that he acted in good faith. *Perkins v. Caldwell*, 441.

16. Where a will gave certain legacies and devises to a widow in lieu of dower, which amounted to less in value than her dower: *It was held*, that such legacies and devises were not assets liable for the debts of the testator. *Smith v. Smith*, 455.

17. Where cotton belonging to an estate was shipped by the executors to a firm of commission merchants in good repute, who preferred claims against the proceeds arising out of their transactions with the testator and also with testator's widow, and while the matter was still unsettled the firm failed: *Held, that* the executors are not liable to the creditors of the estate for the loss. *Ib.*

18. But if while the demands of the firm are being resisted by the executors and are still unadjusted, the executors ship other cotton to the same firm, which is not then notoriously insolvent, and the proceeds are lost: *Held*, that their previous dealings should have put the executors on their guard and they are liable to the creditors for the loss. *Ib.*

19. For effecting an arrangement whereby the creditors of an estate took $49,500 worth of land in payment of their claims, the executors were allowed two and one-half per cent commissions. *Ib.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

20. Where all the devisees under a will, including the plaintiffs and one of the executors, took the lands devised to them and for two years received the rents and profits, and the estate proving insolvent, then surrendered the same: *Held*, that as between the plaintiffs and said executor, the executor was not chargeable with the rents. *Ib.*

21. Where a testator was a prudent business man and his indebtedness was apparently small as compared with his estate, and the will set aside enough property in his judgment to pay his debts, and where the devises were specific (farms) and already in possession of the devisees; and when the value of testator's estate was so greatly impaired by the effects of a financial crisis and an inability to collect debts due the estate, that it proved insolvent: *Held*, that the executors have a right to call upon the legatees under the will to refund. *Ib.*

22. Where, the plaintiff having received a legacy of stock, etc., sold the same to defendant H, and received in part payment a note of the testator and sued upon it, and the executors answer, for the reasons stated above, that they have nothing to pay with except the plaintiff's legacy: *Held*, that the equity of the executors to compel the plaintiff to refund the legacy is a good counterclaim to the plaintiffs demand. *Ib.*

See Counterclaim 2; Evidence 13; Husband and Wife 8; Jurisdiction; Probate Court; Trusts 1, 5.

EXPERT—See Evidence 1.

EXPRESSION OF OPINION BY JUDGE—See Practice 53.

FACTOR'S LIEN—See Contract 14.

FALSE PRETENSE—See Judge's Charge 5.

FINDING OF FACTS—See Practice 23.

FORMER ACQUITTAL—See Indictment 1, 2.

FRAUD—See Contract 23, 24; Deed 1, 2; Evidence 14, 15; Judgment 1; Practice 26, 43; Trusts 4.

FREE-TRADER—See Husband and Wife 7.

GENERAL CHARACTER—See Evidence 18.

GUARANTY:

1. The distinction between a guaranty for the payment of a debt and a guaranty for the collection of the same is clear and well defined. The former is an absolute promise to pay the debt at maturity if not paid by the principal debtor, and the guarantee may bring an action on default of payment at the day named against the obligor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success. *Jones v. Ashford*, 172.

2. What amounts to due diligence in any given case is a question of law for the Court. *Ib.*

3. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona* to the execution issuing thereon, has always been regarded as one of the extreme tests of such diligence, and this Court adopts it as such. *Ib.*

GUARANTY—*Continued.*

4. An agreement in writing "to guaranty the payment" of a certain note to a party named, "and in case she fail to recover the money on said note," to pay the principal, interest and costs thereon, is merely a a guaranty for the collection of the note. *Ib.*

See Contract 1.

GUARDIAN AND WARD:

1. An order by a Superior Court clerk in a cause pending before him for the removal of a testamentary guardian, where it is not alleged or found as a fact by the clerk that the estate of the ward has been wasted, or that the guardian is insolvent, so that the ward would be unable to recover the balance due on a final settlement, is improperly made, and will be set aside upon proceedings properly instituted to that end. *Sanderson v. Sanderson*, 369.

2. A judgment obtained against a guardian in 1871 in favor of his ward, is *conclusive* evidence against him and the sureties upon his bond of the amount of his indebtedness to the ward at that time. *Badger v. Daniel*, 372.

3. Where a guardian sold land which was devised to his ward to J for $10,000, and afterwards bought it back from J, paying for it with his ward's money; and the land was subsequently sold under a decree to reimburse the ward, and the ward became the purchaser at $8,000: *Held*, that the price bid by the ward was a proper credit to the guardian upon the charge made against him for the original price. *Ib.*

4. In an action by a ward against the surety on the bond of his deceased guardian, it is no defense for the defendant that assets came into the hands of the administrator of the guardian sufficient to pay the amount due the plaintiff which were wasted by him, and that he and the sureties on his administration bond are insolvent. *Humphrey v. Humphrey*, 396.

5. The conversion by a guardian into Confederate currency of the bank bills and solvent notes of his ward, which came into his hands before the war, requires explanation, without which it will be deemed to import negligence. *Sudderth v. McCombs*, 398.

6. The pressure of public opinion unaccompanied by peril of life, limb, or great bodily harm, is not such *duress* as will excuse the conversion by a guardian of his ward's estate into depreciated currency or securities. *Ib.*

See Executors and Administrators 1, 9; Practice 5, 6.

HEIR—See Executors and Administrators 3, 4, 7, 13; Husband and Wife 12; Vendor 2.

HOMESTEAD—See Action to recover land 5.

HOMICIDE:

Where, upon a trial for homicide, the only evidence relied upon by the State to connect the prisoner with the offense, is his own confessions, and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and the deceased: *It was held*, to be error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence. *S. v. Jones*, 630.

HUSBAND AND WIFE:

1. In the absence of proof to the contrary, the rules of the common law relative to marriage are presumed to obtain in all christian countries and especially in the States of the American Union. *Jones v. Riddick*, 290.
2. By the law of North Carolina, which is in conformity to the common law, reputation, cohabitation, and the declarations and conduct of the parties are competent evidence of marriage in questions of inheritance. *Ib.*
3. A wife is entitled to the possession and control of her separate estate, to manage the same and receive the income arising therefrom, free from the control or interference of her husband. *Manning v. Manning*, 293.
4. In an action by a wife against her husband to recover the possession of her lands of all which he had taken possession and control and was cultivating solely for his own use, and damages for withholding the same: *It was held*, that the action would lie and that the plaintiff was entitled to the relief demanded. *Ib.*
5. But in such case, the husband's marital right of occupancy can not be impaired; his right of ingress and egress to the dwelling and society of his wife continues; and a writ of possession following a judgment must be so framed as to put the wife in possession without putting the husband out. *Ib.*
6. An action can not be maintained by a husband against his wife and her agent, for an account of the dealings of the agent in the management of the wife's separate estate. *Manning v. Manning*, 300.
7. A wife (whether a free-trader or not) is entitled under the Constitution (Art. X, sec. 6, and Bat. Rev., ch. 69, sec. 29) to recover and hold to her own use, her separate property and also the income derived from it; and agents appointed by her, whether before or after marriage, must account with and pay to her, what they have received either before or after her marriage. *Ib.*
8. Where a father insures his life for the benefit of his children, one of whom (a daughter) marries and dies without issue, the husband of the deceased daughter is entitled, as her administrator, to her share of the money arising from the policy of insurance upon the death of the father. *Conigland v. Smith*, 303.
9. Where husband and wife join in mortgage of lands consisting in part of the wife's separate estate to secure the husband's individual debts, a judgment creditor of the husband in no way connected with the mortgages is not entitled to an order of Court directing a sale of the wife's land in the first instance, to satisfy the mortgage creditor, thereby exonerating the husband's land and leaving it open for the satisfaction of outside debts. *Shinn v. Smith*, 310.
10. Where a marriage took place prior to the adoption of the Constitution of 1868, and in 1871 the wife acquired certain personal property, it vested in her as her separate estate, free from "the debts, obligations or engagements of her husband." *Holliday v. McMillan*, 315.
11. Where a married woman purchased certain real estate taking title to herself, and borrowed money with which to pay the purchase money, and to defray necessary family expenses and for carrying on her farming operations on other lands, and to secure the sum borrowed executed with her husband a deed of trust on certain land of her separate estate: *It was held*, that such deed of trust was valid. *Jeffrees v. Green*, 330.

HUSBAND AND WIFE—*Continued.*

12. The rents of a wife's land (prior to the adoption of the Constitution of 1868) accruing in the lifetime of the wife, or of the husband surviving her and having an estate by the courtesy for life, belong to the husband and not to the heir of the wife; he is entitled to the land at the death of the husband.

Therefore, where land was sold by a clerk and master in 1853 under a decree for partition among tenants in common, the husband and wife being entitled to a share in right of the wife; and the wife died in January, 1868, and the husband in December, 1873, without having received said share: *It was held*, in an action by the heir of the wife upon the bond of said clerk, that he was entitled to recover his share of the principal money realized by said sale, with interest from the death of the husband—the proceeds of sale standing as and for the land, and the interest thereon as and for the rent. *Matthews v. Copeland*, 493.

See Witness 2.

INDICTMENT:

1. A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and defendant can be again put on trial for the same offense. *S. v. Swepson*, 632.

2. The defendant was indicted for cheating the State, and a motion was made in the Court below by defendant's counsel (he not being present and the Solicitor for the State not being ready for trial) upon an allegation that the matter had been compromised, that a verdict of "not guilty" should be entered; his Honor thereupon directed a jury to be impaneled and a verdict of "not guilty" to be entered and refused to permit an appeal to this Court and also refused to permit a statement of the facts to be made part of the record; thereafter his Honor went out of office. Upon a motion in this Court that a mandamus issue to the Court below to cause inquiry to be made into the truth of the alleged facts, and if true, to cause the defendant to be again put on trial: *It was held*, that this Court has no jurisdiction in the premises; the remedy is in the Court below where the defendant can be again put on trial and the truth of the facts alleged by the State inquired into upon a plea of former acquittal. *Ib.*

3. An indictment for a nuisance by profanely swearing in a public place should set forth:

   (1) That the offense was committed "in the *presence* and *hearing* of divers persons then and there assembled," and the general conclusion "*ad communem nocumentum*" is not sufficient.

   (2) That "the acts were so repeated in public as to have become an annoyance and inconvenience to the public."

   (3) The profane words alleged to have been used, so that the Court may decide as to the quality. *S. v. Barham*, 646.

4. An omission of any of these specifications is a fatal defect in the indictment, for which judgment will be arrested. *Ib.*

5. It is no ground for an arrest of judgment that an indictment charging only a common law offense, concludes "*contra formam statuti*," and "against the peace and dignity of the State." The conclusion against the statute may be rejected as surplusage. *S. v. Bryson*, 651.

6. An indictment for disposing of mortgaged property under the act of 1873-'74, ch. 31, is fatally defective, if it fails to set forth the man-

INDICTMENT—*Continued.*

ner of disposition, and the name of the person receiving it in case of a transfer of possession. *S. v. Pickens*, 652.

7. An indictment for larceny which describes the property stolen as "one pound of *meat*," etc., is fatally defective. *S. v. Patrick*, 655.

8. Where an indictment for injuring a cow concluded at common law, and failed to charge the offense to have been committed "mischievously or from malice to the owner:" *Held, to be fatally defective. S. v. Hill*, 656.

9. An indictment for injuring live stock under Bat. Rev., ch. 32, secs. 94, 95, is defective, if it omits to conclude *contra formam statuti*, and to charge an unlawful intent—to drive the stock from the range, or to injure the owner. *Ib.*

10. Upon the trial of an indictment for injury to live stock, *it was held* to be a variance:
Where the defendant was charged with injuring a cow, and the proof was that the animal injured was an ox.
Or where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner. *Ib.*

11. In such case it is essentially necessary that there should be an averment describing the thing injured, and proof of ownership thereof.
(SUGGESTION—*Statutory Offenses.* It is not always sufficient to follow the words of the statute. The charge should be as specific as the proof adduced in its support must be). *Ib.*

INFANT WITNESS—See Evidence 21.

INJUNCTION:

1. An injunction bond is not void, under C. C. P. sec. 192, because it specifies no amount in which the signers to it are bound. *Gold Co. v. Ore Co.*, 48.

2. An injunction will be dissolved when the answer and affidavits of defendant are full and complete, denying the whole equity of plaintiff and are credible, exhibiting no attempt to evade the material charges in the complaint and affidavits of plaintiff. *Perry v. Michaux*, 94.

3. The defendant under an injunction or restraining order can only recover damages upon the dissolution of the one or the vacation of the other, by showing want of probable cause for the plaintiff's action, or malice in its legal acceptation as applicable to such cases. *Burnett v. Nicholson*, 548.

See Practice 16, 17.

INJURY TO LIVE STOCK—See Indictments 8, 9, 10.

INSOLVENT DEBTOR—See Arrest and Bail 4.

INSPECTOR—See Contract 18.

INSURANCE:

1. Where a policy of fire insurance covered a stock of "drugs and medicines," and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fireworks, *saltpetre*, etc: *It was held*, that the prohibition was not against keeping saltpetre as a drug, but only in such manner or quantity or for such purpose as would increase the risk. *Collins v. Insurance Co.*, 279.

INSURANCE—*Continued.*

2. Where in such case saltpetre was on hand as a part of the stock of drugs at the time the policy issued, being an article usually kept in drug stores, it was a part of the stock insured, and although specially prohibited by the terms of the policy, the policy was not thereby avoided. *Ib.*

3. Where, in an action to recover on a policy of fire insurance, it appeared that at the time of the issuing of defendant's policy, additional insurance upon the property was taken out by the plaintiff with the same agent in another company, the consent of defendant being endorsed upon its policy; and thereafter another company was substituted by the same agent in place of the second insurer; and that such substitution was known to defendant, and that no complaint was made against it either at the time or after the fire when defendant was attempting to effect an adjustment of the loss: *It was held*, that the fact that the substiuion was made by defendant's agent with defendant's knowledge and without objection by defendant, constituted a waiver of the stipulation in its policy that no additional insurance should be placed upon the property insured, unless the consent of the company was endorsed upon its policy. *Ib.*

4. Where the holder of a policy of insurance against fire complies substantially with all the requirements of the contract between himself and the insurers, immaterial variations will not vitiate it. *Willis v. Insurance Co.*, 285.

5. Where the fire policy forbids the keeping by the assured of benzine, camphine "or any explosive," it is a question of fact for the jury whether or not certain alcohol kept in the store of the policyholder was an explosive under the particular circumstances of the case. At any rate, it can not be so considered in the absence of finding to that effect. *Ib.*

6. If such a policy authorize the keeping of kerosine of a certain quality, it will rest upon the insurers in case of a loss to show: (1) that the kerosene was not of that quality, and (2) that the fire originated or was influenced by the kerosene kept. *Ib.*

7. An instruction by a policy holder to his agents not to interfere in case of fire unless the entire stock could be saved, in order that no dispute might occur with the insurers as to the amount of a loss will not stand in the way of a recovery where it affirmatively appears that no efforts of the assured or his agents could have averted the loss. *Ib.*

See husband and Wife 8.

INTEREST.

1. In an action by heirs-at-law against an administrator when the final account of the administrator showed a net balance in his hands due the 1st of December, 1858; *Held*, that the defendant is liable for interest from the date, it being more than two years from the death of the intestate and no reason appearing why the amount should have remained in his hands. *Bushee v. Surles*, 51.

2. A note as follows, "on 25 December, 1873, I owe and promise to pay G, *with legal interest*, the sum of etc., this 21 October, 1871," bears interest from its date. *Gohlson v. King*, 612.
See contract 12; Judge's Charge 5.

INTERLOCUTORY ORDER—See Practice 40.

IRREGULAR JUDGMENT—See Practice 13, 14, 27, 28, 29, 43, 44, 45.

ISSUES—See Contract 13; Practice 20, 22, 23, 52, 59.

JOINT OBLIGORS—See Contract 20.

JUDGE'S CHARGE:

1. The failure of the Judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. *Wiseman v. Penland*, 197.

2. On the trial of an action involving the validity of a deed of trust only as to certain personal property therein conveyed, when the deed included both real and personal property; *It was held* to be error to submit to the jury an issue as to its validity in regard to the real estate. *Gidney v. Logan*, 214.

3. In such case, the Court below should have excluded from its charge to the jury, all consideration of any provision in the deed affecting the real estate. *Ib.*

4. It is the duty and privilege of the jury to determine what *is* the testimony in a cause as well as its weight and reliability; *Therefore*, when upon the disagreement of counsel as to what was testified by witness, the Court stated that both the counsel were wrong, and added that he would so recapitulate the testimony that "it would be moral perjury for a juror to accept the statement of defendant's counsel," *Held*, to be an invasion of the province of the jury, and entitles the defendant to a *venire de novo*. *S. v. Sykes*, 618.

5. A charge is erroneous which, in attempting to describe the offense of obtaining a signature by false pretenses, as declared in Bat. Rev., ch. 32, sec. 67, omits to direct attention to the fraudulent intent of the defendant as a necessary ingredient of the crime. *S. v. Austin*, 624.

6. While, in the absence of a prayer for instructions from counsel, omission of the Judge to charge in a particular way is not assignable for error, yet, if he should undertake to state the law, and in so doing, should neglect to mention an essential constituent of the offense charged, the defendant if convicted is entitled to a new trial. *Ib.*

7. A failure of the Judge to instruct the jury, preparatory to a short adjournment pending the trial of a capital case, that they should not discuss the case among themselves or with third parties during the recess of the Court, is not sufficient cause for a new trial, where it does not affirmatively appear that an improper verdict resulted from such omission, or, at least, that the jury were tampered with. *S. v. Edwards*, 648.

See Contract 5, 19; Evidence 2, 20; Practice 53.

JUDGMENT.

1. A judgment, in the absence of proper proof of fraud, must be presumed to have been fairly and regularly taken. *Wiseman v. Penland*, 197.

2. An agreement to take part of a debt in payment of the whole was *nudum pactum* before the Act of 1874-'75, ch. 178, and where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a judgment of restitution for the money advanced by him. *Fickey v. Merrimon*, 585.

JUDGMENT—*Continued.*

3. Where counsel on both sides agree that the clerk may take the verdict of a jury, and afterwards such agreement is rescinded with notice to the clerk but not to the presiding Judge, a judgment of the Court, rendered in ignorance of such recision, is not irregular. *Ib.*

See Bankruptcy 1; Contract 20; Guardian and Ward 2; Parties 4; Pleading 4; Practice 10, 12, 13, 14, 31, 41, 43, 44. 45.

JURISDICTION.

1. Where an action in the nature of a creditor's bill was brought by the plaintiff (a creditor of defendant's testatrix) to the Superior Court at term time, under sec. 6, ch. 241, Laws 1876-7, and after the institution of the action the defendant commenced a special proceeding in the Probate Court for the sale of the land of the testatrix for assets; *It was held*, that the Superior Court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the Probate Court. *Haywood v. Haywood*, 42.

2. Under Bat. Rev., ch. 45, sec. 73 and Laws 1876-7, ch. 241, sec. 6, there is not a conflict of jurisdiction between the Probate and Superior Courts in regard to the settlement of estates but the jurisdiction is concurrent. *Ib.*

3. When there are Courts of equal and concurrent jurisdiction, that Court possesses the case in which jurisdiction first attaches. *Ib.*

4. Prior to the act of 1876-7, ch. 251, a Justice of the Peace had no jurisdiction in cases of tort. *Krider v. Ramsey*, 354.

5. Under the Constitution, Art. IV, sec. 12, and Laws 1876-7, sec. 6, the Superior Court in term time has original jurisdiction to hear complaints against executors and administrators, demanding an account of their dealings and a settlement with the legatees or distributees. *Bratton v. Davidson*, 423.

6. Where an administrator fails to exhibit in Court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond to a regular term of the Superior Court, alleging such failure as a breach, and calling for an account, without first seeking the account in the Probate Court. *Ib.*

7. Courts of Probate have no power to provide for the payment of the debts of a lunatic contracted prior to the lunacy. *Smith v. Pipkin*, 569.

8. Where the existence of a debt, alleged to be due from a lunatic, is denied, a Court of Probate has no jurisdiction to try the question of debt or no debt. *Ib.*

9. Under Laws 1876-7, ch. 241, sec. 6, the Superior Courts have concurrent jurisdiction with the Courts of Probate over lunatics and their estates. *Ib.*

See Indictment 2; Practice 36, 37; Probate Court 2, 3, 4, 5, 6; Trusts 1.

JURY:

A statute exempting members of a fire company from jury duty in general, does not operate to discharge them from service as *talesmen*. The object of the law is to afford them leisure for the performance of their duty as firemen; and when their presence in Court demonstrates that their services are not required in the line of their employment, the reason for their exemption ceases. *S. v. Willard*, 660.

See Evidence 6; Judge's Charge 4; Judgment 2; Practice 14, 15, 22; Trial 1.

JUSTICE OF THE PEACE—See Jurisdiction 4; Practice 36, 37.

LANDLORD AND TENANT:

1. One, at the time under a disability to contract, who enters upon land by permission of another claiming and acknowledged to be the owner must return the possession to such owner as a condition precedent to denying his title.. *Wilson v. James*, 349.

2. Where, in an action under the Landlord and Tenant Act, it appeared that the defendant, a slave, in 1863 entered into possession of the *locus in quo* as the tenant of plaintiff, and in 1865 refused to pay further rent and disclaimed being the plaintiff's tenant; *It was held*, that he was estopped to deny the plaintiff's title, and that plaintiff was entitled to recover. *Ib.*

3. If there are no covenants in a lease against sub-letting, the lessee may underlease, and if the under-tenant commits no breach of the covenants between the lessor and the lessee which would work a forfeiture of the lease and authorize an entry and disposesssion of him by the lessor, and entry upon the land demised to the undertenant and a dispossession of him by the lessor is a trespass. *Krider v. Ramsey*, 354.

4. Where a tenant for years, after sub-letting to a third patry, and before the underlease has expired, surrenders to the landlord, the latter is guilty of a trespass in entering upon the sublessee. *Ib.*

5. In cases of subletting such as above, there is no privity of estate or contract between the lessor and the under-tenant; and *therefore*, no action in substance *ex contractu* can be maintained for a wrongful entry by the landlord. *Ib.*

6. A mortgagor of land left in possession (or his assignee) has the right to appropriate the profits arising therefrom to his own use, or to lease to another and take the accruing rent; and this right remains until divested with some positive interference of the mortagee; *Therefore*, where the plaintiff (assignee) agreed to sell said land to the defendant who was let into possession, and upon default of payment of the purchase money the plaintiff elected to treat the defendant as a tenant at a certain sum for rent, as provided in the contract of sale; and afterwards, the mortgagee sold and conveyed the land under a power in the deed to pay the original debt secured thereby; *It was held* in an action for the rent that defendant's occupation by the election of plaintiff was changed from that of vendee to that of lessee, and that the plaintiff was entitled to recover. *Dunn v. Tillery*, 497.

Held further, that the incapacity of plaintiff to make title to the land exonerated defendant from the payment of the purchase money. *Ib.*

See Adverse Possession 4.

LARCENY—See Indictment 7.

LATENT AMBIGUITY—See Deed 3.

LEASE—See Landlord and Tenant.

LEGACY AND LEGATEE:

1. Where a testator bequeathed to certain of his children a fund arising from a policy of insurance which belonged to them all equally, and directed that in the event the fund should be used in the payment of his debts, the bequest should be made good out of his land, and the

LEGACY AND LEGATEE—*Continued.*

residue of the land divided among all of his children equally, thereby putting the children not included in the bequest to an election between their interest in the insurance money and their claim to the land under the will; *It was held*, that they were entitled to an account to ascertain how much of the insurance fund had been applied to the payment of the debts before they could be compelled to make their election. *Weeks v. Weeks*, 77.

2. Parties put to an election between land and another fund, have no right to call for a sale of the land to ascertain its value before making their election; they must rely upon their own judgments. *Ib.*

See Counterclaim 2; Executors and Administrators 2, 15, 21, 22; Will 3.

LEGISLATIVE POWER—See Statute of Limitations 4.

LIEN—See Executors and Administrators 7.

LIS PENDENS—See Pleading 2.

LOST RECORDS—See Parties 5; Pleading 7.

LUNATIC—See Jurisdiction 7, 8, 9.

MALICE—See Injunction 3.

MARRIAGE—See Husband and Wife.

MISTAKE—See Boundary 5; Practice 9, 26.

MONEY PAID TO ANOTHER'S USE—See Contract 27.

MORTGAGE:

1. The registration of a mortgage deed executed without the State, the execution whereof is not proved according to law, (Bat. Rev., ch. 35, secs. 7, 8,) is ineffectual to pass title against creditors or subsequent purchaser for value. *Todd v. Outlaw*, 235.

2. Such registration does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. *Ib.*

3. A mortgage deed, defectively registered, does not create an equity in the mortgagee which follows a deed from him and attaches itself to the legal estate in a subsequent purchaser from the mortgagor. *Ib.*

4. A mortagee is a purchaser for value, and whether the consideration is adequate or not will not affect the legal title; *Therefore*, where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B, the defendant's grantor, defectively registered; *It was held*, that if after the execution of plaintiff's mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with notice of defendant's equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. *Ib.*

MORTGAGE—*Continued.*

5. A deed by the mortgagor in possession to a third party, with notice of of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. *Parker v. Banks*, 480.
6. Registration of a mortgage is notice to all purchasers from the mortgagor subsequent to such registration. *Ib.*
7. Where a mortgage is given to secure several notes falling due at different times, the possession of the mortgagor or his assignee is not to be deemed hostile to the mortgagee until the maturity of the last note. *Ib.*
8. Mere knowledge on the part of the mortgagee, that the mortgagor has conveyed an absolute estate in the mortgaged property to a third party, does not estop the mortgagee from asserting at any time his legal rights against such third party. *Ib.*
9. While it is a general rule that a power of sale under a mortgage deed must be executed by the mortgagee in person, yet if such sale be conducted by the attorney of the mortgagee, who subsequently ratifies the same by making the necessary deed for the property, the mere fact that the sale was conducted by the attorney in the absence of the mortgagee will not invalidate the title derived thereby.
10. Where a mortgage deed directs a cash sale upon default of the mortgagor he can not be heard to complain that the mortgagee sold on credit and made title to the purchaser, as such sale and conveyance extinguish the mortgage debt to the extent of the purchaser's bid. *Ib.*
11. Where one partner executes a mortgage on a stock of goods to secure payment of his share in the purchase of the same, and upon a subsequent dissolution of the firm and sale of its effects by a receiver, the purchaser acquires title subject to the right of the mortgagee to his proportionate share of the assets, the mortgagor is also a creditor of the firm as to any amount advanced by him after the date of the mortgage. *Burbank v. Wiley*, 501.

See Husband and Wife 9; Indictment 6; Practice 57, 58.

MORTGAGOR AND MORTGAGEE—See Adverse Possession 4; Evidence 14, 15; Landlord and Tenant 6; Mortgage.

MOTION IN THE CAUSE—See Practice 5, 8, 9, 13, 56.

MOTION TO ISSUE EXECUTION—See Bankruptcy 2.

MOTION TO VACATE JUDGMENT—See Practice 43, 44, 45.

NEW PROMISE—See Bankruptcy 6.

NEW TRIAL—See Judge's Charge 6, 7; Practice 20, 21, 23, 55.

NOTE:

1. A note, executed by a distributee to the administrator of an estate and expressed on its face to be for money loaned, but which was in truth executed to secure money *advanced in part payment of his distributive share*, is not rendered illegal by the fact that the money was applied to the purchase of a substitute with the knowledge of the administrator. *Williams v. Williams*, 411.

NOTICE—See Contract 1; Counterclaim 1; Executors 1, 7; Mortgage 2, 4, 5, 6, 7; Pleading 2; Practice 9, 21, 28.

NUISANCE—See Indictment 3.

NULLITY—See Executors 13; Indictment 1.

NUL TIEL RECORD—See Practice 11.

OBLIGORS—See Contract 20.

OFFICIAL BOND:

1. In an action for breach of an official bond, where it appeared that the officer, being reappointed to the office, had renewed his bond in the same amount and with the same sureties, and the plaintiff declared upon and alleged a breach of both bonds, and the defendant demurred for a misjoinder of causes of action; *Held, that the demurrer was* properly overruled. *Matthews v. Copeland*, 493.

2. Where a clerk and master sold certain land under decree of a Court of Equity and had collected only a part of the purchase money, when in 1868, under C. C. P., sec. 142, he delivered to his successor in office (the clerk of the Superior Court) all the papers, etc., in the case; and thereupon, by consent of the parties, the papers, etc., were redelivered to him to be proceeded with and collected; *It was held*, that upon his delivery of the papers, etc., to the Superior Court clerk, his official duties, powers and liabilities ceased, and the sureties on his official bond were not liable for anything thereafter done by him. *Gregory v. Morisey*, 559.

3. Where, in such case, gold bonds had been taken for the purchase money and the clerk and master had collected a portion of them, part in currency and part in gold by consent of parties, who received from him whatever he collected, whether currency or gold; *It was held*, that from the whole amount of his receipts while clerk and master should be deducted the amount of his commissions and his disbursements during that time; that the sureties on his bond were liable for the amount of the balance due (with twelve per cent interest from date of the summons) in currency, with the addition of the present premium on gold, on that part of the said balance due on his gold collections and disbursements. *Ib.*

4. In such case, the clerk and master will be liable for the account due from the sureties as above, and also for his subsequent collections, less the amount of his disbursements and commissions with twelve per cent interest from date of summons. *Ib.*

5. The rule that a dishonest agent should not be allowed commissions is to too rigid for application in this case, there being no facts stated which would make such rule applicable. *Ib.*

See Husband and Wife 12; Pleading 3; Superior Court clerk.

OVERRULED—*Stone v. Marshall*, 52 N. C., 300 (See *Morris v. Pearson*, 253).

OWNERSHIP—See Indictment 10, 11.

PAROL AGREEMENT—See Contract 23, 24.

PAROL EVIDENCE—See Deed 1, 3, 9; Evidence 5; Practice 11.

PARTIES:

1. Where there are several parties defendant to an action pending in the Superior Court, and one of them is a non-resident, a motion by such defendant to remove the action to the United States Court (under U. S. Rev. Stat., sec. 639) will be granted, if the other defendants are not necessary parties and a full and final determination of the matter can be had without their presence in Court. *Swann v. Myers*, 101.

2. In an action to recover land, in the possession of M, a non-resident defendant, who claimed the legal estate therein, where the plaintiffs alleged that the codefendants of M were their trustees and held the legal estate in the land for their use; *It was held*, that the codefendants of M were not necessary parties defendant, that their interest in the land, if any, was adverse to M, and that they were substantially plaintiffs; and that the action, on motion of M, should be removed for trial to the United States Court. *Ib.*

3. The county treasurer is the proper plaintiff in an action on the bond of a Superior Court clerk to recover money collected by him as taxes on suits. *Hewlett v. Nutt*, 263.

4. Where a defendant in a civil action dies after verdict and before judgment, the plaintiff is entitled to a judgment without waiting to make the personal representatives or heirs of the defendant, as the case may be, parties to the action. *Beard v. Hall*, 506.

5. It *seems* that all persons whose estates may be affected by a proceeding to restore lost records, should be made parties. *Cowles v. Hardin*, 577.

See Practice 10, 15; Supplemental Proceedings 3; Vendor 2; Witness.

PARTNERSHIP—See Mortgage 11.

PENALTY—See Statute of Limitations 2.

PENDENCY OF ACTION—See Practice 33, 34.

PERJURY:

1. An indictment against a defendant for perjury assigned in an oath taken by him in a bastardy proceeding entitled, "The State on relation to M. v. B.," which refers to the same as constituted "between the State and the said 'B" and as it appeared on the minute docket, sufficiently sets out the substance of the records and identifies the case. *S. v. Brown*, 642.

2. In such case where it appeared that the defendant swore he was not the father of the child and had not had sexual intercourse with its mother, whereas the mother swore that he was the father, and other witnesses proved the defendant's confessions that such intercourse had taken place about five months before the birth of the child; *It was held*, that the false evidence was material, and warranted a verdict of guilty. *Ib.*

PLEADING:

1. In an action before a Justice of the Peace on a promisory note, an exhibition of the same accompanied with a statement that a specified sum is due thereon, which the plaintiff seeks to recover, is a sufficient complaint. *Evans v. Williamson*, 86.

2. A party to an action who desires to claim the protection of a notice by *lis pendens*, must in his pleadings specifically set forth and claim the benefit of such plea. *Todd v. Outlaw*, 235.

PLEADING—*Contiued.*

3. A complant by the board of commissioners upon the official bond of a county tax collector, alleging a default of payment to the county treasurer is demurrable if it fails to set forth directly and positively, and not by the way of recital merely, that the treasurer improperly neglects or refuses to sue. *Com'rs v. McPherson*, 524.

4. Where a plaintiff filed his complaint in an action at the appearance term with a verification substantially in the form prescribed by C. C. P., sec. 117, and the defendant filed an answer thereto without such verification; *Held*, that the plaintiff on motion was entitled to judgment, as for want of an answer. *Alspaugh v. Winstead*, 526.

5. A complaint (or declaration) which merely states a conclusion of law, and not the facts from which that conclusion is derived, is demurrable both at common law and under the C. C. P.; *Hence*, a complaint which simply alleges that the defendant is indebted to the plaintiff and that the debt has not been paid, is subject to demurrer as not stating a sufficient cause of action. *Moore v. Hobbs*, 535.

6. If a declaration (or complaint) in debt be upon simple contract, the *consideration* must be set forth with the other facts. If it be upon a specialty, the specialty must be set forth and that imports a consideration. *Ib.*

7. In a special proceeding under an act of assembly to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute; and where such statute directs that the complaint of the petitioner shall be sworn to as in other actions," the want of a proper verification is a fatal defect for which judgment will be arrested. *Cowles v. Hardin*, 577.

8. In such a proceeding an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. *Ib.* See Contract 2, 3, 21; Counterclaim; Executors, 14; Official bond 1; Practice 11, 12, 31, 34, 36, 46, 52; Statute of Limitations 1.

POSSESSION—See Adverse Possession 1; Mortgage 5, 7; Practice 21.

PRACTICE.

1. Where the Court below continued an action, the pleadings raising issues to be tried either by a jury or by the Court, and the Court holding that a trial could not then be had; *Held*, not to be error. *Isler v. Dewey*, 1.

2. The affirmative of an issue "Did plaintiff's testator pay or purchase the note" in suit, is upon the plaintiff. *Hudson v. Weatherington*, 3.

3. The rule that a party alleging an affirmative is bound to prove it, means the affirmative of any matter the truth of which is essential to the case. *Ib.*

4. Where the Court below ruled that the affirmative of the issues was upon the defendant and required him to open the case by introducing evidence and then allowed the plaintiff to open and conclude the argument, he having also introduced evidence; *Held*, to be error. *Ib.*

5. A party can not resort to a new action where the relief demanded can be obtained by motion or proceeding in the original action; *Therefore*, where land belonging to an infant was sold by a clerk and master under a decree of a former Court of Equity, and the note

PRACTICE—*Continued.*

for the purchase money was executed to him as guardian, (he having become guardian of the infant after the sale), and on settlement of the note was thereafter transferred to the ward; *It was held*, that the ward could not bring an action upon the note and to subject the land to its payment, but was limited to her remedy by motion in the original cause; and this is so, notwithstanding the fact that the original cause was never docketed pursuant to C. C. P., secs. 400, 401. *Lord v. Beard*, 5.

6. Where land belonging to an infant was sold by a clerk and master under a decree of a Court of Equity which directed title to be retained until the payment of the purchase money, and a note for the purchase money was executed by the purchaser to the clerk and master as guardian of the infant (he having become guardian subsequent to the sale) who thereupon made title to the pruchaser; and thereafter strangers to the decrees made in the original cause became *bona fide* purchasers of the land with notice of the non-payment of the purchase money by the original purchaser at the master's sale; and the note on settlement with the guardian had become the property of the ward; *It was held*, that the ward could not maintain a separate action against the purchasers of the land to subject the same to the payment of the note, but was limited to her remedy by motion in the original cause. *Lord v. Meroney*, 14.

7. Land sold under decree of Court remains in *custodia legis* until the final disposition of the case by payment of the purchase money and execution of title by the regular order of the Court, and all who claim title, mediately or immediately, through the first judgment of the Court and before the final disposition of the cause, must claim subject to the rights of the parties to the original suit, and to the orders of the Court made to be made in that suit. *Ib.*

8. A party to an action seeking relief against a judgment rendered therein, must do so by motion in the original action; he can not miantain separate action. *Askew v. Capehart*, 17.

9. A motion under C. C. P., sec. 133, to correct errors and mistakes in a judgment must be made within one year after *rendition of the judgment;* the law presumes that every party to an action takes notice of all that occurs in the progress of the action and of the judgment rendered. *Ib.*

10. Where the plaintiffs claimed as assignees of M, and failing to prove the assignment by reason of technical difficulty, obtained leave to have M brought in as a party plaintiff, and the jury found for the plaintiffs, the judgment should have been in favor of M to the use of the other plaintiffs, the real parties in interest. *March v. Verble.* 19.

(The Court *suggests* that in a case of radical amendments like the above, either the defendant should be allowed a mistrial, or the plaintiff should be taxed with such costs as may be presumed to result from the change of the character of the action.) *Ib.*

11. The plea of *nul tiel record* is tried by the Court upon an inspection of the record itself, and when the record is regularly certified by the proper officer, it cannot be explained by parol, but is conclusive upon this plea. *Harrell v. Peebles*, 26.

12. Where, upon a *sci. fa.* to enforce a judgment, the defendant pleads *nul tiel record* and the Court finds the issue in favor of the plaintiff,

PRACTICE—*Continued.*

such finding is not conclusive as to the validity of the judgment denied, but only as to its existence. *Ib.*

13. An irregular judgment may be impeached and set aside on motion within any reasonable time upon parol proof that it was not rendered according to the course of the Court. *Harrell v. Peebles*, 26.

14. Where issues of law and fact are joined in term time before a Court and jury, and afterwards, by consent of counsel, the case is withdrawn from the jury, the facts being agreed upon, and the questions of law left open for His Honor's decision during the session of his Court in a neighboring county, a judgment rendered at such last named Court in the absence of counsel and without argument or briefs filed, and not communicated to the defeated party until six months after its rendition, is not irregular, but is conformable to the present practice and to the provisions of the Constitution, Art. IV, sec. 22, and C. C. P., sec. 315. *Ib.*

15. Where the record in such case states that a jury was duly impaneled and found all issues in favor of the plaintiff, upon which the judgment in question was rendered, any party in interest is entitled to have such record amended and made to speak the truth. *Ib.*

16. It is not contemplated under C. C. P., sec. 192, that a separate action shall be brought upon an injunction bond, the damages sustained by reason of the injunction shall be ascertained by proper proceedings in the same action, by reference or otherwise as the Judge shall direct. *Gold Co. v. Ore Co.*, 48.

17. It is not error for the Court below to direct that issues of fact, raised by exceptions to the report of a referee appointed to ascertain the damages sustained by reason of an injunction, be submitted to a jury. *Ib.*

18. It is not error for the Court below to set aside a reference for the statements of an account, after the report has been made and exceptions filed, and proceed to try the case; such action is a matter of discretion and not reviewable by this Court. *Bushee v. Surles*, 51.

19. Nor, in such case, is the exercise of the discretionary power of the Court below in refusing to allow the defendants to amend their answer, reviewable by this Court. *Ib.*

20. Where the issues submitted to the jury on the trial in the Court below were confused, it was not error to set aside the verdict and order a new tral. *Tankard v. Tankard*, 54.

21. Where in an action to recover land, the replication of the plaintiff admitted the open and notorious possession of defendant's ancestor when plaintiff purchased, and on the trial the jury found that defendant's ancestor had certain equitable rights against plaintiff's vendor, and also found that the plaintiff was a *bona fide* purchaser for value without notice; *It was held*, that the possession of defendant's ancestor was actual notice to plaintiff of his equities in the land, and that the facts submitted and the findings of the jury were inconsistent and contradictory, and a new trial was ordered. *Ib.*

22. It is the constitutional right of every litigant to have the issues of fact joined in the progress of his cause determined by a jury, except where he voluntarily waives the privilege; and *therefore* a compulsory reference of such issues to the determination of a single person is error. *Bernheim v. Waring*, 56.

PRACTICE—*Continued.*

23. If the Judge to whose decision are referred both the law and the facts of a case under C. C. P., sec. 240, should fail to find the acts fully and distinctly, so that his conclusions of law can not be reviewed on appeal, the case will be remanded for a fuller finding on the facts. *Straus v. Beardsley*, 59.

24. It is the duty of an appellant excepting to the rejection of evidence to set forth the evidence offered, so that the appellate court may judge of the propriety of its rejection. *Ib.*

25. A Court of Equity will not disturb a sale of land for division made by a Commissioner of the Court, after a decree of confirmation merely because of an advance offered in the price; *Aliter*, if an advance of ten per cent is offered before confirmation. *Blue v. Blue*, 69.

26. Generally, such a sale will not be set aside after confirmation except upon the ground of fraud, but "fraud" should here be understood in its largest sense as including those cases of accident, mistake and surprse of which it is unconscientous to take advantage. *Ib.*

27. In order to acquire such sanctity as will make it inviolable except for the causes above set forth, a judgment or decree must be regularly rendered according to the course and practice of the Court. An irregular judgment is entitled to no such protection. *Ib.*

28. A judgment confirming the report of a commissioner selling for division rendered without notice to the parties in interest to come in and oppose the same if so advised, is an irregular judgment and may be vacated on motion. *Ib.*

29. Except in the case of an order merely formal and of course, a Probate Court has no power, on its own motion and without application from any party in interest, to make any order in an action. Such order is irregular and voidable, if not void. *Ib.*

30. A Court of Equity will set aside a judicial sale for division when it appears, (1) that the commissioner to make the sale sold for cash instead of on credit as he was directed by the Court to do, and (2) that there was a grave mistake as to the area of the land, common to all parties. *Ib.*

31. A judgment declaring expressly or impliedly certain facts as admitted by the pleadings, can only be reviewed (if at all) upon some direct proceeding instituted for that purpose. *Weeks v. Weeks*, 77.

32. No Court has power to order a sale of land except where it is bound by some trust, or the like; or when the power is given by statute. *Ib.*

33. The fact of the pendency of another action or proceeding involving the same controversy between the same parties as the one under consideration must appear of record by plea, answer or demurrer, before this Court will notice it. *Smith v. Moore*, 82.

34. If two actions are between the same parties for the same cause and the first is so constituted as to afford complete relief to all the parties, the second is unnecessary, and must be dismissed. *Ib.* If a final decree has been entered in the first this would bar a new action, or even a motion in the same action, until the decree is impeached or vacated for cause. *Ib.* If the allegations in the second action should set forth the substance of the pleadings in the former, and disclose facts calling for the same measure of final relief as in the first action, and nothing more is demanded, such pleading is demurrable. *Ib.*

PRACTICE—*Continued.*

35. *It seems* that there is no means known to our practice of holding a commissioner appointed to make a judicial sale peculiarly responsible for the money collected by him; except by an action instituted by the parties entitled to such money. *Ib.*

36. The title to real estate can not be drawn into controversy by the defendant on a trial in a Justice's Court except by delivering to the Justice an answer in writing showing that such title will come in question. *Evans v. Williamson*, 86.

37. The reference in the Constitution (Art. IV, sec. 27) and Battle's Revisal (ch. 63, secs. 16, 18) to controversies respecting the title to realty is, probably, meant to be applied only to those cases where the defendant sets up title in himself, and not where he alleges title in a stranger for some collateral purpose; *Therefore*, where the defendant, sued upon a promisory note, undertook to show, by way of establishing a failure of consideration, that it was given for timber growing upon land the title to which was in a third party. *Semble*, that the title to land was not in dispute within the purview of the constitutional and statutory provisions. *Ib.*

38. Where on a rehearing of a case in this Court, it appears that no exception to the amount of the judgment was taken in the Court below on the trial, nor any issue submitted to the jury, nor any reference asked for to ascertain what was really due and no error was pointed out in regard thereto on the former hearing, this Court will not disturb the judgment. *Dobson v. Chambers*, 142.

39. A report of a referee, in a reference under the Code, is not in the nature of a special verdict and conclusive as to the facts, but is reviewable on exceptions. *Lawrence v. Hyman*, 209.

40. An interlocutory order is always under the control of the Court, pending the action in which it is made. *Shinn v. Smith*, 310.

41. This Court will assume that the date of a judgment is the date of the beginning of the debt upon which it is rendered, when there is nothing in the record to the contrary. *Hill v. Oxendine*, 331.

42. Where the report of a referee does not state fully and distinctly his findings on the facts, so that his conclusions of law may be reviewed by the Court, the case will be remanded, in order that the defect may be supplied. *Norment v. Brown*, 363.

43. On a motion to set aside a judgment, where it appeared that the original summons was not signed; that no pleadings were filed and no evidence of debt exhibited; that no jury were empaneled and no issue tried at the term when judgment was taken; that the entries upon the summons docket and minute docket conflicted, and no attornew was marked for defendant: *It was held*, that the judgment was *irregular* and should be set aside, although there was no allegation of fraud and although the motion was not made within one year. *Monroe v. Whitted*, 508.

44. Upon a motion to vacate a judgment, it is the duty of the Court below to find the facts upon which its judgment is grounded, and on appeal to this Court to set them forth upon the record. *Jones v. Swepson*, 510.

45. Where a defendant in a civil action wrote to his regular attorney who lived in Northampton County, and notified him that he was summoned to appear at fall term, 1876, of Wayne Superior Court, but did not request him to attend to the case and took no further notice of

PRACTICE—*Continued.*

it himself; his attorney did not attend the courts in Wayne or reply to defendant's letter, but overlooked the matter; and judgment by default was regularly entered, of which the defendant had actual notice in January, 1877;

It was held, that he was not entitled on a motion made in December, 1877, to have the judgment set aside on the ground of surprise, inadvertence or excusable neglect under C. C. P., sec. 133. *Hyman v. Capehart*, 511.

46. It is not in the province of a Judge to order the reformation of pleadings to remove defects, though upon application he may permit it to be done; *Therefore*, where on the trial of an action the Court below declared that the defences were inconsistent and contradictory, and directed the defendant to elect on which one he would rely and amend his answer accordingly; *Held*, to be error. *Ten'Broeck v. Orchard*, 518.

47. Where the decision of all questions both of law and fact is left to the Judge below under the provisions of C. C. P., sec. 240, his findings and conclusions will not be reviewed by this Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. *Chastain v. Coward*, 543.

48. Where one agrees to take a judgment against a third party in satisfaction of a debt, all inquiry as to the amount realized on such judgment is irrevelant in a suit for the recovery of the original debt. *Ib.*

49. In order to obtain a review by this Court of proceedings in the inferior tribunals, the exceptions taken in the Courts below must be distinctly pointed out, together with the facts upon which they depend. This Court will not search for error through obscure and voluminous records. *Meekins v. Tatem*, 546.

50. The only exceptions to this rule in civil causes are where there is a want of jurisdiction, or where, upon the whole case, it is apparent that the plaintiff is entitled to no relief. *Ib.*

51. The title to property seized under the provisional remedy of claim and delivery, can not be drawn into question upon an inquisition to ascertain the damage to the defendant where the seizure was irregular. *Manix v. Howard*, 553.

52. Plaintiffs alleged that defendants owed them a certain amount for goods sold and delivered. Defendant answered denying the debt and setting up a compromise between them and the plaintiffs' counsel by which defendant was to pay plaintiffs fifty per cent of the alleged indebtedness on condition that it should be "established." The plaintiffs replied, reaffirming the contract and alleging that the debt was to be "established" by an affidavit made before a proper officer, with which condition the plaintiffs had complied; *Held*, that under such pleadings it was not improper to submit to a jury an issue as to the validity of the original debt unaffected by the compromise, especially where the counsel on both sides assented to the framing of the issue. *Fickey v. Merrimon*, 585.

53. Plaintiffs alleged a sale to defendant in person, which defendant denied. On trial plaintiffs' counsel upon suggesting that the sale was good, whether made to defendant or his agent, was interrupted by the defendant's attorney who insisted that the plaintiffs' witness testified to a sale direct to the defendant; whereupon the Judge inquired—"Does the record show this?" Upon plaintiffs' counsel's assent, the Judge demanded, "How then do you argue that they were

PRACTICE—*Continued.*

delivered to an agent?" Counsel replied, "The deposition of S. G. M. will fix that," upon which his Honor said, "Very well; proceed;"

Held, that the transaction was not an intimation of an opinion by the judge under the act of 1796 forbidding the expression of an opinion by him upon the facts of the case. *Ib.*

54. It is not within the privilege of counsel in argument to a jury, to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and by-standers, particularly when he has not been impeached. *Coble v. Coble*, 589.

55. Where, on the trial below, a witness for plaintiff had been impeached by the testimony of defendant and plaintiff's counsel said in addressing the jury, "that no man who lived in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him;" *Held*, that the defendant was entitled to a new trial. *Ib.*

56. Where land was sold under decree of a Probate Court and notes secured by mortgage on the land taken to secure the deferred payments, the only remedy for their collection is by motion in the cause in the Probate Court; an independent action on the notes can not be sustained. *Hoff v. Crafton*, 592.

57. In such case an order by the Probate Court to collect the notes by a sale of the mortgaged premises is not in any sense a proceeding to foreclose a mortgage; it is simply an order directed to its commissioner to proceed under the mortgage deed and convert the property into money to pay the debts secured. *Ib.*

58. In such case, the terms of sale prescribed in the mortgage deed can not be changed by the Court without the consent of all parties interested. *Ib.*

59. Where, in such case, there was a conflict in the Probate Court as to the ownership of the notes and issues in regard thereto were ordered to be made up and sent to the Superior Court for trial, and thereupon the case was carried by appeal to the Superior Court; *It was held* to be error for the Superior Court to remand the case to the Probate Court without trying such issues: they should have been passed on and decided and then the cause should have been remanded to the Probate Court to be proceeded with and closed. *Ib.*

60. The refusal of the Court below to allow counsel to comment on irrelevant matter is not assignable for error, even though the refusal be based upon invalid reasons. *S. v. Parrott*, 615.

See Contract 9, 15; Injunction 2; Judgment 2, 3; Parties 1, 2; Probate Court 1.

PRACTICE IN SUPREME COURT—See Contract 9; Practice 33, 38, 41, 47, 49, 50.

PRIVILEGE OF COUNSEL—See Practice 54, 55.

PROBABLE CAUSE—See Injunction 3.

PROBATE COURT:

1. An application to the Probate Court to incorporate into the record of a will an agreement between the executor and the other parties interested under it, that the former, in consideration of a promise

PROBATE COURT—*Continued.*

by the latter to forbear resisting the probate thereof, would pay certain legacies and a sum additional, which should be a charge on the land of the testator, is irregular. *Gardner v. Anderson*, 24.

2. The Probate Court has jurisdiction of claims for legacies, but not of claims founded on contract. *Ib.*

3. Petition to sell real estate for assets by executors or administrators must be filed in the Probate Court. *Wood v. Skinner*, 92.

4. When issues of fact are raised on such petitions, it is the duty of the Probate Court to transfer the trial thereof to the Superior Court in term time where all the questions, both legal and equitable, can be settled. *Ib.*

5. The Probate Court has original jurisdiction of a proceeding to remove an executor. *Barnes v. Brown*, 401.

6. When in the course of such a proceeding, it appears inferentially that the executor has become a bankrupt since the death of his testator, and when it is clearly shown that he is the owner of no property above his exemptions, that he has neglected for six years to file in the proper Court an inventory or return of any sort, and has failed to convert the personal property into money for the payment of debts, it is the duty of the Probate Court, upon the application of judgment creditors, to require such executor to give bond for the faithful discharge of his duties, and, in default of such bond, to remove him from his office. *Ib.*

PROBATE OF DEED—See Registration 2.

PROCEEDING TO DRAIN LAND:

1. Under ch. 222, Laws 1876-'77, proceedings to drain land must be commenced by summons returnable to a regular term of the Superior Court. *Bunting v. Stancil*, 180.

2. The provisions of ch. 142, Laws 1876-'77, are repealed by ch. 222. *Ib.*

PROCESSIONING LAND:

1. In a proceeding under the processioning act, Bat. Rev., ch. 91, it is not necessary that the processioner should sign the report of the free-holders; it is sufficient if it appear affirmatively from the report that he was present participating with them. *Britt v. Benton*, 177.

2. In such proceeding it is sufficient if a majority of the free-holders act. *Ib.*

3. The act for processioning land having been in operation since 1723, the long acquiescence of the Courts raises the presumption of its constitutionality which, at all events, can not be questioned by one who has voluntarily submitted his claim to the statutory tribunal for the settlement of disputed boundaries. *Ib.*

PROFANE SWEARING—See Indictment 3.

PURCHASER:

1. A purchaser at a sale of land for division is under no obligation to disclose his opinion that the area of the land is greater than it is described to be at the sale. *Blue v. Blue*, 69.

See Bankruptcy 5; Executors 7, 13; Mortgage 6, 11; Practice, 6, 7, 21; Trusts 5; Vendor 1, 2.

PURCHASE MONEY—See Landlord and Tenant 6; Vendor 1, 2.

QUANTUM MERUIT—See Contract 21.

RECITAL IN DEED—See Deed 1.

REFEREE—See Practice 16, 17, 18, 22, 23, 39, 42, 47; Trial 1.

REFUNDING BOND—See Executors 1, 2.

REGISTRATION OF DEED:

1. The "Cherokee Nation" is a territory within the meaning of the statute (Bat. Rev., ch. 35, sec. 8). *Whitsett v. Forehand*, 230.

2. The certificate of the "Chief of the Cherokee Nation," under its great seal that a judge, before whom the probate of a deed is taken, is such Judge, etc., is sufficient to entitle the deed to probate and registration in this State. The word "Governor" in the statute must be taken to mean the Chief Executive Officer of a State or Territory, having its great seal. *Ib.*

See Deed 4; Mortgage 1, 2, 3, 6.

REMOVAL OF CAUSE—See Parties 1.

REMOVAL OF EXECUTOR—See Probate Court 5.

REMOVAL OF GUARDIAN—See Guardian and Ward 1.

RENTS—See Executors 20; Husband and Wife 12; Landlord and Tenant.

RESERVATION OF LIFE ESTATE—See Deed 4.

RESTORING RECORDS—See Pleadings 7, 8.

RIGHT TO OPEN AND CONCLUDE—See Practice 4.

RIGHT OF WAY—See Roads.

ROADS:

1. No appeal lies to this Court from the judgment of the Superior Court upon a petition to discontinue a public road, heard on appeal from the action of the Board of County Commissioners. *Ashcraft v. Lee*, 34.

2. Such proceeding is regulated by statute and the exercise of the power thereby granted to the county authorities is a matter of discretion, subject to the right of appeal to the Superior Court. *Ib.*

3. The mere user of a footpath or neighborhood road, however long the time, will not raise a presumption of its dedication to public use, in the absence of accompanying circumstances (as if it had an overseer, etc.), from which such dedication might be presumed. *Boyden v. Achenbach*, 539.

4. In an action to enforce a right of way, the complaint should set out *how* the plaintiff acquired such right. *Ib.*

5. A private action does not lie for obstructing a public way except for a special injury sustained by the plaintiff. *Ib.*

SALARIES AND FEES:

The Cerk of the Supreme Court is not embraced in the provision of ch. 247, Laws 1874-'75, directing the payment of half fees in certain cases. He is entitled to full fees when the defendant in a criminal action appeals to this Court. *Clerk's office v. Com's*, 598.

SALE OF LAND—See Bankruptcy 5; Legacy 2; Mortgage 9, 10; Practice 6, 7, 25, 26, 28, 30, 32, 56, 57; Purchaser 1.

SEAL—See Contract 4.

SEPARATE ESTATE—See Husband and Wife.

SHARES IN NATIONAL BANKS—See Taxes 3, 4.

SPECIAL PROCEEDING—See Jurisdiction 1, 2.

SPECIAL VERDICT—See Practice 39.

SPECIFIC PERFORMANCE—See Action to Recover Land 4; Contract 25.

STATUTE OF LIMITATIONS:

1. If suit be brought March 20th, 1872, on a cause of action, founded on simple contract, arising subsequent to August 1st, 1860, and such action be dismissed for want of jurisdiction, in March, 1874, the plea of the statute of limitation will not avail against a second suit on the same cause of action begun December 31, 1874. *Straus v. Beardsley*, 59.

2. An action against a clerk for the penalty of $500, prescribed by Rev. Code, ch. 28, sec. 7, if not brought within one year, is barred by the statute of limitations under C. C. P., sec. 35. *Hewlet v. Nutt*, 263.

3. An action or proceeding to reopen an account stated and readjust a settlement made under the supervision of a Court of competent jurisdiction, and sanctioned by a decree of the Court, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a Court of Law. *Spruill v. Sanderson*, 466.

4. The Legislature has the power to repeal or suspend the effect of a statute of limitation or presumption before it operates, and to give such repeal or suspension a retroactive effect. *Pearsall v. Kenan*, 472.

5. The provisions of the Rev. Code, ch. 65, sec. 1, relative to the time of commencing actions, govern all cases where the cause of action accrued prior to the adoption of the C. C., Title IV. *Johnson v. Parker*, 475.

6. Seven years exclusive adverse possession of land under color of title will protect the occupant from the claim of the true owner, unless such owner be under some disability, and in that event, his right must be asserted within three years from the removal of the disability. *Ib.*

See Abandonment of Wife; Executors 6; Will 2.

STATUTORY EVIDENCE—See Evidence 20.

SUBSTANTIVE EVIDENCE—See Evidence 4.

SUPERIOR COURT—See Guardian and Ward 1; Jurisdiction; Practice 59.

SUPERIOR COURT CLERK:

A Superior Court clerk, who collects taxes upon suits, to an amount unauthorized by law, is nevertheless bound to account for the same to the proper county officer; and a surety upon his official bond is liable for his failure to do so. *Hewlet v. Nutt*, 263.

See Official Bond 2; Statute of Limitations 2.

SUPREME COURT CLERK—See Salaries and Fees.

SUPPLEMENTAL PROCEEEDINGS:

1. Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature and organized for purposes of the private gain of its share-holders. *La-Fontaine v. Southern Underwriters' Association*, 514.

2. A creditor of such corporation, when the same is insolvent, is not compelled to pursue the remedy provided in Bat. Rev., ch. 26, sec. 22. (Whether the provisions of that section are mandatory in regard to corporations created under the general law—*Quere? Ib.*

3. Creditors not parties to a supplemental proceeding are not entitled to share in any of the benefits arising therefrom. *Ib.*

SURETY AND PRINCIPAL—See Contract 16, 17; Executors 1, 4; Guardian and Ward 2, 4; Official Bond 1, 2, 3, 4; Superior Court Clerk; Trusts 3.

TALESMAN—See Jury.

TAXES AND TAXATION:

1. The tax prescribed by the Rev. Code, ch. 28, sec. 4, on indictments, civil suits, etc., is not a tax within the meaning of the revenue act of 1858-'59, which repealed the taxes not therein imposed; nor is it a tax within the meaning of the constitution. Art. V, sec. 3, which requires taxes to be equal and uniform. *Hewlett v. Nutt*, 263.

2. Such tax is not in violation of the constitution, Art. I, sec. 35. *Ib.*

3. Shares in national banks owned by residents of the State may be assessed for taxation either at the place where the owners reside, or at the place where the bank is located, as the legislature of the State may elect. *Buie v. Comrs*, 267.

4. Under the existing laws such shares must be taxed at the place where the owner or person required to list them resides. *Ib.*

5. An action to recover back an amount of taxes paid under protest, will not lie against a sheriff who collected the same by virtue of a list delivered to him by the register of deeds under the revenue act of 1876-'77, ch. 156, schedule B. Such list has the force and effect of a judgment and execution. *Mulford v. Sutton*, 276.

TENANTS IN COMMON—See Adverse Possession 1; Will 2.

TERMS OF SALE—See Practice 58.

TITLE TO REAL ESTATE—See Landord and Tenant; Mortgage 9; Practice 36, 37; Vendor 1, 2.

TOWNS AND CITIES:

Under the Private Laws of 1868-'69, ch. 5, sec. 9, it is the exclusive province of the board of aldermen of the city of Wilmington to declare the result of a ballot for chief of police for said city. *Price v. Brock*, 600.

TRANSACTION WITH PERSON DECEASED—See Evidence 4.

TRESPASS—See Landlord and Tenant 3, 4.

TRIAL:

Where it appeared that A, who was indebted by note to B, paid off and discharged, at the request of the latter, a debt due by him to C, it should have been found as a fact by the jury (or referee) whether or not the transaction was intended by the parties as an extinguishment *pro tanto* of the debt from A to B. The fact of the payment to C is in itself *some* evidence of such intent. *Norment v. Brown*, 363.

See Contract 13; Indictment; Judge's Charge 7; Practice 59.

TRUSTS AND TRUSTEES:

1. H conveyed certain real estate in Alabama to her son J in fee, and a cotemperaneous paper writing (not under seal) was executed by them to the effect that said real estate was J's, "to be disposed of as he sees proper; and said lands or the proceeds if sold to be his during his life, and at his death the said lands, or if sold the proceeds, to belong and to be given by him to W, etc:" J sold certain of the real estate and thereafter died; in an action by W against the administrator of J; *It was held*,

   (1) That the paper writing, executed by H and J created a trust in favor of W which attached to the conveyance of the lands to J.

   (2) That the trust is to be ascertained *from the paper writing* independent of the parol testimony.

   (3) That the locality of the lands in another State does not deprive the Courts of this State of their jurisdiction to compel execution of the trust.

   (4) That the plaintiff is entitled to recover out of the personal estate of J, in the hands of his administrator in this State, the proceeds of the land sold by J. *Henderson v. McBee*, 219.

2. A debt secured by separate deeds of trust, executed at different times, by persons liable therefor, is entitled to share *pro rata* on the full amount of the debt as it existed when such securities were given, in the distribution of the money arising therefrom, until the debt is satisfied. *Brown v. Bank*, 244.

3. In such a case the debtors are alike bound to the creditor for the entire amount of the debt and their relations with each other as principal and surety can not impair the essential right of the creditor to be paid out of the assigned estates. *Ib.*

4. A deed in trust made to secure several debts of which one is feigned and frauduent and the others valid, will be sustained for the benefit of the true creditors, but is inoperative as to the fraudulent claim; *provided*, that neither the trustees nor the true creditors have connived at the insertion in the deed of such fraudulent debt. *Morris v. Pearson*, 253.

5. To the general rule that a trustee is not permitted to purchase at his own sale there are the following exceptions:—

Where the trustee has a personal interest in the property, he may, if necessary, bid it in to protect that interest. But even then, it is proper, if not indispensable, that his bidding should be sanctioned by the previous permit or subsequent confirmation of the Court, upon a full disclosure of all the facts.

And where the *cestui que trust* consent to the purchase or ratify with full knowledge of all the facts. *Froneberger v. Lewis*, 426.

See Bankruptcy 5; Evidence 7, 8, 9, 10, 11; Executors 7; Husband and Wife 11; Judge's Charge 2, 6.

UNDER-LEASE—See Landlord and Tenant.

USER—See Roads.

VARIANCE—See Indictment 10.

VENDOR AND VENDEE:

1. A vendor of land can not maintain a suit for the purchase money without first tendering a good and sufficient title to the vendee. *Pascall v. Brandon*, 504.

2. If the vendee die before payment of the purchase money, the deed should be tendered to the heirs, and they should be parties defendant to a suit for the price of the land. *Ib.*

See Contract 10, 11, 18; Landlord and Tenant 6.

VERDICT—See Indictment 1; Judge's Charge 7; Judgment 3; Parties 3.

VERIFICATION—See Pleading 4, 7, 8.

WAIVER—See Insurance 3.

WARRANTS—See Contract 10, 11.

WIDOW:

1. A widow is not barred of her right to a year's support, under Act 1871-'72, ch. 193, sec. 44, by reason of adultery committed prior to the passage of the act. *Cook v. Sexton*, 305.

2. An application for year's support made after the expiration of twelve months from the death of the husband, is barred by the statute of limitations, Battle's Revisal, ch. 117, sec. 18. *Ib.*

(In sec. 26, ch. 117, Bat. Rev., the first sentence ends with the word "prescribed;" the word "without" is the first word in the next sentence and should be spelt with a capital "W.") *Ib.*

WILL:

1. In expounding a will the grammatical construction must prevail, unless a contrary intention plainly appears. *Pruden v. Paxton*, 446.

2. A testator, by the first item of his will, devised to his wife real property exceeding in value a life estate in all his property of that character. In the residuary clause of said will he devised as follows:—"I give, devise and bequeath all my other property of every description to my beloved wife and dear children, to be divided among them according to law"; *Held*, that a farm included in such residuary clause passed to the wife and children as tenants in common of the fee. *Ib.*

3. A testator by his will devised certain lands to his sons J and H, on the following conditions, "provided that they each pay" certain amounts to three other of his sons, infants, when they severally attain the age of twenty-one years; by the residuary clause of the will he gave all his remaining property, not before disposed of, to four daughters; the three sons died in infancy and without issue, during the testator's life time; *Held*, that the legacies lapsed and J and H took the lands devised to them without charge. *Whitehead v. Thompson*, 450.

See Executors 15, 16; Legacy 1, 2; Probate Court 1.

WITNESS:

1. Under sec. 43, C. C. P., a party to an action is a competent witness as to a transaction between himself and a person at the time of such examination deceased, when the representative of such deceased person is not a party to the action. *Shields v. Smith*, 517.
2. The rule of law (Bat. Rev., ch. 43, sec. 16) disqualifying the wife to testify for or against her husband in criminal proceedings, applies only to cases where the husband has a legal interest in the result, and does not render her incompetent to contradict his testimony for the State upon an indictment against a third party for an assault and battery upon him. *State v. Parrott*, 615.

See Evidence 7, 9, 10, 13, 17, 21; Practice 55.

WITNESS FEES—See Costs.

YEAR'S SUPPORT—See Widow.