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NORTH CAROLINA REPORTS

VOL. 81

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1879.

REPORTED BY
THOMAS S. KENAN,
ATTORNEY-GENERAL.

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

RALEIGH
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CASES REPORTED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1879

RUFUS EDNEY, Adm'r, v. THOMAS A. EDNEY and others.

Practice—Interlocutory Order by Consent.

An interlocutory order or decree entered in a cause by consent, can not be modified or altered otherwise than by the consent of both parties, except upon petition or motion in the cause, specifying imposition, fraud or other adequate cause going to the whole order or decree, and constituting such as would be ground to set it aside by a civil action in the case of a final decree.

MOTION to strike out a portion of a decree, heard at Spring Term, 1879, of HENDERSON, before *Gudger, J.*

See same case, 80 N. C., 81. Upon the certificate of the opinion of the Supreme Court, the plaintiff moved for an order to resell the premises mentioned in the pleadings, which motion was not resisted, but the defendant moved to add to the decree in the cause in accordance with the opinion of the Supreme Court, that defendant should be reimbursed out of the proceeds of sale the amounts expended in (2) the former purchase of the land, including taxes, etc., and the plaintiff desired that the rents and profits be included, when it was agreed that the defendant should have such decree, and an order for the sale of land was granted.

On Friday evening of the same term of court, the counsel of both parties called upon the Judge and the defendant's counsel submitted the decree he had prepared when the plaintiff's counsel pointed out some objectionable features in the same. It was thereupon rewritten by defendant's counsel and the announcement made to the Judge that they had agreed upon the terms and requested the Judge to sign it by consent, which he did without scrutinizing it, because the decree had been agreed to, signed and filed by the counsel of the parties.

On the next morning the plaintiff's counsel moved to strike from the decree that portion of it which directed the arbitrator to credit the

defendants, Moss and Rice, with such sums as they, or either of them, had paid to get possession of the land purchased by them. This was objected to by the defendant, who then filed an affidavit of Moss, setting forth among other matters, that the rents and profits of the land which he undertook to buy at the sale, were not equal in value to the improvements put thereon by the affiant. The Court, after hearing the argument of counsel on both sides, declined to strike from the judgment the part objected to, and from this ruling the plaintiff appealed.

No counsel in this Court for plaintiff.
Messrs. Reade, Busbee & Busbee for defendant.

DILLARD, J. In this cause an appeal was taken to, and decided by, this Court at last term, reported in 80 N. C., 81, wherein the decree of the Court below, setting aside a sale of land made by its
(3) authority to O. H. Moss and D. G. Rice, was affirmed and a certificate of the opinion directed to be issued.

At the last term of the Superior Court of Henderson County, upon the coming down of the certificate from the Supreme Court, the cause stood for hearing, when the parties agreed upon and prepared a decree by consent, which was presented to and signed by the Judge and filed in the cause. At a later day, in the same term, the plaintiff moved to strike from the decree the clause which provided for the mode and manner of ascertaining the sum to be repaid to the purchaser, which was opposed, and his Honor having disallowed the motion, the present appeal is taken.

The decree entered by consent was what is termed an interlocutory order, and the general rule is that such orders made in the progress of a cause are in the breast of the Court during the term at which they are passed, and may be altered in any respect, and also may be rescinded or modified at any time after the term and before the final hearing by a proper case being made out. The formal and orderly proceeding for rescission or amendment of such orders is, by a *viva voce* motion in matters of course, which according to the course of the Court may be granted without hearing both sides; and by written petition in matters specially affecting the rights of other parties, so as to notify them of the grounds and enable them to show cause against the same and adduce evidence, if necessary, in opposition. Adams Eq., 348. *Wilcox v. McLain,* 3 N. C., 368; *Ricks v. Williams,* 16 N. C., 3.

This is the rule, it will be observed, when the order sought to be rescinded or modified is the order of the Court. But a decree by consent is the decree of the parties, put on file with the sanction and permission of the Court; and in such decrees the parties acting for themselves may provide as to them seems best concerning the subject-mat-

ter of the litigation, and with the like sanction of the Court they may alter or amend from time to time, with the assent of all. (4) But where a consent decree is entered, neither party can strike from it a material part or clause, nor have the aid of the Court to do so, without the consent of the other. For if it could be so done, then a party, by order of the Court, may be held to a decree with a material clause stricken out, without which he would never have assented to it, and one which, in its altered form, the Court could never have made.

A decree by consent as such must stand and operate as an entirety or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out against the will of a party, then it is no longer a consent decree, nor is it a decree of the Court, for the Court never made it.

There is no doubt a decree by consent, either enrolled or not, may be rescinded or modified; but it is certain it can not be done by a petition to rehear, or on a bill of review for errors of law apparent, for the reason that it was not the judgment of the Court; and, therefore, if erroneous, the error was not the error of the Court. In such case it would seem to be a necessity to seek remedy by an original bill under the old system, or by civil action under the new, on the ground of fraud and imposition and the like. *Monnell v. Lawrence,* 12 Johns., 521; *Harrison v. Ramsay,* 3 Ves.

Just so in the case of an interlocutory order after or during the term at which it was entered under our code system: The order, if entered by consent, could not be modified by striking out a clause against the consent of a party opposing, nor for error as upon a petition to rehear, but it would have to be done by a motion or petition in the cause, specifying imposition or fraud, or other adequate cause, going to the whole order and constituting such as would be ground to set it aside on an original bill in the case of a final decree.

In this case, from the case of appeal made out by the Judge, the plaintiff moved to strike out a single clause of the decree by (5) consent, and the other party not consenting, and no special ground of circumvention, imposition or fraud having been urged so far as we can see, there was no error in disallowing the plaintiff's motion. Judgment of the Court below is

Affirmed.

Cited: Stump v. Long, 84 N. C., 620; *McEachern v. Kerchner,* 90 N. C., 179; *Vaughan v. Gooch,* 92 N. C., 527; *Kerchner v. McEachern,* 93 N. C., 455; *Massey v. Barber,* 138 N. C., 89; *Bunn v. Braswell,* 139 N. C., 138; *Lynch v. Loftin,* 153 N. C., 274; *Bank v. McEwen,* 160 N. C., 424; *Simmons v. McCullin,* 163 N. C., 414.

*WYATT EARP and others v. W. H. RICHARDSON and others.

Agent—Limited Power—Practice—Former Decision—Statute of Limitations.

1. It is incumbent on one who has dealings concerning a note past due with an agent acting under a limited power, to "look out for the power" under which the agent acts.
2. A former decision of this court will not be reversed on review, because in considering the case the court laid stress upon a fact that was immaterial, when it appears that it did rely upon another fact that was material and comes to a correct conclusion of law.
3. The statute of limitations will not run against one to whom the defendant stood in the relation of trustee or bailee, until after a demand.

PETITION to rehear, filed by defendant at January Term, and heard at June Term, 1879.

The facts in this case are reported in 78 N. C., 277, and the errors assigned in the petition to rehear are embodied in the opinion delivered by Mr. Justice ASHE.

Messrs. Gilliam & Gatling, Lewis & Strong, and *G. M. Smedes*
(6) for plaintiffs.

Messrs. Busbee & Busbee for defendants.

ASHE, J. This was a petition to rehear the decision made in this case at January Term, 1878, of this Court, and reported in 78 N. C., 277. The defendant in his petition assigns the following errors:

1. That it binds a third person trading with an agent who is the son of the principal by the undisclosed instructions given to the agent, even though the note, the subject of the trade, was in the hands of the son, claimed by him as his own, treated as his own, and thought by the third person to be the property of the agent, and although the principal did not disavow the action of his agent even after the trade.

2. That stress is laid upon the fact that the note or bond was not endorsed to the son, even though it was likewise not endorsed to the father.

3. That it decides that an action for the possession of a note under seal analogous to an action of trover, is not barred by the statute of limitations until after the collection of the note.

As to the first assignment of error:

This Court held, and we think correctly, that the authority given by John Earp to his son, Taylor Earp, to buy a mule from Hocutt by giving him a credit of one hundred and twenty-five dollars on the note, was a limited power; and as the note was afterwards traded to the defendant after it became due, he was affected with notice, and it was in-

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

cumbent on him "to look out for the power" of Taylor Earp. It may be presumed from the finding of the referee that John Earp had notice of the written contract entered into by Taylor Earp with the defendant; but he expressly finds that he did not know of the nature of the last agreement between Taylor Earp and the defendant; and in that view of the case he could not be expected to disavow the transaction, and his failure to do so could not be construed into a acquies- (7) cence from which a ratification of the act could be inferred. When the agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts. 2 Greenl. Ev., Sec. 66.

As to the second assignment of error:

We can not concur in the proposition that a decision of the Court should be reversed because in considering the case it laid stress upon a fact that was immaterial, when it appears it did rely upon another fact that was material, and came to a correct conclusion of law.

As to third assignment of error:

Conceding that the Court did err in assuming the position that the statute of limitations would not bar until after the collection of the note, this Court at the same time held that as the defendant stood in the relation of bailee or trustee to John Earp, the statute did not begin to run until after a demand; and no demand having been made, the statute did not bar the action of the plaintiffs.

The decision made in this case at January Term, 1878, is

Affirmed.

Cited: Sherill v. Clothing Co., 114 N. C., 440; *Land Co. v. Crawford*, 120 N. C., 348; *Thompson v. Power Co.*, 154 N. C., 22.

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(8)

ELIZABETH G. HAYWOOD, Ex'r, v. ELIZABETH B. DAVES.

Petitions to Rehear—Practice Concerning—Decision of Foreign Court, Effect of Here.

1. No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court.
2. The decision of the court of another State, in the interpretation and administration of its own laws in respect to property subject thereto and within its jurisdiction, is binding upon the courts of this State.

PETITION to rehear, filed by plaintiff, and heard at June Term, 1879. See same case, 80 N. C., 338. The error assigned is: Because by

the decision and judgment the Court held that in dividing the sum of money specified in the record as having been received by one Jackson (agent of the parties), the whole of the three sums of $248.20, $191.13, and $246.55, are to be charged against the five-ninths of said fund in the hands of said Jackson, belonging to the plaintiff as executrix of James F. Haywood, and that no part of said three sums is to be charged against the four-ninths of said fund belonging to the defendant. The plaintiff is advised that the decision and judgment are erroneous and should be reversed, and that only five-ninths of the three sums ought to be charged against the five-ninths of the fund in the hands of Jackson to be received by plaintiff:

Mr. E. G. Haywood for plaintiff.
Mr. D. G. Fowle for defendant.

SMITH, C. J. At the last term this case was fully and ably discussed by counsel representing the respective parties, and after careful consideration determined by the Court. The same line of argument
(9) was then pursued as that now addressed to us, and to a great extent the same authorities cited and relied on. The additional references are cumulative to the same points. No overlooked aspect of the case has been brought to view upon the rehearing.

The frequency of the applications for a revision of the decisions of the Court and the readiness of its counsellors who did not appear at the first hearing to certify their opinion that "the judgment was erroneous," induce us to recall what has been heretofore said about the practice and the principle on which it rests: "The weightiest considerations," says PEARSON, C. J., "make it the duty of the Court to adhere to their decisions. *No case ought to be reheard,* upon petition to rehear, unless it was decided *hastily* and some *material point* was overlooked, or some *direct authority* was not called to the attention of the Court." *Watson v. Dodd,* 72 N. C., 240. This is repeated with emphasis by READE, J., delivering the opinion in *Hicks v. Skinner,* 72 N. C., 1; and is approved at the present term in *Devereux v. Devereux, post,* 12.

The argument upon the second hearing, as before, proceeds upon an alleged error in the ruling of the Supreme Court of New York, whereby the unpaid purchase money due from the vendee is charged with the costs and expenses incurred by her in the suit to divest the legal estate passing to the infant devisees under the will of the testatrix, and transferring the same to her. Whether right or wrong, such decree was rendered in the action for specific performance against those devisees, in a case where the fund was under the control of the Court, and its jurisdiction was ample. The necessity of this proceeding was superinduced by the death of the testatrix and the devises in her will, and

by no act or omission of the defendant. She and the adult devisees were competent to convey, and did convey to the vendee their individual estate in the land. This suit was instituted to perfect the title, required under the contract against those who, having acquired (10) a share of the estate, were incapable, by any act of their own and without the aid of the Court, of passing the same to the vendee. In granting relief and thus fulfilling the conditions of the bond for title, the Court charged the purchase-money remaining unpaid with the expenses rendered necessary by the death of one obligor and the disability of some of her devisees.

Under the laws of this State it is plain the devisees would acquire a mere legal estate without beneficial interest therein, and the testatrix's share of the money into which the land devised has been converted by the contract of sale would pass at her death to her personal representative. But the case is governed by the laws of New York, the *situs* of the devised land, and, in the opinion of the Court, the infant devisees were declared to be entitled to a ratable share of the fund substituted therefor, diminished by deducting the costs and expenses aforesaid. The decree was operative and effectual in making the appropriation. If it is erroneous (and we are not at liberty to impute error to the Court of another State in the interpretation and administration of its own laws in respect to property subject thereto and within its jurisdiction), we have no revisory power over the action of that Court, and must recognize what has been done as final and conclusive. If it be conceded that the plaintiff's money has been wrongfully applied in the payment of charges for which neither the testatrix nor herself ought to have been held liable, it would be manifestly unjust to put a share of the loss upon the defendant, who is in no default whatever, and has complied fully with her own part of the contract. It is needless to do more than refer to the former opinion and the reasons therein given for the conclusion arrived at, and to say that our convictions upon the re-argument are unchanged. There is no error.

Petition dismissed.

NOTE BY THE CHIEF JUSTICE.—Since the opinion was prepared we have examined the statutes of the State of New York (11) to see if there was not some special provision by which its Court was governed in making the decision, and we find in 2 Rev. Stat., 64, Sec. 45, the following enactment:

A bond agreement or covenant made for a valuable consideration by a testator to convey any property, devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall

pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement against the devisees or legatees as might be had by law against the heirs of the testator or his next kin as if the same had descended to them.

In the construction and application of the statute in the case of *Knight v. Weatherwax,* 7 Paige, 182, Chancellor WALWORTH uses this language:

Whether the two lots were to be considered real or personal estate after making the agreement to sell the same, the interest of the testatrix therein passes to the objects of her bounty as specified in the first section of the will, in the same manner as if that agreement had not been made, subject to the complainant's right to a specific performance of the contract upon payment of the purchase-money and interest, for the benefit of whoever may be entitled to the same under that clause of the will.

Cited: Mizell v. Simmon, 82 N. C., 2; *Ashe v. Gray,* 90 N. C., 138; *Lockhart v. Bell, Id.,* 501; *Dupree v. Insurance Co.,* 93 N. C., 239; *Fisher v. Mining Co.,* 97 N. C., 97; *Hannon v. Grizzard,* 99 N. C., 162; *Fry v. Currie,* 103 N. C., 206; *Gay v. Grant,* 105 N. C., 481; *Commissioners v. Lumber Co.,* 116 N. C., 745; *Weisel v. Cobb,* 122 N. C., 69; *Weathers v. Borders,* 124 N. C., 611; *Herring v. Williams,* 158 N. C., 13.

(12)

THOMAS P. DEVEREUX v. JOHN DEVEREUX and others.

Pratice—Former Decision—Action to Construe Will—Jurisdiction and Waiver of Objection.

1. The weightiest considerations make it the duty of courts to adhere to their former decisions and not to reverse the same unless they were made hastily or some material point was overlooked, or some controlling authority was omitted to be brought to the attention of the court.
2. In an action for the construction of a will, a former decision of this court, rendered when the court was differently constituted from what it is at present, should not be reversed because the present members of the court might infer differently as to the intention of the testatrix from the words and context of the will.
3. In an action, brought to the superior court in term time, to declare the trusts of a devisee and of the executor under a will, and to adjudge and determine the liability to the payment of legacies of certain lands devised; *Held,* that the court having jurisdiction over the adjudication of the trusts and the enforcing thereof, also, had, and this court on appeal, has jurisdiction (Acts 1876-'77, Chap. 241, Sec. 6) to retain the cause and go on and grant incidentally the application of the personality, and that failing, then apply the lands, or enough thereof to satisfy the legacies, on the same.

4. In such action, the jurisdiction is in the superior court of the county in which the testatrix was domiciled at her death, and in which her will was admitted to probate but if the action is brought in another county and no objection on this ground is taken in the court below, none such can be urged on the hearing on appeal in this court.
5. The decree rendered in this cause at January Term, 1878, should be modified in so far as it decrees a sale of the land before the personal estate in the hands of the executor is applied to the payment of the legacies.

PETITION to rehear, filed by plaintiff and heard at June Term, 1879.

The petition assigns errors apparent in the opinion and decree of this Court rendered at January Term, 1878, in the above-entitled cause, reported in 78 N. C., 386: (13)

1. In that, by the last will and testament of Mrs. C. A. Edmondston, the pecuniary legacy of $4,000 to her niece, Rachel Jones, and the legacies of $1,000 each to her three sisters, were held by the Court to be charged on the real estate devised in said will to the plaintiff, T. P. Devereux.

2. In that, the Superior Court had no jurisdiction of the action, or, if any, then that the jurisdiction was in the Superior Court of Halifax County, in which the testatrix was domiciled at her death, and in which her will was admitted to probate, instead of the Superior Court of Wake County.

3. In that, supposing the jurisdiction to exist, it was error to decree a sale of the land until the personalty in the hands of John Devereux, Sen., the executor, was first applied.

4. In that, the executor to whom the testatrix committed the execution of her will was not decreed to make sale of the land, but another was appointed a commissioner to sell and report.

5. In that, a sale was ordered by the decree of this Court of a tract of land which the plaintiff had *bona fide* sold to R. A. Hancock, who had paid him the purchase-money.

Messrs. J. W. Hinsdale, Gilliam & Gatling and *R. C. Badger* for plaintiff.

Messrs. T. M. Argo and *R. H. Battle, Jr.,* for defendants.

DILLARD, J. The main question for our consideration under the alleged errors, arises under the one which assigns error to be in the ruling, that the lands devised to the plaintiff in trust for his mother for the life of John Devereux, with remainder to himself and the heirs male of his body, and in default of such heirs, then over to John Devereux in fee, were charged together with the personal estate with the payment of the said pecuniary legacies to the niece and three (14) sisters of the testatrix.

1. It is a cardinal rule in construing a will, to ascertain and carry out the intention of the testator or testatrix in all things permitted by the law, within the fair and reasonably certain import of the language employed. And in settling the meaning of a provision or clause in the will, it is a rule in aid of construction to interpret the words in their ordinary and natural sense, in connection with the context and with regard to the situation of the maker of the will with reference to his or her property and family at the date of the will. 1 Redf. on Wills, 432. It is also a rule that all the papers which constitute the will, embracing the will and codicil and all other papers so referred to as to be incorported in the same, are to be taken and considered together. *Ibid.*, 433, *et seq.*

The question for construction arose on bequests and devises as follows, to-wit: In the original will the testatrix bequeathed the interest of $4,000 to be paid annually to Rachel Jones, her niece, for life, and devised and bequeathed to Owen Richardson and Dolly, his wife, two servants, a sum of money specified, and an allowance of provisions to be annually paid them during their joint lives and the life of the survivor of them; and in the fourth item she devised and bequeathed the whole of her estate (subject to the devises and bequests therein otherwise made), including her interest in her grandfather's estate and a policy on her life for $5,000, to the defendant, John Devereux, Sen., in fee simple, if he should be solvent at the death of the testatrix, and if not, then to him in trust for his wife and children and their heirs, the same not to be liable in any event to the debts or contracts of the said Devereux; and the said item winds up with a declaration that this gift includes the whole estate, real, personal and mixed. By the first codicil the annuity of interest on $4,000 is revoked, and the principal sum is given absolutely to Rachel Jones, and $1,000 is
(15) given to each of three sisters; and by a subsequent codicil the testatrix recites, "Not wishing my real estate to be in any manner liable for the debts of my brother, John Devereux, and to avoid the possibility of such an event, I devise to my nephew, Thomas P. Devereux, all my lands and other real estate in trust for his mother during the life of his father, and then to remain to him and his heirs male; but if he shall die without any heirs of his body, then in fee to John Devereux, Jr."

Upon the effect of the will as first made, it is not controverted that the annuity to the niece, and the devise of an acre of land and bequest of yearly sums of money and provisions to Richardson and wife, were a charge on the personalty and land given to John Devereux.

When the first codicil was annexed, the only alteration of the will was to give the niece $4,000 absolutely instead of its interest for life,

and to give legacies for the first time of $1,000 each to the three sisters of the testatrix. And the codicil being to be construed with the will, it is settled law that the will will stand and be operative, except so far as the provisions of the codicil are inconsistent therewith. Iredell on Executors; Redf. on Wills, 362. Applying this principle, the construction, if the second codicil had never been executed, was entitled to be that the legacies were to be paid at all events, and the devise and bequest to John Devereux were subject to them, as they had been to the charges thereon by the original will.

Now, on the execution of the last codicil, there is no express exemption of the lands devised to the plaintiff from the charges, before that time, imposed on them; and the devise is stated to be on the apprehension that the land might become liable to John Devereux's debts, and the operative motive is avowed to be to protect the same against his debts. The liability of the lands before the second codicil had been, if need be, to pay the legacies; and in the second codicil, what was (16) to be its liability is not stated. It is stated therein that the motive to change the gift from John Devereux, Sen., to the plaintiff, was that it might not be held liable to John Devereux's debts, but whether it was still to be liable in aid of the personalty to pay the pecuniary legacies or not, is not stated. And hence conflicting views having arisen between the plaintiff, claiming its exemption from liability to pay the legacies, and the legatees and John Devereux, Sen., the executor, claiming it to be liable, this suit was brought amongst other things to have this conflict of doubt settled.

The question of construction presented and decided by this Court in the opinion and decree now reheard, was, whether the true intent and meaning of the will was that the lands devised to plaintiff were still liable to pay the legacies as before, or exempt.

On reading the opinion now reviewed and sought to be reversed, it is obvious that the question of doubt existing between the parties and presented in the pleadings for judicial construction, was not hastily considered and decided, but was carefully weighed, regarding the intention of the testatrix collectible from the codicil in question, in connection with the context, and the situation of the testatrix as respected her property, as of primary and controlling influence in fixing the meaning of the will. The conflicting views were represented by counsel as to the intent and meaning of the testatrix and as to the legal construction to be determined, and authorities were cited favoring the views of the parties respectively; and on careful consideration the opinion under review was prepared and delivered as expressing the view of the whole Court.

Before us on the rehearing the same diversity of views are agitated,

the same contrary inferences of intention moving the testatrix are drawn, and the same rules of construction and other legal au-
(17) thorities are brought to the attention of the Court as on the hearing heretofore, and we are urged to reverse the former decision as erroneous.

Upon a moment's reflection the intention in case of a will if it can be ascertained, being all-controlling and shaping the construction within the fair meaning of the words used, and in connection with the context, it is obvious that its existence and scope can not generally be expected to be settled by any authorities in law or direct decisions of the Courts, but each case is to depend on its own peculiar words and context, and may be inferred and found, one way by one mind, and differently by another, as they may be differently constituted and differ in their modes of thought. Accordingly, it might be that this Court in construing said will as affected by the two codicils, might infer and decide the intention to be that the legacies should be a charge on the real as well as personal estate as announced in the opinion of the CHIEF JUSTICE. And the same Court as now constituted might infer differently as to the intention of the testatrix, and under the influence of such different inference declare a different construction of the instrument.

Would it be admissible on such difference of intention inferred as a fact from the words and context of the will, operating to induce a different legal construction in the same Court, on a change in its members, that the Court should reverse the former opinion of the Court when differently constituted, on the mere ground of a different inference of a fact that largely entered into and shaped the final opinion of each? In such case it ought not to be done unless the error was palpable, and we concur in the rule announced by this Court in the case of *Watson v. Dodd,* 72 N. C., 240—that the weightiest considerations make it the duty of the Courts to adhere to their decisions and not to reverse the same unless they were made hastily, or some material point was overlooked, or some controlling authority was omitted
(18) to be brought to the attention of the Court; and there being no such thing affecting the decree under consideration, we decline to revise so much thereof as adjudges the legacies to be a charge on the lands devised to the plaintiff.

2. It was assigned as error that the Superior Court had not jurisdiction of the subject-matter, and if it had, then that the jurisdiction was in the Superior Court of Halifax and not in the Superior Court of Wake County.

It has been decided in this Court that whenever it is necessary to have an express trust declared and enforced, or one implied by con-

struction *ex delicto,* the action may be brought in the Superior Court to term, and the Judge having jurisdiction over one main ground of relief is not obliged to dismiss the case with a mere declaration of the trusts, but may go on and give full relief. *Oliver v. Wiley,* 75 N. C., 320. Since that decision, and about the time of the institution of this suit, the Legislature, besides the remedy by special proceedings against executors, etc., enacted that it should be competent to the Superior Court in any action pending therein to go on and order an account to be taken, and to adjudge the application of the fund ascertained, or to grant other relief, as the nature of the case may require. Laws 1876-'77, Chap. 241, Sec. 6.

Here the action was to declare the trusts of the plaintiff as devisee, and of John Devereux, the executor, under the will of Mrs. Edmondston, and to adjudge and determine the liability or non-liability of the lands devised to the payment of the legacies; and on the answer of the legatees made parties to the cause, the allegation was of delay and refusal of the executor to apply the personalty and land to their legacies, and the aid of the Court was invoked to have payment made according to the true intent and meaning of the will. The Court having, as is apparent, jurisdiction over the adjudication of the trusts and enforcing thereof, under authority of said decision of this Court, and within its powers as enlarged and conferred by said act of Assembly, his Honor had the jurisdiction, and this Court, on appeal to it, has the (19) jurisdiction to retain the cause and go on and grant incidentally the application of the personalty; and that failing, then to apply the lands, or enough thereof to satisfy the legacies charged on the same. As to the error alleged to consist in the action, being brought in Wake County instead of Halifax, there can be no doubt that the county of Halifax was the proper county, and the suit should have been brought there. But it appears that no objection on this ground was taken in the Court below, and none such urged on the hearing on appeal in this Court. And, therefore, it would not be admissible on the petition to rehear to make the objection for the first time, and if it were, it is settled that the objection could not now be sustained, as the party urging such objection should have made it in apt time, otherwise it is waived. *McMinn v. Hamilton,* 77 N. C., 300. There were other errors assigned in the petition to rehear, and amongst them the decree for sale of the land before the personalty is applied, and it being necessary to remodel the decree in this respect as being unauthorized by the opinion of this Court, it is unnecessary to refer to them more particularly.

It is, therefore, the opinion of this Court that the decree entered in this cause, in so far as it adjudged the land devised to plaintiff to be liable to pay the legacies, be affirmed; and that it be reversed in so far

as it decrees a sale of the land before the personal estate in the hands of the executor is applied; and to this end, a decree may be drawn for ascertaining the sum due the legatees and the personal estate in the hands of the executor liable thereto, and reserving the cause as to a sale of the lands until the further order of this Court.

PER CURIAM. Decree Modified.

Cited: *Haywood v. Daves, ante,* 9; *Mizell v. Simmons,* 82 N. C., 2; *Ashe v. Gray,* 90 N. C., 138; *Lockhart v. Bell, Id.,* 501; *Dupree v. Ins. Co.,* 93 N. C., 239; *Fisher v. Mining Co.,* 97 N. C., 97; *Hannon v. Grizzard,* 99 N. C., 162; *Fry v. Currie,* 103 N. C., 206; *Gay v. Grant,* 105 N. C., 481; *Commissioners v. Lumber Co.,* 116 N. C., 745; *Baruch v. Long,* 117 N. C., 511; *Weisel v. Cobb,* 122 N. C., 69; *Weathers v. Borders,* 124 N. C., 611; *Baker v. Carter,* 127 N. C., 95; *Summer v. Staton,* 151 N. C., 202; *Herring v. Williams,* 158 N. C., 13.

(20)

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

Supreme Court—Former Decisions.

The weightiest considerations should induce this court to adhere to its decisions, unless manifest error appears, especially when the decision was made by a full court and with unanimity and after full argument by counsel.

PETITION to rehear, filed by defendants at January Term, and heard at June Term, 1879.

The petitioners ask that the judgment rendered in this case, reported in 78 N. C., 323, he reversed. The errors assigned are stated in the opinion.

Messrs. E. G. Haywood and *D. G. Fowle* for plaintiff.

Messrs. Gilliam & Gatling, Lewis & Strong, and *Geo. H. Snow* for defendants.

DILLARD, J. The appeal to the January Term, 1878, of this Court was taken by the plaintiff from the judgment of the Court below in dismissing the action, on the ground that the action upon the case made by the pleadings and on the facts found by the referee Samuel A. Ashe, in law, did not lie; and at the hearing in this Court it was held that his Honor was in error in ruling that the plaintiff was not entitled to recover, and a certificate was ordered to issue to the Court below that further proceedings might be had in conformity to the opinion filed.

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

VICK & MEBANE v. WILLIAM P. POPE and wife.

Practice—Married Woman—Vacating Irregular Judgment.

1. The absence of a complaint will not make a judgment irregular where the specialty sued on is filed as a substitute and the summons specifies the amount claimed.
2. Where husband and wife are sued together on their joint obligation, it is the duty of the husband to defend for both, and to set up the wife's inability in a proper case; and if he fail to do so, the wife can not have the judgment against her set aside on the ground of her incompetency to contract.
3. A judgment against a married woman appearing in the suit by counsel of her husband's selection, is as binding as one against any other person, unless it be obtained by the fraudulent combination of the husband with the adverse litigant.
4. The party aggrieved by an irregular judgment must move to vacate the same before the rights of innocent third persons have intervened.

MOTION in the cause to vacate a judgment, heard at Spring Term, 1878, of NEW HANOVER, before *Eure, J.*

This motion was made by the *feme* defendant to set aside a judgment obtained by the plaintiffs against the defendants upon the ground that the note on which the judgment was taken was executed by her jointly with her husband, and that the consideration thereof was not in
(23) any way for her separate use or benefit, and contained no charge upon her separate estate; that execution has been issued and is now in the hands of the sheriff, who threatens to levy upon the separate estate of the petitioner. Upon these and the additional facts set out in the opinion of this Court, the Judge below ordered the judgment to be vacated as to the *feme* defendant, and the assignee of plaintiffs appealed.

Messrs. Merrimon, Fuller & Ashe for plaintiffs.
Mr. D. L. Russell for defendants.

SMITH, C. J. On 6 April, 1875, the plaintiffs sued out a summons against the defendants returnable to Spring Term, wherein is
(24) demanded the sum of $1,456, with interest from 30 March, 1874, which was duly served on both and returned.

The cause was thereupon docketed, and the defendant's attorney entered an appearance for them. No complaint or other pleading was filed, but instead thereof, the promissory note of the defendants for the same principal money and with like interest as described in the summons.

The cause was ontinued until Fall Term following, when, on motion in open Court, judgment was entered up against the defendants. The judgment has since been assigned to the First National Bank, of Wilmington, at whose instance execution has issued.

And now at this term a petition to rehear is brought on for argument at the instance of the defendants, on errors assigned in the said opinion and judgment of this Court in the following par- (21) ticulars, in substance:

1. In ruling that the words used in the contract of sale descriptive of the article sold as a warranty.

2. In holding that there was no waiver of the warranty, that the rosin was of the kind specified in the contract, by the opportunity the plaintiffs had of inspection before and at the delivery of the rosin, and by the selection they made of the barrels to be shipped out of a larger number.

3. In holding that the plaintiff was not bound to notify the defendants of the defect in the rosin on its arrival in New York City, and to offer to return the same.

On examination of the case on appeal, obviously it was incumbent on the plaintiff, in order to a reversal of the judgment holding him not entitled to recover, to maintain on reason and authority in law the three propositions which the defendants in their petition to rehear urge as erroneous in the opinion and judgment of this Court, and on reference to the opinion and judgment complained of, reported in 78 N. C., 323, it will be seen that those points were discussed and carefully considered and adjudged by the Court.

We have taken the labor to look through the authorities cited in the briefs of counsel in support of and adverse to the correctness of the points ruled in the former decision, and we find the rulings not only sustained by the authorities referred to in the opinion, but by numerous cases not cited, while at the same time there are various decisions in our sister States of positive ability settling the same points to the contrary. Under this state of the authorities, we accept the points decided in the opinion and judgment under review as settling the law of the case, the decision being made by a full Court and with unanimity, upon a full argument by counsel and a careful consideration by the Court. In such cases the weightiest considerations should induce the Court to adhere to its decisions, unless manifest error appears. *Watson v. Dodd,* 72 N. C., 240. The petition of defendants to (22) rehear is therefore dismissed.

Petition Dismissed.

Cited: Ashe v. Gray, 90 N. C., 138; *Lockhart v. Bell, Ib.,* 501; *White v. Jones,* 92 N. C., 394; *Fisher v. Mining Co.,* 97 N. C., 97; *Hannon v. Grizzard,* 99 N. C., 162; *Fry v. Currie,* 103 N. C., 206; *Gay v. Grant,* 105 N. C., 481; *Commissioners v. Lumber Co.,* 116 N. C., 746; *Weisel v. Cobb,* 122 N. C., 69; *Weathers v. Borders,* 124 N. C., 611; *Herring v. Williams,* 158 N. C., 13.

The defendants, on 15 March, 1878, moved to set aside the judgment, and meanwhile for a restraining order upon their affidavit, the material facts set out in which are the following: That the *feme* defendant was a married woman when jointly with her husband she executed the note, and that the consideration thereof enured wholly to his benefit, and not to the benefit of herself or of her separate estate; that it contained no charge upon her separate property, and that she was not a freetrader. Nothing further is alleged to impeach the validity of the transaction or the regularity of the proceedings in the action, terminating in the judgment, and no objection urged except that growing out of the disabilities incident to her coverture.

On hearing the motion, the Court ordered the judgment to be vacated and set aside as to the *feme* defendant, and from this judgment the assignee appeals.

1. It is obvious no relief can be obtained under Section 133, C. C. P., because the motion is not made in apt time, and the facts contained in the affidavit do not constitute a case of "mistake, inadvertence, surprise or excusable neglect" on the part of either defendant. We have so often had occasion to advert to this section that nothing further need be said as to its proper construction. The argument in support of the ruling of the Court is not derived from that section, (25) but is put entirely upon these grounds: First, the incapacity of the *feme* defendant to enter into the contract, and, secondly, irregularity and error in the judgment itself.

Any just defenses either party may have had against a recovery on the note was available while the action was pending and might then have been set up. It was too late after the judgment was entered and the opportunity thus lost, to complain or to seek redress by reopening the matter.

They had their day in Court, and for two terms failed to suggest, by plea or otherwise, any objection to the claim, of the nature of which they were fully advised by the summons, and their attorney by the production of the note itself before, as well as at the time when judgment was given. The absence of a complaint is not such a defect as to invalidate the judgment, and it was properly entered for the amount and interest claimed in the summons and specified in the note, the foundation of the action. *Leach v. R. R.*, 65 N. C., 486; C. C. P., Sec. 217.

This disposes of the first objection and shuts off all inquiry into the character of the transaction, the circumstances under which, and for whose benefit, the security was given.

2. The second point made is that the proceeding in the action is irregular, and the judgment erroneous, and as such liable to be set aside.

The new system of practice requires that "when a married woman is a party, her husband must be joined with her," except that, first, "when the action concerns her separate property she may sue alone," and, secondly, "when the action is between herself and her husband, she may sue alone, and in no case need she prosecute or defend by a guardian or next friend." C. C. P., Sec. 56.

The summons must be served on the husband, as well as on the wife, when the action is intended to subject her or her separate estate
(26) to liability, and he is allowed on motion, and with her consent, which we must assume to have been given to warrant the action of the Court, and because no suggestion to the contrary appears in the affidavit, "to defend the same in her name and behalf." Bat. Rev., Chap. 69, Sec. 15.

It is manifest that to her husband's management and protection are entrusted the interests of the wife in an adversary suit, and in the absence of collusion or fraud on his part with the plaintiff, the judgment must be conclusive as to antecedent matters, and as effectual as in other cases. More especially must this be so, since the law dispenses with a guardian or *prochein ami,* and now leaves to them alone to set up and establish any defense that either may have against the plaintiff's demand. If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? If she is disabled from resisting a false claim, how can she prosecute an action for her own benefit, when nothing definite is determined by the result? It is no sufficient answer to say that the defendant's execution of the note with her husband did not bind her. The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat it. As then a married woman may sue and with her husband be sued on contracts, they and each of them must at the proper time resist the recovery as other defendants, and their failure to do so must be attended with the same consequences. The duty of making defense for both for either now devolves upon the husband alone, and he must employ counsel to make such defense effectual and in proper form.

3. An appearance by attorney for both husband and wife is legal and proper, and, therefore, says TAYLOR, C. J., "if an action be brought against husband and wife, if the husband appear by attorney, he
(27) shall enter an appearance for both"; and he adds, that this may be done when the wife is under age, "because the husband may by law make an attorney and appear both for himself and wife." *Frazier v. Felton,* 8 N. C., 231.

"Married women," says RUFFIN, J., in a case where relief was sought

in the Court of Equity, "are barred by judgments at law as much as other persons with the single exception of judgments allowed by the fraud of the husband in combination with another"; and referring to the allegation of its injustice and wrong, he adds "That was a thing that might have been shown on the trial at law, and, therefore, can not itself be heard now. She must charge and prove that she was prevented from a fair trial at law, by collusion between her adversary and her husband, preceding or at the trial." *Green v. Branton,* 16 N. C., 504.

The present application has in it no such meritorious element as would have entitled the *feme* defendant to relief in equity, and it does not call for nor authorize the interposition of this Court, in the manner proposed.

It is true an irregular judgment, not taken according to the course of the Court, may be set aside and reformed at any time as has been often held. *Keaton v. Banks,* 32 N. C., 381; *Monroe v. Whitted,* 79 N. C., 508, and numerous other cases. While the judgment sought to be set aside is neither erroneous nor irregular, if it were irregular, the motion should have been made in a reasonable time, and not after its transfer to an innocent holder for full value with nothing upon its face nor in the record to indicate any infirmity. *Winslow v. Anderson,* 20 N. C., 1.

We think, therefore, the ruling of the Court was not warranted by any facts contained in the affidavit and the judgment ought not to have been disturbed for any of the causes assigned.

Reversed.

Cited: Jones v. Cohen, 82 N. C., 80; *Stradley v. King,* 84 N. C., 639; *Grantham v. Kennedy,* 91 N. C., 156; *Vass v. B. and L. Association, Ib.,* 62; *Williamson v. Hartman,* 92 N. C., 242; *Stancill v. Gay, Ib.,* 460; *Burgess v. Kirby,* 94 N. C., 579; *Neville v. Pope,* 95 N. C., 351; *Baker v. Garris,* 108 N. C., 225, 228; *Green v. Ballard,* 116 N. C., 146; *McLeod v. Williams,* 122 N. C., 453, 455; *Moore v. Wolfe, Id.,* 717; *Strother v. R. R.,* 123 N. C., 198; *LeDuc v. Slocomb,* 124 N. C., 351; *Ferrell v. Broadway,* 127 N. C., 406; *Arthur v. Broadway, Id.,* 410; *McLeod v. Graham,* 132 N. C., 474; *Harvey v. Johnson,* 133 N. C., 355; *Smith v. Bruton,* 137 N. C., 88, 89; *McAfee v. Gregg,* 140 N. C., 449; *Rutherford v. Ray,* 147 N. C., 260; *Windley v. Swain,* 150 N. C., 360; *Price v. Electric Co.,* 160 N. C., 452.

Dist.: Nicholson v. Cox, 83 N. C., 53; *Robeson v. Hodges,* 105 N. C., 50; *Patterson v. Gooch,* 108 N. C., 507; *Sikes v. Weatherly,* 110 N. C., 133; *Wilcox v. Arnold,* 116 N. C., 711.

(28)

T. J. SOUTHAL and wife v. W. H. SHIELDS, Adm'r.

Practice—Parties—Settlement of Estates.

Whenever the pleadings in a cause show the necessity of an account, and that there are others besides the plaintiffs interested in the fund and not before the court, the defendant has a right to require that such persons be made parties of record so as to conclude them by the proceedings.

Hence, when the sole legatee of an estate sues the executor for an account and the balance to be thereby ascertained, and the latter answers, admitting assets in excess of the debts and charges of administration, but averring the pendency of a creditor's bill against the estate; *It was held*, to be error to direct the payment of the legacy before the creditors have been heard in the proceeding.

SPECIAL PROCEEDING tried on appeal at Spring Term, 1877, of NORTHAMPTON, before *Buxton, J.*

This proceeding was commenced in the Probate Court on behalf of the *feme* plaintiff against the defendant for an account of the administration of the estate of B. G. Clark, deceased. The case is fully stated by Mr. Justice DILLARD in delivering the opinion. The Court below overruled the exceptions to the account as stated, and gave judgment accordingly, for which the defendant appealed.

Messrs. D. A. Barnes and *Gilliam & Gatling* for plaintiffs.
Messrs. T. N. Hill and *J. B. Batchelor* for defendant.

DILLARD, J. The testator of the defendant departed this life in Virginia, in the year 1872, leaving a last will and testament, which was recorded in that State. A duly certified copy of said will was afterwards regularly admitted to record in Northampton County by the judge of probate, and the defendant, W. H. Shields, was appointed and qualified as administrator with the will annexed according
(29) to law. The *feme* plaintiff was the legatee and devisee of the entire estate of the testator, B. G. Clark, and she and her husband, on 26 April, 1875, instituted a special proceeding in the Probate Court of Northampton against the defendant for an account of his administration, and payment to her of whatever might be found to be the net surplus of the estate after deduction of all debts against the estate, and the costs and charges of administration.

The defendant filed an answer representing that the administration was not closed and the debts against the estate not all paid, but admitted that the assets were more than sufficient to pay all the debts and charges against the estate, and he submitted to come to an account under the order of the Court. In the course of the cause an account

was taken by the probate judge of the administration of the estate by defendant, resulting in a balance found in the hands of defendant of $1,341.17, and the defendant filed divers exceptions to the said account, which, being overruled by the probate judge, an appeal was taken to the Superior Court.

In the Superior Court of Northampton the cause was brought to a hearing before *Buxton, J.,* and after a full consideration of the exceptions and the rulings thereon and remodeling the account, his Honor adjudged that there was in the hands of the defendant a balance of $1,283.39; and in relation thereto, amongst other things, he also adjudged as follows: "It appearing to the Court that a creditors' bill is now pending in the Superior Court of Northampton, it is adjudged by the Court that plaintiffs recover the sum of $1,283.39, amount of assets aforesaid against the said Shields, administrator of B. G. Clark; and it is further ordered that the Clerk of this Court take an account of the debts proved in said creditors' suit or otherwise, and the said Shields is hereby authorized and directed to return enough of the assets to satisfy the debts so proved, if any, and to have the judgment herein reduced by such debt or debts"; and from the judgment of (30) his Honor an appeal is taken to this Court.

1. The defendant complains in this Court of error in the Judge below in overruling his exceptions to the account of the judge of probate, and specially assigns as error, that the judgment was given against him without previously ascertaining the amount of the unpaid debts against the estate and making suitable provision in the decree for their payment. From the view taken of the error assigned in this Court, it is unnecessary to consider and decide any of the alleged errors in overruling the exceptions of the defendant, but only the one assigned in the passing of any final judgment at all under the existing state of the cause and in the terms of the judgment.

We understand the rule and practice of courts of equity under our former system and equally so under our present system of courts, to be, that whenever it appears from the case as made by a plaintiff, or the answer of a defendant, or both, that an account must be taken and that there are others, besides the plaintiff, interested, not before the Court, it is the right of a defendant liable to account, in a just representation of others and for his own safety, and also the duty of the Court, to require that all proper parties be before the Court; or the proceedings be of such frame and scope as to admit of their coming before the Court, so that they may have a voice in the matter of account and in the application of the fund, and be concluded by the final judgment or decree which shall be made. Adams Eq., 315 to 324; Story's Eq. Pl., secs. 99-104 and notes. Here the *feme* plaintiff is the legatee of the entire

estate of the testator, and is entitled on the account to recover against the administrator with the will annexed, only so much as may remain after the payment of all debts against the estate, and the costs and charges of administration. And it being averred in the answer of defendant that there are various unpaid creditors, and by recital in
(31) the Judge's decree, a creditors' bill pending for their payment in the same Court whence this appeal comes, it would seem material to a final determination of the rights of all parties interested in the fund to be administered in the action, that an inquiry should be instituted into the number of the unpaid creditors and the amount of their debts; so that coming before the Court at the same time with a report of the assets, a distribution of the net assets might be decreed, first to the several creditors, and then of the residue to the *feme* plaintiff.

It is laid down in Story's Equity Pleading that when it appears from the pleadings that the share or amount due a plaintiff alone or others in the same situation cannot be determined until the rights of others are first ascertained, it will be required that such others shall be made direct parties to the bill, or the proceedings be so shaped by interlocutory orders in the cause as to admit of their coming before the master on a general account of assets and of the debts against the estate. Section 99 and notes. For example, it often happens that if a legatee sue for account and payment of a specific legacy, the Court will decree payment if the executor admits assets sufficient, but if the answer suggests other legatees to be equally entitled, and a deficiency of assets to pay creditors and the legatees too, the bill will be either converted into the form of one suing for all, or the same thing will be substantially done by providing in the decree for an account of assets, for an account also of the legatees and creditors and the amounts respectively due them. In either of which cases, everyone interested in the fund could have a voice in the matters of account as well as in the application of the assets. *Ibid.*, secs. 99, 100; *Hallett v. Hallett,* 2 Paige, 19. This mode of dealing with the administrator is just to the creditors and to a legatee of the residue of the estate, and at the same time it protects the executor
(32) or administrator and makes the decree to be a final determination of the rights of all, as it ought to be.

2. In our opinion, therefore, at the time a reference was made to state the account of the administration of the estate by the defendant Shields, the order should have gone further and directed the referee to advertise for and take an account of all the debts outstanding and unpaid, so as to give all an opportunity to assert their rights, and be concluded and barred by the decree of distribution of the fund. The decree as entered is final and yet it is objectionable, in that it does not dispose of the matters and things embraced therein. A decree is defined to be a sentence

or order of the Court pronounced on hearing and understanding all the points in issue and determining the rights of the parties in the suit according to equity and good conscience. Danl. Ch. Pr., 1192. Tested by this definition the decree in this case will appear to be faulty in several particulars:

It adjudges a recovery by the plaintiff for the assets found due, and then orders that the clerk take an account of the creditors unpaid and names no day or forum to receive and pass upon the report; so that if controversy exist amongst the creditors as to the validity of each others' debts, there will be no mode to pass thereon.

It directs whatsoever may be found due to creditors to be retained by the administrator, and no one is appointed to make the application and enforce the payment; and subject thereto to ascertain and enforce payment of the balance to the plaintiff.

3. A final decree should be a complete determination by the Court of the whole controversy, and leave nothing to be determined by others, as was done in this case. It is our opinion, therefore, that the decree of the Court below be set aside and the cause remanded to the end that it may be consolidated with, and heard with the creditors' bill now pending; or suspended until that is heard and ended; or be practically converted into a creditors' bill by an order for a general (33) account of the assets and the outstanding debts of the estate.

Judgment of the Court below is

Reversed and remanded.

Cited: Pegram v. Armstrong, 82 N. C., 330; *Carlton v. Byers,* 93 N. C., 305; *Glover v. Flowers,* 101 N. C., 141; *McNeill v. Hodges,* 105 N. C., 55; *Kornegay v. Steamboat Co.,* 107 N. C., 118.

THOMAS J. WRIGHT v. ROBERT HEMPHILL.

Practice—Correcting Verdict.

In civil actions, it is admissible for the judge, on retiring from the bench, by consent of parties, to direct the clerk to receive the verdict of the jury if they should agree during the recess, and on his return, it is competent for the judge, if the verdict be not responsive to all the issues, and the jury being in court, and there being no suggestion of tampering or other improper influence, to order them to retire and complete their verdict in the same manner as in cases of verdicts rendered in open court.

APPEAL from *Kerr, J.,* at Fall Term, 1878, of GUILFORD.

The facts constituting the basis of the exceptions taken in the Court

below are sufficiently stated by Mr. Justice DILLARD in delivering the opinion. Verdict and judgment for defendant, appeal by plaintiff.

Messrs. Scott & Caldwell for plaintiff.
Mr. J. A. Gilmer for defendant.

DILLARD, J. On the trial of this action of claim and delivery for a horse, which had been taken out of the possession of the defendant
(34) and delivered to the plaintiff, his Honor, on leaving the bench in the evening, by consent of the parties, directed the Clerk to receive the verdict of the jury, when they should come in. At the opening of Court next morning the Judge called for the reading of the verdict, and the jury having found the property in the horse to belong to the defendant, but omitted to fix the value and assess the damages for detention, his Honor refused to accept the verdict and directed the jury then present in Court to return and supply the omission, as to which there was no conflict of evidence, there being but one witness as to the value.

The jury retired and in a short time returned a verdict finding "all issues in favor of the defendant and assessed his damages at $45, with interest from the 1st day of June, 1877," which was received by the Court and ordered to be recorded; plaintiff excepted to the order of the Judge in directing the jury to retire and complete their verdict, and also to the grant of judgment on the verdict as finally recorded, and now on appeal to this Court, his Honor's ruling in these respects is complained of as erroneous.

It is always proper for the Judge, when a jury returns their verdict in open Court, to see that it is responsive to every material issue of fact submitted to them, and if it be not so, to refuse to receive it and direct the jury to retire and make up and bring in a complete verdict.

In civil actions it is the practice for the Judge, on retiring from the bench, by consent of the parties, to direct the Clerk to receive the verdict of a jury then out considering their verdict; and on his return it is competent to the Judge, if there be an omission of the jury to respond to the issues, the jury being present in Court, and no suggestion being made of tampering or other influence to order them to retire and complete their verdict in the same manner as in cases of verdicts rendered in open Court.

In accordance with this practice, in the case of *Willoughby v. Threadgill,* 72 N. C., 438, the jury returned their verdict to the Clerk
(35) and separated and were dispersed for five minutes, and his Honor, on coming upon the bench, ordered them to retire and complete their verdict, and on appeal to this Court, it was held to be admissible in civil cases that the Judge who presided and saw all the incidents of

the trial, should determine whether the jury had rendered or only tendered a verdict, and in view of all the circumstances in the exercise of a sound discretion, might discharge the jury or call them together again. And this practice was approved in the case of *Robeson v. Lewis,* 73 N. C., 107, and other cases.

Ordinarily we would not think it admissible after the rendition of a verdict to the Clerk and a dispersion of the jury, to call them together again and allow them to complete a verdict as to omitted points about which there was a conflict of evidence or as to which there was a possibility of communication and influence by either party during the separation; but in this case the omission in the verdict was in not fixing the value of the horse and damages for his detention, about which there was no controversy, there being but one witness as to that matter, and, therefore, in view of the state of the proof bearing on the omitted point, it was obvious that no suspicion did, or possibly could be entertained of any influence on the jury during the separation, and in the exercise of a sound discretion, his Honor might the next morning require the jury to perfect their verdict with as much propriety as if done at the instant of its rendition to the Clerk.

On the return of the verdict assessing the damages of the defendant at $45, with interest from the first day of June, 1877, the statement of the record is that the plaintiff excepted to the verdict and moved to set it aside and for a new trial, without specifying the grounds of his exception and motion; but we suppose it was on the idea (36) that the verdict was such as not to authorize the Court to proceed to judgment thereon.

The counsel of the defendant in this Court having entered a *remitter* for the interest on the $45 found as the value of the horse, it is not necessary that we should consider the exception to the verdict on that account.

No error.

Cited: Petty v. Rousseau, 94 N. C., 362; *Cole v. Laws,* 104 N. C., 657; *Mitchell v. Mitchell,* 122 N. C., 334; *Bond v. Wilson,* 131 N. C., 507.

JAMES W. GRANT v. JAMES W. NEWSOM.

Practice—Controversy Without Action.

The court will not hear a controversy without action submitted under C. C. P., Sec. 315, in the absence of an affidavit that the controversy is real, and the proceeding in good faith to determine the rights of the parties.

CONTROVERSY without action under C. C. P., sec. 315, heard at Spring Term, 1879, of NORTHAMPTON, before *Eure, J.*

The plaintiffs are James W. Grant, administrator of Lewis B. Hill, deceased, and Matilda J. Hill, widow; and the defendants are James W. Newsom, Sheriff, and W. H. Hughes, executor of W. M. Crocker, deceased. At Fall Term, 1869, Hughes, as executor aforesaid, obtained judgment against Lewis B. Hill for the sum of $1,025.83, in an action to recover a debt contracted prior to 1 January, 1865, and executions were regularly issued thereon. On 14 November, 1878, Hill died intestate, and the plaintiff qualified as his administrator on 2 December following, and on 30 December, an execution issued on said judgment tested as of Fall Term, 1878, of said Court (which was held
(37) on 30 September) and went into the hands of defendant Sheriff, returnable to Spring Term, 1879.

About 2 December, 1878, the plaintiff, as administrator aforesaid, took possession of all the personal property belonging to the estate of his intestate, and advertised its sale on the 30th of the month. In the meantime (11 December, 1878) sundry articles of personal property were allotted to the widow of the intestate (which are itemized in the case agreed), amounting in value to $214.06; and the whole allowance being estimated at $400, a return of a deficiency of $185.94 was made. The defendant Sheriff, by direction of said Hughes and by virtue of said execution, on 30th of said month, levied upon and sold all the personal property belonging to the estate of Lewis B. Hill, including that portion which had been allotted to the widow aforesaid, and realized the sum of $483.25. There were other debts owing by said intestate than the one due to Hughes.

If the Court is of opinion that the seizure and sale by the Sheriff were authorized by law, then judgment of nonsuit shall be entered against the plaintiffs; but if not, then judgment shall be entered for the widow for the return of the above-mentioned articles and $185.94, or $400 and interest from 30 December, 1878, in lieu thereof; and also, judgment for the administrator for the sum of $83.25, with interest. The Court being of opinion with plaintiffs gave judgment accordingly, and the defendant Hughes appealed.

Mr. T. W. Mason for plaintiff.
Mr. R. B. Peebles for defendant.

SMITH, C. J. If the case were properly before us we should find little difficulty in determining the questions intended to be pre-
(38) sented. The cases cited for the appellant, and the provisions of the statutes referred to, leave little room to doubt as to any of them. *McCarson v. Richardson,* 18 N. C., 561; *Aycock v. Harrison,* 65

N. C., 8; Acts 1870-'71, Chap. 43, Sec. 7; C. C. P., Sec. 261. But we do not undertake to decide them, for the reason that the cause was not properly instituted in the Superior Court, and consequently is not properly before us on this appeal. The case agreed between the parties as "containing the facts upon which the controversy depends," is submitted without action under C. C. P., Sec. 315, and as the proceeding is outside the common law, to give jurisdiction the requirements of the statute must be strictly observed.

But this is not the case. There is no accompanying affidavit and The Code declares that "it must appear by affidavit that the controversy is real and the proceeding in good faith, to determine the rights of the parties." When this is done, the Judge shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending. The affidavit is plainly an indispensable prerequisite to the exercise of jurisdiction in such a case; and so it is declared by this Court in *Hervey v. Edmunds,* 68 N. C., 243. The appeal must therefore be dismissed.

PER CURIAM. Appeal dismissed.

Cited: Wilmington v. Atkinson, 88 N. C., 55; *Ruffin v. Ruffin,* 112 N. C., 108; *Arnold v. Porter,* 119 N. C., 124.

R. H. LANE v. D. W. MORTON.

Practice—Writ of Restitution—Nonsuit.

Whenever a defendant is wrongfully dispossessed of his land by legal process, he is entitled to a writ of restitution and an inquisition of damages *in that action,* of which the plaintiff is not permitted to deprive him by taking a nonsuit.

APPEAL at Spring Term, 1879, of PAMLICO Superior Court, (39) from *Avery, J.*

This action was brought before a Justice of the Peace under the landlord and tenant act, to recover possession of land and judgment rendered for plaintiff. The case was taken to the Superior Court by writ of *recordari,* and at Spring Term, 1877, before *Moore, J.,* the defendant suggested that as the title to the land was in controversy, the Justice of the Peace had no jurisdiction, which question of jurisdiction had been raised before the Justice verbally, the defendant having no counsel present and the Justice refusing to examine any witnesses touching the matter. And under the suggestion of the Court to the counsel of defendant, the case was remanded to the Justice's Court to enable defend-

ant to answer in writing. The Justice took no action in the premises, and thereupon the defendant obtained a *mandamus* compelling him to proceed and try the case. In obedience thereto he notified the parties to appear before him, when the defendant asked leave to file an answer in writing raising the question of jurisdiction, which was refused and defendant appealed to Fall Term, 1877, when the motion for leave to file the answer aforesaid was allowed by *Eure, J.*, and the plaintiff appealed. (See same case, 78 N. C., 7.) And at Spring Term, 1879, before his Honor the plaintiff stated that he would take a nonsuit, which was objected to by defendant upon the ground that he was entitled to an order for a writ of restitution and assessment of damages by a jury for the rents and profits of the land. In reply, the plaintiff contended that the defendant asked for no affirmative relief in his answer, and that he (plaintiff) was not prepared to go into an inquiry of damages. Thereupon the Court ordered a writ to issue to place defendant in possession of the land described in the pleadings, and that issues be framed for trial at the next term of the Court as to the
(40) amount of damages sustained by defendant for rents and profits. From this judgment the plaintiff appealed.

No counsel in this Court for plaintiff.
Mr. W. E. Clarke for defendant.

SMITH, C. J. When the case was before us at January Term, 1878 (78 N. C., 7), it was decided that the defendant might, with consent of the Court, file his answer in the Superior Court, which he had offered to do, and was not allowed to do while it was pending before the Justice.

In accordance with this decision the answer was put in in the Superior Court, and thereupon the plaintiff proposed to submit to a nonsuit. This was resisted by the defendant, who moved for a writ of restitution of the lands of which he had been dispossessed by a writ of possession before granted the plaintiff, and that a jury might be impaneled to assess his damages by reason thereof. The Court refused to allow the nonsuit, and adjudged that a writ of restitution issue, and that issues be framed for trial at the next term as to the damages sustained by the defendant for rents and profits. From this judgment the plaintiff appeals.

We see no error in the record. The defendant had been wrongfully deprived of the possession of his lands by the action of the Justice in an early stage of the proceedings, and when they were depending before him, and it was the right of the defendant to have, and the duty of the Court, before ending the action, to restore that possession and to allow compensation to him for the injury done. For this purpose the cause

was properly retained, and, to meet the plaintiff's suggestion that he was unprepared to try the question of damages, an issue ordered to be made up to be tried before a jury at next term. The ruling is supported by authority.

"We think," say the Court in *Dulin v. Howard,* 66 N. C., 433, the facts of which are similar, "that the defendant was entitled (41) not only to restitution of the possession, but if he had asked for it, to an inquiry as to the damages he had sustained by being deprived of it." Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment. *Perry v. Tupper,* 70 N. C., 538.

There is no error, and this will be certified to the end that the writ of restitution be awarded, and proceedings had in the cause according to law as declared in this opinion.

Affirmed.

Cited: Lytle v. Lytle, 94 N. C., 525; *S. v. Crook,* 115 N. C., 764.

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*GEORGE W. LONG, Admr., and others v. BANK OF YANCEYVILLE and others.

Practice—Pleading—Statute of Limitations—Evidence—Creditor's Bill—Obligation of Contract.

1. After a defendant has answered, denying the allegations of the complaint and averring new matters of defense, he can not move the court to dismiss the action because of the insufficiency of the complaint.
2. The defense of the statute of limitations can be made only by answer.
3. The statute of limitations, in its ordinary acceptation, does not apply to bank bills which circulate as money.
4. The face of such bills is not evidence of the date of their issue, since they are constantly paid into the bank and re-issued.
5. When the plaintiff declares in his complaint that he sues for himself and all other creditors who will come in and be made parties and share the expenses, such complaint is, in form and substance, a "creditors' bill."
6. It *seems* that the Legislature has no power to coerce a creditor of an insolvent bank into an acceptance of a *pro rata* share in the assets as a full discharge of his debt and his right to look to the stockholders upon any collateral liability assumed by them. Such act appears to be clearly violative of the sanctity of contracts.

APPEAL tried at Spring Term, 1879, of ALAMANCE Superior (42) Court, before *Buxton, J.*

This action was begun in 1872 by Joseph B. McMurray, the intestate of plaintiff, against Thomas Biglow, George Williamson and others,

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

stockholders in defendant bank, and payment demanded of an amount alleged to be due under the personal liability clause of the bank charter. McMurray died in 1877, and the plaintiff Long, his administrator, was made a party. The defendants move to dismiss the action for the causes and upon the facts set out in the opinion of this Court. His Honor allowed this motion, but denied that of the plaintiff to amend the complaint, from which ruling the plaintiff appealed.

Mr. E. S. Parker for plaintiff.
Messrs. Thos. Ruffin and *J. W. Graham* for defendants.

(43) SMITH, C. J. This action is brought to enforce against the defendants, stockholders of the Bank of Yanceyville, the liability imposed upon them in section 12 of the act of incorporation, which is as follows:

"That in case of any insolvency of the bank hereby created, or ultimate inability to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them separately held in said corporation." Acts 1852-'53, chap. 8.

The complaint alleges that the intestate, Joseph B. McMurray, is the owner of certain notes issued by the bank, a list whereof is contained in the schedule annexed, and all of which bear date previous to June, 1857; that the bank, previous to 1 January, 1866, became and was then insolvent, and has so continued, and that having ceased to do any business, the plaintiff sought out and made demand of payment of its last cashier, which was refused; and that there are no creditors or bill-holders of the bank known to the intestate other than himself.

(44) The complaint further recites the general provisions of the Act of 12 March, 1866, entitled "An Act to enable the banks of this State to close their business" (Laws of 1866, chap. 3), and alleges that the stockholders in the spring of the same year filed their bill in the name of the bank and proceeded to wind up its business in the manner therein directed; that the assets collected admitted of a very small per centum distribution among the creditors, and the per centum was paid only upon their surrender of the entire claim held by each who accepted his part or share; and that the intestate was no party to the proceeding, and did not participate in the division of the fund.

The defendants answer these allegations and set up various matters of defense against the claim, not necessary now to be specifically mentioned. No issues were framed to determine the facts controverted in the pleadings, nor was evidence adduced in support of the allegations made either in the complaint or answers. At Spring Term last the defendants moved to dismiss the action for the following reasons:

1. Because none of the bills sued for bear date subsequent to 24 November, 1860, when the bank failed and the liability of the stockholders accrued.

2. For that the action is in the name and for the benefit of one instead of all the creditors, and,

3. That the proceedings instituted in the Court of Equity are a bar to the prosecution of the plaintiff's claim.

The action was dismissed, and the question on the appeal is as to the sufficiency of the reasons assigned, or of any other apparent on the record, to sustain the ruling of the Court.

If the defendant, instead of answering, had put in a demurrer, we should be confined to an examination of the complaint to ascertain if it stated a sufficient cause of action, and perhaps the same issue would be presented on a preliminary motion to dismiss. C. C. P., Sec. 99. But when new and independent matters of defense are set up in (45) the answer, and the plaintiff's allegations denied, the proper course is to eliminate from the pleadings such issues of fact as they involve, and submit them to a jury, or for determination in some other mode authorized by law. While the controverted allegations of fact remain open and undisposed of, it is irregular to entertain a motion to dismiss and put the cause out of Court. This has been held in several cases.

In *Garrett v. Trotter,* 65 N. C., 430, after the cause was called and before the impaneling of the jury, the defendants objected to the admission of any evidence, because of a defect in the complaint, in that it failed to charge a wrongful possession and unlawful withholding of the premises by the defendant, and the action was dismissed. This Court reversed the judgment, and PEARSON, C. J., discussing the irregular and unusual mode of proceeding, says: "This irregularity furnishes a second ground upon which the plaintiff is entitled to have the judgment set aside, and a *venire de novo* awarded." This was an action at law, and at the same term a decision was made in a cause in equity. *Mastin v. Marlow,* 65 N. C., 695. The bill had been dismissed on the ground that upon its face it showed the plaintiff not to be entitled to the relief asked, and there was an adequate remedy at law. The Chief Justice who delivered the opinion in this case also, overruling the Court below uses this language: "This is the second instance at the present term of a case, when in the midst of a trial, the proceedings are abruptly stopped by motion to dismiss"; adding: "This mode of procedure is irregular, and gives rise to great inconvenience and useless costs."

In a more recent case the same ruling is made, and BYNUM, J., says: "The plaintiff moved for judgment upon the complaint and answer.

This was irregular. If he admitted the allegation of the answer, he should have demurred thereto and then nothing but issues of (46) law would have been presented to the Court. But the answer denies some material allegations of the complaint, which raised issues of fact which should have been found either by the Court or by a jury." *Baldwin v. York,* 71 N. C., 463.

These decisions and the clear and sound reasoning by which they are supported warrant us in reversing the action of the Court below and sending the case back for a new trial. But as our opinion upon the points raised and debated before us, and which will come up upon the next hearing, may facilitate the final disposition of the cause, we proceed to examine them also.

1. The first ground relied on for the order of dismissal is that the bills of the bank bear date anterior to November, 1860, and the action is barred by the statute of limitations. If this were so the defense would be unavailable in the present stage of the proceedings, since the dismissal of the action can be only justified by what is contained in the complaint itself, as on demurrer, and if the statutory bar was apparent therein, the defense can be taken only by the answer. C. C. P., Sec. 17; *Green v. R. R.,* 73 N. C., 524. And hence the dismissal of the action is erroneous.

But the face of the bills is not evidence of the date of their issue, since they are constantly paid into the bank and reissued. Nor does the statute of limitations in its ordinary acceptation apply to bank bills which circulate as money. LORD MANSFIELD, in *Miller v. Race,* 1 Burr., 457, gives as a reason for the rule, "that these notes are not like bill of exchange, mere securities or documents for debts, nor are they so esteemed, but are treated as money in the ordinary course and transaction of business, by the general consent of mankind." Thompson, Liab. of Stock, Sec. 300.

In *Perry v. Tubman,* 92 U. S., 156, the Supreme Court of the United States held that the statute began to run against the action to enforce the personal liability of the stockholders from the time (47) "when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent, and this may be before the assets of the corporation are applied and exhausted." This point of time is not fixed in the present case, and it may be very difficult to fix it, unless the rule adopted in *Godfrey v. Terry,* 97 U. S., 171, be applied, which determines the insolvency by the date of suspension of specie payments, a doctrine announced by a majority of the Court, and opposed by a strong and forcible dissent of others. It is unnecessary now the decide the question.

2. The second reason assigned is that the bill is not, and ought to be

a creditor's bill, and that the proper and only legal method of procedure against stockholders is by a creditor's bill, or action prosecuted on behalf of all the creditors, is expressly decided in *VonGlahn v. Harris,* 73 N. C., 323. But in our opinion this is in legal effect such an action. The summons in the usual form requires the defendants to answer the complaint to be filed by the plaintiff, and the complaint, when filed, is in these words: "In behalf of himself and of all others, holders of bank bills issued by the president, cashier, directors and company of the Bank of Yanceyville, which shall remain unpaid, who shall come in and contribute to the expenses of the suit"; and the amended complaint, subsequently filed, contains a clause substantially the same. The summons, unlike the old writ of *capias ad respondendum,* or the subpœna used at the commencement of the proceedings in equity, is a mere notice of the action, unaccompanied by any penalties for disregarding it, except in incurring a liability to a judgment by default. It refers to the complaint as containing a statement of the cause of action and the redress demanded, and to this the defendant must demur or answer.

In *Wilson v. Moore,* 72 N. C., 558, the "summons commanded the defendants to answer the complaint of *Wilson & Shober* alone, while in the complaint they sue for themselves and in behalf of all others, the creditors and noteholders of the bank of the State of (48) North Carolina, who will come forward and contribute to the expenses of the action; and this was held to be free from objection. Referring to the practice prevailing in courts of law and equity before the introduction of the new substitute for both, BYNUM, J., speaking of the writ and subpœna, says: "In both courts, its only operation and office are to give notice of an action begun, the parties to it, and when the complaint will be filed. In our case, these purposes have been answered, and the defendants have had every privilege allowed by the regular course of the Court. The objections seem captious and for the evident purpose of delay."

In *Wilson v. Bank,* 72 N. C., 621, determined at same term, the defendants assigned, among the causes of demurrer, that the action was brought by Wilson & Shober alone, while, as the complaint shows, there are other creditors, all of whom should have been associated as plaintiffs, and the Court held "that none of the causes of demurrer are sufficient," and say: "It is a *creditor's bill* and all the creditors are, or may come in and be parties and share the recovery." See, also, as to the practice when there are defective parties, *Brooks v. Headen,* 80 N. C., 11. These references sufficiently dispose of the objection.

3. The last assigned reason grows out of the proceedings had in the equity suit under the Act of 12 March, 1866. The plaintiff refers to this proceeding and declares he was not a party to it, had no legal

notice of it, and that he declined to surrender his notes and thus discharge the obligation of the bank and the stockholders, as he was required to do, for receiving the inconsiderable percentage the assets of the bank were able to distribute among its creditors. The fifth section of the act declares that creditors who may prove their demands in the case "shall be entitled to payment *in satisfaction of the same out of the assets,*" and that "all claims and demands not presented, (49) proved and established according to the provisions of this act, within the time allowed by the decree of this Court therefor, shall be barred of recovery by any action at law or other proceedings in equity, and any suit brought for their recovery otherwise than is herein provided, shall, on the plea of the commissioner of such bank, be abated, or on his motion dismissed."

We are not prepared to uphold this exercise of power by the General Assembly to coerce the creditor into an acceptance of what may be his share in the distribution of the assets of an insolvent debtor corporation as a full discharge of his debt and his right to look to the stockholders upon the collateral liability assumed by them.

In the case already cited from 97 U. S., 171 (*Godfrey v. Terry*), Mr. Justice MILLER, who delivers the opinion, when discussing the effect of the act of the General Assembly of South Carolina, which authorizes the suspension of specie payments by the banks, uses this language: "The Legislature did no more than to relieve them from the penalty of the forfeitures of their charters. It could not relieve them from the obligation to pay their debts in specie, nor extend the time for such payment. It could not do this, because *any such law* would impair the obligation of the creditor's contract." Such is also declared by this Court to be the only legal operation of the similar Act of 24 November, 1860, passed in this State, wherein the Court say: "Whatever the intention of the act cited may have been, the only effect which can be constitutionally allowed them, is to exonerate the banks from a forfeiture of their charters and other penalties under the laws of the State. They can not have the effect to discharge the banks from their liabilities to innocent holders of their bills." *Glenn v. Bank,* 70 N. C., 191.

But the facts are not before us in a form to call for the expression of a decided opinion on the point, and it is alluded to in order that it may not seem to have escaped our notice. It is enough at (50) present to say that there are no sufficient reasons now shown to justify the summary dismissal of the action. It is true that if there were other grounds besides those mentioned, *apparent in the complaint,* which would sustain the order of the Judge, it is contrary to the practice of the Court to consider them, since it is the *legality* of the

order itself, not the particular *reasons given* for making it, which we are to pass upon. None such are pointed out in the argument and none are discovered upon an examination. We therefore declare there is error in the ruling and it is

Reversed.

IN SAME CASE AT THIS TERM:

SMITH, C. J. Calvin J. Cowles, alleging himself to be a creditor of the defendant in a large sum, files his petition to be allowed to come in and be made a party plaintiff. The answer sets up substantially the same matters of defense to the application which are relied on in the original answers, and the application is denied.

In addition to what we have said in the opinion in the other appeal, we are content to refer to *Glenn v. Bank,* 80 N. C., 97. The issues made upon his petition and answer thereto should have been first determined before the summary order of the Court. This order is reversed, and the cause will proceed according to law as declared by this Court.

Error. Reversed.

Cited: Wilson v. Linebarger, 82 N. C., 414; *Long v. Bank,* 90 N. C., 406; *Montague v. Brown,* 104 N. C., 165; *Hancock v. Wooten,* 107 N. C., 20; *Smith v. Summerfield,* 108 N. C., 286.

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(51)

JOHN G. CHASTEEN v. WILLIAM P. MARTIN.

Practice—Issue Joined—Waiver of Jury Trial—Judge of Superior Court.

On the trial of a civil action a jury were sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury were discharged without verdict; *Held,*

(1) That the parties stood at issue on the pleadings just as they were before the jury were sworn.

(2) That in such case the judge has no right to pass upon the issues, except upon a waiver of jury trial in accordance with Section 240 of The Code of Civil Procedure.

Remarks of DILLARD, J., upon the rule which formerly obtained in equity practice.

APPEAL at Spring Term, 1878, of CHEROKEE Superior Court, from *Schenck, J.*

The plaintiff claims that one John M. Martin, being the owner of a certificate of purchase, No. 101, third district of Cherokee lands, and having paid the purchase money to the State, transferred the same to one Standridge, who afterwards assigned the same to him. It is

averred that the defendant, well knowing of the transfer to the said Standridge, purchased of John M. Martin the same tract of land, and by some means procured the State to issue a grant to him therefor in his own name, under which he now holds possession, and refuses on demand of plaintiff to convey to him, or in any manner to recognize him as having a just claim; and thereupon judgment is prayed that defendant may be declared a trustee and compelled by a proper deed to convey said tract of land to him.

To this claim of the plaintiff, the defendant answers:

1. He admits the payment of purchase-money and assign-
(52) ment of the certificate of purchase, No. 101, by John M. Martin to Standridge, and he avers that said Martin at the same time owned and had paid for another certificate of purchase, No. 101, and that he transferred both of the certificates, not for any consideration paid him by Standridge, but merely as an indemnity against loss by reason of his being surety for him to one Rogers.

2. He alleges that Standridge had to pay as surety of John M. Martin to Rogers the sum of two hundred and eighty dollars.

3. That Standridge went into possession of the tract covered by certificate No. 101, and procured a State grant therefor, the same being worth much more than the sum paid as surety for John M. Martin.

4. That John M. Martin kept the possession of the tract covered by certificate No. 101, being the one which is sued for in this action, and sold it to this defendant, who, before he made purchase, called on Standridge, and by him was told that he had no claim to it, and advised defendant to buy it if he wished; and thereupon he purchased for value and procured a grant from the State, and ever since has occupied the same, holding adversely to all the world.

5. That plaintiff has never purchased the land at all, but has merely agreed to pay some inconsiderable sum in the event he shall be able to recover; and he avers that the same was not *bona fide,* but of purpose to enable plaintiff to annoy defendant with a law-suit.

6. Defendant alleges that plaintiff had full notice of all these facts at the time he pretended to purchase or contract with Standridge.

7. Defendant avers that Standridge is fully indemnified in the tract for which he got a grant, and has never claimed the tract sued for in this action; and if he is not indemnified, the defendant offers to pay the sum that may remain unpaid.

To the answer of the defendant, the plaintiff filed a reply
(53) denying each and every article of the answer separately. After issues of fact were joined on the pleadings, his Honor, Judge Furches (then presiding), settled the issues to be passed on by the jury, and the cause was continued; and at the next term of the Superior

Court the cause coming on to be tried, the case of appeal states that his Honor drew up other issues; the jury were sworn and impaneled, and neither side offered any evidence to the jury; and the issues were not submitted to the jury, because neither party offered any evidence upon them. Thereupon, the case was considered upon the pleadings and judgment was rendered in favor of the plaintiff, from which the defendant appealed.

Messrs. Battle & Mordecai for the plaintiff.
Messrs. A. T. & T. F. Davidson and *Reade, Busbee & Busbee* for defendant.

DILLARD, J. (after stating the case). From a mere perusal of the pleadings, it is apparent that various issues of fact were joined by the parties, which had to be determined in some way, either by a jury or by the Judge on a waiver of a jury, before any judgment could be pronounced, in conformity to the procedure prescribed in such a case, or which could reach the merits of the controversy. For example, the plaintiff sets up an equity to have the defendant declared a trustee of his legal title under the grant from the State, for his benefit, and to have a deed executed to him, on the ground that he bought the certificate of purchase, No. 101, from Standridge for value and *bona fide;* and defendant, by his answer, denies the consideration and the *bona fides;* and the plaintiff, by his reply, took issue on these facts.

The plaintiff, in further maintenance of his equity to have title, alleged that Standridge, from whom he bought was himself an assignee of John M. Martin, under whom the defendant also (54) claims for value and as the purchaser of an absolute interest; and by the answer the purchase by Standridge is denied, and it is alleged that the assignment to him was a mere security against loss as surety of John M. Martin to Rogers, and not as a purchase; and by the reply issue is taken on these facts.

It is alleged that defendant bought of John M. Martin, and by some means procured the grant of the State to be issued to him, well knowing that John M. Martin had previously transferred the same certificate of purchase to Standridge, to whose rights the plaintiff claimed to be entitled; and by the answer it is denied that the transfer had been made, except as a security against loss as surety to Rogers, and the defendant avers that he purchased and procured title from the State with the assent of Standridge, who then made no claim on the tract, and of all this the plaintiff had full knowledge before his pretended purchase; and a reply being filed denying these facts, an issue was joined as to them likewise.

Besides these, there are other issues of fact joined in the pleadings, and being so joined, it was the right of the parties to have the same tried by a jury, unless that right was waived as prescribed by law. C. C. P., Secs. 224, 240.

The record states that the jury were sworn and impaneled, and issues were framed, but no evidence being adduced on either side, no verdict of the jury was found. Thereupon the parties stood at issue on the pleadings just as they were before the jury were sworn. The case recites that the cause was heard by his Honor on the pleadings, and on consideration thereof he adjudged in favor of the plaintiff. But there is no waiver of jury trial by the defendant, and no statement of facts on which the judgment was based. And on the appeal as it comes up, it can only be seen that after a discharge of the jury without verdict on the issues of fact, his Honor, without waiver of jury trial (55) by the defendant, assumed to try the issues himself, and, without setting out the facts found, pronounced judgment in favor of the plaintiff. This has been expressly ruled to be inadmissible. *Leggett v. Leggett,* 66 N. C., 420. If the answer of defendant had admitted the facts constituting the plaintiff's cause of action, the plaintiff might have moved for judgment on complaint and answer, but such is not the state of things in this case. If plaintiff, without reply, had moved for judgment on the ground that the answer was frivolous and irrelevant, that course would have been irregular, and he should have demurred. *Baldwin v. York,* 71 N. C., 463; *Erwin v. Lowery,* 64 N. C., 321.

It is argued, however, that the jury being discharged without a verdict on the facts, the case is in the same condition as a bill in equity, wherein the defendant by answer admitted the equity of the bill and set up matter of avoidance, and on replication taken, allowed this case to be brought on to hearing without proof of the matter of avoidance. In that case the rule was to decree for the plaintiff on the equity confessed, the matter of avoidance passing for naught, as defendant had a day to make proof and had failed to do so. But under the Constitution and The Code, all distinction between actions at law and suits in equity being abolished, and there being now but one form of action, the Judge does not try and pass on facts put in issue on the pleadings. It is the constitutional right of the parties, as well as the statutory provision, that such issues shall be passed on by a jury, except upon a waiver of that right as expressed in Section 240 of The Code. And no such waiver appearing, his Honor could not try the issues joined in this case.

Venire de Novo.

Cited: *White v. Morris,* 107 N. C., 102; *Boles v. Caudle,* 133 N. C., 533.

(56)

W. OVERBY and wife v. THE FAYETTEVILLE BUILDING AND LOAN ASSOCIATION.

Practice—Reference—Exception to Report—Building and Loan Association—Interest of Shareholder—Interest—Mortgage—Covenant to Insure—Consent Reference—Jury Trial.

1. An exception to the report of a referee that a party is not credited with a certain amount in the statement of accounts can not be made upon the trial of the action on the referee's report where the claim was not asserted before the referee and no evidence offered in its support.
2. A shareholder in a building and loan association, whose stock is redeemed, can not participate in the profits of the business thereafter. To retain the property in his stock, he must conform to the general regulations and contribute as others are required to do; otherwise, he puts an end to his relations with the association and ceases to have any further interest in its affairs.
3. Interest is allowed upon the items of an independent account when used as a set-off or counter-claim to extinguish or reduce a debt, but is not to be computed upon *payments* as such, whose effect is to reduce *pro tanto* the sum due, interest being first discharged.
4. Where a mortgage contained a covenant that the mortgagor should keep the mortgaged premises insured, and in case of his failure to do so, the mortgagee should have the privilege of insuring the same, etc.; *Held*, that any moneys paid by the mortgagee for insurance (the mortgagor having failed to insure), are properly chargeable against the mortgagor upon a settlement of account.
5. The right to a trial by jury of facts passed upon by a referee, does not extend to a reference by consent.
6. Where a plaintiff in his complaint expresses a readiness and willingness to come to a fair and equitable settlement, and the defendant in his answer submits to the account and settlement proposed by plaintiff, and where the matters of account are proper subjects of reference, and no opposition to the order of reference is made by either party; *Held*, to be a reference by consent.

(The manner of settling the affairs of building and loan associations announced in *Mills v. B. and L. A.*, 75 N. C., 292, affirmed.)

CIVIL ACTION, heard upon exceptions to the report of a referee, (57) at Spring Term, 1879, of CUMBERLAND, before *McKoy, J.*

The plaintiff was a shareholder in defendant corporation, and upon the redemption of his stock by the association, he and the *feme* plaintiff joined in the execution of mortgage deeds to defendant to secure the performance of certain covenants and agreements. The plaintiff alleged that the defendant had advertised the mortgaged premises for sale, and asked for an order to restrain the same, upon the ground that the contract set out therein was usurious; and also asked for an account and settlement with the association. The case was subsequently referred to the Clerk of the Court to state an account, and upon the coming in of his report, exceptions were filed by the plaintiff, which are sufficiently set out by the Chief Justice in delivering the opinion. The Court below

overruled the exceptions, confirmed the report, and gave judgment for the defendant, and the plaintiff appealed.

Messrs. Guthrie & Carr and *T. H. Sutton,* for plaintiffs.

Messrs. Hinsdale & Devereux and *MacRae & Broadfoot,* for the defendant:

(58) SMITH, C. J. The plaintiff W. Overby became the owner at different times of eleven and of eight shares of stock in the defendant corporation which were subsequently redeemed by the association at the price of $1,210 for the first, and $800 for the last lot of shares. The contract of redemption, under the regulations of the association, requires the continued payment of monthly instalments on the shares and other dues from stockholders, and the payment of interest on $200, the full par value of each share of stock, at the rate of eight per cent per annum, until by the accumulated profits that sum can be distributed among the holders of the unredeemed shares, when all further payments are to cease, and the former owner of the redeemed shares is permanently disconnected from the association and the business between them closed. These payments from holders of stock redeemed or purchased by the association, to be ultimately extinguished, and kept in existence only to maintain in force the obligation to make the regular payments are required to be secured by mortgage; and in this case were secured by two conveyances of land, executed by both the plaintiffs, of which copies are annexed to the pleadings.

When the decision of the Court in *Mills v. Building and Loan Association,* 75 N. C., 292, and in the similar case of *Vann v. Building and Loan Association* (this defendant), 75 N. C., 494, made at the same time, was known, the defendant determined, in conformity to the opinion in those cases, to close up its butiness and divide its funds
(59) among the shareholders, and was proceeding to do so by selling the mortgaged premises of the plaintiffs, when this action was instituted and further progress arrested by injunction.

The matters in dispute between the parties were referred to the Clerk, who has stated an account upon the basis of giving the plaintiffs credit for all moneys paid by them to the association for installments, fines or otherwise, and charging them with the money actually received, with interest. To this end monthly computations with deductions for monthly payments have been made, and the referee reports to be due upon both transactions from the plaintiffs the sum of $1,134.31, with interest on $969.87, principal, from January 29, 1877, the day to which the interest is computed.

The plaintiff appeared before the referee when he took the account, and objected to certain parol evidence of payments by the association

for insurance on the property, which is set out in the referee's report, but made no other objection until the report was returned to Court. He then filed several formal exceptions in addition to that taken before the referee, and demanded a jury trial of all of them. The Court permitted an issue to be drawn up and submitted to the jury as to the plaintiff's failure to insure, and the insurance and payment by the association of the premiums therefor, which were both found in favor of the defendant, and his Honor declined to submit other issues for reasons mentioned in the record, and which will hereafter appear. The exceptions were taken to the report after its return, and the correctness of the rulings of the Court thereon are before us for consideration. They will be disposed of in their proper order:

1. For that the plaintiff is not credited with a payment of $185, alleged to have been made by him.

No such claim seems to have been asserted before the referee, nor any evidence offered in its support. He has, therefore, made no ruling either on the admission or rejection of the claim. Its (60) character is not pointed out in the exception itself, nor any reason suggested why it should be allowed. It would defeat all the desirable objects and advantages of a reference if a party may slumber upon his rights, or, if present, fail to assert and sustain them by proof before the referee, and then complain of the omission of the latter to pass upon a claim of which he had no notice and no information. This cannot be allowed. *Green v. Jones,* 78 N. C., 265.

2. For that the plaintiffs have no credit for the value of their stock.

It does not appear that this claim was made before the referee, and, if it had been, it should have been disallowed. The proposed adjustment between the parties, the proper mode of doing which is intimated in the opinion in the cases cited, is upon the basis of an actual loan of money and subsequent partial payments therefor by the plaintiff, and, upon the settlement of the balance due, of the retirement of the redeemed shareholder from the association. It is unreasonable to permit him to retain his original stock and participate in the profits of a business equally with those who have made their required and regular contributions to the common fund, while he withdraws and appropriates his own to the discharge of a debt, and actually pays nothing. To retain the property in his stock, he must conform to the general regulations, and contribute as others are required to do. Instead of this, he prefers to put an end to his relations with the association, and ceases to have any further interest in its affairs. He is thus, by his own voluntary act, a shareholder no longer.

3. That interest is not allowed on the plaintiff's successive payments.

Interest is allowed upon the items of an independent account when

used as a set-off or counterclaim to extinguish or reduce a debt,
(61) but is not to be computed upon *payments,* as such, whose effect is to reduce *pro tanto* the sum due, interest being first discharged. This rule of computation is laid down in *Bunn v. Moore,* 2 N. C., 279, and in *North v. Mallett,* 3 N. C., 151, and has been recognized and followed since. Same rule laid down in *Story v. Livingston,* 13 Peters, 359.

Fourth, fifth and sixth exceptions: For that the plaintiff is charged with premiums paid the defendant for insurance on the buildings upon the mortgaged land.

The jury find, upon issues submitted to them, that the plaintiff failed to insure the premises, and the defendant, in consequence, effected the insurance and paid therefor the several sums charged against the defendant in the account. The mortgage contains a clause authorizing this to be done. Among the covenants of the mortgagor are, that "he will keep the buildings on said premises during the said time in good repair, and insured"; and (in the third clause) "that the said association shall have the privilege of insuring the said buildings and paying all taxes and charges on the said lands in case of the failure of the party of the first part (the mortgagor) so to do." The charge is consequently a proper one, and was rightly allowed.

On the trial of the issue before the jury, a witness was permitted to prove the payment by the defendant of the insurance premiums, the plaintiff objecting to the evidence on the ground that the written receipt of the insurance company or its agent was the primary and only admissible proof. This objection is founded upon a misconception of the law applicable in this species of evidence. A receipt or memorandum in writing, acknowledging the payment of money, when executed by a stranger to the action, is not only not the best evidence of payment, but, if offered, is inadmissible proof of the fact. It is but an unsworn declaration of the person executing it, and would be properly rejected
(62) by the Court for this reason. It was entirely competent to show the payment by any person present when it was made, and cognizant of the transaction. Such a writing given by one of the parties in the suit to the other is but an acknowledgment, and does not preclude direct testimony to the fact. *Smith v. Brown,* 10 N. C., 580; *Brown v. Brooks,* 52 N. C., 93; *Wilson v. Derr,* 69 N. C., 137; *Reynolds v. Magness,* 24 N. C., 26.

7. For that the plaintiff is charged with more money than he received by the sum of fifty dollars.

The vagueness of this as of the first exception is a sufficient reason for disregarding both, and what we have already said in considering the one applies with equal force and pertinency to the other. But a full and satisfactory answer is found in what is said by the Court below

as a reason for overruling it: "That the report of the referee showed that the plaintiffs were charged with no more money than in their complaint they allege they received from the defendant."

The plaintiffs further except that other matters of controversy in regard to the report were not permitted to go to the jury. It is perfectly well settled that the right to a trial by jury of the facts passed on by the referee does not extend to a reference by consent. *Lippard v. Roseman,* 70 N. C., 34, and same case 72 N. C., 427; *Atkinson v. Whitehead,* 77 N. C., 418, and other cases. Was this a reference by consent? We are inclined to think it was, and for these reasons:

1. The plaintiff in his complaint (Art. 13) expresses a readiness and willingness to come to a fair and equitable settlement.

2. The defendant submits in his answer (Art. 12) to the account and settlement proposed by the plaintiff.

3. The matters of account are a proper subject of reference, and no opposition was made to the order by either.

In *Atkinson v. Whitehead, supra,* an order was made in these words: "Referred on motion of plaintiffs to B. W. Brown to (63) state account." BYNUM, J., discussing the character of this order, says: "After the pleadings were all in and the issues joined upon the motion of the plaintiffs themselves, the reference was ordered by the Court to take and state the account between the parties. This motion was *not opposed,* that is, it was *assented to* by the defendant. The reference was, therefore, by consent, and is the mode of trial selected by the parties, and is a waiver of the right of trial by jury." The plaintiff was here demanding a jury, while at his instance the reference was directed, but it could only be by consent, when the consent was mutual, concurred in by both. The rights of the contesting parties are not varied because one of them asked for the order. It is binding equally on both or on neither, and the same consequences follow to each.

The right, however, to have issues framed for a jury trial of facts contained in the report, must be confined to such controverted facts as were presented to the referee and required his decision, and the verdict is a mode of reviewing his findings. This is an anomalous practice, and should not be extended. Indeed, it may be questioned, as the correctness of the opinion in *Armfield v. Brown,* 70 N. C., 27, was in the dissenting views of a member of the Court at the time, whether the recent amendments of the Constitution do not change the law, as then declared, and restore the power exercised by the courts of equity under the former system of disposing of exceptions to a referee's report without the intervention of a jury. But we are not required, and we forbear to express an opinion of the full extent and measure of these constitutional changes.

There have been other points brought into the argument, such as the legal capacity of the defendant to make loans and collect interest, and the presence of usurious taint in the transactions themselves,
(64) which are not essential to the determination of the cause. There was in fact no lending of money, but a redemption or calling in of stock at an agreed price, on the terms and under the regulations adopted by the shareholders and carried out substantially in the provisions of the mortgage deeds. The only interest stipulated to be paid was at the rate of eight per cent upon the future contemplated value of the stock, until the maximum was reached. As the rate of interest is thus established by the contract, and the consideration received for redemption was in fact money, in the view of the Court which decided *Mills v. Building and Loan Association, supra,* the solution of the controversy was to be attained by treating the vendor as borrower, the vendee as lender, and the sum received as money loaned, and adopting the conventional interest allowed by law. The Court in that case say: "If the parties should desire to settle upon the basis of what we have intimated, there will be an account stated, charging the plaintiff with $379 and interest at six per cent, that being the rate agreed on up to the time of stating the account. He will then have credit for all the interest, dues and fines, and all other payments, if any, which he has made, with interest thereon from the time the payments were made, and the balance will be the amount due the defendant. This will be a charge upon the land under the mortgage, and for it the land may be sold after a reasonable time." Upon this principle the account is stated, and by this the defendant is willing to abide. Surely the plaintiff can find in it no just ground of complaint.

The plaintiffs seek relief from what they deem an oppressive and usurious contract, and a court of equity grants it only on condition that they pay what they owe, with lawful interest.

This is the full measure of relief to which they are entitled,
(65) and this is secured to them by the referee's report.

Affirmed.

Cited: Grant v. Reese, 82 N. C., 74; *Currie v. McNeill,* 83 N. C., 181; *Hoskins v. B. and L. Asso.,* 84 N. C., 838; *Carr v. Askew,* 94 N. C., 211; *Vaughan v. Llewellyn, Id.,* 478; *Wiley v. Logan,* 95 N. C., 362; *Yelverton v. Coley,* 101 N. C., 250; *Rowland v. Loan Asso.,* 115 N. C., 829; *Meroney v. Loan Asso.,* 116 N. C., 909; *Aiken v. Cantrell,* 127 N. C., 417.

WEILLER & CO. v. S. M. LAWRENCE and another.

Practice—Supplemental Proceedings—Notice.

1. Section 346 of C. C. P., requiring eight days' notice of motions generally, has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by Section 264 of The Code, which refers the *time* and place of examination to the discretion of the court or judge.

Obiter: If the notice were insufficient, *it seems* that the proper course would be to retain the case until full time for appearance had been given.

2. An affidavit is insufficient to warrant the examination of the judgment debtor, if it does not negative property in the defendant liable to execution *and* the existence of equitable interests which may be subjected by sale in the nature of execution; but the omission of such negative averments may be remedied by amendment at the hearing.

3. Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return.

4. A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a sufficient demand.

PROCEEDING supplementary the execution under C. C. P., sec. 264, heard at Chambers in Jackson, NORTHAMPTON, on 11 April, 1879, before *Eure, J.*

The plaintiffs recovered a judgment against the defendants, S. M. Lawrence and A. B. Daughtry, partners in trade, before (66) a justice of the peace, on 29 March, 1879, and had it docketed in the Superior Court. An execution was issued thereon on 8 April, 1879, and, upon affidavit of plaintiffs, an order for examination was made, returnable before the Judge at Chambers. The defendants appeared specially and moved to dismiss the proceeding and discharge said order, for that only three days notice had been given. In reply, the plaintiffs insisted that the notice was sufficient in law, but offered to continue the case to a day which would suit the convenience of defendants. It was further objected that the plaintiffs' affidavit did not show that defendants had no property which could be sold under proceedings in the nature of execution to enforce its sale; and, without admitting the force of the objection, the plaintiffs asked and obtained leave to amend the affidavit so as to meet the objection. The amendment was allowed, and the defendants excepted. It was also contended by defendants that this proceeding could not be maintained against joint debtors, unless the affidavit showed that the execution had been returned unsatisfied in whole or in part.

The motion to dismiss was overruled, and the defendants filed their answer. It was then admitted that no demand or request was made on

defendants to apply any of their property to plaintiffs' debt, other than the issuing the summons, obtaining judgment, and issuing execution. The Court also refused to dismiss upon this ground, and ordered the examination to be had before N. R. Odom, Clerk of the Superior Court, at his office in Jackson, upon ten days' notice to each party. From which ruling the defendants appealed.

Messrs. R. B. Peebles and *B. S. Gay* for plaintiffs.
Messrs. W. Bagley and *Mullen & Moore* for defendants.

(67) DILLARD, J. The plaintiffs having judgment duly docketed against defendants as partners in business, issued their execution, and while the same was in the hands of the Sheriff, applied to the Judge of the district for an order to examine the defendants on proceedings supplementary to execution.

His Honor ordered the examination before himself at Chambers, and issued a notice to the defendants on the 8th of April, returnable before him on the 11th, and at the return day defendants appeared specially on a notice to discharge the order of examination and to dismiss the proceedings, on the grounds which, together with the rulings of the Judge thereon, will be separately mentioned and considered.

1. The defendants moved the dismission, for that they had had but three days notice, and the same in law was insufficient, insisting that they were entitled to eight days notice under C. C. P., sec. 346. This section of the Code is a part of the chapter regulating the subject of motions generally, and the eight days prescribed therein is to be ordinarily observed, but there is a distinct provision in regard to supplementary proceedings in section 264, wherein it is provided that the debtor may be required to appear and answer concerning his property before the Court or Judge at a *time and place* specified in the order, and from this phraseology it is to be taken that the eight days notice insisted upon under section 346 does not apply, for it is manifest from the language aforesaid that it was competent to the Judge to name the place and fix upon the time according to his discretion under all the circumstances. He might in some cases make it longer; in others, he might make it shorter, according to the emergency, upon the facts disclosed in the affidavit, having a due regard to the convenience of the parties and the necessity for a speedy examination. His Honor, however, did not require the defendants to submit to an examination on the return day of the notice, but made a new order of examination, and
(68) ordered the examination to be had before N. R. Odom, Clerk of the Superior Court, at his office, on ten days notice to each party of the time and place, and thus a reasonable opportunity was afforded

the defendants to make ready. This action of the Judge derives support from the ruling of this Court in the case of *Guion v. Melvin,* 69 N. C., 242, wherein it was held that, on a summons requiring a party to appear on a day certain, which was short of twenty days after the service, the Judge of Probate should not have dismissed the case, but continued it so as to give the party full time for appearance. We think, therefore, the defendants have no just cause of complaint of his Honor's action on this point.

2. It was moved to dismiss on the ground that the affidavit of the plaintiffs was insufficient to warrant the order of examination, in that whilst it negatived property in the defendants liable to execution, it did not negative the existence of equitable interests, which could be reached by proceedings to enforce a sale in the nature of an execution. It was certainly necessary that the affidavit should be thus definite, as decided by this Court in the cases of *McKeithan v. Walker,* 66 N. C., 95, and *Hutchison v. Symons,* 67 N. C., 156; and so when the motion was made, the affidavit being defective, the order of examination and proceedings should have been set aside and dismissed, if the plaintiffs stood upon the sufficiency thereof; but on the mention of the defect, they at once, in order to obviate the objection, asked leave to amend their affidavit.

His Honor allowed the amendment, and it was forthwith made so as to negative both the existence of property which could be reached by execution, and of equitable interests which could be reached by proceedings for the sale of the same, in the nature of an execution. And the question is, was his Honor right in allowing the amendment of the affidavit? It is urged by defendants that as their motion was grounded on the insufficiency of the plaintiff's affidavit, and without any affidavit on their part, it was inadmissible to allow any new (69) affidavit or amendment of the one already filed on the part of the plaintiffs; and for this position they rely on the authority of this Court in the cases of *Brown v. Hawkins,* 65 N. C., 645, and *Clark v. Clark,* 64 N. C., 150.

The cases cited were motions to vacate attachments, and it was therein decided that if the motion was based on the insufficiency of the plaintiff's affidavit alone, it was incompetent to resist the same by any affidavit in addition to the one on which the attachment was issued as per C. C. P., sec. 213; and the same ruling was made by this Court as to motions to vacate an injunction under C. C. P., sec. 196, and as to motions to vacate an order of arrest under C. C. P., sec. 175. In all these instances the Court was bound by the express provisions of the Code, and there was no power or discretion to rule otherwise. But in regard to supplementary proceedings there is no such provision in the statute, and so the Judge was at liberty when the defect was exhibited

to allow the amendment by inserting other provisions therein, under the liberal powers contained in C. C. P., sec. 132.

The Judge, on the motion to dismiss, assuredly had the power to set aside the order of examination and dismiss the proceedings *eo instante,* to allow the amendment and to make a new order of examination, and this his Honor in effect did; he allowed the amendment at once and ordered an examination to be had, not before him, as at first, but before Mr. Odom in his office in Jackson, on ten days notice of the time and place. It seems to us, therefore, in the absence of any statutory prohibitions, as in the provisional remedies before mentioned, the allowance of amendment was in furtherance of justice, and within the competent authority of his Honor.

3. It was objected that supplementary proceedings did not lie against joint debtors, unless it appeared that the execution had been returned *unsatisfied.* Under the first part of section 264 of the Code, the
(70) remedy is given as to the judgment debtor, or any one of several debtors in the same judgment, *after* execution returned *unsatisfied,* and this is construed to extend the case of a single debtor, or to joint debtors, and is not controverted by the counsel for defendants. But in the second part of said section the remedy is given, when the execution is *still* in the hands of the Sheriff, and is described as extending to *any judgment* debtor; and from the difference of the phraseology in the two cases, it is argued that in the last case the defendants, being joint debtors, are not liable to be examined in such a proceeding. In our opinion, the language used in the case of an execution *unreturned,* "any judgment debtor," is as broad as the words employed in the case of an execution *returned,* "the judgment debtor, or any one of several debtors in the same judgment," and was intended to embrace, and does embrace, the case of the defendants as joint debtors. The history of the section in the New York Code, from which section 264 in our Code is copied, confirms this view; at first the Code provided the remedy as extending to the judgment debtor, or any one of several debtors in the same judgment, on the return of an *execution unsatisfied,* and, afterwards, by amendment, it was authorized in the case of an execution *issued and in the hands of the Sheriff.* 2 Whitaker's Prac., 665. And the construction and practice in that State were, that joint debtors were embraced alike under each part of the section, and in all cases, except where a judgment was taken against joint debtors on service of a summons on but one as authorized by the Code, and this was provided for by another amendment in 1863, restricting the examination of the debtor, not served, to the joint property, and after execution returned unsatisfied. This last provision is contained in our Code, and is the second clause in section 266, and the remedy therein extended to joint

debtors in a judgment obtained on service of summons on but one, indicates and establishes that joint debtors included in a (71) judgment founded on a service on all, was already provided for in section 264.

Our attention has been called to the decision of this Court in the case of *Howey v. Miller,* 67 N. C., 459, and it is claimed that the point there decided is adverse to the conclusion to which we have arrived. In that case the decision was that a debtor to one of several judgment debtors might not voluntarily pay his debt to the Sheriff having an execution in his hands, but could only do so under section 265 of the Code, when the judgment was against a single debtor. It decided nothing as to the payment of a debt due to partners, and certainly nothing as to a compulsory payment by order of the Court on a judgment against partners for a joint debt, on supplementary proceedings as provided for in C. C. P., sec. 266. We therefore conclude that the remedy does extend to joint debtors, and his Honor ruled correctly as to this ground.

4. The defendants failing in their motion to dismiss on these several grounds, urged that no demand had been made on them, and that they had never refused to apply their property to the satisfaction of plaintiffs' debt, and therefore the plaintiffs were not entitled to an order for their examination. In our opinion, suit brought and all the proceedings up to judgment, and execution issued and placed in the hands of the Sheriff, was in law a demand; and during all the while it was the duty of the defendants to comply with the demand thus made, by devoting their property to the payment of the debt, and their non-compliance was a refusal within the intent and meaning of the statute, and authorized the remedy. It certainly cannot be that the plaintiffs, before they can resort to the remedy, have to make a personal demand and have a formal refusal; if so, then in case a debtor should be fraudulently inclined, such a course would be notice to put away and secrete the property and render the proceedings fruitless.

It is enough that the defendants, in disregard of their obligation, refused in the sense before explained, to devote their prop- (72) erty to the payment of plaintiffs' debt, which had been demanded by suit brought and the proceedings to judgment.

We concur with his Honor in his ruling on this and all the grounds of the motion to dismiss. The examination may be had as ordered.

Affirmed.

Cited: Hinsdale v. Sinclair, 83 N. C., 343; *Strayhorn v. Blalock,* 92 N. C., 294; *Hackney v. Arrington,* 99 N. C., 112; *Turner v. Holden,* 109 N. C., 185, 187.

In the matter of J. M. DAVES.

Practice—Contempt—Appeal.

1. Where it appears from an examination under supplementary proceedings that the judgment debtor holds a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it is error for the court to order such third person to deliver the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order is to sell the corn and apply the proceeds to the debt.
2. It is incumbent upon the judgment creditor, claiming under such erroneous order, to demand the corn in a reasonable time, and if he fail to do so, and in the interval the judgment defendant get judgment against his debtor and take the corn in satisfaction, the latter is not guilty of a contempt of court in consenting to the seizure.
3. An appeal does not lie from a judgment imposing a penalty for a contempt committed in the presence of the court, or so near as to interfere with its business, but the lawfulness of the power exercised is a proper subject for review in cases where the right to punish depends upon a "wilful disobedience" of "any process or order lawfully issued." Bat. Rev., Chap. 24, Sec. 1, (4).
4. A rule to show cause why a party should not be attached for contempt in disregarding the order of a court, should not be granted on mere motion, but should be based on the affidavit of the party moving the attachment, or other satisfactory evidence.

(73) PROCEEDING for contempt, heard on appeal at Spring Term, 1879, of MACON, before *Gudger, J.*

This proceeding was commenced before the Clerk, under sec. 266 of the Code, in an action wherein W. A. Cabe was plaintiff and W. A. Patton defendant. His Honor affirmed the ruling of the Clerk that the answer to the rule upon the facts set out in the opinion was insufficient, and that a fine of fifty dollars be imposed, and Daves appealed.

Messrs. A. T. & T. F. Davidson for the appellant.
Messrs. Reade, Busbee & Busbee, contra.

SMITH, C. J. The plaintiff's execution being returned unsatisfied, he made affidavit that one James M. Daves was indebted to the judgment debtor in a sum exceeding ten dollars, and obtained an order from the Court requiring him to appear and answer the same. On 21 November, 1877, Daves appeared according to the summons and put in his answer on oath, admitting his indebtedness to the defendant Patton, in the amount of twenty-four dollars, to be paid in corn at the price of fifty cents per bushel, during the fall or when gathered and shucked.

The Court thereupon adjudged that the said Daves pay to the
(74) plaintiff thirty-one and three-fourths bushels of corn according to his contract with the judgment debtor. On 27 March, 1879, the Court, at the instance of the plaintiff, and, so far as the case dis-

closes, without evidence from his affidavit or otherwise of disobedience of the order, issued a citation requiring the said Daves to appear and show cause why he should not be attached for contempt. In answer to the rule he stated that soon after the order was made he sent as many as three messages to the plaintiff to come and get the corn, and the plaintiff failed to do so, and that Patton, the defendant, had recovered judgment against him on the contract, and had come and been paid in full in the corn. There was no other evidence before the Court, and it was adjudged that the answer did not purge the contempt, and that Daves pay a fine of fifty dollars. From this judgment he appealed.

The order requiring the delivery to the plaintiff of a specific quantity of corn, at the stipulated price equal to the debt, in satisfaction, was not warranted by the facts contained in Daves' answer. The plaintiff was entitled to be paid out of the corn, and by a sale of so much of it as was necessary for the purpose, and no more. He could not claim the benefits of a good contract made by his debtor, nor is he liable for losses consequent upon a bad one. The corn should have been sold and the proceeds applied to the debt, and Daves should have been directed to deliver to a receiver or other appointee of the Court so much of the corn as, upon such sale, would suffice to pay the same. But as both contracting parties were before the Court, and neither makes objection to the form of the order, we notice the matter to rebut any inference of approval.

From the examination of the record the following facts appear:

1. No proper ground is laid by affidavit or otherwise to support the plaintiff's application for the rule to show cause, and it improvidently issues without any written suggestion that the order (75) has been disobeyed.

2. The statements contained in the appellant's answer are not controverted, modified or explained by any counter evidence from the plaintiff.

3. The appellant was prepared and willing to deliver the corn to the plaintiff, and so informed him by repeated messages, which were disregarded.

4. The corn was afterwards taken and removed by the defendant under a judgment recovered by him for the full amount due under the contract.

5. After the gathering of the crop designated in the contract, and that of the succeeding year, this proceeding is instituted, and it does not appear that meanwhile the plaintiff has made any demand for delivery.

The law of contempts is now regulated by the act of April 10, 1869, and among the enumerated acts which may be punished for contempt

is "wilful disobedience of any process or order lawfully issued by any Court." Bat. Rev., chap. 24, sec. 1 (4).

The facts in the present case, aside from the irregularities noticed, do not, in our opinion, constitute a case of "wilful disobedience" within the meaning of the law. The article to be delivered was of a perishable nature, and it was the duty of the plaintiff, in a reasonable time, to apply for and remove it, and the appellant to retain possession until this was done. No such application seems to have been made, and the loss must be ascribed to the plaintiff's own neglect, and upon him it must rest.

The plaintiff insists that an appeal does not lie from a judgment imposing a penalty for contempt. This is true as to that class of contempts which are committed in the presence of the Court, or so near as to interfere with its business, and the reasons for which are justly set out by NASH, C. J., in the opinion in *S. v. Mott,* 49 N. C., 449. But in cases like the present, where the right to punish depends upon
(76) a "wilful disobedience" of "any process or order lawfully issued," the lawfulness of the power exercised is a proper subject of review in this Court, as is held in *Bond v. Bond,* 69 N. C., 97.

Reversed.

Cited: Cromartie v. Commissioners, 85 N. C., 214; *Deaton In Re,* 105 N. C., 62; *Bristol v. Pearson,* 109 N. C., 721; *In Re Briggs,* 135 N. C., 129; *Ex Parte McCown,* 139 N. C., 96.

DANIEL S. MORRISON v. MARCUS A. BAKER.

Practice—Discretionary Power—Evidence—Statute of Frauds—Promise to Pay Debt of Another—Exceptions to Referee's Report.

1. An exception grounded upon the increased costs incurred by a delay in ordering several actions to be consolidated, will not be sustained. *It seems* that the consolidation of causes is an exercise of discretionary power from which no appeal lies.
2. A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best,* but as the *only* admissible evidence of its existence; and *hence,* a defendant, sought to be charged upon a parol engagement to answer the debt of another, need not plead the statute of frauds, but may object on the trial to any evidence of the alleged contract which is not in writing.
3. Where goods are furnished to A upon the unconditional promise of B to pay for them, this is not undertaking to pay the debt of another, but the personal debt of B.
4. An exception that a refereee "does not report many specific exceptions to particular items in an account" taken during the inquiry before him, is too indefinite to be passed upon an appeal.
5. Where, by the items of a reference, the referee's findings of fact are to be conclusive, it is not necessary to send up all the evidence taken,

but only so much as relates to findings excepted to as wanting the support of any evidence, or as resulting from the reception of improper evidence, against objection in apt time, or the rejection of proper evidence. In such cases the exception should set forth the evidence received or rejected or the facts found without evidence.

ACTION commenced in ROBESON and removed to and heard upon (77) exceptions to a referee's report at Fall Term, 1878, of RICHMOND, before *Buxton, J.*

The plaintiff brought three actions in a justice's court against the defendant, and alleged in his complaint that on or about 12 March, 1875, and from time to time thereafter until 10 April, 1875, the firm of Patterson & Co. sold and delivered goods and merchandise to defendant in certain amounts, due by account, and that defendant agreed to pay cash for the same; that plaintiff became the sole owner of the accounts of said firm, prior to the commencement of this action, and demanded judgment, etc.

The defendant denied the alleged indebtedness, and said that at the time of the sale of the goods the firm of Patterson & Co. was composed of John Patterson and the plaintiff, and that John Patterson was and still is indebted to the defendant in a certain sum, and asked that he be made a party to this action. Upon the trial before the justice of the peace Patterson was made a party; and from the judgment rendered against the defendant he appealed to the Superior Court, where, by consent of parties, the case was referred to Alfred Rowland.

1. Upon the hearing before the referee the defendant moved to consolidate the three cases, which motion was refused, and the defendant excepted. His Honor ordered "that the three cases be now consolidated, and that one bill of costs in the Superior Court in the further conduct of the cause shall only be taxed by the Clerk," and to (78) this ruling the defendant excepted.

2. The referee found as a fact that it was agreed between the plaintiff and defendant that Patterson & Co. (of which firm the plaintiff was a member and is now assignee of the claim in suit), should furnish to one McKinnon the necessary supplies to enable him (McKinnon) to carry out his contract for the grading of a part of the Fayetteville and Florence Railroad, as sub-contractor of defendant, and that the defendant agreed to pay for the same; and in accordance with this agreement the firm did furnish the supplies to McKinnon, amounting to the sums claimed in the three actions as aforesaid. The defendant excepted before the referee to any items in the several accounts, except bacon, flour, molasses and implements, and to such as were furnished under any general authority, written or verbal, from McKinnin to any of his servants or employees. This exception was overruled by the referee, and also by his Honor.

3. The defendant excepted to the report, in that "the referee overruled the specific exceptions of defendant to many items of the account, and has not set forth the specific exceptions in his report." His Honor overruled this exception.

4. The defendant further excepted to the report in that the referee has failed to set out the evidence in writing, which was taken before him; and thereby the defendant is precluded from making exceptions to certain portions of the evidence admitted by the referee and excepted to by the defendant before him. This was also overruled, and the Court gave judgment for the plaintiff for the amounts found due by the referee. From which judgment the defendant appealed.

Messrs. McNeill & McNeill for plaintiff.
Messrs. McRae & Broadfoot for defendant.

(79) SMITH, C. J. The plaintiff brought three actions against the defendant before a Justice of the Peace to recover the separated parts of a running and continuous account of merchandise sold and delivered, and from the judgment rendered thereon on 3 October, 1875, appealed to the Superior Court of Robeson County. A complaint, accompanied by the account as an exhibit, and answer, both in writing and in due form, were put in before the Justice, and constitute part of the transcript sent up in the appeal.

The case made up for this Court states, though the record does not disclose the fact, that at the first term to which the appeal was taken, the defendant moved for a consolidation of the three cases into one, and that motion was not passed on at the term. Subsequently, on defendant's application, the causes were removed to Richmond County, and at Fall Term, 1877, the following order was made: "By consent of parties these cases are referred to Alfred Rowland, whose decision on the facts is to be final, and upon law, to be subject to review. The referee is to pass upon the motion to consolidate now pending."

Upon the hearing before the referee he declined to order the consolidation, and made his report to the Court, to which several exceptions were taken by defendant, and are now to be considered.

1. The defendant excepted to the refusal of the referee to con-
(80) solidate the causes, which was sustained by the Court, and the order then made. The defendant now complains that the Court did not sooner act on this motion, and of the increased costs incurred by the delay. If the consolidation of causes is not an exercise of discretionary power from which an appeal does not lie—as was strongly intimated in the opinion of the Court in *Glenn v. Bank,* 70 N. C., 191—the order was in fact made, and most certainly the postponement of action and

the sufficiency of the reasons therefor are not subject to our review and correction. The exception can not be sustained.

2. The referee finds that the defendant contracted with the plaintiff, acting on behalf of the firm of Patterson & Co., of which he was a member, to pay for such supplies as the latter might furnish to one McKinnon to enable him to carry out his contract, as a sub-contractor, with the defendant to grade a part of a railroad, and that the articles set out in the accounts sued on were so furnished to McKinnon. The defendant contends that he ought not to be charged with goods supplied by McKinnon's direction, to his servants and employees, nor with any furnished to himself, except bacon, flour, molasses and implements; and having asked and obtained permission to set up a further defense under the statute of frauds, he insists that the alleged promise, if made, not being in writing, is void.

The referee decided against the defendant, and his ruling was, on exception, sustained by the Court. It was not necessary specially to insist in the pleadings, and then rely on the defense afforded by the statute, since its benefits would be equally secured by an objection to parol evidence of a contract required by law to be in writing. A promise to answer "the debt, default or miscarriage of another" must be in writing, to be valid and binding, and parol evidence is incompetent to prove it. A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best* (81) but as the *only admissible evidence of its existence.* But the facts found by the referee show that the statute of frauds has no application. The contract between Patterson & Co. (to whose claim the plaintiff succeeds as sole assignee of the firm) and defendant, was the *sole contract* in the case, and is not collateral to any entered into by McKinnon. The goods were supplied to him under an absolute and unconditional promise of defendant, not to see them paid, or to guarantee the payment by McKinnon, but to pay for them himself. In such case the contract is not within the statute.

Looking over the list of articles contained in the account, we see none that may not fairly come within the terms of the defendant's contract to pay for all necessary supplies to enable McKinnon to carry on and finish his own contract for grading, of which, necessarily, the latter must be left in a large degree to determine, rather than the sellers; and unless palpably outside the terms, were properly furnished on the faith of defendant's promise to pay. We therefore concur in the ruling of the referee and of the Court.

3. The defendant excepts that the referee does not report many specific exceptions to particular items in the account, taken during the inquiry before him. This exception is too indefinite to enable us to

determine whether the referee acted correctly or not. The *items* are all set out in the account, and if, of themselves, liable to objection, such objection should have been distinctly made, and the obnoxious charges pointed out.

4. The defendant objects again that the report is not accompanied with the evidence taken by the referee, whereby he is precluded from having his exceptions to the evidence then made, now passed on by the Court. The referee's findings of fact being final, the only reviewable exception to his action in regard to them, must be either to evidence received after objection, or offered and refused, or the want of
(82) evidence of a fact found. In either case, to bring the matter before the Court, the exception should specify the evidence alleged to have been improperly admitted or wrongfully excluded, or the fact found without evidence. An exception failing to do this is too vague to be considered and acted on. There was no necessity for reporting the evidence in full, because its sufficiency, if competent to prove the fact, is committed exclusively to the judgment of the referee, and can no more be revised than the finding of a jury. "An exception," says RODMAN, J., "will not be considered which does not specifically and distinctly point out the error alleged, and show wherein the error is conceived to consist, without the necessity of referring to the pleadings or proceedings, except for the verification of what is stated in the exception." *Brumble v. Brown,* 71 N. C., 513.

And again: "The error must be specially assigned or the exception will not be considered, and the evidence bearing on the question and showing the error of the Judge, must be singled out and referred to, either in the exception itself or in a brief of counsel filed in the case." *Green v. Castleberry,* 77 N. C., 164.

This was not done in taking the exception before the Judge in the Court below, nor in this Court does it distinctly appear what was the objection to the evidence, and consequently we are unable to pass on it.

Upon the well settled rules of this Court in cases of appeal, the error committed must be pointed out and shown, or the judgment will not be disturbed.

Affirmed.

Cited: Gulley v. Macey, 84 N. C., 444; *Wiley v. Logan,* 95 N. C., 362; *Tharrington v. Tharrington,* 99 N. C., 124; *Smith v. Smith,* 101 N. C., 463; *Holler v. Richards,* 102 N. C., 549; *Fortescue v. Crawford,* 105 N. C., 32; *Browning v. Berry,* 107 N. C., 235; *Vann v. Newsom,* 110 N. C., 125; *Williams v. Lumber Co.,* 118 N. C., 932; *House v. Russell,* 119 N. C., 547; *Cochran v. Improvement Co.,* 127 N. C., 389; *Winders v. Hill,* 144 N. C., 617; *Miller v. Monazite Co.,* 152 N. C., 609; *Peele v. Powell,* 156 N. C., 557, 566; *Whitehurst v. Padgett,* 157 N. C., 427.

(83)

B. W. BELL v. D. C. CUNNINGHAM.

Practice—Bankruptcy, When Pleaded—Supreme Court—Appeal.

1. Where a defendant, during the pendency of the action, obtained his discharge in bankruptcy, but failed to plead it and suffered judgment to be taken against him, he can not thereafter plead the discharge against a motion under C. C. P., Sec. 256, for leave to re-issue execution.
2. If the judgment of the court below is right, it will not be reversed on appeal, because the result below was reached by an erroneous process of reasoning.

MOTION for leave to issue execution, heard at Spring Term, 1879, of MACON Court, before *Gudger, J.*

The motion was made by the plaintiff before the Clerk of the Court where issues of fact were raised, and thereupon the case was transferred to the Superior Court, and a trial by jury being waived, the Judge found the facts, which are sufficiently stated in the opinion. The motion was granted, and the defendant appealed.

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

SMITH, C. J. The plaintiff, at Fall Term, 1870, of MACON, recovered judgment against the defendant, and the same having (84) become dormant, after notice and upon oath that no part of the debt had been paid, moved before the Clerk for leave to issue execution thereon. The defendant, in answer, filed his affidavit, in which he states that on 2 December, 1867, he instituted proceedings in the proper Bankrupt Court, and in September, 1869, obtained a decree of discharge from his debts; that the plaintiff did not prove his debt against the estate, and that the defendant has never, since he was declared a bankrupt, assumed or made himself liable for the debt. To this the plaintiff replies on oath that the defendant failed to set up the discharge as a defense to the plaintiff's action, and since filing his petition has repeatedly promised to pay the debt. The cause was then transferred to the Superior Court, and, by consent of parties, referred to the Judge to find the facts. His Honor found that the defendant filed his petition in bankruptcy and obtained his discharge as set out in his affidavit. That the plaintiff's action was then depending, and judgment recovered after the decree of discharge; that he did not avail himself of this defense by plea or otherwise; and as well before as after the decree, recognized and promised to pay the debt.

The Court thereupon granted the motion, and the defendant appealed.

The bankrupt act contemplates a suspension of any pending action

against the bankrupt until he obtains his discharge or his application therefor is refused, so that when allowed it may be interposed to defeat a recovery. It provides that "any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of the discharge." Bankrupt Act, Sec. 21; Bump. on Bankruptcy, 6th Ed., 441.

(85) The Judge does not find the date of the plaintiff's judgment, but as his allegation in this regard is not denied, we assume it to have been rendered, as stated in the notice and disclosed in the record, at Fall Term, 1870. The defendant then had an entire year, after receiving his discharge, to plead it in defense, and "as a full and ample bar" to the suit, and failed to avail himself of the opportunity. His answer offers no explanation of the delay and no excuse for the neglect.

In *Paschall v. Bullock,* 80 N. C., 329, the defendant was in like default, and also failed to set up his defense on a motion for leave to issue execution on a dormant judgment, and the Court says: "Here the defendant could have arrested further proceedings in the action, and with no sufficient excuse neglected to take advantage of the opportunity. Again, he failed to offer his discharge in opposition to the plaintiff's application for leave to issue execution, *if indeed it was not then too late to do so.* Defenses must be brought forward in apt time, and usually the judgment precludes all inquiry between the parties into matters antecedent to its rendition." The rule of practice here intimated applies with greater force to the facts of the present case. The defendant had his day in Court, and amply opportunity to bring forward his defense. He fails to make use of it, and permits the judgment to be entered. Now, without excuse for his negligence, and as a matter of right, he offers his discharge in opposition to the plaintiff's motion. The objection comes too late, and if its allowance were a matter of judicial discretion, would be less favorably entertained, inasmuch as the plaintiff's neglect to preserve the vitality of his judgment, and the consequent necessity of his present application, may be owing to the defendant's repeated assurances of an intention to pay the debt.

(86) It is argued for the defendant that upon the appeal the Court is confined to an examination of the grounds upon which the judgment was rendered. This is a misapprehension of the rule. The correctness of the judgment itself, upon the facts set out in the record, and not the sufficiency of the reasons assigned for rendering it, is the proper subject of consideration and review. If the judgment is right, it will not be reversed because the result is reached by an erroneous process of reasoning. The plaintiff is entitled to his motion, and the answer sets up no legal defense, and is not aided by the fact that an

undue prominence may have been given to the defendant's promises. The appellant must show error, or the judgment will be affirmed. *Davis v. Shaver,* 61 N. C., 18.

Affirmed.

Cited: Sanderson v. Daily, 83 N. C., 70; *Hughes v. McNider,* 90 N. C., 251; *Hughes v. Hodges,* 94 N. C., 61; *Peacock v. Stott,* 101 N. C., 153; *Bank v. Cotton Mills,* 115 N. C., 518.

A. L. SIMMONS and wife v. HENRY C. FOSCUE.

Supreme Court—Practice—Issues of Fact—Partition of Land—Report of Commissioners.

1. Where the evidence (instead of the deductions of facts therefrom) taken in the court below upon exceptions to the report of commissioners appointed to make partition of land, is sent up to this court with the record upon appeal; *Held,* that the case is not within the constitutional amendment, Art. IV, sec. 8, restoring to the supreme court the same jurisdiction over "issues of fact" and "questions of fact" as exercised by it prior to 1868.
2. But in such case, where the evidence does not conflict in any material point, this court will assume it to contain the admitted facts on which the rulings of the court below were based.
3. In such case, where it does not appear that the commissioners overlooked any material considerations in making partition of the land, their report should be confirmed.
4. Where two or three commissioners appointed to make partition of land met on the premises and in the presence of both parties to the action proceed to fill the vacancy occasioned by the absence of the third commissioner, neither party making objection thereto, *Held,* that it is too late to except on that account, after the commissioners have partitioned the land and filed their report; in such case the assent of both parties will be presumed.
5. On the hearing of exceptions to the report of commissioners in a proceeding to partition land, it is competent for the court to have evidence impeaching the fairness of the partition, and to set the same aside if the evidence is sufficient; and the action of the court in such case is not reviewable if no error in law is committed.

PETITION for partition of land, commenced in the Probate (87) Court, and heard on appeal at Spring Term, 1879, of JONES, before *Seymour, J.* The facts are stated in the opinion. The report of the commissioners was set aside by the Probate Court, and this ruling was affirmed by his Honor, and the plaintiffs appealed.

Messrs. Faircloth & Simmons for plaintiffs.
Messrs. A. G. Hubbard and *W. H. Bailey* for defendant.

SMITH, C. J. The plaintiffs filed their petition in the Probate Court for the partition of land held by them and the defendant as tenants in common, whereof they were entitled to one-fourth part, and the defendant to the residue. A decree for partition was made, and three commissioners appointed to divide the land, one of whom withdrew, and another person substituted in his place by the remaining commissioners without objection from either party, co-operated in executing the order. In their report, the share allotted to the defendant is charged with the payment of $1,030 to the share of the plaintiffs for equality of partition, and the whole property is valued at eight thousand dollars. The
(88) defendant excepted to the report, assigning as causes therefor the following:

1. For that the commissioners should have allotted to the plaintiffs one-fourth of the land in value, and not have ordered the payment of any money by the defendant, and that the land was susceptible of such division.

2. That they have overlooked the brick house.

3. That they have undervalued the widow's dower.

4. That nothing was allowed the defendant for his improvements.

5. That the commissioners making the report are not those appointed by the Court, and that the plaintiff A. L. Simmons undertook to excuse one of them from serving, and called on one Joseph Banks to act in his place, who unites with the other appointees in making the partition and report.

Upon argument, the Probate Judge set aside the report, and ordered another commission, and the plaintiffs appealed to the Superior Court. Affidavits were read at both hearings. In the latter Court, the first four exceptions were overruled, and the last sustained.

The evidence, instead of the deduction of fact therefrom, is sent up with the record, and upon this we are required to determine the sufficiency of the exceptions, and the ruling of the Court thereon. Ordinarily, we should feel constrained to return the cause for the findings of fact, or affirm the judgment because no error is apparent. The case is not within the recent constitutional amendment which restores to this Court the same jurisdiction over issues of fact and questions of fact which the former Supreme Court possessed, since proceedings for partition, although cognizable also in the Court of Equity, were usually brought in the County or Superior Court of Law, and, on appeals from the latter, questions of law alone could be considered and determined. Rev. Code, Chap. 33, Sec. 6. The present appeal
(89) must be assigned to this class of cases, or else the jurisdiction might be extended beyond its proper limits.

But as the statements made in the affidavits do not conflict, except

perhaps in estimates, and involve no question of credibility, we may assume them to contain the admitted facts on which the rulings of the Court below were based, and we are asked to correct the alleged errors. Taking the statements as true and in a sense most favorable to the defendant, his overruled exceptions find no support whatever in the evidence, and he has no just ground of complaint. It does not appear therefrom that a more fair and equitable division can be made, or that the brick house was overlooked, or that the dower encumbrance was underestimated; or that any injury results to the defendant by the omission of the commissioners to consider the improvements put on the land. If in the division and allotment of shares, that part which either party may have improved by the erection and repair of buildings, a judicious system of tillage, or otherwise, has been assigned to him, as, whenever practicable, should be done, the valuation of the land should be without regard to such improvements—as if more had been made—and thus each would get the benefit of his outlay upon the common property. *Pope v. Whitehead,* 68 N. C., 191; *Collett v. Henderson,* 80 N. C., 337.

As to the amount of expenditures of the tenants and the enhanced value of the land by reason thereof, the evidence shows no damage to have accrued to the defendant from the failure of the commissioners to estimate them, since, while the plaintiffs own but an undivided fourth, their expenditures upon the land and the increased value thereof are in excess of those of the defendant.

In sustaining the fifth exception, the Judge says: "I find from the affidavits that the defendant never assented to the substitution of a commissioner for one of those appointed." This is a finding of law, to support which the evidence is relied on, and which makes (90) it necessary to examine and see what the facts are. The defendant, in his own testimony, admits that he knew that the plaintiff had excused one of the commissioners and had substituted another in his stead; that he made no objection to this action of the plaintiffs, and was present when the commissioners were engaged in making the partition. The plaintiff A. L. Simmons gave similar testimony, adding that the defendant made statements before them "as to the value of the property."

E. M. Scott, one of the commissioners, in his affidavit, says that when himself and the other commissioner, Hargett, "met on the premises the third commissioner, Hudson, was absent, and that both parties, A. L. Simmons and H. C. Foscue, being present, called in Banks, neither party raising any objection."

We think these unexplained facts do show an assent on the part of the defendant to the substitution of a new for the retiring commissioner, and that it is too late, after such acquiescence, on finding their action

unfavorable, to make the objection. It should have been made, if at all, in apt time, and before the result was known. Aside from this, it is expressly provided by law that the report shall be sufficient when signed by two of their number, and it is not suggested that any undue or improper influence was exerted over them by their new associate, whose co-operation was not at all needed for the validity of their act. Bat. Rev., Chap. 84, Sec. 5; *Ibid.*, Chap. 108, Sec. 2. Indeed, the attending circumstances when he was called in, and the presence of both parties when the decision was made, repel any such inference. We suppose that the commissioners and the parties were under the impression that three must concur, and hence the third person was asked to come in and act.

We may remark in this connection, that while there is nothing upon the face of the report to warrant its being set aside for apparent inequality or unfairness, in opposition to the contrary presumption
(91) arising from its being the act of sworn officers, as was declared in *Nicelar v. Barbrick,* 18 N. C., 257, it was entirely competent to hear evidence impeaching the fairness of the partition, and if satisfied of its sufficiency, the Court could have set it aside and ordered a new commissioner. But of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the Judge when called on to confirm the action of the commissioners, he alone must determine, and if no error in law is committed, we can not reverse his decision.

The judgment is reversed, and the report must be confirmed.

Reversed.

NOTE.—In a case between the same parties at this term:

SMITH, C. J. For the reasons given in the opinion filed in the plaintiff's appeal, it must be declared that there is no error in overruling the defendant's first four exceptions, and the judgment therein is affirmed.

Cited: Trull v. Rice, 92 N. C., 575; *Thompson v. Shemwell,* 93 N. C., 224; *McMillan v. McMillan,* 123 N. C., 580; *Taylor v. Carrow,* 156 N. C., 8; *Thompson v. Rospigliosi,* 162 N. C., 156.

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(92)

RICHMOND YOUNG, by his next friend, etc., v. ZEPHANIAH YOUNG and others.

Pleading—Complaint—Parties—Contract—Estoppel.

1. Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit. C. C. P., Sec. 126.

2. A complaint containing several causes of action, viz.: 1. To declare one defendant a trustee of land. 2. To recover judgment of other defendants for purchase-money of same. 3. And to recover possession of the land with damages for withholding it, is not demurrable.
3. Purchase money paid on agreement for sale of land is in equity considered as land, and if the contract be vacated after the death of the vendee, it goes to the heir; and *hence*, in an action to recover the same the heir is the proper party plaintiff.
4. A parol contract for the purchase of land is void under the statute of frauds, but the plaintiff's right of action in this case is thereby only affected *pro tanto*.
5. *Quaere*—As to whether under the circumstances of this case the defendants are not concluded by an equitable estoppel from denying the plaintiff's title.

ACTION, tried upon complaint and demurrer, at Spring Term, 1879, of YANCEY, before *Graves, J.*

Richmond Young, by his next friend, J. O. Griffith, plaintiff, against Zephaniah Young, Jr., Seth Young, B. S. Young and William Hutchins, defendants. The complaint states:

1. That Seth Young, some time in 1856, in order to advance B. S. Young, his son, permitted him to have and to hold a certain tract of land in Yancey county (describing it), and he sold said land, with the consent and approval of his father, to defendant William Hutchins; and Seth Young then and there delivered the grants and *mesne* conveyances which constituted the chain of title, to Hutchins, and also agreed by parol to convey the land to him, to obviate the necessity of making a deed to his son, and Hutchins paid the purchase-money to B. S. Young, the son, with the consent and approval of the father. That afterwards, in the year 1857, one Josiah Young intermarried with Ann Young, a daughter of Seth Young, and at request of his father-in-law, bought said land of Hutchins, agreeing by parol to pay him $225, the said Seth then and there also agreeing by parol to convey to Josiah upon payment of the purchase-money; that Josiah paid Hutchins the money according to agreement, and Hutchins delivered to him (93) the said grants and *mesne* conveyances, and he took possession of the land, and died before any conveyance was executed to him by Seth Young, leaving him surviving the plaintiff, Richmond Young, his only heir-at-law, a minor without guardian, and his widow, Ann Young, who returned to her father's and lived there for some years, during which time Seth Young took control of the land and enjoyed the rents and profits of the same; and, by some means unknown to the plaintiff, the said Seth and B. S. Young obtained possession of the grants and conveyances *aforesaid*.

2. That afterwards Seth Young, in fraud of the plaintiff's rights, and in violation of his parol agreement, entered into a conspiracy, as here-

inafter alleged, and conveyed the land to Zephaniah Young, who purchased, or pretended to purchase, the same, with full knowledge of plaintiff's rights and equity.

3. That afterwards the defendants, the Youngs, wilfully and unlawfully, did agree together to defraud the plaintiff out of his land, having obtained the grants and title papers as aforesaid; and in pursuance of such unlawful conspiracy, the said Seth conveyed the land to Zephaniah, to the great damage of the plaintiff, to-wit, to the amount of two thousand dollars.

4. That they now refuse to convey to plaintiff, and they and William Hutchins refuse to pay plaintiff the sum of $225, with interest; that Zephaniah is in possession of the land and refuses to surrender the same to plaintiff, and unlawfully withholds it, to the plaintiff's damage one thousand dollars.

Therefore, the plaintiff demands judgment:

1. For a decree declaring Zephaniah Young, Jr., a trustee for plaintiff's benefit, and that he be compelled to convey the land to plaintiff, and for a thousand dollars damages.

2. For a decree that the defendants shall pay to the plaintiff
(94) the sum of $225, with interest, and that this sum be declared a lien on the land, and in default of payment at such time as the Court may fix, then a writ of possession to issue to put the plaintiff in possession, there to remain until by the rents and profits of the land he shall be paid said sum and interest.

3. For such other and further relief as the case may demand, and for costs of action.

The defendants demurred to the complaint, for that it appeared upon its face:

1. That several causes of action have been improperly joined, one being to declare the defendant Zephaniah a trustee, a second being a money demand against William Hutchins and the other defendants for $225 and interest, and a third for the recovery of real property, with damages for withholding the same.

2. That the plaintiff has not the legal capacity to sue for said sum of money, the personal representative of said Josiah Young being the proper party plaintiff to sue for the same.

3. That the complaint does not state facts sufficient to constitute a cause of action, because there was no memorandum in writing, signed by the defendants, or either of them, of the pretended agreement or contract to convey said land, but that the same was in parol and void under the statute of frauds.

The Court overruled the demurrer, and gave judgment that defendants answer over, from which ruling they appealed.

Mr. J. M. Gudger for plaintiff.
Messrs. A. T. & T. F. Davidson for defendants.

ASHE, J. The complaint in this case unites two causes of action: first, that Zephaniah Young should be declared a trustee of the land described in the complaint, for the benefit of the plaintiff, (95) and that he be compelled to convey the same to him, and for damages; second, that Zephaniah Young, Seth Young, B. S. Young and William Hutchins are indebted to him for the purchase-money of the land in controversy, with interest, for which they are liable by reason of a conspiracy between them to cheat and defraud the plaintiff out of the land.

The defendants demurred to the complaint, and set forth in their demurrer three grounds of objection thereto:

First.—That several causes of action have been improperly joined, to-wit: 1. To declare Zephaniah Young, one of the defendants, a trustee of the lands mentioned in the complaint, for the plaintiff, and to compel him to convey to him the said land. 2. That defendants, William Hutchins, B. S. Seth and Zephaniah Young, are indebted to him in the sum of two hundred and twenty-five dollars, with interest. 3. That he seeks to recover real property, the land mentioned in the complaint.

Second.—That plaintiff has not the legal capacity to sue, for that the action should have been brought in the name of the executor or administrator of Josiah Young.

Third.—That the complaint does not state facts sufficient to constitute a cause of action, because the contract to convey the land was not reduced to writing, and was void under the statute of frauds.

The demurrer was overruled by the Court, and the defendants appealed to this Court.

While it was the object of the Legislature, by adopting C. C. P. 126, to avoid a multiplicity of suits and prevent protracted and vexatious litigation, the first sub-division of the section has given rise to more unprofitable litigation and fine-spun disquisitions upon its construction, than any other section, not excepting Section 343. In this State it was decided in *Land Co. v. Beatty,* 69 N. C., 329, that a cause of action in contract against one of two defendants could not be joined with a cause of action on the fraud of both; but Judge RODMAN, (96) who delivered the opinion of the Court, felt constrained to say that "it is difficult to give any exact meaning to that clause." And the late Chief Justice of the Court (PEARSON), in the case of *Hamlin v. Tucker,* 72 N. C., 502, referring to this clause, said: "The purpose being to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad

enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same subject of action, so that the Court may not be forced to take 'two bites at a cherry,' but may dispose of the whole subject of controversy and its incidents and corollaries in one action."

Unfortunately, it was this very purpose to obviate the necessity of forcing the Courts to take "two bites at a cherry" that has been the *fruitful* source of all the uncertain and unsatisfactory constructions of the clause, all of which might have been avoided and an easy solution of the difficulty attained if they could have anticipated and adopted the suggestion of the Chief Justice in his opinion above referred to, which is, "Should the action become so complicated and confused as to embarrass the Court in its investigation, the remedy furnished is, that the Court may, *ex mero motu,* refuse to pass upon matter not germane to the principal subject of action." But it will be borne in mind that this is only a *dictum* of the learned Judge.

In New York, the birthplace of The Code, Judge SUTHERLAND, in *Adams v. Bissell,* 28 Barb., 382, which was the case of a demurrer for a misjoinder of causes of action, under a similar section of The Code, in concluding his opinion, said: "Upon the whole, I have come to the conclusion that the plaintiff had the right to unite the two causes of action in the complaint; but I have done so, knowing that no reasoning
(97) on this point can have much logical precision, or lead to a satisfactory result." And Mr. Pomeroy, in his tratise on Remedies and Remedial Rights, criticises the opinion and says the Judge is "afloat as to the legal import of the subject of action." And we think he might truly have added that not a few other Judges and commentators are "afloat" upon the legal import of "the same transaction," "transactions connected with the same subject of action," "the object of the action," and "causes of action," and the nice and refined distinctions between them. So many and such diverse analyses of this sub-division of the section have been made by the Courts in those States which enjoy the blessings of the code system, that they have made "confusion worse confounded," to such an extent that Mr. Pomeroy, in his work above referred to, after citing a number of decisions and quoting copiously from them, is compelled to admit "that little help can be obtained from the foregoing judicial explanations." And so complex, uncertain and defiant of logic has the subject proved, that the Courts have failed to derive any said aid from even the "reason of the thing," that *dernier resort* of some Judges when all other resources have failed.

Before this section of The Code was adopted, the doctrine of multifariousness was generally understood by the profession, and as The Code has in the main conformed to the equity practice, it may be well

to look to those old landmarks for a guide through the mist that envelopes this subject.

We find it held that if the grounds be not entirely distinct and unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole, the objection of multifariousness does not arise. Story Eq. Pl., Sec. 271; *Bedsole v. Monroe,* 40 N. C., 313. And if the objects of the suit are single, and it happens that different persons have separate interests, in distinct questions which arise out of the single object, it necessarily follows (98) that such different persons must be brought before the Court in order that the suit may conclude the whole subject. *Salvidge v. Hyde,* 5 Mad. Ch. Rep., 138. The same doctrine was laid down by Chancellor WALWORTH in the case of *Boyd v. Hoyt,* 5 Paige, 78. And in the case of *Whaley v. Dawson,* 2 Sch. & Lef., 370, it was held that in English cases when demurrers, because the plaintiff demanded in his bill matters of distinct natures against several defendants not connected in interest have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct; and so it was held in the case of *Dimmock v. Vixby,* 20 Pick., 368, that where one general right is claimed by the plaintiff, although the defendants may have distinct and separate rights, the bill of complaint is not multifarious. All of these cases were decided upon the principle of preventing a multiplicity of suits, which was the object of the "clause" under consideration.

Applying the principles enunciated in the cases cited to our case, we are of the opinion the causes of action in the complaint were properly united, and the first ground of objection taken by the demurrer can not be sustained.

The second ground is also untenable. The action is rightfully brought by the plaintiff as heir of Josiah Young. The purchase-money paid upon an agreement for the sale of land is in equity considered as land, and if the contract is vacated after the death of the vendee, it goes to the heir. *Tate v. Conner,* 17 N. C., 224.

But the third ground of objection must be sustained, because it appears upon the face of the complaint that the contract for the purchase of the land was not reduced to writing, and is void under the statute of frauds. This, however, does not affect the plaintiff's right of action, only *pro tanto,* and he may prosecute his action against (99) the defendants, or such of them as he may be advised to proceed against. If it should be found there are too many defendants joined in the action, the joinder of the unnecessary parties may be treated as

surplusage, and the plaintiff may proceed against the real defendants. *Green v. Green,* 69 N. C., 294; *Rowland v. Gardner, Ibid.,* 53.

While we have sustained the third ground of demurrer, we would suggest, without meaning to intimate an opinion, that it may be worthy of consideration whether Seth Young, having the title, by advising and encouraging Josiah Young to expend his money for the land, and Hutchins to sell him his interest in it, is not concluded by an equitable estoppel from denying the title of Josiah Young; and whether Zephaniah, who purchased from Seth with full notice of all the facts and equities, is not also estopped.

Reversed.

Cited: Bank v. Harris, 84 N. C., 212; *Syme v. Bunting,* 86 N. C., 178; *England v. Garner, Id.,* 370; *King v. Farmer,* 88 N. C., 27; *Heggie v. Hill,* 95 N. C., 306; *Holler v. Richards,* 102 N. C., 549; *Vann v. Newsom,* 110 N. C., 125; *Outland v. Outland,* 113 N. C., 75; *Pretzfelder v. Ins. Co.,* 116 N. C., 496; *Benton v. Collins,* 118 N. C., 198; *Daniels v. Fowler,* 120 N. C., 16; *McCall v. Zachary,* 131 N. C., 469; *Fisher v. Trust Co.,* 138 N. C., 234, 243; *Oyster v. Mining Co.,* 140 N. C., 137; *Ricks v. Wilson,* 151 N. C., 49; *Quarry Co. v. Construction Co., Ib.,* 350; *Worth v. Trust Co.,* 152 N. C., 244; *Chemical Co. v. Floyd,* 158 N. C., 462.

Dist.: Loughran v. Giles, 110 N. C., 427, 428.

SALLY HILLIARD and others v. BRYAN PHILLIPS and others.

Evidence—Levy—Description in Deed.

1. Where, upon the trial of an issue of fraud in the sale of land, the fact that the grantor remained in possession after conveying, is competent evidence; any act or declaration of his, characterizing his possession as fraudulent or otherwise, is also competent.
2. A levy, made in 1846 under a justice's execution, which describes the land as lying "on the waters of Tyson Creek, adjoining the lands of Bryant Burroughs and others, containing two hundred acres, more or less," is sufficient under Rev. Code, Ch. 62, Sec. 16; and a sheriff's deed which conforms to such description confers, at least, color of title on the purchaser.
3. In such case parol evidence is admissible to fit the description to the land.

SMITH, C. J., dissenting.

(100) ACTION to recover land, tried at Spring Term, 1879, of CHATHAM, before *Buxton, J.*

The plaintiffs claimed the land in dispute as heirs at law of Ezekiel

Hilliard, deceased, and showed title out of the State by a grant to one Charles Shearing, dated 9 October, 1783, and put in evidence a deed from Dennis Phillips to James Hilliard, dated 22 August, 1835, and one from James Hilliard to their father, Ezekiel Hilliard, dated 2 December, 1841, conveying the same land. There was evidence that James Hilliard and family remained in possession after the execution of the deed to Ezekiel, with the consent of the latter and as his tenant, and that Ezekiel held his notes for rent of the land, and had paid James the purchase-money in full.

The defendants, conceding that James Hilliard was once owner of the land, claimed that defendant Bryan Phillips had obtained his title thereto, and alleged that the deed from James to his brother Ezekiel was without consideration, fraudulent and void against creditors, and read in evidence a Justice's judgment in favor of one Jesse Womble against James Hilliard for seventy-five dollars, with interest from 8 October, 1841, which judgment was rendered on 10 November, 1846. A levy was made and returned to the County Court of Chatham describing the land levied on as follows: "The land of defendant, in the county of Chatham, on the waters of Tyson Creek, adjoining the lands of Bryant Burroughs and others, containing two hundred acres, more or less." An order of sale was made at February Term, 1847, of said Court. A *venditioni exponas* issued, returnable to the ensuing term, in which the land is described as above, and under which the said (101) land was sold to Jesse Womble, who took the Sheriff's deed, dated 11 August, 1847, and the same was duly proved, registered, and put in evidence on the trial of this case, the description of the land conveyed therein conforming to the above levy. The plaintiff objected to the introduction of this deed in evidence, even as color of title, for the reason that the description was defective and no land was in fact conveyed by it. The Court held that it was not so defective but that it might be helped out by parol proof, overruled the objection, and admitted the evidence, and the plaintiffs excepted. And thereupon the defendants were allowed to prove that James Hilliard lived upon the land at the date of the levy, and owned no other land on Tyson Creek, etc. .

There was evidence that James Hilliard remained in possession after the execution of the Sheriff's deed to Womble, with the consent of Womble and as his tenant, and continued to remain thereon after Womble's death in 1854, by the consent of his widow, and until his (James Hilliard's) death in 1869; and that his family remained there until the defendant, Bryant Phillips, bought the land of the executor of Womble, after the expiration of the widow's life estate in 1876, and took possession. It was also proved that Ezekiel Hilliard never was in

actual possession of the land. The deed from Womble's executor to defendant, dated 15 February, 1876, was put in evidence.

The defendants then introduced the deposition of one Archibald Shields, and proposed to read as evidence the following question and answer:

Question—Did you ever hear James Hilliard say why he conveyed this land to Ezekiel Hilliard?

Answer—I heard him say that he did it to keep the land from being sold for his debts.

To which the plaintiffs objected, (1) because it was the declaration of James Hilliard made after his deed of 1841 to Ezekiel, the (102) father of plaintiffs, and (2) because it was not made in presence of Ezekiel. There being evidence that James was in possession at the time he made the declaration, the objection was overruled and the evidence admitted. Plaintiffs excepted.

It was also in evidence that previous to making the deed to Ezekiel, James Hilliard consulted his son Joe as to the disposition to be made of the land in order to avoid his creditors, and was advised to place it in the hands of Ezekiel, his brother; that Ezekiel never paid for it, but was holding it to keep James a home.

The plaintiffs asked for the following special instructions:

1. That both parties claiming under James Hilliard, neither party can deny James' title, and as James is estopped by his deed to deny Ezekiel's title, and as defendants claim under James, they are also estopped to deny Ezekiel's title, unless the jury shall find the deed from James to Ezekiel was made for a fraudulent purpose, with the knowledge and consent of Ezekiel. This was given.

2. That the deed from James to Ezekiel bearing date 2 December, 1841, was not fraudulent as to creditors, because there was no creditor in existence at the date of the deed. Refused.

3. That the deed from Sheriff to Womble, of 11 August, 1847, was not color of title, and possession under it is not adverse, and no parol testimony can supply the defects of description therein. Refused.

Upon refusal of the last instructions, the Court submitted the questions of the identity of the land levied on and conveyed by the Sheriff, the existence of creditors of James Hilliard at the date of his deed to Ezekiel, and the intent of the parties to said deed, whether fraudulent or not, to the determination of the jury upon the evidence in the (103) case; and plaintiffs excepted. Verdict for defendants, judgment, appeal by plaintiffs.

Mr. John Manning for plaintiffs.
Mr. John M. Moring for defendants.

ASHE, J. There are but two questions presented in this case, the consideration of which involves and will determine all the exceptions taken and instructions prayed for on the trial. And (104) they are:

1. Was there error in admitting the declarations of James Hilliard as to the fraudulent character of the deed executed by him to his brother Ezekiel Hilliard, after its execution and while he was still in possession of the land; and,

2. Was there error in admitting parol proof as to the identity of the land in the deed executed by the Sheriff to Jesse Womble?

As to the first point: We think it has been settled by the decision of this Court in *Yates v. Yates,* 76 N. C., 142. It was a case very similar in its facts to this. In that case the defendant offered in proof a written affidavit, made by the vendor of the plaintiff after the execution of the deed by him to plaintiff, that the plaintiff had no deed from him, and if he had, it was a forgery. The plaintiff objected to the reading of the affidavit, because it was an *ex parte* statement made by the vendor in the absence of the plaintiff, but the objection was overruled and the evidence admitted, the Court assigning as a reason for its ruling that the unchanged and continued possession of the supposed grantor was competent evidence to impeach the supposed deed. Twine's case, 1 Smith L. C. And the Court proceeds to say: "If the fact of possession is competent evidence, any acts or declarations of the possessor must also be competent as characterizing his possession. This has been very often held in cases where the question was whether a prior deed from the possessor had been made in fraud of his creditors. The cases on this point are numerous. I cite the most recent in this Court—*Kirby v Masten,* 70 N. C., 540." And it will be seen by reference to this case that it fully sustained the opinion of the Court. We, therefore, hold upon this authority that there was no error in the admission of the evidence.

As to the second point: We hold there was no error. The description of the land in the deed of the Sheriff to Jesse Womble corresponds with the return of the levy by the constable upon the (105) execution, and it conforms exactly to the requirements of the statute. Rev. Code, Chap. 62, Sec. 16. In *Brown v. Coble,* 76 N. C., 391, which was an action to recover land that had been sold under a decree in a petition for partition, and the petition described the land as that on which John Brown died seized and possessed in the county of Guilford, on the waters of "Stinking Quarter," etc., it was held to be sufficient; that the land might be identified by parol evidence. In *Parks v. Mason,* 52 N. C., 362, held, the levy is good if it follows the words of the statute, "although it may require extrinsic evidence to

identify it, as indeed," said Chief Justice RUFFIN, "may be the case with the most accurate description in a deed." In *Blanchard v. Blanchard,* 25 N. C., 105, where the levy did not conform to the terms of the description prescribed in the statute, it was held that the *onus* was thrown on the purchaser of showing by extrinsic evidence that the return does as completely identify the land as it would have been identified by a literal observance of the statute. To the same effect are *Huggins v. Ketchum,* 20 N. C., 550, and *Smith v. Low,* 24 N. C., 457. And again in *Moses v. Peak,* 48 N. C., 520, which was a deed, and the description of the land was "all our right, etc., that we have in and to certain tracts of land that belong to the heirs of Zachariah Peak, deceased, lying and being in the county of Macon and State of North Carolina, lying on the Elijah Creek and its waters, in District Eleven," the Court thought it sufficient to admit extrinsic evidence to fit the description to the thing.

Where the statute describes the terms of description to be used in a levy, and the deed of the Sheriff is executed to consummate the sale had by virtue of the levy, we see no reason why the same description in the deed should not be sufficient, and subject to the same rules of evidence in regard to identity. His Honor in the Court below (106) very properly submitted to the jury upon the evidence in the case the question of the identity of the land levied on and conveyed by the Sheriff, the existence of creditors of James Hilliard at the date of the deed to Ezekiel Hilliard, and the intent of the parties to said deed, whether fraudulent or not. The jury returned their verdict in favor of defendant, and the judgment of the Court was in accordance therewith.

SMITH, C. J., dissenting. I do not concur in the opinion of the Court as to the admissibility of the declarations of James Hilliard that he made the deed to his brother to prevent the land from being sold for his debts. The declaration does not qualify or explain the possession, nor disparage declarant's title, but is received as evidence of a pre-existing fact to impeach the validity and effect of his own act in conveying title. Its incompetency for such purpose is, in my opinion, fully established by the authorities. 1 Greenl. Ev., Secs. 109, 110; *Ward v. Saunders,* 28 N. C., 382; *Wise v. Wheeler, Ibid.,* 196; *Hodges v. Spicer,* 79 N. C., 223; *Burbank v. Wiley, Ibid.,* 501. In all these cases, except the first, the declarations of the party in possession who had made the conveyance, were offered as evidence of fraudulent intent, and ruled out. In *Wise v. Wheeler* the declarations were made, as an examination of the record shows, *after* the execution, and not before, as erroneously stated in the report.

No error.

Cited: Roberts v. Roberts, 82 N. C., 33; *Wharton v. Eborn,* 88 N. C., 346; *Gadsby v. Dyer,* 91 N. C., 315; *Woodley v. Hassell,* 94 N. C., 160; *Magee v. Blankenship,* 95 N. C., 568; *Blow v. Vaughan,* 105 N. C., 210; *Perry v. Scott,* 109 N. C., 384; *Bank v. Levy,* 138 N. C., 278; *Clary v. Hatton,* 152 N. C., 110.

(107)

E. MOLYNEUX and another v. G. W. HUEY and wife.

Evidence—Judgment, Vacation of—Superior Court—Attorney and Client.

1. The declarations of a deceased attorney contained in an affidavit of defendant on a motion to vacate a judgment are admissible in evidence, where it appears that neither the estate of said attorney nor the interest of anyone claiming from him can be affected by the event of the action. The provisions of Section 243 of The Code do not apply to such a case.
2. The superior Court has power to vacate its judgment at a subsequent term for sufficient cause shown (as here) where the judgment was confessed by defendant in pursuance of the advice of an attorney who was counsel for both parties to the action and upon a written agreement with him, reciting, that no execution should issue thereon until a certain time, that credits to which defendant was entitled to have endorsed on the note should be applied to the judgment, and, that the same shall not be docketed in any other county, and where said agreement was violated by the plaintiff. (The equitable jurisdiction of the court, discussed by ASHE, J.)
3. A judgment in a civil action may be rendered by consent after the expiration of the term; and a party thereto who fails at the time to interpose an objection waives his right, which amounts to an implied assent and concludes him.
4. A judgment obtained by the advice of an attorney acting for both parties to an adversary proceeding, may be vacated on application in due time of the party injured.

MOTION to set aside a judgment, heard at Spring Term, 1879, of HENDERSON, before *Gudger, J.*

The motion was allowed upon the facts set out in the opinion, and the plaintiffs appealed.

Mr. H. G. Ewart for plaintiffs. (108)

Messrs. Gray & Stamps and *W. W. Jones* for defendants.

ASHE, J. The facts of the case necessary to the consideration of the exceptions taken by the plaintiffs are, that the defendant Mary Huey, on 29 July, 1875, purchased from the plaintiffs a tract of land lying in the county of Henderson, together with a considerable amount of personal property, for which she agreed to pay eleven thousand dollars, and after paying four thousand dollars executed a deed of trust to J. G. Martin as trustee for the benefit of the plaintiffs to secure the balance of the purchase-money, due by installments and secured by notes

endorsed by her husband, the other defendant, the last of them falling on 1 January, 1882; and stipulated in said deed that if the whole of the purchase-money was not paid by that time, that then the trustee might advertise and sell the land. That the plaintiffs brought an action on two of these notes against the defendants to the August Term, 1877, of HENDERSON, and said J. G. Martin, who was the attorney for both parties in the case, advised the defendants not to defend the said action, but to confess a judgment on the same at the appearance term, promising that they should not be prejudiced thereby, nor be placed in a worse condition than in the deed of trust, and that it
(109) should not be enforced against them until 1882, nor be docketed in any other county in the State. That the agreement was reduced to writing and delivered to Martin for safe keeping and the protection of the defendants, but since his death it has not been found. That in pursuance of the advice of Martin in this agreement, they confessed judgment at the appearance term of said Court and paid the casts. Martin died on the .. day of ....., 187.., and soon after his death the plaintiffs sued out execution and placed it in the hands of the Sheriff of Henderson County, who has levied upon and advertised for sale the land conveyed in the deed of trust; and have had a transcript of the said judgment docketed in the county of Polk, where the defendants own some property. That defendants had a "drawback" on the purchase-money for a considerable amount of the personal property purchased at the same time with the land, but not delivered, which Martin promised should be credited on the notes upon which judgment was confessed, but he failed to give the credit, and judgment for the whole amount, to-wit, twenty-three hundred dollars, was confessed by defendants, with the understanding it was to be reduced by that credit. That in confessing the judgment the defendants were influenced by their attorney, Martin, and that he at the same time and in the same case was acting as attorney for the plaintiffs.

Upon this state of facts found by his Honor from the uncontroverted affidavit of the defendant G. W. Huey, the Court ordered and adjudged that the judgment taken by confession in this cause on 27 August, 1877, be vacated and set aside.

The motion of the defendants to vacate the judgment in this case was resisted upon two grounds:

1. Because the affidavit of G. W. Huey made to set aside the judgment was incompetent, purporting as it did to give the declara-
(110) tions of a deceased attorney, who was the counsel of plaintiffs, and also a trustee of both parties in the trust deed.

2. Because the motion was not made within a year and a day, as required by The Code.

The first objection was properly overruled by the Court. The evidence of the transaction and communication with Martin, as stated in the affidavit, was clearly admissible. It does not come within the purview of the proviso of Section 343 of The Code. It 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, then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person. The plaintiffs are not prosecuting this action as the executors or administrators of deceased Martin, or as any of the other characters enumerated. The object of the proviso in the section was to protect the estates of deceased persons and the interests of those claiming under or from them. Martin's estate, nor the interest of any one claiming from him, can be in any way affected by the event of this action. *Howerton v. Lattimer,* 68 N. C., 370; *Thomas v. Kelly,* 74 N. C., 416; *Isler v. Dewey,* 67 N. C., 93.

2. The second objection made by the plaintiffs that the motion of the defendants comes too late, and should have been made under Section 133 of The Code, within a year after the judgment, is equally untenable. The motion of the defendants is not made under the provisions of that section. The defendants invoked the aid of the equitable jurisdiction of the Court, which, under the old practice, would always be exercised to vacate a judgment at law where the defendant had been prevented from setting up his defense against the judgment, by fraud or accident or the act of the party, when he was himself in no default. 1 Story Eq., 252; Story Eq., Juris., Secs. 1573, 1574.

Or where the plaintiff has possessed himself improperly of something by means of which he has an unconscientious advant- (111) age at law. *Ibid.,* Sec. 896.

Or where one of the parties has failed to present his claim or defense because he has relied upon some agreement or understanding between himself and his adversary, which, if observed, rendered such presentation unnecessary.

And more especially where such agreement has been designed to lull a party into security, that some unconscientious advantage might be taken of him; as, for instance, where one was sued upon a note and mortgage, and the plaintiff, for a valuable consideration, released him from personal liability, but took judgment in violation of his agreement, and issued execution thereon; such execution was restrained on the ground that it was against conscience for the mortgagee to retain his advantage. Freeman on Judgments, 492; *Deaver v. Erwin,* 42 N. C., 250; *Stockton v. Briggs,* 58 N. C., 309; *Dobson v. Pierce,* 2 N. Y. Court of Appeals, 156; *Huggins v. King,* 3 Barb., 616.

The equity of the defendants is that by the promises and assurances of the plaintiffs' attorney, they have been prevented from making a defense which they might otherwise have set up; and the plaintiffs, by the agreement between their attorney and the defendants, have obtained a judgment, and secured a lien on the defendants' property in the county of Polk, in violation of the agreement, by which they have obtained an unconscientious advantage at law, an advantage which the Court of Equity, under the old system, would have put out of the way by a decree in a suit properly instituted for that purpose.

Under that system a Court of Law could, as it now may, set aside an irregular judgment at any time; but could not set aside at a subsequent term a judgment regularly rendered according to the course and practice of the Court. In such a case the party injured was driven for relief to a writ of error or a suit in equity, as the case might be. (112) But under our present judiciary system, as the functions of the Courts of Law and Equity are united in the same Court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, it would seem that the rule no longer exists to the extent of prohibiting a Superior Court from setting aside its judgment at a subsequent term for any sufficient cause that might have demanded the interposition of a Court of Equity under the old system. And the proper way to apply for such relief is by notice in the cause, or by a written petition, as was pursued in this case. *Jarman v. Saunders,* 64 N. C., 367; *Dobson v. Pearce, supra.*

3. But the plaintiffs, for a further exception, say the judgment rendered by his Honor vacating the confessed judgment, was a nullity, because it was drawn up and signed after the expiration of the term. Whether this objection would be fatal, we need not decide, for the Judge clearly has the right to render the judgment of the Court when it is done by consent, express or implied. This motion was discussed in Court, and his Honor pronounced his judgment in open Court, and requested the attorney for the defendants to draw it up, which was not done until after the adjournment of the Court. It was then drawn and signed by the Judge, and sent to the Clerk of Henderson Superior Court, and soon thereafter the plaintiffs' attorney carried the judgment to his Honor and asked for time to appeal, but did not then make any objection to the judgment being entered, which he should have done if he wished to take any exception to its not having been signed during the term; and his failure then to object was a waiver of his right of objection—an implied assent, and he is concluded. *Hervey v. Edmunds,* 68 N. C., 243.

But there is another reason why this confessed judgment should not be allowed to stand. Martin, as shown by the affidavit of the defendant, Huey, and by the facts as found by his Honor from the affidavit,

and nowhere denied, was the attorney of both parties in this (113) action. He had been the general counsel and attorney of each. And in this action he brought suit as attorney for the plaintiffs, and as counsel for the defendants advised them to confess judgment. This, of itself, is sufficient to vitiate the judgment. In *Moore v. Gidney,* 75 N. C., 34, the Court say, "The law does not tolerate that the same counsel may appear upon both sides of an adversary proceeding, even colorably; and in general will not permit a judgment so affected to stand, if made the subject of exception in due time by the parties injured thereby. The presumption in such cases is that the party injured was unduly influenced by that relation, and the opposite party can not take the benefit of it." The defendants took exception to the judgment at first term after ascertaining that the agreement had been violated; and they seem to have been unduly influenced and thrown off their guard by the implicit confidence they had in the fidelity and integrity of their counsel, who was also acting for the other party, and the plaintiffs are trying to take advantage of it.

This case very aptly illustrates the great impropriety of the same person acting as counsel for opposing parties. For had Martin, in place of essaying the vain attempt of subserving two antagonistic interests, acted solely as counsel for defendants, he would probably have advised them that besides their counter-claim for the deficiency in the personal property, they had a good defense to the action; and instead of advising them to confess judgment, would have set up for them the defense that, as the deed of trust was not to be foreclosed until 1882, when the last note will fall due, there was an implied credit upon all the notes secured in the trust, until then, upon the authority of the decision of this Court in the case of *Harshaw v. McKesson,* 66 N. C., 266, and 65 N. C., 688. (114)

There is no error. The judgment confessed or assented to by the defendants at the August Term, 1877, of HENDERSON, may be vacated, and the transcript of said judgment docketed in any other county upon proper application may be set aside.

Affirmed.

Cited: Badger v. Daniel, 82 N. C., 469; *Mabry v. Henry,* 83 N. C., 300; *McLean v. McLean,* 84 N. C., 371; *Shackelford v. Miller,* 91 N. C., 186; *Maxwell v. Blair,* 95 N. C., 321; *Grant v. Hughes,* 96 N. C., 188; *Bynum v. Powe,* 97 N. C., 378; *Gooch v. Peebles,* 105 N. C., 429; *Roberts v. R. R.,* 109 N. C., 671; *Cotton Mills v. Cotton Mills,* 116 N. C., 652; *Bank v. Gilmer,* 118 N. C., 670; *Ellis v. Massenburg,* 126 N. C., 134; *Hinton v. Jones,* 136 N. C., 56; *Johnson v. Johnson,* 141 N. C., 93; *Westhall v. Hoyle, Ib.,* 338; *Kerr v. Mosley,* 152 N. C., 224; *Holt v. Ziglar,* 159 N. C., 279.

J. L. CALDWELL v. J. S. NEELY.

Evidence—Boundary—Estoppel—Tenants in Common—Adverse Possession—Ouster.

1. Hearsay evidence of a deceased person relative to a question of boundary is only admissible when the person whose declaration is offered in evidence was disinterested at the time of making it.
2. When the adverse parties to an action involving the title to land derive their claims from the same person, neither is at liberty to dispute that person's title, or to assert a superior and better title in another, unless he has acquired that title, or, in some way connects himself with the true owner.
3. The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract.

(115) ACTION to recover land, tried at Fall Term, 1878, of MECKLENBURG, before *Schenck, J.*

The facts appear in the opinion. The question before the jury was, whether thirty years adverse possession was proved so as to take the title out of the State, and the Court charged if the jury were satisfied of this, they should find for the plaintiff; and declined to charge that both parties claimed under James Neely, and that therefore the defendant could not deny the plaintiff's right to recover the one-half as tenant by the curtesy of his wife's interest. There was a verdict for defendant, judgment, appeal by plaintiff.

Messrs. Jones & Johnston and *A. Burwell* for plaintiff.
Messrs. Wilson & Son and *Shipp & Bailey* for defendant.

SMITH, C. J. The plaintiff claims an estate for his own life in an undivided moiety of the lands described in his complaint, held by himself and the defendant as tenants in common. He derives title under one John Neely, who died intestate, leaving an only child, James Neely, to whom, as his heir-at-law, the same descended. James Neely also died intestate in the year 1834, leaving two daughters, one of whom married the plaintiff, had issue and died. The other daughter married one R. B. Caldwell, and they, by deed, in the year 1856, undertook to convey the whole tract and a full estate therein to the defendant. The defendant has been in possession since that date, and claims to be absolute owner.

To show title in John Neely, the plaintiff relied on his possession of thirty years, and to determine the boundaries up to which the possession extended, offered in evidence certain declarations of his deceased

wife, made soon after their marriage, in which she pointed out a certain hickory and stone corner as the boundaries of her father's land. The declarations were not received, because they proceeded from a party then interested in and claiming the lands; and this ruling is fully warranted by the cases of *Sasser v. Herring,* 14 N. C., 340, (116) and *Hedrick v. Gobble,* 63 N. C., 48. In the latter it was proposed to prove by the son that his deceased father under whom he claimed, "while in possession showed him certain marked lines as the boundary lines of the tract," and the Court say: "An exception to the general rule is that in regard to boundary hearsay evidence of a deceased person is admissible, but the person whose declaration is offered in evidence *must have been disinterested at the time* he made the declaration."

2. Another exception taken by the plaintiff is to the refusal of the Court to charge the jury that, both parties to the action claiming under James Neely, the defendant is not allowed to deny the descent from him to the daughters, from one of whom the plaintiff, and from the other the defendant, deduces title to a moiety of the land. While it is not expressly so stated, we must infer that such instruction was asked from the fact that "the Court declined" so to charge, and hence the exception is presented in the appeal. We think if the land was identified, the estoppel did ascend beyond the vonveyance to the defendant, to the source from which the *feme* bargainor derived her estate, the ancestor of the sisters and the common origin of both estates. It was not necessary to pursue the inquiry as to title beyond James Neely, and we see no reason why it should be arrested at an intermediate point. When the adversary parties to an action for the recovery of real estate derive their claims from one and the same person, neither it at liberty to dispute his title or to assert a superior and better title in another, unless he has acquired that title, or in some way connects himself with the true owner. *Copeland v. Sauls,* 46 N. C., 70; *Johnson v. Watts, Ibid.,* 228; *Feimster v. McRorie, Ibid.,* 547; *Barwick v. Wood,* 48 N. C., 306; *Brown v. Smith,* 53 N. C., 331.

It is equally well settled that the ouster of one tenant in common of land by a co-tenant will not be presumed from an ex- (117) clusive use of the common property and appropriation of its profits to himself for a less period than twenty years. *Cloud v. Webb,* 14 N. C., 317, reaffirmed on second appeal, 15 N. C., 290; *Covington v. Stewart,* 77 N. C., 148; *Neely v. Neely,* 79 N. C., 478.

The result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. The principle and reason for it are thus forcibly stated by PEARSON, C. J.: "If a tenant in common convey to a third person, the purchaser occupies the relation of a tenant in common, although *the deed purports to pass the*

whole tract, and he takes possession of the whole; for in contemplation of law his possession conforms to his *true* and not to his *pretended* title. He holds possession for his cotenant, and is not exposed to an action by reason of his making claim to the whole and having a purpose to exclude his fellow." *Day v. Howard,* 73 N. C., 1. The contrary doctrine had been declared in *Burton v. Murphy,* 4 N. C., 684, Sc.. 6, N. C., 339, and its correctness successfully assailed in the argument delivered in *Cloud v. Webb, supra,* when first before the Court, of which the Chief Justice in the opinion in *Day v. Howard* thus speaks: "In *Cloud v. Webb,* the effect of a tenancy in common is discussed by the late Patrick Winston with so much ability and learning, and the subject is so clearly set out, as to make it superfluous to say anything more; and I prefer giving him the credit of having disposed of the subject, rather than to attempt to make a rehash of it by borrowing his reflections and learning upon so abstruse a subject. The decision following the line of Mr. Winston's argument, declares that the estate of a tenant in common is not defeated by the fact that the co-tenants had conveyed their shares, and the grantees, and those claiming under them, had held possession of the whole, claiming to be entitled to the
(118) whole, and having exclusive possession, receiving rents and profits without claim or interruption from their co-tenant."

If, then, the tract whereof the ancestors, John and James Neely, had successive possession is ascertained upon the evidence to be the same mentioned in the complaint, the estoppel would apply unless the defendant has a paramount title derived from some other source, and the Court should have so instructed the jury.

Error. *Venire de Novo.*

Cited: Bell v. Adams, post, 121; *Ray v. Gardner,* 82 N. C., 147; *Mason v. McCormick,* 85 N. C., 228; *Christenbury v. King, Id.,* 234; *Whitehurst v. Pettipher,* 87 N. C., 180; *Ward v. Farmer,* 92 N. C., 97; *Gaylord v. Respass, Ib.,* 558; *Fisher v. Mining Co.,* 94 N. C., 399; *Bethea v. Byrd,* 95 N. C., 311; *Hicks v. Bullock,* 96 N. C., 171; *Page v. Branch,* 97 N. C., 102; *Hampton v. Wheeler,* 99 N. C., 226; *Dugger v. McKesson,* 100 N. C., 5; *Bonds v. Smith,* 106 N. C., 565; *Gilchrist v. Middleton,* 107 N. C., 681; *Ferguson v. Wright,* 113 N. C., 544; *Collins v. Swanson,* 121 N. C., 68; *Carson v. Carson,* 122 N. C., 647; *Roscoe v. Lumber Co.,* 124 N. C., 47; *Shannon v. Lamb,* 126 N. C., 46; *Allred v. Smith,* 135 N. C., 452; *Yow v. Hamilton,* 136 N. C., 359; *Woodlief v. Woodlief, Ib.,* 137, 138; *Hemphill v. Hemphill,* 138 N. C., 506; *Bullin v. Hancock, Ib.,* 202; *Campbell v. Everhart,* 139 N. C., 513; *Dobbins v. Dobbins,* 141 N. C., 217; *Lumber Co., v. Branch,* 150 N. C., 241; *Boggan v. Somers,* 152 N. C., 395; *Bowen v. Perkins,* 154 N. C., 451.

H. BELL and others v. LYNN ADAMS.

Evidence—Declarations of One in Possession of Land—Statute of Limitations—Parties—Deed, Construction of.

1. The declarations of one in possession of land are not admissible in evidence to show changes in the title of those for whom he holds.
2. When land, devised to several, is held by the heirs of one devisee adversely for more than twenty years, the other devisees and their heirs not under disability are barred by the statute of limitations.
3. In a proceeding for parttition of land, those having a reversionary interest in the land are necessary parties, as well as the life tenant.
4. B having an interest in a lot of land as tenant in common, conveyed the entire lot by deed with full warranty in 1834; afterwards a certain other share in the land descended to B upon the death of another tenant in common in 1840; *Held*, that the deed not only transferred the estate possessed by B at the date of its execution, but also has the effect, by way of *rebutter*, against the heirs of B, of passing the share thereafter inherited by him.

SPECIAL PROCEEDINGS for partition of land, commenced in the (119) Probate Court, and tried upon issue joined at January Special Term, 1879, of WAKE, before *Seymour, J.*

The opinion contains the facts. Judgment for plaintiffs, appeal by defendant.

Messrs. J. H. Fleming and *D. G. Fowle* for plaintiffs.
Messrs. W. H. Pace and *Battle & Mordecai* for defendant.

SMITH, C. J. Zadock Bell was in possession of a tract of land in the city of Raleigh, of which that described in the complaint forms a part, for more than fifteen years previous to his death in November, 1826, using it as his own, and devised it to his children. The testator had six children, of whom Jeremiah died in April of the same year, and the others survived him. Jeremiah left a widow and six children whose heirs-at-law are plaintiffs in the action, except such as have sold their shares and whose estate is vested in the defendant. In 1829, Lavinia, the widow, entered into possession of the lot, on behalf of her children and claiming it for them, and held adversely against all others, under a single enclosure until her death in 1852, a period of twenty-three years.

The plaintiffs allege that they are tenants in common with the defendant of that portion of the land proposed to be divided, and entitled to nineteen-thirtieths thereof, and the defendant to the remaining eleven-thirteenths. The defendant asserts a sole seizin in himself by virtue of a deed executed in June, 1862, by William Bell to W. W. Johnson, and a subsequent conveyance from the latter to himself.

It was proved on direct examination of a witness of the defendant

that Lavinia Bell, while in possession, had frequently been heard to say that the land belonged to her children, who had bought the place and let her live there. The defendant further proposed to show
(120) that in 1831 William Bell, at his own expense, had caused the lot to be enclosed with a fence; and also to give in evidence declarations of Lavinia during her occupancy, to the following effect:

1. That the northern part of the lot outside of that in controversy belonged to her daughter Nancy, mother of the plaintiff Julia Thompson.

2. That a stake driven into the ground in 1831 by one Brazier, a surveyor, was then pointed out by her as the place "where Nancy's line came to."

3. That the lot whereon she was living belonged to William and Nancy, and the latter owned the northern part.

4. That her children had bought the land at a sale at the courthouse door, and sold to William.

The evidence is offered to prove changes in the title of the tenants, presumed from the adverse and exclusive occupation for more than twenty years by the mother for all her children, whereby a sale and separate estate in one part of the lot has vested in Nancy, and in the other in William Bell. For such purpose the evidence was incompetent and was properly refused. The title to land can not be divested out of one living person by his declarations or admissions, not amounting to an estoppel, nor be transferred to another except by judicial decree under the statute, or deed duly proved and registered, or the presumption arising from long adverse occupancy. No other proof can supply the want of these. Still less are the declarations of one in possession receivable to show changes in the title of those for whom he holds. "No reason is perceived," says Mr. Greenleaf, "why every declaration accompanying the act of possession, whether in disparagement of the declarant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestae.*" 1 Greenl. Ev., Sec. 109. "It is to be observed," says the author in the next section, "that when declarations offered in evidence are merely *narrative*
(121) *of a past occurrence,* they can not be received as proof of the existence of such occurrence." *Ibid.,* Sec. 110.

Neither what was said by Lavinia about a dividing line between her children and Nancy and William, nor the ownership of separate portions of the lot by them, nor the sale and conveyances by which this was brought about, nor the construction of the fence by William, was competent to prove the facts stated or to alter the relations among the tenants in common of the lot, and consequently ought not to have been

heard by the jury, or allowed any such effect. There is no error in the rulings of the Court upon the admission of evidence.

At the conclusion of the evidence, the defendant's counsel submitted several propositions, in which he was overruled by the Court, that will now be noticed in succession:

1. There was no presumption of the death of all the descendants of the other devisees of Zadock Bell, and such as are living are entitled to a share in the common property. This is incorrect. If any such are still alive and not under disability, they are barred by the long possession of Lavinia for her children and their exclusion from all participation in the rents and profits for more than twenty years. *Day v. Howard,* 73 N. C., 1; *Covington v. Stewart,* 77 N. C., 148; and *Caldwell v. Neely,* at this term, *ante,* 114.

2. Lavinia Bell, by her own declarations, held subsequently the separated parcels for her children, Nancy and William, and not for them all. This is answered in what has already been said about the character and legal effect of her holding.

3. The heirs-at-law of Elizabeth Moss have a reversion only in their mother's share, subject to the life estate of their father as tenant by the curtesy, which has been conveyed to the defendant, and having no present estate, are not proper parties to the action. If this were so at the commencement of the action, the death of the life tenant makes them necessary parties. But in case of a divided estate held by (122) different persons in one share, to make partition effectual, both the life estate and the reversion or remainder should be represented by parties before the Court.

4. The deed from Balos Bell precludes his children from claiming any interest in the land. The point is well taken. The deed executed in 1834 undertakes to convey, with full warranty, an absolute estate in the entire lot, and besides transferring the share he then possessed, has the effect, by way of *rebutter,* against his heirs who are parties to the action, of passing the one-fifth part of the share of John, which, at his death, without issue, between 1840 and 1845, descended to Balos and others, his heirs-at-law. By the same descent, the share of William was similarly enlarged, and the estates of both, being twelve-thirtieths, or two-fifths, passed by his deed in 1862 to Johnson, and thence to the defendant. The children who died in 1851 are, by his deed, prevented from claiming any interest by inheritance from him. *Taylor v. Shufford,* 11 N. C., 116—opinion of HENDERSON, J., 126; *Southerland v. Stout,* 68 N. C., 446.

5. Julia Thompson is barred by the statute of limitations. There is nothing in the case to support this proposition, nor was it urged in argument, and it is dismissed without further comment.

The special verdict in finding that the heirs of Balos Bell, viz., Hilliard Bell, Susan Saunders, Martha Stubbins and Nancy Jelly, are entitled to one-thirtieth part of the lot, is not warranted by the facts proved and stated in the case, and the judgment thereon is erroneous. That fractional part should have been allowed to the defendant. For this error, the verdict must be set aside and a

Venire de Novo.

Cited: Gaylord v. Respass, 92 N. C., 558; *Starnes v. Hill,* 112 N. C., 26; *Zimmerman v. Robinson,* 114 N. C., 48.

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(123)

EDWARD KIDDER v. THOMAS C. McILHENNY and wife.

Evidence—Practice—Mortgage Securities—Usury—Foreclosure Sales.

1. Where the jury find that the note in suit was given in settlement of the final balance due on partnership transactions, all inquiry into the articles of co-partnership is immaterial.
2. Exceptions to evidence, and the reasons therefor, must be stated in apt time; and it is not admissible to urge one objection at the trial and a totally different one on appeal.
3. A party who fails to tender on the trial such issues as he deems proper, can not be heard on appeal to complain that the issues submitted do not cover the entire case.
4. A note made in 1868, for a debt then incurred, bearing eight per cent interest, is usurious, unless it be for borrowed money and both the rate and the consideration are set forth therein; but if the note be secured by a mortgage, the mortgagor can only redeem by paying the principal money and legal interest.
5. A note given in renewal of one secured by a mortgage, carries with it the original security.
6. The provisions of C. C. P., Sec. 259, relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others (as legatees, heirs, tenants and trustees) charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice.

APPEAL at Fall Term, 1878, of BRUNSWICK, from *Buxton, J.*

This was an action in the nature of a bill to foreclose a mortgage. The plaintiff alleged that defendant executed a note to him for forty-two hundred dollars on 27 April, 1868, and secured its payment by a mortgage upon certain lands. The defendant admitted the execu-
(124) tion of said deed, and avers that he did not make the note as alleged, but made a note at that time to the plaintiff, which, he is advised and believes, was not secured by the mortgage, and that seven years subsequent to the date of the mortgage he executed to the plaintiff

a promissory note which answers the description set out in the complaint, but not secured as alleged, and which was without consideration and void. The defendant further alleged that the plaintiff and he entered into a written contract, which has been continuously in possession of plaintiff for seven years past, the substance of which, according to his recollection, was for the purpose of cultivating a plantation of defendant for the year 1867, for their mutual benefit, the defendant binding himself to furnish the lands, upon which were valuable buildings and machinery suitable for the cultivation and management of the crops agreed to be cultivated, and the plaintiff binding himself to furnish the capital necessary therefor; which agreement was carried out for the year 1867, but, owing to the unprecedented rains, the crop was destroyed and lost; that after the loss occasioned as aforesaid, the plaintiff proposed that if defendant would execute a promissory note for the sum above mentioned at eight per cent interest, and secure the same by mortgage, the plaintiff would furnish money to cultivate the farm to recover the loss which had been mutually sustained, to which defendant assented, and the note and mortgage were executed. The defendant further alleged that he received no benefit by this arrangement, because the plaintiff furnished the money for one year only, whereas he should have furnished it for at least two years; that the demand is not for borrowed money, and said note bears usurious interest, which can not be recovered; that his wife is a party in interest, and a necessary one to this action; that heretofore, on 4 April, 1876, an execution in favor of a creditor issued against this defendant and was levied on the land embraced in said mortgage, the homestead of defendant having been laid off, and the same was sold by the Sheriff and bought by (125) W. G. Curtis, to whom a deed was made; and thereafter, to-wit, on 10 July, 1876, said Curtis conveyed the land to the *feme* defendant (subsequently made a party) in fee simple.

The plaintiff amended his complaint, and asked judgment against both defendants.

The *feme* defendant then filed an answer, setting up an absolute title in fee by virtue of the deed from said Curtis, and substantially adopting the averments above recited from the defendant's answer, and further alleged that said note and mortgage are void as to her.

Notice was issued to plaintiff to produce the said note and contract in open Court, but was returned by the Sheriff that plaintiff was not to be found in his county.

The defendant amended his original answer, to the effect that the co-partnership for the year 1867 was continued for the year 1868, plaintiff to furnish the money and defendant the land; that the crop of that year was delivered to plaintiff, and the proceeds thereof applied

by plaintiff to the payment of his share of the capital advanced, and no part thereof was paid to defendant, who now claims that he is entitled to an account of the same.

The plaintiff, replying, alleged that while it was true the note mentioned in the complaint was not executed on the day of the date of the mortgage, yet the plaintiff averred that a note for a like sum, and of the same tenor, except the words "for borrowed money," was made by defendant at the date of the mortgage, under the following circumstances: The words for "borrowed money" being omitted through oversight in the original note, the plaintiff was doubtful of his right to recover more than six per cent interest, and applied to defendant some years afterwards to make a new note, and the defendant consented and wrote a new note, and plaintiff surrendered the original; that he has not (126) in his possession the original contract, but has a letter-press copy thereof, which he is ready to produce when required, and denied that he agreed to furnish supplies or money for two years; that a settlement was had between them for the year 1867, and after the note upon which this action is brought is paid, the plaintiff alleged that he would be the loser in a considerable sum; that the *feme* defendant purchased only the equity redemption at said sale, with full notice of said mortgage. The plaintiff denied that he received any crops for 1868, or any sum of money or other property from defendant, and averred that he had advanced largely in excess of the amount required by said contract.

And thereupon the following issues, offered by the parties and settled by the Court, were submitted to the jury:

1. Did the parties come to a settlement in 1868, prior to the execution of the first note and mortgage? Ans: "Yes."

2. Was the first note given for the balance found to be due the plaintiff on said settlement? Ans: "Yes."

3. Was the mortgage executed by defendant to secure said first note? Ans: "Yes."

4. Was the note in suit executed in place of and in substitution for said first note? Ans: "Yes."

5. Was there a contract partnership, such as is alleged by defendant for the year 1868, between the parties, or was it a contract between them for advances by plaintiff, such as is alleged by him? Ans: "As alleged by plaintiff; we find no new contract."

The issues being found in favor of plaintiff, the Court adjudged that he recover the amount of six per cent interest, and on payment of same within three months after entry of judgment, the plaintiff do convey the mortgaged premises to the *feme* defendant; but in default thereof, the defendants to be foreclosed of their equity of redemption. And it was further adjudged that the part of the land bought by defendant

from Eagles and Everett be sold at public auction by a com- (127)
missioner, with privilege to the plaintiff or any other party to this action to become the purchaser, the proceeds to be applied to the satisfaction of the sum herein adjudged to be due plaintiff, the balance, if any, to be paid to defendant, and the purchaser put in possession, etc. It was also adjudged that the interest be six instead of eight per cent, because the original note secured did not on its face specify that it was for borrowed money.

The case states that the defendants moved for a new trial, for that improper evidence was admitted: On the trial of the issues it became material to plaintiff to show the contents of the written contract of 1867, as aforesaid; and plaintiff testified it was the only one he had ever made with defendant for the said purposes, while the defendant testified that the written contract was abandoned after the first year, and afterwards he operated under a new parol agreement of a different tenor. The plaintiff further testified that he retained a letter-press copy of the original contract, leaving original with defendant, and that said copy was a correct one. The notice to the plaintiff to produce the written contract had not been served, and no notice was given to defendant to produce it. Defendant testified that he had never had the written contract in his possession, that the signature to said copy was his. Thereupon the plaintiff proposed to read the letterpress copy in evidence, which was objected to by defendant on the ground that the original was the best evidence, and no notice had been given him to produce it. Objection overruled and copy read. Rule for new trial discharged, judgment for plaintiff, appeal by defendants.

Messrs. A. T. & J. London for plaintiff. (128)
Mr. E. G. Haywood for defendants.

SMITH, C. J. This case has been elaborately argued, and numerous points eliminated from the record and pressed upon our attention, which, in the view we take, need not be considered in its final disposition.

The action is to recover judgment on a promissory note of the defendant, and to foreclose a mortgage of land given for its security. The *feme* defendant claims the land under an execution sale upon a judgment recovered by a creditor of her husband, the other defendant, and both in their separate answers allege that when the note was executed by the husband, he was not indebted to the plaintiff, and hence the deed, being voluntary and without consideration, was void as to his creditors. It does not appear that the debt, for which the sale under execution was made, existed at the date of the mortgage, or before the

year 1876, eight years thereafter. The answers further allege that the original note was surrendered and a new one given in its place, antedated so as to correspond in terms with the first, except in its recital of a consideration of money loaned; and that thereby the secured debt was discharged, leaving but a naked legal title in the mortgage, which as an unmixed trust, passed to the purchaser under execution (129) by virtue of the act of 1812. Bat. Rev., Chap. 44, Sec. 4.

The defendants also rely upon a written contract of the plaintiff with the defendant McIlhenny, the substance of which both answers undertake to set out, for the cultivation of the defendant's farm for the common benefit of each, and that their entire crop was destroyed by excessive rains, and all their labor and expenditures in its cultivation lost.

The plaintiff replies to this, that upon a full and final settlement of their joint farming operations, McIlhenny fell in debt to him for that and other matters, in the sum for which at that date the original note was given, and that the second note was executed as a renewal, and with the express understanding that it was to occupy the place of a secured debt in the mortgage.

From these conflicting allegations there were several issues extracted, and without objection from either party, submitted to the jury, and the jury find them all in favor of the plaintiff. These findings establish the following facts: The parties did come to a settlement in 1868, and the first note was then executed for the balance ascertained to be due, with the mortgage to secure it. The second note was executed in place of the first, and as a substitute for it, and the plaintiff's statement of the partnership contract for the year 1868 is correct, and the defendant's version of the matter is not true.

The only ruling of the Court on the trial of the issues to which an exception was taken, as appears from the statement of the case, was the admission of the letter-press copy of the partnership contract of 1867 as evidence, on the ground that the original was the best evidence, and no notice had been given the defendant to produce it on trial. The plaintiff swore on the trial that when the original contract was entered into, he struck off and kept a letter-press copy of the instrument, and left the original with the defendant, and he had never seen it (130) since. The defendant, in his answer, setting out its substance from memory and duly verified, declares that he does not have the original contract, and never had it in possession since its execution. He had issued a notice to plaintiff to produce the original, but the notice was not served. To the sufficiency of this exception, several answers are naturally suggested.

1. The evidence was not important to the plaintiff's case. His action

was on the substituted note, and the admission of its execution devolved on the defendants the *onus* of proving matters of defense against the obligation. The settlement was the basis of the execution of the note, not the nature of the dealings and transactions of which it was the consummation. It was indifferent to the plaintiff to inquire into the provisions of the absent instrument, and its existence was not essential to the parol proof that was offered of full and final adjustment, and that the note represents what was admitted to be due.

2. If the defendant did not have the contract, as he alleges, why should a notice requiring him to produce what he did not have and could not control, be given?

3. If, as argued, the proof of search was not sufficient to show the loss, why was not that objection then made, instead of the objection that no notice had been given the defendant? Had it been, we can not say that abundant proof of the search may not have been furnished. The defendant was content with the plaintiff's general declaration that he did not have possession, and it was not an error of which he can complain. The fact is positively and unequivocally sworn to by the plaintiff that he did not then have, nor had ever had, the lost instrument in his possession since the press copy was taken, and that it then passed into the defendant's hands.

The general rule is that when an objection might have been removed, if made in apt time, and it is afterwards made, it will not be entertained. Thus, where a copy of a bill annexed to a deposition is proved, and it did not appear why the original was not produced, (131) and objection was made to the evidence because it was secondary, at the reading of the deposition on the trial, it was disallowed, because not made when the deposition was given, nor by a preliminary motion to suppress, and the Court remarks that "had the objection been taken before trial, either at the examination of the witness or on a motion to suppress, to the proof of the copy, without producing the original or showing its loss, the opposite party would undoubtedly have secured the production of the original, if in existence, or if it be lost or destroyed, been prepared to account for its absence." *York Co. v. R. R.*, 3 Wall., 107.

So here, had the defendant then made his objection to the sufficiency of the preliminary inquiry as to the search, that defect might then perhaps have been supplied by a further and fuller examination, and it is unreasonable for him to acquiesce and to put his objection on a want of notice to himself, and then be permitted to assign for the first time, in this Court, a ground for his objection of a nature wholly different. The defendant expressed then no dissatisfaction as to the proof of loss, and he can not be heard to do so now. *Bridgers v. Bridgers*, 69 N. C.,

451. But what harm can come to the defendant from the admission of the press copy of the contract? It has no bearing upon a substantial issue. The existence of an original in no way effects the plaintiff's right of action, and its stipulation and terms, inasmuch as they are immerged in the final settlement, do not impair the defense. It is plain, then, that the admission or rejection of the evidence is wholly immaterial and furnishes no ground of exception.

4. It was insisted for the defendant that the issues do not dispose of the matters in controversy upon the pleadings, and that there should have been, and should now be, a further issue passed on involving
(132) the validity of the mortgage as against the *feme* defendant, who, by her purchase, acquires all the rights of a creditor to impeach.

It is to be noticed that an actual fraudulent intent is not imputed to the defendant McIlhenny in making his mortgages, by the wife, and both attack its validity only by alleging that it was voluntary, resting on no consideration, and hence is void. This allegation is fully met by the finding of the jury that the indebtedness did exist to the full amount of the debt secured, and as this is the only impeaching fact alleged, there is nothing left to the jury to determine affecting the mortgage, and no issues are proper except they involve facts controverted in the pleadings.

Outside of the allegations and denials, no inquiries can properly be made. Nor ought the defendants to have been content with the proposed issues if they deserved others. They should then have asked for other issues, and, if necessary, they would have been allowed, or if not allowed, the refusal would have constituted matter of exception. It might produce serious inconveniences and delays if, when a party has opportunity to propose further and other issues, he refuses or fails to do so, he would then be heard to complain of the consequences of his own neglect, and thereby increase the costs as well as delay the determination of the cause. We think the point now made for the first time in this Court, and even if taken in the Court below in apt time, can not be supported.

The last exception relates to the change of the notes and the effect upon the mortgage security. The notes are for the same sum and for a like time of interest; the substitute does not increase the sum contracted to be paid, and the jury find expressly that it was the intent of the parties to preserve the mortgage security. It is true, upon the plea of the defendant, the notes, both of them, would bear interest only at six per cent; the last because it so stated in the note
(133) *borrowed money* was not its *consideration,* and the first for the same and the additional reason that it is not so expressed upon its face.

The sums contracted to be paid, and the sums recoverable if the defendant chooses to avail himself of the statute, would be in both cases the same, and we know of no way by which the substitute could work a damage to the defendant, or impair the mortgage. The deed was, when made, effectual to secure a debt *bona fide* due; the renewal can work no injury to any one. *Hyman v. Devereux,* 63 N. C., 624, decides that a bond given in renewal of one secured in a mortgage, even to an assignee, retains its place in mortgage as a secured debt. The notes, if usurious by reason of the rate of interest expressed, are good as to the principal sum and legal interest, and if effectual as to the residue against the debtor, are equally so against the purchaser and owner of the equity of redemption. For this sum the judgment was entered. *Coble v. Shaffner,* 75 N. C., 42. There are, therefore, no errors in the proceedings, except as to the form of the judgment in reference to the sale of the lands, and we need only cite on this point *Mebane v. Mebane,* 80 N. C., 34.

Our attention has been called to C. C. P., Sec. 259, as authority for the form of the judgment which directs an absolute sale and conveyance by the Sheriff or referee appointed for the purpose, of real property adjudged to be sold, and this clause is supposed to comprehend a foreclosure sale under mortgage. There have been many cases before the Court since the adoption of The Code, in which the old rules of equity procedure in regard to judicial sales, including judgments to foreclose, have been recognized as still in force, down to the recent case of *Mebane v. Mebane, supra,* when the subject was carefully considered; and we should be reluctant to disturb a practice so well settled by giving such wide scope to the words of the statute. The section in which they are found is a part of the chapter defining execu- (134) tions, and the mode of enforcing them, and directs how lands adjudged to be sold shall be sold, as in other forms of final process. Why the agency of the Court is called a referee, and why this mode of judicial sale should be beyond the further control of the Court ordering it, find no explanation in the law itself. We can hardly suppose such sweeping effect as is now proposed to be given to the mandate could have been in the contemplation of those who adopted the new system, and we must seek elsewhere for some mode of satisfying its requirements. Accordingly, Section 319 authorizes proceedings, after the death of a judgment debtor, against his heirs, devisees or legatees, and also against tenants of real property, owned by him and affected by the judgment; and clause 2 of Section 261 provides for the satisfaction of the judgment by execution "against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees." The words thus find a meaning, and the difficulty

involved, a solution in their application to the lands of others, charged with the payment of the judgment, and which the process, the writ of *venditioni exponas,* requires specifically to be sold, as contradistinguished from that directed against the debtor's property generally and to pay his own debt. Thus restricted, the clause leaves unabridged that important function of a Court of Equity which directs and controls a sale made by its order and under its authority, through a commissioner of its own appointment, and which is transmitted to the present Superior Court, its successor. We are not disposed to leave the debtor mortgagor without the protection he has always received when the aid of the Court was asked to sell his lands for the payment of the mortgage debt, unless plainly so required by the statute.

(135) The judgment, corrected as we have explained, is affirmed.

PER CURIAM. Modified and affirmed.

Cited: Vick v. Smith, 83 N. C., 82; *Curtis v. Cash,* 84 N. C., 43; *Davis v. Rogers, Ib.,* 416; *Bryant v. Fisher,* 85 N. C., 72; *Alexander v. Robinson, Id.,* 277; *Brooks v. Headen,* 88 N. C., 452; *Simmons v. Mann,* 92 N. C., 18; *Jones v. Call,* 93 N. C., 179; *McDonald v. Carson,* 95 N. C., 380; *Bank v. Mfg. Co.,* 96 N. C., 304; *Leak v. Covington,* 99 N. C., 564; *Mining Co. v. Smelting Co., Ib.,* 466; *DeBerry v. R. R.,* 100 N. C., 315; *Blanton v. Commissioners,* 101 N. C., 535; *Walker v. Scott,* 106 N. C., 62; *Maxwell v. McIver,* 113 N. C., 291; *Wagon Co. v. Byrd,* 119 N. C., 461; *Presnell v. Garrison,* 121 N. C., 368; *McLarty v. Urquhart,* 153 N. C., 341; *Ludwick v. Penny,* 158 N. C., 113.

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

Appeal—Public Road—Evidence.

1. Under Chap. 36, Sec. 1, of the Acts 1872-'73, either party to a petition to discontinue a public road has a right to take the cause up, by successive appeals, from the township board of trustees to the supreme court.
2. In determining upon the propriety of discontinuing a public road, evidence as to the original object in opening the road, is not pertinent to the inquiry, as its utility is not dependent upon the intentions of those at whose instance it was first laid out, but upon the wants of the community and its tendency to promote the public interest.
3. Evidence that the road hands in a certain township are in number insufficient to keep up *all* the roads in that township has no tendency unless connected with other facts, to show that *any particular road* should be discontinued.
4. Evidence as to the number of families to be benefited by continuing the road is pertinent and important.

ASHCRAFT *v.* LEE.

PETITION to rehear, filed at January Term, and heard at June Term, 1879.

This was originally a petition to discontinue a public road, heard at Spring Term, 1878, of STANLY, before *Moore, J.* (see 79 N. C., 34), and the plaintiffs, in their application to rehear, state that the cause was commenced before the Township Board of Trustees, taken by appeal to the County Commissioners, thence to the Superior and Supreme Courts, when in the latter Court the appeal was dismissed. The petitioners allege error, in that the Court say "there is no authority whatever for bringing the matter before this Court"; whereas, they are advised that Ch. 36, Laws 1872-'73, amendatory of Ch. 185, Laws (136) 1868-'69, provides for and allows appeals in such cases.

Messrs. Hinsdale & Devereux for plaintiffs.
Messrs. J. M. McCorkle and *A. W. Haywood* for defendants.

SMITH, C. J. When the decision of this case dismissing the appeal for want of jurisdiction was rendered at June Term, 1878, our attention was not called in the argument to the amendatory act of 29 January, 1873, and not being brought forward in Battle's Revisal, it was overlooked by the Court. The previous act of 10 April, 1869 (Laws 1868-'69, Ch. 185, Sec. 14), in express terms confers upon the Board of Township Trustees authority "to lay out, alter, repair or discontinue highways," and the amendment provides that in all case where the authority is exercised, "either party may appeal from the decision of the Township Board of Trustees to the Board of Commissioners of the county, and from the decision of the Board of Commissioners of the county to the next term of the Superior Court thereof, and from the deision of the said Superior Court to the Supreme Court." Laws 1872-'73, Ch. 36, Sec. 1. The right of appeal being thus given, the former judgment is erroneous, and must be reversed.

It now remains to consider the legal sufficiency of the exceptions to the ruling of the Court in admitting and rejecting the evidence set out in the record.

The object of the present proceeding is to obtain an order for the discontinuance of a public road hertofore laid out and established in the county of Union, terminating but not connecting with any other public road at its intersection with the Anson County line. It does not appear what, if any, distinct issues were submitted to the jury, nor what facts are found by their verdict. The only statement in the record is that "there was a verdict for the defendants." It is the province of the jury to pass upon the conflicting allega- (137) tions contained in the pleadings, presented in the form of issues,

and to settle the material facts upon which the result depends, so that the Court may be able to see and determine whether the public convenience requires the longer maintenance of the highway, or will be promoted by its discontinuance, and may proceed to judgment accordingly. It certainly can not be the intent of the legislation on the subject to vest in a jury, and especially, as in this case, a jury formed in another county (Stanly) an absolute discretion, denied alike to the Boards of Township Trustees and County Commissioners, to decide finally the question of the establishment or continued existence of public roads. The record failing to show what issues were submitted, and what facts ascertained by the verdict, we are somewhat at a loss to determine the bearing and pertinency of the evidence offered, and consequently the correctness of the ruling in relation thereto. We must assume, therefore, that the jury were left to determine the final result and say whether the road should or should not be discontinued.

First Exception.—During the trial the plaintiffs proposed to show that the original purpose in opening the road (though not disclosed in the written application) contemplated its projection, by the co-operating action of the authorities of Anson, into that county and its connection with other roads therein. The testimony was refused. We are unable to see the materiality and bearing of the evidence upon the question (if such issue was involved in the inquiry before the jury) whether it was *then expedient and proper* to discontinue the road. The usefulness is not dependent upon the intentions of those at whose instance and by whose efforts it was first laid out, but upon the wants of the community and its tendency to promote and subserve the public interest. The proper inquiry is, does the public convenience require the road, and does it furnish needed facilities of transit to such a number as to
(138) give it a public character. The motives and opinions of prominent persons sought to be elicited by the testimony might warp the judgment and influence the action of jurors, but would not legitimately conduce to a fair and full understanding of the matter in dispute, nor contribute to the formation of a just and correct opinion of its merits. The way may be useful now, and of great convenience to many, notwithstanding the full benefits expected from its extension have not been realized. There is no error in rejecting the evidence.

Second Exception.—The Court excluded evidence offered by the plaintiffs to show that the road-hands in Lane Creek Township, through which the road runs, were in number insufficient to keep up and maintain all the public roads therein, twelve in number, and hence the necessity and propriety of a disuse of this road. The fact proposed to be proved might show an adequate reason for discontinuing one or more of the least useful of these highways, but it does not tend, unless

connected with other facts not suggested, to prove this to be *one of those least useful highways* that ought to be dropped. The testimony points with equal force to each one of the roads, and would as well justify the discontinuance of any of them. And its introduction was calculated to mislead rather than instruct the minds of the jury.

Third Exception.—The Court did not permit the jury to hear the testimony of one of the defendants, offered by the plaintiffs, to the effect that the witness had united with others in a petition to the Board of Township Trustees of White Stone Township in Anson for the extension of the road in that county to another public road therein, and that the application was denied. The reasons for overruling the first exception are equally applicable to this. The inquiry leads to an issue collateral and wholly irrelevant. That efforts were made and failed of success in securing a connecting road in Anson, and that the witness was a party thereto, sheds no light upon an inquiry as to (139) the usefulness and value of the road laid out in Union, and was therefore properly rejected for irrelevancy.

Fourth Exception.—Upon the cross-examination of a witness for the plaintiffs, the defendants extracted evidence tending to show that the road was useful to seven families living along its course, and to five or more families living within half a mile. The testimony, after objection from plaintiffs, was admitted. The evidence was both material and important, as showing how large a number used the road and the inconvenience of depriving them of the facilities it afforded. The whole question was one of public and general convenience, and the consequences of its disuse to those most interested.

There is no error. The exceptions are overruled, and the judgment

PER CURIAM. Affirmed.

ASHE, J., having been counsel, did not sit.

R. H. CANNON v. JOHN M. MORRIS.

Statute of Presumptions—Acts Suspending—Evidence.

1. The acts suspending the statute of presumptions do not apply to a debt contracted in March, 1866.
2. It is not proper to consider, on an appeal from a justice's court, a written statement of the plaintiff's testimony before the justice which that officer had appended to the transcript sent to the superior court, when the plaintiff is present at the trial in the latter court and able to testify, if competent.
3. Under the Act of 1879, Chap. 183, it is not admissible for the plaintiff to prove by his own oath or to examine the defendant to prove the non-payment of a bond in suit executed prior to the first day of August, 1868.

4. Where an attorney abuses his privilege in addressing the jury and the judge promptly stops him, a new trial will not be granted.

(SMITH, C. J., dissenting.)

(140) APPEAL at Spring Term, 1879, of MACON, from *Gudger J.*

The facts appear in the opinion. Judgment for defendant, appeal by plaintiff.

Messrs. A. T. & T. F. Davidson for plaintiff.
Messrs. Reade, Busbee & Busbee for defendant.

ASHE, J. This is an action commenced before a Justice of the Peace in the county of Macon, upon a note under seal for $211, due one day after date, and dated 5 March, 1866, with a credit of $100 endorsed on 6 August, 1866. Judgment was rendered by the Justice in favor of plaintiff for $267.67, with interest on $116.97 from 26 September, 1878, and costs, from which judgment the defendant appealed to the Superior Court.

The pleas were payment and the statute of limitations. The case was submitted to a jury, who found all the issues in favor of the defendant. There was a rule for a new trial, rule discharged, and the plaintiff appealed to this Court.

The action was commenced in the Justice's Court on 26 of September, 1878, and is founded on a bond falling due since 1 May, 1865, and the presumption of its payment arises by virtue of Sec. 18, Ch. 65, of Rev. Code, whose provisions are still applicable to contracts of this character. By that section, the presumption of payment arises on all judgments, decrees, contracts and agreements within ten years after the cause of action shall accrue. The 16th sec. of title IV of The Code of Civil Procedure provides that the statutes (of limitations and presumptions) in force previous to the ratification of that act, 18 August, 1868, shall be applicable to cases where the right of action had already
(141) accrued. The presumption of payment, then, on this bond arose in ten years after it fell due, when the right of action accrued, and it is not affected by the act of 12 February, 1867, Ch. 18, which provides that the time elapsing from 20 May, 1861, until 1 January, 1870, shall not be counted so as to bar actions on suits, or to presume satisfaction of suits; for it was declared by the act of 2 March, 1867, that the provisions of that act should not apply to debts or matters *ex contractu* created since 1 May, 1865.

In order to rebut the presumption of satisfaction of the bond, the plaintiff offered to read a written statement of his testimony before the Justice of the Peace, which that officer had appended to the transcript

sent to the Superior Court, to the effect that the bond had not been paid, but his Honor, upon objection, refused to hear the evidence, to which ruling the plaintiff excepted.

We can not conceive upon what ground it was proposed to introduce that statement as evidence. Whether it is to be regarded as the testimony of a witness on a former trial, or a deposition, in either case it would be inadmissible, supposing the witness to be competent, so long as he can be called; and he is incapable of being called when he is dead, or beyond the jurisdiction of the Court, or insane, or permanently sick, or kept out of the way by the contrivance of the opposite party. 1 Taylor on Ev., Sec. 440.

The plaintiff then offered to prove by his own testimony that the bond had not been paid. His Honor refused to admit the testimony, and he then proposed to examine the defendant and prove that fact by him, but there was objection on the part of defendant, and his Honor declined to allow the motion, and the plaintiff excepted to the ruling upon both propositions.

The plaintiff and defendant were incompetent witnesses for the purpose for which the plaintiff proposed to introduce them. They were made incompetent by Ch. 183, 1879, which provides that no (142) person who is a party to a suit now existing or hereafter to be commenced upon any bond for the payment of money, executed previous to 1 August, 1868, shall be a competent witness, but the rules of evidence in force when said bond was executed shall be applicable to said suit.

There was still another exception taken by the plaintiff: In the argument of the case before the jury, defendant's counsel referred to the fact that the plaintiff's counsel was the son-in-law of the plaintiff, and stated that the zeal manifested by him arose from the fact that he was a beneficiary in the action. The Court instantly stopped the counsel, and informed him he could not use such language, and he at once desisted; yet the plaintiff excepted. There is nothing in the exception. The Court promptly stopped the counsel in the abuse of the privilege of an attorney, and having done so, the Court discharged its duty under the law, and there was no ground for a new trial. *Jenkins v. Ore Co.*, 65 N. C., 563.

No Error.

SMITH, C. J., dissented from the majority of the Court in the ruling upon the point of evidence.

Cited: *S. v. Braswell,* 82 N. C., 694; *Macay Ex Parte,* 84 N. C., 66; *Greenlee v. Greenlee,* 93 N. C., 280.

(143)

MERCHANTS BANK OF FAYETTEVILLE v. T. S. LUTTERLOH and another.

Interest—Usury.

1. A note given 4 March, 1875, in renewal of a prior obligation contracted in 1871, is subject to the law regulative of the rate of interest enacted 12 March, 1866.
2. By that law (1866) the plea of usury is made a matter of *defense*, extending to the defeat of the interest *only*, and *hence*, one who has paid usury on a contract then made can not *recover back* the interest so paid by pleading the same as a set-off or counter-claim to an action on the contract.

APPEAL at Spring Term, 1879, of CUMBERLAND from *McKoy, J.*

The plaintiff bank alleged that on the 4 March, 1875, the defendant Lutterloh promised, by his promissory note, to pay his co-defendant, T. J. Jones, the sum of three hundred and fifty-five dollars, sixty days thereafter, with interest at eight per cent from maturity; and that the defendant Jones endorsed the same to plaintiff.

The defendants, answering, alleged that the note was given in renewal of a prior obligation, and that both were usurious; that plaintiff, in taking the renewal note sued on, charged and received from defendants, as interest in discounting the same, eighteen per cent, or one and a half per cent a month; that the note sued on was the last renewal given for the amount of a draft of $400, dated on 8 August, 1871, drawn payable 60 days after date by A. J. Jones, in favor of defendant Lutterloh, on the defendant T. J. Jones, and accepted by him, and endorsed by Lutterloh in blank, which transaction was for the accommodation of said A. J. Jones, who negotiated the note with A. W. Steele & Co., at a usurious rate of interest, to wit, eighteen per cent; that a draft in substitution therefor made by defendant Lutterloh, and endorsed by defendant Jones, was transferred by said Steele & Co. to the plaintiff, well knowing the same to be usurious; that the obligation while in the hands of plaintiff was renewed by defendants from time to time, the plaintiff at each renewal charging the defendants usurious interest.

The defendants, by way of counter-claim in this action, further alleged that since the date of the original transaction (8 August, 1871),

(144) in renewal of which notes were given as aforesaid by them from time to time, including the last one, which is the subject of this action, they have paid to the plaintiff and to Steele & Co. on the same, the sum of three hundred and twenty-one dollars and sixty cents, for which they have been allowed as credits on the principal only the sum of thirty-five dollars; and that defendants' claim, as a set-off to plaintiff's demand, a credit for the full amount of the aforesaid pay-

ments, and rely upon the plea of usury as a protection against said demand.

The plaintiff demurred to the answer as to the counter-claim, and assigned as cause that the counter-claim was not such as that an independent and distinct cause of action could be maintained against the plaintiff, as the answer showed that the interest paid and alleged to be usurious, was paid by defendants knowingly and with full knowledge of all the facts. The Court sustained the demurrer and the defendants appealed.

Messrs. Gray & Stamps for plaintiff.
Messrs. Guthrie & Carr for defendants.

DILLARD, J. On 8 August, 1871, A. J. Jones drew a bill for (145) $400, payable at 60 days, on T. J. Jones, who accepted to pay the same, and after endorsement thereof by T. S. Lutterloh, all for accommodation to the drawer, A. J. Jones procured A. W. Steele & Co. to discount the same at the rate of eighteen per centum per annum, or one and a half per cent per month for the time it had to run.

Afterwards, Lutterloh, with his co-defendant as surety, executed his note to A. W. Steele & Co. as a substitute for the original bill drawn by A. J. Jones, and while in their hands several times renewed it at the same rate of interest, and finally it was negotiated to the plaintiff, who had notice of the usurious rate of interest on which it had been discounted and renewed as aforesaid.

On getting into the plaintiff's hands, the statement in the complaint is that it was, from time to time, renewed, how often not specified, at the same usurious rate, until 4 March, 1875, when, just before the going into effect of the act of 1874-'75, Chap. 84, the note, on which the action is brought for $335, was executed.

The defendants allege that since the debt was originally made, in the whole round of renewals to A. W. Steele & Co., whilst they were owners, and since then to the plaintiff, there have been paid sums of money for interest making an aggregate of $321.60, of which only the sum of $35 has been applied to extinguish any part of the principal money, and in their defense they make a counter-claim or set-off against the plaintiff for the various sums of interest paid before the execution of the note sued on in this action.

To the counter-claim the plaintiff demurred, on the ground that the sums constituting the same are not such as could be the subject-matter of an independent action, having been paid willingly and with a full knowledge of all the facts, and on the hearing his Honor sustained the demurrer, and from that judgment the appeal is taken.

1. Anciently, in England, many doubts were entertained as to
(146) the propriety of taking a price or reward for the use of money, *in foro conscientiæ*, and at one time it was held to be a misdemeanor and indictable as such, on the idea that it was an iniquity and criminal. Afterwards the taking of interest was impliedly authorized by 37 Hen. VIII, which fixed on ten per cent as being the ultimate limit to which the lender might go, and by different enactments the rate was changed from time to time, until at last the legal rate was fixed at five per cent as the ultimatum, at which it has ever since stood and now stands, with a statutory declaration of invalidity of every contract or security tainted with usury and a *qui tam* action to anyone who would sue for the same.

Under such state of the law in England, it was much disputed whether the excess of interest paid beyond the legal rate could be recovered back in a common law action, on the ground that the receipt and payment of it contrary to the statute was a *delictum* and therein the borrower was equally participant with the lender; but at length is was settled that a distinction was to be taken between statutes passed to protect the weak and necessitous from being overreached and oppressed, and those enacted from motives of policy and general expediency, in the former of which the parties were held as not equally criminal, but in the latter *in pari delicto*. Comyn on Usury, 5 Law Lib., 211; *Clark v. Shee*, 1 Cowper, 197; *Browning v. Morris*, 2 Cowper, 790.

Under this distinction, the Court held that in gaming contracts and the like, prohibited by statute, the thing prohibited was done from public policy and general expediency; and so, if parties paid anything under such contracts they did so in equal fault, and could not have remedy to get it back, on the maxim *volenti non fit injuria*. But in the case of contracts prohibited by the statute against usury, it was to be taken that the borrower in the transaction was not free, but a slave to
the lender, and therefore in this case, after payment of the usu-
(147) rious interest, the maxim *in pari delicto* had no application, and a recovery of the excess might be effected in the action of *assumpsit* on the count for money had and received.

2. Conformable to this state of the English law was our statute law and the rights of parties prior to 1866; and up to that time the borrower was regarded as under necessity taking away his freedom, and not of equal guilt with the lender. Accordingly, it was provided that the usurious contract should be void and the whole amount forfeited, and the lender be subject to pay double the whole amount if he received the usurious excess, in a *qui tam* action. Rev. Code, Chap. 114.

By Laws 1865-'66, Ch. 24, the Legislature, giving expression to the

popular will on this subject, repealed the 114th chapter of the Rev. Code, and in lieu thereof enacted in substance that six per cent should be the legal rate of interest, with liberty to stipulate on a loan of money, but on no other consideration, for a rate so high as eight per cent, provided the rate and consideration were expressed in the obligation, with a declaration of validity to the contract under any circumstances as to the principal money lent, and without any forfeiture except of the entire interest on plea of the borrower, in case of an agreement to take more than six per cent where no rate was named, or more than eight where the rate is named.

Obviously by this enactment a new theory was introduced, and now the view obtained that money, like an article of property or merchandise, ought to be regulated by the market, and the borrower be at liberty to pay for the loan of money on his own estimate of advantage and benefit to himself therefrom, without interference of law further than to fix a rate beyond which interest should not be recoverable in the Courts, and to provide a defense against its collection if the borrower, in the exercise of his option, choose to interpose the plea of usury. (148) Accordingly, under this statute, the contract tainted with usury and formerly held void, is now valid in any and every event for the principal. All penalty for receiving usurious interest recoverable by the party aggrieved, or anyone who would sue for the same, is taken away, and a mere privilege of defense personal to the borrower is provided for, limited to a forfeiture of the entire interest on the note or obligation; and to the end that the defense may be ample and complete, if the borrower in his discretion should resort to it, he is authorized to examine the lender as a witness.

From these terms of the statute, the statutory remedy provided for the borrower extends merely to the defeat of the interest on the note or obligation unpaid, and does not embrace any remedy as to the interest already paid; and it seems to us that in the view of the Legislature the borrower was no longer to be regarded as under such necessity as to take away his free will, but as being competent to act freely, and that therefore if he paid what he need not have paid, he should be barred by this act, and not have remedy to recover it back on the ground of his having paid it willingly and freely. If it was intended that the usurious excess paid should be recovered back, why was not a remedy therefor furnished as is the old law, Rev. Code, Ch. 114, and as provided for in a remedy prescribed for the recovery of double the amount of interest so paid in the act of 1876-'77, Ch. 91?

3. This, our construction of the act of 1865-'66, as to the nonexistence of a remedy to recover usurious interest paid, derives support and confirmation in our view from the course and terms of the Legislature on

this subject since: The act of 1874-'75, Ch. 84, re-enacts the invalidity of all contracts tainted with usury on plea of the borrower, and a forfeiture of double the amount lent to anyone who will sue for the
(149) same, and the act of 1876-'77, the one now in force, re-adopts the law of 1865-'66, with a forfeiture of the interest unpaid, and a remedy given to the party for double the amount of all the interest paid; and the provision of a remedy in those two statutes extending to usurious interest paid amounts to a legislative construction that no such remedy existed for usury paid under the act of 1865-'66. The interest paid in the case under consideration was all paid, and the note now in suit was given, during the time that the act of 1865-'66 was in force.

4. Applying these views, let us see what is the result. The answer avers the loan originally to have been $400, and interest paid in renewals to A. W. Steele & Co., and since to the plaintiff, in all amounting to $321.60, which was applied to the interest, and the overplus to the principal, so that on the day the note now in suit was given, the principal was reduced from $400 to $355; and it then shows forth that the present note was executed on 4 March, 1875, in the interval between the passage of the act of 1874-'75 and the day named for its going into effect; and the demurrer admitting these facts, in point of law, the conclusion is, that payment of interest having been made freely and willingly, and located and applied to the interest as such, and in the settlement with the plaintiff again recognized as payments on the interest, and in small part on the principal at the giving of the note now sued on, the defendants have not the right to recover therefor and be allowed the same by way of counterclaim and set-off against the plaintiff's demand.

We therefore hold that his Honor was not in error in sustaining the demurrer and holding that defendants were not entitled to a counterclaim or set-off for usurious interest paid anterior to the execution of the note in suit under the act of 1865-'66.

Affirmed.

Cited: Cobb v. Morgan, 83 N. C., 213; *Webb v. Bishop,* 101 N. C., 102; *Moore v. Beaman,* 112 N. C., 561; *Ward v. Sugg,* 113 N. C., 493, 497.

JAMES S. GRANT v. W. H. MORRIS & SONS. (150)

Questions of Law and Fact—Usury—Interest.

1. What constitutes usury is a question of law, to be determined by the court when the facts are not in dispute.
2. In the absence of a special contract as to the rate of interest, only six per cent is collectible on a debt incurred on the 6th of March, 1876.
3. The Act of 1876-'77, ch. 91, sec. 3, which makes it a forfeiture of all interests to exact or charge usurious rates, does not apply to contracts entered into before its passage.
4. The mere entry on account and subsequent presentation of an usurious claim is not a "charging" within the meaning of that statute.

APPEAL at Fall Term, 1878, of NORTHAMPTON, from *Seymour, J.*

This action was commenced before a Justice of the Peace to recover the sum of one hundred and seventy-six dollars and twenty-five cents, and the defendants offered to set up a bond executed by plaintiff (and embodied in the opinion of this Court) as a counter-claim, and the plaintiff replied that said bond was void, for that on all the sums of money furnished under it, the defendants had reserved and taken more than eight per cent interest. Upon the hearing before the Justice of the Peace, judgment was rendered in accordance with the plaintiff's demand, and the defendants appealed to the Superior Court, where the case was submitted to a jury, who returned a verdict in favor of the plaintiff for eleven dollars and costs, from which the plaintiff appealed, and claimed a judgment for a greater amount, as demanded in the two actions originally brought (and consolidated by order of the Judge). On the trial, the plaintiff tendered the following issue: "Did defendants knowingly and corruptly take or receive interest on the money and supplies, or either, which they furnished plaintiff under the contract of 6 March, 1876, at a rate greater than eight per cent per annum? If so, what rate?" The Court refused to submit the issue to (151) the jury, for the reason that inasmuch as the statement of the account showing the excessive charge of interest was not *rendered* or furnished plaintiff until after the repeal of Chapter 86, Acts of 1874-'75, to wit, on the 21 March, 1877, the Court would hold that the plea of usury could not avail to defeat a recovery on that account. The plaintiff excepted. There being no dispute as to the items in the account, the Court instructed the jury to take one from the other, allowing defendants interest at eight per cent, and render a verdict for the balance. It was agreed that the Clerk might make the calculation, and in so doing a balance of eleven dollars was found to be due the plaintiff; judgment accordingly, and appeal by plaintiff.

Messrs. R. B. Peebles and *W. H. Day* for plaintiff.

Messrs. Mullen & Moore and *W. W. Peebles* for defendants.

SMITH, C. J. On 6 March, 1876, the plaintiff entered into a covenant with the defendants in these words:

"$250. On 1 January, 1877, with interest from 6 March, 1876, at the rate of eight per cent, I promise to pay to W. H. Morris & Sons the sum of two hundred and fifty dollars, for advances to be made by them to me in money and supplies from now till the maturity of this bond. The interest at said rate is to attach at the time or times the said advances shall be made. Witness my hand and seal, this 6 March, 1876. J. S. Grant (Seal). Witness, W. W. Peebles."

Between 13 March and 28 November of that year, advances were made by the defendants in money and goods to the amount of $366.90, a detailed account of which was rendered to the plaintiff on the
(152) 21 March, 1877, and payment demanded. There is an item therein charged of that date for interest of $38.43, making an aggregate of $405.33. By computation it appears that interest is charged on the several items from their respective dates at the rate of twelve per cent. There was no controversy about the account except a small sum charged for commissions, not necessary to be noticed. The plaintiff objected to the charge of interest as excessive, and offered to settle if that was corrected, which the defendants refused, and thereupon proceeded to sell certain property of the plaintiff which had been conveyed to secure the advances, and brought the sum of sixty-nine dollars.

The plaintiff proposed to submit to the jury an issue involving the question of usury, which the Court refused, and instructed the jury to allow the defendants interest at the rate of eight per cent on the items from the date of each, and the parties consenting that the computation should be made by the Clerk, a verdict was entered in favor of the plaintiff for eleven dollars, the balance due according to his calculation.

The plaintiff excepts to the refusal of the Court to submit an issue as to the alleged usury, which he contends the jury were authorized to find upon the evidence had been charged and taken by the defendants.

1. In our opinion there is no error in this ruling. What constitutes usury is a question of law upon facts admitted or found. The facts in this case were not in dispute, and there was no occasion to ask for any finding by the jury.

The law regulating interest in force at the time the agreement was entered into is as follows:

"The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more: *Provided, however,* that upon special contract in writing, signed by the party to be
(153) charged therewith, or his agent, so great a rate as eight per cent may be allowed." Laws 1874-'75, Ch. 84, Sec. 1.

The defendants were, therefore, authorized to charge and collect interest on these advances at the stipulated rate, up to the limit of $250; and in the absence of any conventional interest, at the rate prescribed by law on the excess. It was erroneous to allow the higher rate on the excess, and the counter-claim of the defendants should be reduced by the sum of the difference in those rates, whereby the balance due the plaintiff will be correspondingly increased.

2. We may not fully understand the ruling of the Court, as set out in the record, that the defense of usury against the counter-claim was not open to the plaintiff, because the claim for usurious interest was not preferred until after the repeal of the act of 22 February, 1875, and was not consequently subject to its condemnation. There are no facts stated upon which any claim to the forfeitures given in that act can be based, inasmuch as no unlawful interest has been paid by the plaintiff or received by the defendants, and no usurious stipulation is found in the contract itself. The defendants have not by the sale of the conveyed property, or otherwise, collected or taken as much as they were legally entitled to. Usury consists in taking more than the law allows, specifically for forbearance and giving time, or in excess of what is legally due, neither of which have the defendants done.

3. It is, however, suggested that the making the usurious charge inserted in the account, and the insisting on its payment, is an act falling within the denunciation of the superseding statute of 12 Feb., 1877, which, after repealing the former act and re-enacting the first section in the very words, declares: "That the taking, receiving, reserving or *charging* a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon." Laws 1876-77, (154) Chap. 91, Sec. 3.

Aside from the objection that the terms of the contract are controlled by the then existing law and can not be modified or changed by subsequent legislation, we do not think the mere entry of a usurious claim upon the account as either "a taking, receiving, reserving or charging," within the meaning of the amending act. These words imply something more to be done, to the loss or detriment of the debtor, than the mere presentation of an illegal claim which is neither recognized nor paid.

The plaintiff will have judgment according to this opinion, and recover his costs.

PER CURIAM. Modified and Affirmed.

Cited: *Gore v. Lewis,* 109 N. C., 540; *Churchill v. Turnage,* 122 N. C., 431.

THOMAS JONES, Admr., and others v. A. M. F. CAMERON and another.

Injunction—Proceeding for Partition—Infant Parties.

The affidavit upon which an injunction was asked alleged in substance that one J. T. died, leaving several children, and that, upon partition of his land in 1864, the share of his daughter E. was charged with $2,114.25 for equality of division, payable to E. J., another daughter; that several payments in reduction of said charge were made to said E. J., who afterwards became insolvent that in 1877, after the death of E., it was adjudged in said cause that the share of E. be sold for the balance due E. J.; that said E. left surviving her a husband and an infant son, now parties defendant; that a proceeding had been pending for six years in the probate court in which the administrator of J. T. sought to sell his land for assets; *Held*,

(1) That as to the payments in reduction of the charge, it appearing that they were made before the rendition of the judgment, the defendants had a day in court to avail themselves of them, and failing to do
(155) so, they were not entitled to injunctive relief against the consequences of their own laches.

(2) That the law (Bat. Rev., ch. 84, sec. 9) which provides that when the share of an infant party to partition proceedings is charged with any sum for equality of division, the same shall not be payable until such minor arrives at majority, has no application to the facts of this case, as the dividend charged did not fall to the infant defendant, but to his mother, and he took as her heir.

(3) That with reference to the apprehended danger from the proceedings to sell for assets, it should be made to appear that proceedings so long pending without decisive action were *bona fide*, and that the land would probably have to be sold before an injunction would be authorized.

MOTION for an injunction, heard at Chambers in Kinston, on 28 October, 1878, before *McKoy, J.*

The action in which this motion was made is pending in GREENE Superior Court. The facts are stated in the opinion. The motion was granted restraining the plaintiffs from selling the lands mentioned in the pleadings, and from this judgment the plaintiffs appealed.

(156) *Mr. H. F. Grainger* for plaintiffs.
No counsel in this Court for defendants.

DILLARD, J. At the death of John Turnage, he left a number of children, and in 1864 partition was made of his lands and the share assigned to Eliza, one of his daughters, who intermarried with A. M. F. Cameron, was charged with $2,114.25, to be paid to Elizabeth, another daughter, wife of Aligood Jones, for equality of partition. Eliza, the owner of the share charged, died, leaving John Cameron her only heir, and her husband, A. M. F. Cameron, her surviving.

The sum charged on Eliza's share not having been paid, this action was brought to Spring Term, 1875, against the defendants, the husband and heir of Eliza, to enforce the charge, and have the money raised out

of the lands assigned to Eliza; and it was so proceeded in that at Spring Term, 1877, the scaled value of the sum charged was fixed at $500, and it was adjudged that the share of land assigned to Eliza be sold for its payment, and a commissioner for that purpose was appointed.

Afterwards, when the commissioner appointed to sell the land had advertised, and was about to sell, the defendant applied to his Honor, Judge McKoy, by motion in the cause supported by affidavits, for an injunction to restrain the sale, and on the hearing, after rule to show cause on the plaintiffs, the injunction was granted as prayed for, and from this order the appeal is taken.

Upon consideration of the grounds on which the injunction was asked, and the matters alleged and proved by the affidavits used before his Honor, and sent up with the case of appeal, we are of opinion that the defendants were not entitled to the injunction, and that the order granting the same was improvidently awarded.

It is settled that a cause is pending until the judgment is fully executed, and while it is so pending a defendant aggrieved (157) thereby may obtain the relief he may be entitled to against the judgment on application to the Court in which it exists by a motion in the cause, and generally the Court will grant a *supersedeas* or other order arresting proceedings until the matter of grievance can be heard. *Chambers v. Penland,* 78 N. C., 53, and C. C. P., Secs. 188 to 196.

But it does not follow as a matter of course to arrest the execution of a judgment establishing *prima facie* the right of the adverse party, merely because it is asked, but it is necessary that the party asking a modification of the judgment, or other relief against it, shall allege facts legally sufficient to constitute the right and make such proof as to afford probable cause to believe that the party will be able to establish his right to the relief asked at the hearing. High on Injunctions, Secs. 4, 44 and 261; *Jarman v. Saunders,* 64 N. C., 367.

In this case the injunction is asked on several grounds, 1st, for that several sums had been paid on the sum charged on the share of Eliza, in whose right the defendants claim, for which they claim to be entitled to a credit; 2d, for that the defendant John Cameron is an infant, and that by express provision of the statute, Bat. Rev., Chap. 84, Sec. 9, the right to enforce the lien is postponed in the case of infants until their majority; 3d, for that a petition is pending, and has been for six years, in the name of the administrator of John Turnage, to sell the lands partitioned for the payment of debts, and that a sale pending that petition will be attended with a sacrifice of the property and irreparable loss to the defendants, as Elizabeth Jones, to whom payments have been made, is insolvent and unable voluntarily, or by compulsion, to repay the sums paid in part of the charge.

Considering the grounds alleged on the affidavits of defendants' claim, without regard to the counter affidavits on the part of the (158) plaintiffs, the defendants were not entitled, as it seems to us, under the principles above enunciated regulating relief against judgment, to the order of injunction granted by his Honor.

As to the payments made for which credit is asked, it appears, giving full credit to the affidavit of defendants, they were all made before the rendition of the judgment at Spring Term, 1877, and that defendants had a day in Court to avail of them, and failed to make claim, without any sufficient excuse for the failure. And in such case of laches, the rule is not to interrupt or arrest proceedings for the enforcement of the judgment. High on Injunctions, Sec. 97.

As to the ground of interference alleged, in that the defendant John Cameron is an infant, and no execution may be issued for the sum charged until his full age (as per Bat. Rev., Chap. 84, Sec. 9), the answer is, that the dividend charged did not fall to him, but to his mother, at the partition in 1863, among the heirs of John Turnage, and from her it descended to him as her only heir, and therefore the restriction claimed in the terms of the act did not extend to defendant John Cameron, who takes as heir to his mother Eliza, and not as heir to John Turnage.

As to the ground to arrest the sale under the judgment claimed to consist in the fact of the pendency of a petition in the Probate Court by the administrator of John Turnage for license to sell the lands descended and heretofore parcelled out among the heirs, and in irreparable damage consequent on a sale of the land pending that petition; it appears as a fact from defendants' affidavit that partition was made in 1863, fifteen or sixteen years ago, and that the petition for license to sell has been pending in the Probate Court for six years or more. The defendants, one the husband and interested as tenant by the curtesy, and the other a son and heir to Eliza Cameron, who was an heir to John Turnage, are to be taken as standing in such relation to the estate in which (159) they are interested, as to know whether there was any or no personal assets, whether any and what the amount of debts unpaid, what the prospect of a decree of sale in the Probate Court, and for what amount, and wherefore the delay to sell and pay the debts ever since the death of Turnage in 1863, and specially the delay to speed the pending petition for license now pending, and which has been standing for the last six years in the Probate Court.

In these respects it was incumbent on defendants in their affidavits to give information. The great length of time elapsed since the death of Turnage, and the delay to procure a license to sell the land and pay the debts, is so much out of the usual course of administration as to create a

suspicion that no creditors are in existence, and that the petition to sell is not begun and proceeded with in good faith; and it seems to us the defendants were not entitled to have had any more favorable view taken by his Honor of their application for the injunction.

In the opinion of this Court, therefore, the defendants, upon the case made by their affidavits, were not entitled to any injunction; or if so entitled, not an injunction by motion in the cause made to depend on the prosecution of the petition to sell for assets pending in the Probate Court, over which the Superior Court had no control, and which might be allowed to hang for a long time.

The judgment granting the injunction is

Reversed.

Cited: *Powell v. Weatherington,* 124 N. C., 41.

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(160)

P. B. CLIFTON v. JAMES C. WYNNE.

Attorney's Tax Fee—Ficto Juris.

1. The proceedings of a court are *in fieri* until the close of the term, and *hence* the Act of 14 February, 1879, ch. 41, which abolishes the tax fee of attorneys in civil cases to be *thereafter determined* applies to all cases decided at January Term, 1879, of the Supreme Court.
2. The fiction of law by which all the days of a term are condensed into one, and that the first is intended to promote and not to evade justice, and can not avail to defeat the clearly-expressed legislative will.

MOTION by defendant to retax costs, heard at June Term, 1879, of the Supreme Court.

The question presented is whether the act of 1879, Chap. 41, abolishing the tax fee of attorneys in civil suits, prevents the Clerks from taxing such fees in cases heard at January Term, 1879, of this Court, after the date of the ratification of said act. See same case, 80 N. C., 145.

Messrs. C. M. Cooke and *A. W. Tourgee* for plaintiff. (161)
Messrs. Lewis & Strong for defendant.

SMITH, C. J. The General Assembly, at its late session, passed an act "to abolish the tax fees of attorneys charged in bills of costs in civil suits," which was ratified and took effect on 14 February, 1879. Laws 1879, Ch. 41.

The first section enacts "that Clerks of the Supreme and Superior Courts shall not include or charge in any bill of costs any atttorney's

fee in any civil suit hereafter determined in any Court of the State, and that all laws or parts of laws coming in conflict and within the meaning and purview of this act be and they are hereby repealed."

The defendant's counsel moved to have the fee taxed by the Clerk for the use of the relator's counsel stricken from the bill of costs, and thus the question is raised whether the act applies to causes depending in this Court and disposed of at the last term, which began on the first Monday in January and ended in April.

The act, in direct terms, forbids the taxation of "an attorney's fee in any civil suit" *thereafter determined,* and obviously includes the present case unless it is exempted under the rule or fiction which assigns to the first day all the business of the entire session of a Court, and hence considers the cause to have been determined before the law was passed.

(162) The rule may be more accurately stated as condensing all the days of a session into a single day, and that the first, whenever the rights and interest of suitors are to be affected. It is also an established rule of the Court that all matters depending before it, and its action upon them, are *in fieri,* undetermined, until its close, and meanwhile under its control. No cause is, properly speaking, finally disposed of, put an end to, or, in the words of the act, determined, until the end of the term, and then the action of the Court is referred to its commencement to avoid unseemly controversy for priority or advantage among suitors whose cases were acted on at different periods of the session. But a fiction adopted for convenience and to promote the ends of justice, will not be allowed to defeat the substantial rights of others, nor to obstruct the clear expression of the legislative will. "The Court will not endure," says Lord Mansfield in *Johnson v. Smith,* 2 Burr., 950, 963, 1 Wm. Black, 207, 215, "that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing."

The extent to which the fiction has been carried in this State will be seen in the cases cited by counsel in the argument. *Farley v. Lea,* 20 N. C., 307; *Weeks v. Weeks,* 40 N. C., 111; *Foust v. Trice,* 53 N. C., 490.

The subject was considered by this Court at June Term, 1869, when framing rules of practice, and the absurdity of applying the rule to cases of appeal from a Superior Court, whose term began after that of the Supreme Court, was so manifest that it was repudiated, and the case of *Farley v. Lea* overruled upon the authority of the well-considered case of *Whitaker v. Wisbey,* 74 E. C. L., 44; *Rules of Court,* 63 N. C., 667, Rule 9, note. The facts in that case are these: The goods, the subject of the action, were claimed by the plaintiffs under a *bona fide*

assignment made on 20 March, 1851, and by the defendant under a forfeiture incurred by the assignor, Thomas Whitaker, for the crime of arson, of which he was convicted before the assizes on the 22d of the month, the fourth day after the session began. It was (163) insisted that the title under the forfeiture by relation accrued on 19 March, and displaced the assignment. The defense was not allowed, and the plaintiff had judgment. MAULE, J., quoting and approving the words of the Court in *Wrangham v. Husey,* 3 Wils., 274, says: "By fiction of law, the whole term, the whole time of the assizes, and the whole session of Parliament may be, and sometimes are, considered as one day, yet the matter of fact shall overturn the fiction in order to do justice between the parties."

The decision in *Farley v. Lea* was but an application of a rule of law, and not a fiction which gives to an execution a lien on the property of a debtor from its teste, which is always the beginning of the term, so as to defeat any intervening disposition of the property by the debtor to the prejudice of the creditor.

The principle to be extracted from *Whitaker v. Wisbey* is that rights and interests intermediately acquired are not displaced by the fiction, and that the one on which the Court in fact rendered its judgment may be inquired into in deciding upon the preferences among contesting claimants.

Many embarrassments must be encountered in the attempt to enforce the rigid rule of relation. Suppose the offense to have been committed and the criminal indicted, tried and convicted on some day or days during the term, is it a legal intendment that the trial was before the criminal act itself? or if the statute creating the offense is repealed after the term begins, will the Court, upon the theory of relation, proceed to try and punish in disregard of the repealing act? or would not a compromise or payment, under like circumstances, be recognized as putting an end to the action, if brought forward before the term expires? In these and similar cases which may be supposed, the application of the fiction would be wholly inadmissible; and if so in regard to private interests merely, much more must it be our duty, in giving effect to a public statute, to ascertain the facts upon which it is to operate.

But aside from all this we put our decision upon the distinct (164) ground that none of the causes decided at the January Term were determined, in the sense of the statute until its close in April, and hence its prohibition extends to them all, as well those in which opinions had been filed as those in which they had not been, at the date when the act went into effect. This is the clear intent of the General Assembly, and the plain meaning conveyed in the statute. Of its policy we are not called on to speak, the office of the Court being to expound

the law and enforce its command. The motion is allowed, and the bill of costs will be corrected accordingly.

PER CURIAM. Motion Allowed.

Cited: *Webber v. Webber,* 83 N. C., 281; *Worthy v. Brady,* 91 N. C., 266; *Turrentine v. R. R.,* 92 N. C., 644; *Davison v. Land Co.,* 120 N. C., 260; *McKinney v. Street,* 165 N. C., 517.

W. A. ROGERS, Executor, v. ROBERT McKENZIE and others.

Attorney—Power to Receipt for Client.

1. It is competent to the plaintiff's attorney of record to receive payment of a judgment and discharge the defendant.
2. Plaintiff's counsel, without the client's actual knowledge, associated with himself another attorney, and marked the latter's name upon the docket. The cause was in litigation for about seven years, during which time both attorneys participated equally in its conduct: *Held,* that the plaintiff was bound by the receipt of the associate attorney given in discharge of the final judgment.

MOTION in the cause, heard at June Term, 1879.

It was agreed that the Clerk of this Court should ascertain (165) and report whether William McL. McKay was one of the attorneys of the plaintiff, and as such received from defendant the sum of two hundred and eighty dollars upon a judgment heretofore recovered, the amount of which has been paid to plaintiff, except said sum which the Clerk was directed to retain until the determination of the question raised by the motion of defendant.

The Clerk accordingly submitted a report stating that it appeared from the statements of the Clerk of the Superior Court of Robeson, under his seal of office, that the name of Mr. McKay, "in his own proper handwriting," as one of the attorneys for plaintiff, appears upon the docket of said Court at Fall Term, 1875, and also at Fall Term, 1876, and that the decree in the case is in his handwriting; but that there was no direct evidence contained in the affidavits submitted by the parties that he was employed by the plaintiff; the evidence of the plaintiff was positive that he never employed Mr. McKay in this case, and that Mr. N. A. McLean was his sole counsel therein; the evidence of Mr. McLean was that he asked Mr. McKay to appear with him generally in his cases in the Supreme Court; this case came to the Supreme Court at January Term, 1871, and was decided, and the names of both the gentlemen appear as counsel for plaintiff upon the Clerk's docket, and are published in the Reports—65 N. C., 218; the case came to the Supreme

Court again at June Term, 1875, and was continued until June Term, 1876, when a final decree was entered, and the said names appear as counsel for plaintiff on the docket in the handwriting of Mr. McLean. The Clerk, therefore, finds that there is no direct or positive testimony that Mr. McKay was ever employed in the case by the plaintiff himself, either in this Court or in the Court below, but that it fully appears that he was associate counsel for the plaintiff, and of record in both Courts. The main facts are stated in the opinion of this court. (166)

Messrs. Hinsdale & Devereux for plaintiff.
Messrs. Battle & Mordecai and *A. Rowland* for defendants.

SMITH, C. J. At June Term, 1876, of this Court the plaintiff (167) recovered judgment against the defendants for the sum of $462.39, whereof $270.56 was principal money and bore interest from 1 April, 1875. In June, 1876, the defendant paid to W. McL. McKay, an attorney marked on the record for the plaintiff, the sum of $30, and in October following the further sum of $250, upon the said debt. Under execution subsequently issuing, on which no credit was endorsed or mentioned, the defendant, on the first day of December, 1877, paid to the Sheriff of Robeson County the amount of the judgment, to wit, $516.68, and took his receipt therefor in full of debt, interest and costs.

The funds being paid into Court, the sum of $280 was directed to be retained to await the result of a motion of defendant's counsel that that sum be returned to him, and the residue paid to the plaintiff. The plaintiff claims the money, notwithstanding the payment to Mr. McKay, on the ground that he was not the plaintiff's attorney, and was without authority to represent him in the case, or to collect the money. At January Term, 1878, the matter was referred to the Clerk, with directions to "ascertain and report whether W. McL. McKay was one of the attorneys of the plaintiff," and as such collected the sum of $280 from the defendant. At the present term the report is made, accompanied by the evidence taken, from which it appears as follows: The name of Mr. McKay, associated with that of Mr. N. A. McLean, is entered as plaintiff's attorney in the case, at Fall Term, 1869, of the Superior Court, the action having been brought by Mr. McLean in (168) the spring of 1868, and has so remained during the progress of the cause until its final determination. The judgment entered at Spring Term, 1875, was drawn by him and signed by the presiding judge.

The cause was twice brought to this Court on defendant's appeal, first to January Term, 1871, when a new trial was ordered, and again to June Term, 1875, and it was continued until June Term, 1876, when final judgment was recovered by the plaintiff. The appearance of both

the attorneys is entered on the docket of this Court in both appeals, and on the last appeal is in the writing of Mr. McLean, and both participated in the prosecution of the cause. There is no direct evidence of the employment of Mr. McKay, and the plaintiff testifies positively that he did not retain him, nor assent to his appearing as an attorney in the cause, until after his collection of part of the money from the defendant. Mr. McKay died before any action on the part of plaintiff repudiating his authority to act with Mr. McLean, and we have consequently no statement from him in regard to the matter.

Although, as Mr. McKay's personal representative is not a party to this proceeding, the testimony of the plaintiff as to transactions with the deceased may not be incompetent under the rules of evidence to prove matters transpiring between him and the deceased, yet the relations of the deceased to the pending motion are so nearly like those of a party that the evidence should be accepted with great caution and carefully weighed.

But assuming the facts to be as the plaintiff deposes, the question arises, can the plaintiff, under the circumstances, be now heard to disavow the authority of his attorney of record, who has been openly such for seven years, in both Courts, participating actively with associate in managing the action and promoting the plaintiff's interests, and to require the defendant, acting upon the apparent authority, to pay the money a second time? The plaintiff has had the benefit of the
(169) attorney's services in securing the money now claimed, has never been present at a Court when the cause was for trial, committing its conduct entirely to his admitted attorney, Mr. McLean; can this indifference and neglect to inform himself during this long period of what was going on, thereby assuring the defendant's confidence in the authority of both attorneys, as recognized by the Courts, be allowed to subject the defendant to a double payment? The proposition finds no support in reason or authority. The loss should fall not upon him who has been without fault or blame, and who has throughout acted in entire good faith, but upon the plaintiff, by whose negligence it has been caused. This is a sound rule of law, and the dictate of justice. While we attach no blame to Mr. McLean for his failure to communicate to his client the fact that his associate was assisting him in the management of the case, yet his knowledge must in its legal consequences be imputed to the plaintiff, as if actually possessed by him. Surely the defendant had sufficient reason to believe, and to act upon the belief, that Mr. McKay had full and ample authority to represent the plaintiff, and to exercise such power as is incident to his relation as an attorney in the cause. It would be a gross wrong now to permit the plaintiff to repudiate and

disown that authority to the prejudice of the defendant, and for his own advantage.

These views seem to be warranted by the authorities to which we have been referred by the defendant's counsel: "When a respectable and responsible attorney appears for a party," say the Court in *Denton v. Noyes,* 6 John., 296, "the Court will not, ordinarily, inquire into the fact whether he was authorized or not."

Again, it is said that "where no circumstances are shown calculated to raise a suspicion of fraud, or of an attempt to impose upon a party, or to abuse or pervert the process of the Court, even the (170) mere fact of authority will not be questioned." *Mexico v. De Arangoiz,* 5 Duer., 643.

The attempt of the defendant to question the authority of the attorney for the plaintiff in bringing the suit was also unavailing. It is the course of the K. B., said HOLT, C. J. (1 Salk., 86), "when an attorney takes upon himself to appear, *to look no further, but to proceed as if the attorney had sufficient authority,* and to leave the party to his action against him." *Jackson v. Stewart,* 6 John., 3.

Chancellor WALWORTH says, in *Amer. Ins. Co. v. Oakley,* 9 Paige, 496: "As a general rule, when a suit is commenced or defended, or any other proceeding is had therein, by one of the *regularly licensed solicitors,* it is not the practice of the Court to inquire into his *authority* to appear for his supposed client." See, also, Weeks on Attorneys, Secs. 198, 199.

A further citation of cases would seem needless, for if the existence of ample authority to act is assumed from the appearance of the attorney with the sanction of the Courts (and ordinarily it could not be questioned), all the results must follow as if actual authority had been conferred, and among them the rightfulness of the defendant's payment. It was not denied in the argument that an attorney of record may receive payment partially or in full of the judgment recovered for his principal, and if it were, the adjudications in support of the proposition are abundant. Weeks on Attorneys, Sec. 232, and cases there cited. The right is recognized also in *Moye v. Cogdell,* 69 N. C., 93, and in *Morris v. Grier,* 76 N. C., 410.

We have been furnished in the brief of defendant's counsel with several cases wherein a party, prejudiced by the unauthorized act of an attorney, has been permitted to deny and disprove his assumed authority to appear; but upon examination they will be found to be cases in which relief was sought against a judgment or some unfavorable action of the Court consequent on such appearance, either in bringing the suit or instituting the proceeding without warrant to (171) do so, or in defending it when process had not been served and

the defendant had no notice. Thus the conclusiveness of the judgment was strongly affirmed in *Shumway v. Stellman,* 6 Wend., 453, and in *Hess v. Cole,* 3 Zab. (N. J.), with two qualifications only. First, if it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void. Secondly, if it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him. See, also, *Bayley v. Buckland,* 1 Wels., Hurl. & Gordon, 1, and the note appended.

The case before us is not within the principle thus declared. The plaintiff does not complain of what has been done in the conduct of the cause, nor propose to disturb the judgment of the Court. He seeks to repudiate the subsequent act of one of his counsel in reducing into his possession a part of the fruits of his professional labor and skill, because it has not been faithfully accounted for. There is imputed to the defendant no misconduct or bad faith in the premises. The plaintiff, and not the defendant, ought to bear the loss. The money improperly collected a second time, and now in the Clerk's office, must be returned to the defendant. The referee is allowed fifteen dollars for his services, which, with the other costs of the motion and reference must be paid by the plaintiff, and it is so ordered.

PER CURIAM. Motion Allowed.

Cited: Isler v. Murphy, 83 N. C., 219; *England v. Garner,* 90 N. C., 201; *Branch v. Walker,* 92 N. C., 91; *Coor v. Smith,* 107 N. C., 431; *Lewis v. Blue,* 110 N. C., 423; *Harrell v. R. R.,* 144 N. C., 544; *Bank v. Peregoy,* 147 N. C., 295; *Newkirk v. Stevens,* 152 N. C., 502.

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(172) S. EGERTON v. G. W. LOGAN.

Attorney and Client—Presumptive Fraud—Statute of Limitations.

1. The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage.
2. Defendant, an attorney, purchased of his client (the plaintiff) several notes against an estate at a sum greatly less than their face value, stating to the plaintiff that if he collected in full, he would "do what was right." Thereafter the defendant did collect face value of the claims, and the plaintiff, on being informed thereof, called on the defendant for some money and inquired, "Will you not give me any of the money; are you going to keep it all?" to which defendant made no reply; *Held,* that if the indefinite promise to "do what was right" originated a trust as to the sum collected, the subsequent call for money and the defendant's silence amounted to a repudiation of the fiduciary relation and a closing of the trust; whereby a legal, as distinguished from an equitable, cause of action arose, which was barred by the statute in three years after demand.

APPEAL at Fall Term, 1878, of RUTHERFORD, from *Schenck, J.*

The summons in this action was issued on 9 September, 1876. The plaintiff alleged that he employed defendant as his attorney and placed certain claims in his hands for collection, some of which the defendant represented to plaintiff he did not believe could be collected; that plaintiff being an ignorant man and unaccustomed to business transactions of this nature, did not know the actual value of the claims or the probabilities of collecting them; and relying solely on the representations of defendant, he was induced thereby to sell said claims to defendant at a sum greatly less than their true value and greatly less than (173) the amount afterwards realized upon them by defendant; that in 1869, the defendant brought suit on the claims (which were due from an intestate's estate), and compromised the same by receiving a claim due by him to said estate, and got judgment on a certain other debt and collected the money from the administrators of said intestate; that a demand for a settlement was made on defendant, which he refused, and declared that plaintiff had no claim upon him for any sum of money whatever. Wherefore, the plaintiff demanded judgment for the sum of $2,213.40 (amount of claims), with interest from the date of the summons.

The defendant admitted that the claims were given him, but alleged it was done under the following circumstances: Plaintiff held the claims for several years, and after the emancipation of the slaves, he brought them to defendant and informed him the notes had been for the purchase of slaves, and expressed great doubt as to whether he would ever get anything for them, and left them with defendant, who advised plaintiff to hold on to them. Defendant denied the allegation that he used any unfair means to obtain the claims, or that he deceived the plaintiff, and that in giving the price he did for them, he felt he was running a great risk of losing his money.

The following issues were submitted to the jury:

1. Was the assignment of the notes procured by fraud? Answer: "Yes."

2. If the assignment was procured by fraud, did plaintiff discover the facts constituting the fraud more than three years before this action was brought? Answer: "No."

3. Was there a demand made on 13 December, 1871, by plaintiff on defendant for more money on the promise "to do what was right"? Answer: "Yes."

The evidence was substantially as follows: Plaintiff testified that in the year 1866 he placed in defendant's hands for collec- (174) tion as an attorney, two notes on John Geer, deceased, dated 19 April, 1862, one for $910, and the other for $881.65 (with small

credits on each), which notes were given for slaves; that defendant gave him a receipt for the notes, but he had lost the same; that he could neither read nor write, was ignorant, and generally employed at that time an agent, one John Logan, to transact his business, and by his advice placed the notes in defendant's hands; that said agent died in 1868, and shortly thereafter the defendant sent for plaintiff to come to his office in Rutherfordton; that defendant was then Judge of the Superior Court, and stated he had not sued on the notes, was doubtful whether they could be collected, being given for slaves, but would give plaintiff $300 for them; that when parties came in, defendant requested them to retire, saying he was on private business, and told the plaintiff "to keep his tongue" about the matter; that owing to these representations, and having confidence in the defendant, he assigned the notes to him by the endorsement "Pay to G. W. Logan," and signed his name by making his mark, and defendant then paid him $150 in cash and gave his note for the balance, which has been since paid, and defendant said, "If I collect the notes, I'll do what is right."

It was also in evidence that on 1 March, 1869, the defendant issued summons on these notes in his own name against the administrators of John Geer, deceased, and at February Special Term, 1870, took judgment in pursuance of a compromise and settlement with the administrators, as follows (the facts being agreed on): Defendant, owed the Geer estate a note for $1,100, given in 1851, for slaves, which was credited at its face value on the Egerton notes; the administrators also assigned to defendant an insolvent note for $110 on one Bartlett, and defendant took judgment for the balance due, to wit, $1,350; that subse-
(175) quently defendant issued execution, and sold the Geer estate lands, and on 16 August, 1870, received from the Sheriff $1,390.50.

It was also in evidence that defendant was counsel for the administrators of the Geer estate, and that one of them refused to submit to the judgment, until defendant, Logan, advised him that he would be obliged to pay the Egerton notes and could not get out of it. That plaintiff, Egerton, after he heard defendant had received the said sum from the Sheriff, went, on 13 December, 1871, and told defendant that he wanted some money; defendant gave him ten dollars, and required plaintiff to give him a note; that plaintiff then said, "Will you not give me any of the money you collected; are you going to keep it all?" and defendant gave no answer. That the Geer estate was insolvent, and defendant was solvent in 1869. That the said compromise was made in 1869 or 1870. That a demand to pay what defendant had collected was made on him by plaintiff before suit brought.

The defendant, in reply, testified that he gave all the information

of facts he had to plaintiff in regard to the notes, and his best opinion in regard to the law bearing on their collection; that the transaction was open, fair and *bona fide;* that he did not send for plaintiff, but that plaintiff, before the trade, had expressed himself willing to take less for the notes, and that he thought he paid a fair price for them. Defendant denied all allegations of fraud in the transaction. Two other witnesses swore that the war notes for slaves were almost worthless, and that Egerton transacted his ordinary business in the stores, settled his accounts, etc.

The first two issues above set out were submitted by the Court and approved by the parties; the third, by defendant's counsel, and assented to by the plaintiff. The statute of limitations was reserved by the Court as a question of law on the issues found and facts (176) agreed upon. There was no exception to the charge to the jury, who responded to the issues as stated above. And thereupon the Court held that plaintiff was entitled to have defendant declared a trustee of the fund collected, and that he have judgment for $1,390.50 and interest, subject to a credit of $300, and commissions allowed defendant for collection, etc.

The Court also held that the action being one solely cognizable in a Court of Equity under the former system, was not barred by the statute of limitations. Judgment for plaintiff, appeal by defendant.

Messrs. W. J. Montgomery and *Merrimon, Fuller & Ashe* for plaintiff.
Messrs. Reade, Busbee & Busbee for defendant.

SMITH, C. J. The facts disclosed in the pleadings, independently of the finding by the jury, show a case of fraud entitling the plaintiff to relief upon the principle laid down in *Lee v. Pearce,* 68 N. C., 76, and *Harris v. Carstarphen,* 69 N. C., 416, "that only the known and definite fiduciary relations by which one person is put in the power of another, are sufficient, under our present judiciary system, to raise a *presumption of fraud as a matter of law,* to be laid down by the Judge as decisive of the issue unless rebutted. The relation of "attorney and client in respect to the matter wherever the relationship exists," is specially mentioned as embraced in the proposition. The verdict but affirms the presumption as one of fact, and establishes the invalidity of the assignment to the defendant, and the formal endorsement by which it is attempted to be effected.

The only question presented in the record, and necessary to be considered, arises out of the defense set up under the statute of limitations, and this, in our opinion, is decisive of the case.

The moment the defendant collected the claims, the money
(177) was received by him to the use of the plaintiff, and he became liable to account for the excess in his hands above the proper charges and expenses of collecting and the sum advanced at the time of endorsement, when the plaintiff, on the 15th day of December, 1870, after payment to the defendant, applied to him for the money or some part of it, and the defendant made no answer to the inquiry "Won't you give me any of the money you collected; are you going to keep it all?" It was a clear and distinct demand and refusal, which entitled the plaintiff to an immediate action, and at once put the statute in operation. Unless this effect is allowed to his silence and conduct, a party may always evade the consequences of a necessary previous demand by refusing to make a response. The application is for moneys belonging to the plaintiff, then in the hands of the defendant, which it was the legal duty of the latter to account for and pay over, and no excuse is offered for his failure to do so. This is a plain denial of the plaintiff's right, and manifests the intention of the defendant to retain the moneys as his own. This result is not affected by the more formal and peremptory demand afterwards made, and which met a refusal equally unequivocal and decisive. As the action is not brought within three years thereafter, the statute interposes its barrier to the recovery. The form of the demand is not essential to its efficacy. It is sufficient when it serves to inform the agent that the money in his possession is wanted by the principal, and affords him opportunity to pay it, and the neglect to do so puts him in the wrong and exposes him to the action for money had and received to the plaintiff's use.

The Court below put the plaintiff's claim upon one of two grounds: 1st, an express trust by force of the words, "If I collect the notes, I will do what is right," to which the statute does not apply until the
(178) trust is closed, or adversary relations assumed between the parties; or, 2d, a newly discovered fraud, cognizable alone under the former system in a Court of Equity, as to which the statute begins to run from the time of discovery of the facts in which it consists. C. C. P., Sec. 34 (9).

We find some difficulty in reconciling the findings of the jury upon the second and third issues, since if the demand specified in the last was, and we think it is, legally sufficient, whereby the obligation of the defendant is disowned, the trust repudiated, and the intended fraud consummated (and its essential and controlling element is the misappropriation of the fund to the trustee's own benefit), we are unable to see why all "the facts constituting the fraud" were not then fully known to the plaintiff within the meaning of the statute. The subse-

quent is but a repetition of a former refusal, and discloses no new fact not already known to the plaintiff, so that in this aspect of the case the action is also barred.

If the express trust alleged to arise out of the vague and indefinite words used by the defendant at the time of transfer was not determined by the first demand, and the antagonistic relations thereby produced, it is nevertheless manifest that there are concurrent remedies at law and in equity, and hence the case does not come within the saving of the statute. We have already said that the action for money had and received was open to the plaintiff, and in support of the proposition refer to *Bahnsen v. Clemmons,* 79 N. C., 556. It lies when "the defendant has recovered or obtained possession of the money of the plaintiff which in equity and good conscience he ought to pay over to the plaintiff."

It is, however, suggested in the argument for the plaintiff that as the fraud is not in the act of endorsement, but in the influence and means employed to procure it, a Court of Equity is alone com- (179) petent to give relief, and therefore the statute begins to run at the date of its discovery.

But this rule applies only to deeds and written instruments under seal, and thus far is supported by the cases cited for the plaintiff. *Logan v. Simmons,* 18 N. C., 13; *Gant v. Hunsucker,* 34 N. C., 254, and other more recent decisions. The rule does not extend to other executed contracts, whether in writing or by parol. We have familiar instances of its operation where a vendor of goods, even after sale and delivery, retains his property therein and may sue and recover possession, when the sale has been induced by false and fraudulent representations, of which *Wilson v. White,* 80 N. C., 280, is the most recent example in our own Reports. The sale is treated as a nullity, conveying no title, at the vendor's option, as is the alleged assignment under which the defendant claims the notes and the money due on them. In whatever aspect the facts of the case may be viewed, *quacunque via data est,* the plaintiff encounters the same insuperable obstacle resulting from his delay, and the statute, which but speaks the voice of the pre-existing law, arrests the prosecution of the cause. *Blount v. Parker,* 78 N. C., 128.

We determine the case upon strict principles of law, which alone it is our duty to expound and enforce. Yet we can not refrain from marking our strong disapprobation of the wrong done an ignorant and unlettered client by an attorney to whom he had committed his interests and given his confidence, successful through the influence of fiduciary relations the most sacred, and now beyond redress. But

ignorance does not suspend the onward movement of the statute, and the plaintiff's forbearance puts an end to his remedy.

The judgment must be reversed and judgment entered here that the defendant go without day.

Reversed.

Cited: Jaffray v. Bear, 103 N. C., 167; *Smith v. Moore,* 149 N. C., 198.

(180)

BRANCH & POPE v. FRANK & ADLER.

Attachment—Affidavit for, and Proceedings in.

1. It is not necessary that the affidavit upon which an attachment is sought should state either that the court has jurisdiction of the subject matter of the action, or that the defendant has property in this State.
2. It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment.

MOTION to vacate an order of attachment, heard at Spring Term, 1879, of HALIFAX, before *Eure, J.*

The affidavit of plaintiffs upon which the order of attachment was issued is substantially as follows:

1. That the plaintiffs are partners, doing business in Enfield, N. C., and the defendants in Baltimore.

2. That on or about 13 September, 1878, plaintiffs bought of defendants goods to the amount of seven hundred dollars, in the city of Baltimore, for sale by plaintiffs in Enfield.

3. That defendants then agreed to forward the goods without delay, but, disregarding their promise, they failed and refused to forward the same till about 25 September, 1878; and by reason of the delay the plaintiffs were injured and wrongfully delayed in reselling the goods, by which they sustained damage to the amount of two hundred and fifty dollars.

4. That by reason thereof, the plaintiffs were injured in their credit and good standing as merchants to the amount of two hundred dollars, and they believe they are entitled to said sum.

5. That plaintiffs have commenced an action in this cause (181) by issuing a summons against defendants upon the cause of action above stated.

6. That defendants are non-residents of this State, and can not, after due diligence, be found within this State, and have property

therein, as plaintiffs are informed, consisting of a debt due, or shortly to be due, them from one L. A. Fairnholt, in Weldon.

7. That plaintiffs are informed and believe that a cause of action exists in their favor against the defendants by reason of the wrongful act complained of.

The grounds of the motion to vacate, which was granted by the Court below, are set out in the opinion. Appeal by plaintiffs.

Messrs. W. H. Day and *John A. Moore* for plaintiffs.
Mr. Thomas N. Hill for defendants.

ASHE, J. This was a motion to vacate an attachment. The motion was based upon two grounds; first, that the affidavit for the attachment did not state "that the Court has jurisdiction of the subject-matter of the action"; second, "that it did not state posi- (182) tively that the defendants had property in the State, but stated that the defendants had property therein, as plaintiffs are informed and believe, consisting of a debt due, or shortly to be due, them by L. A. Fairnholt, of Weldon."

It seems that the Court below fell into the error of confounding the requisites of the affidavit for service of summons by publication with those for obtaining a warrant of attachment, the first as prescribed in Section 83 of The Code of Civil Procedure, and the latter in Section 201, and are quite different. By Section 201, it is provided the warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is a foreign corporation, or not a resident of this State. The affidavit in this case, so far as relates to the obtaining the warrant of attachment, comes fully up to the requirements of the law—the second, third and fourth paragraphs set forth the fact that a cause of action exists against the defendants, and state with sufficient precision the amount and grounds thereof; and the sixth states that the defendants are non-residents of the State. This is all that is needful to obtain the warrant. There is no provision in this section that requires the statement "that the Court has jurisdiction of the subject-matter of the action, nor that the defendant has property in this State."

The error assigned is for not dismissing the action for want of a legal service of the process. We have nothing to do here with that question. No such order was made in the Court below. The action is still pending in the Superior Court of Halifax. And the only question for our consideration is whether the affidavit was sufficient for obtaining the warrant of attachment.

The attachment, under The Code, is a "provisional remedy,
(183) and is always ancillary to an action commenced by summons, its proceedings are not jurisdictional, and any errors committed are capable of being amended." 1 Tiffany and Smith, 315. It is commenced by summons, and may be issued at any time, with the summons or afterwards; and its object is to secure the property of the defendant for the satisfaction of such judgment as the plaintiff may recover against him. If the proceedings for obtaining the warrant are regular, the property seized by virtue of its exigence must be held *in custodia legis* until the action to which it is ancillary shall be determined. In this case the action is still pending. The affidavit to obtain the warrant was sufficient. It was error to vacate the attachment before judgment, however defective the affidavit may be, for the purpose of having service of the summons by publication, for it is possible that may be amended.

Error. Reversed.

Cited: Penniman v. Daniel, 90 N. C., 159; *Cushing v. Styron,* 104 N. C., 341; *Sheldon v. Kivett,* 110 N. C., 410; *Mullen v. Canal Co.,* 112 N. C., 111; *Parks v. Adams,* 113 N. C., 476; *Foushee v. Owens,* 122 N. C., 363.

BRUFF, FAULKNER & CO. v. STERN & BRO.

Attachment—Fraud—Verification by Agent.

1. The court will not surrender property *in custodia legis* if its detention appear reasonably necessary to protect the right of the plaintiff until the trial.

2. It appeared from the affidavit for an attachment (made by plaintiff's agent) and the accompanying exhibits, that the defendants, partners in trade, had made an assignment of their entire stock to the father-in-law of one partner, in trust, after the payment of the expenses incident to the assignment and a five hundred dollar personal property exemption to each partner, to sell privately the goods, etc., and apply the proceeds to the satisfaction of the firm debts, the trustee being a preferred credi-
(184) tor in an amount sufficient to absorb the entire assets devoted to the debts. The trust deed contains a proviso that the general creditors should be paid only upon the condition of their releasing all claims against the individual partners. The affidavit also alleged that the trustee, who lived in a distant State, had delegated his charge to his own son and the assigning partners. It further appeared that in about four months immediately preceding the assignment, the assignors had converted about five thousand dollars worth of their stock into money, of which the creditors had received not more than one-ninth: *Held,* that such affidavit, embodying the foregoing facts, and stating that the defendants had disposed of and secreted their property, with intent, *as the agent believed,* to defraud the plaintiffs, was sufficient to warrant the continuance of the attachment until the trustee and all per-

sons interested could submit their conflicting statements and interests to the decision of a jury: *Held, further*, that the personal property exemptions provided for by the deed should be paid out of the first money coming into the trustee's hands, and not out of the residue liable to the claims of the general creditors.

3. The provisions of C. C. P., sec. 117, requiring that verifications made by agents shall state why they are not made by the principals, and that the material acts are personally known to the agent, apply not only to *actions* in which the responsive pleadings must also be under oath, and not to those ancillary remedies intended merely to secure the fruits of an ultimate recovery, in seeking which greater latitude is allowed.

MOTION to vacate an attachment, heard at Spring Term, 1879, of PITT, before *Seymour, J.*

Upon affidavit of an agent of the plaintiffs, an attachment issued against the defendants, and the Sheriff, by virtue thereof, seized certain property of defendants, who subsequently, upon notice, moved to dissolve the order of attachment, which motion was denied by the Court; and it appearing that issues of fact were raised by the intervening interests of a trustee and of the creditors of defendants, the Court ordered the case to be set for trial before a jury. The facts are fully stated in the opinion of this Court. Defendants appealed (185) from the order of the Judge below.

Mr. W. B. Rodman for plaintiffs.
Messrs. Gilliam & Gatling for defendants.

SMITH, C. J. The plaintiffs, at the time of suing out their summons on 13 January, 1879, applied for an attachment against the goods of the defendants upon an affidavit made in their behalf by one George L. Pender, their agent.

The affidavit states that the defendants, on or about the 8th day of January, 1879, made an assignment of their stock of goods and entire visible estate to one A. Ostheim, of New York, the father of the wife of the defendant Max Stern, and an alleged creditor of the firm to the amount of forty-five hundred dollars or thereabouts, in trust, after payment of expenses, to pay to each assignor the sum of five hundred dollars, his personal property exemption, and then in trust for the creditors, priority being secured to the debt due the trustee, the aggregate of the debts being about ten thousand dollars; and it alleges that the fund is insufficient to reach beyond the preferred debt, that the deed confers on the trustee power to sell privately, and the trustee had returned to New York, leaving the property in the hands of the assignors and his own son, thereby affording ample opportunity for the fraudulent removal and disposition of the goods; and that upon

information, between 1 September, 1878, and the date of the assignment, the defendants had disposed of a large part of their stock of goods in their two stores at Tarboro and Williamston, to the amount of $5,000, of which only about $570 has been applied to the payment of their large indebtedness, and that this money is not included in the assignment, and is now concealed and secreted, and that affiant is in-
(186) formed and believes that the defendants have assigned and disposed of and secreted their property "with intent to defraud" the plaintiffs. Upon this affidavit the attachment issued to the Sheriff, who seized and took into his possession the various articles enumerated in his return endorsed on the writ.

After notice, the defendants appeared before *Seymour, J.*, on the 24th day of February, and moved for an order discharging the attachment, and in support thereof filed affidavits of themselves, of the trustee and others; the plaintiffs also filed additional affidavits to sustain the order. At the same time the said A. Ostheim was allowed to interplead and set up his title to the property. The deed of assignment is also put in as evidence. Upon hearing the motions, that of the trustee to be made a party is allowed, and the issues of fact raised by the interpleader directed to be tried before a jury, and the motion to dissolve the attachment is refused, from which latter ruling the defendants appeal.

The evidence read before the Judge is conflicting, and it is unnecessary, if in such case it is our duty under recent constitutional amendments, to pass upon its force and effect. Unless there was manifest error, we should be reluctant to disturb the conclusions to which the mind of the Judge is brought in weighing the evidence.

The grounds of the motion to dissolve, as set out in the record, are numerous, and will be considered in their proper order of presentation. They are as follows:

1. The defendants did not dispose of their property with intent to hinder, delay or defraud their creditors.

2. The defendants have not concealed, nor do they now conceal, any money or other things of value with intent to hinder, delay or defraud their creditors.

3. The affidavit does not impute to the trustee and preferred
(187) creditor, A. Ostheim, any knowledge of, or a participation in, the alleged fraud of the defendants.

4. The affidavit fails to allege the value of the property to be attached to be in excess of the exemptions allowed the defendants.

5. The exemptions were not set off to the defendants before the Sheriff's seizure.

6. The agent who made the affidavit was not competent to make an affidavit on which an attachment could rightfully issue, and it does

not contain the statements required in verifying a complaint by an agent. C. C. P., Sec. 117.

The sufficiency of these exceptions is alone subject to our review. Exceptions 1 and 2 may be considered together.

The assignment was made about the date when the last note sued on fell due, after, as the affidavit of the agent asserts, some $5,000 worth of the stock had been disposed of within a little more than four months preceding, whereof about one-ninth only had been applied to outstanding liabilities of the firm. The assignee was, by marriage, a near relation of the senior partner, and resided in New York, rendering necessary the supervision of others over the property and in executing the trusts. It does not appear that the proceeds of the sales since the assignment have been appropriated to the payment of the personal property exemptions, but to the debt of the preferred creditor, thus leaving an incumbrance on the property undischarged, which should have been removed.

The deed, moreover, contains a clause disposing of what remains of the trust fund after payment of the debt due Ostheim, and two small debts next preferred, as follows: "If, when all the costs, charges, commissions and expenses, the personal property exemptions of the said M. Stern and Simon Stern, and the debts due said Ostheim and Forbes and Whitehead, specified in the first, second, third and fourth clauses, have been paid and discharged, there shall still remain a balance in the hands of said Ostheim, he shall estimate what percentage (188) of all the other debts hereinbefore enumerated the said balance will pay, and shall notify all the creditors hereinbefore named what such percentage will be, and that he will pay such amount on their respective debts, provided *they will discharge the said M. Stern and Simon Stern from all further liability.* Should any of the creditors assent to receive the said percentage of their debts and *discharge the said M. Stern and Simon Stern from further liability,* the said Ostheim shall thereupon pay such percentage to him or them, taking their discharge under seal. But if any refuse to assent, then the said Ostheim *shall not pay them such percentage,* but shall pay the same to the said M. Stern and Simon Stern, or their assigns."

The effect of such a provision in a deed of trust we do not propose now to discuss, and refer to it in connection with other facts stated in the first affidavit only to show the propriety of not allowing a fund now in the hands of an officer of the Court and under its control to be placed beyond the reach of the plaintiff's recovery by a premature decision of the merits, upon a review of the interlocutory order by which it is now secured. See Burrill on Assignments, Secs. 193, 195, where the effect of such a provision is discussed. The evidence pro-

duced upon the hearing was conflicting, and having some probable grounds in support of the plaintiff's claim, presents a proper case for the application of the rule that the Court will not surrender a property *in custodia legis* if it appear reasonably necessary to protect the rights of the plaintiff until the trial. *Monroe v. McIntyre,* 41 N. C., 65; *Heilig v. Stokes,* 63 N. C., 612; *Ponton v. McAdoo,* 71 N. C., 101.

If the deed exhibited at the hearing was not made a part of the original affidavit, it may nevertheless be considered in passing upon the motion to dissolve and may help out a defective affidavit. *Brown v. Hawkins,* 65 N. C., 645.

(189) Taking the affidavit to be true, its statements of the acts of the defendants in making the assignment and secreting a part of their effects with the intent charged upon information and belief, is sufficient to warrant the process under C. C. P., Sec. 197. These exceptions are, therefore, overruled.

Exception 3.—The third exception is, that if the deed was made with a fraudulent intent, the trustee and creditor most interested did not participate therein, and consequently the deed is not invalid under the decision in *Rose v. Coble,* 61 N. C., 517, and *Lassiter v. Davis,* 64 N. C., 498. Whether the trustee knew of or participated in the fraudulent purpose of the assignors in the making of the deed, or by taking benefit under it, and what weight the evidence ought to have upon the mind of a jury when charged to pass upon such issues, it is not our province thus prematurely to determine, or, indeed to intimate an opinion. This must be left to be passed on at the final trial, and we are not at liberty now to surrender the fund by assuming that there is no evidence of such complicity. The trustee, Ostheim, is admitted a party, and this question will arise between him and the plaintiffs, but it can not be raised by the defendants, as to whom it is quite sufficient that *they had a fraudulent intent* in making the conveyance. This exception is also overruled.

Exceptions 4 and 5.—It appears from the affidavit of Jonas Ostheim, put in possession of the property by his father, that he has realized from the assignment by sales and collections about $3,500 in money, a sum ample to pay the exemptions, and out of which, by the terms of the deed, they ought to be paid. The exemptions should be satisfied out of the money in the hands of the trustee, and not become a charge upon the remnant of the assigned property levied on under the attachment.

It may be further suggested that it nowhere appears that application was made before the seizure by the officer to set apart any exempted property, and, indeed, none could be claimed by the individual

(190) partners out of the partnership assets except by their mutual consent. *Burns v. Harris,* 67 N. C., 140. The affidavit, moreover,

charges a fund to be in the defendants' hands, unappropriated to creditors, largely in excess of their claim, and *concealed,* out of which, if true, their exemptions should be retained, and the law will make the application. This exception can not be sustained.

Exception 6.—The incapacity of the plaintiffs' agent to make the affidavit, unless he sets out the facts as required in verifying complaints under C. C. P., Sec. 117, and the defect in the form of the affidavit in this respect: As the complaint, filed on oath, requires an answer from the defendant on oath, and thus entails on him the necessity of a careful and truthful statement, not necessary under the old forms of pleading in Courts of Law, the new system requires a personal verification of the complaint, or, if made by an agent, that it shall appear further why it is not made by the plaintiff, and that the material facts are personally known to the agent, C. C. P., Sec. 117.

The reason does not apply to an affidavit required in seeking those ancillary remedies which The Code admits to secure the fruits of an ultimate recovery. Hence, it is only necessary that "it shall appear by affidavit," without stating by whom to be made, on behalf of the plaintiff, that such facts exist as warrant the issuing of the attachment. C. C. P., Sec. 201. This exception is also overruled.

Without intending to express any opinion upon the controverted facts, or the inferences to be drawn from the conflicting affidavits, we simply sustain the ruling of the Judge, by which the attachment remains in force until the trial.

The defendants have no just ground of complaint, for whoever may be entitled to the goods, they certainly have no claim to them except to the extent of the personal property exemptions, and these are equally secured whether the assignment prevails, or the superior title vests under the seizure. They can have, therefore, no direct interest in dissolving the attachment, nor motive, except to give ef- (191) fect to their conveyance to the preferred creditor. The trustee is now a party to the action, and the title to the property will be directly put in issue between him and the plaintiffs. We leave it to the arbitrament of that tribunal to whom the law commits the decision of all material questions of fact.

Affirmed.

Cited: Sims v. Goettle, 82 N. C., 272; *Weaver v. Roberts,* 84 N. C., 495; *Devries v. Summit,* 86 N. C., 134; *Hale v. Richardson,* 89 N. C., 64; *Sheldon v. Kivett,* 110 N. C., 410.

S. P. ALEXANDER, Admr., v. MARY E. WRISTON, Executrix.

Executors and Administrators—Guardian and Ward—Trust Funds.

An administrator of a deceased guardian can not maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon had become the property of the intestate's estate upon a final settlement with his wards.

APPEAL at Spring Term, 1879, of MECKLENBURG, from *Kerr, J.*

This action was brought by the plaintiff as administrator of John M. Springs, deceased, to recover the amount alleged to be due upon a note made by M. L. Wriston, the defendant's testator, to the plaintiff's intestate. It was admitted upon the trial that the note was made payable to J. M. Springs, as guardian of Richard A. Springs and other minors; but the plaintiff alleged that since his qualification as administrator, he had paid to the wards of his intestate the amount of the note, and insisted that it had thereby become a part of the as-
(192) sets of his intestate's estate, and could be recovered without any other proof than that the note was payable to his intestate as guardian. The Court held that it was competent for plaintiff to show he had accounted to said wards for the amount of the note, but in the absence of such proof he could not recover. In deference to this opinion, the plaintiff, with defendant's consent, took a nonsuit and appealed.

Messrs. Wilson & Son for plaintiff.
Messrs. Jones & Johnston for defendant.

(193) SMITH, C. J. The plaintiff's intestate, J. M. Springs, while guardian to the four infant children of Alexander Springs, as a part of the trust estate in his hands, took from the defendant his bond, as follows:

"$793.85. One day after date I promise to pay J. M. Springs, guardian, seven hundred and ninety-three 85-100 dollars, for value received. M. L. WRISTON. (Seal.)

"18 November, 1865."

This bond, after his death, was found among the intestate's papers, and the plaintiff, as his administrator, brought this action to recover the money due thereon. The plaintiff offered no evidence of any settlement of the trust, or that this bond had been accounted for to the infants, and insisted upon his right of recovery as representing the intestate obligee, to whom, though in a fiduciary character, the money was payable. The Court intimated an opinion that, upon this showing, the

bond belonged to the infants, and the action could not be maintained by the plaintiff. In deference to this opinion, the plaintiff, with the defendant's consent, submitted to a nonsuit and appealed.

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section 57, C. C. P., Sec. 55. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another Section 57.

In the construction of these sections, the Court has held a guardian to be such trustee and capable of suing for the benefit of his wards, on a note endorsed to him as guardian, alone or by joining them. *Rankin v. Allison,* 64 N. C., 673. And a survivor of joint guardians may maintain an action on a note payable to both. *Biggs v. Will-* (194) *iams,* 66 N. C., 427; *Mebane v. Mebane, Ibid.,* 334.

The pervading feature of the new system is that the action shall be brought in the name of the person who is entitled to the fruits of the victory. Thus, when a note was endorsed to the plaintiff, under a contemporary contract of the endorsee, to collect and pay over the proceeds to the endorser, after retaining a reasonable compensation for his services, it was decided that the plaintiff could not recover in his own name, he not being "the real party in interest." *Abrams v. Cureton,* 74 N. C., 523.

There is no doubt the action would have been well brought in case the money due on the note had become the property of the intestate's estate, through a settlement and accounting for the entire trust fund; but as this does not appear, the interest in the note and the right to receive the money belong exclusively to the infants. It is a part of their estate as much so as a distinct article of personal property would be, though the guardian may be also liable for the mismanagement of the funds. At the intestate's death, there was no trustee of an express trust within the meaning of The Code, and the plaintiff's appointment is for the purpose of administering the intestate's estate, not the trust funds he held in his hands. *Davis v. Fox,* 69 N. C., 435. These are to be delivered over to the succeeding trustee, or the person in interest, if arrived at full age. The administrator collects the assets of his intestate, pays his debts, and distributes under the law to those entitled. The proceeds of this note can not be thus applied, and the administrator incurs no personal liability in respect thereto upon which his bond could be charged.

We think it, therefore, to be clear that the death of the guardian terminated his relation to the infants as trustee, and that relation is not

resumed by his administrator. The case, therefore, falls within the section of The Code first recited, and the plaintiff not being the real (195) party in interest, and failing to show any title in his intestate to the money, can not maintain the action, and the nonsuit was proper.

Affirmed.

Cited: Rogers v. Gooch, 87 N. C., 444; *Jennings v. Copeland,* 90 N. C., 578; *Holly v. Holly,* 94 N. C., 673; *Ballinger v. Cureton,* 104 N. C., 477; *Hartness v. Wallace,* 106 N. C., 430; *Chapman v. McLawhorn,* 150 N. C., 167; *Martin v. Mask,* 158 N. C., 442.

ANGUS McFAYDEN v. JOHN T. COUNCIL, Executor.

Executor, Removal of.

1. A court of probate is not authorized to remove an executor for a slight departure from duty merely, but only for some *devastavit* or other dishonest, corrupt or improper neglect and maladministration of the estate; and in passing on the objection urged, the executor should not be held to any greater diligence and care, or foresight and caution, than is usual among ordinarily prudent men in the conduct of their business.
2. On a petition for the removal of an executor, it appeared that he was insolvent and bankrupt, but that he was in like condition before the will was made, and that it was known to the testator; that he had paid the debts of the estate except a debt due plaintiff from himself as principal, to which the testator was surety, which he alleged would have been paid but for the fact that he had a larger debt due him from plaintiff, which was in litigation, and plaintiff had agreed not to press his debt until the suit was determined; that he had received the testator's personal estate and had used it instead of selling it, but that his wife was sole legatee and devisee and the entire personal estate was not sufficient to pay plaintiff's debt after paying the other debts of the estate; that he had borrowed $1,000 from his wife and used it in compromise of certain debts due by the estate and afterwards repaid her out of the estate; that he had not made any annual statement of the condition of the estate, but alleged that he held himself ready to do so when required: *Held,* that there was not sufficient cause to warrant the removal of the executor, but that he should be required to execute a sufficient bond for the proper administration of the estate, and in default to do so, should be removed.

(196) PETITION for the removal of an executor, heard on appeal at Chambers, in Fayetteville, on 23 April, 1879, before *McKoy, J.*

The petition was filed before the Probate Judge of Bladen County, who, upon the facts set out in the opinion of this Court, ordered the removal of the defendant from his office as executor, and on appeal to the Judge of the district, the judgment was affirmed, and the defendant appealed to this Court.

Messrs. MacRae & Broadfoot for plaintiff.
Mr. Thomas H. Sutton for defendant.

DILLARD, J. The plaintiff, a judgment creditor of the estate of Charles Colvin, in a debt to which the defendant is principal, and the testator, the surety, instituted this proceeding before the Clerk as Judge of Probate, for the removal of the defendant as executor and the appointment of an administrator *de bonis non* with the will annexed.

Upon the averments on both sides for and against the removal, supported by the affidavits of the parties and other evidence sent up with the transcript, the Probate Judge found some of the facts as the basis of his decree, while other facts, material to the proceeding before him and to a proper decision of the matter were altogether overlooked; and the case coming by appeal to the Superior Court, and thence to this Court, it remains for us to determine, as a matter of law, whether, on the evidence and the facts found by the Probate Judge, the defendant should or should not have been removed and an administrator *de bonis non* appointed in his place.

An executor derives his authority not from the law, but from the appointment of the will, and having qualified and taken on himself the position of executor, it is his duty to carry out the will honestly, and to keep an accurate account of his receipts and payments in the discharge of his duty, and to make inventory and reports of the (197) condition of the estate, as directed by law; and on failure to report as required, it is the duty of the Clerk to cite him to comply, and if he refuse or fail to exhibit a satisfactory account, he may remove him from office. C. C. P., Secs. 478, 479.

It is also expected of every executor to be diligent in the performance of his trust, and as soon as reasonably may be, to get in the assets and to devote the same to the payment of the creditors, and in case of neglect or undue delay, or in case of a *devastavit* and mismanagement from dishonest or improper motives, any creditor may, besides a petition for his removal, sue before the Clerk for a settlement of account and the application of the assets in full or ratably on all the debts, with power in the proceedings to have injunction or a receiver appointed for the safety of the fund as the emergency may require. Bat. Rev., Chap. 45, Sec. 73.

The last course would seem to have been the better course for the plaintiff, if he desired an account and payment of his debt, as he could have made his remedy effectual in half the time already consumed on his motion for removal. But he had the right to petition for removal, and having selected that proceeding, the Court of Probate was not authorized, in the proper administration of the law, to remove the

executor for a slight departure from duty merely, but only for some *devastavit* or other dishonest, corrupt or improper neglect and maladministration of the estate. And in passing on the objection urged, the executor should not be held to any greater diligence and care, or foresight and caution, than is usual among ordinarily prudent men in the conduct of their own business. *Atkinson v. Whitehead,* 66 N. C., 296. What would not be sufficient to induce a chancellor to remove a trustee or appoint a receiver to take the funds out of his hands, ought not to authorize the Clerk to remove an executor and to appoint an administrator *de bonis non.*

Apply these principles to the facts of this case, as the evi-
(198) dence accompanying the transcript shows them to be, and let us see how it would be.

1. The application for removal was based in part on the insolvency and bankruptcy of the defendant and the assignment to him of his homestead and personal property exemption. The answer is, that the alleged insolvency and bankruptcy existed *before* the will was made, and was well known to the testator, who lived the last twelve years of his life, and up to his death, in the family; and it is apparent from the evidence that such insolvency had no effect, as every debt has been paid except the plaintiff's, and that would have been but for the fact that defendant had a personal debt due him from the plaintiff equal to and larger than the plaintiff's judgment, and he expected to recover it and use it by way of set-off.

2. It is urged that he be removed because he received the personal estate of the value of several thousand dollars and he did not sell the same, but kept and used it. The answer is that his wife was sole legatee and devisee of the whole property after payment of the debts, and that the entire personal estate was not sufficient to pay the debt of the plaintiff after paying the other debts of the testator, every one of which he had paid, relying on his ability to pay plaintiff's debt, as it was his own personal debt, in the recovery he expected to make in his two pending suits against the plaintiff, who bound himself not to press his judgment until said suits were tried.

3. As to the $1,000 paid to his wife and charged as a misapplication of the trust fund. The answer is that he borrowed that sum from her and used it by way of compromise of two actions in which the estate was interested, and thereby effected a saving to the estate of $5,000, and the money complained of was but a re-payment of the money borrowed and used for the benefit of the estate.

Defendant admits that he did not make any annual state-
(199) ment of the condition of the estate, for the reason that he has

not been required to do so, but on the plaintiff's motion, he said he had always held himself ready to account.

Defendant denies that the estate has been wasted or converted to his own use, but that the value of the same has been largely increased, and he avers that if plaintiff is not paid in the way of a set-off of the recovery he expects to make against him, his judgment already secure as operating a lien on the real estate, has been made doubly secure by the enhancement of the value of the land by the labor and expenditures of the defendant, which the neighbors estimate at $10,000. Defendant says the plaintiff's debt would have been paid except that it was his own debt, and he had a much larger debt justly due him on the plaintiff, for the collection of which he had two suits pending, and that he had an arrangement with the plaintiff not to press his judgment until the defendant's suits could be tried.

Upon a full survey of all things alleged and proved in the proceeding, this Court fails to detect any want of good faith in the executor in any of the particulars urged as grounds of removal. The wife of defendant being sole legatee of the whole estate, and every debt paid except the plaintiff's judgment, against which defendant claimed to be entitled to use as a set-off a larger sum due from the plaintiff, and an agreement being made not to urge payment until defendant's suits were tried, it was very natural the defendant should have kept and used on his wife's lands the mules and other personalty belonging to the estate, and is precisely as anyone would have done under the same circumstances.

All the debts being paid except the plaintiff's, why should defendant sell the personalty and suffer a loss on it, when he had a larger debt due him on plaintiff then in course of collection, in which he expected to make a recovery large enough to pay it off, and when the existence of that debt was so far recognized by plaintiff as to in- (200)
duce him to agree not to press payment until defendant's suits against him were ended.

The failure to sell personal property, in law the primary fund to pay debts, is certainly a neglect of duty, and the use of it by the executor in his own business is *mala fide,* and furnishes, ordinarily, good ground for the appointment of a receiver in a Court of Equity. But in view of the fact that every debt against the estate is paid except the plaintiff's, and a reasonable probability of its payment existing by way of a set-off of his debt to the defendant, and if not so paid, the same being a lien on the land of the testator, it seems to us that the defendant's case is an exceptional one, and he ought not to be removed.

No creditor, as it appears, can be hurt by a continuance of the defendant in office, except the plaintiff on a remote possibility; and against

that contingency provision might be made by requiring bond and surety in sufficient penalty to insure full accountability, if the Clerk, in his discretion, shall deem it necessary or proper. *Barnes v. Brown,* 79 N. C., 401.

The judgment of the Superior Court is reversed, with direction that the Probate Judge require the defendant to execute bond with sufficient sureties in adequate penalty, conditioned for the proper administration of the estate of Chas. Colvin, or on default to give such bond, that he revoke the letters testamentary and appoint an administrator *cum testamento annexo.*

Reversed.

Cited: Edwards v. Cobb, 95 N. C., 10; *In re Knowles,* 148 N. C., 464.

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McKINNON & LILLY v. McKAY McKINNON and others.

Guardian Bond—Liability of Surety—Pleading.

1. The sureties on a guardian bond are not responsible for the nonpayment of a note given by the guardian, and signed by him *as guardian,* for the board and tuition of his ward.
2. In declaring upon a guardian bond, the plaintiff should set forth the condition, the breach of which is the *gravamen* of the action.
3. A creditor of a guardian is not the proper relator in an action upon the guardian bond.

ACTION upon a guardian bond, tried at Fall Term, 1878, of RICHMOND, before *Buxton, J.*

The plaintiffs were the business managers of Floral College, and in their complaint alleged that defendant McKinnon was duly appointed guardian of Hattie S. McKinnon, and executed his bond with Hugh L. Patterson as one of his sureties; that said surety died leaving a will, and the defendant Gilbert Patterson qualified as the executor therein named; that said guardian, on account of board and tuition of his ward at said college, became indebted to the plaintiffs in the sum of three hundred and sixty dollars and ninety-six cents, evidenced by three notes made by him as guardian aforesaid, and upon which judgments have been recovered by the plaintiffs, and the same have not been paid; that the ward has become of full age, and has had a final settlement with her said guardian, who retained sufficient funds of his ward to pay said indebtedness; wherefore, the plaintiffs demand judgment, etc.

The defendants demurred to the complaint, for that there is no allegation that the conditions of the bond have not been complied with,

or that any of them have been broken; and there are no facts stated showing legal liability on the part of defendants in this action to pay the plaintiffs. The demurrer was sustained, and the plain- (202) tiffs appealed.

Messrs. W. F. French and *McNeill & McNeill* for plaintiffs.
Mr. John D. Shaw for defendants.

ASHE, J. The defendant McKay McKinnon was the duly appointed guardian of Hattie S. McKinnon, and entered into bond with the usual conditions for the performance of the duties of a guardian, in the Court of Probate for Richmond County, with one Hugh L. Patterson as surety thereto. Hugh L. Patterson died, leaving a last will and testament, in which he appointed the defendant Gilbert Patterson his executor.

For the board and tuition of his ward at Floral College, the defendant guardian gave his three several notes to the plaintiffs, as the business managers of the college, and signed each of the notes with his own name as "guardian of H. S. McKinnon." Upon the arrival of his ward at lawful age, he came to a final settlement with her, and retained in his hands a sufficient fund to pay off and discharge these notes. On the failure of McKinnon to pay them upon demand, the plaintiffs instituted actions against him, and recovered a judgment upon each of the notes for the amount due thereon; and the plaintiffs not being able to obtain satisfaction of the judgments, brought this action upon the guardian bond, suing for the penalty thereof "to be discharged upon the payment of the amounts of the said judgments against the defendants McKay McKinnon and Gilbert Patterson, the executor of Hugh L. Patterson, deceased."

The defendant filed a demurrer to the complaint, and alleged as causes of demurrer:

1. That there is no allegation that the conditions of the guardian bond sued on have not been complied with, or that any of (203) the conditions of said bond have been broken.

2. That there are no facts stated showing legal liability on the part of the defendants in this action to pay plaintiffs.

The demurrer was sustained by his Honor, and the plaintiffs appealed to this Court.

The penalty of a guardian bond is given in trust for the ward, and the conditions are that the guardian "will secure and improve the estate of the ward during her minority, and on her arrival at full age will deliver up, pay and possess her of all such estate as she ought to be possessed of, or to such persons as shall be authorized and empowered

to receive the same." And it is provided that any person injured by a breach of the conditions of the bond may prosecute his suit thereon. Bat. Rev., Ch. 53, Sec. 12. And the plaintiffs say they are injured, and therefore bring this action. But it seems to us to be an experimental suit. It is certainly an action of the first impression. For when the bond is given exclusively for the protection, improvement and the faithful delivery up of the estate of the ward on her arrival at full age, we can not see how any one but the ward, or some one asserting a right in her behalf, or her personal representative, can be injured by a breach of the conditions of the bond. The words, "or to such other persons as shall be authorized and empowered to receive the same," evidently refer to a succeeding guardian, a personal representative, or a trustee, or some one to whom the guardian may be directed by a Court of competent jurisdiction to transfer the estate of his ward, as was done in the case of *Jones v. Brown,* 67 N. C., 475.

But admitting they have reference to an assignee of the ward, that will not help the plaintiffs, for they are not the assignees of the ward. There was no contract and no privity between the ward and the plaintiffs. They looked to the guardian for their money, and he by giving his notes and submitting to judgments thereon, made them his
(204) individual debts. And the ward came to final settlement with him and left a sufficient amount in his hands to indemnify him against the claims of the plaintiffs; by which transaction the surety was clearly discharged from all further liability on the bond. Even if the plaintiffs could bring themselves within the class of injured persons who are authorized to sue upon the bond, their complaint is defective, in that it does not set forth any condition of the bond by the breach of which they have sustained damage.

We think there was no error in the judgment of the Court below, and that the demurrer was sustainable upon both the grounds assigned for cause.

Affirmed.

W. H. HUGHES, Executor, and another v. WILLIAM BOONE.

Guardian Bonds—Contribution—Joinder of Parties.

C. was co-surety with the defendant in one, and S. in another, of three guardian bonds, each in the same penal sum. The bonds being put in suit for a deficit of the principal, it was ascertained that he and the sureties to the third bond were insolvent. Defendant paid one-third of the judgment and refused to pay more; *Held,* that C. and S., upon paying the balance of the judgment, were entitled to maintain a joint action against the defendant for the difference between the one-third paid by him and the one-half of the judgment.

APPEAL at Fall Term, 1878, of NORTHAMPTON, from *Seymour, J.*

This action was brought for contribution, and upon the facts set out in the opinion delivered by Mr. Justice ASHE, the Court, (205) below gave judgment for plaintiffs, and the defendant appealed.

Messrs. Mullen & Moore and *W. C. Bowen* for plaintiffs.
Messrs. Reade, Busbee & Busbee for defendant.

ASHE, J. The record in this case shows that Nicholas Peebles, on the .. day of ...., A. D., 18.., was duly appointed guardian of Ellen T. Peebles, by the County Court of Northampton, and gave successively three bonds, in the penal sums of four thousand dollars each, for the faithful discharge of his duties as guardian.

In the first bond William Boone, the defendant, and W. J. Capehart, one of the plaintiffs, were the sureties; in the second, the sureties were the said Boone and W. T. Stevenson, the testator of the other plaintiff, W. H. Hughes; and in the third, Samuel T. Stewart and James W. Stancil were the sureties.

On 19 April, 1871, an action was brought in the Superior Court of Northampton County, in the name of the State of North Carolina, on the relation of W. R. Cox, Solicitor, against the said Nicholas Peebles, Samuel T. Stancil, James W. Newsom, W. T. Stevenson, William Boone and W. J. Capehart, for an account of the guardianship of the said Peebles, and for the payment of whatever sum may be ascertained to be due to his said ward.

During the pendency of this action, James W. Newsom was adjudged a bankrupt, and obtained his final discharge. Samuel T. Stancil died insolvent, and it is admitted that Nicholas Peebles, the guardian, was insolvent.

The judgment was rendered in the said action against W. T. Stevenson, W. J. Capehart and William Boone for the sum of $2,061.78, which was satisfied by each of them paying off the one-third (206) thereof.

This action was then instituted by W. J. Capehart and W. T. Stevenson to recover from W. Boone contribution as co-surety with them on the bonds of Nicholas Peebles; and Stevenson having died during the pendency of the action, his executor, W. H. Hughes, was made a party plaintiff.

The plaintiffs insist that as they paid the two-thirds of the amount of the judgment, and Boone only one-third, that he is justly and equitably indebted to them for contribution in the difference between the one-third paid by him and the one-half of said amount, which they allege is the true proportion of his liability, considering the insolvency

of the sureties on the third and last bond The Court below taking this view of the question, gave judgment for the amount of $370.50, with interest on $305.36 from 30 September, 1878, which was the difference between the one-third and the one-half of the amount of the judgment. From this judgment the defendant appealed, assigning for error:

1. "That Boone's liability ceased when he paid one-third of the judgment of the Supreme Court."

2. "That if he is liable for more than one-third, the plaintiffs have not a joint, but a separate cause of action against him, for an amount below the jurisdiction of the Superior Court."

There is nothing in the first exception; as all the obligors on the last bond are insolvent, we may leave it entirely out of our consideration; and the question, then, is, what are the respective liabilities of the sureties on the first two? Boone is co-surety with Capehart on the first bond and with Stevenson on the other.

It is well settled that all the bonds given by a guardian for the faithful performance of his duties as such, are cumulative; and (207) the sureties on each stand in the relation of co-sureties to the sureties on every other bond, and the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalties of the bond in which each class is bound. *Jones v. Hays,* 38 N. C., 502; *Jones v. Blanton,* 41 N. C., 115.

The liability of one co-surety to another for contribution is not founded in contract, "but is bottomed on fixed and general principles of equity and justice," and whenever they are bound as sureties in the same transaction, though by different instruments, they have a "common interest and a common burthen." Pitman on Principal and Surety, 148, 149.

Before the new system, the sureties who paid the money on account of the joint liability had two remedies against their co-sureties for contribution, the one by bill in equity, and the other by action at law. The action at law was the more modern remedy, and was found to be inadequate where some of the co-sureties were insolvent, for in that case each surety who paid more than his proportion of the joint liability had to institute a separate action against each of the others who was solvent and had not paid his proportion, and could only recover the aliquot part of the whole, regard being had to the number of sureties. But in equity, all the persons interested in the matter as co-sureties had to be made parties; a multiplicity of suits was avoided, the insolvency of any one or more of the co-sureties was taken into consideration, and their several liabilities adjusted upon equitable principles, and the surety who paid the debt could recover contribution against the solvent co-sureties, without regard to the shares of those who were insolvent or out of the State.

We think the second exception is as untenable as the first. It seems to have been the design of the Code of Civil Procedure to adopt the practice in equity in regard to the joinder of parties, and to apply this doctrine to legal as well as equitable actions. "Per- (208) sons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs in all actions, whatever their nature, although their rights are legally several, and although at common law they would be required to institute separate actions." Pomeroy on Remedies and Remedial Rights, Sec. 200. The practice of the Courts of Equity in regard to the joinder of parties seems to be especially appropriate in actions for contribution between co-sureties, when the rights and liabilities of all concerned may be considered, adjusted and determined in one action, and is in perfect accord with Section 248 of The Code of Civil Procedure, which provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side as between themselves. The judgment below is affirmed, with the modification that it be entered here for the one-half of said judgment in favor of each of the plaintiffs.

Modified and affirmed.

Cited: *Pickens v. Miller,* 83 N. C., 547; *Hulbert v. Douglas,* 94 N. C., 128; *Gibson v. Barbour,* 100 N. C., 200; *McNeil v. Hodges,* 105 N. C., 55.

SAMUEL RUFFIN and others v. C. B. HARRISON and others.

Trusts and Trustees.

1. Where the simple relation of debtor and creditor exists and the same person representing both, is to pay and to receive, the possession of assets which ought to be applied to the debt, is in law an application.
2. Where one is clothed with a double fiduciary capacity and the balance remaining upon a full execution of one trust belongs to the other, if the amount has been definitely and authoritatively ascertained and the fund is then in the trustee's hands, the law makes the transfer.
3. If the first trust is not closed, although the trustee may have rendered an account which has not been passed on by a competent tribunal, the fund remains unchanged and is held as before.
4. The trustee may, by an unequivocal act indicating the intent, elect to hold the fund in possession in another capacity, and it will be thereby transferred.

EXCEPTIONS to the report of a referee, heard at Fall Term, (209) 1878, of FRANKLIN, by *Kerr, J.*

This was an action brought by the sureties upon the bond of C. B.

Harrison, guardian of Lee A. Jeffreys (now Brown), against Harrison and the sureties upon his bond as administrator of McKnight, and also against Mrs. Harrison and other purchasers of the land of McKnight, sold by Harrison, as administrator, to make assets. Pending the action, Harrison died, and his administrator was made a party.

The sureties upon the guardian bond having been declared by the Court in *State ex rel. Harris v. Harrison and others,* 78 N. C., 202, primarily liable to the ward for the amount which ought to have come into the hands of her guardian (for the most part from McKnight's estate), prosecuted this action to indemnify themselves by charging the administration bond with certain proceeds of the lands of McKnight sold by Harrison to make assets, alleging that he wasted the same while they were in his hands as administrator, and before he received them as guardian. They sought also to charge certain lands purchased by Mrs. Harrison with the debt due by McKnight's estate to Lee A. Jeffreys, alleging that the said debt had never been paid, and that Mrs. Harrison had not paid for the lands conveyed to her.

(210) The case was referred to R. H. Battle, Jr., and was heard upon exceptions to his report. The facts necessary to an understanding of the case will be found in the opinion, and in the case of *Harris v. Harrison,* 78 N. C., 202.

The exceptions to the report were overruled, and both sides appealed.

Messrs. E. G. Haywood and *Reade, Busbee & Busbee* for the plaintiffs.

Messrs. D. G. Fowle, Davis & Cooke, Lewis & Strong and *W. F. Green* for the defendants.

SMITH C. J. By a decree of the Court of Equity of Franklin County, rendered at Spring Term, 1868, Lee A. Jeffreys, an infant, was adjudged the sum of $5,997.86, and interest on $5,895.65, principal money thereof, from 6 April of the same year, due from her deceased gaurdian, Alexander McKnight, and recovered the same against Carter B. Harrison, his administrator with the will annexed. The personal estate of the testator being insufficient to discharge his indebtedness, the administrator filed a petition in the Snperior Court of Franklin against the devisees under the will, and the said Lee A. Jeffreys and other creditors to have the debts ascertained and determined, and for license to sell and convert the devised lands into assets for the payment thereof. There was an order of reference and report made, and a decree ordered confirming the same at Fall Term, 1872. The decree declared the testator to be indebted to:

1. Lee A. Jeffreys, in the sum and with the interest specified in the said decree of the Court of Equity.

2. Mary L., wife of O. L. Ellis, in the sum of $1,822.19, and interest on $1,013.65 from 11 September, 1871.

3. The said Mary L. and Penelope Egerton in the joint sum of $3,762.78, and interest on $2,678.14 from same date, the former being entitled to one-third and the latter to two-thirds thereof; (211) and,

4. Margaret F. Harrison in the aggregate amount of $2,363.73, and interest in $1,932.50, as above. The said indebtedness being incurred in the management of several trusts committed to the testator, and that there was in the administrator's hands $1,773.01 of the unadministered personal estate applicable to the debts.

The Court thereupon granted license to sell the lands, and directed "that the debt due to the defendant Lee A. Jeffreys be first paid in preference to all other debts herein declared," and the other creditors to be paid *pari passu* out of the residue.

On 28 October, 1871, the administrator made sale of a large part of the testator's lands, on a credit as to most of the purchase-money, and applied what was received in cash to the costs and charges attending the proceedings. Under a subsequent decretal order, he sold the remaining lands, except the dower estate allotted to the widow, and appropriated the proceeds to the other unpreferred debts recited in the decree.

On 7 November, 1871, the said C. B. Harrison was appointed guardian to the infant Lee A. Jeffreys, and gave bond in the usual form with the plaintiffs as his sureties. He continued to act as such until his removal by the Probate Judge for default in not renewing his bond. During the interval between his appointment and removal, divers large sums of money came into his hands from the sale of the land, which, with the balance due upon the administration of the personal estate, were more *than enough, if so applied* as so directed by the decree, to discharge the entire debt due his ward.

The guardian charges himself as such with the moneys collected by him as administrator in the successive returns made next thereafter, as well as with certain other sums, in exoneration of his administration bond. The referee allows a credit for $1,773.01 upon the ground that he had more than this sum on deposit in bank, both (212) when the decree was made and when he elected to hold the same as guardian in his first official return. But he refuses to give this effect to moneys afterwards received from sales of the land and so charged in subsequent returns, because he had not then the funds to make the attempted transfer valid and operative.

If the legal consequences of receiving assets of the testator, as his administrator, applicable, and by the decree ordered to be applied, to the debt due the infant, of which the right and duty of collection devolved upon the sam person, as guardian, is *ipso facto* a payment of the debt, the liability for subsequent mismanagement and waste is shifted from the administration to the guardian bond, and the sureties to the former are discharged. The refusal of the referee so to hold furnishes the principal exception to the report, the decision of which may dispose of all others, since if the loss primarily falls upon the sureties to the guardianship, and examination into the equities subsisting among the other parties becomes wholly unnecessary. The question is one strictly of law, and we proceed to consider it.

The decree, ascertaining what was due the infant from the testator, closes the trusts of the prior guardianship and definitely fixes the sum due from the testator to his ward. The subsequent suit to make the real estate assets reaffirms the indebtedness, and requires it to be paid out of the first moneys coming into the administrator's possession. When Harrison became guardian, the debt was payable to him, as representing his ward. Thus the obligation to pay and the right to receive were united in one and the same person, and in such cases the law makes an appropriation of the funds when received to the discharge of the debt and the enlargement of the creditor's estate.

The rule is well established in its application to the relation of debtor and creditor, as we think an examination of the authorities re-
(213) ferred to in the able and exhaustive argument of counsel will abundantly show. We propose to examine the cases somewhat in detail as most conductive to a satisfactory solution of the question involved.

In *Muse v. Sawyer,* 4 N. C., 637, the material facts were these: One Horniblow became indebted to Ramsay by bond executed in 15 June, 1798; Ramsay died in September, 1799, before any payment on the debt, leaving a will, wherein he appointed the plaintiff and Alexander Millen his executors. Horniblow died in October following intestate, and administration on his estate was granted to said Millen and one Blount. Blount died soon after, and Millen, the survivor, received assets from Horniblow's estate. In June, 1802, he endorsed one, and in January following another credit on the bond. Millen died in 1807, leaving assets of his intestate applicable and sufficient in amount to pay the residue of the bond, and his executors delivered the bond to the plaintiff, the surviving executor of Ramsay, and paid the assets of Horniblow to the defendant, his administrator *de bonis non.* RUFFIN, J., after noticing the distinction in cases where the creditor appoints his debtor his executor, and where he becomes administrator by the

action of the Court, and the different legal consequences resulting therefrom, proceeds to say: "Upon the second question, I am of opinion with the defendant upon the ground *that sufficient assets of Horniblow's estate* came to the hands of Millen to discharge the debt, and that it was entitled to have them applied in due course of administration. It is not necessary that Millen should actually, by endorsement on the bond, or other similar act, have applied Horniblow's assets in discharge of this debt, in order to its extinguishment. *As soon as the assets came to his hands, the law made the application of them and the debt became extinct instanter.*"

Thus it was decided that the debt was satisfied and the plaintiff could not recover, notwithstanding the funds, which should have been used in payment, were not thus disposed of, and had been (214) delivered over to the administrator *de bonis non* of the debtor.

This case was followed by *Chaffin v. Hanes,* 15 N. C., 103, the facts of which were not dissimilar. The plaintiff held a bond executed by W. W. Chaffin as principal, and the defendants as sureties. Chaffin died intestate, and the plaintiff became his administrator, and collected assets of his intestate's estate adequate to pay this and all other bond debts due the plaintiff. It was held in the Court below that the debt was discharged, and evidence, offered to prove the existence of other bond debts of the intestate to which the plaintiff was his surety, and that the assets had been used in paying them, was refused. This Court sustained the ruling, approved the decision in *Muse v. Sawyer,* and RUFFIN, C. J., delivering the opinion, remarks: "When the debt becomes extinct by reason of the receipt of assets, it is extinguished *for all purposes* and *as to all persons,* as well co-obligees as the heirs of the deceased obligors, for, says Lord Holt in *Wankford v. Wankford* (Salk., 305), having assets amounts to payment, and another obligor in the bond can not be sued. Being thus extinguished, it can never be revived by any subsequent acts of the administrator, such as the application of the assets to other debts of inferior dignity, or even of the same dignity, falling due or acquired by him, after the assets were legally applicable, *and had been by the law applied to this bond.*"

In the case before us, it is proposed to continue in force the obligation of the testator, determined by the decree, and the liability of the sureties to the administration bond therefor, after assets of the principal debtor sufficient to pay the same have gone into the hands of the guardian, not only applicable but required by the decree itself to be applied to the debt. In this common feature the (215) cases are scarcely distinguishable in principle.

In *Moore v. Miller,* 62 N. C., 359, PEARSON, C. J., after commenting on the act of 1794, which declares that "the appointing any person

executor shall not be a discharge of any debt or demand due from him to the testator," uses this language: "At common law, if a creditor is appointed administrator or executor of his debtor, he not only has a right to retain in preference to any other creditor of equal degree, on the ground that his right of action is suspended, but he is *presumed to retain the moment he receives assets,* and the *debt is extinguished,* so that he can not apply the assets to another debt and sue another obligor on the debt due to himself"—citing *Chaffin v. Hanes.* He declares further that the act simply abolishes the distinction between executors and administrators, and "puts them upon the same footing." It leaves, therefore, untouched the rule of retainer, applicable to both, which at once appropriates assets received to the debt due and extinguishes it.

In *Smith v. Watkins,* 8 Hump., 331, the same doctrine is strongly asserted, and the Court, after quoting from 3 Bl. Com., 18, and other elementary works, say: "These authorities establish that the reception of assets by an executor extinguishes his debt. He holds the goods in satisfaction of his debt, and not as executor. The debt is paid, the operation of law being equivalent to a recovery by execution." * * * "If he pay out the assets and do not actually retain for his own debt, it is his folly, for by a conclusion of law he is held to have retained. For, as the Court say in *Dorchester v. Webb,* Cro. Car., 373, as he may retain he shall do so. There is no act to be done by an executor to constitute a retainer, no volition on his part as to whether he will retain or not; but the moment he receives assets sufficient to discharge his debt, the law applies them in payment and the debt becomes extinct *instanter.*"

The rule has been so far extended as to embrace the case
(216) of an administrator *durante minore aetate,* who may retain alike to satisfy a debt due the infant and one due to himself personally. Williams Ex'rs., 942; *Hosack v. Rodgers,* 6 Paige, 415.

The cases relied on mainly for the plaintiffs are cases of double trusts resting upon the same person, and do not impugn the principle as effecting the same relations of creditor and debtor, to which class that now under consideration belongs.

In *Dozier v. Sanderlin,* 18 N. C., 246, it was held that when an administrator married one of the next of kin of the intestate, who was entitled to a distributive share in the estate, and upon the wife's death administered also on her estate, and had assets applicable to the payment of the distributive share, the law made the appropriation, and the share was satisfied therefrom, and the Court say: "When a retainer is allowed and the party has assets, it is an extinguishment, upon the principle that the same hand is to pay and to receive."

In *Clancy v. Dickey,* 9 N. C., 497, the executrix, Elizabeth Shutt,

took possession of certain slaves bequeathed to herself and her children, to be kept in common and the share of each child separated and assigned as they respectively arrive at age; and the defendant Dickey, guardian of a legatee, married the executrix and removed out of the State, carrying the slaves with him. In an action on the guardian bond, TAYLOR, C. J., says: "As the testator appointed his wife one of the two executors of his will, it was reasonable to expect that the negroes should be kept together by her as executrix as long as it was lawful to detain them in that character, viz., two years, and that after that period she would become guardian to the children and keep them together as such till one of them came of age or married. The reason, then, is much stronger for considering Dickey's possession as that of a guardian than as executor, and the condition of the bond is consequently broken, if Nancy Shutt, the orphan, has a vested legacy in her share"; (217) and it was declared the relator did have a vested estate therein.

In *Harrison v. Ward,* 14 N. C., 417, it was held that the condition of the administration bond was not discharged by the rendering an account current of the administration, and showing the balance due the plaintiffs, for that he was also their guardian, and that this balance was not transferred to the trusts of the latter office. Chief Justice HENDERSON thus lays down the general rule: "When a person has two or more capacities in which to take and hold, and takes and holds without declaration in which capacity he does so, it shall be taken that he holds in that capacity in which he ought of right to take and hold. He takes in one capacity or the other; not in both. It is, therefore, reasonable that he should hold in the rightful capacity, and so, in the absence of proof to the contrary, the law presumes."

The proposition meets the necessities of the present case. Harrison, as administrator, receives the fund, and the law requires its immediate appropriation to the testator's debt. The debt is to be paid to Harrison as representing the creditor to whom it is due. The law presumes this transfer to have been made and thereafter the guardian charged with the amount as part of the trust estate of the ward. This is a fair deduction from the rule, and is supported by the maxim which assumes an act to be rightful rather than wrongful when it admits of either interpretation.

It is to be remarked that it does not appear in the case as reported that the administrator had the trust fund to pay over when he rendered his account; if he did not have it at the time, the guardian bond could not, upon any reasonable principle, be made responsible upon a presumed transfer of what did not exist to be transferred. To charge the bond under such circumstances would be to shift the consequences

(218) of a *devastavit* committed by him in one capacity to the sureties for his official fidelity in another.

In *Graham v. Davidson,* 22 N. C., 155, among other provisions of his will, the testator directed his daughter to "be furnished with a horse, saddle and bridle." In stating the accounts of the defendant as executor and as guardian to the legatee, he is credited with the value of the legacy in the first and charged with it in the latter, and this, on exception, is sustained.

The plaintiff's counsel cites and strongly relies on three cases, two of which, in the Circuit Court of the United States, were decided by Mr. Justice STORY, and the other in the Supreme Court of Massachusetts. We propose to examine and see their bearing upon the matter in controversy.

In *Taylor v. Deblois,* 4 Mason, 131, the administratrix, who was also guardian to a minor entitled to a distributive share of the intestate's estate, caused her administration account to be settled in the Probate Court, and the amount of each share ascertained. To some of the distributees the sums due them were paid, and the administratrix retained the share of her ward. It was declared that this share was held by her, not as administratrix, but as guardian, and the Court, in discussing the general subject of retainer, say: "If, then it be a right of the administrator to retain a debt due to him in his own right, or in right of another, the doctrine equally applies when he unites in himself the character of guardian and has assets in his hands to discharge the debt due to his ward. I go further, and consider it the *duty under such circumstances to retain,* and if he were to yield up the assets without such retainer, it would, in my judgment, be a *maladministration of his guardianship,* for which, in case of loss, he and his sureties might justly be held responsible upon the guardianship bond." He states the general rule to be "that when the party unites in himself, by representation or otherwise, the character of debtor and creditor, inasmuch as he (219) can not sue himself, he is entitled to retain, and the law *will presume a retainer in satisfaction of the debt,* if there are assets in his hands."

In *Pratt v. Northam,* 5 Mason, 95, the administrator *cum testamento annexo,* who also became guardian to his two infant daughters, legatees, substituted in place of their mother, who died, received assets of his testator, after his appointment as guardian, which were fraudulently suppressed and no return thereof made, and the bill sought to charge the sureties to the guardian bond with the *devastavit* and waste, the Court say: "It was plainly his duty to inventory them (the assets) and account for them as part of the testator's estate in his hands and possession, and upon settlement of his accounts in the probate office, he

ought to have procured a decree directing a distribution of the balance between his wards in equal moieties. *Had he done so,* there would have been no question upon the principles settled by the Court in *Taylor v. Deblois, supra,* that the *administration bond would have been discharged, and, by operation of law, he would have been deemed to possess the balance in his character as guardian.*" And it was declared that the "act or election to hold the property in a different capacity from that in which it was received, may justly be insisted on before the responsibility is shifted from one class of sureties to another. Besides, here the administrator never admitted the assets to be in his hands. He held them secretly as his own, without acknowledgment *and settled his probate account without an admission of them.*" It is apparent this is in entire harmony with the current authorities referred to, and not opposed to the doctrine of retainer as applied to the present case. If there had been an ascertained amount, a definite sum arising from a legacy, as in the present case, there is a distinct debt due the infant, the law would interfere and transfer the fund from one to the other trusteeship.

In *Conkley v. Dickinson,* 13 Met., 51, the action was brought on a guardian bond, and it was proposed to charge the guardian (220) with a residuary legacy given the ward in the will of one Sally S. Dickinson, who died after the defendant's appointment and during the ward's minority, wherein the guardian had been appointed executor and qualified as such. The Court say: "We consider the law to be well settled, that if a legacy is given by will and the same person is executor and trustee or guardian for the legatee he is not bound to account for the legacy as executor, if he has sufficient assets, unless he has rendered an account in the probate office charging himself as trustee or guardian, and *that account has been allowed* by the Probate Court."

The decision rests upon the ground that until there is a legally ascertained balance, nothing remaining to be done except to pay over, the fund continues without change in the hands of the executor as such and is not transferred.

In a recent work, the author sums up the results of his investigation in these words: "The better opinion is, that after the time limited by law for the settlement of the estate has elapsed, and there is no evidence of an intent to hold longer, as executor, he shall be presumed to hold as guardian, on the principle that what the law enjoins them to do, shall be considered as done." Schouler on Dom. Rel., 441.

We do not consider the cases of *Winborn v. Gorrell,* 38 N. C., 117, and *S. v. Brown,* 68 N. C., 554, as impugning the principle. In the former, it is decided that a note, secured by a retention of title to the land sold, and executed for the purchase-money by one who afterwards

became guardian to the infant to whom the vendor, her grandfather, had given the note, was not extinguished by passing into the debtor's hands, nor did it lose the security of the land. In the other, it is declared that when a guardian becomes trustee, there is no presumption of law of a transfer of the fund from the first to the latter capacity; and as a presumption of fact, it was negatived by the finding of
(221) the referee that there had been no change of the estate from the guardian to the trustee.

We think the following conclusions may be fairly deduced from the adjudged cases:

1. When the simple relation of debtor and creditor exists, and the same person representing both, is to pay and to receive, the possession of assets which ought to be applied to the debt is in law an application.

2. When one is clothed with a double fiduciary capacity, and the balance remaining upon a full execution of one trust belongs to the other, if the amount has been definitely and authoritatively ascertained, and the fund is then in the trustee's hands, the law makes the transfer.

3. If the first trust is not closed, although the trustee may have rendered an account which has not been passed on by a competent tribunal, the fund remains unchanged, and is held as before.

4. The trustee may, by an unequivocal act indicating the intent, elect to hold the fund in possession in another capacity, and it will be thereby transferred.

The present case clearly is embraced in the first mentioned class, and is distinguished from the others.

The result is, that the assets of the testator, McKnight, which came into the possession of Harrison from the administration of the personal estate and the sale of the lands, were instantly applied to the debt due the ward, and he then held the same as a part of the trust estate which is secured by the guardian bond. The payment of the debt relieved the sureties to the administration bond. It would be a hard and oppressive rule that holds these sureties responsible after such payment was made to the guardian for his subsequent mismanagement and waste. Between the two sets of sureties, the loss must fall on those who undertook for the fidelity of his administration as guardian of the ward's estate.

The conclusion to which we have come in sustaining the ex-
(222) ception renders unnecessary the consideration of others dependent on it.

While the assets received by the administrator are sufficient to discharge the entire indebtedness to the infant, and were by law at once appropriated thereto, the report of the referee shows that a portion of them, for which the guardian bond is responsible, were paid over to

the testator's other creditors. On 15 May, 1875, the administrator received $1,555.23, raised by a mortgage of some of the lands bought by his wife, and, with her consent, paid the money to the other creditors, including herself. A part of this sum was, or may have been, needed to pay the balance then due the infant, and if so, has been misapplied, and may be followed by the plaintiffs into the hands of those who participated in this misapplication and recovered for their partial exoneration. In order to ascertain whether any and how much of the preferred debt remained due and was paid out of the fund then received, and what are the several liabilities of the creditors to whom it was paid, a reference is necessary, and if the plaintiffs so desire, will be ordered, and meanwhile the cause will be retained. A decree may be drawn in accordance with this opinion.

PER CURIAM. Judgment Accordingly.

Cited: *Ruffin v. Harrison,* 86 N. C., 190; *S. c.,* 90 N. C., 569; *S. c.,* 91 N. C., 76; *Grandy v. Abbott,* 92 N. C., 38; *Haliburton v. Carson,* 100 N. C., 109; *Moore v. Garner,* 101 N. C., 379.

(223)

*NORTH CAROLINA R. R. CO. and JOHN W. GRAHAM v. N. H. D. WILSON.

Breach of Trust—Removal of Trustee—Appointment of Receiver—Parties.

The defendant was appointed by the plaintiff company trustee of a sinking fund to pay the debts of the corporation, and it was provided in the trust deed that the moneys of said fund might be invested, in the discretion of the trustee, in such securities as the president of the company or its board of directors might recommend. The trustee, without any previous direction, loaned a portion of said moneys to a banking firm, of which he was the senior member, and which soon thereafter became insolvent; *Held,*

(1) That such action constituted a breach of trust, which it was not in the power of the board of directors to condone, their relation to the company being that of an agent to his principal.

(2) That the misconduct was not relieved by taking collaterals to secure such loan, which the trustee thought to be good at the time of taking them.

(3) That the creditors to be paid out of said sinking fund are not necessary parties to a proceeding to remove the trustee.

(4) That taking a bond from the trustee is but a subsidiary security for his fidelity, but is not a substitute for his personal fitness for the place.

(5) That the foregoing facts constitute sufficient grounds for the removal of the trustee and the appointment of a receiver to take charge of the fund until the acts and dealings of the former trustee can be thoroughly investigated.

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

MOTION by plaintiff for the appointment of a receiver and for an injunction, heard at Chambers, in Greensboro, on 20 January, 1879, before *Kerr, J.*

The facts appear in the opinion. The motions were refused, and the plaintiff company appealed.

(224) *Messrs. Thos. Ruffin* and *L. M. Scott* for plaintiff.

Messrs. J. A. Gilmer, Boyd & Reid, W. S. Ball and *F. C. Robbins* for defendant.

SMITH, C. J. On 29 February, 1868, the North Carolina Railroad Company, to secure and give credit to a series of bonds proposed to be issued for its benefit, conveyed to William A. Graham, trustee, its entire property of every kind upon the trusts that are therein particularly declared, and, among other things, in the seventh article provided as follows: "On 1 January, 1869, and on the 1st of January, in each succeeding year thereafter, the said party of the first part (the N. C. R. R. Co.), its successors and assigns, for the further security and ultimate redemption of the bonds intended to be secured thereby, for the creation of a sinking fund for that purpose, shall pay to the trustee for the time being, such a sum of money as, at the periods when the three classes of bonds above mentioned have respectively matured and become payable, shall, in the judgment of the trustee, furnish a fund sufficient wholly to pay off and discharge such bonds, and the trustee shall deposit the sum so paid over to him in the United States Trust Company in the city of New York, or some other depository which shall be, in his judgment, safe; and the said moneys, together with all accumulations of interest thereon, if any, which may actually come into the hands or within the disposal of the trustee, shall be laid out and invested by him in the purchase of bonds secured by these presents, upon the most favorable terms on which they can be purchased. The bonds so purchased, with the coupons thereto annexed, shall be immediately canceled by the trustee, and a certificate of the numbers and amounts of said bonds shall be immediately furnished under his hand and by the said trustee to the president of the North Carolina Railroad Company. In case bonds secured by these presents can not be purchased upon favorable
(225) terms, then the said trustee may, in his discretion, invest the said sinking fund moneys in such securities as may from time to time be *recommended to him* by the *president* of the said North Carolina Railroad Company for the time being, or by the *board of directors of said company.*"

In article ten it is declared "that in case at any time hereafter the said trustee, or any trustee hereafter appointed, shall die or resign, or

become incapable or unfit to act in the said trust, a successor to such trustee shall be appointed by said company, and the trustee so appointed shall thereupon become vested with all and singular the powers, authorities and estates granted to and conferred upon the party of the second part (said William A. Graham) by these presents, and all the rights and interests requisite to enable him to execute the purposes of this trust without any further assurance or conveyance, so far as such effect may be lawful; and upon the death, resignation, or removal by any Court of competent jurisdiction, of any trustee, or an appointment in his place, in pursuance of these presents, all his powers and authorities by virtue hereof shall cease."

The trustee entered upon and continued in the discharge of his duties until his death in August, 1875, when the board of directors appointed the defendant in his stead. Shortly thereafter, on the 14th of September, 1875, the executor of the deceased trustee came to a settlement with the defendant, and delivered over the trust funds to him, taking his receipt therefor. It appears from the receipt that the fund consisted of three individual bonds for $13,000, two of the second series of secured bonds, due in 1877, twelve of the last series, due in 1888, and of deposits in the State National Bank of Raleigh and in three other banks of Charlotte, in the aggregate sum of $73,072.07, the total paid being one hundred thousand one hundred and eleven dollars and a few cents; and with which the defendant charges himself in his first annual account, rendered in May, 1876. This account shows a balance in the hands of the defendant of $96,285.26, constituted of the twelve (226) bonds of the series due in 1888, the individual bonds received from the executor, deposits remaining in two of the Charlotte banks, $30,000, and deposits in the banking house of Wilson & Shober, of which the defendant is the senior partner, of $40,477.27. Of these latter, it appears from the certificates of deposit filed, that $25,000 were deposited 16 October, 1875; $22,000, 6 November, 1875; and the residue was a general deposit; while during the interval the defendant had withdrawn from the banks a little over $43,000.

During the succeeding year, as appears from the second account, the defendant received from the treasurer of the company, and in interest, $93,740.44, and paid out about $1,000, leaving in his hands 2 May, 1877, $191,019.70, the items of which are given in detail. The fund was then constituted of the individual notes and the twelve bonds originally received, the deposit of $47,000 with Wilson & Shober, other personal loans, ten U. S. six per cent bonds, cash deposits in bank $13,907.63, and of bonds and debt of the Atlantic, Tennessee and Ohio Railroad Co. $73,670.57. This last mentioned investment was made under the direction of the board of directors.

The last account, rendered in May, 1878, shows that besides the sum already in hand, the defendant collected from dividends of the road and from other sources $32,380.72, and disbursed in the redemption of secured bonds, including loss in resale of the U. S. bonds and a small sum for express charges, $87,740.42, leaving the sum of $135,660; and this consisting of the original individual bonds $7,000, the investment in debts of the A. T. and O. R. R. Co. $73,670.57, deposits remaining with Wilson & Shober $41,311.50, individual loans to others mentioned in preceding returns, and a small sum on general deposit with Wilson & Shober and in State National Bank of $677.93.

The twelve bonds of the company of the last series, which had
(227) been redeemed by the first trustee and were delivered over to his successor uncanceled, as well as the U. S. bonds, were during the fiscal year sold and the proceeds disposed of as is represented in the accompanying statement of the condition of the fund.

These accounts were submitted, and full and detailed explanations of the collaterals and other securities then held made by the trustee to the board of directors, and embodied in their reports to the annual meeting of stockholders, without any express intimation of disapproval of his management until 19 June, 1877. At the meetings of this date the report of the finance committee charged with the duty of examination and made to the stockholders, indicates an expectation that the bonds to fall due in November ($165,000) would "be provided for by the trustee out of the sinking fund," and suggests to him the exercise of great caution on the part of the trustee in making loans "to individuals on collaterals or mortgages," assigning as a reason therefor "the fluctuating character of collaterals and the very great difficulty of realizing under forced sales of real estate in times like the present."

It appears from transcript of proceedings before the board of directors that on 23 October, 1877, the defendant was instructed "to pay all the bonds of the North Carolina Railroad Company which mature 1 November, 1877, out of the sinking fund now in his hands"; and again, on 21 June, 1878, they passed a similar resolution, requiring the trustee to collect forthwith all the debts due the sinking fund (except the debt due by the A., T. and O. R. R. Co.), and that he pay off all the past-due bonds and accrued interest thereon of this company, except the bonds held by E. M. Holt, about $20,000.

On 11 July, 1878, after the failure and assignment of the defendant's firm, the stockholders adopted the report of a committee of
(228) their number recommending to the directors to make a full examination of its financial matters, and "to take all necessary steps to protect the interests of the company therein." The board of directors met on the same day and adopted and approved the report

of their committee charged to inquire into "the affairs of N. H. D. Wilson, trustee," and therein say, "that on account of the large indebtedness of Wilson & Shober to the trustee of the sinking fund of the North Carolina Railroad Company, and the failure of that firm, and the doubtful value of the securities taken by the said trustee to secure his loans to the said firm, the said N. H. D. Wilson is not a proper person to act in the trust, and that if he does not resign, then this board sought to take further action in the matter." The resolution was communicated to him on the 15th day of that month by the president, and the defendant refused to surrender the place, complaining of the hasty and summary action of the board without giving him notice and permitting him an opportunity of self-defense, and assigning many reasons constraining him to disregard the intimation expressed in the resolution.

On 20 September thereafter the board of directors passed a resolution removing the defendant, and declaring "that by reason of the failure of N. H. D. Wilson, trustee of the sinking fund, to obey the instructions of the board of directors of said company in regard to the collection of the debts due the sinking fund, and to pay off past-due bonds and accrued interest, and by reason of his using the funds in his hands as trustee in his private business, and to the injury of the company, the board of directors, by virtue of authority in them vested, do hereby declare that the said N. H. D. Wilson is unfit to act in said trust, and he is therefore removed." At the same time the plaintiff John W. Graham was appointed in his place.

Numerous notes belonging to Wilson & Shober were at the date of the loans in October and November separated from their (229) effects and kept by the trustee as collateral security therefor, and much evidence was offered as to the sufficiency of the security. The character and value of the collaterals were fully explained by the trustee to the board in his first official report, verbally as well as in writing, and no dissatisfaction was then felt or expressed in regard to the loan to the firm. And upon these representations the board thought the security full and ample. The loans, however, do not seem to have had the previous sanction of the president or board of directors, nor were they consulted in advance about them.

There was much controversy as to various particular collaterals, their value, and the legal liability of those whose names were upon them; and the argument before us was mainly upon the good faith of the defendant, the legal sufficiency of the facts proved to justify his removal, and the capacity of the board to remove in the manner in which it is here attempted to be done.

To insure the faithful management of the trust, the defendant, on

13 March, 1877, executed a bond in the penal sum of $100,000, with sureties justifying to that amount, and delivered it to the company.

We have given the summary of the material facts upon which the motion for a receiver and an injunction was pressed, and the defense offered thereto. The correctness of the ruling of the Court in its refusal to make either order is the only question before us on the appeal.

The suit is instituted upon the basis of the legal appointment of the plaintiff Graham in the place of the defendant, as trustee to secure the trust fund, and compel its delivery to him; but the company seeks relief, if the removal and new appointment have been ineffectual, in the appointment by the Court of a trustee to whom these funds shall be delivered, and meanwhile for a receiver to take charge of them
(230) until the controversy upon its merits has been determined. But this issue, though elaborately and ably discussed, is not now before us, and our duty is limited to the decision of the question whether the funds have been hitherto properly managed, and their probable safety where they remain. We do not deem it necessary to inquire into the moral aspects of the controversy; this is beyond our province; nor to impute any intentional wrong to the defendant. We must determine the case upon strict principles of law and enforce the well-settled rules of a Court of Equity in regard to the management and use of trust funds. It is an inexorable rule in a Court of Equity, where such matters are properly cognizable, that trust funds must be managed exclusively in the interest of the beneficiary, and can not be appropriated to the use of the trustee, or of any firm of which he is a member, or in which he has a contingent interest. And such use of the fund involves a breach of fiduciary obligation. "Trustees can not use trust money in their business," says Mr. Perry, "nor embark it in any trade or speculation; nor can they disguise the employment of the money in their business under a pretense of a loan to one of themselves, nor to a *partnership of which they are members;* nor can the money be loaned on security to be reloaned back to the trustee at a profit." 1 Perry on Trusts, Sec. 464. The rule seeks to remove all temptations to hazardous risks of the fund, and to place it under the supervisory control of one whose only interest, coinciding with legal duty, will be to secure its safety and all its benefits to the rightful owner. The law frowns upon any act on the part of a fiduciary which places interest in antagonism to duty, or tends to that result. Let us apply the principle to the facts of the present case.

The defendant, within about six months after the funds passed into his possession, withdraws a large amount of the moneys from depositories, safe as far as appears to us, to which the former trustee
(231) had confided them, and deposits them in his own banking house,

which in about two years thereafter becomes insolvent. It is true he selects and lays aside notes and other securities belonging to the firm as an indemnity against loss, but the same mind and under like influences offers and accepts the collaterals, and there is absent in the transaction the sharp lookout, careful scrutiny and cautious judgment of an impartial trustee whose only duty is to take care of the interests he has in his charge. Whether these collaterals may ultimately yield a sum sufficient to wipe out the indebtedness of the insolvent firm to the trust is not material to the present inquiry. It is enough to say the moneys of the sinking fund are locked up in that deposit, and are not now available for the purposes for which it was formed. So, when the directors, in two resolutions, passed in October and June, required the application of the moneys to the retirement of the overdue bonds of the second class, the firm depository had used the money and were unable to replace them. Again, when the firm is yielding to the pressure of accumulating embarrassments and approaching its unavoidable insolvency, the defendant finds it impracticable to restore the moneys; and, as testified to by the president, when asked if that could not be done, his only reply is, "I could have done so, but it would have embarrassed Wilson & Shober." Thus the conflict was working out its practical fruits, and in the moment of peril the fund is without its natural and legal protector. And so the deposit, with all its accruing interest, except some $6,000 returned, remains in a failing house until its financial ruin in the early summer and the general assignment put an end to its further operations. Now, the reason and necessity of the rule are manifest in the very misfortunes which have followed the first unwise departure from its requirements, and in the want of that constant and single care and unremitting oversight to which a trust fund is always entitled from him who has to manage it. (232)

The company complains of another unauthorized act of the defendant in the sale of the twelve bonds received from the preceding trustee. They had been redeemed with its own moneys provided for that purpose, and, under the requirements of the deed, should have been canceled and so much of the debt extinguished. They were retained by the defendant, and disappear from the list of assets returned in May, 1878, having been disposed of to raise means to meet the pressing overdue debt, while more than $40,000 were then on deposit with his own banking house. The defendant does not seem to have made an effort, or if he did it was fruitless, to withdraw the moneys deposited with his own firm for the urgent necessities of the company; and there it remained, with the knowledge we must suppose he possessed of impending calamity. This is the result of the error in making the original misapplication.

In the argument it was contended that the loans received the implied sanction of the directors, and do not constitute ground for removal. If this were true, it must be remembered that both are but fiduciary agencies of the corporation, and their concurrence in the breach of trust would not relieve the trustee who acts under the provisions of a deed which creates the trust and directs the manner of its execution. But we do not so understand the action of the directors. Accepting the condition of the fund as reported by the defendant, they examined the collateral security which he had set aside, and in the light of his explanations pronounced it sufficient. But no approval of the loan itself effected by the individual act of the trustee is given.

It was also contended that the bond executed with sureties by the defendant for his faithful care and management of the trust funds, guarantees the return of the money, and shows it not to be in (233) peril, and that hence there is no reason for his removal. The bond of the trustee is but a subsidiary security for his fidelity, but is not a substitute for his personal fitness for the place. It is the duty of the Court, when it appoints, to select a competent and suitable person for the office, and at all times, when called on, to enforce the performance of his duties. Any ascertained dereliction in this regard demands its prompt interference for the safety of the fund. We can not see, therefore, how the bond, though a wise and prudent precaution against loss, can affect the question of personal competency involved in the present proceeding.

We do not deem it important to inquire as to the ultimate recovery of the loans from the proceeds of the appropriated collaterals. The fund is now, for all practical purposes, unavailable, and though after long and expensive litigation it may be restored, it fails to accomplish the very object contemplated in its creation. The defendant's insolvency and unsuccessful management of his own business matters may well be considered in passing upon the question of the longer continuance of his trusteeship. Whatever may be the issue of the controversy as to the possession of the office, it is manifestly proper, during its pendency, to place the funds of the company in a safe condition to await the result, and the plaintiff's motion ought not to have been refused.

It is suggested that the bondholders are interested parties, and no complaint proceeds from them, and hence none should be entertained from the company. But the company has also an abiding interest in having the bonds paid and the incumbrance removed from its property, and in the return of any residue when they are paid. But a sufficient answer to the suggestion is furnished by an examination of the deed itself. By the tenth article, already cited, the duty of interposing for the removal of an unfit trustee and the appointment of a successor is de-

volved upon the company, with the continuing oversight necessarily incident thereto, and it must act in the premises when the (234) occasion requires, alone or in association with the secured creditors, in enforcing the due execution of the trusts of its own deed. Should both the company or its agency, the board of directors, and the trustee be derelict, and the fund become exposed to danger, undoubtedly the Court would entertain an application for procedure against both parties from the several creditors. But when they acquiesce in a movement of the company for their own security and benefit, their inaction affords no defense to the trustee.

We do not, as we have already said, intend to impute any dishonest purpose to the defendant. But he has acted unwisely and in opposition to those well-settled rules in reference to trust funds, which we must maintain in their integrity and force; because in their observance reposes the safety of estates in the hands of trustees. The Court erred in refusing the motion of the plaintiff.

Reversed.

Cited: Simpson v. Jones, 82 N. C., 325; *Coates v. Wilkes,* 92 N. C., 387; *Wilson v. Lineberger,* 94 N. C., 647; *McEachern v. Stewart,* 114 N. C., 371; *In re Battle,* 158 N. C., 393.

SAMUEL ROWLAND v. CALVIN BARNES.

Contract—Ratification—Statute of Frauds—Form of Action.

Plaintiff sued defendant for one hundred and twenty-five dollars, the price of a gin, which the latter, without any authority from the plaintiff, had sold to one T. on credit. At the time of the suit, which was brought in a justice's court, and in form *ex contractu,* the defendant had collected nothing from T. When informed by defendant of the sale, plaintiff said, "Very well, go ahead and collect the money and remit." In a subsequent conversation, occurring some hours later, plaintiff said to defendant, "I don't know T. in the transaction; I shall look to you," to which defendant made no reply; *Held,*

(1) That the words, "Go ahead, collect," etc., amounted to a ratification of the sale to T., which the plaintiff was not at liberty afterwards to recall.

(2) That, if any promise to pay could be implied from the silence of the defendant when told that he was responsible, it was a promise to pay the debt of T., which was *nudum pactum* after the previous ratification, and void under the statute of frauds for want of a writing.

(3) That even assuming that there was not ratification of the sale, plaintiff's remedy was by an action in the nature of *trover,* since no money had been received and no personal benefit derived by defendant.

APPEAL from a Justice's Court, tried at Spring Term, 1879, of (235) WILSON Superior Court, before *Seymour, J.*

On the trial before the Justice of the Peace, the plaintiff exhibited an account against the defendant consisting of two items, one for $25 for repairing a certain cotton gin, and the other for $125, the price of another gin. The Justice gave judgment for the amount claimed upon the last item, and the defendant appealed.

On the trial in the Superior Court, the plaintiff proposed to introduce evidence as to the repairs aforesaid, the repairs to the one gin being done at a different time from the sale of the other gin, and constituting an entirely distinct transaction, but the defendant objected on the ground that the Justice had found against the plaintiff on that matter and he had not appealed from the ruling thereon. The objection was overruled, and the plaintiff testified he had repaired the gin at defendant's request, and the work was worth the amount claimed. He further testified that he left another gin in defendant's possession for safe keeping, and defendant had assumed authority without his direction to sell it, and did sell it to one Taylor; that when they met some time after the sale, the defendant informed plaintiff of what he had done,
(236) and the plaintiff said, "Very well, go ahead and collect the money and remit," and defendant said nothing. Later in the day they met again, and Taylor's name being mentioned, the plaintiff said, "I don't know Taylor in the transaction; I shall look to you." Defendant said nothing.

Defendant testified that plaintiff authorized him to sell the gin, that he informed plaintiff of the sale to Taylor, when plaintiff said, "Very well, go ahead and collect," etc., as testified by him; that plaintiff never told him he should look to him for pay, and it was not until just before the commencement of this suit, which was more than a year after said conversation, that plaintiff gave him to understand that he, defendant, was to be held personally responsible. It was admitted that the defendant never received any pay for the gin from Taylor.

Defendant's counsel insisted that plaintiff could not recover for money had and received, and no money had passed, nor on a promise to be implied from defendant's silence when plaintiff said he would hold him responsible, as the promise to answer Taylor's debt or default would have to be in writing.

His Honor charged the jury if they believed the plaintiff's testimony, they might imply from defendant's silence a promise to pay the price of the gin as his own debt, and the jury found a general verdict for plaintiff for one hundred and twenty-five dollars. Defendant moved for a new trial for misdirection and for error in admitting evidence as to repairs; and for the reason that the plaintiff's evidence disclosed no cause of action *ex contractu*, but only a cause of action for a tort in converting property of the value of more than fifty dollars, in which case

a Justice of the Peace has no jurisdiction. Motion refused, judgment for plaintiff, appeal by defendant.

Messrs. Connor & Woodard for plaintiff. (237)
Messrs. H. F. Murray and *Lewis & Strong* for defendant.

ASHE, J. This was an action begun before a Justice of the Peace, and founded on two accounts, the one for twenty-five dollars for repairing a gin, and the other for one hundred and twenty-five dollars for the price of another gin. The Justice refused to give judgment in behalf of the plaintiff on the account for repairing the gin, but did give a judgment against the defendant for one hundred and twenty-five dollars, the price of the other gin, and the defendant appealed to the Superior Court. Upon the trial of the cause before a jury, the plaintiff proposed to introduce evidence as to the repairs of the gin. The (238) defendant objected, on the ground that the Justice had found against the plaintiff on that item of the account, and he had not appealed. The objection was overruled, the testimony admitted, and the defendant excepted to the ruling.

It was proved on the trial by the testimony of the plaintiff that he had left the other gin in the possession of the defendant for safe keeping, and he had sold it to one Taylor without any authority from the plaintiff; and when they met some time after the sale, and the defendant told the plaintiff what he had done, he said, "Very well, go ahead and collect the money and remit," to which the defendant made no reply. Later in the day they met again, and the plaintiff said to defendant, "I don't know Taylor in the transaction; I shall look to you," and defendant said nothing.

His Honor charged the jury that if they believed the plaintiff's testimony, they might imply from defendant's silence when plaintiff told him he should look to him for pay, a promise to pay the price of the gin as his own debt. Under this instruction, the jury found a verdict for the plaintiff for one hundred and twenty-five dollars. The defendant moved for a new trial on the ground of misdirection in the charge of his Honor, and error in admitting the evidence in regard to the repairs on the gin, and for the reason that the plaintiff's evidence disclosed no cause of action *ex contractu,* but only a cause of action for a tort for the converting of property of the value of more than fifty dollars, in which case a Justice of the Peace had no jurisdiction. The new trial was refused, and the defendant appealed to this Court.

1. In the view we take of this case, it is not material to consider whether there was error in the admission of the evidence in regard to

the repairs on the gin. We are of the opinion that his Honor
(239) did commit an error in his charge to the jury, and that the error arose from a misconception of the legal import of what transpired between the plaintiff and defendant in regard to the sale of the gin. We hold that when the defendant told the plaintiff that he had sold the gin to Taylor, and the plaintiff said, "Very well, go ahead and collect and remit," that was an explicit ratification of the sale, and was just as binding on the plaintiff as if he had previously authorized the defendant to make the sale, upon the maxim, *"omnis ratihabitio retrotrahitur et mandato priori aequiparitur."* And after the sale was once ratified, the plaintiff could not afterwards withdraw his assent and repudiate his authorization of the sale by saying, "I don't know Taylor in the transaction; I shall look to you." To give these words their full force and effect, they can amount to nothing more than a guaranty on the part of the defendant to pay the debt of Taylor. When the ratification of the sale was made, the defendant was discharged from all liability on account of the gin, and the plaintiff assumed to look to Taylor for its price. It was then Taylor's debt. And admitting that when the plaintiff afterwards told the defendant that he would "look to him," and the defendant said nothing, it was an assent to the proposition, but what was the proposition—the legal import of the proposition? It was that he would hold him responsible for the price of the gin, or, in other words, for the debt of Taylor. This is the full scope and meaning of the agreement which it is insisted was then entered into between the parties. It was a promise to be answerable for the debt of another, to pay the price of the gin in the event it could not be collected out of Taylor. The promise was void on two grounds: First, because there was no consideration to support it; and second, because being a contract to answer for the debt of another, it was not reduced to writing according to the requirements of the statute of frauds.

2. But conceding that there was no ratification of the sale,
(240) how does the case stand? The plaintiff brought the action against the defendant for the nonpayment one hundred and fifty dollars due by account. It was an action of *assumpsit* for money had and received to the use of the plaintiff. And in an action of *assumpsit* for money had and received, the *money* must have been received by the defendant, or he must have derived some individual benefit from the transaction, as a credit on his account, or some equivalent of such a character as to show that the parties treated it as money. Stephens Nisi Prius, 327. But in this case it is not shown that any money had ever passed from the purchaser to the defendant, and for aught that appears in the transcript, the money is still due from Taylor for the price of the gin. The plaintiff, then, has misconceived his

action. His only remedy, in this view of the case against the defendant was an action of *trover* for the conversion of the property, in a Court of competent jurisdiction.

Error.

Cited: *Peele v. Powell,* 156 N. C., 558.

W. W. BRICKELL, Guardian, v. COMMISSIONERS OF HALIFAX.

Contract—Burden of Proof.

A contract made by a county during and in aid of the late war, can not be enforced; and the *onus* of showing it was made for an innocent purpose is upon the party seeking its performance.

(Remarks of SMITH, C. J., upon the ruling in *Leak v. Commissioners,* 64 N. C., 132.)

(241)

APPEAL at Spring Term, 1879, of HALIFAX, from *Eure, J.*

The facts agreed on are that at May Term, 1862, of the Court of Pleas and Quarter Sessions of Halifax County, a majority of the Justices of the Peace being present, R. B. Pierce, Chairman of the Court, was appointed commissioner to borrow money upon the credit of the county to buy salt for distribution among the people of the county, and was authorized to execute a bond to secure payment of the same. Accordingly, on the 23d of June, 1862, he borrowed three thousand dollars of the plaintiff's intestate (William Brickell, as guardian of the plaintiff's wards), and gave bond for the amount. The money was used by the commissioner in the purchase of salt, which was distributed gratuitously among the poor of the county, and at a cost to those able to pay for it. On the 24th of November, 1863, said Pierce, chairman as aforesaid, executed the bond sued on in renewal of the one first given, including the accrued interest, which has been presented for payment from time to time, and payment refused. When said wards became of age they declined to take the bond sued on, and said intestate accounted fully with them for the amount thereof. The Court gave judgment for plaintiff, and defendants appealed.

Messrs. Gilliam & Gatling for plaintiff.
Messrs. W. H. Day and *Mullen & Moore* for defendants.

SMITH, C. J. The facts of this case are not distinguishable in principle from those before the Court in *Leak v. Commissioners of Richmond,* 64 N. C., 132, and it is conceded that if that decision is adhered to, the present action can not be maintained. In that (242)

case, after full argument and careful consideration, it was declared by a unanimous Court that the bond the payment of which was sought to be enforced was illegal and void. In delivering the opinion, the Chief Justice says: "At the time of the legislative act giving power to the Justices to make the contract, and at the date of the contract, the persons exercising the power of the State, and the persons exercising the power of the county, had disavowed their allegiance and put themselves in open hostility to the rightful State government and to the government of the United States; in other words, there was rebellion. It follows that the Courts of the rightful State government, which has regained its supremacy, can not treat the acts of persons so unlawfully exercising the powers of the State and county authority as valid, unless the Court is satisfied that the acts were innocent and such as the lawful government would have done. So, when the plaintiff asks the Court to compel the defendants who are in the rightful exercise of the power of the county to perform a contract made by a set of men who were wrongfully exercising the power, the *onus* of showing that the contract was made for an innocent purpose and not in aid of the rebellion, is upon the plaintiff; if the matter is left in doubt, the Courts can not enforce the claim against the rightful authorities of the county. So far from being left in doubt, it is clear that the contract was in aid of the rebellion." In the course of the discussion he refers to the provision contained in the Constitution, Article VII, Sec. 13, and adds: "Here is a declaration of the will of the people, obligatory upon the Courts, that no war debt, as it is termed, contracted either by the State or by the counties or cities or towns shall be paid." The result is summed up in these words: "That furnishing salt to the people, during the war, was calculated and intended to aid in resisting the invasion; in other words, aiding the rebellion."

The doctrine is reiterated and applied in *Setzer v. Commis-*
(243) *sioners,* 64 N. C., 516, determined at the same term.

The vitiating taint is extended to State Treasury notes delivered in redemption of interest due on bonds issued before the war, in *Rand v. The State,* 65 N. C., 194. The principle established in Leak's case is approved in *Logan v. Plummer,* 70 N. C., 388; *Lance v. Hunter,* 72 N. C., 178, and in other cases.

In *Weith v. Wilmington,* 68 N. C., 24, READE, J., uses this language: "Why was it that the Convention of 1865 ordained that the State should never pay any debt contracted in aid of the rebellion? And why was it provided in the Constitution of 1868 that neither the State nor any municipal corporation should ever pay such debts? Evidently because the considerations were illegal, and it was against public policy, for the rightful government, after its rehabilitation, to pay, or allow to be

paid by its municipal corporations, which are but parcels of the State, any debt contracted by the rebel authorities."

In *Davis v. Commissioners,* 72 N. C., 441, the defendants had borrowed money of Poindexter to pay a debt previously contracted with the bank for the equipment of soldiers for the service of the Confederate States, and had given him a county bond therefor with the plaintiff as surety. Poindexter sued Davis and recovered judgment on the ground that the taint of the original transaction did not reach and avoid the bond for money borrowed to pay the illegal debt, and Davis, having discharged the larger part of the judgment, sought in this action to compel reimbursement and exoneration from the county. The application was denied, READE, J., saying: "Grant, then, that the borrowing of money of Poindexter by the County Court of Stokes to pay the bank debt was not tainted with political turpitude, yet the County Court had *no power* to borrow the money or to give the bond. It may be true that those were statutes of a rebel Legislature which authorized it, but such statutes are void." We refer to these cases to show (244) how firmly established in subsequent adjudications is the principle laid down and acted on in Leak's case. After these repeated recognitions of its authority, the tendency of public and private interests to find an adjustment upon that basis, and the importance of adhering to well-considered precedents, we would not feel at liberty to disturb the decision and unsettle the law, with the mischiefs consequent thereon, unless upon the clearest convictions of error.

The plaintiff's counsel calls our attention to a case recently decided in the Court of Appeals of Virginia, *Dinwiddie County v. Stewart,* 28 Gratt., 526, in which a similar contract, entered into for the supply of salt to a county for the use of the people, is sustained and enforced. The decision is rendered by a bare majority of its members, and able and elaborate opposing opinions upon both sides of the question delivered. The dissenting opinion of ANDERSON, J., in which President MONCURE concurs, arrives at a conclusion unfavorable to the legal validity of the claim by a train of reasoning in entire harmony with that of this Court in Leak's case. We can not regard it as of controlling authority.

Whatever might be our own opinon were the matter *res integra,* and the question an open one, we feel constrained by the force of the precedents to abide by the former action of this Court, and not to open the door to the unforseen mischiefs which may follow the unsettling of a long-established rule of law.

The judgment must, therefore, for the error assigned, be reversed and Action dismissed.

Cited: Bluthenthal v. Kennedy, 165 N. C., 373.

(245)

CHARLES H. BROWN v. JESSE W. KINSEY, Executor.

Bond—Validity of—Immoral Consideration—Practice—Insufficiency of Evidence.

1. The fact that a bond is executed in consideration of past cohabitation does not affect its validity, if not appearing that there was any stipulation for future cohabitation; and this is so, although in fact the cohabitation continues after the execution of the bond.
2. In an action upon such bond, the *onus* is on the defendant to prove the immoral consideration.
3. On the trial of an action, if there be no evidence, or if the evidence be so slight as not reasonably to warrant the interference of the fact in issue, or furnish more than materials for a mere conjecture, the court should not leave the issue to be passed on by the jury, but should direct a verdict against that party on whom the burden of proof is.

APPEAL at Spring Term, 1879, of JONES, from *Seymour, J.*

The plaintiff assignee brought this action to recover the amount alleged to be due certain notes under seal, executed by Ivey King, the defendant's testator, to one Winefred Hill, who subsequently assigned them to the plaintiff. The payment was resisted by the executor upon the ground of immoral consideration, in that the said Winefred was living in adultery with the testator for some years during his life and up to the time of his death; and that the plaintiff took the notes past due with notice that payment was refused for the reason aforesaid. There was no evidence of any agreement or promise for future cohabitation made at the time of the making of the notes, nor of any statement that they were given for past cohabitation, and the Court held that the notes being under seal were good without a considera-
(246) tion, and declined to submit the question to the jury upon the evidence in the case, stating that defendant should have shown the consideration to be illegal; that past cohabitation did not constitute an illegal consideration, while an agreement for future cohabitation did; and conceding the notes were given on account of the adultery, yet there was no evidence it was for future cohabitation. Defendant excepted. Judgment for plaintiff, appeal by defendant.

Messrs. Faircloth & Simmons and *A. G. Hubbard* for plaintiff.
Messrs. Green & Stevenson and *H. R. Kornegay* for defendant.

DILLARD, J. The case in the Court below was four appeals from a Justice's Court, founded on four bonds executed by the testator of the defendant on 13 September, 1872, to Winefred Hill, and assigned by her after due to the plaintiff. By order of the Court, the actions were consolidated, and the trial was had by a jury on the issue joined on the

plea of immoral consideration, and the evidence relied on by the defendant being all in, his Honor being of opinion that the same was not such as reasonably to warrant a finding of the matter of avoidance pleaded, so held. Thereupon the verdict was for the plaintiff, and the defendant appealed.

The question on the appeal is whether the evidence adduced was or was not such as in law to authorize and require the Judge to submit it to the jury upon which to find the fact of immoral consideration alleged by the defendant.

The evidence was, that the testator of defendant died in October, 1872, and that about five years before his death Winefred Hill, the assignor of the plaintiff, gave birth to a bastard child begotten by him (said testator), and afterwards, in the course of the same (247) illicit intercourse, he executed to her a bond under seal for three hundred dollars. Winefred, on her death, said he owed her nothing, and that when the bond was delivered to her, testator made no declaration as to his reason or to the consideration moving him thereto. Upon the death of testator's wife, the said Winefred went to live in the house of testator, and took charge of his domestic business about a month before the testator died. And whilst there, on 13 September, 1872, during the continuance of the immoral connection, the testator took up the bond for $300 and destroyed it, and then and there executed to said Winefred the four bonds now in suit, one of them falling due on each first day of January in the next four succeeding years, stating at the time that they were executed in place of the bond for $300, and he made no declaration to the motive for the substitution or the consideration on which they were founded.

Upon the issue joined, the bonds under which the plaintiff claims being under seal, the execution and delivery made them effectual at law, made them *deeds, things done;* and by the common law they had the force and effect to authorize plaintiff to recover without any consideration, with power, however, in the defendant to have the same held null upon proof of illegal or immoral consideration, not from any motive of advantage to him or his testator, but from consideration of the public interest and of morality. *Harrell v. Watson,* 63 N. C., 454; 2 Chitty Contracts, 971; *Collins v. Blantem,* 1 Smith Lead. Cases, 153.

On the trial, then, we are to take it that plaintiff was absolutely entitled to recover, unless the defendant showed the immoral consideration alleged, by evidence full and complete, or by proof of such facts and circumstances as would reasonably warrant a jury to find it as a fact. In other words, the *onus* was on the defendant, and in order to defeat the recovery it was incumbent on him to show that the bonds were not voluntary, that is, not executed as a mere gift, (248)

and not on the consideration of past cohabitation, which is legal, but on the consideration, in whole or part, for future criminal intercourse, or to show that the nature of the securities was such as to hold out an inducement or constitute a temptation to Winefred Hill to continue the connection.

It is indisputable that the bonds, if executed as a gift by the testator of the defendant to Winefred Hill, the mother of his bastard child, would be legal and enforceable, it not being immoral to assist her by gift to raise his progeny; and it is equally settled that if they were given for past cohabitation, they would be binding on the ground that the illicit connection was an evil already past and done, and the public had no interest to defeat them. The only restriction put on the contracts of the parties is, that they shall not stipulate for future fornication, or in such manner as that the security given shall operate an inducement or motive to go on in the vicious course. 2 Chitty Contracts, 979; *Trovenger v. McBurney,* 5 Cowen, 253; *Gray v. Mathias,* 5 Vesey Ch., 286.

In these cases it is held that the continuation of the criminal intercourse after the execution of the bond or contract impeached for immorality, does not invalidate the same; but that it is to be avoided and held null only on proof that it was executed in whole or part on the understanding that the connection was to continue. This will be apparent from the following extracts taken therefrom. In *Trovenger v. McBurney, supra,* the Court say: "A bond executed for the cause of past cohabitation, although the connection is continued, is not invalidated thereby." The test always is, does it appear by the contract itself, or was there any understanding of the parties, though not expressed, that the connection was to continue. In *Gray v. Mathias, supra,* a bond was given during the cohabitation, and in the course of the cohabitation a second bond was given, which, upon its face, recited the existing illegal connection and stipulated for its continuance,
(249) with an annuity for the woman in case of discontinuance; and it was held that the last bond was void, but the former one was good, although the cohabitation continued after its execution.

In *Hall v. Palmer,* 3 Hare, 532, the bond was executed to the woman conditioned to pay an annuity from and after the death of the obligor, and the parties lived together at the time and continued so to live afterwards upon a declaration of the obligor that he did not intend to break off the connection; and upon a reference to the master, it being found as a fact that it was given for past cohabitation, it was held that the continuance of the connection after the execution of the obligation had no effect to invalidate it.

From the principle decided in these cases, it may be taken as settled

that the cohabitation of the testator of defendant with Winefred Hill after the execution of the bonds to her, did not by any legal presumption invalidate the same; and that the same could only be held void on proof that there was an understanding, express or implied, that the criminal intercourse was to be continued. Applying these principles to our case, we have this state of things: At the time the first bond for $300 was given, Winefred testified that testator of defendant owed her nothing, and therefore the bond was voluntary; or if not that, then it may have been on consideration of past cohabitation, and if so, it was valid; or it may have been partly for past and partly for future, or altogether for future intercourse, and if the latter, then the *onus* was on the defendant to prove it otherwise than by mere evidence of a continued connection after the bonds were executed.

The defendant, on the trial of the issue, had no proof, except of the execution of the bonds in the course of an illegal intimacy between the parties and a continuation thereof afterwards up to the death of the testator, together with an admission by Winefred that (250) they were not executed for any debt due to her; and obviously in such state of the proof the jury could not have done more than have a suspicion and conjecture, whether the bonds were executed as a gift, or for past cohabitation, or wholly or in part for future cohabitation.

The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the Court will not leave the issue to be passed on by the jury, but rule that there is no evidence to be submitted to their consideration, and direct a verdict against that party on whom the burden of proof is. *S. v. Waller,* 80 N. C., 401; *S. v. Patterson,* 78 N. C., 470; *Sutton v. Madre,* 47 N. C., 320; *Cobb v. Fogalman,* 23 N. C., 440.

In our opinion, therefore, the Judge properly held that there was no evidence of the illegal or immoral consideration alleged, and in so doing he committed

No error.

Cited: S. v. Rice, 83 N. C., 663; *McCanless v. Flinchum,* 98 N. C., 364; *Covington v. Newberger,* 99 N. C., 531; *Bank v. Burgwyn,* 110 N. C., 276; *Pettiford v. Mayo,* 117 N. C., 29; *Spruill v. Ins. Co.,* 120 N. C., 147; *Epps v. Smith,* 121 N. C., 165; *S. v. Gragg,* 122 N. C., 1091; *Byrd v. Express Co.,* 139 N. C., 275; *Kearns v. R. R., Ib.,* 472; *Burton v. Belvin,* 142 N. C., 153; *S. v. Norman,* 153 N. C., 594; *Electrova Co. v. Ins. Co.,* 156 N. C., 235; *Liquor Co. v. Johnson,* 161 N. C., 76; *S. v. Matthews,* 162 N. C., 548.

T. B. HILL v. W. H. SHIELDS.

Liability of Endorser—Remote Endorsee-Evidence.

1. In an action upon a note by a remote endorsee, who purchased *bona fide* for full value and without notice, against the payee, who endorsed the note in blank, evidence of an agreement between the payee and his immediate endorsee that he should not be held liable on his endorsement, is not admissible.
2. In such case, the plaintiff held the note unaffected by any special agreement between the payee and his immediate endorsee.

(251) APPEAL at Spring Term, 1879, of HALIFAX, from *Eure, J.*

The facts appear in the opinion. There was a verdict for plaintiff, judgment, appeal by defendant.

R. B. Peebles for plaintiff.
Messrs. W. H. Day and *Batchelor & Son* for defendant.

DILLARD, J. From the case of appeal sent up to this Court, the case is that defendant was payee in a promissory note executed to him by Edward Anderson, payable at twelve months, for a large sum of money, and secured by a mortgage on property, and on 23 January, 1875, after its dishonor, he transferred the same by a blank endorsement thereon to the Mercantile Bank of Norfolk, which car-
(252) ried with it the mortgage as an incident, and the bank afterwards transferred the same to the present plaintiff by delivery for full value. After receiving several payments on the note and realizing all the proceeds of the property conveyed in the mortgage, there still remained a balance unpaid on the note, and for that this action was brought.

On the trial in the Court below, the plaintiff tendered the issue, "Was the plaintiff a *bona fide* purchaser of said note for full value and without notice?" Defendant admitted the affirmative of that issue, and tendered on his own behalf the following issues:

1. Did the defendant and the bank, when the former endorsed the note in blank, agree that defendant was not to be held responsible on his endorsement?

2. Did any consideration pass from the bank to defendant for his endorsement?

The plaintiff objected to said issues upon the ground that an affirmative response thereto could in no way affect the liability of the defendant to the plaintiff, who was admitted to be a remote endorsee for full value and without notice, and his Honor, being of opinion with the plaintiff on the objection, refused to submit the said issues, and

thereupon pronounced judgment, upon said admission of defendant and other facts not denied in the pleadings, for the plaintiff for the unpaid balance of his debt, from which judgment the appeal is taken.

The question presented by the appeal for our determination is, does the plaintiff, a remote endorsee of defendant's note, put into circulation past due, hold the same subject to the special agreement of defendant with the Mercantile Bank, his immediate endorsee, not to hold him responsible on his endorsement, the plaintiff being a purchaser for full value and without notice of the alleged special agreement?

We concur in the opinion of his Honor that the plaintiff held the legal title to the note, unaffected by the special agreement between the defendant and the bank, supposing such agreement (253) to have been made.

A promissory note, by the statute of 3 and 4 Anne, in England, and by statute in this State, is made negotiable as inland bills of exchange, and the legal title may be passed by endorsement thereon in full or in blank, absolute or restricted, in honor or dishonor, with incidents, however, to the holder and to the parties to the note raised by the fact of its being made before or after its maturity If acquired before due, by the law merchant, the holder takes the title clear of all objections; but if after, he is put on inquiry, and is held to take subject to all equities and legal defenses of the maker at the date of the transfer, or before notice thereof against the payee under the English law, but against the payee and all intermediate holders under our Code, as decided in the case of *Harris v. Burwell,* 65 N. C., 584.

This liability of the holder of over-due paper to equities and legal exceptions, extends only to those that the maker has, as explained above; but does not apply as between the holder and others taking before him by endorsement, except between the holder and his immediate endorser. There is no adverse presumption from the paper being in dishonor as between successive endorsers, as there is between the holder and the maker. Each endorser, including the payee, down the line, has and passes the legal title, and his endorsement, in legal import, is a contract with his endorsee and all subsequent holders by endorsement, that the maker will pay the note, or on notice he will. *Parker v. Stallings,* 61 N. C., 590; *Bank v. Texas,* 20 Wall., 89—*Swayne's* opinion.

Here the defendant put the paper overdue afloat with his name merely written on the back, and that in legal effect passed the title to the Mercantile Bank, and gave it the unqualified power of disposing of the same, and imported a promise to the bank, and not only to it, but to the plaintiff, a subsequent endorsee, that the maker would pay the note, and if he did not, he, the defendant, would. 2 Parsons (254)

on Bills, 23. The endorsement being in blank, and the contract implied by law with his endorsee and subsequent holders, giving such unqualified power as we have seen, it has been much debated and variously decided as to the competency of the endorser, by parol proof, to rebut the implication of the law, and to annex a qualification when none is expressed.

It is settled in this State, however, that parol testimony may be adduced under a blank endorsement to annex a qualification or special contract as between the immediate parties. *Davis v. Morgan,* 64 N. C., 570; *Mendenhall v. Davis,* 72 N. C., 150. But between endorser in blank and remote parties without notice, the weight of authority is that parol proof is inadmissible, and the contract implied by law stands absolute. 2 Parsons, 23; *Hill v. Ely,* 1 Sergt. and Rawle, 362; 1 Daniel Neg. Insts., Secs. 699 and 719.

In treating of this subject, Daniel, in his work on Negotiable Instruments, says a parol agreement in the endorsement of a note to the effect that the transfer should be without recourse on the endorser, can not be interposed as a defense against a subsequent *bona fide* holder without notice; nor would the case be varied by the fact that the transfer was to such a holder by delivery, and that he declared on the prior endorsement as though made to him. 1 Daniel Neg. Insts., Sec. 699.

It appears in the case that the plaintiff purchased the notes of the Mercantile Bank, and it is admitted by defendant it was for full value and without notice of the special agreement between him and the bank as to his alleged non-responsibility; and the defendant having, by this act, put it into the power of his immediate endorsee to circulate the paper to the plaintiff upon the faith of an absolute responsibility on his part, as imported by his endorsement, ought not to be al-
(255) lowed, in our opinion, by parol to vary the legal effect of his endorsement as against this plaintiff. To this extent the principle decided in *Parker v. Stallings, supra,* goes. There, the payee endorsed to his attorney for collection merely, but not so expressed in the terms of the endorsement, and the attorney endorsed to a stranger for value and without notice of the special purpose of the endorsement, and the endorser sought to escape liability to the holder by proof of the circumstances of the endorsement, and the Court, in the course of their opinion, say, the payer "who puts a note in circulation ought no more to be protected from the claim of a subsequent *bona fide* purchaser for value, than would be the endorser of a bill of exchange not yet due as against an innocent holder for value." And they further say, promissory notes overdue being by law assignable, "the unchecked circulation

of them must be upheld by the same principles as are applied to bills of exchange."

It seems to us, therefore, that the defendant having endorsed the note in blank, and thereby put it into the power of his endorsee to impose on the plaintiff by relying on the legal import of the endorsement, ought not to be allowed, as against the plaintiff, a purchaser for value and without notice, to make proof of the alleged special agreement, and in that aspect of the case it was immaterial to have any response by the jury to the issues tendered by the defendant.

No Error.

Cited: *Commissioners v. Wasson,* 82 N. C., 311; *Hoffman v. Moore, Id.,* 316; *Adrian v. McCaskill,* 103 N. C., 186; *Bank v. Pegram,* 118 N. C., 675; *Sykes v. Everett,* 167 N. C., 605.

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S. L. FOBES & CO. v. L. BRANSON.

Principal and Agent—Evidence—Contract.

1. A principal is answerable for the reasonable consequences of his agent's representations, but not for their special effort upon the mind of one with whom the agent makes a contract; *Therefore,* in an action to recover on a contract for the sale of goods, evidence of the defendant that he was induced to purchase by the representations of plaintiff's agent, is not admissible.
2. Where the plaintiff sold the defendant certain goods, guaranteeing that the freight thereon should not exceed ten per cent, and the freight, when the goods, were delivered, did exceed that amount, the defendant complained to the plaintiff thereof and left the goods in the depot, but did not notify him that he declined to take the goods, and thereafter the plaintiff reduced the price so as to cover freight; *Held,* that the plaintiff was entitled to recover; in such case the defendant should have given prompt notice to the plaintiff of his refusal to take the goods if he desired to avoid the contract.

APPEAL from a Justice of the Peace, and tried at Spring Term, 1879, of WAKE, before *Eure, J.*

This action was brought to recover the price of certain wooden splints sold to the defendant by the plaintiffs' agent, and shipped from Geneva, Ohio, to Raleigh, less a discount of ten per cent, and $18.28 additional discount allowed by the plaintiffs. The said agent testified, among other things, that in October, 1877, he sold a bill of splints to the defendant, who is the only person in Raleigh to whom he has sold these goods, and the price charged is that at which the goods were selling at the time; which the defendant said was lower than that charged by other dealers in like goods; and upon cross-examination he

stated he had no recollection of any agreement with defendant that the freight charges should not exceed ten per cent of the bill; that he expressed the opinion that they would not exceed that amount, but did not guarantee it; that the allowance made for freight reduces (257) it to less than ten per cent.

The defendant admitted ordering the goods from said agent, and testified that the agent guaranteed that the freight would not be more than ten per cent reduction which he agreed to give defendant in the price of the goods; that the goods arrived at the depot in Raleigh about December 1, 1877, and the freight was $26.28, instead of ten per cent, or $12.00; that he did not take the goods, but on the 5th of the month wrote the plaintiffs as follows: "There are nine boxes of goods in depot here directed to me, on which there is a freight charge of $26.28. Mr. McChessny assured me that ten per cent on splints would certainly cover the freight, and guaranteed me the same. How about it?" Whether plaintiffs replied at once or not, the defendant had forgotten, but sometime before 4 January, 1878, he says he received a letter proposing to give him an additional reduction of $10.00, to which he replied as follows: "Your favor is to hand proposing $10.00 reduction. I supposed you would do what your agent proposed, that is, put them at the wholesale, enough off to pay freight. I had no idea the freight would be so much. The goods are still in the depot. I have not the money to take them out of the railroad office, and don't know when I shall have. I do not want to damage you, but I am not prepared to be damaged myself even to the amount of a dollar."

Defendant's counsel proposed to ask the witness the following question: "Were you induced to order the goods by the representations of plaintiffs' agent that they were especially salable about Christmas?" Objection was made and sustained, and defendant excepted. The evidence of the agent in regard to this matter, after stating the goods could not be shipped before thirty days, was, that he could not say whether or not he represented the goods as salable; that he could not have said they were salable in Raleigh, for he knew nothing (258) of the place, but did represent that the orders were in advance of the capacity of his house to furnish the goods, and the inference that they were salable was a necessary conclusion. And the defendant testified that the agent said they were especially salable during the Christmas holidays, and promised they should be in Raleigh before Christmas.

The defendant insisted that the guaranty by the agent that the freight would not be more than ten per cent was a part of the contract, and the representation that the goods were especially salable during the Christmas holidays was also a part of the contract, and the entire re-

duction was not made until some time after 25 December, and defendant was not obliged to take them. Defendant's counsel then asked the Court to charge the jury that if defendant was unable to get the goods in his store before Christmas, except by paying a larger freight bill than was guaranteed, according to defendant's testimony, then he had a right to withdraw from the contract, and the plaintiffs could not recover. The instruction was not given, but the Judge charged, among other things not objected to, that if defendant's testimony was believed, and the jury should find that the agent guaranteed the freight should not exceed ten per cent, and when defendant complained by letter of 5 December, plaintiffs made a reduction in the price within ninety days from the date of the contract, the plaintiffs were entitled to recover. The only issue to the jury was, "Did plaintiffs comply with their contract?" to which there was an affirmative response. Judgment for plaintiffs, appeal by defendant.

Messrs. Reade, Busbee & Busbee for plaintiffs.
Messrs. Gray & Stamps for defendant.

SMITH, C. J. Two points only are presented in this appeal:

1. The Court permitted the defendant to prove the conversation which passed between him and the plaintiff's agent at the time of the sale, and the representations made by the latter to induce (259) the defendant to enter into the contract, but refused to allow him to state whether he was influenced by these representations to purchase the goods.

2. The Court was asked, and refused, to charge the jury, upon the facts testified to by the defendant, that if he could not get the goods before Christmas without paying a larger freight than that guaranteed, the plaintiff could not recover, and directed the jury "that if the defendant's testimony was believed, and they should find that the plaintiff's agent guaranteed that the freight should not exceed ten per cent" on the amount of purchase, "and that when the defendant complained by letter of 5 December, plaintiffs made a reduction in the price within ninety days from the date of the contract, the plaintiffs should recover."

Upon this instruction, the jury found that the plaintiffs did comply with their contract, and from the judgment thereon, the defendant appeals.

1. The first exception is untenable. The plaintiffs were answerable for the reasonable consequences of their agent's representations, but not for their special effect upon the defendant's own mind. All the facts were in evidence, and the jury could draw their own conclusions there-

from. It was not proper to inquire into the secret motives that may have in fact operated on the defendant's mind, not warranted by anything done or said by the agent. All the evidence that was admitted was competent.

2. The exceptions to the instructions asked and refused, and to those given, are also untenable.

The plaintiffs transmitted the goods in due time by railway, and they reached the station in Raleigh on or before 5 December, in strict conformity with the contract, as interpreted by the defendant, and were then subject to his disposal. He did not take possession
(260) because, as he says, they were charged with a freight of $26.28, more than double the guaranteed rate of ten per cent on the purchase-money. What is meant by a "guaranty" will be understood from the second letter of the defendant to the plaintiffs, in which, referring to the goods, he says: "I supposed you would do what your agent proposed, that is, put them *at wholesale, enough off to pay freight,*" and the legal effect of which is to diminish the price by the sum paid for the freight, although in excess of the plaintiff's estimate. The defendant would, therefore, sustain no loss from this increased charge. As, however, some misunderstanding seems to have existed as to the precise terms of the contract, the defendant was not bound to accept the goods if a price beyond that agreed on was demanded, for he is not obliged to take a *controversy with them.* It was his duty, however, to act promptly, and if he intended to refuse the goods, at once to give notice to the plaintiffs, in order that they might make other disposition of them and prevent a loss. The defendant does not do this. In his first letter to the plaintiffs, of 5 December, he announces the arrival of the goods, and adds: "Mr. McChessny (the plaintiffs' agent in making the sale), assured me that ten per cent on splints would certainly cover the freight, and gauranteed me the same. How about it?"

In his second letter, written in January, in answer to one from the plaintiffs, offering a further reduction of $10 on the price, he says: "The goods are still in the depot. I have not the money to take them out of the railroad office, and don't know when I shall have. I do not want to damage you, but I am not prepared to damage myself, even to the amount of a dollar." He does not decline taking the goods, nor refuse the proposed reduction. He should have done both, and communicated his intention promptly to the plaintiffs. In such case, if the defendant's reasons were legally sufficient, the goods would have been at the plaintiffs' risk, and any consequent loss would fall upon them.

The conduct of the defendant, followed by an actual reduction
(261) of the price by the plaintiffs below that contended for, puts the defendant in the wrong, and renders him liable. The numerous

cases cited for the defendant, where it is held that if a party entering into a special contract executes it in part and refuses to perform the residue, he can not recover at all, have no application.

No Error.

*GEORGE P. BURGWYN v. ROBERT P. WHITFIELD.

Stock—No-fence Law—Construction of Statute.

1. By our general law, the owner of stock is under no obligation to restrain them to his own grounds, and is not responsible for their trespasses upon the lands of others not properly fenced.
2. Laws 1876-'77, Ch. 60, which establishes the "no-fence law" in a certain district of Northampton County, but enacts that the law shall not apply to stock kept east of prescribed limits, "*provided*" a gate be kept at a certain point, is not intended to cast upon the outside parties the burden of keeping up such gate, at the peril of being responsible for the trespasses of their stock within the boundaries. The word "provided" should be construed to mean "unless."

CLAIM AND DELIVERY, at Spring Term, 1878, of NORTHAMPTON, before *Seymour, J.*

This action was brought to recover the possession of a hog, which was admitted to be the plaintiff's property. A demand was made upon the defendant, who refused to deliver the property, and claimed the right to hold the same under the provisions of Chapter 60, page 684, Laws 1876-'77, until double damages were paid him for the injury committed by the hog upon his growing crop on a farm (262) in Occoneechee Neck, for which trespass and injury the defendant distrained the hog. The plaintiff refused to pay the damages and insisted that said act was unconstitutional and that he came within the second proviso of Section 6, which is as follows: "This act shall not apply to stock kept east of Wheeler's Swamp, provided a gate is kept up at Bull Hill Mill-house, so as to prevent stock from passing over the bridge across the run of said swamp." The jury found that the hog was kept east of Wheeler's Swamp, and no gate was kept up at said mill-house. Thereupon, the plaintiff moved for judgment on the ground that the act did not make Wheeler's Swamp a lawful fence, and that it was unconstitutional. During the controversy the property was taken from defendant by the Sheriff and delivered to plaintiff, and the Court gave judgment that he retain possession, and the defendant appealed.

Messrs. W. Bagley and *Mullen & Moore* for plaintiff.

Mr. R. B. Peebles for the defendant.

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

DILLARD, J. The cultivators of land in a certain bend of Roanoke River, in Northampton County, known as Occoneechee Neck, having no fence around the whole or the separate parcels of land lying therein, the Legislature, at the session of 1876, Chap. 60, passed a private law for their benefit, wherein it was enacted that the river, a rail fence running from Faison's corner on the river to Mud Castle, and thence to Wheeler's Swamp, at the head of Bull Hill mill-pond and the run of said swamp from the head of said mill-pond to the river, should be sufficient as a fence, with the declaration in the sixth section of the act that the act should not apply to stock kept north of the rail fence constituting part of the boundary, unless the fence was kept in good and lawful condition, nor to stock kept east of Wheeler's Swamp,

provided a gate was kept up at the mill-house where a bridge
(263) crossed the run of the swamp, so as to prevent stock passing into the Neck.

After the passage of the act, the hog of the plaintiff, kept east of Wheeler's Swamp, was found inside the Neck, doing damage to the crop of the defendant, when defendant, claiming the right under the provisions of the private act, took it up and notified plaintiff thereof, and of his purpose to hold until he paid damages as provided in the act, and thereupon the plaintiff brought this action of claim and delivery, and the defendant admitting the right of property in the plaintiff, attempted to justify under the said private act.

On the trial, the jury, in response to an issue submitted to them, found that no gate was kept up at the mill-house where the bridge crosses the run of the swamp, and on motion for judgment by plaintiff on the verdict, it was adjudged by the Court that the plaintiff was entitled to retain his hog, which had been taken out of defendant's hands by the Sheriff and delivered to him, and the costs of the action were adjudged against defendant, with which judgment defendant being dissatisfied, appealed to this Court.

At common law, it was the duty of the owner of stock in England to keep them under restraint and prevent their going on the lands of a neighbor, and if he failed to do so, he was responsible for any damage they might do. But at an early day in the settlement of this country, only such parts of the land being enclosed as were under cultivation, and the English rule therefore not being adapted to the situation and circumstances of the settlers, the usage obtained to allow stock to go at large, and very soon this usage was legalized indirectly by a statute making it the duty of every planter, under heavy penalty, to keep a fence five feet high around his cultivated ground during crop time, unless where there was a navigable stream or other deep water-

course that was sufficient in place of a fence, as now brought (264) forward in Bat. Rev., Chap. 48, Sec. 1.

And besides this, other legislation was passed providing for the assessment and payment of damages for the ravages of stock on crops, under a lawful fence, and for injury to stock by cultivators not having a lawful fence, together with enactments making it indictable to injure stock in the range or within any field or pasture not surrounded by a lawful fence.

From this course of legislation in our country it plainly results that the rule of the common law as to keeping stock under restraint, if it was ever applicable, has been long ago abrogated here, as decided by this Court in the case of *Jones v. Witherspoon,* 52 N. C., 555; so that now stock may lawfully be allowed to range at large without the right of any one to recover for their trespasses, or do otherwise than drive them off their premises without hurt, unless he have a fence as required by law. *Jones v. Witherspoon, supra; Laws v. R. R.,* 52 N. C., 468.

The plaintiff, then, consistently with this state of the law, had the right to let his hog go at large, and if it wandered upon the defendant's crop in the Neck, and did him a damage, defendant could not recover therefore or be authorized to take up or do any injury to the animal unless he had a lawful fence as required of every planter under the general law, or had something under the private act under which he justifies which shall be sufficient in place of an actual fence. In this case there is no pretence that defendant had an actual fence, and therefore, he had no right to take up and detain the plaintiff's hog, or make claim for damages under the general law, but the claim is that he and the other cultivators in the Neck had a legislative fence, one made by the private act, consisting of the river in part, Faison's rail fence in part, and the run of Wheeler's Swamp in part; and that plaintiff's hog being found on the crop of defendant in the Neck, defendant, in the express terms of the act, was authorized to dis- (265) train and hold the hog until the double of the actual damage done was paid him.

The words of the statute are "This act shall not apply to stock kept east of the swamp, *provided a gate be kept up at the mill-house,* so as to prevent them from passing over the bridge across the run of the swamp," and in the literal sense of the words the defendant claims that he was at liberty, no gate being kept up, to distrain plaintiff's hog, or that of any other person outside of the Neck, which might trespass upon him. Such a construction of the act as, it seems to us, leads to an absurdity and manifest injustice. Upon that view, all the stock outside of the Neck are liable to be distrained and held if there be no gate, but

not so liable if there be a gate to keep them back; whereas, the policy of our law has always been to provide for the going at large of all stock except as limited and restrained by the lawful fences of planters, and not to create responsibility for their trespasses except made upon premises surrounded by a lawful fence.

In construing a statute, it is laid down as a rule by which Courts ought to be guided, to look at the words and construe them in the ordinary sense, if such construction would not lead to absurdity or manifest injustice; but if it would, then they ought to vary and modify the words used, so as to avoid that which it certainly could not have been the intention of the Legislature should be done. Brown's Legal Maxims, 552. It is also an established rule in the exposition of statutes that the intention of the Legislature is to be gathered from the words used in connection with the whole act and every part thereof compared together, and if the intention can be clearly collected, the Courts will give effect to it, however incorrect or ungrammatical some of the words used may be. Dwarris on Statutes, 144 and 176.

Guided by these rules, we think there can be no question that the object of the private act under consideration was to legislate
(266) into existence a substitute for an actual fence, for the benefit of the defendant and other croppers within the Neck, with the right to compensation for trespasses of outside stock, not so absolutely and in every event, but only subject to the maintenance of the rail fence in lawful condition, and to the keeping up of a gate at the mill-house on the swamp, so as to keep out the stock of others. It was a prerequisite to any right of distress and damages that the fence aforesaid should be kept in lawful condition, and the gate kept up at the mill-house by somebody; and it is definitely so imported in the language employed in regard to the rail fence; and whilst the phrase "provided a gate is kept," etc., is obscure, yet interpreted in view of the context, it is manifest that the word *"provided"* is used in the sense of *"unless."* This construction avoids absurdity, and is consistent with the clear intention of the Legislature and justice to all parties.

It is urged, however, by the defendant that it was enacted that the act should not apply to stock kept east of the swamp provided a gate was kept up at the mill-house, in order to throw the burden of the gate on the persons living outside of the Neck. Such a construction, as it appears to us, is forbidden by several considerations: 1st. No reason appears why persons living east of the swamp should keep up a gate to protect defendant any more that the persons living north of the rail fence should keep up that fence in a lawful condition; and 2d, a decent respect to the Legislature forbids the idea that that body would put such a burden on the outsiders for the benefit of those residing within

the Neck, or if they did so intend, they would put the burden without saying who in particular was to bear it, whether those near, and how near to the swamp; and 3d, it is not to be imputed to the Legislature that they would intend to grant peculiar privileges to a few at the expense of a large number, thereby running the hazard of objection to the act on the score of its being unconstitutional, into which question we do not enter, as it is unnecessary to the determina- (267) tion of this case.

Upon a careful consideration of the act under which the defendant attempts to justify, it is the opinion of this Court that the right to distrain and hold plaintiff's hog did not accrue to him, because no gate was kept up at the mill-house, as contemplated by the act, which was a pre-requisite to that right.

No Error.

Cited: Runyan v. Patterson, 87 N. C., 344; *Farmer v. R. R.,* 88 N. C., 568; *Randall v. R. R.,* 107 N. C., 765; *S. v. Anderson,* 123 N. C., 709.

A. T. BRUCE & CO. v. M. STRICKLAND and wife.

Restriction on Alienation—Vested Rights—Wife's Interest in Homestead.

1. The *jus disponendi* is an important element of property and a *vested right* protected by the clause in the federal constitution, which declares the obligation of contracts inviolable.
2. Where land was acquired and a marriage took place prior to March, 1867, the husband may convey the entire estate without the concurrence of his wife, unless he has voluntarily dedicated the property to the purposes of a homestead.

APPEAL at Spring Term, 1879, of NASH, from *Seymour, J.*

In order to secure the payment of a debt to one John A. Harrison, the defendant executed a deed without the joinder of his wife, conveying a tract of land to him, dated 20 January, 1874, which debt was by agreement to be paid in two years from the date of the deed. The land was acquired by the defendant prior to March, 1867, and the debt was contracted subsequent to 1868. The defendant was married in 1847, and his wife is still living. They now live upon (268) the land, and have infant children. No homestead has ever been assigned, nor does the defendant own any other real estate, nor is the land worth more than one thousand dollars. On 3 May, 1877, Harrison, for a valuable consideration, transferred his debt against defendant and his interest in the land to the plaintiffs, who seek in this action to subject the land to the payment of the debt.

The above are the facts, in brief, as found by the referee to whom the case was referred, upon which he concluded, as matter of law, that there is due the plaintiffs the sum of $489.72, and interest; that as against the *feme* defendant, the deed was ineffectual to deprive her of her homestead right; that the deed conveyed the reversion, to take effect in possession after the homestead estate; and gave judgment that plaintiffs recover the debt, also for a sale of the reversionary interest in the land, unless the money is paid in three months after the confirmation of the referee's report.

The plaintiffs excepted to the report, for that the referee erred in finding as a conclusion of law that the deed was ineffectual to convey the land discharged of any claim of the wife, and that it only conveyed to Harrison a reversionary interest. The Court overruled the exception, and confirmed the report, from which the plaintiffs appealed.

(270) *Messrs. Connor & Woodard* and *H. F. Murray* for plaintiffs.
Messrs. Reade, Busbee & Busbee for defendants.

SMITH, C. J. The defendant was married in the year 1847, and acquired title to the tract of land described in the pleadings prior to March, 1867. He contracted a debt to one John A. Harrison of $500 subsequent to the year 1868, and to secure the same, on 20 January, 1874, conveyed the land to said Harrison by deed absolute in form and with a contemporary parol agreement between them that the debt should be paid in two years in redemption of the land. The wife was not a party to the deed, and the defendant owns no other land. No homestead has been laid off to the defendant, and he has infant children living.

On 3 May, 1877, Harrison, for a valuable consideration, transferred the debt and his estate and interest in the land to the plaintiffs. The debt and interest due on 25 February, 1879, amounts to $589.62, whereof $489.72 is principal money and bears interest from that date. These facts are found by the referee, and no exception is taken thereto. The referee adjudges that the deed is effectual to convey the reversionary interest of the defendant in the land, subject to his right of homestead therein, and directs a sale unless the money due is paid in three months.

The plaintiffs except to the referee's finding that only a reversionary interest was conveyed, and that the land remained still subject to the defendant's right of homestead. The exceptions being overruled, the plaintiffs appeal.

The marriage took place, and the title vested in the defendant previous to the restoration by statute of the common law right of dower,

and before the creation of a homestead in land. It was *then* in the power of the defendant by his deed to *convey a full and complete title in fee* to the land. Has this absolute dominion over (271) his property been abridged by any act of subsequent legislation, or could it be under the principles of the Constitution, without the owner's consent or concurrence? The value of property consists in its use, disposition and conversion into something else, and these are the elements constituting a *vested right* which the legislative body can not take away except for public use, and then only on making compensation to the owner. This security is guaranteed in the Constitution of the United States, in the clause declaring the obligation of contracts inviolable.

In *Sutton v. Askew,* 66 N. C., 172, the right of the husband to convey his lands acquired before marriage and before the passage of the act of 27 March, 1869, extending dower to all lands whereof he may have been "seized and possessed at any time during coverture," free from the claim of dower, was carefully considered in a long and elaborate opinion delivered by Mr. Justice READE, and the conclusion reached was that such pre-existing right could not be impaired, and the husband's conveyance was upheld. The Court declares that the "act does not affect *rights* or marriages which existed before its passage."

In *Williams v. Munroe,* 67 N. C., 164, the husband conveyed lands in 1859, after his marriage, and, as we infer, though the fact was not expressly so stated, died after the passing of the act enlarging dower, and it was held that his wife had no claim thereto. These decisions rest upon the sanctity of vested rights under the protection of the Constitution, among which is embraced the *jus disponendi* or right of alienation. The principle is too deeply imbedded in the fundamental law of free governments to require vindication. If this be true in regard to dower, how can an involuntary restriction be imposed in the provisions of the homestead? We are unable to distinguish (272) between the cases in this immunity of the rights of property from legislative interferences. We are therefore of opinion that the defendant could convey his land, free alike from dower or homestead, and having exercised the right, it is now beyond his recall. But we do not mean to intimate that the homestead may not attach to the debtor's land by his own consent, and this as well by his own seeking as by the allotment by the Sheriff under the provisions of the Constitution and the act of 7 April, 1869, Bat. Rev., Chap. 138, or upon his death by such as then may be entitled.

His acquiescence in the appropriation of his lands, as a homestead, would be deemed a voluntary surrender of his absolute right of alienation, and it could not be impeached by creditors. The homestead would

then pass to his infant children or widow, as the law directs. When he conveys before this is done, and new rights and interests are thus created, the assent to the homestead can not be given so as injuriously to affect them. In other words, as to such lands, the debtor may, if he chooses, take his homestead therein, and hold it exempt from liability; and if without doing so he conveys his estate, it passes and vests in the grantee in the same plight and freed from the further control of the grantor. This view of the case dispenses with the necessity of considering the nature of the homestead as an estate or right anterior to an assignment, and other interesting topics discussed in the argument.

The referee erred in his ruling, and the Judge erred in affirming the same, and the plaintiffs' exception must be sustained.

Reversed.

Cited: *O'Connor v. Harris,* 81 N. C., 284; *Jenkins v. Jenkins,* 82 N. C., 209; *Murphy v. McNeill, Id.,* 224; *O'Kelly v. Williams,* 84 N. C., 283; *Williams v. Teachey,* 85 N. C., 405; *Reeves v. Haynes,* 88 N. C., 311; *Fortune v. Watkins,* 94 N. C., 314; *Castlebury v. Maynard,* 95 N. C., 284; *Gilmore v. Hodges,* 101 N. C., 387; *Hughes v. Hodges,* 102 N. C., 239, 249; *Kelly v. Fleming,* 113 N. C., 140; *Kirby v. Boyette,* 116 N. C., 169; *Kramer v. Old,* 119 N. C., 8; *Walton v. Bristol,* 125 N. C., 430; *Joyner v. Sugg,* 132 N. C., 594; *S. v. Darnell,* 166 N. C., 302.

(273)

MARY W. HALL v. HENRY B. SHORT.

Equitable Conversion—Married Women.

1. The proceeds arising from the sale of a *feme covert's* land for division, made by an order of court, retain the character of realty until converted by some act of the owner.
2. The plaintiff (a married woman) was the owner of a remainder in land expectant upon a life estate. By a decree in equity, the land was sold and the proceeds paid over to the life tenant upon his giving bond, with the defendant and one L. as sureties, to pay over the same to the plaintiff at the expiration of the particular estate. Thereafter, the life tenant having exhausted the fund and died insolvent, and the said L. being also insolvent, the plaintiff and her then husband, in consideration of the payment by defendant of about one-half the amount due by said bond, covenanted not to sue him on the same (reserving their rights against all other parties), released him from the debt and assigned to him the fund so far as might be necessary to effectuate his complete discharge. The plaintiff was privily examined as to her free execution of this instrument; *Held,*
   (1) That the transaction was in the nature of the compromise of a lawsuit.
   (2) That it was authorized by the Constitution, Art. X, Sec. 6, and Bat. Rev., Chap. 69, Sec. 17.
   (3) That the effect of it was to exonerate the defendant from all liability on the bond.

HALL *v.* SHORT.

APPEAL, at Spring Term, 1879, of HALIFAX, from *Eure, J.*

The case states: On 27 April, 1858, one Thomas B. Nichols, as principal, and Charles Latham and the defendant executed to the Clerk and Master in Equity for Halifax County a bond in the sum of three thousand dollars, conditioned as follows: "A tract of land belonging to the said Nichols for life, remainder to Mary W. Nichols, has been sold by order of the Court of Equity, and the money (274) ($1,500) paid over to said Thomas B. Nichols; now, if the said Nichols, at his death, shall pay to said Mary the said sum of fifteen hundred dollars, this bond is to be void, otherwise to remain in full force." Thereafter Mary Nichols married John H. Hall, who died in August, 1877. Thomas B. Nichols died insolvent on 1 March, 1868, and the said Charles Latham is also insolvent.

On 17 July, 1871, during the coverture, the plaintiff (being the owner of said bond) and her husband executed their deed, with privy examination of the wife taken as prescribed by law, as follows: "Know all men by these presents, that we, John H. Hall and wife Mary W. Hall, have received of H. B. Short the sum of seven hundred dollars, for and in consideration of which we do hereby agree and bind ourselves that we will never sue nor prosecute any claim or demand of any kind against said Short on the bond in the Clerk and Master's office [describing it], said bond having been given for land belonging to said Mary W. Hall. The object of this paper is to release, acquit and discharge said Short forever from all responsibility on said bond; but it is expressly agreed and understood that the other signers are not hereby released and discharged. And so far as is necessay to discharge and release said Short, we do hereby assign, bargain, sell and set over to him the money produced by the sale of said land, for which said bond was given; the object of this paper being to assure said Short against any and all further claims and demands of every kind. The said sum of seven hundred dollars is this day paid us by said Short as a compromise and in full discharge and settlement of said claim of ours against him, and all claims of every kind that we have against him."

Neither the plaintiff nor any one for her has received any amount, except the sum of seven hundred dollars as aforesaid from any of the obligors in the bond, and she seeks by this action upon (275) said bond to recover of defendant the balance due for the sale of said land. Upon consideration of the above, the Court held that the plaintiff could not recover, and thereupon the plaintiff excepted to the ruling and assigned as error: 1. That the deed of 17 July, 1871, is *nudum pactum*. 2. That it is void as a deed and can operate only as a receipt for seven hundred dollars. 3. That privy examination of the

feme covert and the registration of the deed can give it no force and effect that it did not have before. Judgment, appeal by plaintiff.

Messrs. W. W. and *R. B. Peebles* for plaintiff.
Messrs. T. N. Hill and *Gilliam & Gatling* for defendant.

DILLARD, J. There was a sum of money in the hands of the Clerk and Master, arising from the sale of lands for partition, to the use of which one Thos. B. Nichols was entitled for term of his life, and then the principal was to remain over to the present plaintiff, who was a *feme covert* before and long after the sale made by decree of the Court of Equity.

Nichols, the party entitled for life, was allowed, by order of the Court, to receive and use the principal fund itself, on the execution of a bond with sureties, to be approved by the Clerk and Master, conditioned for the payment of the same at his death to the plaintiff, and in pursuance of said order of the Court, the tenant for life executed the bond as required, with the defendant and Charles Latham as sureties.

On the death of the life tenant, the plaintiff and her husband received from defendant $700, about one-half of the fund due, and executed to him a deed releasing him from any and all liability for the residue of the sum secured by the said bond taken by the Clerk and Master, and assigning him the money produced by the sale of the land for which the said bond was taken, so far as might be necessary for his discharge, with all the requisites and formalities, including a privy examination of the plaintiff as required by law in the case of deeds of husband and wife for land.

Since the execution of said deed, the plaintiff, now become discovert, has instituted this action, and therein seeks to subject this defendant for the whole amount, the estate of the life tenant and Chas. Latham, the co-surety, having proved to be insolvent, and the question is,
(277) was the release of the *feme* and her husband, discharging the defendant, in law obligatory and effectual on the plaintiff.

The solution of this question makes it necessary to inquire into and determine the nature and kind of property the plaintiff had in the money secured by the bond taken in the Clerk and Master's office, and to consider and define the rights and powers over the same of the *feme covert.*

The money secured by the bond aforesaid arose from a sale of land by decree of a Court of Equity for partition, and by law it was impressed with the character of realty, and retained that character at the time of the execution of the release. Bat. Rev., Chap. 84, Sec. 17. *Jones v. Edwards,* 53 N. C., 336, and *Lyon v. Akin,* 78 N. C., 258.

The estate of the plaintiff in the money was, under our Constitution, a separate estate, not liable for any debts, obligations or engagements of her husband, and capable of being devised, and, with the written assent of her husband, conveyed by her as if she were unmarried. Const., Art. X, Sec. 6. And her power over the same is to be estimated under this clause in connection with Section 17, Chapter 69, of Battle's Revisal, wherein it is enacted that no woman during coverture shall be capable of making any contract to affect her real or personal estate except for her necessary personal expenses, or for the support of her family or payment of her debts *dum sola* without the written assent of her husband, unless she be a free-trader.

Without controversy, under these provisions of law, the plaintiff, with the written assent of her husband, usually signified by joinder in the deed, had the right to assign and convey her estate in the fund in question to another, or to encumber it with her own or her husband's debts, and of this there is no need to cite authorities. She had power to collect in the money secured by the bond for her benefit by suit in Court or otherwise, as practiced in the ordinary course of business among prudent business men; and her contracts to this purpose, (278) carried into effect and executed with the written assent of her husband, were legitimate and valid. *Kirkman v. Bank,* 77 N. C., 394.

The plaintiff had power, under this restriction of having the written assent of her husband, to convey to another, or, if in the course of her efforts to collect, it occurred that it was to her benefit to compromise with the defendant upon the terms of receiving one-half and releasing him from all liability on the bond for any further sum, she had the right and capacity to settle the matter on that basis and execute the arrangement by a deed suited to the purpose with joinder of the husband, and with the formalities prescribed by law for deeds to which a *feme covert* is a party.

In *Pippen v. Wesson,* 74 N. C., 437, and *Rountree v. Gay, Ibid.,* 447, it is decided that marriage under the present Constitution and the marriage act is a disability to the wife, just as it was before, to enter into any contract operating *in personam,* or affecting her separate estate, unless it is made with the consent of the husband now, in place of the trustee formerly, and charged on the separate estate expressly or by necessary implication arising out of the nature and consideration of the contract, and showing that it was for her benefit. And it may be, if the contract of the plaintiff and her husband with this defendant had been executory and never executed by deed, the same would be *nudum pactum,* and no bar to a recovery in this action, according to *McKenzie v. Culbreth,* 66 N. C., 534; *Mitchell v. Sawyer,* 71 N. C., 70. But this is a contract expressly concerning her separate estate, and with the

written assent of the husband, and not left executory, but executed by a deed with the joinder of her husband and acknowledged with a privy examination of the wife, releasing the defendant from any further payment than the sum already paid, and assigning to him the entire fund for his protection and indemnity against any breach of the agreement.

(279) And it seems to us that the thing done was within the express provisions of the Constitution, a conveyance, and barred the plaintiff of any right to recover, except perhaps in an action impeaching the release and assignment on a special equity of being obtained by fraud and imposition.

It is our opinion that the release and assignment executed by the plaintiff and her husband with the requisite formalities to convey land, was effectual in law to release the defendant from the claim of the plaintiff, and is a bar to her present action.

Affirmed.

Cited: Burns v. McGregor, 90 N. C., 225; *Sanderlin v. Sanderlin,* 122 N. C., 3; *McLean v. Leitch,* 152 N. C., 267; *Gann v. Spencer,* 167 N. C., 431.

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*J. O'CONNOR and others v. W. H. HARRIS, wife and others.

Marriage—Vested Rights—Wife's Choses in Action—Husband's Right to Assign Them—Interest of Assignee.

1. Marriage, prior to the adoption of the Constitution of 1868, conferred on the husband *a vested right* to reduce into possession and convert to his own use the choses in action of the wife belonging to her at the time of the marriage.
2. Where a marriage took place in 1865 and the husband, pending suit brought in 1867 on a chose in action of the wife's, assigned the same in 1873, the assignee succeeds to the vested rights of the husband in the claim, and may assert his title against the wife and all others, subject only to the wife's right of survivorship in the claim if it be not collected during the life of the husband.

(280) APPEAL at Fall Term, 1878, of NORTHAMPTON, from *Seymour, J.*

Upon the finding of the jury and the facts admitted in the case, the Court gave judgment for the plaintiffs, and the defendants appealed.

Messrs. R. B. Peebles, W. H. Day and *Mullen & Moore* for plaintiffs.
Messrs. Reade, Busbee & Busbee for defendants.

(281) DILLARD, J. The defendant Harris intermarried with Susan, his wife, who had been the ward of defendant Carstarphen, in

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

1865, and brought suit in the name of himself and wife to Spring Term, 1867, against the guardian to surcharge and falsify on account of his guardianship previously settled; and pending the suit, to wit, in 1873, the said Harris conveyed the chose in action, which formed the subject-matter thereof, to the plaintiff, J. O'Connor, in trust for the purposes in the deed of assignment mentioned. After having so done, Harris compromised the suit, and the allegation is that a decree by consent was entered for a small sum against the guardian, with a private understanding that he was to make over and secure to the *feme* plaintiff the sum of about $1,800.

The plaintiff alleges that after the assignment to him he notified Carstarphen of it, and he and Harris then combined to end the pending suit by a consent decree and private understanding as aforesaid; according to which a considerable sum of money was paid to Harris's wife, after notice of the assignment of the claim, upon the fraudulent intent to defeat the plaintiff in its collection.

The defendants Harris and wife answered, and on an issue submitted to the jury, it was found as a fact that Carstarphen had paid the *feme* plaintiff one thousand dollars as her guardian, after notice of the transfer to the plaintiff. Upon the verdict of the jury and the (282) other admitted facts in the pleadings, his Honor overruled the claim of separate estate of Susan Harris in the chose in action, and adjudged that plaintiff recover the same ($732.47 and interest) secured by the assignment against Harris and wife and Carstarphen, it being less in amount than the $1,000 paid as aforesaid, after notice to the guardian of the plaintiff's claim, and from this judgment an appeal is taken to this Court.

The appeal presents this question: Did the assignment by Harris to J. O'Connor in 1873 have the effect to pass to the assignee a right to have the funds in the hands of the guardian of the wife, the marriage having taken place and the sum being due before the adoption of the Constitution of 1868, or was the wife entitled to the same as a separate estate against the claim of her husband and his assignee?

At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife die to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one.

It was also competent to the husband having choses in action *"jure mariti"* to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. Bell, Husband and Wife, 55 and 56; *Arrington v. Yarborough,* 54 N. C., 72.

Such has ever been the effect of marriage in this State as to the rights and powers of the husband in the choses in action of the wife,
(283) legal and equitable. And accordingly, without the concurrence of the wife, the husband could receive and grant discharges for any sum or sums of money due her, and the money when received became his, and he had the right to enforce payment of all her choses in action, without the obligation, here as in England, to make a settlement out of her equitable choses. And so, Harris, the husband, on his marriage, acquired the perfect right, and J. O'Connor, by assignment, succeeded to the same, to have an account and settlement of any sums due from Carstarphen, the former guardian of the wife, liable only to be defeated by the accident of the husband's death before the death of the wife.

In this case, the chose in action assigned to the plaintiff, J. O'Connor, was due at the time of the marriage, and a suit was brought for its recovery before the adoption of the Constitution of 1868; and the coverture still continuing, the assignee of the husband has still the right to have the proceeds of the claim assigned to him, unless the Constitution operated to divest or take away the husband's right and thus disable him to pass any right by assignments to J. O'Connor.

In *Sutton v. Askew,* 66 N. C., 172, the husband owned land and married before the passage of the act of 1867 enlarging the right of dower, so as to include all the lands of which the husband was seized at any time during the coverture, and the question was as to the effect of the act on the rights of alienation by the husband, and it was ruled in this Court that the husband might sell and convey the title without being joined by the wife, upon the ground that he had a vested right to sell and convey on his single deed at the marriage, and it was incompetent to the Legislature, by the new dower act, to restrict his right of alienation, or do more than confer an inchoate right on the wife de-
(284) feasible by a sale and conveyance by the deed of the husband alone.

In *Holliday v. McMillan,* 79 N. C., 315, the marriage occurred before the adoption of the Constitution of 1868, and the father having given his daughter some articles of personal property after its adoption; the

property was levied on by creditors of the husband, and it was claimed that, as an incident to marriage, the husband not only had the right to the property of the wife in possession then, but also to all such, including the late gift to the wife, as she might in any manner acquire during her coverture; and it was urged that this right of the husband could not be impaired by the Constitution adopted subsequently to the marriage. This Court ruled, reaffirming *Sutton v. Askew, supra,* that it was only vested rights of the husband that were secure from impairment by the Constitution and subsequent legislation, and that it was legitimate and no infringement of the proper rights of the husband, to create a separate estate in the wife of all acquisitions of property and possibilities accruing to her in any manner subsequent to the adoption of the Constitution of 1868.

In *Bruce v. Strickland,* decided at this term, *ante,* 267, the marriage took place and the land was acquired before the act restoring the common-law right of dower and before the creation of a homestead in land, and the husband, by deed, in 1874, without his wife's being a party thereto, conveyed the tract with a right of redeeming the same within two years, and on a question made, it is ruled that the husband had a vested right to sell his land, free alike from dower or homestead, as provided by the Constitution of 1868, and having exercised that right it is beyond recall.

Adhering to the correctness of the decisions above referred to, and the reasons on which they were founded, we hold that the marriage between Harris and his wife clothed him, or any assignee claiming under him, with the right to have the legal and equitable (285) choses in action of the wife, and that such right, although not absolute so as to exclude survivorship to the wife, was a substantial and vested interest, with no infirmity in it, except as being liable to be defeated on the death of the husband before the wife's death. This right was not a right in a possibility or mere expectancy, but a right fixed and established by law in the husband as an incident to marriage and attaching to a fund due and outstanding in the hands of the guardian, and presently recoverable, with nothing to defeat it, except in the possible survivorship of the wife.

Such being the character of the right of Harris as husband in the fund assigned, his rights could not be taken away and given to the wife, without his consent, by the Constitution of 1868, creating separate estates in *femes covert.*

It is therefore the right of the present plaintiff, O'Connor, to recover and have as assignee of Harris, for the purpose of the trust, so much of the fund in the hands of the guardian, or which was in his hands after notice of the assignment, as will answer the purposes of the assign-

ment, subject, however, to the continuing right of the wife to have the fund if the husband shall die before it is collected.

No Error.

Cited: Jenkins v. Jenkins, 82 N. C., 209; *Morris v. Morris,* 94 N. C., 617; *Benbow v. Moore,* 114 N. C., 273; *Fowler v. McLaughlin,* 131 N. C., 211.

R. J. CECIL v. F. M. SMITH.

Married Women—Separate Estate—Parties.

In a suit by a purchaser at an execution sale, seeking to dispossess the husband of his wife's land, the wife's possessory right is such an interest in the controversy as entitles her to be made a party defendant.

(286) MOTION to be made a party defendant, heard Spring Term, 1879, of DAVIDSON, by *Schenck, J.*

In this action the plaintiff, as purchaser at Sheriff's sale, sues to recover possession of the lands mentioned in the pleadings of the defendant, who was the debtor in the execution under which the sale was made, and was then and is now in possession. At the return term of the summons, Mary E. Smith, wife of the defendant, filed her affidavit alleging that she was the owner of the land sued for, and was in possession with her husband at the time of the sale, and ever since, and demanded to be let in as a party to defend her title and right of possession, and thereupon his Honor ordered that she be allowed to file her answer and make her defense. The plaintiff being dissatisfied, appealed to this Court.

Messrs. M. H. Pinnix and *W. H. Bailey* for plaintiff.

No counsel in this Court for defendant.

DILLARD, J. The plaintiff being a purchaser of the wife's land, as we must take to be the fact in reviewing the order of the Judge allowing the wife to become a party to the action, on his appeal contends that he has the right to recover against the husband whatever interest or possession he had, and that it is incompetent to him or to his wife, admitted as a party, to defeat his recovery by proof of title and possession in the wife, and thereupon it was error in the Judge to admit the wife as a party.

In order to determine the question of error or rightfulness in the ruling complained of, it will be material to consider the rights of hus-

band and wife respectively in the lands of the wife, and the provisions of The Code of Civil Procedure relative to the admission of third persons as parties to pending suits.

A *feme covert* owning land, in law, has the same as a separate estate, exempt and clear of any debts, obligations or engagements of the husband, and is entitled to have possession and control of (287) the same, making her own contracts of lease and receiving the rents and profits independently of her husband, with no right in the husband except the right of occupancy with her, and ingress and egress to her dwelling and society, and to live with her. Const., Art. X, Sec. 9; *Manning v. Manning,* 79 N. C., 293. The husband has not, under the present Constitution and laws, nor has he had since the act of 1848, any interest in the real estate of his wife, which he could sell or lease for life or any less term of years, except by deed joined by the wife and with her privy examination; and as to sales of any supposed interest of the husband in the lands of the wife by execution against him, it was declared by said statute, which is still in force and brought forward in Battle's Revisal, Chap. 70, Sec. 33, that the same should be null and void in law and equity.

Such being the nature and character of the possession of husband and wife respectively in the lands of the wife, made a separate estate as aforesaid, it would seem that the sale of the husband's interest, a mere occupancy with the wife, under execution against the husband, was invalid, and that the Sheriff's deed was ineffectual to pass any right whatsoever to the plaintiff as purchaser. And being so, the rule entitling the purchaser to have judgment as of course against the debtor in the execution continuing in possession and excluding, as by *quasi* estoppel, all proof of title in others, has no application. It can not be that the law protects the wife's lands from sale under execution for the husband's lebts, and get gives to it the efficacy in an action for the possession to avail him.

We, think, therefore, in the pending suit there is an exception to the general rule, and it would perhaps be competent to the husband to defeat the action by proof that the land was the separate estate of the wife. But however this may be, the wife having an interest (288) in protecting her possession, has the right not only to rely on the husband, but, by leave of the Court, to become a party and in her proper person make her own defense.

By Section 61 of The Code it is provided that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff; and by another clause in the same section, in an action to recover the possession of real property, the landlord and tenant thereof may be joined, and so may any persons claiming title or right

of possession be joined as plaintiffs or defendants, as the case may require. The controversy made by the suit with the husband was a controversy in regard to the possession, and that possession thus drawn into litigation was not only a possession in which the wife was interested, but in law, as we have seen, it was hers solely, and without other right in the husband than ingress and egress and to live with her. And therefore she was authorized to be made a party by the plaintiff, or on her own motion to be admitted a party by leave of the Court, within the express words of said section. In *Wade v. Saunders,* 70 N. C., 277, in construction of this section of The Code as to the admission of third persons as parties defendant, a distinction is drawn between *an interest in the controversy* adverse to the plaintiff, and an interest in the thing which is the subject of the controversy; and it is held to be admissible to add to the parties if the person proposed to be interested in the controversy, but not so, if being out of possession he have merely a title to the property. Under the authority of this decision in exposition of the first clause of Section 61, we think the ruling of the Judge allowing the wife to become party to the action was rightful, as her actual possession was the controversy in the action. Her admission is warranted also by *Rollins v. Rollins,* 76 N. C., 24.

It may be that the wife being made competent to sue and defend in respect of her separate estate, and the sale of her land under (289) execution for the husband's debts being declared to be void, it was within the discretion of the Court to admit her as party under Section 65 of The Code, by way of interplea, to set up a title independent and paramount to the claims of both parties to the action. But seeing she could be properly admitted under the first clause of Section 61, it is unnecessary to consider of the power of the Judge under Section 65.

Affirmed.

Cited: Young v. Greenlee, 82 N. C., 348; *Bryant v. Kinlaw,* 90 N. C., 341; *Taylor v. Apple, Id.,* 346; *Walton v. Parrish,* 95 N. C., 265; *Walker v. Long,* 109 N. C., 513; *Jones v. Coffey, Id.,* 517; *Taylor v. Taylor,* 112 N. C., 137; *Robinson v. Robinson,* 123 N. C., 137; *Burns v. Womble,* 131 N. C., 176.

State on relation of S. H. HODGIN, Guardian, v. ROBERT MATTHEWS and others.

Excusable Neglect, Section 133.

Defendant, one of the sureties on a guardian bond, upon the suggestion of his counsel and the other defendants that the recovery against him would be small and not of sufficient amount to justify the expense of litigation, admitted the execution of the bond and submitted to a reference to ascertain the extent of his liability. The report, after undergoing a correction on motion of plaintiff, charged the defendant with a sum considerably in excess of what he had anticipated. New counsel employed by defendant filed exceptions to the report, which were passed upon by the court, and judgment was entered for about double the sum first reported as due:
Held, that the defendant was not entitled to have said judgment set aside on the ground of "excusable neglect" under C. C. P., Sec. 133, in order to let in a plea of *non est factum* to such bond.

MOTION by defendant to set aside a judgment on the ground of excusable neglect, under C. C. P., Sec. 133, heard at Spring Term, 1879, of FORSYTH, by *Schenck, J.*

The motion was refused upon the facts set out in the opinion, (290) and the defendant Matthews appealed.

Messrs. Watson & Glenn for plaintiff.
Messrs. Gray & Stamps for defendant.

SMITH, C. J. This is a motion on the part of Robert Matthews, against whom and others the plaintiff recovered judgment at Spring Term, 1878, of FORSYTH, to be relieved therefrom under the provisions of Section 133 of The Code. The facts upon which the application rests, as found by the Court, are in substance these:

The action was originally brought to Fall Term, 1872, against the principal and his sureties, of whom the defendant is alleged to be one, to a guardian bond executed for the security of the estate of Ann E. Kenner, an infant, in the hands of her former guardian. The complaint charges the execution of the bond by all the defendants.

The defendant now asking to have the judgment set aside as to (291) himself, employed an attorney to represent and defend him.

An answer was put in on behalf of the defendants, all of them admitting the execution of the bond, and after reference to and report from the Clerk, judgment was entered for the plaintiff for about $2,200, of which the defendant Robert Matthews' ratable share would be $220. This was done with his knowledge and consent, under the assurance of counsel and after consultation among the several attorneys representing the different defendants, that the share of each would be small, and this

was preferable to a protracted and expensive litigation. Subsequently, it was discovered that a considerable error had been made in the report, and on 6 May, 1876, the plaintiff gave notice to the defendants of an intended motion to re-open the judgment and rectify the mistake. Matthews employed another attorney to protect his interests in the proceeding, who entered an appearance at the ensuing term of the Court for him, but put in no answer. The matter was reopened and another reference ordered. The referee proceeded to take depositions, restated the guardian accounts and made report therof at Spring Term, 1877, largely increasing the amount due on the administration of the trust. To the report exceptions were filed by both parties, and at Spring Term, 1878, they were passed on and disposed of, and the judgment modified and re-entered for about $4,400, one-tenth of which is this defendant's share. The other defendants have paid up their respective parts, and the defendant Matthews now asks to set aside the judgment as to himself on the ground of his excusable neglect. He denies that he ever executed the bond, and the bond being lost, the minutes of the county do not mention his name among those of the obligors who tendered it. The Court deeming it not material to inquire into the fact of the execution of the bond by the defendant, was of opinion that he is
(292) guilty of gross laches, and refused the motion, and the defendant appeals.

It is manifest the case is not one of "excusable neglect" within the meaning of Section 133. The defendant assents deliberately, after conference among the attorneys and their clients, to withhold his proposed defense of non-execution of the instrument, and permits the case to proceed to final judgment. The subsequent correction of an error does not change his relations to the cause, nor impart any additional force to his present application. He submits to a recovery of what is due, to be ascertained by the reference, thereby surrendering his claim to entire exemption; and the results of the second reference have the same legal effect, as to the defendant's rights in this regard, as if they had been embodied in the first report, and the judgment founded upon it. The representations under which the defendant was induced to give his assent came from his associate defendants and their counsel, into whose hands he voluntarily confides his own interests, and with them makes common defense. It is not pretended that his course was in anywise influenced or affected by any suggestion or action of the plaintiff.

We concur in the opinion of the Court below that the defendant is not entitled to any relief in the premises. This is clearly shown in the cases cited in the argument—*Burke v. Stokely,* 65 N. C., 569; *Sluder v. Rollins,* 76 N. C., 271; *Bradford v. Coit,* 77 N. C., 72—to which we add a single reference, *Mebane v. Mebane,* 80 N. C., 34. In

the last case, the Court, speaking of the numerous cases which had been before it, say: "It is difficult to deduce any distinct practical principle from them, or to run a well-defined line separating those *neglects* that are, from those that are not *excusable,* in the sense of the statute; and hence the facts relied on must be ranged on the one and the other side of that line as they arise." In the present case the defendant waives all defense to the action on its merits, does not deny his liability as an obligor, and raises no objection to a judgment for whatever (293) may be found to be due from the guardian. The only reason assigned for setting it aside is that the amount owing is much greater than he or his counsel thought it would be. This is no ground for the interference of the Court, and the judgment is

Affirmed.

Cited: University v. Lassiter, 83 N. C., 44; *Williams v. R. R.,* 110 N. C., 481.

WILLIAM E. COBB v. JOHN O'HAGAN.

Excusable Neglect.

It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, such as to make affidavits for continuances and the like; *Hence,* where a defendant, knowing that his case stood for trial at a regular term of court, remained at his home, thirty-seven miles distant from the place of trial, expecting that his attorneys would give him timely information as to when his presence would be necessary, although they had never engaged to do so, and the attorneys themselves failed to attend court, and the case was tried in the absence of the defendant and his counsel, and judgment rendered for the plaintiff; *It was held,* that the defendant is not entitled to have such judgment set aside, on the ground of excusable neglect, under C. C. P., Sec. 133.

MOTION to vacate a judgment, under C. C. P., Sec. 133, heard at Greenville on 27 March, 1879, before *Seymour, J.*

The judgment which the defendant moved to set aside was recovered against him at Spring Term, 1879, of WILSON. The facts are stated in the opinion. The motion was refused, and defendant appealed.

Messrs. Connor & Woodard for plaintiff. (294)
Mr. W. B. Rodman for defendant.

DILLARD, J. This was a motion of defendant to vacate a judgment taken against him, under Section 133 of The Code of Civil Procedure, and the facts on which it was based, so far as it is material to state

them, were as follows: The cause having been previously put in issue, stood for trial by a jury at Spring Term, 1879, of Wilson Superior Court, which Court was limited to one week, and was liable to be reached in the regular call of the docket. Defendant had retained two members of the bar to defend the action, and remained at home, thirty-seven miles away from the Court, expecting, if the State docket should be disposed of within the first three days of the term, an unusual thing in the county, that his counsel would communicate the fact to him, by mail, and intending, if so notified, to be present at the trial. There is no statement of any arrangement with the counsel to give defendant notice by mail or otherwise. The case was called and tried; defendant was absent, and so were both of his counsel, one from sickness, and no reason is assigned for the absence of the other.

It is the duty of a party, and so settled by the adjudications of this Court, to be present in Court at the trial of his cause, for the performance of matters outside of the proper duties of an attorney-at-law, such as to provide for the attendance of his witnesses, make affidavit for continuance, and the like. *Sluder v. Rollins,* 76 N. C., 271; *Waddell v. Wood,* 64 N. C., 624.

The excuse of defendant is that he expected his counsel to write him through the mail of any probability there might be of his case being called, if the State docket should be disposed of in a shorter time than at previous terms of the Court. Defendant was wilfully absent, and took on himself the risk of his case not being called, or if likely to
(295) be reached, the risk of notice being given him through the mail by counsel when no such arrangement had been made, or if attempted through the mail, the hazard of the notice reaching him in time to admit of his presence at the distance of thirty-seven miles away from his residence.

This was not such attention given as a man of ordinary prudence gives to his important business, and his absence upon such expectations as above is not in law an excusable neglect. Cases, *supra.* This case is quite different from the case of *Griel v. Vernon,* 65 N. C., 76. In that case, an administrator being sued, retained an attorney-at-law to plead at the return term the protection pleas of "fully administered" and "no assets," a matter peculiar to the duty and business of the attorney, and his failure to enter the pleas was held an excusable neglect in the party, and entitled him to a vacation of the judgment; whereas, in this case the issue for trial involved an alleged settlement of the subject-matter of the action, to which defendant was a party, and of which he not only had knowledge, but of which he was solely or in part a competent witness; and in this respect it was peculiarly the duty and the interest of defendant, in the exercise of ordinary prudence, to be present,

and a wilful failure to be present was inexcusable. Had he been present, he could have accounted for the absence of his attorneys, and either had a continuance on that account, or substituted others in their place, and on the trial could have had the advantage of producing his testimony, and, if necessary, of being a witness in his own behalf.

In the language of this Court in *Waddell v. Wood, supra,* it is not to be tolerated, even in the most liberal practice, that a party is to lie by until a judgment passes, and then at a subsequent term move to vacate it.

Affirmed.

Cited: University v. Lassiter, 83 N. C., 44; *Williams v. R. R.,* 110 N. C., 481; *Koch v. Porter,* 129 N. C., 137.

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*DAVID P. ADAMS v. WM. H. THOMAS and W. L. HILLIARD, his Guardian.

Estate of Lunatic—Claims, How Collected.

Property of a lunatic in the hands of a committee is to be regarded as *in custodia legis*, and no creditor can reach it for a debt preëxisting the inquisition of lunacy, except through the order of the superior court; and that order is never made until a sufficiency for the support of the lunatic and that of his family, if minors, is first ascertained and set apart.

MOTION for leave to issue execution, heard at June Term, 1879, of the Supreme Court.

The decree in this case was rendered in this Court in 1868.

Messrs. Merrimon, Fuller & Ashe for plaintiff.
Messrs. Gilliam & Gatling for defendant.

DILLARD, J. In this case, which was a bill in equity, a decree was heretofore rendered in favor of the plaintiff for a considerable sum of money against the defendant W. H. Thomas, and the same not having been collected, nor any execution issued for the purpose, a motion, on notice to W. L. Hilliard, guardian of said Thomas, was made at the last term of this Court for leave to issue an execution, and thereupon it was referred to the Clerk to inquire and report whether the said debt, or any part thereof, had been paid.

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

The Clerk having filed his report showing that no part of the debt had been paid, the plaintiff at this term of the Court renews his motion for execution, when W. L. Hilliard files petition representing that
(297) W. H. Thomas is a lunatic, and he is his guardian, and praying that a sufficiency of the estate of the lunatic may be ascertained and set apart for the maintenance of himself and family before any execution is awarded.

It appears from the proceedings in the cause that the decree sought to be executed was obtained before the said Thomas became lunatic, and in such case, a guardian being appointed, he holds the estate as agent of the law, with power, by leave of the Probate Court, to sell personal and real estate for the maintenance of the lunatic, or payment of debts unavoidably incurred for his maintenance, but without the power to sell or apply any part of the estate to the discharge of the debts existing at the lunacy, except by order of the Superior Courts, in which Courts alone the jurisdiction to order the payment of such debts resides. Bat. Rev., Chap. 57, Secs. 6 and 7, and *Blake v. Respass,* 77 N. C., 193.

Property of a lunatic put into the hands of a committee is to be regarded as *in custodia legis,* and no creditor can reach it for a pre-existing debt, except through the order of the Superior Court, and that order is never made until first a sufficiency is ascertained and set apart for his own maintenance and that of his family, if minors, and this administration of the estate is based on the idea that the sovereign owes the duty to a person thus unfortunate to devote his property primarily to his maintenance, and to protect him against his existing creditors, except in subordination thereto. *Blake v. Respass, supra; Smith v. Pipkin,* 79 N. C., 569; *Ex Parte Latham,* 39 N. C., 231.

It being the duty of the Court to provide for the maintenance of W. H. Thomas, and to hold the plaintiff as entitled to the payment of his decree only out of any residue that may be left, the case is not in such a condition as to authorize this Court at this time to order the execution to issue or take other action for its immediate payment. The report of the Clerk only ascertains that no part of the debt has
(298) been paid, and we have no inventory of the estate belonging to the lunatic out of which an adequate support may be assigned.

In such a state of the case, all that we can do is to continue the motion, with leave to renew it again hereafter when a maintenance for the lunatic has been assigned; and in the meantime to direct the guardian to proceed before the Probate Court of Jackson County to have a sufficiency of the lunatic's estate set apart for his support and that of his family, who are minors, and to report to this Court, when assigned, an

inventory or schedule thereof, together with a descriptive list of any other estate of the lunatic not included in the allotment.

The motion of plaintiff is continued, with leave to renew the same as herein expressed, and an order may be drawn directing W. L. Hilliard to proceed and report as herein indicated.

PER CURIAM. Order Accordingly.

Cited: Adams v. Thomas, 83 N. C., 522; *McIlhenny v. Trust Co.,* 108 N. C., 313; *McLean v. Breese,* 109 N. C., 566; *Lemly v. Ellis,* 146 N. C., 223.

R. H. SAUNDERS v. W. J. GATLING.

Title to Office—Quo Warranto—Parties.

1. A civil action in the nature of a writ of *quo warranto* is the appropriate remedy to test the validity of an election of the right to a public office. C. C. P., Sec. 366.
2. Such action must be brought in the name of the people of the State by the attorney-general on the relation of the party aggrieved.

APPEAL at Fall Term, 1878, of HERTFORD, from *Eure, J.* (299)

The complaint states substantially that the plaintiff and defendant were candidates for the office of Clerk of the Superior Court of Hertford, at an election held on the first Thursday in August, 1878; that the plaintiff received a majority of the lawful votes cast, and was duly elected, but the judges of election at one of the precincts refused to count the votes given for plaintiff, and it was alleged that they rejected them unlawfully; that by means of incorrect returns the defendant was wrongfully declared elected, and has qualified as Clerk of the Superior Court, and entered upon the discharge of the duties thereof, and is receiving the emoluments of the same, to the great damage of the plaintiff. Wherefore, the plaintiff demands that he be declared Clerk of said Court and inducted into office, and that defendant be restrained from acting as such; and asks for judgment for the fees and emoluments of the office. The facts in regard to the alleged irregularities in counting the votes were agreed to by the parties (but are not material to the point decided by this Court), and upon them his Honor held with the defendant, and the plaintiff appealed.

Messrs. D. A. Barnes, J. W. Albertson and *J. B. Batchelor* for plaintiff.

Messrs. Gilliam & Gatling for defendant.

ASHE, J. This is an action brought by the plaintiff in his own name against the defendant, to determine the question of title to the office of

Clerk of the Superior Court for the County of Hertford; and the Court is asked to oust the defendant and have the plaintiff inducted, and give him a judgment for the fees and emoluments of the office.

We think the plaintiff has mistaken his remedy, and it is not competent for the Court to give him the relief he seeks by this action. Questions as to the title and possession of offices at the common law were determined by the writ of *quo warranto,* which was the appropriate remedy in such cases. It was originally a high prerogative writ issued out of chancery, and was used by the Crown of Great Britain unjustly and oppressively upon its subjects, until it was modified and stripped of many of its harsher features by what were called the statutes *quo warranto;* and then, after the justices in eyre were displaced by the Judge of the Superior Courts, it fell into disuse, and the information in nature of a writ of *quo warranto* obtained in its stead, and has ever since been the remedy in England and this country by which the title to an office can be established by judicial determination. It is the only appropriate and efficacious remedy, sanctioned by an overwhelming current of authority both in this State and in England. High on Ex. Leg. Rem., Secs. 49, 53 and 77; *Ex Parte Daughtry,* 28 N. C., 155; *S. v. Hardie,* 23 N. C., 42. But the original writ of *quo warranto,* as well as proceedings by information in the nature of *quo warranto,* has been abolished, C. C. P., Sec. 362; but it is therein provided that the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of Chapter 2, Title 15.

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What are these provisions? Section 366 provides "that an action may be brought by the Attorney-General in the name of the people of the State upon his own information, or upon the complaint of any private party against the parties offending in the following cases:

1. When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,

3. When any association or number of persons shall act within this State as a corporation without being duly incorporated."

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By Section 368, amended by Laws 1874-'75, Chap. 76, it is provided that when an action shall be brought by the Attorney-General on the relation or information of a person having an interest in the question, the name of such person shall be joined with the State as plaintiff, and

in every such case the Attorney-General shall require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the State against costs, etc. And Section 369 provides how, at the instance of the Attorney-General, the defendant may be arrested and held to bail.

So that, although the proceeding by information in nature of the writ of *quo warranto* has been abolished, it will be seen from these sections of The Code that the remedy to be pursued whenever the controversy is as to the validity of an election or the right to hold a public office, is by an *action* in nature of a writ of *quo warranto*. It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the Legislature by these provisions of The Code seems to have considered paramount to that of the private rights of the persons aggrieved: *Hence,* the requirement that such actions must be brought by the Attorney-General in the name of the people of the State, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney-General in the name of the people. Such is the construction which has been given to these sections of The Code by numerous decisions of this Court. *Patterson v. Hubbs,* 65 N. C., 119; *Tuck v. Hunt,* 73 N. C., 24; *People v. Hilliard,* 72 N. C., 169; *People v. McKee,* 68 N. C., 429; *Brown v. Turner;* 70 N. C., 93. One of the headnotes to this last case is calculated to mislead. It reads, "Any person having a right to an office can, in his (302) own name, bring an action for the purpose of testing his right as against one claiming adversely," but in looking into the case it will be found that the Court did not entertain any such proposition, but just the reverse. That was an application for a *mandamus,* where the party aggrieved may bring the action in his own name, and the Court held that where the right or title to an office is put in issue, *mandamus* is not the proper remedy, but the appropriate remedy is by an action in the nature of a *quo warranto;* and Mr. Justice BYNUM, who delivered the opinion in the case, says that "no stress is laid upon the fact that the action is not on the relation of the Attorney-General, for we are of opinion that under the liberal provisions of The Code of Civil Procedure, any party having a right can sue in his own name in all cases, except when otherwise expressly provided. In modern practice, *mandamus* is not a prerogative writ, but an ordinary process in cases to which it is applicable, and everyone is entitled to it when it is the appropriate process for asserting the right claimed."

In that case, the action being an application for *mandamus,* the action

was properly brought, so far as the parties thereto were concerned, by the plaintiff in his own name; but in our case it is *otherwise expressly provided*—it falls within the exception mentioned by Mr. Justice BYNUM, and the provisions of The Code in that respect should have been followed.

In the view we have taken of this case, we deem it unnecessary to consider it upon its merits, but dismiss the action and leave the plaintiff to resort to his appropriate remedy. The judgment of the Court below is

Affirmed.

Cited: Davis v. Moss, post, 303; *S. v. Norman,* 82 N. C., 689; *Foard v. Hall,* 111 N. C., 370; *Cozart v. Fleming,* 123 N. C., 562; *Midgett v. Gray,* 158 N. C., 135.

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(303)

T. C. DAVIS v. H. C. MOSS.

Title to Office—Quo Warranto.

A civil action in the nature of a writ of *quo warranto* is the proper mode of trying the title to a public office; the submission of a controversy without action under Section 315 of The Code for that purpose, can not be sustained.

PETITION by plaintiff to rehear, filed and heard at June Term, 1879, of the Supreme Court.

The petitioner is informed and believes there is error in the judgment rendered in this case and reported in 80 N. C., 141, and among the errors assigned, he stated that the Court substantially held that the Justices of the Peace of Wilson County appointed the defendant to the Clerkship of the Inferior Court for two years, whereas, the case agreed states that they declined to make any appointment; and if such appointment had been made, it would have been a nullity for the reason that defendant being Superior Court Clerk, was disqualified by Article XIV, Section 7, of the Constitution, from holding any other office under the State, of the nature of the one in controversy.

Messrs. E. G. Haywood and *H. F. Murray* for plaintiff.
Messrs. Gilliam & Gatling for defendant.

ASHE, J. This is a petition to rehear the judgment rendered in this case at the last term of the Court. It is a submission of a controversy without action to determine the title to the office of the Clerk of the

Inferior Court of Wilson County For the reasons assigned in the case of *Saunders v. Gatling,* decided at this term, *ante,* 298, the proceeding can not be sustained. The attention of the Court was not called at the last term in the argument of this case to the (304) provisions of Section 366 of The Code, or the action would have been dismissed.

The judgment, therefore, rendered at the last term is reversed, and the proceeding is dismissed.

Reversed.

Cited: *S. v. Norman,* 82 N. C., 689.

The People, by the Attorney-General, on relation of THOMAS F. WORLEY v. JOSEPH A. SMITH.

Term of Sheriff's Office—Vacancy—Official Bonds.

M., the sheriff of Jones County, was re-elected to that office in August, 1878. In the September following he gave bonds for the new term and the county commissioners inducted him into office. In the same month he died, and the relator was appointed and qualified "to fill the vacancy." On the first Monday of the next December, the commissioners elected the defendant sheriff for two years from that date, and, upon his taking the oath and giving the requisite "process bond," but no other, inducted him into office. In the succeeding April he gave the other bonds required by law; *Held,*

1. That the new term to which the deceased sheriff was elected did not begin until December, and that his induction into office before then was a nullity.

2. That the vacancy to which the relator was appointed was only for the residue of M.'s former term, which expired in December.

3. That, from the first Monday in December, there was another "vacancy" which the county commissioners were entitled to fill by their appointment.

4. That while it was irregular to induct the defendant into office without his giving all three of the required bonds, yet the defect was cured when they were subsequently tendered and accepted.

QUO WARRANTO, tried at Spring Term, 1879, of JONES, before (305) *Seymour, J.*

This action was brought to try the title to the office of Sheriff of Jones County, and upon the facts set out in the opinion of this Court, his Honor held that the first term of office of Nathan McDaniel, deceased, did not expire until December, 1878; that the appointment of the plaintiff was for the unexpired term of McDaniel under his first election, and plaintiff's term of office expired on the first Monday in December, 1878; that the defendant, being duly appointed to and in-

ducted into the office of Sheriff for the second term of McDaniel, is entitled to judgment. From this ruling, the plaintiff appealed.

Messrs. Green & Stevenson and *A. G. Hubbard* for plaintiff.
Messrs. R. H. Bryan and *Faircloth & Simmons* for defendant.

SMITH, C. J. Nathan McDaniel, Sheriff of Jones County, at the election held in August, 1878, was re-elected for the ensuing term. On the first Monday in September following he appeared before the Board of County Commissioners and tendered his official bonds, which were accepted, and took the prescribed oath. Sometime during the month he died, and on 7 October the Commissioners appointed the relator, Thos. Worley, to fill the vacancy, and he was duly qualified as such on 16 October.

At the meeting of the Commissioners on the first Monday in December they elected the defendant Sheriff for the full term of two years, and upon his giving one only of the bonds required by law, that (306) for the due execution of process, and taking the oath, was by them inducted into office and entered upon the discharge of his official duties. On the first Monday in April, and after this action was commenced, he executed and tendered the other bonds for the collection of State and county taxes, which were approved and accepted by the board.

By the act of March 22, 1875, the general election which, under the existing law, was required to be held on the first Thursday in August, 1876, was postponed and required to be held on Tuesday after the first Monday of November of that year; and the county officers, then elected, to be qualified and inducted into office on the first Monday in December instead of the first Monday in September, as theretofore. The law in its other provisions was modified and made to conform to this change of time for holding the election, and those county officers whose terms would have expired on the first Monday in August were "authorized and directed to hold over in the same until their successors in office are elected and qualified under the act." Laws 1874-'75, Chap. 237, Sec. 6.

We have already decided that this section simply extended the expiring term—spanning over the intervening space—until the newly elected officers could be qualified; and that it did not take away the power of the Commissioners to fill a vacancy by appointment or election. *Sneed v. Bullock,* 80 N. C., 132. The effect of this act is to change the *time of election,* and to make the terms of office begin and end in *December,* instead of *September,* as theretofore; and this the General Assembly was competent to do.

The appointment of the relator was for the unexpired term of office

held by McDaniel at the time of his death, and until his successor was qualified, and no longer.

The Constitution provides for the election of Sheriffs, Coroners and Constables, fixes their term of office, and declares that "in case of a vacancy *existing from any cause,* in any of the offices (307) created by this section, the Commissioners for the county may appoint to such office for the unexpired term." Art. IV, Sec. 24. And so the statute provides that in case of the conviction of a Sheriff of a misdemeanor in office and a vacancy caused by his removal, *or any other means,* the Commissioners shall, at their first meeting thereafter, elect a successor to fill the residue of the term. Bat. Rev., Chap. 106, Sec. 6.

The only question, therefore, is this: Did the vacancy contemplated in the Constitution exist when the defendant was appointed, so as to authorize the Commissioners to exercise the power conferred?

The question is substantially answered in *Cloud v. Wilson,* 72 N. C., 155. In that case D. H. Starbuck, who had been elected one of the twelve Superior Court Judges at the first election held under the Constitution of 1868, refused to accept the office, and the relator, J. M. Cloud, was appointed and commissioned by the Governor in his stead. The Constitution, Art. V, Sec. 31, declares that "all *vacancies* occurring in the offices provided for in this article of the Constitution shall be filled by the appointment of the Governor," etc. The Court held the appointment to be valid, and say: "We adopt the conclusion that although Mr. Starbuck declined to accept and did not qualify and take his commission, *a vacancy did not occur in the office.* By an unexpected event, there was no one to fill the office. Thus, for all practical purposes, the office was vacant, and it can make no difference whether Mr. Starbuck declined before, or the moment after he qualified, or whether he was eligible to the office."

The language employed to describe the vacancy to be filled by the Commissioners is still more explicit and manifest, for it is added. "existing for any cause," that is, *whenever the office is without an incumbent.* The Commissioners appointed, and had power to (308) appoint, the relator only for the residue of the official term of the deceased Sheriff, and at its determination, rightfully proceeded to elect the defendant for the new term then commencing. *Sneed v. Bullock, supra.*

The attempted qualification of McDaniel in September for a term to begin two months thereafter, and while he was still in office under a prior election for a term of which two months still remained, was without warrant of law and nugatory. There can not be an induction into an office for one term until the preceding term is ended, and the quali-

fication and induction are directed to be done at one and the same time on the first Monday in December. Bat. Rev., Chap. 27, Sec. 8 (31).

The act of March 12, 1877, regulating elections, makes permanent the change in the day of election, which was prescribed in the act of 1875 for one occasion, to-wit, the Tuesday after the first Monday in November of the years in which elections are held, leaving in full force the necessary corresponding changes made in the former act. Section 77, however, directs the general elections for 1878 to be held in August, as formerly, but leaves in full force all the other provisions of the act of 1875.

Though the election is held in August, the terms of the county officers elected commence in December and continue for two years thereafter, as required by the Constitution.

It was irregular and improper for the Commissioners to induct the defendant into office without his giving all three of the required bonds, as was held in *Dixon v. Commissioners of Beaufort,* 80 N. C., 118, yet he was legally in the office, and so remains until ousted therefrom by judicial sentence. Bat. Rev., Chap. 79, Sec. 3. This defect was (309) removed, however, by his furnishing the necessary tax bonds in April, and does not now call for his amotion.

Affirmed.

Cited: Kilburn v. Latham, post, 313.

WILLIAM J. CLARKE v. E. W. CARPENTER.

Superior Court Clerk—Term of Office—Practice—Conflicting Claimants for Vacant Office.

1. The term of office of a superior court clerk, elected in August, 1878, began on the first Monday of September following.
2. Where there are conflicting claimants for a vacant office a court must act upon the *prima facie* evidence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession.

APPLICATION of plaintiff to be recognized a Clerk of the Court, heard at Spring Term, 1879, of CRAVEN, before *Eure, J.*

It was admitted that defendant was duly elected Clerk of the Superior Court of Craven County at an election held on the first Thursday in August, 1878, and was inducted into office on the first Monday in September following, and was acting as Clerk aforesaid when the motion of plaintiff was made. The plaintiff exhibited a transcript of the pro-

ceedings of the Board of County Commissioners to his Honor, which set forth substantially that at an adjourned meeting of the board, held on 10 March, 1879, William J. Clarke, appointed by Judge Seymour to fill a vacancy in the office of Superior Court Clerk, appeared and tendered a satisfactory bond as Clerk, which was accepted, and having taken the oaths prescribed, it was ordered by the board that he notify the defendant that he is required without delay to deliver to the plaintiff the records, etc., of the office. Upon the evidence (310) of *prima facie* title, it being conceded that the said office had been declared vacant, and that plaintiff was appointed to fill the same, the plaintiff's counsel moved that he be recognized as Clerk, and that an order be made requiring the defendant to surrender the office, records, etc., to plaintiff. The Court refused the motion, stating that the title to an office could only be tried in an action in nature of *quo warranto,* and the plaintiff appealed.

Messrs. Lewis & Strong, and *Reade, Busbee & Busbee* for plaintiff.
Messrs. Green & Stevenson and *D. G. Fowle* for defendant.

SMITH, C. J. At the regular election held in August last, pursuant to Section 77 of the act of 12 March, 1877, the defendant was elected Clerk of the Superior Court of Craven, and before the Board of County Commissioners, at their meeting on the first Monday in September following, was duly qualified and inducted into office, and has since been in the discharge of the duties incident thereto.

Subsequently to his induction, the presiding Judge of the district, deeming a vacancy to exist, appointed the plaintiff to the office, and he, on 10 March, appeared before the board, gave bond, and took the prescribed oaths of office. At Spring Term of the Superior Court, the plaintiff presented the evidence of his appointment and qualification, and asked "to be recognized as Clerk and allowed to perform the duties of said office." The application was denied, and the plaintiff appeals.

In *Buckman v. Commissioners,* 80 N. C., 121, it is declared to be the duty of one elected to the office of Clerk of the Superior Court, at the election held in August, 1878, to tender his bond to the Commissioners at their meeting on the first Monday in September en- (311) suing, as was done by the defendant in this case.

The act of 22 March, 1875, deferring the election for 1876 from August to November, and making the necessary correspondent changes in the law to give effect thereto, in express terms, is confined to members of the General Assembly, "County Treasurer, Register of Deeds, County Surveyor, five County Commissioners, Coroner and Sheriff," and does not extend to a Clerk of the Superior Court, whose term did

not expire until two years thereafter. The effect of the act is to make the term of those county officers elected under it begin and end on the first Monday in December, instead of September, as before. The act of March 12, 1877, makes the change permanent as to those officers mentioned in Section 1, and in all elections held in and after the year 1880. While a Clerk is not named in the enumeration, members of the General Assembly are, and the Constitution (Art. IV, Sec. 16), provides that he shall be elected "at the time and in the manner prescribed by law for the election of members of the General Assembly."

The defendant was, therefore, rightly in possession of the office and entitled to hold the same. But, were it otherwise, we are not disposed to concede that the defendant, regularly inducted into office and in full discharge of its trusts, even if wrongfully holding the same against a better title in the plaintiff, can be ejected in the summary way proposed. When there are conflicting claimants for a vacant office, the Judge must act upon the *prima facie* evidence of right and admit the one possessing it, leaving the other to pursue his proper legal remedy for the recovery of possession, for the obvious reason that the public interest requires an incumbent, and that the office be not left unfilled during a protracted contest to determine the title. So. on the expiration of the term of office, or in case of an appointment to fill a (312) vacancy, he may direct and enforce an order for the surrender to a successor of "the records, documents, papers and moneys belonging to the office." Rev. Code, Chap. 19, Sec. 14.

But the statute does not authorize the exercise of the power invoked for the plaintiff's relief upon the facts stated in his application.

Affirmed.

Cited: *Kilburn v. Latham, post,* 313.

The People by the Attorney-General on relation of D. N. KILBURN v. T. J. LATHAM.

Term of Office—County Officers.

1. It was the duty of a county treasurer elected in August, 1878, to appear before the board of county commissioners on the first Monday in December following and file his official bond; and on his failure to do so, it was competent for the board of commissioners to declare the office vacant and fill it.
2. The terms of all county offices (except superior court clerks elected in 1878), begin on the first Monday of December following their election (Laws 1874-'75, Ch. 237).

QUO WARRANTO, tried at Spring Term, 1879, of CRAVEN, before *Eure, J.*

KILBURN *v.* LATHAM.

This action was brought to recover the office of Treasurer of Craven County, and a trial by jury being waived, the Court found the facts as follows: The plaintiff was elected Treasurer on the first Thursday in August, 1878, and on the first Monday in September following, gave the official bond required by law and qualified before the Board of County Commissioners. On the first Monday in December following the said Board made an order requiring all county officers who are required to give official bond to renew the same on that (313) day. The plaintiff appeared before the Board on Tuesday, 3 December, 1878, and was allowed until 16th of the month to give the bond required of the County Treasurer, and he again appeared on that day and was allowed further time, to-wit, until the first Monday in January, 1879, to give bond, when he appeared and the matter was postponed until 7 January, on which last-mentioned day he neither gave nor renewed his bond, nor offered to do so. The said order to give bond was not served on Kilburn, and on said 7 January the Board of Commissioners declared the office of Treasurer vacant, and appointed the defendant, Latham, to fill the vacancy, who gave bond and was qualified, and is now exercising the duties of said office. Upon these facts, the Court gave judgment for the defendant, and the plaintiff appealed.

Messrs. A. G. Hubbard and *W. H. Bailey* for plaintiff.
Messrs. Green & Stevenson and *D. G. Fowle* for defendant.

SMITH, C. J. In *Worley v. Smith, ante,* 305, and *Clarke v. Carpenter, ante,* 309, the Court held that the effect of the act of 22 March, 1875, upon the persons elected under it is "to make the terms of office begin and end on the first Monday in December, instead of September, as theretofore." It was consequently irregular and improper for the plaintiff to tender his official bond to the Board of County Commissioners in September, since their successors, whose term of office began on the first Monday in December, are required, after their own qualification, "to proceed to qualify the other officers elected in the county." Bat. Rev., Chap. 52, Sec. 23, as amended by Section 3 of the act aforesaid.

The act of 12 March, 1877, directs the election of those officers named in the first section to be held in the year 1880 and thereafter "on the Tuesday next after the first Monday in November," thus (314) rendering permanent the change made in the former act for a single occasion, and its subsequent sections are intended to adapt the law to this alteration in time. The election for 1878 is, however, required by Section 77 to be held on the first Thursday in August, while the amendments made in Section 3 of the former act remain as before.

Construed in connection, this legislation makes the terms of all county officers, except Clerks, and of Clerks also in elections held in and after the year 1880, begin and expire on the first Monday in December of the years when they are elected.

But no change in the term of Clerks is effected by the acts in their application to the election in August last, and hence their terms begin, and they should be qualified, on the first Monday in September, while other county officers must do so in December. Uniformity will, however, be secured in future elections.

It is insisted in argument for the plaintiff that Section 33 of the act of 1877, which directs the Sheriffs to "notify all persons in the county to meet at the court-house on the first Monday in the ensuing month to be qualified," applied to Section 77, must be understood as requiring those county officers elected in August to qualify in September, which is the "ensuing month," and it is supposed that the court has overlooked that clause in former opinions. This is, however, a misapprehension. The section was not intended to apply to the August election, which is left to the control of pre-existing laws. It is a part of a series of provisions by which the general law is made to conform to the change in the day of election, and hence means the month next after the elections in November. It does not apply to the August elections in November. It does not apply to the August election, which is governed by the act of 1875, and if it did so apply, it would be in harmony with it.

It was necessary, therefore, for the plaintiff to appear before the newly appointed Commissioners at their meeting on the first
(315) Monday in December, and give bond, and failing to do so, after repeated indulgences as to time to prepare and tender it, it was competent for them, on January following, to declare a vacancy and fill it. *Jones v. Jones,* 80 N. C., 127; *Buckman v. Commisisoners, Ibid.,* 121.

The defendant is rightfully in office, and is entitled to hold the same.

Affirmed.

A. A. BROYLES to the use of J. W. GIBBS v. B. S. YOUNG and another.

Justice's Judgment—Transcript—Effect of Docketing—Statute of Limitations.

The transcript of a justice's judgment docketed in the superior court becomes, for the purposes of lien and execution, a superior court judgment, enforceable on the same property and by the same kind of execution issuable within the same limitations as is prescribed for the proper judgments of that court.

BROYLES *v.* YOUNG.

MOTION to issue execution, heard on appeal from Clerk at Spring Term, 1879, of YANCEY, before *Graves, J.*

A notice was issued to defendants on 4 February, 1879, to appear before the Clerk of the Superior Court and show cause why an execution should not issue upon a judgment obtained before a Justice of the Peace on 1 September, 1869, and docketed in the Superior Court on 10 February, 1870. The defendants appeared, and insisted in their answer that the judgment was barred by the statute of limitations. No evidence was offered that any execution had ever issued upon it; and more than seven years had elapsed since its rendition; but (316) the Clerk allowed the plaintiff's motion, on the ground that it had become a judgment of the Superior Court by being docketed, and was only barred after the lapse of ten years from its rendition. His Honor affirmed this ruling, and the defendants appealed.

Mr. J. M. Gudger for plaintiff.
Messrs. A. T. & T. F. Davidson for defendants.

DILLARD, J. The question presented for our determination upon the record and accompanying case of appeal is, whether the transcript of a judgment in a Justice's Court is liable to the seven years bar to actions on Justices' judgments under C. C. P., Sec. 32, or to the limitation of ten years prescribed to judgments of the Superior Court under Section 31 of The Code. The plaintiff's judgment, of which a transcript was docketed in the Clerk's office of the Superior Court, was obtained on 1 September, 1869, on a note dated 28 March, 1860, and after being docketed, no execution was issued or new action brought on the same up to the motion for execution to issue before the Clerk of the Superior Court on 8 March, 1879.

It seems to us, having regard to the policy and purposes of the law in allowing a transcript to be docketed, to the language of the enactments as to the effect of the docketing, and the mode and manner of its enforcement, that the plaintiff could not have maintained an action on the Justice's judgment on the day of his motion, but might have had an execution issued on his docketed judgment by leave of the Court, on personal notice to the adverse party. C. C. P., Sec. 256.

By the Code of Civil Procedure, Section 31, it is prescribed that an action on a Justice's judgment must be commenced within seven years, and clearly if no transcript of the plaintiff's judgment had been docketed in the Superior Court, the bar of the statute would (317) have attached upon it, by reason that more than seven years had elapsed without a new judgment obtained thereon, and without the same having been kept alive by the regular issuance of executions on

the same; and being docketed, the motion for execution on 8 March, 1879, was equally barred unless the docketing of the transcript had the legal effect to put it under the ten years limitation prescribed to actions on judgments originally recovered in the Superior Courts; and so we must determine how the docketing a transcript affects a judgment.

A creditor, having recovered judgment in a Justice's Court, may have execution in that Court extending to the tangible personal property, and to the person of his debtor in certain cases, but without the right thereunder to levy on and devote the land to its payment, or by any proceeding in that Court to reach the choses in action of his debtor. Being thus restricted, it was thought but right, from the greater efficiency of the Superior Court, to help the creditor in getting the fruits of his judgment, to provide for the docketing of a transcript on the Superior Court judgment docket, and to give to such docketing the legal effect of a judgment of that Court, so that the creditor might have the advantage of a lien on the land and a way to reach the choses in action through proceedings supplementary to execution.

In pursuance of this policy, it was accordingly enacted that the creditor might procure a transcript from the Justice's Court, and have the same entered on the judgment docket of the Superior Court, noting the day thereof, and from that day, the declaration of the statute is, that the judgment of the Justice's Court shall be a judgment of the Superior Court *in all respects,* and executions thereon may be issued by the Clerk of the Superior Court within the time against the person or (318) property, and with like effect, as executions issued on judgments originally recovered in the Superior Court. Bat. Rev., Chap. 63, Sec. 19.

Hence, as it appears to us, the legislative intent was to make the docketed transcript a judgment of the Superior Court for the purposes of lien and of execution, enforceable on the same property by the same kind of execution, and issuable within the same limitations as by law is prescribed for the lien and enforcement of the proper judgments of the Superior Court, including the power of the Clerk of the Court on notice to the adverse party to grant execution after the judgment became dormant as provided for in C. C. P., Sec. 256.

Our idea is, that a creditor having a judgment in a Justice's Court may keep his judgment altogether in that Court, and rely alone on such process for its enforcement as a Justice of the Peace may issue; and if he so do, the bar of the statute will apply to it at the end of seven years, unless before that time he sues and obtains a new judgment as he lawfully may do; but if he elect to have a transcript docketed in the Superior Court, and it is done, then all right of execution in the Justice's Court is renounced and *in lieu* thereof, the creditor has the

more efficient and far-reaching executions and process of the Superior Court, and he acquires the same time within which to make his money as belongs to suitors in that Court; the judgment of the Justice of the Peace in this last case remaining in that Court with power only in the Justice in certain cases to entertain motions in the cause looking to a vacation or modification of the judgment.

This conclusion to which we have arrived we think is not without support in decisions of this Court, and we will advert to some of them:

In *Ledbetter v. Osborne,* 66 N. C., 379, after the recovery of a judgment by Osborne and docketing of a transcript, Ledbetter sought to set aside the judgment on a petition in the Superior Court on the ground of surprise and advantage taken of his ignorance, and (319) this Court on appeal held that the docketing of the transcript was to create a lien and for purposes of execution, and in that respect only was it a judgment of the Superior Court.

In *Hutchison v. Symons,* 67 N. C., 156, citing and approving Ledbetter's case, it is reiterated by this Court that it was not the object to join to the fact of docketing a transcript any other effect than to constitute a lien of record on all the real estate of the debtor, and the right to have it sold by execution, and whilst this was so, the judgment still remained in the Justice's Court.

In *Birdsey v. Harris,* 68 N. C., 92, citing and approving both the cases hereinbefore mentioned, the doctrine is again announced that the judgment remains in the Justice's Court, and that any relief sought by the debtor against the judgment must be by a proceeding in the Justice's Court, thus reaffirming the principle that the docketing of the transcript had only the effect to make the judgment a judgment of the Superior Court for the purposes of lien and execution.

From these cases and the broad words of the statute describing the judgment as a judgment of the Superior Court *in all respects,* it may be safely concluded that the judgment has a lien on land for the same length of time, counting from the day of docketing, and that executions may be sued out within three years, by leave of the Court on notice to the adverse party in the same manner as in the case of a regular judgment of the Superior Court.

The effect of a docketed transcript is not only admissible within the words of the statute in this behalf, but it is material to a uniformity of proceedings and rights in the same Court. And in many respects the construction we have given is necessary in order to give the creditor the benefit of that lien on land which was the chief object in view, as we have seen, in providing for the docketing in the Superior Courts; for example, the lands of many debtors being (320) wholly exempt by the homestead law, and the creditors held off

until the expiration of that estate, it is but just that judgments in Justice's Court should be allowed through transcript docketed to have the effect of liens and to endure as the liens of regular judgments of the Superior Courts; otherwise all persons having judgments for sums under $200 would be exposed to be barred at seven years and before the homestead estate expired, and, therefore, not having equal chance of payment out of the homestead as other larger judgment creditors.

We think, therefore, the plaintiff's transcript being docketed in the Superior Court and motion made for execution to issue short of ten years, but after the lapse of seven years the same was not barred by the statute of limitations and it was competent on the motion to grant leave to issue execution as provided in Section 256 of The Code of Civil Procedure.

Affirmed.

Cited: Morton v. Rippy, 84 N. C., 614; *Williams v. Williams,* 85 N. C., 385; *Surratt v. Crawford,* 87 N. C., 374; *Daniel v. Laughlin, Id.,* 435; *Woodward v. Paxton,* 101 N. C., 28; *Bailey v. Hester, Id.,* 540; *Adams v. Guy,* 106 N. C., 276; *McIlhenny v. Trust Co.,* 108 N. C., 312; *Oldham v. Rieger,* 148 N. C., 550.

R. H. CANNON v. A. W. PARKER.

Judgment Liens—Priority of Creditors—Execution Sale—Application of Proceeds.

1. The effect of a sale under a junior judgment is to pass the debtor's estate unencumbered with the lien of an older docketed judgment; and of a sale under both, to vest the title in the purchaser, and transfer the liens, in the same order of priority, to the proceeds of sale.
2. The sheriff must observe these priorities, of which he has notice upon the face of the executions, in paying out the money to the respective crditors.
3. The time of contracting the debts on which the several judgments were obtained, and the dates of issuing and levying the executions, are wholly immaterial.

(321) MOTION of a Sheriff for instructions as to the proper application of funds in his hands, heard at Spring Term, 1879, of JACKSON, before *Gudger, J.*

On 14 September, 1878, the plaintiff obtained a judgment against the defendant, on a debt contracted prior to 1868, before a Justice of the Peace, which was duly docketed in the Superior Court on 13 January, 1879, and on same day an execution was issued and levied on defendant's land, and the land sold on 15 May, 1879.

On the said day, to-wit, 14 September, 1878, William Cope and Jesse Estis, administrators of Andrew Cope, obtained a judgment against same defendant, A. W. Parker, on a debt contracted prior to 1868, before a Justice, which was docketed in the Superior Court on 31 October, 1878 (prior to the docketing of this plaintiff's judgment), and on 26 February, 1879, an execution was issued and levied on same land (after the levy made under plaintiff's execution).

After the sale the Sheriff came into Court and asked to be instructed how to apply the money.

The plaintiff insisted that the debt being contracted prior to 1868, the oldest levy created a lien, without regard to the time of docketing the judgment, and that the proceeds of sale should be applied to the satisfaction of his debt. But the said administrators maintained that docketing their judgment prior to the time of docketing plaintiff's, gave them a proper lien without reference to the dates of the levies, and that the money should be applied to their debt.

His Honor held that the date of docketing the judgment was the time from which the lien took effect, and instructed the Sheriff to pay the money to said administrators. From this ruling the (322) plaintiff appealed.

Messrs. A. T. and T. F. Davidson for plaintiff.

No counsel in this Court for the administrators.

SMITH, C. J. The judgment of a Justice of the Peace may be docketed in the office of the Superior Court Clerk of the county wherein it is rendered, and then becomes a "judgment of the Superior Court in all respects." Execution thereon shall issue "to the Sheriff of the county, and shall have the same effect and be executed in the same manner as other executions of the Superior Court." C. C. P., Sec. 503.

It is, however, a judgment when thus docketed in the Superior Court, only for the purpose of creating a lien on the debtor's real property in the county and enforcing satisfaction by final process. It can not be impeached, set aside or modified by proceedings before the Superior Court, except by writ of *recordari* removing the cause to a higher jurisdiction. *Ledbetter v. Osborne,* 66 N. C., 379; *Birdsey v. Harris,* 68 N. C., 92. The lien extends to the real property which the debtor then has in the county, and such as he may thereafter acquire for the period of ten years from the time of docketing. C. C. P., Sec. 254; *Murchison v. Williams,* 71 N. C., 135, and other cases preceding.

The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older judgment, and of a sale under both (as we understand this to be), to vest the title in the

purchaser and transfer the liens in the same order of priority to the proceeds of the sale. *Sharpe v. Williams,* 76 N. C., 87. The Sheriff must observe these priorities, of which he has notice upon the face of the executions, in paying out the money to the respective creditors. The times of issuing and levying the executions are wholly immaterial.

The administrators of Andrew Cope are therefore entitled to
(323) be first paid out of the fund, and the plaintiff out of any residue which may remain.

Affirmed.

Cited: *Morton v. Rippy,* 84 N. C., 613; *Hinson v. Adrian,* 86 N. C., 63; *Titman v. Rhyne,* 89 N. C., 68; *Woodard v. Paxton,* 101 N. C., 29; *Meyers v. Rice,* 107 N. C., 31; *Gambrill v. Wilcox,* 111 N. C., 43; *Cotton Mills v. Cotton Mills,* 116 N. C., 649; *Bernhardt v. Brown,* 118 N. C., 710; *Dysart v. Brandreth, Ib.,* 974; *Gammon v. Johnson,* 126 N. C., 65; *Dunham v. Anders,* 128 N. C., 212.

CLARA A. DIXON v. JOSEPH DIXON and others.

Judgment Lien—Lis Pendens—Bankruptcy.

1. A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title is taken in the name of some third person.
2. In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings.
3. An adjudication of bankruptcy and the attendant assignment of the bankrupt's effects vests all the debtor's property in the assignee; and creditors, whether secured by lien or not, must pursue the debtor in the bankrupt court for the final adjustment and satisfaction of their claims.

APPEAL at Spring Term, 1879, of GREENE, from *Seymour, J.*

On 16 October, 1871, the plaintiff obtained judgment upon a note against the defendant Joseph Dixon, and execution issued and was returned *nulla bona.* Soon thereafter the defendant bought and paid for the tract of land described in the complaint with his own funds,
(324) and caused title to be made to the defendant John D. Grimsley; which conveyance was alleged by plaintiff to be in fraud of her debt and other creditors of Joseph Dixon; but this allegation was denied in the answer.

On 19 November, 1873, the defendant Grimsley conveyed said land

to the other defendant, Augusta B. Dixon, the wife of Joseph Dixon, she having notice of the pendency of this action at the time of said conveyance, and being subsequently made a party defendant.

On 23 November, 1874, the defendant, Joseph Dixon, on his own petition was adjudicated a bankrupt, and on 25 May, 1875, obtained a final discharge and plead his certificate of the same in this action, which was commenced in 1872 by the plaintiff for the purpose of subjecting said land to the payment of her debt.

The jury found the issues in favor of the plaintiff, who moved for judgment that the land be sold, etc., but asked for no judgment against Joseph Dixon. His Honor on the question of law reserved, disallowed the motion on the ground that the adjudication and discharge in bankruptcy of said Joseph Dixon ousted the jurisdiction of the Court in this matter. It was agreed that Dixon's assignee in bankruptcy has not become a party to the action, nor filed any answer therein, and that no order has been made in the bankrupt Court to stay proceedings in the Court below. The plaintiff appealed from the judgment.

Messrs. Faircloth & Simmons for plaintiff.
Messrs. W. T. Dortch & Son for defendants.

DILLARD, J. The plaintiff recovered judgment against the defendant Joseph Dixon, in 1871, and sued out execution which (325) was returned *nulla bona*.

After the rendition of the judgment Joseph Dixon purchased and paid for the tract of land in the pleadings mentioned, out of his own funds, and procured his vendor to execute title to John D. Grimsley, who, in 1873, conveyed the same to A. B. Dixon, the wife of Joseph Dixon.

The plaintiff's execution being returned *nulla bona*, as aforesaid, she instituted her action to Fall Term, 1872, of Greene Superior Court, against Joseph Dixon and John D. Grimsley, to follow the money of the judgment debtor into the said tract of land upon the allegation that the same was paid for out of the debtor's proper funds, and that the title was executed to Grimsley on a secret trust for him or for some member of his family in fraud of his creditors. The action by leave of the Court was afterwards amended so as to bring before the Court A. B. Dixon, the wife of the said Joseph Dixon, and the case being thus constituted in Court, all three of the defendants filed answers denying the allegations of fraud, and alleging a title *bona fide* obtained and on valuable consideration.

In 1874 Joseph Dixon went into bankruptcy, and was discharged from the plaintiff's debt and all others provable under the bankrupt act

by decree of the District Court of the United States on 25 May, 1875, and he pleaded his certificate of discharge in this cause.

The assignee in bankruptcy of Joseph Dixon never became a party to this cause, nor was any order made in the bankrupt Court to stay proceedings in the State Court. At the trial at Spring Term, 1879, the jury found all issues in favor of the plaintiff as to the alleged fraudulent purchase and conveyance of the land, and thereupon, on motion for judgment by plaintiff, his Honor, on the question reserved, declined the plaintiff's prayer for judgment and adjudged that the defendants recover their costs, on the ground that the adjudication and dis-
(326) charge in bankruptcy ousted the jurisdiction of the Superior Court in the matter, and from this judgment the appeal was taken.

1. If the plaintiff had no lien on the land by force of the effect given by C. C. P., 254, to a docketed judgment, nor by the institution of this action, then without controversy the subsequent adjudication of Joseph Dixon a bankrupt and the attendant assignment of his property, by operation of the bankrupt act, vested the land in suit in the assignee, even though the same may have been fraudulently conveyed as alleged to Grimsley on a secret trust, and then afterwards conveyed by Grimsley to A. B. Dixon, the wife of the debtor. Bankrupt Act, Sec. 14, and Bump., 119.

The assignee in such case would owe the duty to avail of the property, and administer the same in the interests of the general creditors, subject, however, to any priority or equities which others might have in the same; and the discharge granted, of which it is admitted a certificate was issued and pleaded in the cause, operate to discharge the plaintiff's judgment and all remedies thereon, either affecting the person or property of the debtor.

2. But did the plaintiff's judgment have any lien on the land bought by the bankrupt and procured to be conveyed to Grimsley and afterwards by Grimsley to his wife?

A docketed judgment by C. C. P., Sec. 254, is a lien on all the *real property* of the debtor in the county or counties in which it is docketed; and by the decision of this Court, the words "real property" embrace legal and equitable estates. *McKeithan v. Walker,* 66 N. C., 95; *Hoppock v. Shober,* 69 N. C., 153. But those words, of however broad signification, do not cover land in which the debtor never had any estate or right, and as to which the creditors have only the right to follow a personal fund which has been converted into land, and the title taken to some member of his family or other in fraud of creditors.

Wall v. Fairley, 77 N. C., 105. Land bought as this was and
(327) paid for by a debtor and the title procured to be executed to

Grimsley and by him afterwards to the wife of the debtor in fraud of creditors, is in no proper sense the land of the debtor. He has no legal title to it and never had, and the conveyance being made *mala fide* and dishonestly, he can have no trust declared by a court of equity in his favor, and, therefore, it was not his *real property* and the lien of plaintiff's docketed judgment did not extend to or affect it. *Page v. Goodman,* 43 N. C., 16, and *Wall v. Fairley, supra.*

3. But did the institution of this action follow the funds of the debtor, begun before the bankruptcy of the debtor, give the plaintiff a lien so as to authorize her since the discharge of the debtor to proceed to judgment and have the land sold and her money paid out of its proceeds by decree of a State Court?

Formerly Courts of Equity took jurisdiction at the instance of a judgment creditor in the course of the collection of his debt in two cases; first, when the execution sued was a lien on the property sought to be subjected, but there was some impediment or hinderance in the way of any sale at all, or a sale under eligible circumstances, and then the jurisdiction was exercised as auxiliary to the effective execution of legal process; in the other case the jurisdiction was original and granted relief on the ground that the debtor had property or effects which ought to be applied to the creditor's debt, which could not be so applied by levy and sale under execution and when otherwise the creditor would be remedyless. *McKay v. Williams,* 21 N. C., 398; *Brown v. Long,* 36 N. C., 190.

In the first instance above of interposition by courts of equity it will be observed that the property sought to be subjected was liable to levy and sale by execution at law, and, therefore, the creditor going into that tribunal for aid in the execution of his process, had a lien by virtue of his execution extending to the day of judgment (328) rendered; but in the case of a suit to reach the funds of a debtor, not capable of being applied under an execution, as in this action to reach the money of the judgment debtor vested in the land conveyed to the wife, there is no lien by the judgment or execution, and the jurisdiction arises because there is no lien, and the action when instituted, at the most, is looked on as one to follow the funds of the debtor, and its effect is to constitute a *lis pendens* as to the property in which the funds are vested, and thereby to disable the debtor or other person holding the property, as in equity causes generally, to convey, except subject to the results of the action, and to give the creditor first bringing his suit a priority over any other creditor.

It is usual we know in speaking of a suit to follow funds of the debtor, not liable to levy and sale at law, to speak of the suit as operating a lien in favor of the creditor, but the jurisdiction is assumed and

exercised, as we have said, not on the grounds of any lien the creditor has, but simply as enabling him to reach a part of his debtor's effects, which could not otherwise be come at, and in the course of the suit, there is no lien, but only a resemblance to a lien, in that the debtor and other person holding property in which the funds are vested by the *lis pendens* are disabled to convey except subject to the suit in order to prevent evasion and frustration of the decrees of the Court; and in that the creditor first suing is allowed to have a priority in the fund, if realized, as an incident to diligence, and as fixing the order of application between him and others who might separately seek the same fund. *Edgill v. Haywood,* 3 Atkins, 357; *McKay v. Williams, supra.*

Suppose pending plaintiff's suit Joseph Dixon, whose money in the land is sought, had died instead of going into bankruptcy, would not his administrator have been entitled to have and apply the fund (329) in a due course of administration according to the priorities prescribed by statute? It was decided in the case of *Tate v. Morehead,* 65 N. C., 681, that the lien acquired by a creditor or service of garnishment on a debtor to the defendant in the action, was lost on the death of the garnishee before answer and judgment; and equally so, it would be, that the lien on goods attached would abate and fail if the debtor sued, died before appearance; and so we think if Dixon had died the plaintiff's suit must have fallen.

4. When the debtor went into bankruptcy, what was the effect on the plaintiff's suit? The effect was to stay proceedings until the question of discharge was settled; and in the meantime, the adjudication and assignment to the assignee in legal effect vested in the assignee the entire estate of the bankrupt, including the right to follow the funds in the land conveyed to the wife for administration under the law for the general creditors, subject, of course, to any liens existing in favor of others against the bankrupt. On discharge granted and plea of the certificate in the cause, as was done, the debt of plaintiff was discharged; and incidentally, all remedies for its collection, including the *lis pendens,* fell with the discharge. And so we think the plaintiff was not entitled after discharge of the debtor to pursue further in a State Court the funds of the debtor vested in the lands conveyed to his wife.

If we be in error in this, still in the case of *Blum v. Ellis,* 73 N. C., 293, it is decided that all the property of a bankrupt, including that subject to liens, passes to the assignee and is *in custodia legis* subject to such liens; and that a creditor must go into the bankrupt Court and have his lien adjudged and enforced in that Court; or otherwise, he is at risk of losing his security and having his debt barred. And in *Withers v. Stinson,* 79 N. C., 341, the principle decided in *Blum v. Ellis,* after careful review, is affirmed and the lien of Withers's judg-

ment on the lands of the bankrupt is held discharged by the proceedings in bankruptcy. After these two decisions of this Court, whatever might be the views of the question, if it were now for (330) the first time presented, we would hold ourselves bound under their authority to hold that plaintiff was not entitled to the decree she asks, besides the other ground of having no lien, already discussed.

No Error.

Cited: Sumrow v. Black, 87 N. C., 105; *Windley v. Tankard,* 88 N. C., 225; *Trimble v. Hunter,* 104 N. C., 135; *Thurber v. LaRoque,* 105 N. C., 320; *Guthrie v. Bacon,* 107 N. C., 339; *Bruce v. Nicholson,* 109 N. C., 206.

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*D. P. MAST, Adm'r of Margaret Gardner, v. MARGARET E. RAPER and others.

Priorities—Judgment Liens—Subrogation.

An administrator *cum test. annex.*, pursuant to directions in the will, contracted with J. R. to sell him land of the estate, and gave a bond to make title when the purchase-money, for which the vendee executed his note, should be paid. The vendee, after making some payments, took up the note and by agreement substituted two others therefor, one payable to the administrator and the other to the guardian of the testator's children, with one M. G. as surety to the latter. On this note the guardian obtained judgment, which was duly docketed and thereafter assigned to J. F. W. Sometime afterwards, J. R. paid off the note held by the administrator and procured from him a conveyance of the land to the surety. Later still, W. and S. obtained and docketed a judgment on an independent claim against J. R. and the surety, M. G. The controversy being between the assignee of the guardian and W. S., as to the priority of their liens; *Held*, that in either of two views, the guardian's judgment was entitled to the preference:

1. The substituted note on which it was rendered retained the lien of the original note, and charged the land in possession of the surety, or,
2. If J. R. had procured the conveyance to be made to his surety as an indemnity against her contingent liability on the guardian note, then on the principle of subrogation, the guardian or his assignee became at once entitled to the benefit of that security.

SPECIAL PROCEEDING heard on appeal, at Spring Term, 1879, of (331) FORSYTH, before *Schenck, J.*

The opinion contains the facts. From the judgment below, the defendants, Wilson & Shober appealed.

Messrs. Watson & Glenn for defendant Welborn.
Messrs. J. A. Gilmer and *Gray & Stamps* for appellants.

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

SMITH, C. J. The plaintiff, as administrator with the will annexed of Margaret Gardner, applies by petition to the Superior Court Clerk of Forsyth for license to sell, for the payment of her debts, a tract of land in said county devised by the testatrix to her two children, Margaret E. and Sarah L. Raper. The devisees, and also N. H. D. Wilson and Charles E. Shober, partners of the firm of Wilson & Shober, and John H. Welborn, each of whom asserts a lien on the land, are made defendants, in order that their conflicting claims may be determined in the action. Wilson & Shober and John H. Welborn file answers, setting out the facts upon which their respective claims are founded and assenting to the sale and transfer of the controversy to the fund to be substituted in place of the land. The plaintiff has accordingly by order of the Probate Court made sale of the land and holds the proceeds to await the decision in regard to their distribution.

The facts agreed on by counsel as constituting the case are (332) as follows:

Between 1861 and 1865, James D. Payne, administrator, with the will annexed of Joab Teague, and by authority thereof, contracted with J. J. Raper to sell and convey the land for one thousand dollars, and thereupon the latter gave his note for that sum, and the former executed his bond to make title when the purchase-money was paid.

In 1866, the parties came to an account and it was found that $750 was still due, and the said Raper thereupon executed two notes, one for $650 with the testatrix, Margaret Gardner as surety, payable to H. T. Byerly, guardian to the minor children of the testator, Joab Teague, and the other for $100 to the administrator, James D. Payne, and the original note of $100 was surrendered. The guardian, H. T. Byerly, brought suit on the note delivered to him against J. J. Raper, the principal, and recovered judgment for the amount due thereon at Fall Term of 1870 of Forsyth Superior Court. After the docketing of this judgment, Raper paid thereon $195, and also paid the note held by the administrator in full, and directed title to the land to be conveyed to the said Margaret Gardner, his surety, which was accordingly done on 31 January, 1872, without the knowledge or consent of the guardian. This judgment has been assigned to the defendant J. F. Welborn.

Wilson & Shober recovered judgment at Spring Term, 1872, of Davidson Superior Court, against said J. J. Raper, and the plaintiff's testatrix, Margaret Gardner, on a note for $650 and interest, and about the same time recovered judgment before a Justice of the Peace against Raper alone for two hundred dollars, both of which judgments they caused to be docketed in the Superior Court of Forsyth on 11 May, 1872. The defendant Welborn insists upon the priority of his docketed judgment against Raper, to whom, on payment of the purchase-money,

the land belonged; whilst the defendants, Wilson & Shober, con- (333)
tend that the legal estate in the land passed by the deed to the plaintiff's testatrix and their larger judgment against her is the only lien upon it.

The merits of the controversy are open to us and we are called on to decide upon the whole case to the satisfaction of which debts the proceeds of sale shall be applied, and which of the competing claimants has the prior legal or equitable title thereto. When the substituted note was executed to the guardian for a large part of the remaining purchase-money, the land was held by the administrator, Payne, under an express agreement with Raper, the debtor, that it should be in trust to secure the payment of the purchase money, as well as the portion contained in the note payable to the guardian, as the small residue payable to himself. If the renewal notes had been taken by Payne and he had assigned the larger to the guardian, the right to retain the estate and the legal obligation of the vendor to hold it for the security of both, would be clear and indisputable. The execution of one directly to the guardian does not change the substantial character of the transaction, or affect the legal rights of the parties, as the purchase-money is not paid by giving a new security for it, unless so intended, and the vendee is only entitled to a conveyance when the purchase-money is paid. This is involved in the decision in *Lord v. Merony,* 79 N. C., 14, where it is held that a note taken payable to the guardian, to whom the money due on a sale of land by the clerk and master, when collected, would be paid, still retained its lien upon the land even after the clerk and master had conveyed to the purchaser and the latter had sold and conveyed to an innocent holder.

When the renewal notes were substituted for the single original note, they did not lose their lien upon the retained estate in the land, but the vendor continued to hold the same as trustee for both, (334)
and neither could he rightfully part with the title, nor Raper demand it until the notes were paid. The guardian took the debt with this security and in like condition when reduced to judgment it passed under his assignment to Welborn. *Winborn v. Gorrell,* 38 N. C., 117.

When upon Raper's payment of the small note, under his direction the land was conveyed to the plaintiff's testatrix, the surety to the larger note, with notice of its non-payment and the attaching trusts, the act was a direct breach of fiduciary obligation concurred in by all the parties to the transaction, which had not the effect of discharging the land, and the trust remained unimpaired following the transfer of the legal estate to her. To this precedent liability for the unpaid purchase-money, any lien created by a docketed judgment is necessarily subordinate, because it can only reach the debtor's interest with all the encum-

brance thereon. If his equitable estate had been such as could be sold under execution, no greater interest than the debtor had would be acquired by the purchaser, and the judgment lien can have no wider scope of operation. *Flynn v. Williams,* 23 N. C., 509; *Homesley v. Hogue,* 49 N. C., 481.

Had the testatrix lived, the trust could be enforced against her by the holder of the guardian note; the same right exists to have satisfaction out of the moneys derived from the administrator's sale.

The operation of the rule of subrogation will be illustrated by reference to some adjudged cases.

The surety to a note given for land, the title to which is to be retained until full payment of the purchase-money, has an equity on the insolvency of the principal debtor, to have a resale of the land, his property, and the proceeds applied in discharge of the debt *Smith v. Smith,* 40 N. C., 34; *Egerton v. Alley,* 41 N. C., 188; *Ferrer v.* (335) *Barrett,* 57 N. C., 455. So one surety may have property provided by the debtor for the indemnity of a co-surety subjected to the payment of the debt in exoneration of both. *Leary v. Cheshire,* 56 N. C., 170.

The creditor himself may pursue a fund belonging to the principal and held by a surety for his own indemnity appropriated to the debt. *Wiswall v. Potts,* 58 N. C., 184; *Harrison v. Styers,* 74 N. C., 290. In the latter case a deed in trust was made conveying property for the indemnity of the surety, and the Court say: "The creditor's interest, therefore, is the primary object to be protected in equity, and the surety's indemnity is only secondary.

In *Ins. Co. v. Ledyard,* 8 Ala., 866, the Court declare that the creditor is entitled to the benefit of all pledges or securities given to or in the hands of the surety for his indemnity to be applied to the payment of the debt.

In *Phillips v. Thompson,* 2 John. Ch. Rep., 418, Chancellor KENT held the holder of an endorsed note entitled to the benefit of a collateral security given by the maker to the endorser for his indemnity.

In *McCallum v. Hendley,* 9 Vt., 143, REDFIELD, J., lays down the rule thus: "It is a familiar principle that the creditor may compel the surety to surrender to him any peculiar means which may have been entrusted to him by the principal for the purpose of securing the payment of the debt."

These authorities are decisive of the right of the owner of the note given for the unpaid purchase-money, to subject the land to his debt, if the conveyance by Payne was directed by Raper to be made to the testatrix for the purpose of protecting her from loss on account of her said suretyship; and, as far as the case agreed discloses, it was made,

without any other consideration moving from her. It is true the answer of Wilson & Shober, alleges the conveyance to have been (336) made in payment of a debt due her from Raper on a contract for the purchase of land in Davidson County, but it is not so stated in the case agreed. So in the answer of Welborn it is said that the guardian note on its face recited the consideration to be "a part of the purchase-money of the land," but the fact does not appear in the statement upon which the judgment of the Court is asked. Accepting each or discarding both allegations, the result will not be changed. If the conveyance was voluntary, the land is chargeable with the debt, if for a valuable consideration the purchaser had information from the face of the note that it was for part of the purchase-money yet due and unpaid for the land, or the means of knowing, which is equivalent.

But the case was argued before us exclusively upon the effect of the docketed judgments and their respective liens upon the land. The guardian judgment was recovered before the conveyance to the testatrix and its lien attached to such interest as Raper then had in the premises, and that was an equitable estate charged with the payment of the residue of the original purchase-money. The lien was not removed and could not be removed by any act of Raper, and remained unimpaired by the conveyance executed under his direction, to the testatrix. The legal title only thereby vested in her, subject still to the lien upon the unassignable equitable estate of the debtor.

The lien of Wilson & Shober's judgment attaches to the legal estate, transferred to the executrix, and secures any surplus that may remain after discharging the encumbrance upon the equitable estate of Raper, which did not pass under the deed so as to defeat or obstruct the lien previously acquired by the first docketed judgment. In each aspect of the case, therefore, the debt due to Welborn is entitled to priority of payment out of the proceeds of sale.

Affirmed.

Cited: Stenhouse v. Davis. 82 N. C., 434; *Scott v. Timberlake,* 83 N. C., 385.

(337)

LANIER & BROWN v. JOSHUA BELL.

Material-man's Lien—Notice, Where Filed.

1. Notice of a lien on land must be filed in the office of the superior court clerk.
2. It is certain that the vendor of lumber has no lien on the same for the purchase-money, unless the lumber be furnished with the understanding that it is to be used in building or repairing buildings on the purchaser's land.

(*Quaere*—As to whether the lien attaches when such understanding exists.)

APPEAL at Spring Term, 1879, of HALIFAX, from *Eure, J.*

The opinion contains the facts. The plaintiffs recovered judgment in this action before a Justice of the Peace, and on appeal his Honor held that the plaintiffs had no lien upon the premises, but that they had a lien upon the lumber, and gave judgment accordingly, from which the defendant appealed.

Messrs. Mullen & Moore for plaintiffs.
Messrs. Reade, Busbee & Busbee for defendant.

ASHE, J. This action was begun before a Justice of the Peace in the county of Halifax, to recover the price of a lot of lumber sold and delivered by the plaintiffs to the defendant, and piled on his land on 19 October, 1878; and also to enforce a pretended lien, not only upon the lumber, but upon the land on which it was piled, a notice of which the plaintiffs claimed to have filed with a Justice of the Peace in said county on 9 November, 1878.

The defendant admitted the debt, but denied the lien, and it was adjudged by the Court "that the plaintiffs having complied in all
(338) respects with the provisions of the statute to entitle them to a lien upon the lumber sold by them to the defendant, that they recover of the defendant the sum of ninety dollars, with interest thereon from 19 October, 1878, till paid, and for costs of this action, to be taxed by the Clerk, and that they have all the remedies and process provided by statute for the enforcement of said recovery."

The notice of lien was as follows:

"Lanier & Brown Halifax County.
v. Palmyra Township,
Joshua Bell. Before E. P. Hyman, J. P.

"The plaintiffs, Lanier & Brown, complained of an account amounting to ninety dollars due for bill of lumber furnished the defendant, Joshua Bell, 19 October, 1878, and filed a lien for said amount on said lumber now piled on said premises of said defendant, this 9 November, 1878, with E. P. Hyman, J. P. Plaintiffs also filed on the premises of said defendant, whereon said lumber is piled, a lien for said amount, this 9 November, 1878."

If this notice of lien had been in proper form, complying with all the requisites of the statute, it would not have created a lien upon the land of the defendant because it was not filed with the Clerk of the Superior Court as the law requires.

The lien for materials furnished is given by the first section of Chapter 65 Battle's Revisal, which is as follows: "Every building built,

repaired or improved, together with the necessary lots on which said building may be situated, and any lot, farm or vessel, or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work on the same, on materials furnished."

Several of the States have lien laws very similar in phraseology to ours, and the construction put upon them has not been uniform. In some of them it has been held that there is a lien on the (339) building, etc., for materials furnished for the purpose or with the understanding that they were to be used in the erection or repairing of a building, whether so used or not; in others, that the material man had a lien for the materials furnished, with the understanding that they were to be used in the construction of a building, although they were not used for such a purpose; and in others, with lien laws more resembling our own, that no lien can be acquired upon materials furnished for a building, etc., as distinct from the building, but only upon the building, etc., in the construction or repairing of which they are used.

While we are inclined to hold the latter the proper construction of our statute, it is not necessary for the purposes of this appeal to decide that question, as the lien claimed by the plaintiffs does not come within the scope of either of the constructions. It nowhere appears in the case that the lumber was used in the erection, repairing or improvement of a building, or that it was furnished with the understanding that it was to be used for such a purpose. It was an unqualified sale of the lumber, and the vendor acquired no more lien upon it by his pretended notice of lien than any other vendor has upon personal property he has sold and delivered.

There is error. So much of the judgment of the Court below as relates to the lien and the enforcement thereof, is

Reversed.

Cited: Bank v. Mfg. Co., 96 N. C., 309; *Pipe Co. v. Howland,* 111 N. C., 620.

(340)

JESSE E. WHITAKER v. JAMES N. SMITH.

Laborer's Lien—Overseer not "Laborer."

An overseer is not entitled to a laborer's lien, for his wages, upon the crop or land of his employer over which he has superintendence.

APPEAL at Spring Term, 1879, of HALIFAX, from *Eure, J.*

The opinion contains the facts. His Honor gave judgment for the

sum claimed by plaintiff as due for services rendered as a farm overseer, but held that he had no lien on the crops, etc., of defendant to secure payment of the judgment. From which ruling the plaintiff appealed.

Mr. J. H. Fleming for plaintiff.
Mr. Thomas N. Hill for defendant.

ASHE, J. This was an action to recover of the defendenat services rendered by the plaintiff as overseer during the year 1877, and to enforce what is claimed to be a laborer's lien upon the crops, stock, farming utensils and plantation of defendant. A document was filed with the Clerk of the Superior Court of Halifax County, purporting to be a notice of lien, which is as follows:

"Know all men by these presents, that I, Jesse E. Whitaker, of the county of Halifax and State of North Carolina, commenced work by verbal contract with James N. Smith, on 1 January, 1877, as
(341) overseer and farm superintendent, at the rate of five hundred dollars per year, and worked as per contract until 1 January, 1878; that said Smith is indebted to me for said services in the sum of five hundred dollars, no part or portion thereof has been paid. I file this as my lien against the crops raised, and the stock, farming utensils used on the river farm of the said Smith, and against the lands of said Smith, that is to say, his river plantation, whereon I performed said services the said year 1877. Witness my hand and seal, this 5 January, 1878. J. E. WHITAKER. (Seal.)"

The facts of the case were submitted to the Court as upon a case agreed, and, among other things, it was submitted that "if the Court shall be of opinion either that the plaintiff has no lien on said lands or crops, or having had one, lost it by failing to comply with the statute, it will so declare." The Court held that the plaintiff had no lien upon the crops and other property of the defendant, from which judgment the plaintiff appealed to this Court.

And the only question presented by the appeal is whether an overseer is entitled to a laborer's lien for his wages upon the crops, stocks, etc., of his employer, and also upon the plantation over which he had superintendence.

In Article XIV, Section 4, of the Constitution, it is provided that the General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor; and in pursuance of the injunction of the Constitution, the Leg-

islature passed the act of 1868-'69, Chap. 117, entitled "An act to create a mechanics' and laborers' lien," and as amendatory of the same, the act of 1870, Chap. 206, entitled "An act for the protection of mechanics and other laborers, materials," etc.

A very large proportion of the laboring population of the State had just recently been released from thraldom and thrown upon their own resources, perfectly ignorant of the common business trans- (342) action of social life, and this provision of the Constitution and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers.

Who, then, was a laborer in the meaning of these acts and the Constitution?

Words in a Constitution or statute which have a technical meaning are supposed to be used in that sense; but if not, then in their ordinary sense or common acceptation. Worcester defines a laborer to be one who labors, one regularly employed at some hard work; and Webster's definition is, one who labors in a toilsome occupation, one who does work that requires little skill, as distinguished from an artisan. In a Georgia case, *Adams v. Goodrich,* 55 Ga., 335, a laborer was held to be one who performs *manual* labor. In Pennsylvania an action was tried involving the construction of a statute of that State to prevent the wages of laborers from being liable to attachment in the hands of their employers; and the Court decided that the word "laborer" used in the statute meant manual *laborer* by profession and occupation. *Heebner v. Chave,* Pa. St. Rep., 117. And in another Pennsylvania case the question arose whether an engineer on a railroad was a laborer within the meaning of a statute of that State, which gave a lien to contractors, laborers and workmen upon railroads and other works and property of public corporations; and the Court held that he was not within the purview of the act, that a laborer was one who toils, who is dependent upon his *manual* labor for his subsistence. *R. R. Co. v. Leuffer,* 8 Pa. St. Rep., 168. In the common use of the word, we mean one who toils, one who labors with his hands. But an overseer is an agent, a superintendent, a sort of *"alter ego."* His business is not to labor, but to oversee those who do work in subjection to his authority. He might in special cases unite both capacities, and be both laborer and overseer; but in (343) this case he was only overseer. He so describes himself in his pretended notice of lien, and it is expressly stated in the case as made up for this Court that he did not perform any labor except to supervise and superintend the farm and laborers. Such a person does not come

within the meaning of the Constitution or acts of the Legislature giving protection to laborers.

Affirmed.

Cited: *Cook v. Ross,* 117 N. C., 195; *Nash v. Southwick,* 120 N. C., 460; *Moore v. Industrial Co.,* 138 N. C., 307; *Stephens v. Hicks,* 156 N. C., 240.

REBECCA A. CHEATHAM v. JAMES A. CREWS and another, Executors.

Jurisdiction—Amendment of Summons.

In an action brought before the clerk, of which the superior court in term time had jurisdiction, where issues of law and fact including the question of jurisdiction were raised by the answer, and the action thereupon transferred to the court in term time; *It was held,* not to be error for the court below to refuse a motion to dismiss the action and to amend the summons so as to make it in form returnable to that term of the court.

MOTION in the cause, heard at Spring Term, 1879, of GRANVILLE, before *Buxton, J.*

The summons in this case was made returnable before the Clerk, and, upon the facts set out in the opinion of this Court, the defendant insisted that the matters complained of were the proper subject of a civil action and not a special proceeding. In the Superior Court, before his Honor, the plaintiff moved to amend the summons so as to (344) make it returnable to term, and the defendant moved to dismiss the proceeding for want of jurisdiction, as set forth in the answer. The Court allowed the amendment as moved by plaintiff, and the defendant appealed.

Messrs. Merrimon, Fuller & Ashe for plaintiff.
Messrs. J. B. & W. P. Batchelor for defendant.

SMITH, C. J. This action was instituted to reform and correct an alleged error in the partition of certain lands, devised by one James Crew to his eight children, the plaintiff and part of the defendants, and directed by the testator to be divided into eight equal shares, and one share allotted to each.

Under the direction of the will, the executors appointed three commissioners, who divided the land and assigned to each his and her share in severalty. The complaint alleges a mistake made by (345) the commissioners as to the area of the lot which fell to the plaintiff, whereby she loses about fifty acres, her lot being esti-

mated to contain one hundred and twenty-nine acres, whereas, it contained only about eighty acres. The purpose of this suit is to rectify this error. The summons issued on 20 February, 1879, was executed the next day, and is made returnable before the Clerk at his office within twenty days after service, to answer a complaint which will be filed in ten days from the date of the summons.

The complaint was accordingly filed in the office on the 1st of March, and after further time allowed the defendants, their answers were filed, one on the 15th and the other on the 19th day of March, and they set up several matters of defense, both of law and fact.

The cause was thereupon transferred to the next ensuing Spring Term of the Superior Court, as required by The Code for the trial of both issues of fact and law. *Jones v. Hemphill,* 77 N. C., 42.

The defendants, in their answer, among other defenses, deny the jurisdiction of the Clerk, and, before the Judge at the term aforesaid, moved to dismiss the action; at the same time plaintiff moved for leave to amend the summons so as to make it in form returnable to that term. The Court allowed the amendment and refused to dismiss, and from this ruling the appeal is taken to this Court.

The appeal presents a single question: Has the Judge the right to make the amendment and proceed with the cause?

The purpose and scope of the new system is to facilitate the trial and disposition of causes upon their merits; and to this end, when necessary, the process and pleadings are liberally reformed by amendments which do not substantially change the claim or defense. C. C. P., Sec. 132.

The power to amend the process in a case, not distinguishable from the present, has been exercised and sustained in *Thomas v. Womack,* 64 N. C., 657. Approving the decision and the reason- (346) ing by which it is supported, we are content to refer to the opinion in that case as an answer to the argument for defendants.

The practice in allowing amendments is liberal, as is manifest in the cases of *Bullard v. Johnson,* 55 N. C., 436, and *S. v. Cauble,* 70 N. C., 62, in each of which a new plaintiff was allowed to be substituted in a warrant issued by a magistrate after it reached the Superior Court by appeal.

In *Bledsoe v. Nixon,* 69 N. C., 81, the plaintiff against whom final judgment had been rendered in this Court, instituted proceedings for a new trial as to one of the issues, upon the ground of newly discovered evidence, and the case came to this Court by appeal. It was held that the action was improperly begun in the Superior Court, yet the Court, treating it as a motion originally made in the Supreme Court, entertained jurisdiction and decided the cause. This current of ruling fully sustains the action of the Judge in permitting an amendment which re-

moved the defect and placed the case properly under the Court's jurisdiction.

It may be suggested that the present case differs from *Thomas v. Womack* in that *here* the exception to the jurisdiction is taken in the answers filed with the Clerk. This feature does not, however, in our opinion, make any essential distinction, nor impair the force of the precedent. The removal to the Superior Court for trial at term time is a necessary consequence of raising this and the other issues of law and fact in the pleadings, and the jurisdiction thus attaching, the Judge had control of the proceedings, and had the power, and, as we think, properly exercised it in correcting the error and retaining the cause.

Affirmed.

Cited: Bank v. McArthur, 82 N. C., 110; *Houston v. Howie,* 84 N. C., 354; *Henderson v. Graham, Id.,* 498; *Capps v. Capps,* 85 N. C., 410; *Reynolds v. Smathers,* 87 N. C., 27; *Epps v. Flowers,* 101 N. C., 160; *Redmond v. Mullenax,* 113 N. C., 510; *McLean v. Breece, Id.,* 393; *Elliot v. Tyson,* 117 N. C., 116; *Eubank v. Turner,* 134 N. C., 80.

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(347)

M. M. PATTON v. A. R. SHIPMAN and another.

Superior Courts—Jurisdiction.

1. Under Rev. Code, ch. 31, sec. 38, the superior courts formerly had jurisdiction of actions upon bonds, etc., where the amount of principal and interest was not less than one hundred dollars, although the principal alone might be.
2. Under C. C. P., sec. 401, an action pending in the superior court at the adoption of the Constitution of 1868, wherein the amount claimed was less than two hundred dollars, was properly transferred to the docket of the superior court under the new judicial organization; such section is not in conflict with Art. IV, sec. 25, of the Constitution.

MOTION to set aside a judgment, heard at Spring Term, 1879, of HENDERSON, before *Gudger, J.*

Upon the facts set out in the opinion, his Honor refused the motion, and the defendant appealed.

Mr. H. G. Ewart for plaintiff.
Messrs. W. W. Jones and *Gray & Stamps* for defendant.

SMITH, C. J. On 6 April, 1867, the plaintiff commenced his action against the defendants by issuing a summons wherein he demands his debt of $69.17 and $100 damages for detaining the same.

The defendants pleaded the general issue, payment and set-off, and on the trial at Fall Term, 1869, of Henderson Superior Court, the jury returned a verdict for the plaintiff, assessing his damages at $167.17, of which $106.11 is principal money.

On April 27, 1878, notice issued and was served on the defendants, reciting the plaintiff's recovery of judgment and requiring them, within twenty days after service, to appear at the Clerk's office (348) and show cause why the plaintiff shall not have execution thereon.

On the hearing before the Clerk on 20 September, 1878, the defendant Thomas Case, against whom alone the plaintiff proceeded, failed to show cause, and leave was granted the plaintiff to sue out his execution against the said defendant for $105.47, with interest on $69.17 from 25 October, 1869, which sum is adjudged to be due and unpaid.

At Spring Term, 1879, after notice, the defendant Case moved the Court to set aside the original judgment, upon the ground of a want of jurisdiction of the cause. The motion was refused, and defendant appealed.

The defendant's counsel insists that the judgment rendered in 1869 is void for two reasons:

1. For that the Superior Court of Law in which the action originated did not then have legal cognizance thereof.

2. For that under the change in our judicial system, the cause should have abated or been transferred to the docket of a Justice of the Peace, and not to the Superior Court, which had no authority to proceed therein.

The first objection is not supported by the facts of the case, and if it were, is untenable in law. The sum claimed in the summons and in the declaration which we must assume to be in harmony with it, brings the action within the jurisdiction of the Superior Court of Law as formerly constituted. "No action shall be originally commenced in any of the said Courts (Superior and County) for any sum less than $100, when the sum sued for is due by bond, promissory note or liquidated account signed by the party to be charged thereby." Rev. Code, Chap. 31, Sec. 38. This clause has been construed to embrace the case where the amount of principal and interest is not less than that sum, although the principal alone may be. *Griffin v. Ing,* 14 N. C., 358; *Birch v. Howell,* 30 N. C., 468. If the want of jurisdiction "appear on the writ or declaration," the action "may be dismissed on motion," and if it do not so appear, the defense is available only by plea in (349) abatement. Rev. Code, Chap. 31, Sec. 38, construed in *Clark v. Cameron,* 26 N. C., 161. The defect does not appear in the writ or declaration; there was no plea to the jurisdiction, and the verdict ascertained the amount due to be in excess of one hundred dollars.

The second objection arising out of the transfer is also untenable. "The Clerks of the Superior Courts, at the request of a party thereto, within six months from the ratification of this act, shall enter on a separate docket, *all suits* which, at the ratification aforesaid, shall have been commenced, and in which final judgment has not been rendered in the late County Courts, Superior Courts of Law and Courts of Equity of their respective counties." C. C. P., Sec. 401. The law is thus explicit and positive in its direction that suits pending in those Courts at the time when they ceased to exist should be transferred at the instance of a party to the Superior Courts formed under the new system, their successors, as was done in the present case. The enactment does not conflict with Section 25, Article IV, of the Constitution, which provides that "actions at law and suits in equity pending when this Constitution shall go into effect, shall be transmitted to the Courts having jurisdiction thereof, without prejudice by reason of the change." The purpose and effect of this constitutional provision are to prevent an abatement of such actions and suits, consequent upon a dissolution of the Courts, by removing them to the dockets of their proper successors, when established under the new judicial organization—those pending in the late Supreme Court to the present Supreme Court; those pending in the former County and Superior Courts of Law and Equity to the Superior Courts of their respective counties; and they have no reference to the Inferior Courts held by a Justice of the Peace, or to proceedings therein.

Such seems to be the intention of those who framed the Consti-
(350) tution, as expressed in the clause, and such is the interpretation implied in the enactment made to give it effect. The Court therefore properly refused the motion to set aside the judgment.

Affirmed.

MARY A. ASKEW v. W. F. BYNUM and others.

Jurisdiction—Assignment of Dower.

1. Petitions for dower should be filed in the county of the husband's last usual residence, but the jury of allotment may assign the same in one or more tracts situate in one or more counties.
2. Proceedings for the assignment of dower instituted and determined in the county of the deceased husband's last residence, are a bar to subsequent proceedings for the same purpose in another county to affect lands therein located.

PETITION for dower, filed before the Clerk of the Superior Court of HERTFORD, and heard on appeal at Chambers, on 19 September, 1878, before *Eure, J.*

A. J. Askew and Mary A., his wife, intermarried in 1843; and in

1874 the husband died, residing at the time of his death on a tract of land of which he was seized, situate in the county of Bertie, leaving him surviving his wife, the plaintiff. The husband, in the year 1869, acquired a title in fee and to a tract of land in the county of Hertford, called the "Bynum Tract," and he continued to be the owner thereof until he conveyed it to W. F. Bynum, J. D. Reddick and wife, Annie C. Bynum and Mary J. Bynum, by deed without the joinder of his wife with privy examination, as required by law.

After the death of the husband, Mary A., the widow, filed her petition in the Probate Court of Bertie County against the heirs- (351) at-law of the husband for the assignment of her dower in the lands of which he died seized in that county; and it was assigned in these lands without taking into consideration the value of the lands in Hertford County, which had been conveyed to the defendants as aforesaid.

After the assignment of dower in the Bertie lands, the widow filed another petition in the Probate Court of Hertford County, praying to have her dower assigned in the lands which her husband had conveyed to the Bynums, and to this petition the heirs-at-law of the husband and the bargainees of the husband were made parties defendant. In the Probate Court of Hertford the parties made a case agreed containing the facts above recited, and submitted the same to the judgment of the Judge of Probate, agreeing that if the widow was entitled in law to be endowed in the Hertford lands, and the Judge of Probate of that county had jurisdiction, judgment might be entered for the assignment thereof and for costs against the defendants; otherwise for defendants and for costs against the plaintiff. The Judge of Probate, on the facts submitted, adjudged that the widow was entitled to have her dower assigned, and ordered that a writ of dower issue, and from this ruling an appeal was taken to the Judge of the Superior Court. And his Honor held that the plaintiff was entitled to have the Hertford tract considered and valued as a part of the husband's lands for the purpose of estimating the quantity of the dower, but the same was to be laid off on the Bertie lands, if sufficient; and if not, then a sufficient quantity to be taken of the Hertford lands to make a full third in value of all the lands; that the bargainees of the husband had the right, as against the heirs, to have dower located on the lands of which the bargainor died seized, in exoneration of the lands conveyed to them. His Honor being further of opinion that the application for dower should be made in the Probate Court of Bertie, adjudged that the proceedings be dismissed at the costs of the plaintiff, and from this judg- (352) ment the appeal is taken.

Messrs. Gilliam & Gatling for plaintiff.

Messrs. D. A. Barnes and *J. B. Batchelor* for defendants.

DILLARD, J. (after stating the case). By act of the General Assembly, ratified 2 March, 1867, the right of dower in this State theretofore attaching only to the lands of which the husband died seized, was enlarged and made to embrace all the lands of which the husband was seized at his death or at any time during the coverture, unless conveyed with a joinder of the wife in the deed, and with the privy examination as prescribed by law. The quantity to be assigned was one-third interest in value of all such lands, with a peremptory direction to include the dwelling-house in which the husband usually resided, and the outhouses and other improvements thereunto belonging. Bat. Rev., Chap. 117, Sec. 2. By Sec. 3, Ch. 118, Revised Code, which,
(353) although not brought forward in Battle's Revisal, according to the construction of this Court in *S. v. Cunningham,* 72 N. C., 469, and other cases, is to be taken as still in force, it is provided that the assignment be made (subject to the restriction to embrace the dwelling-house, etc.), not in every separate tract, but in one body or several, on one or more tracts, having a due regard to the interests of the heirs and the rights of the widow.

Under these provisions of the law, the plaintiff, on the death of her husband in Bertie, was entitled to have dower of one-third in value of the lands in Bertie and Hertford, assignable in part at least in the lands in Bertie, or wholly on that tract, as the jury to be summoned for its assignment might determine, having due regard to the interests of the heirs and purchasers claiming under the husband and the rights of the widow.

2. It is argued, however, that Sec. 2, Ch. 118, Rev. Code, providing for a writ of dower to the Sheriff and giving power to the Sheriff to summon a jury from one, or all, or any of the counties in which the lands were situate, was repealed by the act of 1869, Chap. 93, Sec. 51, on page 213, and that no substitute or other equivalent legislation has been since enacted; therefore it is claimed that no power exists to have dower assigned as formerly under the Revised Code in the case of lands situate in more counties than one, and so it is now necessary to assign dower in each of the counties of one-third in value without taking into the estimate the lands in the other.

We do not think the repeal of said Section 2 was designed to have, or did have, the effect contended for; but was designed merely to change the jurisdiction over the subject of dower from the County and Superior Courts under our old system, to the Clerk acting as Probate Judge under the new system, with adequate power in the Court to decree, and in the Sheriff to execute the decree by a jury to be summoned
(354) by him; and this was effected, in our opinion, by sufficient legislation.

According to this purpose of the Legislature, provision is made, in the same act repealing the second section of Chapter 118 of the Revised Code, for the new jurisdiction of the Clerk and its exercise, and for the execution of its judgment for the recovery of dower by the Sheriff and a jury, just as had been usual under the Revised Code, as follows: The jurisdiction of the subject of dower and the mode of application for its exercise is vested in the Probate Judge and regulated by Section 40, Chapter 93, of the act of 1869, brought forward in Battle's Revisal, Chap. 117, Sec. 9; and the requisites of a petition as regards parties are prescribed in Section 41 of said act, and brought forward in Section 10 of said Chapter 117. As to entering judgment and execution thereon, Titles 9, 10 and 11 of The Code of Civil Procedure are declared applicable in special proceedings by Section 6 of said Chapter 93, brought forward in Section 423 of Chapter 17 of Battle's Revisal; and under the authority of these provisions it was competent for the Judge of Probate to adjudge the right of dower and order its allotment, and to issue an execution or writ of dower conformable to the judgment directed to the Sheriff of the county in which the lands or some part thereof lay; and such Sheriff of executing the same was authorized by Section 42, Chapter 93, of the act of 1869, to be found in Battle's Revisal, Chap. 117, Sec. 11, to summon a jury to meet on the premises, or some part thereof, to allot and lay off dower.

Thus it is, in our opinion, that the Judge of Probate has the jurisdiction to decree, and the Sheriff to whom the performance of the decree is committed has the power to assign dower in one special proceeding, though the lands may be situate in several counties.

3. Our attention has been called to Sec. 4, Ch. 117 of Battle's Revisal, wherein it is enacted that no alienation of the husband (355) shall have any other or further effect than to pass his two-thirds interest in the land conveyed; and it is suggested that this declaration of the statute makes a necessity to allot a third in value of the lands in each county, and takes away the discretion of the jury to assign the whole on the tract on which the husband had his dwelling at his death. It seems to us that said section being passed with reference to dower, is entitled to be construed as merely protective of the widow, so that the bargainee shall hold subject to give way to the extent of a third, at most, or less, as the jury may determine on the actual assignment, and subject thereto, as passing the entire title as against the bargainor and his heirs. We hold that it is no hindrance to the assignment of one-third in value of the whole, altogether on the home tract, or partly on it and partly on another, due regard being had to the interests of the heirs and the rights of the widow.

In our opinion, his Honor was not in error in dismissing the special

proceeding in Hertford on the facts stated in the case agreed. The right of the widow was a third in value of *all the lands* of which the husband was seized at any time during the coverture; and to the petition praying its assignment the statute is peremptory that the heirs, devisees, and other persons in possession of or claiming estates in the lands, shall be made parties. We therefore conclude that the dower was intended to be sought, and must be sought, in but one special proceeding for the purpose.

4. In this case, the plaintiff first instituted her special proceeding in the Probate Court of Bertie, and had her dower therein assigned of one-third in value in that county, and even if she did have the right to bring her action in either county, she thereby made her election, and it was incumbent on her to seek her full dower in respect of the lands in both counties. Not having done so, she ought to be held disabled afterwards to go into the Probate Court of Hertford for a sepa-
(356) rate assignment of dower in a third of the lands lying in that county.

The decree for dower in Bertie standing in full force and unreversed, is conclusive as between the widow and heirs; and in case jurisdiction is exercised in Hertford, it must be for a full allotment in respect of all the lands, and should the jury summoned to assign it lay off a less or different boundary in Bertie from that already laid off, then we will have different quantities assigned around the dwelling-house, and two final decrees adjudging the dower into two Courts, both standing on the record in full force. The Probate Court in Hertford has no power to open or put out of the way the decree and proceedings in the Probate Court of Bertie, and, in our opinion, the plaintiff was properly held to seek her remedy for a full dower by such proceedings in Bertie as she may be advised are suitable and proper, with opportunity to the Bynums to set up their equities, if any they have.

Affirmed.

Cited: Howell v. Parker, 136 N. C., 375; *Harrington v. Harrington,* 142 N. C., 520.

MIBRA GULLEY and others v. E. O. MACY, Admr., and others.

Superior Court—Jurisdiction—Practice—Parties—Married Women—Infants.

1. The superior court in term has jurisdiction of an action to declare a trust in certain real estate and to have title executed to the plaintiff, and also to impeach a sale of the land under a decree of the probate court had in a special proceeding then ended.

2. A decree for the sale of land made in a special proceeding is not conclusive upon a *feme covert* defendant whose husband is not served with process nor otherwise made a party, or obtained leave from the court to proceed without him.

3. A decree in such case is not conclusive upon infant defendants who were not served with process, but who were represented by guardian *ad litem*, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without injury as to the rights of the infant defendants.

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

This action was instituted in the Superior Court to declare void and set aside proceedings in the Probate Court, in which the defendant administrator had obtained a license to sell, and did sell, the real estate of his intestate for assets to pay debts; and also to recover the land sold in pursuance of said proceedings from the other defendants, the purchasers at said sale. The facts necessary to an understanding of the case are stated in the opinion of this Court. His Honor held: 1. That the return of the Sheriff upon the summons in the proceedings by Macy, administrator, was conclusive upon the plaintiff Mibra in this Court, and could not be attacked except by a proceeding for that purpose brought in the Probate Court. 2. That the Probate Court of Wake County had exclusive original jurisdiction and cognizance of any proceeding to have the special proceeding of said administrator declared unauthorized and irregular, and to set aside the same. 3. The failure to serve summons in said special proceeding upon the plaintiff Mibra's husband, the service being upon her alone, did not make the proceeding void as to her. 4. That if *feme* plaintiff could not recover in this action, neither could the infant plaintiffs, upon the case presented by the pleadings and the evidence.

To this ruling the plaintiffs excepted. There was judgment of (358) nonsuit, and the plaintiffs appealed.

Messrs. T. M. Argo and *Lewis & Strong* for plaintiffs.

Messrs. D. G. Fowle, Battle & Mordecai and *G. H. Snow* for defendants.

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DILLARD, J. The case made by the pleadings, in legal substance, is that Thomas C. Nichols, in February, 1863, conveyed the land in controversy to the defendant George W. Thompson, and in a short time went into the army and died, and Mibra, his widow, since then intermarried with George W. Gulley, after the conveyance aforesaid, purchased the said land from Thompson with money furnished her by her father as a separate estate for herself, with remainder in fee to her children, who are co-plaintiffs in this action. She

had no deed executed by Thompson making estates as was designed, but merely had him to surrender the deed made to him by Thomas C. Nichols, which had never been registered, and she thereafter kept the said deed in her possession, and lived on the land with her children, believing that the land belonged to her and them, without any suspicion of its possible liability to pay the debts of Thomas C. Nichols,
(362) and without any knowledge whatsoever of any proceedings had or threatened for that purpose.

It is alleged that matters thus stood until early in 1873, when E. O. Macy, having become administrator on the estate of Thomas C. Nichols, as it is charged, at the procurement of Sol. J. Allen, a near neighbor, who well knew of the equitable title of Mibra and her children, filed his petition in the Probate Court for license to sell the land to pay the debts of Thomas C. Nichols; and it is averred that although the Probate Court had jurisdiction of the subject-matter, yet the proceedings were not such as to give that Court jurisdiction of the persons of Mibra and her children. It is particularly charged that the summons issued in the cause was returned unexecuted on George W. Gulley, with whom by this time Mibra had intermarried, and that no other summons or publication as a substitute therefor was ever issued or made as to him. That the summons was returned served on her the said Mibra, but in truth and fact was not, until after the sale of the land; and as to the infant children, no service was made on them, and having no general guardian, one Whitaker was appointed a guardian *ad litem* before the petition was filed, on the nomination of Macy, the administrator, who had no acquaintance with his wards, and he, without any conference with their friends or inquiry into their case, forthwith accepted service and filed an answer prepared for him by Macy, or by his counsel, assenting to the sale. And it is represented that in the case thus constituted in Court, a sale was decreed and had, sale reported and confirmed, purchase-money paid by Sol. J. Allen, and title executed to him, who purchased and afterwards conveyed a few acres to C. C. High, both having notice of the equitable title of the plaintiffs, and the said Allen having fraudulenty procured the sale to be made, that he might become the purchaser, the whole thing being conducted
(363) through, without any knowledge thereof, it is alleged, by the said Mibra and her children.

Upon the sale coming to the notice of said Mibra, and after everything was done and accomplished under the special proceedings in the Probate Court, she and the said infants, by a regular guardian, instituted this action in the Superior Court, returnable to term. And upon the facts hereinbefore recited, they seek to have a declaration of trust by the Court of the legal title in Thompson, by the deed sur-

rendered by him, which has been registered, and the title executed to them according to their rights respectively, and to impeach the decree and sale in the Probate Court, and have the same held inconclusive, on the ground of the cause not being duly constituted in Court, or, at the least, of preventing an unconscientious use of it by Sol. J. Allen and C. C. High, claiming under him, on the ground of its being contrived and fraudulently procured by arrangement between them and Macy, the administrator, and of the purchase being made with notice of the equitable claims of the plaintiff.

We think the Superior Court had jurisdiction of the action. The purchase of the land from Thompson as a separate estate, with money furnished to Mibra by her father, if true as alleged, entitled her to have legal estates created by a proper deed, to herself for life, remainder to her children. But that not being done, and the deed that was surrendered being since registered, the legal title is now in Thompson, and it is competent to a Court having equitable powers to declare him a trustee, and to decree the execution of title, and at the same time to declare the title of Allen and High null and void, or at the least to adjudge it inoperative from the fraudulent procurement of the sale and a purchaser with notice.

Certainly if no sale had ever been made by decree of the Probate Court, Mibra and her children would have had the right, and could have enforced it, to have had the title executed to them by Thompson. And although a sale has been had, and apparent (364) title acquired under the decree of that Court, still, if the fact be true on which the equity arises, the Superior Court had the jurisdiction by construction to declare the trust and to enforce it, and no other Court had. The Court of Probate may have had the power while things were *in fieri,* and perhaps when ended, by motion in the cause, to set aside the sale and put the parties in *statu quo,* but it had not the power either when the cause was pending nor now that it is ended, to adjudge a trust against a stranger and enforce it, nor adjudge a trust *ex delicto* in Allen and High, if any title is held to be in them.

In the case of *Oliver v. Wiley,* 75 N. C., 320, the action was brought in the Superior Court for an account and settlement, and on the facts set out, there was a necessity to enforce an express trust, and also to declare and enforce some constructive trust arising *ex delicto;* and it was objected that the Probate Court had jurisdiction and not the Superior Court. This Court, in answer to the objection, say: "The Probate Court has no jurisdiction to enforce a trust created by contract and not arising out of the official duty of an executor, or a constructive trust arising out of fraud or the like." And they held "that when the

Superior Court had jurisdiction over one main ground of relief, it is not obliged to dismiss the case, but will go on and give full relief."

In *Dula v. Young,* 70 N. C., 450, the administrators sold a tract of land belonging to their intestate under the decree of the Probate Court, and pending the proceedings, the heirs-at-law sued in the Superior Court to have a trust declared of the legal title to their own use as heirs to their mother, on the ground that the same had been bought with the proceeds of her land, and the title was to have been taken in her name. The Superior Court retained the case and did not dismiss the parties to the Probate Court to assert their claim in the pending special proceedings.

In *Johnson v. Jones,* 75 N. C., 206, the heirs-at-law of John
(365) Turnage, after a decree of sale was had to sell the lands described, brought their suit to enjoin the sale, upon the allegation that the outstanding judgment against the estate in favor of one Grimsley had been confessed by the administrator collusively; and the Court held that the remedy by motion in the cause must be confined to the parties to the cause; and Grimsley being a stranger thereto, they might proceed in the Superior Court by a separate action.

It being thus seen that the Superior Court had a clear ground of jurisdiction, to what end should the parties have been sent to the Probate Court? The relief sought was a declaration of trust as against Thompson, who was not before that Court, or, if the title be held to be in Allen and High as purchasers under the decree, then against them upon the ground of a purchase with notice and upon a collusive arrangement with Macy; and obviously, under the authorities above cited, the Probate Court had not a jurisdiction which extended to the merits of the case, and the Superior Court should have gone on and given relief. It is argued, however, that the decree and sale were in a cause to which Mibra and her infant children were parties, and that the legal operation thereof is to conclude and estop them from the assertion of any title otherwise derived than by descent from Nichols.

Mibra was a married woman at the time the proceedings in the Probate Court were begun, and being so, at law, she was under the disability to be sued except joined with her husband. In equity she could not be sued without having her husband joined, with the exception in case he was out of the country and not capable of being served with process, when the practice was to join him for conformity and proceed by leave of the Court. But under our Code, Sec. 56, the law is mandatory that the husband must be joined, except she may be
plaintiff alone in an action concerning her separate property;
(366) and when the action is between herself and husband, she may sue him and be sued by him. This language is plain and explicit,

and recognizes the common-law idea that the wife's existence is merged in the husband, and that she hath not capacity to protect her own interests, and therefore, within the spirit of the rule, an effort should have been made in the modes prescribed by law to bring him into Court, that is, by summons served or by publication, and on failure in this way to get him before the Court, then perhaps the Court would have allowed the case to proceed without the husband. But it was not so done. The summons issued was returnable at twenty days, and yet was returned before the time. No second or *alias* was ever issued; no publication was ever made; no leave was obtained to proceed without the husband; and in such case, there was not, as it seems to us, such jurisdiction of the person of the said Mibra as to conclude or affect her rights. But, however this may be, there is still the allegation that the return of service by the Sheriff on Mibra is untrue; and if it should so appear on the investigation as a ground of impeachment of the decree, then most clearly the entire proceedings would be void as being had against her without a day in Court. *Rowland v. Perry,* 64 N. C., 578; *Harris v. Jenkins,* 72 N. C., 183; *Doyle v. Brown, Ibid.,* 393; *Stallings v. Gully,* 48 N. C., 304.

As to the infants, the defense that was made for them was nothing more than a defense in name. The law, in its care of the rights of infants, and to the end to protect their lands from being improperly sold on the petitions of administrators to make assets, provides the safeguard of a guardian *ad litem;* and by Chapter 233 of the Acts of 1870-'71, under which the guardian was appointed in this case, in order that the defense made might not be hasty or inconsiderate, it was enacted that the guardian should be served with summons and a copy of the complaint, and at the end of twenty days file his answer, with the provision for the allowance of fee to legal adviser out of (367) the ward's estate.

In this case the allegation is that the guardian was appointed before petition for decree to sell the land was filed, and was a person selected by Macy, without any acquaintance with his wards, and he accepted service as soon as petition was filed, and forthwith filed answer without inquiry into the interests of the wards, which was prepared by Macy or at his instance. And upon the supposition of the truth of the allegation, there was no defense made in the eye of the law, and the purchaser buying under proceedings thus irregular must be held to take subject to the risk of having the sale set aside. *Moore v. Gidney,* 75 N. C., 34.

In our opinion, therefore, the special proceeding being ended, and everything done under it which was intended, and the legal title being in Thompson, and new rights claimed by Allen and High, the action was

properly brought to the Superior Court at term, in analogy to a bill in equity, with the double view to have a declaration of trust of the legal title to the use of plaintiffs, and to vacate and annul by decree all claims of Allen and High as purchasers with notice of plaintiff's equity, and upon an alleged collusion between them and E. O. Macy, the administrator of Nichols.

The judgment of nonsuit is

Reversed.

Cited: Wahab v. Smith, 82 N. C., 233; *S. c.,* 84 N. C., 434; *Kirkman v. Phipps,* 86 N. C., 431; *Gulley v. Macy, Id.,* 721; *Gulley v. Macy,* 89 N. C., 343; *Sparger v. Moore,* 117 N. C., 453; *Carraway v. Lassiter,* 139 N. C., 154; *Rackley v. Roberts,* 147 N. C., 205; *Hughes v. Pritchard,* 153 N. C., 141.

(368)

JOHN T. FINLEY v. J. W. HAYES, Sheriff.

Sheriff—False Return—Action for Penalty—Evidence—Misjoinder of Actions —Demurrer.

1. A mistake of fact as to the date of sale endorsed upon an execution by a sheriff, will not excuse or free him from liability for the penalty for a false return under Battle's Revisal, ch. 106, sec. 15.
2. Nor is a sheriff, who endorses upon an execution an application of the proceeds of a sale different from the actual application, excused from the penalty for a false return although the actual application was proper and the false entry made by mistake or inadvertence.
3. In such case, on the trial of an action for the penalty, when the defendant sheriff offered to introduce in evidence the true returns of the proceeds of sale endorsed upon certain other executions; *Held,* that the evidence was immaterial and properly excluded.
4. An objection to the joinder of different causes of action should be taken advantage of by demurrer; otherwise the objection is waived.

ACTION to recover a penalty for false return under Bat. Rev., Chap. 106, Sec. 15, tried at Spring Term, 1879, of WILKES, before *Schenck, J.*

The defendant, as Sheriff of Wilkes County, had in his hands divers executions against J. O. Martin and Leland Martin, returnable to Spring Term, 1870, of the Superior Court, and amongst them the four executions in favor of the plaintiff described in the complaint, and also one in favor of the State, for $23.15, marked as No. 188, and one in favor of John A. Parks for a large debt, marked No. 107, both of older lien to the executions of the plaintiff; and besides these, there were other executions in his hands returnable to same term, not necessary to be here more particularly described.

The two executions, one in favor of the State and the other in favor of Parks, marked respectively Nos. 188 and 107, were endorsed as levied on the lands of J. O. Martin and Leland Martin "to satisfy sundry executions," and all four of those in favor of plaintiff (369) were endorsed with levies on the same lands and "to satisfy sundry executions."

The two tracts levied on were sold, the J. O. Martin tract on the first Monday in February, 1870, and the Leland Martin tract at the Court in April, 1870; and the Sheriff's return of the sale on the four executions of the plaintiff was the same as to each, and in these words, "Made on the first Monday in February, 1870, by sale of the lands on which this execution had been levied, the sum of $210; retained my fees and applied residue to executions Nos. 107 and 188, said executions having prior liens; no other property belonging to the defendants, J. O. and Leland Martin, found in my county."

The plaintiff's action is brought for the four penalties of $500 each for alleged falsity in the foregoing return endorsed on each of his executions in two particulars: 1. In that the date of the sale was false. 2. In that the application of the money was false. And issues were framed and submitted to the jury as to each particular falsity alleged.

In the course of the trial on the issues to the jury, the plaintiff, amongst other testimony tending to establish the falsity in the return, introduced the returns on the two executions, one in favor of the State and the other in favor of John A. Parks, Nos. 188 and 107, referred to in the return on plaintiff's executions, which, so far as material to this case, are in the following words, to-wit: On No. 188—"Defendant L. Martin's land sold at the court-house in Wilkesboro on 21 April, 1870, for $86, out of which my fees and commissions retained; pay into office on this execution $23.15; the balance of the purchase-money applied on execution No. 107. See return on said execution." On No. 107—"J. O. Martin's land sold and proceeds applied to executions of prior lien, except $2.70, which is allowed me for my fees. Sold the land of L. Martin for $86, the execution creditor being the purchaser." The jury, on the issues submitted, found that the (370) return was false in fact as to the date of the sales of the land, and also as to the application of the proceeds. Judgment for plaintiff, appeal by defendant.

No counsel in this Court for plaintiff.
Mr. G. N. Folk for defendant.

DILLARD, J. On the appeal to this Court the only matter for our consideration is as to the exceptions for evidence excluded, and to the charge of his Honor given and refused on the subject of false returns.

1. The stringent rule has been adopted in this State, that every return untrue in fact is a false return within our statute upon the subject of false returns, although the officer may be mistaken in the matter or insert the fact in his return by inadvertence. *Albright v. Tapscott,* 53 N. C., 473; *Peebles v. Newsom,* 74 N. C., 473. It is immaterial that the officer had no selfish purpose to subserve, or was unmoved by any criminal intent. If in returning to the Court his action under an execution, his return is false in its facts or any of the facts touching the things done under it, he is as well exposed to the penalty of $500 denounced against a false return, as if the false facts were wilfully and corruptly inserted.

In this case, the two tracts of land were certainly sold under the executions, the one on the first Monday in February, and the other at the Court in April; and the return of the defendant of a sale both on the first Monday in February was a mistake, but yet it was a falsehood in the sense of our statute as settled by the Courts, and exposed the party to the penalty.

It was, therefore, not error in his Honor to decline to charge the jury that a mistake of fact as to the date of the sale would (371) not excuse or free the defendant from liability to the penalty sued for.

2. As to the application of the proceeds of sale of the two tracts of lands on which the plaintiff's executions were levied, the return of the Sheriff was that he had applied the same to two executions, one in favor of the State and the other in favor of John A. Parks, numbered respectively 107 and 188, and the jury, in response to an issue as to this matter, found that the return was false.

On examination of the case of appeal and the two executions, Nos. 107 and 188, to which the proceeds of sale according to the Sheriff's return were applied, and the other testimony in the cause, it is evident that the proceeds of sale of one of the tracts was in part applied to execution No. 188, and the residue of that fund and the entire proceeds of the sale of the other tract were not applied to No. 107, but to some other execution of prior lien; and so, as to the fact of application, the return was false in locating the proceeds on the two executions Nos. 107 and 188, by mistake or inadvertence, just as we have said it was in regard to the date of sale. And the defendant can not acquit himself of the penalty for this false fact in his return, any more than he can for that as to the date of the sale.

3. In the course of the trial the defendant claimed that the proceeds of sale not applied to No. 188 were applied to an execution, No. 245, and to others which were returnable to Fall Term, 1869, and he proposed to read them and the returns endorsed thereon in evidence, but the

Court excluded the proof, and the defendant excepted. There was no error, as it seems to us, in the rejection of the proposed evidence. The return of the application to Nos. 107 and 188 being shown to be untrue by the return of the Sheriff on those executions, and conceded to be false in the offer of the rejected evidence, it was immaterial to show the application to other executions; for, even if shown, the false fact returned of application to Nos. 107 and 188 would still remain, and under the rigid rule adopted by our Courts, the liability to (372) penalty would still exist.

4. Besides the exception above disposed of, the defendant, in his answer, made objection to the joinder of counts or causes of action for distinct penalties in the same action. The Court overruled the objection on the ground that the matter was apparent on the complaint, and should have been taken advantage of by demurrer, and not being so done, it was waived. We concur in the ruling of his Honor, and for the reason assigned by him.

It is thus seen that no error is found in the exceptions of the defendant, and so it only remains to affirm the judgment of the Court below, and this we do with reluctance, for it is evident that the untrue facts imputed to the Sheriff's return were without fraud and benefit to him, and without any damage to the plaintiff. The mistake made deprived the plaintiff of no part of the proceeds of the lands sold, as the executions Nos. 107 and 188, having prior lien, were more than sufficient to absorb the entire proceeds; and it is inconceivable how it was that the defendant did not obtain leave to amend his returns so as to acquit himself of all penalty, which no doubt would have been allowed him if he had asked it. It is a very hard case on the defendant, but it is our duty to declare and apply the law as it is.

Affirmed.

Cited: Mining Co. v. Smelting Co., 99 N. C., 463; *Harrell v. Warren,* 100 N. C., 264; *Hall v. Turner,* 111 N. C., 182; *McMillan v. Baxley,* 112 N. C., 588; *Stealman v. Greenwood,* 113 N. C., 358; *Kiger v. Harmon, Id.,* 408; *Campbell v. Smith,* 115 N. C., 499; *Hocutt v. R. R.,* 124 N. C., 216; *Swain v. Phelps,* 125 N. C., 44.

(373)

HARRY SKINNER v. ALLEN WARREN, Sheriff.

Sheriff—Execution Sale—Purchaser.

A sheriff, having executions in his hands in favor of A, B and C, levied on the lands of the debtor, and advertised the same for sale according to law at a regular term of the court. Afterwards, at the request of the debtor, and with the concurrence of the attorney of A and B, he sold the land on another day, without notice to C, and after but two days' advertisement. Said attorney became the purchaser, and, on refusal of the sheriff to make him a deed, obtained from the court below a rule absolute for such conveyance, from which the sheriff appealed: *Held,*

(1) That it is the duty of the sheriff to advertise and sell in such a way as to bring the most money for all the creditors.

(2) That this duty was not discharged by a sale on two days' notice without the knowledge or concurrence of C.

(3) That the purchaser, being implicated in the sheriff's dereliction, was not entitled to call for a conveyance.

RULE on a Sheriff, heard at Spring Term, 1879, of PITT, by *Seymour, J.*

The plaintiff obtained a rule on the defendant Sheriff to show cause why he would not execute a deed to plaintiff for certain lands bought at execution sale. The facts set out in the answer to the rule are substantially embodied in the opinion. Upon the hearing in the Court below, the defendant was ordered to execute the deed. From which judgment the defendant appealed.

Messrs. Gilliam & Gatling for plaintiff.
Mr. W. B. Rodman for defendant.

DILLARD, J. The defendant, in answer to a rule served on him by plaintiff, a purchaser of land at execution sale, to show cause why
(374) he should not be ordered to execute a deed, for cause showed in substance:

1. That he had in his hands at the same time three executions against W. G. Little, one for Vaughan, Barnes & Co., for $86.82, one for Lewis Webb for a sum not mentioned, and one for Weisenfeld, Stern & Co. for $1,109, all returnable to Spring Term, 1879, of the Court, to be holden on the third Monday in March; and under all three he had advertised a sale of the lands of the debtor, except so much as was covered by the homestead, at the court-house at the term of the Court.

2. That after the advertisement of the sale as aforesaid, the debtor, Little, requested the defendant to sell the tract of land claimed by the plaintiff, on the 6th of January instead of at the term of the Court in March, and offered to waive the thirty days' advertisement required by

law, and to give his assent thereto in writing, and the defendant yielded, he avers, upon the spur of the moment and without reflection, not thinking the sale would injure anyone; and accordingly he put up the land to sale on the 6th of January, after it had been advertised but two days; and the same was bid off by the plaintiff, who was counsel of all the plaintiffs in all the executions, except Weisenfeld, Stern & Co.

3. That the land knocked off to the plaintiff was covered, or a portion of it, by the homestead of the debtor, of which he was ignorant at the sale.

4. That the creditor Weisenfeld, Stern & Co. had no notice of the sale on the 6th of January, and never gave any assent thereto.

His Honor held the cause shown insufficient, and ordered the defendant to execute a deed to the plaintiff, from which order the appeal is taken.

The Sheriff, with the three executions in his hands, as the minister of the law, owed obedience to the mandates thereof, and in virtue of the power with which he was clothed thereby, he was authorized to raise the money commanded to be made, by the sale of the real (375) estate of Little, the debtor, guided by the law in the exercise of his powers, and responsible for his acts to the creditors, or the debtor, or to the purchaser. In selling under the executions, it was the duty of the Sheriff to observe the directions of the law in regard to the advertisement of the sale, and the time and place thereof; and in all things so to conduct it as to raise the largest amount of money out of the property. But whilst a literal conformity to the terms and forms prescribed is expected of the Sheriff in the execution of his powers, an exact observance of his official duties is dispensed with as to purchasers, who would never become bidders if they were to be affected by every departure from the strict directions of the law by the Sheriff. And hence it is that on the occasion of a sale of the land of Little on the 6th of January, after but two days' advertisement, the purchaser, if acting *bona fide* himself, would be unaffected by the irregularity of the Sheriff in this or any other respect anterior to the sale. In such a state of things, the deed of the Sheriff to the plaintiff, had he executed one, would have passed the title; or if he had declined to execute one, on a rule on him, no good cause could be shown against a compulsory order on account of such irregularity alone.

But suppose that after legal advertisement made of a sale at the term in March, as was done, the Sheriff, at the instance of Little, the debtor, and on his written waiver of the thirty days' advertisement, put up the land on the 6th of January on but two days' notice instead of thirty, and knocked it down to the plaintiff, and this violation of duty was known to, or could not but have been known to, Vaughan, Barnes &

Co. and Lewis Webb, or the plaintiff, their attorney, while Weisenfeld, Stern & Co. had no notice, as the Sheriff sets forth in his answer, was the fact; then the deed of the Sheriff, if he made one, might avail of course to pass the estate, but it would be liable to be set aside
(376) or held invalid, except for the sum bid, at the suit of Weisenfeld, Stern & Co. *Hill v. Whitfield,* 48 N. C., 120; *Crews v. Bank,* 77 N. C., 110; *Banks v. Banks, Ibid.,* 186.

But in case of a refusal to execute the deed on a sale under the circumstances last supposed, what would be the effect of such an irregularity on a rule against the Sheriff to compel him to make a deed? The contract of sale by and between the Sheriff and the plaintiff as the last and highest bidder on the 6th of January, without doubt conferred reciprocal rights on the parties; on the Sheriff, the right to tender the deed and demand the money, and if not paid, to sue for it; and on the plaintiff as purchaser, to tender the money and demand a deed, and if not executed, to have a rule in the cause on the Sheriff to compel him to make the deed. *Patrick v. Carr,* 60 N. C., 633; *Tate v. Greenlee,* 15 N. C., 149; *Grier v. Yontz,* 50 N. C., 371.

The three execution creditors had all of them an interest in the sale of the land advertised to come off at Court on the third Monday in March, and each of them ought to have had opportunity to be present at the sale and see that it was fair and the price adequate. But the answer to the rule shows that Vaughan, Barnes & Co. and Lewis Webb, or their attorney of record, knew of the change of the time of sale to the 6th of January; whereas, Weisenfeld, Stern & Co., the lien of whose judgment we take it was the junior one, had no notice whatever; and the defendant says he acceded to the arrangement proposed by the debtor without reflection and without its occurring to him that Weisenfeld, Stern & Co. would be injured by it, and therefore for this reason, amongst others, he refused to make the deed.

Taking these facts set out by the Sheriff to be true, and they are not denied by the plaintiff, there was a plain violation of official duty, and it was known to two of the creditors or to their attorney of
(377) record; and therefore they are to be taken as abettors in the breach by the office, to the probable prejudice of Weisenfeld, Stern & Co., who had no notice. And, under the circumstances, it seems to us the Court ought not to uphold the sale and compel the Sheriff to complete by his deed an incipient wrong, into which he thoughtlessly entered.

Ordinarily, if a stranger buy at a Sheriff's sale, he has a right to assume that the Sheriff has done his duty in all things anterior to the sale, and on that basis he has the right to have a deed; and on a rule against the Sheriff, as the officer of the Court, it would be compelled;

but in this case the debtor of presented the remarkable spectacle of wishing his land sold without the legal notice, and in his anxiety gave on the day of sale a written dispensation of the thirty days' advertisement and assented to a sale on but two days' notice, when it was immediately put up and struck off to the plaintiff, the attorney of Vaughan, Barnes & Co. and Lewis Webb, who knew of the change in the day of sale, at the nominal sum of twenty-five dollars.

Under these circumstances, evidently, Little, the debtor, was proposing some advantage to himself, and what that was, we are left to conjecture from the results of the sale which was immediately had. The land was struck off to the plaintiff at an insignificant sum, and the transaction would seem to indicate that the proposed benefit was to accrue through the purchase that was made, and according to previous arrangement. It sufficiently appearing that there was a violation of duty by the Sheriff, and that the same must have been known to the plaintiff, a deed, if made, would be set aside at the suit of Weisenfeld, Stern & Co., for the purpose; or, not being made, will not be coerced by an order of the Court, and ought not to be.

The Sheriff having unitentionally begun an injustice to Weisenfeld, Stern & Co. by a sale of land on two days' advertisement, and without notice to them, ought surely to be allowed to draw back; and no Court ought on a rule to compel him to consummate the (378) wrong, by executing a deed to the purchaser, who knew of and abetted a breach of duty and now claims a benefit under it.

In our opinion, the cause shown by the defendant in answer to the rule served on him was sufficient; and we hold there was error in the judgment of his Honor in requiring the defendant to execute a deed to the plaintiff, and the same is

Reversed.

Cited: *Fox v. Kline,* 85 N. C., 177.

STEPHEN W. ISLER v. KOONCE and others.

Judicial Sale—Right of Purchaser to Possession of Land.

1. A purchaser of land, at a judicial sale made in execution of a deed of trust and under decree in a cause properly constituted in court in which all who had any legal estate in the land were parties, is entitled to recover possession of the land from the heirs-at-law of the grantor, although they were not parties to the action in which the decree of sale was made.
2. In such case the right of the heirs to require a resale and an appropriation of the proceeds in excess of the sum paid to the objects of the trust, interposes no obstacle in the way of the purchaser obtaining possession of the land.

ISLER *v.* KOONCE.

ACTION to recover land, tried at Spring Term, 1879, of JONES, before *Seymour, J.*

The facts constituting the basis of the decision of this Court
(379) are set out in its opinion. Judgment for defendants, appeal by plaintiff.

No counsel in this Court for plaintiff.

Messrs. Green & Stevenson, A. G. Hubbard and *W. H. Bailey* for defendants.

SMITH, C. J. The land in dispute formerly belonged to one J. C. B. Koonce, who, in August, 1857, conveyed it to W. A. Cox and F. S. Smith, in trust to secure certain debts therein recited due to them and others. After the making the deed, Koonce and Smith each died intestate, and Calvin Koonce, one of the secured creditors, on 23 November, 1870, instituted proceedings against Cox, the survivor, and the administrator and heirs-at-law of the deceased trustee, for a foreclosure and sale of the premises. Under a decree therein rendered, the land was sold and, by order of the Court, title made to the plaintiff. The defendants in this action are the widow and some of the heirs-at-law of J. C. B. Koonce, who are in possession, some of whom were parties to the foreclosure suit. Upon these facts, the Court decided that as the heirs of J. C. B. Koonce, to whom his equity of redemption descended, were not parties to the suit, no estate passed to the plaintiff under the commissioner's deed, and he could not recover. It is not necessary to consider the other rulings alleged to be erroneous.

In making the decision, the Court was probably guided by what is said by READE, J., delivering the opinion in *Moore v. Byers,* 65 N. C., 240, and *Tally v. Reid,* 72 N. C., 336. In the first, this language is used: "When land is sold, title retained, bonds for title when money paid, part paid and part unpaid, neither the interest of vendor or vendee can be levied on and sold." And in the latter, the following: "A
Court of Law said you may sell the land. A Court of Equity
(380) said, although you have sold it, you shall not recover it against an equity. And so also the sale was valid at law, yet because of the injunction, it amounted to nothing." * * * "And when the Court is asked for an injunction to sell the real estate, we have to say, we will not grant it, because there is an equity which forbids it, and we will not do a vain thing." These cases properly understood do not warrant the conclusion of the Court.

In *Moore v. Byers,* the testator, James W. Osborne, had contracted to sell a tract of land to J. L. Parks, and died before all the purchase-money was paid. Two creditors, having a joint debt, recovered judg-

ment against the testator in his lifetime and sued out execution. They claimed priority of payment out of the assets of the testator by virtue of a lien on the land. The action was brought by the executor to obtain the advice of the Court as to his administration, and it was in answer to an inquiry as to the priority of the judgment that the expressions quoted was used. The Court held, and so advised, that there was no lien on the unpaid purchase-money, and the lien on the land was displaced by the precedent and higher equity of the vendee to have the land when he had paid for it.

In *Tally v. Reid,* the facts were not dissimilar. The plaintiff, at execution sale, bought the estate of the vendor in land contracted to be sold, and claimed the residue of the money due. His action was to have the land sold and the money raised thereby paid over to him. The Court denied the application for the reason that the Sheriff's deed did not and could not convey the money due for the land, following the former decision.

The equitable estate mentioned in the opinion, and so annexed to the land that the owner can only enjoy the benefits by retaining possession, of which the trustee will not be allowed to deprive him, is not an equity of redemption, nor governed by the same rules. Land conveyed to secure debts is held by the trustee for the creditors first, and (381) next for the owner of the equity of redemption, and the very purpose of the deed is to divest the estate of the debtor and place it beyond his control, where it can be made available for the debts. In such cases, as well as where the vendor retains title as a security for the purchase-money, it has been repeatedly held that the estate of the trustee may be sold under process of law, but the purchaser acquires thereby no right to the money secured. *Blackmer v. Phillips,* 67 N. C., 340; *Stith v. Lookabill,* 71 N. C., 25; *Tally v. Reid,* 74 N. C., 463.

In *Stith v. Lookabill* it was decided that a sale under a *venditioni exponas* of land held by the defendant as trustee and levied on in an attachment, passed the legal estate to the purchaser. So, in *Tally v. Reid* it is held that the vendors retained legal estate, where part of the purchase-money remained unpaid, was liable to execution. Illustrating the effect of such sale upon the legal title and the debt secured thereby, PEARSON, C. J., says: "A conveys land to B in trust to sell and pay certain debts, among others a debt to B. A creditor of B has the land sold under a *fi. fa.* upon a judgment against B. The purchaser at the Sheriff's sale *gets the legal title* by the Sheriff's deed. But does he get the debt due to B, which is secured by the deed in trust? No, for the debt was not sold, and the Sheriff had no power to sell it. Again, A lends money to B and takes his note and a mortgage on land to secure the debt. A creditor of A has the land sold under a *fi. fa.* The pur-

chaser, by the Sheriff's deed, *gets the land,* but does he get the debt secured by the mortgage? No, for the debt was not sold."

These authorities show that the estate vested in a trustee for the benefit of creditors is liable to execution, and by a sale is transferred to the purchaser. It is well established that the trustee (and we see no reason why the same right does not extend to one who succeeds (382) to his estate) may, after default, if not before, recover possession of the land conveyed in an action against the maker of the deed, or anyone claiming title under him. We refer to some of the cases where this is decided. *Fuller v. Wadsworth,* 24 N. C., 263; *Cunningham v. Davis,* 42 N. C., 5; *Butner v. Chaffin,* 61 N. C., 497; *Jones v. Boyd,* 80 N. C., 258.

But the plaintiff's title is under a *judicial sale,* ordered in a cause properly constituted in the Court, and in which all who had any legal estate in the land are parties, and the effect must be to transfer that estate to the purchaser. This is all that is necessary to the plaintiff's recovering possession, which, with damages for withholding it, is alone demanded in the complaint. The failure to make the heirs of the grantor parties to the foreclosure suit and thus conclude them, may give them a right to require a resale and an appropriation of the proceeds in excess of the sum paid by the plaintiff to the objects of the trust, but it interposes no obstacle in the way of his obtaining possession of the land. There is error.

Venire de Novo.

Cited: Isler v. Koonce, 83 N. C., 56; *Williams v. Teachey,* 85 N. C., 405; *Rollins v. Henry,* 86 N. C., 716; *Reeves v. Haynes,* 88 N. C., 311; *Mayo v. Leggett,* 96 N. C., 242.

JOHN G. KING v. ISAAC PORTIS and others.

Foreclosure—Judgment Lien—Registration—Priorities.

A foreclosure sale of land lying in two counties under a mortgage registered in but one, passes title to the land in both, as against a purchaser under a judgment docketed, subsequently to the foreclosure proceedings, in the county where the mortgage was not registered.

PETITION to rehear, filed by defendants at June Term, 1878, and heard at June Term, 1879, of the Supreme Court.

The facts are stated in the same case, 77 N. C., 25. The (383) error assigned is that defendant S. G. Sturgis did not acquire title to the land in controversy by becoming the purchaser at the commissioner's sale, at Louisburg, in Franklin County, on 7 November, 1870.

Mr. J. J. Davis for plaintiff.
Messrs. C. M. Cooke and *Gilliam & Gatling* for defendants.

SMITH, C. J. In the opinion delivered upon the former hearing it is declared that the defendant S. G. Sturgis acquired no title to the part of the land lying in the county of Nash; not by virtue of the sale under the decree, because the mortgage deed was not registered in that county; nor under the Sheriff's sale, which embraces only the land in Franklin County. "We are therefore of opinion," say the Court, "that neither the mortgage nor the judgment was of any effect as against the plaintiff beyond the county in which they were recorded."

We concur fully in this statement of the law, and if the defendants' claim rested on this ground alone, we should not (384) hesitate to affirm the judgment. But we think the conclusion reached results from a misapprehension of the merits of the defendants' case, and that the question of the validity of the mortgage as affecting the land therein described, beyond the limits of the county in which it was registered, is not material to the determination of the cause.

The defendants' title is derived under the judicial sale of the entire tract, of specific and well-defined boundary lines, and the conveyance made under the order of the Court. The estate in all the land was in the mortgagee, or, for want of registration, as against creditors and purchasers, remained in the mortgagor. In one or both the entire title was vested, and both were parties to the action for foreclosure and sale. At the sale, and by the deed, the whole tract was conveyed to the defendant, who purchased with all the interest and estate of each of the parties therein, if the Court had jurisdiction to decree a sale of the part outside the county lines of Franklin. That such authority is possessed is manifest from the provisions of C. C. P., Sec. 66, which declares that actions "for the foreclosure of a mortgage of real property" must be brought and "tried in the county in which the subject of the action, or *some part thereof,* is situated."

The deed executed by direction of the Court is not a "deed of trust or mortgage," effective only against creditors and purchasers from its registration "in the county where the land lieth," but in form and in substance is absolute and unconditional, and when registered passes the estate from the time of delivery, and by relation, from the day of sale.

The defendant thus obtains title to all the land, as well the portion in Nash as that in Franklin, and no estate or interest is left in the debtor to which the lien of the judgment subsequently docketed in the former county could attach; and hence nothing passes under the Sheriff's deed to the plaintiff. If the mortgagor and mortgagee had united

(385) in executing a deed to a stranger, his title would be good against the creditors of the mortgagor. And is the conveyance of the interest of both, under the judicial decree, less comprehensive and operative in its results?

The delayed registration of a deed of trust or mortgage exposes the property meanwhile to the claims of creditors, who may prosecute the same to judgment and execution; but it does not disable the debtor from disposing of the property by a valid conveyance before any lien attaches, nor the Court, in a proceeding to which he is a party, from transferring it by judicial sale. The commissioner's deed having thus divested the mortgagor's estate in the land in Nash, before the docketing the judgment therein, and transferred it to the defendant, the plaintiff could take nothing by his purchase at the execution sale.

This view seems not to have attracted the attention of the Court upon the former argument, and is conclusive of the matter in controversy. This is a proper case to be reviewed, and we readily correct the error pointed out in the former decision. The judgment rendered at June Term, 1877, must be reversed, and judgment now entered according to the case agreed for the defendant, and it is so ordered.

Reversed.

DEBORAH MERRITT v. E. W. SCOTT and wife.

Improvements Upon Land—Life Tenant—Remainderman—Evidence—Rents and Profits.

1. Improvements put on land by a life tenant during his occupancy thereof do not constitute a charge upon the land when it passes to a remainderman.
2. A defendant in possession of land under the belief that he has a good title, has the right to show in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value, to the extent of the rents and profits claimed by the plaintiff. Bat. Rev., ch. 17, sec. 262 (a).
3. Remarks of SMITH, C. J., upon the provisions of the act of assembly in such cases.

(386) ACTION to recover land, tried at Spring Term, 1879, of JONES, before *Seymour, J.*

The case states that it was conceded the plaintiff is entitled to recover the land, and the only question was whether defendant is entitled to the value of certain permanent improvements made upon the land by him; to ascertain which he offered to prove that while in possession of the *locus in quo,* and under the belief that he had a good title, he had made such improvements, and to show their value. The

evidence was excluded, and defendant excepted. The facts appear in the opinion. Verdict for plaintiff, judgment, appeal by defendant.

Messrs. H. R. Bryan, A. G. Hubbard, W. E. Clarke and *F. M. Simmons* for plaintiff.

Messrs. Green & Stevenson for defendant. (387)

SMITH, C. J. The tract of land described in the complaint was, in 1842, conveyed by James Merritt, the owner, to his son John Merritt, in trust for another son, Francis Merritt, for life, remainder to his wife Deborah for life or widowhood, and with a further limitation over at her death or marriage to the children of Francis then living. John Merritt, the trustee, died intestate, leaving children, who, with the said Deborah, are the plaintiffs in this action. The life-tenant, Francis, who is also dead, in his lifetime conveyed his estate to one John Cox, and after his death his administrator, under proceedings in the Probate Court and with license therefor, sold and conveyed the land to the defendant Edward Scott. The object of the suit is to recover the land for the use of said Deborah, and damages for its detention since the death of Francis Merritt.

No issue as to title is made, and in the inquiry before the jury as to the damages, the defendant offered to show in support of the defense set up in his answer, that valuable improvements had been made on the lands both by himself and the preceding occupant, in the erection of useful buildings, and by ditching, fencing and manuring, whereby the value of the land had been greatly enhanced. The evidence, on objection from plaintiff, was excluded, and the exception to this ruling of the Court is the only point presented in the appeal.

Under instructions, the jury assessed the damages from 18, August, 1873, which we suppose to be the date of the determination of the first life estate, at the rate of one hundred dollars per annum. Whether these improvements, or any of them, were made during the years for which the defendant is charged for rent, does not appear.

We think it clear that improvements of any kind put upon land by a life-tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman. He is entitled to (388) the property in its improved state, without deduction for its increased value by reason of good management, or the erection of buildings by the life-tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority.

For subsequent rents and uses he is entitled to have the amount reduced by those improvements. Suppose, while holding over, the de-

fendant had, by such improvements as in the answer are alleged to have been made, rendered the land more valuable, as it comes to the remainderman, would it not be reasonable he should pay a smaller rent than if nothing of the kind had been done? So, if no repairs had been made and the buildings had gone to decay, and by mismanagement and bad cultivation the farm had been abused and its value impaired, a full and larger rent might justly be required of the tenant.

The evidence of such improvements as were made by the defendant after his estate expired, and he became chargeable with rent, ought to have been admitted and considered by the jury in measuring the value of the rent, and in mitigation of damages. The evidence was competent for this purpose only, and not, in case the improvements were worth more than the rents, to constitute a counter-claim for the excess.

The rule is thus stated by Mr. Tyler: "The defendant should be allowed the value of his improvements made in good faith, to the extent of the rents and profits claimed, and this is the view of the subject which is supported by the authorities." Tyler on Eject., 849.

Referring to the action for mesne profits which might be brought after a recovery in ejectment, RUFFIN, C. J., uses this language: "The jury can make fair allowance out of the rents, *and to their extent,* (389) for permanent improvements honestly made by the defendant, and actually enjoyed by the plaintiff, taking into consideration all the circumstances." *Dowd v. Faucett,* 15 N. C., 92.

Thus far the jury should have been allowed to hear and consider the evidence, in assessing the sum which the defendant should pay for the use of the premises, for it is quite apparent the improvements were made in good faith and will inure to the plaintiff's benefit.

As a counter-claim, and to charge the land therewith when the estate in remainder is vested in Deborah, the evidence is totally inadmissible under the act of 8 February, 1872. Bat. Rev., Chap. 17, Sec. 262 (a), and the sections following. The act is not applicable to a case like this, but to independent and adversary claims of title, and was intended to introduce a just and reasonable rule in regard to them.

The owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, *the increased* value he ought not to take without some compensation to the other. This obvious equity is established by the act. But to enjoy its benefits, a party, after judgment, must file his petition and ask to be allowed for his permanent improvements, "over and above the value of the use and occupation of such land."

If the Court is satisfied of the probable truth of the allegation, and

the case is one to which the statute applies, and this must be preliminarily determined, it may suspend execution and cause a jury to be impaneled "to assess the damages of the plaintiff and the allowance to the defendant" for his permanent improvements, "over and above the value of the use and occupation of the land."

This course has not been pursued, and the evidence is offered in the trial without any previous application to the Judge, or his assent being obtained. But, waiving the informality, we are not (390) prepared to say the Judge was in error in disallowing the evidence for the purpose of establishing a counter-claim for the excess. The defendant is entitled to have his claim for improvements made since the expiration of his own estate considered by the jury in estimating the value of the rents, under appropriate instructions from the Court in relation thereto. For this error in wholly rejecting the evidence, there must be a

Venire de novo.

Cited: Dunn v. Bagby, 88 N. C., 94; *Condry v. Cheshire, Ib.,* 378; *Barker v. Owen,* 93 N. C., 202; *Justice v. Baxter, Id.,* 410; *R. R. v. McCaskill,* 98 N. C., 535; *Hallyburton v. Slagle,* 132 N. C., 959; *Faison v. Kelly,* 149 N. C., 285; *Whitfield v. Boyd,* 158 N. C., 453; *Gann v. Spencer,* 167 N. C., 432.

THOMAS J. MERONEY v. JOHN L. WRIGHT.

Landlord and Tenant—Lease—Rent.

A summary proceeding in ejectment under the landlord and tenant act begun during the lessee's term can not be maintained where the contract of lease contained no condition, the breach of which would authorize a reëntry by the lessor. The mere failure to pay rent upon "a lease at .....dollars a year, payable monthly," does not warrant such reëntry.

PROCEEDING under the Landlord and Tenant Act, tried on appeal at Spring Term, 1879, of ROWAN, before *Schenck, J.*

Upon the facts set out in the opinion, the Court below intimated that the plaintiff could not recover, and he thereupon took a nonsuit and appealed.

Messrs. J. M. McCorkle and *W. H. Bailey* for plaintiff.

No counsel in this Court for the defendant.

DILLARD, J. This was a summary action in ejectment, be- (391) gun in a Justice's Court on 1 January, 1878, and appealed thence to the Superior Court.

On the trial in the Superior Court, the plaintiff proved by himself

that he acquired the land in controversy in September, 1877, and that in a short time thereafter the defendant, then in possession and claiming under one McEntyre, agreed to hold of him and pay him —— dollars a year for rent, payable monthly, and rested his case. Thereupon his Honor intimated that the lease had not expired before the suit was instituted, and there being no testimony of any condition or stipulation on which it was determinable short of a year, the plaintiff could not recover, and in deference to this opinion the plaintiff took a nonsuit and appealed.

A lease for years is a contract for the enjoyment of one's land by another, at an agreed rent, payable at the end of the year, or monthly, or otherwise as may be agreed on, for a certain determinate period of time; and the contract made vests an interest in the term immediately and on entry by the lessee it vests in him the possession. The tenant then has an estate, and may maintain ejectment or trespass *quare clausum* against his landlord or any other person who unlawfully and against his consent enters on the premises.

When a tenancy is thus created, the term will expire by the affluxion of the definite time agreed on for its duration, or if it be such as to be construed a tenancy from year to year, it can only end by a notice to quit according to the act of Assembly on that subject, and if not ended in one of these ways, it can be determined short of the specified duration only by some act done or omitted by which, according to the stipulations of the lease, the estate of the lessee ceases.

The statute under which this action was instituted, recognizes the duration of a term of years and the modes of its termination as above described, and in so many words confers jurisdiction on a Justice of the Peace over the subject of land in only two cases: 1. Whenever (392) a tenant in possession of real estate holds after his term has expired. 2. When the tenant, lessee, or other person under him, has done or omitted any act by which, according to the stipulation of the lease, his estate has ceased. Bat. Rev., Chap. 64, Sec. 19.

Under the case made by the plaintiff, on his own oath, the lease was made in September, 1877, "at —— dollars a year," and taking its commencement to be from the day of the contract, its duration, if construed to be a lease for a year, would extend to a corresponding day in 1878; or if construed to be a lease from year to year, it would continue until put an end to at the end of the current year by a six months' notice to quit. And so, in either view of the lease between these parties, the suit was instituted before the term had expired, and the action could not be maintained, as intimated by his Honor, unless, in the language of the statute, some act was done or omitted by which, according to the stipulation of the lease, the estate of the lessee was made to cease.

The contract, as deposed to by the plaintiff, contained no stipulation as to any act done or omitted which authorized a re-entry by the lessor, or itself limited, and put an end to the term. It was a lease at —— dollars a year, payable monthly, and at most, in legal effect, that only referred to the mode and time of payment, and did not make the lease cease or enable the plaintiff to make it cease. If the lease had been upon a rent agreed on and payable at the end of a year, confessedly, the lease would not have been expired when the suit was brought, and there is no difference in the stipulation to pay monthly, except that the rent by the contract was payable in instalments, and at the end of each month, instead of altogether and at one time.

There is no reason in the nature of the thing why a refusal to pay the rent demanded to plaintiff should work any other liability than rests on any debtor on his failure or refusal to pay his creditor. The plaintiff, on the refusal, had the right to have action against (393) the defendant and coerce the payments *toties quoties* they were not paid, and that is all that the contract established by him imports.

To maintain this action for the recovery of the land on the mere refusal to pay a monthly instalment, the contract of lease should have contained the stipulations provided for in the statute under which the summary proceeding was begun. Not the failure to pay any month's instalment should have the effect to put an end to the estate or term, and the plaintiff not stipulating for any proviso or condition in the lease whereby the estate of the tenant was to cease, the Court was not authorized to adjudge the *cesser* of defendant's term. 4 Kent, 106; and Arch. Land. and Tenant, 161.

We concur, therefore, in the opinion of his Honor that plaintiff's action was brought before the expiration of defendant's term, and that there was no stipulation in the lease by which his estate was made to cease earlier.

Affirmed.

Cited: Meroney v. Wright, 84 N. C., 337; *Simmons v. Jarman,* 122 N. C., 198; *Product Co. v. Dunn,* 142 N. C., 473.

JORDAN HILL and others v. DANIEL OVERTON and another.

Action for Land—Adverse Possession—Burnt Records—Grant, Presumption of.

1. Where in an action to recover land the plaintiff showed title out of the State by a thirty years' possession, and, without producing any paper title, relied upon section 8, chapter 14, of Battle's Revisal, concerning "burnt records": *It was held,* that this statute did not make it neces-

sary for the plaintiff to show a seven years' adverse possession *in addition* to the thirty years to entitle him to recover.

2. In such case the lapse of seven years' adverse possession concurrently with the thirty years necessary to raise the presumption of a grant, is sufficient.

(394)

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

This action was brought against David Overton and John Hall to recover possession of a tract of land. The case states: The plaintiffs claimed as heirs of their mother. It appeared from the evidence that since said land went out of the possession of plaintiffs ancestor, it was divided into two distinct tracts, and that the defendants went into possession of their respective tracts at different times and under deeds from different grantors, and that they claimed no interest each in the other's part. Thereupon, the Court held that the action could not be maintained against the defendants jointly, but that two separate actions should have been brought. Upon this intimation the plaintiffs took a nonsuit as to Overton, and appealed.

The plaintiffs then proceeded with the case against Hall, and introduced evidence tending to show possession under known and visible boundaries by the plaintiffs' ancestor and those under whom she claimed for a period of time sufficient to take the title out of the State, when the Court held that as the plaintiffs introduced no paper title, but relied upon Sec. 8, Ch. 14, Battle's Revisal, they must show such possession for seven years, in addition to the time necessary to show title out of the State; and thereupon the plaintiffs took a nonsuit as to Hall, and appealed.

Messrs. Gilliam & Gatling for plaintiffs.

No counsel in this Court for defendants.

DILLARD, J. The case shown on the transcript sent up to this Court is that plaintiffs having introduced evidence tending to prove

(395) possession in their ancestor and those under whom they claimed for a period of time sufficient to take the title out of the State, his Honor held that, as they showed no paper title, but relied on Section 8, Chapter 14, of Battle's Revisal, they must show an adverse possession for seven years in addition to the time necessary to afford a presumption of a grant.

It is well settled in this State that in an action under the general law to recover land upon the title, the claimant, having shown a grant by presumption from a long possession under different tenants, fixed by judicial decision at thirty years, must go on, in order to perfect his right, and show an adverse possession for seven years with color

of title, barring all remedy of the supposed grantee and others; or derive a title by presumption of all necessary mesne conveyances on a twenty years' possession without color. *Seawell v. Bunch,* 51 N. C., 195; *Taylor v. Gooch,* 48 N. C., 467.

This proof the plaintiffs were obliged to make by producing in evidence a deed under which the adverse possession for seven years was had, but the seven years was not required to be a time additional to the thirty years on which the presumption of a grant from the State would arise, but might be a part of the thirty years. Proof of possession for thirty years and more, during which the State by her agents failed to interfere, barred her; and proof of adverse possession for seven years under color of title barred the presumed grantee, and any and all persons free from disability.

This point of the sufficiency of a seven years' adverse possession as part of the thirty years on which presumption of title out of the State arises, is not an open one in this State. In *Davis v. McArthur,* 78 N. C., 357, the facts were that plaintiff's ancestor and those under whom he claimed had had adverse possession for thirty-three years, and during the last nine years of the time the plaintiff's ancester was in possession under a deed; and this Court held that the title was out of the State by presumption, and on the nine years' possession, part of the thirty-three, by the ancestor of the plaintiff, if vested in him (396) and became a perfect title by force of the statute of limitations.

Clearly, therefore, the lapse of seven years of adverse possession concurrently with the thirty years necessary to raise a presumption of title out of the State, was a sufficient title under our general law on which successfully to maintain or defend an action for the recovery of real property.

It is said, however, in the case of appeal, that the plaintiffs relied, on the trial, on Sec. 8, Ch. 14, Battle's Revisal, which is entitled "Burnt and lost records and other papers," and which, in substance, provides that every person in possession of land, claiming and using it as his own for the space of seven years under known boundaries, the title being out of the State, shall be deemed to have been lawfully possessed under color of title of such estate as has been claimed by him during his possession, although he may exhibit no deed.

The question is, does this statute alter the case and make it necessary, after proving title out of the State on a thirty years' possession in the different tenants, to show the seven years' possession spoken of in addition to the thirty years? We think not. The statute referred to was passed to relieve parties against the destruction of their title papers by fire or otherwise, and to facilitate them in the maintenance of actions respecting their lands Accordingly, the title being proved out of the

State by grant, actual or presumed, the statute gives to a possession for seven years under claim of right without color the same efficacy in constituting a good title under the statute of limitations, as the like possession with color of title has under the law where there has been no destruction by fire.

If the ruling of his Honor be correct, then a party unable to produce his color of title by the accident of fire has to prove a seven years' possession in addition to the thirty years, which presumes the (397) title out of the State; whereas, a party able to show forth in evidence his color of title may perfect his title by a possession inside of the thirty years. It seems to us such a result was not intended, and that the words of the section do not require such a construction, and we therefore hold that his Honor was in error in his ruling on this point.

The action was brought against Overton as well as Hall, and on the trial his Honor intimated that the same could not be maintained against the two jointly, and upon this intimation the plaintiffs, as the transcript recites, took a nonsuit, by which we understand was meant that they entered a *nol. pros.* as to Overton. Thus understanding the record, the appeal brings up no question for our review as to Overton, and we don ot, therefore, express any opinions as to the power of joinder of the two defendants in the action. In our opinion, his Honor erred on the trial as to Hall, in ruling a seven years' possession to be necessary in the plaintiffs, or those they represent, in addition to the time required for the presumption of a grant before they can recover.

Error.

Cited: *Grant v. Burgwyn,* 84 N. C., 565; *Bank v. Stewart,* 93 N. C., 403; *Pearson v. Simmons,* 98 N. C., 283; *Bryan v. Spivey,* 109 N. C., 67; *Weeks v. McPhail,* 128 N. C., 136.

JESSE YATES v. ROBERT YATES and wife.

Action to Recover Land—Estoppel—Former Action—Parol Evidence.

1. Whenever the record of a trial in a former action is pleaded as an estoppel in a subsequent action, and such record fails to disclose the precise points on which the first action was decided, it is competent to the party pleading it to aver the identity of the point or question on which the decision was had and to support it by proof; and the same, (398) if proved, is equally conclusive as if the same matter appeared of record.
2. In such case, averments and parol proof may be resorted to in support of a record whenever the verdict and judgment are vague, with this

limitation only, that it should be such as to show the question of fact decided in the first action and its materiality, with such precision as to indicate clearly that it was material and must have been passed on by the jury.

2. In an action to recover land, where the defendant pleaded as an estoppel the verdict and judgment in a former action wherein the plaintiff sought to recover of the defendant the possession of the land in question and claimed title under a deed to him from Y., which defendant assailed as a forgery, and the jury found against the plaintiff's right of possession: *Held*, that the question of the validity of the deed was, in a legal sense, of the substance of the issue, and the verdict of the jury was the same thing as deciding adversely to title in the plaintiff, and that the plaintiff was thereby estopped.

ACTION to recover land, tried at Spring Term, 1879, of WILKES, before *Schenck, J.*

The case was tried upon the pleadings, the nature of which is embodied in the opinion. Judgment for the defendants, appeal by plaintiff.

Messrs. G. N. Folk and *D. G. Fowle* for plaintiff.

No counsel in this Court for defendants.

DILLARD, J. In this action the plaintiff seeks to recover land on a claim of ownership and title in himself, and the defendants depend on two grounds:

1st. They deny title in the plaintiff and aver title in themselves; and 2d, they show forth, by way of special plea as an estoppel, that the plaintiff, before the institution of the present action, had a suit against them to recover the possession of the same land, which was defended on the denial of the right of possession in the plaintiff and on the averment of title in themselves, and that on the trial the plaintiff, as part of his claim of title, introduced in evidence a (399) deed to him from one John Yates, under which he claimed title, which defendants assailed as a forgery and inoperative to pass any right of possession to plaintiff, and an issue or point was then raised as to the validity of said deed; that on the trial of the issue to the jury as to the right of possession both sides adduced proof as to the execution and validity of said deed on which the issue turned, and in response the jury returned a verdict negativing the alleged right of the plaintiff to the possession; and besides these facts, on the record of the former action made part of the plea, identity of parties and subject-matter of action and sameness of issue or point in contest is averred in the plea; and it is alleged that plaintiff now has no other ground on which he claims title than under the said deed of John Yates, which was assailed and found against by the jury in the former action.

The plaintiff demurred to this special defense of the defendants, on the ground that it does not appear from the record of the former action, made part of the plea, that any issue was made and passed on as to whether said deed from John Yates was a forgery or not, and that on the pleadings alleging a right of possession in the plaintiff and denial thereof, together with a title in the defendants, nothing did or could appear on said record by way of issue as to the validity of said deed except by way of argument.

On the hearing of the demurrer, his Honor held that it appeared from the record, vouched in the plea, that the defendants admitted possession and put their defense solely on their own title, and a verdict being rendered in favor of defendants, his Honor adjudged that the demurrer be sustained, and that defendants go without day and recover costs, and from this judgment the appeal is taken.

1. The question for our determination raised by the demurrer is, whether in law the facts contained in the record of the first action and the averments in the plea of the point on which that action
(400) was decided, and if the identity thereof, as well as of the parties and subjectmatter of the action, with the same matters in the present action, do or do not conclude and estop the plaintiff from having and maintaining this action.

A verdict and judgment directly upon the point in issue is as a plea, a bar, or as evidence, conclusive upon the same matter directly in question in another suit, not extending to any matter coming collaterally or incidentally in question, or inferred by way of argument. Duchess of Kingston's case, 2 Smith's Leading Cases, 424.

This became a rule, and is enforced in the Courts upon the idea that when a point or question is once litigated and decided by a verdict and judgment, it was justice to the parties and good policy that the same should not again be drawn into contest in a subsequent suit between the same parties. And to give effect and application to the principle, the rules of pleading required it to be availed of by plea of the judgment as a bar, or estoppel, or as evidence on the general issue. And anciently, under the system of pleading conducive to the end of ascertaining and preserving in a permanent form the material issues and the adjudication thereof, it was held that the record should not estop, unless it showed on its face that the very point sought to be kept from a second contest was distinctly presented by an issue and expressly found by a jury.

A system of pleading more general and loose having been adopted and allowed at this day, but little of the ancient certainty of allegation and denial is now required; and hence it is difficult, if not impossible, to ascertain the subject-matter of a controversy and the precise points made and decided by a mere inspection of the record, as formerly; and

therefore it grew to be the rule that it was not necessary that the record should show definitely the precise point or question upon which the right of a plaintiff to recover, or the validity of a defense depended, but only that the same matter might have been litigated (401) and decided, and that extrinsic evidence might be admitted to define what the question was, its materiality, and its decision by the jury. *Young v. Black,* 7 Cranch, 565; *Packet Co. v. Sickles,* 24 How., 333; *Wood v. Jackson,* 8 Wend., 9; *Eastman v. Cooper,* 15 Pick., 276; 1 Greenl. Ev., Sec. 531.

The rule of the admissibility of parol testimony in support of the plea of estoppel to show what was the material point, and its decision in a former action, generally prevails at this day; and although not expressly sanctioned and adopted, it has never been repudiated by our Courts. On the contrary, in an action for detinue for slaves on the plea of *non detinet,* the record showed a verdict for defendant, and on a subsequent action being brought by and against the same parties and for the same negroes, the plea of former verdict and judgment was interposed as an estoppel, with averment and proof of the identity of the cause of action, parties and title, as a ground of recovery in each action. This Court, though deciding the case against the plea, held that the question of the admissibility of proof, that the same point had been insisted upon and passed upon on the first trial, was an unsettled question, and they did not go into it, but dismissed the point with the remark that if the record can be aided by averments and parol evidence, it could only be when the issue and verdict were such as to indicate that the alleged issue and decision in the first action must have been directly in question, and the verdict rendered on the same, and no other ground. *Long v. Baugas,* 24 N. C., 290.

In *Falls v. Gamble,* 66 N. C., 455, the action was to recover land, the plaintiff and defendant both claiming under one Morrow, and the defendant pleaded as an estoppel the record of a former recovery by him against Morrow, in a suit wherein the point on which the case turned was as to the infancy of Morrow at the making of the deed to Gamble, and whilst the record did not show the point (402) on which the first case was decided, evidence was received to show it was the same point as in the second one; and this Court, on the appeal, laid no stress on the competency or incompetency of the parol proof in aid of the record as to the point decided, but decided the case on the ground that Falls was not a privy of record to Morrow, and therefore was not affected by the estoppel.

The point appears to be an open one in this State, but it is believed that the prevailing doctrine is that whenever the record of the first trial fails to disclose the precise point on which it was decided, it is

competent to the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof; and the same, if proved, is equally conclusive as if the same matter appeared of record. Such was the rule in New York as to the admissibility of averments and proof in aid of a record pleaded as an estoppel when the case of *Long v. Baugas, supra,* was before this Court, and it is the recognized rule by many decisions in that State. *Bert v. Sternburg,* 4 Cowen, 559; *Doty v. Brown,* 4 Comst., 71; *Lawrence v. Hunt,* 10 Wend., 89; *Gardner v. Buckbea,* 3 Cowen, 120; and many cases cited in Hare and Wallace's note to Duchess of Kingston's case, 2 Smith's Leading Cases, 874. It is also received as legitimate generally in the States of the American Union, as cited in notes of Hare and Wallace to Duchess of Kingston's case, *supra.* In the United States Courts, in the case of *Miles v. Caldwell,* 2 Wall., 36, it was decided that where the issue in the former trial relied on as an estoppel is so vague on the record as not to show precisely what questions of fact were before the jury, and necessarily passed on by them, parol proof might be given to show them; and the principle of that case has been approved in *Aurora City v. West,* 7 Wall., 72 and in many other decisions of that Court.

From these authorities it seems to us that averment and parol (403) proof may be resorted to in support of a record whenever the verdict and judgment are vague, with this limitation only, that it should be such as to show the question of fact decided in the first action, and its materiality, with such precision as to indicate clearly, as expressed in *Long v. Baugas, supra,* that it was material and must have been passed on by the jury.

This conclusion at which we have arrived is not in conflict with *Rogers v. Ratcliff,* 48 N. C., 225, to which our attention was called, or any other case in our Reports, as we understand it. In that case, the pleas were general issue and *liberum tenementum* to the first action of trespass, and the finding of the jury was general, and on the plea of the record it did not indicate the point or plea on which the case turned, and the plea in the second action of the record being as a bar or a strict estoppel and no averments made in aid, it was held of course as not concluding from maintaining the second action. How it would have been if the plea of estoppel had set forth the record and averred that the first trial was on evidence adduced under the plea of *liberum tenementum,* does not appear, but most likely in harmony with the rule generally prevailing, as shown above.

2. It being thus seen that a verdict and judgment upon a matter in issue are of themselves conclusive as a bar when the identity of the issue is apparent on the record, or that the same may become equally con-

clusive on averment of the issue actually tried and found by the jury, it remains to consider and determine the nature and kind of issue on which the first action between these parties was tried.

The plaintiff, on inspection of the record, sought to recover the possession and the defendants, in answer, admitted possession and averred title in themselves, and thereby in legal effect it was a controversy on the title as carrying the incident of the right of possession, and such being the precise point on which the first action depended, the deed of John Yates to the plaintiff was a material and necessary (404) element and constituent of title, without which he could not have a right of possession as against the defendants; and the validity of the same being assailed, it became in a legal sense of the substance of the issue. The jury having, on the issue put to them, negatived the right of possession in the plaintiff, it was the same thing as deciding adversely to title in the plaintiff, and so it probably became *res adjudicata,* as his Honor regarded it in the Court below. But if under the particular form of the issue as to the right of possession the verdict be regarded as indefinite and not pointing out the ground on which the jury proceeded, still, as we have seen, it was admissible to make averment of the point investigated and passed upon; and in this case the defendant did that thing.

The plaintiff having demurred to the special defense set up by defendants, instead of taking issue on the averment of separate facts therein contained, in legal effect, admits not only the record of the facts, but all the allegations of the plea as to identity of the points in actual contest with those controverted in the present action, and as to a claim of the right of possession under the assailed deed of John Yates and no other, precisely as in the former action, and on the basis of the truth of these facts it seems to us that the defense set up was in law as sufficient to bar the action of the plaintiff as if on a traverse they had been found true by a jury.

Affirmed.

Cited: Crump v. Thomas, 85 N. C., 275; *Davis v. Higgins,* 87 N. C., 300; *Bryan v. Malloy,* 90 N. C., 513; *Anderson v. Rainey,* 100 N. C., 338; *McElwee v. Blackwell,* 101 N. C., 196; *Bickett v. Nash, Id.,* 583; *Harrison v. Hoff,* 102 N. C., 128; *Blackwell v. Dibbrell,* 103 N. C., 275; *Baker v. Garris,* 108 N. C., 228; *Jones v. Beaman,* 117 N. C., 263; *Lumber Co. v. Lumber Co.,* 140 N. C., 442; *Person v. Roberts,* 159 N. C., 173; *In re Lloyd,* 161 N. C., 560; *Clothing Co. v. Hay,* 163 N. C., 499; *Whitaker v. Garren,* 167 N. C., 662.

(405) STEPHEN HENLEY v. J. C. WILSON and others.

Color of Title—Description of Land—Judge's Charge—Trespass on Land—Plaintiff Contributing to Enhance Injury.

1. When on the trial below the court charged that a will devising "all my lands on both sides of Haw River, in Chatham County, and all the mills and appurtenances and improvements thereto, said property being known as the McClennahan Mills," was color of title, provided the jury found that the tract of land was well known throughout the county by the name used in the will, and its metes and bounds were all ascertained, visible and known, and that the plaintiff and those under whom he claims have been in actual adverse possession, etc.; *Held*, not to be error.
2. *Held further*, that in such case, the qualification in the charge "provided the jury find that the tract of land was well known throughout the county by the name used in the will," was unnecessary.
3. In an action for damages for trespass upon land, the fact that the plaintiff contributed to enhance the injury occasioned by the wrongful act of the defendant does not excuse the defendant, although it may go in mitigation of damages.

ACTION for damages for trespass on land, tried at Fall Term, 1878, of CHATHAM, before *Kerr, J.*

The facts are stated in the opinion. Judgment for plaintiff, appeal by defendant. See same case, 77 N. C., 216.

Messrs. John Manning and *J. B. Batchelor* for plaintiff.
Messrs. J. M. Moring and *E. S. Parker* for defendants.

ASHE, J. The plaintiff and defendants both claim title to the land in dispute from H. J. Stone. The plaintiff, in support of his title, offered in evidence the following deeds: A deed from H. J. Stone to (406) one McClennahan, bearing date 9 November, 1848; a deed from Stone to plaintiff, dated 19 March, 1877; and a deed from McClennahan to Mary Taylor, dated 24 May, 1852; and introduced in evidence the last will and testament of Mary Taylor, in which was a devise to W. P. Taylor and John W. Taylor, as follows: "I give to my son William P. Taylor and my grandson John W. Taylor, to them and their heirs, all my land on both sides of Haw River, in Chatham County, and all the mills and appurtenances and improvements belonging thereto, said property being known as the McClennahan Mills"; and mesne conveyances from W. P. and J. W. Taylor down to the plaintiff.

The plaintiff then offered evidence showing that Mrs. Mary Taylor and McClennahan both died in the year 1859; that the tract of land in controversy was known throughout the county as the "McClennahan Mills tract"; that its metes and bounds were well known and visible; that the plaintiff and those under whom he claimed had been in the adverse possession of the same from the 9th of November, 1848, until the institution of this action; and offered proof as to the damages.

The defendants insisted that the deed from McClennahan to Mrs. Mary Taylor, and the devise in her will to W. P. and J. W. Taylor, were too indefinite to operate as color of title, and asked his Honor so to charge. They then introduced evidence to show that there were certain sluices making across the island below the dams of the plaintiff, and that the plaintiff, by damming these sluices, had contributed to his own injury. His Honor refused to give the instruction, and the defendants excepted.

The Court then charged the jury that supposing the deed from McClennahan to Mary Taylor was too indefinite in the boundaries, still the devise in the will of Mary Taylor was color of title, provided that they should find that the tract of land was well known throughout the county by the name used in the will, and its metes and bounds (407) were all ascertained, visible and known, and that the plaintiff and those under whom he claims had been in the actual adverse possession of the tract of land up to these boundaries for seven years from the death of Mary Taylor, excluding the time from 20 May, 1861, to 1 January, 1870.

The Court further charged the jury that the doctrine of contributory negligence did not apply to this case.

Of the several issues submitted to the jury, only the fifth, seventh and eighth are material to our inquiry in the view we take of the case; for the only question for our consideration are, whether the will of Mrs. Taylor is color of title, and whether the doctrine of contributory negligence applies to the case. [The issues alluded to are, 5: "Has Henly and those under whom he claims been in continuous adverse possession, by known metes and bounds, of the land in dispute under color of title, seven years next preceding 25 July, 1876?" Ans.: "We find they have been." 7. "Did the defendants trespass upon the plaintiff's land?" Ans.: "We find that they did." 8. "If so, what is the damage?" Ans.: "One Penny."]

We think there was no error in the instructions given by his Honor, "that the will of Mary Taylor was color of title," with the qualifications superadded. The jury did not respond to this instruction in so many words, but they did respond affirmatively to the fifth issue, which was intended to cover the instruction by finding that the plaintiff, and those under whom he claims, had been in the continuous adverse possession, by known metes and bounds, of the land in dispute *under color of title* for seven years next preceding 25 July, 1876. And when they found the plaintiff held *under color of title,* under the instructions of the Court, it was equivalent to finding, that the land was well known by the name used in the will; and when they also found that its metes and bounds were all ascertained, visible and known, the qualifications

(408) in the charge were fully met. That there was no error in the instructions given to the jury upon this point, we refer to the case of *Smith v. Low,* 24 N. C., 457, where the question was, whether the description of the land levied upon as "the home place," "the Lynn place," "the Leonard Greeson place," was sufficient. The Court held it was, and Chief Justice RUFFIN, who delivered the opinion, said: "The name of a place, like that of a man, may and does serve to identify it to the apprehension of more persons than a description by coterminous lands and watercourses, and with equal certainty. For example, 'Mount Vernon, the late residence of General Washington,' is better known by that name than by a description of it, as situate on the Potomac River and adjoining the lands of A, B and C. Frequently, indeed, the name of a place by which it is well known to those who know it at all overrules a further and mistaken description." To the same effect is *Simmons v. Spruill,* 56 N. C., 9. See, also, *Moses v. Peak,* 48 N. C., 520; *Proctor v. Pool,* 15 N. C., 370; *Ritter v. Barrett,* 20 N. C., 266, and *Kitchen v. Herring,* 42 N. C., 190.

The charge of his Honor, we think, would not have been erroneous if it had entirely omitted the qualification, "provided they should find that the tract of land was well known throughout the county by the name used in the will." The description then would have been all *my* land on both sides of Haw River, and all the mills, appurtenances and improvements belonging thereto; and as it does not appear from the will, or other source, that Mary Taylor had any other land on Haw River, and there was a mill situate on this tract, and it had known and visible boundaries, the description would have been sufficiently definite to identify the land. All *my* land on both sides of Haw River is as definite as *my* house and lot in the town of .....; or "the land on which I live"; or the land of which A died seized and possessed, which no doubt would be good. *Carson v. Ray,* 52 N. C., 609. But the (409) further description in the will of the mills being thereon, and the metes and bounds being known and visible, make the description more definite, and in fact amounting to a certainty.

As to the exception to the ruling of his Honor upon the instruction asked as to the contributory injury: If the plaintiff, by damming the sluices, increased the flow of water upon the wheels of his mill, and thereby contributed to enhance the injury occasioned by the wrongful act of the defendants, it could not excuse them for their trespass upon the plaintiff's land, though it might go in mitigation of damages. There is

No Error.

Cited: Thornburg v. Masten, 88 N. C., 295; *Euliss v. McAdams,* 108 N. C., 511, 512; *Hardy v. Galloway,* 111 N. C., 524; *Pate v. Lumber Co.,* 165 N. C., 187.

State, etc., ex rel. JOHN C. SCARBOROUGH v. JAMES L. ROBINSON and JOHN M. MORING.

Act of Assembly—Signatures of Speakers—Judicial Power.

1. The signatures of the presiding officers, by Art. II, Sec. 23, of the Constitution, must be affixed to an act of legislation during the session of the general assembly, and are necessary to its completeness and efficacy.
2. The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action.

MANDAMUS, heard at June Special Term, 1879, of WAKE, before *Eure, J.*

The service of summons in this case was accepted by the defendants, and the complaint alleges substantially that on 27 February, 1879, a bill to be entitled an act to revise and consolidate the (410) public school law was introduced in the House of Representatives of the General Assembly of North Carolina, then in session, and on that day passed its first reading; and on 6 March, 1879, it passed its second reading by a vote taken by yeas and nays, as appears from the House Journal, and on the next day (7th) it passed its third reading, the vote being by yeas and nays, as appears by the Journal, and on the same day it was ordered to be engrossed and sent to the Senate for concurrence. It was accordingly engrossed, transmitted to the Senate, and passed its first reading in that body on the 8 March, 1879; its second reading on the 11th, and its third reading on the 12th, the vote being taken by the yeas and nays, as appears from the Senate Journal. The bill was duly enrolled and so reported by the Committee on Enrolled Bills to each House, and was announced before adjournment as having been duly ratified, as appears from the Journals of the two houses, and on 15 March, 1879, was transmitted to the office of the Secretary of State, when it was discovered that it had not been signed by the presiding officers, and that the Secretary of State, for that reason, refused to receive and receipt for said bill as an original of one of the laws of the State. That the Legislature adjourned on 14 March, 1879, and through mistake or inadvertence neither of the presiding officers of said houses signed it as required by law, and have not since signed the same. That defendant Robinson was then and is now President of the Senate, and defendant Moring was then and is now Speaker of the House, and the relator Scarborough is the Superintendent of Public Instruction, and a tax-payer of the State, interested in the due execution of the laws, especially in those relating to the public schools, and has requested the defendants to sign said bill, which request has been refused. Wherefore,

the plaintiff demands judgment that a mandamus issue to defend-
(411) ants commanding them to sign the said act, to the end that it may be authenticated, and for such other and further relief as the case may require.

The defendants answer and say substantially that they admit the facts set out, as hereinafter qualified and explained or denied. That it does not appear from the House Journal that the bill passed its first reading on 27 February, but defendants suppose it did, as it was introduced and placed upon the Calendar on that day, and that the facts in reference to its alleged passage are as follows: After its passage through the House and its second reading in the Senate, the House, on 12 March, 1879, sent a message to the Senate requesting the return of a bill (nearly identical with the one annexed to the complaint); which was complied with; and, thereafter, on same day, the Senate received a message from the House transmitting the bill to revise and consolidate the public school law, which had been recalled by that body for correction. That the bill thus returned was materially changed and was not the bill which had passed its first and second reading in the Senate, the change being, as defendants are informed and believe, in Section 26, line 5, of the engrossed bill, substituting the word "may" for "shall," which amendment was made after the passage of the bill upon its second reading in the Senate, without a vote of either House; and after such alteration the bill was not returned to the House for concurrence, but put upon its third reading as returned from the House. That it does not appear by the House Journal that the bill was announced as duly ratified, and that it is true they have not signed it, and the failure to do so was not from design, but defendants say that at the time of adjournment they had no knowledge or information of the facts set out above. And for a further defense, they say that the bill did not pass its three several readings in the Senate as required by law and the usage of legislative bodies, and that the Legislature adjourned on 14 March, 1879,
(412) and they are advised and believe they are not by law required and ought not to sign said bill, and ask to be discharged with their reasonable costs.

By agreement of the parties, the Court found the facts from the evidence adduced (the Journals and Clerks of the General Assembly) and they are, in brief, as follows: The bill was regularly introduced and passed its several readings on three several days, on second and third readings by yeas and nays in the House. It was engrossed and sent to the Senate, and passed its first and second readings, the yeas and nays being recorded on the second reading. It was recalled by the House for correction, and then returned to the Senate, where the returned bill passed its third reading by yeas and nays. It does not

appear that any correction was made. That it was duly enrolled, delivered to the Committee on Enrolled Bills, who endorsed that it was properly enrolled, and it was then carried to the Speakers and laid before them with other bills for their signatures, and then to the Senate and House on the morning of adjournment with a number of other bills, and announced in both houses as enrolled and ratified. After adjournment, it was taken by the Enrolling Clerk to the Secretary of State and left with him. On the following day it was discovered that neither of the Speakers had signed it, and the Secretary of State refused to receive and receipt for it as a law. Thereupon, the Court held that a writ of mandamus issue as prayed for, and the defendants appealed.

There was also a similar proceeding asking that the Secretary of State be required to receive the bill as one of the laws of the State, which the Court refused, but the facts therein are substantially the same as the above, and the two cases were argued together, and the decision of this Court covers the question raised.

Messrs. Walter Clark, Lewis & Strong, and *W. H. Pace* for (413) plaintiff.

Messrs. John Manning, Reade, Busbee & Busbee and *Gilliam & Gatling* for defendants.

(415)

SMITH, C. J. The complaint alleges, and the facts are so found on the trial in the Court below, that a bill relating to public schools and designated as "House Bill No. ....," was introduced into the House of Representatives at the late session of the General Assembly, with amendments, was read three times in that body and in the Senate, and was passed and declared ratified in each house, as directed by the Constitution. From some cause, however, it failed to receive the attesting signatures of the presiding officers of the two houses, which was not discovered until after the final adjournment. The proof of these facts is furnished by the Journals, except the ratification by the House, which rests upon the memory and oral testimony of the Reading Clerk.

The object of the action is to obtain the exercise of the coercive powers of the Court in compelling those officers to affix their respective official signatures to the bill, and thus to remove all doubt as to the sufficiency and efficacy of the enactment.

The argument before us was mainly directed to the question whether an act of the General Assembly clothed with the prescribed forms of law and placed in the keeping of the proper depositary, as such, can be impeached and its operation avoided by evidence derived from the Journals or from other extraneous sources, that the direction of the

Constitution were disregarded or not observed in its progress and passage through the two houses; and if this can be done, as a corollary or consequence, if the examination shows that all constitutional provisions have been strictly pursued up to and including the announcement of ratification, will not the Court interpose and require the presid-
(416) ing officers to perform the omitted and mere ministerial act of authenticating the enactment with their signatures, and thus perfect in form what is already effective in substance.

The discussions of the primary questions upon the solution of which the other is supposed to be dependent, has been full, able and exhaustive; and the numerous cases decided in the Courts of different States before which the point was presented, brought to our attention through the industry and research of counsel, are by no means harmonious and consistent. If it were necessary in determining the present application to pass upon the competency of such impeaching evidence, we should be reluctant to assent to a proposition which leaves the existence and validity of a statute to depend upon the uncertain results of an inquiry made in each particular case, whether the provisions of the Constitution directing the mode of legislative proceedings have been followed in the action of the two houses in passing a bill through its different stages of progress, when by the very act of authentication they declare that all these provisions have been observed. If such an inquiry may be entered on (and it must be collaterally if at all, since there is no direct method of assailing and annulling a statute upon that ground), no lapse of time, no continuous and indefinite recognition of the force and acquiescence in its operation, and no non-interference by succeeding Legislatures, would bar the inquiry or give stability and repose to the law itself; consequences so serious and far-reaching can not be hazarded except upon the clearest convictions of the soundness of the principle from which they flow, and the competency and duty of the Court so to declare.

In most of the cases to which we have been referred in which the competency of such evidence is maintained, the Court pressed by the force of the objection avoid the consequences of its admission by holding that the requirements and restraints put upon the mode of legisla-
tive action, are only directory, and if disregarded do not affect
(417) the validity of the act done. This is but another method of reaching the same result. For why should an inquiry be prosecuted to ascertain a fact which if disclosed by the Journal is to have no effect?

The distinction between the cases in which the judicial power will declare an act of the Legislature void, and in which it will not, is forcibly pointed out in the case of the *R. R. Co. v. Governor,* 23 Mo.,

353, by SCOTT, J., thus: "While the power of the Courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the Constitution from violation, yet such power is claimed and exercised in relation to laws which on their face show that the constitutional limits have been transcended." * * * "If the Legislature exceeds its powers in the enactment of a law, the Courts being sworn to support the Constitution, must judge that law by the standard of the Constitution and declare its validity. But the question whether a law on its face violates the Constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case a power is exercised not delegated or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not in its terms contrary to the Constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the General Assembly in making the law was governed by the rules prescribed for its action by the Constitution."

The question is thoroughly investigated and discussed in *Pangborn v. Young,* 32 N. J. Law, 29, which is followed by the Supreme Court of Nevada in *Nevada v. Swift,* 10 Nev., 176, and all the authorities collected and reviewed. The Chief Justice thus announces the conclusion of the Court in the former case: "My general conclusion, then, is that both upon the grounds of public policy and upon the ancient and well-settled rules of law, the copy of a bill attested in the (418) manner above mentioned and filed in the office of the Secretary of State, is the *conclusive proof* of the enactment and contents of a statute of this State, and that such attested copy can not be *contradicted by the legislative journals or in any other manner."* And ELMER, J., concurring, says: "I am clearly of the opinion that we can not look behind the law as it is signed and deposited among the public archives. It has thus become a record which can not be contradicted." The Supreme Court of Nevada, after full examination of cases on each side of the question, sum up the result in the following words: "From this discussion it appears that the decided weight of authority, as well as every consideration of expediency, is opposed to the doctrine that this or any Court, for the purpose of informing itself of the existence or terms of a law, can look behind the enrolled act, certified by those officers who are charged by the Constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted."

If such force and effect are given to an enrolled bill bearing the impress of legislative sanction, and with the prescribed authentication of its proper officers, deposited for safe keeping as prescribed by law,

this authentication must be by the authority of the Legislature itself, which can neither be coerced nor controlled by the judicial power.

But the determination of the question is not necessary to a decision of the present application. In our opinion, the signatures of the presiding officers of the two houses under and by force of the words used in our Constitution, are an essential pre-requisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the General Assembly. An enrolled bill is not that considered and adopted by the concurring action of the two houses, but is a substituted copy transcribed to take the place of the original, and becomes the final expression of the legislative will. (419) Its accuracy is secured by the examination, comparison and report of a committee in each house, and then each house ratifies that it accepts and adopts the enrolled bill as the embodiment of its own action and the correct expression of its will. Ratification is the act of the house, and its presiding officer, in attesting the same, acts on behalf of and by its authority. This is a necessary safeguard against fraud in the insertion of new matter, or the omission or change of existing provisions in the bill, not to be lost sight of or surrendered. Each body gives its direct and positive sanction to the enrolled bill as its act, when its presiding officer signs; and he is but its agent acting in its stead when he does so. In other words, this is the consummation of legislative action, which is incomplete and inoperative without it. But the Constitution, in express terms, makes the attestation imperative and essential. It declares "that all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses." Art. II, Sec. 23. Some criticism was made in the argument as to the proper construction of the clause produced by a semicolon which disjoins the first from the last paragraph. And it was insisted for the relator that while the three several readings were essential conditions of valid and effective action, the other provision for the signature is not, and is directory merely. We do not concur in this rendering of the Constitution. The mandate is imperative and unequivocal in both particulars; and in the old Constitution of 1776, which contains a clause substantially similar, the paragraphs are separated by a comma only. The obvious import of the entire section is to declare *what* is needful to an act of legislation (not all that is needful to it), and should be read as if the words "before they pass into laws," were the qualification of the concluding sentence also. This is the fair and reasonable interpretation of the section, and such must be the effect. The construction derives (420) support from the very nature and effect of the act of attestation itself, which, as we have seen is to identify and impress the en-

rolled bill with the direct and distinct recognition and sanction of the body itself, of which the officer is but the official organ through whom its will is made known. It would seem that the ratification should be subscribed and attested in the presence of the house, and most certainly it can not be done after the close of the session, at the discretion or pleasure of the officer.

"The signing of an enrolled bill by the Speaker or President," says an eminent writer, "is an official act which can only be done when the house over which he presides is in session, and a quorum is present therein for the transaction of business." Cushing's Law and Practice in Legislative Assemblies, Sec. 2374. The proposition, though not fully sustained by the Journal of the House of Representatives of the Congress of the United States, referred to, is nevertheless entitled to great weight as conveying the opinion of the author, so well versed in the rules and principles of parliamentary law.

We proceed to notice the objections to this view of the subject, made and strenuously pressed on behalf of the relator upon our attention:

1. It is said that the legislative will, when clearly expressed, should not be defeated by the refusal or failure of its officers to annex their formal and official certificate of a fact abundantly proved by the Journals and other evidence.

The objection rests upon the fallacious idea that the legislative will, when it can be ascertained from the concurring action of the constituent parts of the General Assembly, is effectual and must be enforced without regard to its manner of action. This would be to set aside all constitutional restraints, since that will could be determined as well from a single reading of the bill and vote upon it, as from the "three several readings prescribed." So, after the full concurrence in the two houses upon any particular measure, it would be need- (421) less to have an enrollment, ratification, or attestation, because the intention embodied in the bill is manifest without them. This would open the door and expose legislation to fraudulent practices easy of accomplishment and difficult of detection. The history of legislation shows that these apprehensions are not groundless. To obviate them, the Constitution prescribes certain rules to be observed in the work of legislation and a definite method of making its final action authoritatively and conclusively known for which the judiciary is not allowed to substitute another, however reasonable and convenient it may seem to be. We can only know and enforce the will of the Legislature when conveyed through the prescribed forms and with the verifications imposed by the controlling fundamental law, which is equally binding upon both departments of the governments. An analogy may be found in the law relating to the execution of wills: An attorney, under instruc-

tions, prepares an instrument in writing to be executed as a will, and clearly expressing the intended testamentary disposition of his (testator's) estate. It is read over by him and subscribed in the presence of several witnesses. Is the writing sufficient to convey property? Certainly not. And why not, since the intention is manifest from the very act of execution, and nothing can make it more so? It is ineffectual because the law requires it to be signed by him in the presence of at least two witnesses, and attested by them as such in his presence, and this has not been done. The attestation of the witnesses is as necessary to the operation of the instrument as a will, as are the recognition and subscription of the party himself. No other proof from witnesses who were present and know the fact will supply the want of attestation. The purpose of the law is to prevent fraud and imposition, and to identify the paper and the words it contains as the act of the testator. (422) For similar reasons, certain forms are prescribed in regulating legislative proceedings, and for the full and final verification of what is done, which can no more be dispensed with than the essential pre-requisites of a testamentary writing. It is through the observance of these, and in this way only, that the individual will in the one case, and the collective will in the other, can be legally and conclusively made known and rendered effectual.

2. The next objection is, that if the validity of a statute depends upon the signatures of the presiding officers, they may, by withholding their names, defeat legislation; and thus is vested in each one a vetoing power, which, under our system, is denied to the Executive even.

It is true the act of signing is ministerial in the sense that the duty is absolute, and its performance under the authority of the body a positive obligation. And so is every act of a legislative assembly which must be carried into effect by its presiding officer in a form of a precept or otherwise. Indeed, his official conduct is regulated and controlled, in the absence of a higher authority, by rules of its own making, which he and others must alike obey. If the Speaker, chosen by the members of the House, under the Constitution, Article II, Section 18, becomes incapacitated or refuses to discharge the necessary functions of his office and execute its lawful orders, the power undoubtedly resides in the body to enforce its authority by the permanent or temporary substitution of another, who can and will perform them. In other words, the House possesses the inherent ability and right to enforce its authority and maintain its essential prerogatives and the use of the means necessary thereto. "The presiding officer," says the author already quoted, "being freely elected by the members by reason of the confidence which they have in him, is removable at their pleasure in the same manner whenever he becomes permanently unable by reason

of sickness or otherwise to discharge the duties of his place and does not resign; or whenever he has in any manner or for any (423) cause forfeited or lost the confidence upon the strength of which he was elected." Sec. 299. In reference to the presiding officer of the Senate, who is not a member of that body and not elected by the Senators, the same author adds: "The power to choose one of their own members a temporary presiding officer in case of the absence or other disability of the officer designated, though expressly given in most cases, is a necessary incident to a parliamentary assembly in this country, and would be considered as given unless withheld; and upon such temporary presiding officer the assembly may confer what authority they please." Sec. 308. It seems equally necessary that the same power should be exercised in case of a persistent and wilful refusal as of an inability to act. But if this were otherwise, and the only redress for such official misconduct and dereliction of duty is to be found in the process of impeachment, it would not disturb the soundness of the principle. There are moral obligations resting upon conscience only incapable of enforcement by the legitimate exercise of judicial power, and the Court is not at liberty to resort to unusual and arbitrary methods to overcome a pressing exigency supposed to exist and accomplish some desired end, and thus invade the jurisdiction of another co-ordinate department. If the law makes no provision for such an emergency, it is because it will not assume that an officer will wantonly disregard a plain mandate of the Constitution which he has sworn to support; and if he should, that the mischiefs of a judicial interference for correction will outweigh the evil consequences of the wrongful act or omission. Referring to the question of interference with legislation, THURMAN, J., delivering the opinion in *Miller v. The State,* 3 Ohio State, 475, uses this language, which is applicable to the point: "If it be said, as was said in the argument, that this leaves the assembly at liberty to disregard the Constitution, the answer is obvious (424) that a disposition to disregard it is no more to be imputed to the legislative than to the judicial department of the government, and ought not to be imputed to either." The same remark may be applied with equal propriety to their presiding officers.

3. It is further insisted that affixing the official signatures to a bill that has passed is a duty strictly ministerial, and falls under the coercive judicial authority, as in the case of *Cotton v. Ellis,* 52 N. C., 545. The cases are not parallel, and they differ in that the duty required of the Governor was not only ministerial and direct, but involved his own individual and independent action; while that demanded of the others must be performed under the supervision and control of a body which, by adjournment, and until it may re-assemble, is incapable of exercis-

ing that supervisory control. If the General Assembly were in session, each house is competent to take such action as is necessary to secure the legal authentication of its act, and the interposed authority of the Court might produce a conflict of jurisdiction; and if not admissible then, why should it be invoked after an adjournment? Can it be inferred from the fact that the signature was not given nor required that the Assembly intended to do what was then done? And how is this intent to be judicially arrived at and upon what evidence determined? Insuperable difficulties are presented in the prosecution of such an inquiry with a view to any remedial action, and the Court will not enter upon it. But the failure to enact a useful law, not very uncommon in the hurry and confusion incident to the closing days of a session, from the omission of something material to its validity, is not an irremedial evil. It is but a postponement to another session, and the intervening space may be shortened, if the public interests require, by an executive call for an earlier meeting.

In this connection, another aspect of the case may be considered, distinguishing between the consequences of legislative and judicial action.

(425) A judgment is binding between parties and privies, and can be impeached only by a direct proceeding at the instance of one or more of them, aimed at reformation or correction. The correction of injurious legislation in which representatively every citizen is a party, is left to a succeeding Legislature, and the remedy is ample and unrestricted. Only such rights and interests as have meanwhile vested under the law are protected from its power and placed beyond its reach.

Our attention was called to the argument of plaintiff's counsel to an expression found in the opinion in *Gatlin v. Tarboro,* 78 N. C., 119, in which RODMAN, J., says: "If it appeared from the act itself, or affirmatively appeared from the Journals of the Legislature, which would have been competent evidence, that notice of the intended application for the act (*private*), which the Constitution requires, had not been given, *we should probably hold the act void.*" Yet in this very case it was admitted that no such notice had been given, and hence there could be no issue and no controversy about the fact, and the admission was held insufficient to warrant the Court in declaring the act void for the defect. The remark of the able Judge was a *dictum* merely, in no manner necessary in the determination of the cause; and if not an inadvertence, is clearly repugnant to what is declared by the Chief Justice in *Brodnax v. Groom,* 64 N. C., 244: "We do not think it necessary," say the Court, "to enter into the question whether this is a local public act or a mere private act, in regard to which thirty days' notice of the application must be given; for taking it to be a mere private act, we are of opinion that the *ratification certified by the Lieutenant-Gov-*

enror and the Speaker of the House of Representatives makes it a matter of record which can not be impeached before the Courts in a collateral way." Lord Coke says, "A record, until reversed, importeth verity."

The Constitution declares that the legislative, executive and supreme judicial powers of the government ought to be forever (426) separate and distinct from each other. Art. I, Sec. 8. And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the "separate and distinct" co-ordinate departments of the government, and must consequently be denied.

We can not undertake to examine all the numerous references made in the argument without extending the opinion to an unreasonable length, and shall notice such of the cases as seem mainly to be relied on by the plaintiff and bear most directly on the point under consideration.

In *Speer v. Plank Road Co.,* 22 Penn. St., 376, the validity of a statute under which the defendant derived its corporate existence was called in question, because it lacked the signatures of the Speakers, though it had regularly passed both houses of the Legislature, been approved by the Governor, and enrolled in the proper office. The statute was held to be valid, and the Court say: "There is nothing in the Constitution requiring the signatures of the presiding officers of the two houses to be annexed to a bill preparatory to its becoming a law. Neither is there any general statute to this effect. Each branch of the Legislature, *by its own rules,* has adopted this as a safe and convenient method of signifying to the Governor what bills are ready for his approval or rejection, and for this purpose the practice is one of great utility, serving as it does *to guard against mistake or imposition;* but the signatures are no part of the law-making power, and their non-observance detracts nothing from the force of the enactment." The case simply decides that rules prescribed by a parliamentary body for the regulation of its own proceedings have not the force of a constitutional command to avoid the results of its final action, and hence it can (427) have no application.

In *People v. Bowen,* 30 Barb., 24, a bill had been passed by the General Assembly of New York and sent to the Governor, who approved and signed the bill three days after its final adjournment. It was insisted that under the Constitution, which contains a clause similar to that in the Constitution of the United States, the approval must be given dur-

ing the session, and that the act was therefore inoperative. The Court held the approval to be sufficient, and sustained the law, declaring the power of approval and of rejection vested in the Governor to be "not a legislative but an executive revisory act, implying in its exercise, time, examination and judgment." Whatever weight may be due to this construction (and it is at variance with the practice under the similar clause in the Constitution of the United States, as is admitted in the opinion,) it is not pertinent to the present inquiry, and may be dismissed without further comment.

In *Commissioners v. Higginbotham,* 17 Kan., 62, the defendant brought his action to recover the value of certain bonds issued by the county of Leavenworth to the Union Pacific Railroad Company, under an act, the validity of which was contested in the defense on the ground that the signature of the presiding officer of the Senate was wanting. The Court overruled the objection, and say: "It (the bill) contains a certificate and signature of the Secretary of the Senate, showing that the bill passed the Senate, the certificates and signatures of the Speaker and Chief Clerk of the House, showing that it passed the House, and inferentially that it passed the Senate; and the signature and approval of the Governor, which inferentially shows that it passed both houses. The bill has been published as a law by the Secretary of State, both in a newspaper and in the statute book (Laws of 1865). It has subseqeutly been recognized as a law by the Legislature, and the Governor (428) (Laws of 1866), and also by the Courts (7 Kan., 479, 576); and, indeed, it has generally been recognized to be as much a law as any other law on the statute book; and the qeustion that it was not duly passed or signed has never been raised until recently, although it has been on the statute book for over eleven years. We think the mere failure of the President of the Senate to do his duty can not have the effect to invalidate the law." It is true in the discussion, it is said that the signatures of the presiding officers are "only portions of the many evidences of the due passage and validity of the bill," and that a bill may in some instances "be valid although the signature of one of the presiding officers may be omitted," yet assent to the correctness of these general propositions is not necessary to sustain the decision. Beside the reasons so forcibly stated, it may be that the Governor's approval, which can alone be given to a measure which has regularly passed both houses of the Assembly, and its therefore a determination of that fact, is sufficient evidence of the action of that body, even without the concurring certificate of one of the officers. However this may be, the case is not an authority to show that a bill having neither the signature of either presiding officer nor any subsequent legal sanction, can be upheld as effective, or can be made complete by order of the Court.

Our remarks have been directed to general legislation and the legal provisions applicable thereto. We do not mean to say there were no exceptions to the rule which forbids inquiry into the regularity of legislative action for the purpose of impeaching the validity of a properly certified, attested and enrolled bill. It may be that where special limited power to pass certain acts is conferred, to be exercised under conditions essential to their validity, and especially when evidence of compliance with those conditions is required to be entered upon the Journals, as provided in Article II, Section 4, the Court may be compelled to look to the Journals in order to determine the constitutionality (429) of the act upon the ground taken in the case from Missouri. (*R. R. v. Governor, supra.*) Upon this we express no opinion, and leave the question open for determination when it may hereafter arise and become necessary to decide it.

We, therefore, reiterate the announcement, made verbally heretofore, of the conclusions at which we have arrived: First, the signatures of the President of the Senate and the Speaker of the House, by the express command of the Constitution, must be affixed to an act of legislation, during the session of the General Assembly, and are necessary to its completeness and efficacy; second, the judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action.

We simply advert to the frame of this action seeking in one proceeding to enforce separate personal duties upon each defendant and prosecuted by a single relator, having no peculiar separate personal interest in the subject-matter of controversy, instead of at the instance of the public, to say that we do not wish our silence to be interpreted as giving it our approval. Our purpose is to settle the controversy upon its merits, and the form of proceeding has not been considered.

We, therefore, declare there is error, and that the relator is not entitled to relief in the premises and the action must be dismissed.

Action Dismissed.

Cited: *S. v. Patterson,* 98 N. C., 663; *Carr v. Coke,* 116 N. C., 236, 260; *Cook v. Meares, Id.,* 587, 588, 590, 592; *Range Co. v. Carver,* 118 N. C., 339; *Debnam v. Chitty,* 131 N. C., 684; *Graves v. Commissioners,* 135 N. C., 53; *Commissioners v. Packing Co., Ib.,* 66.

(430)

ALEXANDER OLDHAM v. F. W. KERCHNER.

Measure of Damages—Burden of Proof.

In an action for breach of contract is not delivering corn to be ground for defendant by the plaintiff, at the mill of the latter, the measure of damages is *prima facie*, the difference between the cost of grinding and the contract price; and the burden is upon the defendant to prove all matters in reduction of such damages.

PETITION by defendant to rehear filed at January Term, and heard at June Term, 1879, of the Supreme Court.

Mr. D. L. Russell for plaintiff.
Messrs. Hinsdale & Devereux for defendant.

ASHE, J. This is a petition to rehear this cause in which an opinion was filed by this Court at June Term, 1878, and is reported in 79 N. C., 106.

The error assigned by the petitioner in the opinion is, "that the Court declared and determined that in an action for breach of contract in not delivering corn to be ground, the measure of the plaintiff's damages is the difference between the costs of grinding and the contract price, and not the actual damages, to be made out by proof on the part of the plaintiff."

The first inquiry then is, what is the measure of damages in this case?

Mr. Sedgwick, in his work on Damages, in treating of the damages recoverable in personal actions upon contract, says: "The two cardinal principles which will be found to pervade and regulate this branch of our subject are: 1. That the plaintiff must show himself to have
(431) sustained damage, or in other words, that actual compensation will be given for actual loss. 2. That the contract itself furnishes the measure of damages. These two rules are closely interwoven with each other, and it is impossible to consider them altogether separately."

The seeming error in the opinion of the Court results from the separate application of only one of these rules, when if the evidence in the case had justified the application of both the rules, there would have been found no real difference in the doctrine enunciated by the Court in its opinion and that contended for by the defendant, only in the mode of reaching the same end, to-wit, the actual damages. The defendant insists that there was error because the Court did not hold the measure of the plaintiff's damages to be the actual damage, to be made out by the plaintiff. The Court, as we understand the opinion, did

virtually hold that that was the measure of damages, but to be made out by the defendant; that the *onus* was upon him, and, and if he failed to adduce the proof, then the plaintiff having proved the contract, the breach of it by the defendant, the loss of certain profits resulting from the breach, and his ability and willingness to grind the whole amount of the corn, to pay the judgment according to the contract price, that the contract price was the measure of his damages, and to be taken *prima facie,* as the actual damage, unless evidence should have been offered in diminution of the damages; and to that end the burden lay upon the defendant to make the proof.

The Court in its opinion sustained the charge of the Court below, viz., that the measure of damages in this case was the "difference between the costs of grinding and the contract price." And it was suggested by defendant's counsel "that the instructions, though correct, as far as they went, were erroneous, in that they ought to have stated that the actual loss sustained by the 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 re-
ceive from other persons employment more or less lucrative for (432) such part of his 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." The Court admitted that to be the correct doctrine, and the charge of his Honor in the Court below should have been so given if there had been anything in the evidence to which such a doctrine was applicable. And it held that it was incumbent on the defendant to furnish the evidence for its application. In this the defendant says there was error, and this brings us to the sole question involved in the case—upon whom was the burden of proof?

If the *onus* was upon the plaintiff, there was error; but if it lay upon the defendant, there was no error, and the opinion of the Court must stand.

We think the opinion of the court is sustained by the current of authorities. In Sedgwick on Damages, page 210, the doctrine is maintained that where a party was employed as the superintendent of a railroad for a specified compensation, and was dismissed without cause, he was held *prima facie* entitled to recover for the whole time, but that defendant might show in diminution of damages that after the plaintiff had been dismissed, he had engaged in other business. To the same effect is *Costigan v. Mohawk R. R. Co.,* 3 Denio, 610. And it has been held in the case of clerks, agents, laborers and domestic servants who

have engaged to serve for a year, or for a shorter determined period, if the person so employed is improperly dismissed before the time of service expires, he is entitled to recover for the whole time, unless the defendant on whom the burden of proof lies, can show, either that the plaintiff was actually engaged in other profitable service during
(433) the time, or that such employment was offered to him and rejected. 2 Greenl, Sec. 261; *Shannon v. Comstock,* 21 Wend., 457.

This doctrine has been held in *Hendrickson v. Anderson,* 50 N. C., 246, which is the leading case in our own State upon this subject. The Court there held that "when one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of the wages for the whole time; but in a suit for the stipulated compensation, as in our case, the defendant may show in diminution of damages, that after the plaintiff had been dismissed he was engaged in other lucrative business. This, however, must be proved by the defendant and must not be presumed. The decision in this case has been cited and approved in *Brinkley v. Swicegood,* 65 N. C., 626, and the same doctrine is recognized in *Hecksher v. McCrea,* 24 Wend., 305.

These authorities, besides establishing the position that the burden of proof is upon the defendant, clearly illustrate the intimate connection of the two rules above cited in their application to special contracts where specific compensation is stipulated, and the contract price is the guide in the assessment of damages. In such cases, it requires the application of both rules to ascertain the actual damages. The rule that the contract furnishes the measure of damages is subject to the other rule that compensation is only to be given for the actual loss. But there must be evidence furnishing ground for the application of the latter rule, and the burden of producing that evidence according to the authorities lies upon the defendant. This is the full scope and meaning of the opinion filed in this case by this Court at June Term, 1878, in which there is no error.

The opinion, therefore, delivered by this Court at June Term,
(434) 1878, in this case, will stand as the decision of the Court.

Petition Dismissed.

Cited: Williams v. Lumber Co., 118 N. C., 937; *Mfg. Co. v. Gray,* 126 N. C., 109; *Springs Co. v. Buggy Co.,* 148 N. C., 534.

CAROLINA CENTRAL RAILWAY COMPANY v. R. C. G. LOVE, Guardian.

Condemning Land to Use of Railroad Company—Duty of Commissioners.

Under the act incorporating the Carolina Central Railway Company, and providing for the condemnation of land for the construction and operation of the road (Laws 1872-'73, Chap. 75, Secs. 9, 10), it is the duty of the commissioners appointed by the court, not only to ascertain the value, but also the quantity, of the land which it is necessary to appropriate; and the land owner does not waive his right to insist on the performance of this duty by failing to answer the allegations of the petitioner as to the quantity necessary.

APPLICATION for an order to appoint commissioners for the purpose of condemning land for the use of the plaintiff company, heard on appeal at Chambers in Lincolnton on 11 February, 1879, before *Schenck, J.*

This proceeding was begun by the service of a notice upon defendant that the plaintiff would apply to the Clerk of the Superior Court of Gaston County for the appointment of three commissioners to value two acres of land, belonging to the ward of defendant, lying on the west side of Catawba River and joining the right-of-way of the company, to be condemned for the use of the plaintiff. On return of the notice, the plaintiff filed its petition before the Clerk for the purposes indicated above, and an order was made appointing commissioners to view the premises and to value and condemn so much of the land as in their opinion was necessary to serve the uses of the company. (435) And from this order the plaintiff appealed to the Judge of the district, who reversed the judgment of the Clerk in the words set out in the opinion of this Court, and the defendant appealed.

Messrs. Hinsdale & Devereux for plaintiff.
No counsel in this Court for defendant.

SMITH, C. J. The Act of 20 February, 1873, under which "The Carolina Central Railway Company" was incorporated and formed, provides in Sections 9 and 10 for the condemnation and valuation of lands needed in the construction and operation of the road. Laws 1872-'73, Chap. 75.

The former section authorizes the Clerk of the Superior Court of the county, wherein lands sought to be appropriated to the use of the road may lie, to appoint three commissioners to make such valuation, gives the right of appeal to the Superior Court, and directs, when the owner may be an infant, that notice be given to his guardian of the intended application.

The required notice in the present case was given the defendant and the plaintiff applied by petition for the condemnation of two acres of

the infant's land, particularly describing it "for the effectual operation of said railway," and "the building of houses for servants, agents and persons employed on said railway." The guardian put in no answer and set up no defense, and thereupon the Clerk ordered, "that R. H. McLeod, John B. Fite and E. B. Stone be appointed commissioners to view the premises described in the petition and to condemn and value *so much thereof* as may, in their opinion, be necessary."

The plaintiff appealed, and the Judge at Chambers, 11 February, 1879, made the following order: "It appearing to the Court, by the complaint filed in this case, that it is alleged that two acres of land were necessary to be condemned for the purpose therein men-
(436) tioned, and that no answer is filed, nor the allegations in anywise denied or put in issue, it is ordered that the judgment rendered by the Clerk below be reversed, and that he proceed further in the action by ordering the commissioners to lay off *the said two acres* described in the complaint, and that they assess and report the value thereof, and that the commissioners give notice to the respective parties of their meeting, that they may be heard in the matter." From this order the defendant appeals to this Court.

The decretal order we are called on to review, and which reverses the action of the Clerk, condemns the *entire two acres* specified in the plaintiff's application, and directs the commissioners to assess and value the land.

In *R R. v. Phillips,* 78 N. C., 49, this Court was called on to look into and put a construction upon Section 9 of the plaintiff's charter, and found much difficulty in arriving at a satisfactory conclusion as to its operation and effect. Our embarrassment is less, as the controversy here is narrowed to a single point, wherein the two orders differ, to-wit: Shall the commissioners determine the *quantity* of the land needed by the plaintiff as well as its *value,* or are their functions limited to ascertaining the value of the whole lot?

In our opinion it is their duty to ascertain as well what portion of the land the company ought to have as the sum to be paid the owner therefor, and that the omission to answer, is not conclusive upon either. It certainly was not the intent of the act to invest the Clerk with this large power and deny him the right to estimate the value of the property to be condemned.

It seems peculiarly appropriate to leave these matters to the commissioners with that general supervision over their acts which is exer-
cised by the power under whose appointment they act. It is
(437) the right of the owner of lands which are taken for public use under the right of eminent domain, to restrict the public to the smallest quantity needed, and to have the quantity as well as the value

determined by impartial and competent persons. It might lead to great abuses and oppression if it were left to the discretion of the company to condemn what they chose. But we are not left to reason out the result, for we think the intent of the General Assembly is quite manifest from the concluding words of Section 10, which are: "And said company shall also have power to condemn and appropriate lands in like manner for the constructing and building of lateral roads and branches, and for depots, shops, warehouses, *buildings for servants, agents, and persons employed on said railway,* not exceeding two acres for any one lot or station, *the quantity in such case to be determined by the commissioners.*"

The language is explicit, that the quantity is not a settled fact, decided before the appointment of commissioners, any more than the value of the land, and both are committed to their judgment. The order in the Court below, reversing the order of the Clerk, is erroneous, and is itself.

Reversed.

Cited: R. R. v. R. R., 104 N. C., 665; *Power Co. v. Wissler,* 160 N. C., 274.

(438)

*ALANSON CAPEHART v. SEABOARD AND ROANOKE RAILROAD COMPANY.

Common Carrier—Can not Contract Against Negligence—Limitation of Liability.

1. A common carrier may, by special contract founded upon valuable consideration, or upon notice brought to the knowledge of the owner of goods delivered for transportation, relieve himself from liability as an insurer, but he can not so limit his responsibility for loss or damage resulting from his failure to exercise ordinary care.
2. A contract restricting the responsibility of the carrier must be reasonable, and not calculated to ensnare or defraud the other party.
3. A stipulation in a bill of lading that in case any claim for damage should arise for the loss of articles mentioned in the receipt, while *in transitu* or before delivery, the extent of such damage or loss shall be adjusted before removal from the station, and claim therefor made in thirty days to a "trace agent" of the carrier, is an unreasonable provision, which the courts will not uphold.

APPEAL at Spring Term, 1879, of NORTHAMPTON, from *Eure, J.*

This action was brought to recover damages for sixty-two bales of cotton, which defendant company as a common carrier had contracted to carry over its road from Bull Hill landing, in Northampton County,

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

to Norfolk, Virginia, upon the allegation that the damage to the cotton was caused by the negligence of defendant, or its agents or servants, while being transported on its road. The defendant denied the allegation of negligence and that the cotton was in good order when received, and for a further defense relied for its exoneration upon a special contract which was appended to the bill of lading wherein it was

(439) stipulated among other things "that in case any claim should arise from any damage or loss of articles mentioned in this receipt while *in transitu,* or before delivery, the extent of such damage or loss shall be adjusted in the presence of an officer of the line before the same be removed from the station, and such claim must be sent within thirty days after the damage or loss occurred, to James McCarrick, Trace Agent, Portsmouth, Virginia, who has authority to settle such claims."

Issues were submitted to the jury, which, with the finding upon each, are as follows:

1. Was the cotton mentioned in the pleadings in good condition when delivered to defendant? Answer. Yes.

2. Was it damaged while in possession of defendant? A. Yes.

3. Was it damaged by defendant's negligence or that of its agents or servants? A. Yes.

4. If so, what was the amount of damages? A. $1,225 with interest thereon from February 15, 1873.

5. If the cotton was damaged, was the damage patent and plain? A. It was.

6. Was there a special contract for the transportation of said cotton, as is alleged in the amended answer? A. Yes.

7. If so, did any consideration pass for said contract? A. Yes.

8. Was the damage done to the cotton in whole or in part by the negligence of plaintiff's consignees, K. Biggs & Co., and if so, to what extent? A. No.

9. Was the cotton wet and muddy when received by said consignees? A. Yes.

10. Was any claim for damages made upon defendant before or at the time the cotton was received by said consignees? Admitted there was not.

Upon the finding of the jury the plaintiff moved to set aside the verdict and grant him a new trial upon several grounds of alleged

(440) error in the rulings and instructions of the Court (not necessary to be set out), which motion was overruled; and the plaintiff then moved for judgment on the verdict upon the ground that the special contract set up in the amended answer could only reduce the defendant's liability from that of a common carrier to that of a bailee

for hire, which motion was also refused; the plaintiff excepted, and judgment was rendered for defendant, from which the plaintiff appealed.

Messrs. W. W. and R. B. Peebles for plaintiff.
Messrs. D. A. Barnes, S. J. Wright and *Gilliam & Gatling* for defendant.

ASHE, J. The only question presented for our consideration in this case, is, did the Court below render the proper judgment upon the finding of the jury? We think it did not, and that the judgment should have been in favor of the plaintiff.

The jury found by their verdict the facts that the cotton when delivered to the defendant was in good order; that when delivered to the plaintiff's consignee it was wet, muddy and damaged; that (441) it was damaged while in the possession of the defendant by its negligence or that of its agents or servants; that the damage to the cotton was not contributed to in any part by the negligence of the plaintiff, and that the amount of damage to the cotton was twelve hundred and twenty-five dollars.

Upon the finding of these facts the plaintiff was clearly entitled to a verdict for the amount of the damages ascertained by the jury. The defendant was a common carrier and liable for all damages of goods entrusted to it for transportation, during the carriage, from whatsoever cause, except from the act of God or the public enemy. It was an insurer and was liable without any negligence on its part.

But the jury also found that there was a special contract, and the defendant insisted, and so the Court held, that as the plaintiff did not comply with the conditions of the contract, it was exonerated from all liability for the damages resulting from its negligence. The right of a common carrier to limit or diminish his general liability by a special contract, has given rise to as much, if not more, discussion and contrariety of opinion, than any other question of law. Most of the more recent cases held that common carriers may restrict their general liability by notice brought home to the knowledge of the owner of the goods, before or at the time of the delivery to the carrier, if assented to by the owner. 2 Redfield on Railways, 100. And it has been held that the receipt of the bill of lading by the shipper or his agent with restrictive stipulations annexed, is presumptive evidence of assent; though on this there has been a diversity of opinion, as upon every other branch of this subject; some of the Courts going so far as to hold that a bill of lading with the receipt in large letters and the stipulations in small print, is an insufficient notice. However this may (442)

be, it is certainly a mode of giving *notice* that is not to be commended.

The jury have found that there was a special contract, and the inquiry is, what effect has that upon the general liability of the defendant as a common carrier? Has the plaintiff lost his right of action against the defendant by reason of his having failed to have the extent of the damage adjusted in presence of an officer of the line before removal of the cotton, and not presenting his claim for damages within thirty days as prescribed in the "stipulations?" The leading case on this subject is *Nav. Co. v. Bank,* 6 How. (U. S.), 344, which Mr. REDFIELD in his valuable work on the law of railways speaks of, as giving a fair exposition of the American law upon the subject. In that case, Mr. Justice NELSON said: "The special agreement in this case under which the goods were shipped, provided that they should be conveyed at the risk of Harnden, and that the respondents were not to be responsible to him or his employees in any event for loss or damages. The language is general and broad, and might very well comprehend every description of risk incident to the shipping. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care. * * * Although he was allowed to exempt himself from losses arising out of events and accidents, against which he was a sort of insurer, yet as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility, as that which attaches to a private person engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods and their delivery."

To the same effect is *Bank v. Express Co.,* 93 U. S., 174, which was a case where the bill of lading had stipulations or conditions
(443) attached restricting the liability of the company, among which was one "that the company would not be liable for any such loss, unless the claim therefor should be made in writing at this office within thirty days from the date, in a statement to which this receipt shall be annexed." The Court there held that an exception in its bill of lading that the express company is not to be liable in any manner or to any extent for any loss, damage or detention of its contents, or of any portion thereof, occasioned by fire, does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company, to which the former had confided a part of the duty it had assumed. Public policy demands that the right of the owner to absolute security against the negligence of the carrier and all persons engaged in performing his duty, shall not be

taken away by any reservation in his receipt, or by any arrangement between them and the performing company.

In *Wyld v. Pinkford,* 8 M. & W., 443, the Court of Exchequer decided that the carrier, notwithstanding his notice, was bound to use ordinary care. In *Bodenham v. Bennett,* 4 Price, 31, followed and approved by *Birkett v. Willan,* 2 B. & A., 356, it was decided that notices restricting the liability of a common carrier were only intended to exempt carriers from extraordinary events, and were not meant to exempt from due ordinary care.

We might cite a number of cases in the Courts of different States of this country, establishing the principle that a common carrier can not by special notice or contract exempt himself from the exercise of ordinary care and prudence in the carriage of goods. In addition to those already cited, we refer to the cases of *Railroad v. Bauldauff,* 16 Penn. St. Rep., 67; *Dorr v. Nav. Co.,* 4 Sandf., 136; *Parsons v. Monteath,* 13 Barb., 353; *Bingham v. Rogers,* W. & S., 495; *Jones v. Voorhees,* 10 Ohio, 145; *School District v. R. R.,* 102 Mass., 552; (444) Story on Bailments, Sec. 571.

But we are not without authorities in our own State maintaining the same doctrine. This Court held in the case of *Smith v. Railroad,* 64 N. C., 235, "that although a common carrier can not by a general notice to such effect free itself from all liability for property by it transported, yet by notice brought to the knowledge of the owner it may reasonably qualify its liability as common carrier, and in such case it will remain liable for want of ordinary care, *i. e.,* negligence." And to the same effect is the case of *Glenn v. Railroad,* 63 N. C., 510.

From the examination of the authorities on this subject, we conclude that a common carrier can not by special notice brought home to the knowledge of the owner of goods, much less by general notice, nor by contract even, exonerate himself from the duty to exercise ordinary care and prudence in the transportation of goods; and we deduce from the principles enunciated by them, the following propositions:

1. That a common carrier, being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part.

2. That he can not by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care.

And now that railways have become so numerous, and as carriers have absorbed so much of that class of business which is so important to our increasing commerce and the more frequent intercourse of our people, to hold a different doctrine would lead to the abolition of

(445) those safeguards of life and property, which public policy demands shall be preserved and protected.

The jury having found that there was negligence on the part of defendant, we must take that as a fact, and adhering to the principles established in the cases cited, we are of the opinion that the defendant's liability for damages is not diminished or affected in any way by the notice or contract annexed to the bill of lading, not even by the stipulation that the damages must be adjusted before the removal of the goods from the station and the presentation of the claim for payment within thirty days; for the stipulation must be reasonable; and we do not think it is reasonable to require the consignees of a carload of cotton to cut into the bales before they are received to ascertain whether they have been seriously damaged. "A contract restricting the responsibility of the carrier must be reasonable in itself, and not calculated to ensnare or defraud the other party. A contract requiring notice of losses in thirty days is not reasonable." *Express Co. v. Reagan,* 29 Ind., 21; *Express Co. v. Caperton,* 44 Ala., 101; *Place v. Express Co.,* 2 Hill, 19.

Our conclusion is that the judgment rendered in the Court below was not warranted by the finding of the jury. Judgment must be rendered in this Court in behalf of the plaintiff for the amount of damages assessed by the jury.

Reversed, and judgment here.

Cited: Whitehead v. R. R., 87 N. C., 263; *Selby v. R. R.,* 113 N. C., 594; *Thomas v. R. R.,* 131 N. C., 591; *Everett v. R. R.,* 138 N. C., 70; *Jones v. R. R.,* 148 N. C., 587; *Austin v. R. R.,* 151 N. C., 138; *Winslow v. R. R., Ib.,* 254; *Stringfield v. R. R.,* 152 N. C., 128; *Harden v. R. R.,* 157 N. C., 243, 251; *Mule Co. v. R. R.,* 160 N. C., 223; *Kime v. R. R., Ib.,* 462.

(446)

FRANKLIN DOBBIN v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Master and Servant—Negligence of Agent—Liability of Master.

1. Where the relation of fellow-servants or co-laborers subsists, a master is not responsible for an injury to one of his servants occasioned by the negligence of a fellow-servant engaged in the same business or employment.
2. To impute the negligence of an agent to the master, he must be something more than a mere foreman over other hands; he must have the entire management of the business, clothed in that respect with the authority of the master, to whom the laborers are put in subordination and to whom they owe the duty of obedience.

3. In an action against a railroad company for damages, where it appeared that the plaintiff was employed as a train hand and was injured while engaged in digging gravel under the direction of one L., who was engineer, superintendent, conductor and master of the gravel and material train of defendant, whose business it was to employ and discharge hands connected with the train and who had *entire* charge of this branch of the business over a section of defendant's road; *It was held*, that the plaintiff and L. were not mere fellow-servants, and that plaintiff was entitled to recover of the defendant for an injury sustained on account of the negligence of L.

ACTION for damages, tried at Spring Term, 1879, of ROWAN, before *Schenck, J.*

The plaintiff alleged that he was employed by the defendant company as a train hand, under the control and management of one T. W. Lowrie, an employee and superintendent of the company, and by the direction of said Lowrie, he was engaged in digging gravel, when, by the negligence of defendant's employee, a bank of dirt and gravel fell in upon the plaintiff, whereby he was greatly injured, having his leg broken and being permanently disabled from performing any actual work. The defendant denied the allegations of the complaint and alleged that the injury was caused by plaintiff's own negligence, and that its employees and servants on the material train under said Lowrie (447) were men of ordinary skill and care, and if plaintiff was injured by the negligence of defendant's employees, superintendent, or servants, the defendant is in no way responsible therefor.

The facts set out in the statement of the case are substantially embodied in the opinion delivered by Mr. Justice ASHE, and upon them the Court below held that the plaintiff could not recover on the ground that Lowrie was a mere fellow-servant of the plaintiff. Upon this intimation the plaintiff submitted to a judgment of nonsuit and appealed. And it was agreed if this Court should reverse the decision below, no final judgment is to be given, but only judgment setting aside the nonsuit.

Mr. W. H. Bailey for plaintiff.
Mr. J. M. McCorkle for defendant.

ASHE, J. This is an action brought by the plaintiff against the defendant to recover damages for an injury to his person resulting from the negligence of the defendant. The defendant in the answer denied the allegation of the complaint, and for a further defense insisted that if the plaintiff was injured by the negligence of defendant's employees, superintendent or servants, the defendant was not responsible for the injury received.

The case was submitted to a jury for trial, and the evidence pro-

duced disclosed the facts that the plaintiff was employed as a train hand and laborer, and at the time of the injury was engaged in digging gravel under the direction of one T. W. Lowrie, and that said Lowrie was engineer, superintendent, conductor and master of the gravel and material train of the defendant, whose business it was to employ and discharge hands connected with the business for which the gravel
(448) train was used; also, that he had *entire* charge of this branch of business on his section of the railroad, known as that of digging gravel, putting the same upon the track, digging ditches and repairing the same, and also repairing culverts, etc.

After hearing this evidence, his Honor expressed the opinion that the plaintiff could not recover, admitting that he was injured by the negligence of said Lowrie, for the reason as he alleged that Lowrie was a mere fellow-servant of the plaintiff.

Who is a fellow-servant within the meaning of the law appertaining to this subject, is a difficult question, one that has never been decided in this State. And so far as we have been able to find, no definition of the relation as a test applicable to all cases, has as yet been adopted by the Courts; and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, co-laborer and employee, in the various enterprises and employments, with their numerous and divers branches and departments; the cases frequently verging so closely on the line of demarcation between fellow-servants or co-laborers and what are called "middle men," that it is difficult to decide on which side of the line they fall. Each case in the future as heretofore will have to be determined by its own particular facts.

Where the relation of fellow-servants or co-laborers is found to subsist, it is well established by the English as well as American authorities, and is conceded in the argument of this case, that the master is not responsible for an injury to one of his servants occasioned by the negligence of a fellow-servant engaged in the same business or employment. This principle has been so universally recognized by the Courts, that it may be regarded as a general rule of law. And the reason of the rule is, that where one engages to serve, he undertakes, as between him and his master, to run all the ordinary risks of the service, which
(449) includes the risk of the negligence of his fellow-servants, acting in the discharge of his duty as servant of the common master, and engaged in the same common employment. But he does not undertake to incur the risks that may result from the negligence of the master, or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the

supervision of the master, see that they perform their duty, and in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, and purchase material, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a "middle man," who, as well as the laborer, is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a "fellow-servant" in the sense of that term as used by the Courts, because he represents the master in his authority to direct, control and manage the business. To such an agency, the maxim of *"qui facit per alium"* applies. His acts are the acts of the master; his duties the duties of the master; and his neglects and omissions, the neglects and omissions of the master.

We think this principle clearly deducible from the more recent and most approved adjudications on this subject.

In the case of *Lanning v. R. R.*, 49 N. Y., 529, it was held that where the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of one charged with the (450) selection of other servants, in employing and selecting such servants, and the general conduct of the business committed to his care. To the same effect is *Flike v. R. R.*, 53 N. Y., 549.

In *Corcoran v. Holbrok*, 59 N. Y., 520, which was the case where an operative had been injured by the falling of an elevator in consequence of a defect in the chain by which it was operated, the Court held that when the master delegates to one agent the performance of duties which he is bound to perform towards his employees, the agent occupies the place of the master, and he is deemed to be present and he is liable for the manner in which they are performed.

And in *Brothers v. Carter*, 53 Mo., 372, where the plaintiff was injured by the falling of a bridge, the superintendence of the construction of which had been committed to a head carpenter; it was held if the master deputes the superintending control of the work, with the power to employ hands and purchase and remove materials, to an agent, then the master acts through the agent, and the agent becomes the master, the duties are the duties of the master, and he can not evade the responsibilities which are incident and cling to them, by thus delegating to another. In such case the agent represents the master, and though in truth he may be and is a servant, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of the term. He is an agent and stands instead of the principal, and is not a

fellow-servant within the meaning of the rule, as applied to laborers or workmen.

And again, in the case of *Brickner v. R. R.*, 2 Lansing, 504, it was held that the corporation can not act personally. "It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful
(451) appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves represents the corporation as master in all these respects; and though in the performance of these executive duties, he may be and is a servant of the corporation, he is not in these respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may also labor like other co-laborers, and may be in that respect a co-laborer, and his negligence as such co-laborer, when acting as co-laborer, may be likened to that of any other, yet when, by appointment of the master, he exercises the duties of master—as in the employment of servants, in the selection for adoption of the machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of the other and subordinate servants—then his acts are executive acts, are the acts of a master, and then corporations are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouthpiece and interpreter of their will. Their voice which is silent is spoken by him. He then only speaks their executive will, not the irresponsible will of a
(452) fellow-workman or co-laborer. The corporation can speak and act in no other way. His executive acts are their acts, his negligence is their negligence, his control, their control. He has in his executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common co-laborer or so-servant. *Harper v. R. R.*, 47 Mo., 567; *Mullan v. Mail and Steamboat Co.*, 78 Penn., 25.

We might refer to other decisions, but we think those cited establish the principle which governs the present case. We have examined the authorities cited by the counsel of the defendant and regret that several of them were inaccessible; but those we have been able to examine do not controvert, the general doctrine recognized in the cases heretofore cited, except the case of *Sherman v. R. R.*, 17 N. Y., 153. But in that case two of the Judges did not sit, and another expressed no opinion. In *Davis v. R. R.*, 20 Mich., 153, the cause of action was an injury sustained by a yardman of the company by the negligence of an engineer who was alleged to be incompetent, and it retained him in service after notice of his incompetency. But the case was decided in favor of the defendant, because the plaintiff failed to show that the defendant had knowledge of the incompetency of the employee. And the case of *Tindall v. R. R.*, 13 Ind., 366, was where a set of hands were at work for the company gravelling a part of the track. The same hands loaded and unloaded the cars conveying the gravel, and rode back and forth on the cars. While thus employed the train, through the alleged carelessness of the engineer, ran against an ox, was thrown off the track, and one of the employees was killed. It was held that the engineer and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover. The case is not in conflict with those cited above. The person killed and the engineer were colaborers. The engineer had no authority over (453) the laborers.

Applying the principle to be gathered from the current of authorities to our case, we think it is clear that Lowrie was what is termed a middle man; for it was in evidence that he was engineer, superintendent, conductor and master of the gravel and material train, whose business it was to *employ* and *discharge* hands connected with the business for which the gravel train was used, and that he had *entire* charge of the business on this section of the railroad. He was no co-laborer with the plaintiff; he had no equal in this business; he was the representative of the defendant. The laborers engaged in the same business were in subordination to his authority, as master *pro hac vice;* they were bound to yield obedience to his commands; and his acts were the acts of the defendant, and his neglects, the neglects of the defendant.

The nonsuit must be set aside.

Reversed.

Cited: Kirk v. R. R., 94 N. C., 629; *Patton v. R. R.*, 96 N. C., 464; *Hobbs v. R. R.*, 107 N. C., 3; *Ward v. Odell*, 126 N. C., 953; *Bryan v. R. R.*, 128 N. C., 390.

*SAMUEL JOHNSON v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Master and Servant—Negligence—Liability of Master.

When the plaintiff was employed as a brakeman upon defendant's railroad and was injured, while applying a brake on a train, by the breaking of a rod, and on the trial below it was found that in the original construction of the rod defendant had exercised proper care; that at the starting point of the train there was no person charged with the duty of inspecting the machinery, etc.; that there was a defect in the rod which rendered it unfit for use, discoverable upon an ordinarily careful inspection, but which was unknown both to plaintiff and defendant; that plaintiff had no reasonable opportunity to make an examination, and in the exercise of ordinary prudence could not have avoided the accident; *Held*, that all the conditions, upon which the defendant's responsibility depended, existed, and none by which it could be removed; and that plaintiff was entitled to recover.

(454) ACTION for damages, tried at Spring Term, 1879, of GUILFORD, before *Buxton, J.*

The plaintiff was a brakeman in the employ of the defendant company, and was injured by a fall from a freight car, caused by the breaking of the rod of a brake attached to the car, while he was operating it. The rod was alleged to be defective, and the plaintiff insisted that it was negligence in the company in not repairing the same, thereby causing the accident and the consequent injury.

Upon the trial the defendent asked the Court to charge the jury, that the plaintiff should have inspected the machinery in his department, and it was his duty to see that the same was sufficient; and his failure to inspect the brake, or to use it after inspection, if found to be unsafe, is contributory negligence, and he is not entitled to recover. The Court declined to give the instruction as asked, but gave it with the following qualification: "Provided the plaintiff had the opportunity to inspect." The defendant then asked for the following instruction: "If the defendant in the first instance used reasonable and ordinary care in the manufacture of the machinery, and it became defective without notice to defendant, the company is not liable." The Court also
(455) qualified this prayer: "Provided the defendant had competent inspectors." To both of which the defendant excepted.

Issues submitted to the jury.

1. Did the company use proper care in furnishing the machinery when the car was built in 1873? Answer. It did.

2. Did the company have in its employment at Charlotte, the place from which the car started on the morning of the injury, competent

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

inspectors whose duty it was to inspect the machinery and pronounce it road-worthy? A. No.

3. Was the defect such as to unfit it for use? A. Yes.

4. Did defendant have notice of the defect? A. No.

5. Could plaintiff by ordinary care have avoided the injury? A. No.

6. Did plaintiff know or have reasonable opportunity to inform himself of the defect; if so, did he remain in the service thereafter? A. No.

7. Was the defect unknown to both parties? A. Yes.

8. Was it such as an ordinary careful observer would not discover? A. Such an observer would have discovered it.

9. Was plaintiff injured by reason of a defective brake attached to defendant's car? A. Yes.

10. Was plaintiff guilty of contributory negligence? A. No.

11. To what damage is plaintiff entitled? A. $800.

Upon the issues and findings, the defendant moved for judgment on the ground that the special findings were such that the Court could not proceed to judgment for plaintiff. The motion was refused, judgment for plaintiff, appeal by defendant.

Mr. Thomas Ruffin for plaintiff.
Mr. J. E. Boyd for defendant. (457)

SMITH, C. J. The plaintiff was employed as a brakeman on the defendant's railroad, and upon a signal from the engineer was in the act of applying the brake, when the upright rod gave way, precipitating him to the ground and inflicting the injuries for the redress of which the suit is brought.

The defect in the rod was an ancient flaw or crack extending obliquely about two-thirds into its body, and the rod at this point was insufficient to bear the strain. Issues were submitted to the jury and their findings establish the following facts: The defendant exercised proper care in the construction of the rod. There were no inspectors or officers at the place of starting, in the defendant's employ, to examine and report the condition of the machinery and cars, and ascertain if they were sound and in good order. The defect in the rod rendered it unfit for use and this was discoverable upon an inspection made with ordinary care, but it was not known to either party to exist. The plaintiff had no reasonable opportunity previous to the accident to make an examination and inform himself of the defect, and he could not in the exercise of ordinary prudence have avoided the injury.

The plaintiff's damages are assessed at $800. From the judgment rendered for the plaintiff the defendant appeals.

1. The law does not impose upon carriers of passengers the same high responsibility for an injury to one of their own employees. He and his associate servants assume the hazards incident to their employment, and as an insurance against such, receive a compensation for their labor. If an injury to one results from the negligent conduct of another, performing different duties in running the same train, the principal is not liable therefor, if he employs and retains persons competent (458) and possessed of the necessary skill for the service to which they were respectively assigned. If the servant knows of defects in the machinery and remains in the service, he can not recover for injuries caused by such defects unless he has informed his superior and the latter fails to remedy them.

It is the duty of each to examine the part of the machinery in his special charge and ascertain and report its condition, for the protection of the company and for the safety of himself and fellow-servants. But in every case he must not by his own negligent conduct contribute to the injury, and if, by reasonable care and prudence it could have been averted, he has no remedy against his employer. These are the general legal relations subsisting between the servants themselves in a common undertaking which requires the co-operation of many for its successful prosecution. They are recognized by elementary writers and in our own numerous adjudications. *Manly v. R. R.*, 74 N. C., 655; *Crutchfield v. R. R.*, 76 N. C., 320, and 78 N. C., 300; *Hardy v. R. R.*, 74 N. C., 734, and 76 N. C., 5.

2. It is the general duty of carriers of persons, its own servants, as well as paying passengers, to provide suitable carriages, strong and sufficient for safe transportation and to maintain them in repair, and in order thereto to have frequent and thorough examinations made by competent men; and if, from want of such examinations, defects are not discovered, or if discovered are not remedied, and an injury is caused thereby, the company is answerable for the consequences unless the injured party has himself failed to exercise due caution by which the accident could have been prevented. Whart. Neg., Sec. 628, *et seq.*, and the cases cited.

In the present case all the conditions exist upon which the defendant's responsibility depends, and none by which it can be removed. The plaintiff had no knowledge nor information, nor opportunity for (459) examination of the defective rod, and the hazards of its continued use, and was performing his duty when it parted under the strain, and he fell.

Had the proper examination been made by the defendant and the rod repaired and strengthened, the accident would not have occurred,

and hence it must be ascribed to the defendant's own declaration of duty. The fault lies with the company, and it must bear the consequences.

3. The exceptions to the instructions of the Court are substantially disposed of in what we have already said, since they are founded upon the same misconceptions of the law which induced the defendant's motion for judgment against the plaintiff, notwithstanding the findings of the jury.

No Error.

Cited: *Cowles v. R. R.*, 84 N. C., 313; *Pleasants v. R. R.*, 95 N. C., 202; *Cornwell v. R. R.*, 97 N. C., 13; *Porter v. R. R., Id.*, 73, 79; *Mason v. R. R.*, 111 N. C., 490; *Leak v. R. R.*, 124 N. C., 458; *Coley v. R. R.*, 128 N. C., 537; *Ausley v. Tob. Co.*, 130 N. C., 36; *Pressly v. Yarn Mills*, 138 N. C., 433.

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*JAMES W. DOGGETT v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Injury to Live Stock by Railroad—Statutory Presumption of Negligence—Contributory Negligence of Owner—Judge's Charge.

1. In an action against a railroad company for killing or injuring live stock, the force of the presumption of negligence, under Bat. Rev., Chap. 16, Sec. 11, only applies when the facts are not known, or when from the testimony they are uncertain. When the facts are fully disclosed and there is no controversy as to them, the court must decide whether they make out a case of negligence; and when they fail to do so, the defendant can not be held liable.
2. If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented.
3. Wherever, on the trial of an action against a railroad company for killing cattle, it appeared that on account of a heavy rain the cattle had sought a dry spot on the track near a trestle, where they were killed in the night; the train was not shown to have been running with unusual speed, nor were the number and weight of the cars proved, although a witness (a brakeman on the train) stated that in his opinion it could not have been stopped by application of the brakes in less than half a mile, and it did not affirmatively appear that when the cattle were first seen the motion of the running train could have been arrested in time to avert the injury; *Held*, that no blame could justly be attributed to the defendant.
4. In such case *it was held to be error*, for the court below to charge the jury "that if they believed from the evidence the defendant at the time of the killing was running a train which could not possibly be stopped within half a mile, this *of itself was negligence*, and would entitle the plaintiff to recover."

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

(460) APPEAL at Fall Term, 1878, of GUILFORD, from *Kerr, J.*

This was an action to recover damages for killing cattle of the plaintiff. The defendant company admitted the value of the cattle, and that they were killed by being run over by an engine on its road. The testimony introduced on the trial, and the charge of the Judge to the jury are sufficiently stated in the opinion of this Court. Verdict and judgment for plaintiff, appeal by defendant.

Mr. J. A. Gilmer for plaintiff.
Mr. J. T. Morehead for defendant.

SMITH, C. J. This action is brought to recover damages for the killing and injuring the plaintiff's cattle by the negligent manage-
(461) ment and careless running of a freight train over the defendant's road in charge of its servants and employees, and within six months thereafter. The killing was admitted, and thereupon, to repel the imputation of negligence, the defendant introduced its brakeman, then on the train, who testified to the following facts: The witness had been in the defendant's service as fireman for the space of fourteen years and was on the train on the 16th day of June, 1876, when it ran over the cattle. The train was moving down an inclined plane and over a straight line of road a mile in length, with the steam shut off, when it came in contact with the cattle which were near a trestle spanning Reedy Fork branch and on the track between eight and nine o'clock of that night. The night was dark and rainy and the headlight in front of the engine would not enable the engineer to see an object more than thirty yards before him. The witness was supplying wood to the furnace when the signal was given, and hastened to apply the brakes, but before he could do so, the cattle were struck by the engine. The momentum of the moving train of freight cars was such that in the opinion of the witness it could not be stopped by the application of the brakes in less than half a mile. The length of the train of cars and the speed with which it was descending are not stated. Much rain had fallen and the surface of the ground on either side of the track where the accident occurred was covered with water, as the owner testified, when he made an examination next morning.

Among other instructions not set out in the record, the Court charged the jury "that if they believe from the evidence the defendant at the time of the killing was running a train which could not possibly be stopped within half a mile, this of *itself was negligence,* and would entitle the plaintiff to recover."

The rules of law require, in an action for damages resulting
(462) from the negligence of the defendant or his agents and employees

while engaged in his service, that the plaintiff shall prove the negligence as a part of his case. Where injury to stock, straying off, is done by trains running at night, as well as by day, and known only to the defendant's employees, this was an almost impossible requirement. The owner would not know how, when, or by whom the injury was done, while the servants of the road would possess full knowledge of the facts. Hence the General Assembly enacted (Act of February 2, 1857) that if the action was prosecuted within six months, "when any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be *prima facie* evidence of negligence on the part of the company in any suit against such company" (Bat. Rev., Chap. 16, Sec. 11), thus shifting the burden of proof from the plaintiff to the defendant, and requiring the latter to show the circumstances and repel the legal presumption. But where the facts are fully disclosed, and there is no controversy as to them, the Court must decide whether they make out a case of negligence, and if they fail to do this, the defendants are not to be held liable. Such we understand to be the purpose and effect of the statute, and that, all the facts appearing, the defendant is charged or acquitted, as negligence appears or is disproved. The cases where action has been brought for injury to stock from moving railway trains are numerous, and are collected and discussed by Mr. Redfield (1 Red., R. R., Chap. 18), and the rule of liability extracted therefrom seems to be this: If the owner permits his cattle to stray off and get upon the track, and they are killed or hurt, the company is not liable unless the company was carelessly running the train, or could by the exercise of proper care, after the animals were discovered, have avoided or prevented the injury. In other words, the company is not
required to abate the usual and safe speed of their trains, lest (463)
there may be cattle on the road which may be killed or injured;
and if a proper lookout is kept up, and all reasonable efforts made when the obstruction is seen, to avoid the accident, the company is exempt from responsibility, and the injury is ascribed to the contributory negligence of the plaintiff, in permitting his stock to roam about and get on the road.

In the present case, the evidence shows that much rain fell during the night, and the water overflowing the ground the cattle had sought a drier spot near the trestle, and there they were found next morning by the owner. The train is not shown to have been moving with unusual speed, nor were the number and weight of the cars constituting it proved, and hence we can not see how great was the momentum, which prevented an arrest of its motion until it had run over a half mile or more of the road. There is no apparent negligence in this, and it does affirmatively appear that when the cattle were first seen as white objects

on the road within the distance of thirty yards, the motion of the running train could not be arrested, if the force had been applied to the brakes in time to avoid the collision. We can see no blame justly attributable to the persons managing the cars.

The railroad system, traversing the country in all directions, contributes largely to the development of its agricultural, commercial and other resources, and this result is attained mainly by the certainty, regularity and rapidity with which the trains move and transportation is effected. These advantages are transferring a large bulk of the freight from water to this mode of internal land conveyance, and though occasional injury may be done to stock allowed to stray upon the road-bed, this inconvenience is greatly outweighed by the benefits conferred upon the whole country by railway transportation, and it would be an unwise policy to hamper the latter and diminish its usefulness by need-
(464) less restraints. We do not in the present case discover evidence of such culpability in running or conducting the train as should subject the defendant to liability to the plaintiff for the loss of his cattle. It is certainly not the fault of the former that they had sought and found a resting place upon the track, nor would any care or effort have been availing to avert the injury when they were first seen. It is the interest, not less than the duty of those in charge of moving trains, to avoid, whenever it can be done, any obstruction found upon the road, since it endangers the safety of the train itself and the persons and property upon it, and not less the persons in charge than others, and a much higher duty is owing to those to convey them safely.

Now, the instruction of the Court in substance is, that the inability to arrest the progress of a running train, in a less space than half a mile, whether the speed of its motion was fast or slow, or whether that fact could in any manner be the cause of the mischief, made the defendant responsible. In this we do not concur, because it leaves out of view the direct causal agency by which the damage was done, and, as the proof is, did not contribute to the result. We propose to examine the cases decided in our own Court on the subject.

In *Herring v. R. R.*, 32 N. C., 402, the action was to recover damages for a slave run over and killed by the defendant's train on Sunday afternoon. The slave was asleep on the track, the day clear, and the road straight for a mile or more. The slave could be seen for a half a mile, according to some witnesses, and for two hundred yards only, according to others. The train was passing at the usual hour and the attempt to arrest the motion was not made until the cars were near the slave, and was successful only when it had passed over him. The Court held there was no negligence and the defendant was not responsible for the accident.

In *Scott v. R. R.*, 49 N. C., 432, the plaintiff's cow was killed (465) in the day time by the train moving at the usual rate of twenty miles an hour, at a place where the road was straight and the cow could be seen a mile distant. PEARSON, J., says: "In the case of *Herring v. R. R.*, the facts were nearly the same as are presented in this case, with this difference: there, the property destroyed was a slave; here, it was a cow. It was held in that case that the facts did not show negligence on the part of the defendant. We consider that holding decisive of this case."

In *Aycock v. R. R.*, 51 N. C., 231, the cattle killed were feeding on either side of the road, and some in the act of crossing it, where it was straight and they could be seen half a mile, when the train being behind time was running at an accelerated speed, struck and killed one of them, and no whistle was blown to drive it from the track. The Court imputed negligence to the defendant in the failure to use the whistle, the ordinary means of driving stock from the track.

The facts in these cases occurred before the passage of the Act of 2 February, 1857, and the decisions were governed by the common law. We now propose to examine those made since the passage of the statute.

In *Battle v. R. R.*, 66 N. C., 343, actual negligence was imputed to the company in leaving their cars upon a grade in the road that passed through enclosed pasture lands of the plaintiff, "the upper car being chocked with a stick of wood." The lower car somehow became detached, and running down the declivity, killed the mule. "Independent of the legal presumption," say the Court, "the evidence in this case showed gross negligence on the part of the agents of the company."

In *Jones v. R. R.*, 70 N. C., 626, the plaintiff's horse was struck by a freight train, soon after sunrise, while descending a slight down-grade, straight for a half mile or more, so that the animal could (466) have been seen that distance. The horse had run ahead of the train at a rapid pace for some two hundred yards, and was in his owner's field. The Court say: "There was nothing to prevent the engineer from seeing the horse, and, therefore, it is to be taken that he did see him. The alarm whistle was not blown at all, and the whistle for the brakes was not sounded until about the place where the train struck the horse, whether just before or just after striking, does not appear. We agree with his Honor that *this was negligence.*"

In *Clark v. R. R.*, 60 N. C., 109, the statutory presumption is held to prevail until rebutted by showing the exercise of due diligence would not have prevented the accident.

In *Pippen v. R. R.*, 75 N. C., 54, the mules were stricken and rendered valueless by the defendant's train moving at the usual speed of twenty miles an hour and on schedule time, in the night season. The mules

ran in front of the engine on the road a distance of over two hundred yards, could have been seen at seventy-five yards, and in that space the train could have been stopped. But, in fact, the mules were not discovered until within thirty feet of the train, and then every effort was made, but failed, to arrest its motion. This was held to be a case of actual negligence. The language of the Court in the opinion in regard to the force of the statute is very strong in saying the defendant must show "there was no neglect whatever," and "that there was not only such rebutting evidence offered, but without the aid of the statute, it would seem that the plaintiffs are entitled to recover." The facts here also disclosed actual negligence.

In *Proctor v. R. R.*, 72 N. C., 579, the plaintiff's cow jumped upon the track, at the opening of a cut, about two hundred yards in front of a train moving at the speed of twenty-three miles an hour, and incapable of being stopped under four hundred yards, and the engineer, (467) as soon as he discovered her, blew the alarm and the brakes were applied, but not in time to prevent the injury. The Court declared upon these facts that there was no negligence on the part of the defendant's agents, and the company was not liable to the plaintiff for his loss.

We think the cases do not conflict with our own reasonable construction of the act, and that this construction is calculated to secure all its intended benefits to those whose property is destroyed or injured in their absence by railway trains, without doing injustice to the company; and that when all the facts and circumstances of the accident are shown, the law itself will raise or refuse to raise the inference of neglect, upon which the liability of the company depends. The force of the presumption only applies when the facts are not known, or when from the testimony they are uncertain. In such cases the statute turns the scale and fixes the responsibility, and not when all the facts are well established. This seems to follow from the principle that negligence is a question of law, to be decided by the Court upon admitted or proved facts, and thus the law is uniformly and consistently administered. There is

Error.

Cited: Durham v. R. R., 82 N. C., 354; *S. v. Roten*, 86 N. C., 703; *Roberts v. R. R.*, 88 N. C., 563; *Aycock v. R. R.*, 89 N. C., 328; *Winston v. R. R.*, 90 N. C., 68; *S. v. Divine*, 98 N. C., 782; *Randall v. R. R.*, 104 N. C., 414; *Ballinger v. Cureton, Id.*, 478; *Randall v. R. R.*, 107 N. C., 754, 764; *Norwood v. R. R.*, 111 N. C., 241; *S. v. Miller*, 112 N. C., 886; *Kahn v. R. R.*, 115 N. C., 641; *Hardison v. R. R.*, 120 N. C., 494; *Mesic v. R. R., Id.*, 492; *Baker v. R. R.*, 133 N. C., 32, 33; *Kindley v. R. R.*, 151 N. C., 213; *S. v. Baldwin*, 152 N. C., 831.

HENRY VONGLAHN and others v. A. J. DEROSSET and others.

Corporation—Liability of Stockholders—Limitation of Action.

1. The statute (Revised Code, Chap. 26, Secs. 5, 6), which continues the existence of defunct corporations for three years after the expiration of their charters, for the purpose of bringing and defending suits and closing their general business, ousts the former equity jurisdiction for the appointment of a receiver, at the instance of creditors, to wind up the corporate affairs.
2. The statutory remedy is exclusive of all others, and must be pursued within the three years, and a failure to proceed within that period will be a complete defense, not only to the corporation, but to the stockholders, who, by its charter, are made individually responsible in the event of its insolvency.

ACTION, removed from New Hanover and tried at Spring (468) Term, 1878, of BRUNSWICK, before *Eure, J.*

This action was brought to recover an amount of money, alleged to be due the plaintiffs by the Commercial Bank of Wilmington on account of deposits made by them with the bank. The bank being insolvent, a recovery is sought against the defendant stockholders by virtue of the personal liability clause in the charter to the effect that in case of insolvency or ultimate inability of the bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of stock by them respectively held. And the Court being of opinion with defendants, gave judgment accordingly, and the plaintiffs appealed.

Messrs. D. J. Devane and *D. L. Russell* for plaintiffs.
Messrs. Geo. Davis and *Stedman & Latimer* for defendants.

SMITH, C. J. The president and directors of the Commercial Bank of Wilmington were incorporated and organized under an act of the General Assembly, ratified 18 January, 1847. Its existence as a corporate body expired by the limitation contained in its charter and amendment on 31 December, 1871. One of the clauses of the charter upon which the plaintiffs' claim is predicated is in these words: "In case of insolvency or ultimate inability of the bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them respectively held."

To enforce this liability the plaintiff, VonGlahn, instituted an action in his own name and as a creditor, against George Harris, one of the defendants, and it was held that he could not recover and appropriate to his own individual use, a fund in which all the creditors had an equal and common interest, and that they were necessary parties. *VonGlahn v. Harris,* 73 N. C., 323. And the same disposition was made of a

similar action against another of the defendants at the same term. *VonGlahn v. Latimer, Ibid.*, 333.

The plaintiff thereupon, on 23 December, 1875, and within the year, on behalf of himself and the other creditors, commenced the present proceeding against the defendants, stockholders, and representatives of deceased stockholders, and the case came before this Court upon a demurrer filed by the defendant Kidder.

The demurrer was overruled upon the ground that the defendants having a common defense could not sever in their pleadings, and the cause was remanded. *VonGlahn v. DeRosset,* 76 N. C., 292.

The present appeal presents several matters of defense, set
(472) up in the several answers, some of which are special to the particular defendants and not necessary to be noticed. The common defenses relied on by all are:

1. The charter of the bank having by express limitation expired with the year 1871, and the period of three years allowed by law for the settling up of its business thereafter having expired, the indebtedness of the bank and the collateral liability of the stockholders therefor are extinguished and the action can not be maintained.

2. The action is barred by the statute of limitations and is not within the savings of Section 45, C. C. P., modifying Section 8, Chap. 65, of the Revised Code.

3. The corporation itself and the omitted stockholders are necessary and proper parties.

The insolvency of the bank, though denied in the answers, was admitted on the trial. We do not propose to examine the merits of the different defenses set up to defeat the recovery, but confine our attention to one only which disposes of the case.

In *Fox v. Horah,* 36 N. C., 358, a bill in equity was filed to arrest the prosecution of an action at law by the defendant Horah, cashier of the State Bank of North Carolina, to recover the amount of a promissory note executed by the plaintiff, as security of J. G. Hoskins for money borrowed of the bank, and drawn payable to its cashier, on the ground that the bank as a corporate body had ceased to exist. The Court, then, consisting of RUFFIN, DANIEL and GASTON, the latter of whom delivers an elaborate and able opinion in the case, sustain the equitable claim to relief, for the reason that since the dissolution there was no legal person *in esse* entitled to the money when collected, and award a perpetual injunction against the further prosecution of the action at law.

So in *Malloy v. Mallett,* 59 N. C., 345, this Court recognizing the
correctness of the doctrine enunciated and enforced in the pre-
(473) ceding case, and declaring it to be "a well settled principle of

the common law that upon a dissolution of a corporation, its debts became extinct," hold as a clear deduction therefrom that the liability of a stockholder, which is collateral and subsidiary only to the obligation of the principal debtor, is likewise extinguished by the event which extinguishes the prior legal obligation.

These decisions were made and these conclusions reached after full discussion and careful consideration by as able jurists as ever presided in this Court, and our reluctance to disturb them after so long an acquiescence by the profession, could be overcome only by the clearest convictions of their error. They rest, however, upon strictly legal principles, well settled by authority and carried to their logical results, the soundness of which in their applications to the facts before the Court, we are not disposed nor is it necessary to question or controvert.

But a remedy has been suggested, and in numerous cases applies, which may seem to conflict with the decisions of this Court, by calling into exercise, on behalf of creditors or others interested, the equitable jurisdiction of the Court, interposing and affording relief, when none is admissible at law, and for the very reason that there is no legal remedy. While it is manifest that, by its dissolution the corporation ceases to exist and can sustain the relations of neither creditor nor debtor towards others, and hence debts to or from it become extinct at law, it is inequitable that creditors should go unpaid, when there are funds or debts of the defunct corporation which ought to be applied in payment, simply for want of some legal being, intervening between the creditors and debtors of the corporation, with capacity to make the collection and adjustment. Accordingly, acting upon the maxim that trusts shall not fail for want of a trustee, and regarding the debts and other property of the dissolved corporation as the property of its creditors to the extent of their respective claims, the Court of Equity will stretch out its arms and gather up and collect the (474) assets, though there be no strict legal owner to assert his right, and will appropriate and distribute them among the creditors and subordinate thereto, among its secondary creditors, the stockholders themselves. The exercise of this equitable power, though not adverted to in the cases cited, is not denied, nor is it inconsistent with the principle therein declared. The remedy suggested grows out of those rigorous rules of the common law and is the offspring of necessity to prevent a failure of justice. As equity lends its aid to enforce a just and equitable right, because in such case the Court of Law, acting on fixed and unbending rules is incompetent to afford relief, the necessity which creates also limits the power to be exercised, and the power itself must disappear, when an adequate legal remedy is provided. Of the numerous cases cited in the well considered argument of the plaintiff's counsel,

we shall only refer to a few in support of our views. *Curran v. Arkansas,* 15 Howard, 304; *Mumma v. Potomac Co.,* 8 Peters, 281; 2 Potter Corp., Sec. 714; 2 Kent Com., 307.

When a natural person dies, his rights and responsibilities devolve upon his personal representative and survive and vest in him for a space sufficient to allow of all adjustment of his unsettled business relations, and the distribution of the residue of his personal estate among those by law entitled thereto. But for this provision of law the same impediments would be met and the same consequences flow from the death of a natural person as of that ideal entity embodied in a corporation. The want of a representative in the latter case, with legal capacity to act, obstructs the calling in and appropriation of its resources and means to the discharge of its obligations, and it is to supply this defect that equity interferes and enforces the appropriation.

But we have now a statutory remedy to provide for the emergency and secure the settlement of the affairs of a defunct corporation,
(475) which supersedes the exercise of equitable power, as it removes the necessity in which it had its origin, which is contained in the Revised Code, Chap 26, entitled "Corporations."

Section 5 enacts that "all corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock," but not to continue their business.

Section 6 vests, upon the dissolution of such corporation, in the Court of Equity the power, upon application of a creditor or stockholder within the three years, to appoint one or more trustees or receivers "to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend in the name of the corporation, or in the name of such receivers or trustees, all such suits as may be necessary or proper for the purposes aforesaid; and to appoint agents under them, and *to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation, and the powers of such receivers may be continued beyond the said three years, and as long as the Court shall think necessary for the purposes aforesaid."*

The two succeeding sections give the Court a supervising control over the receivers and direct how the funds shall be applied and disposed of. The effect of the statute is to provide for the appointment of a represen-

tative of a dissolved corporation, when necessary, as in case of the death and intestacy of a natural person, to administer upon its estate, to collect its assets and pay its debts, and under the direction of (476) the Court to distribute what may remain among those entitled thereto. The statute effectually and fully obviates all the difficulties growing out of the inexorable rules of the common law in case of the dissolution of the corporate body by affiux of time, or its premature extinction by judicial decree, and Section 29 declares that in *the latter case,* neither the debts *due to nor from it* shall thereby be extinguished.

As the law-making power has thus undertaken to regulate the settlement of the affairs of an expired corporation and provide the mode in which it shall be done, the statutory remedy must be considered as superseding and substituted for all others directed to the same end. The relief is within reach of each and every creditor, and of the stockholders and members of the corporation, during the space of three years, next ensuing the dissolution, and no longer. The limitation is reasonable and proper in itself and an inseparable condition of the remedy.

The plaintiff has not, nor has anyone who might have availed himself of the act, applied for the appointment of a receiver or trustee, and thereby prolonged the corporate life under the act, and thus its benefits have been forfeited and lost. The remedy did exist; it is now barred by lapse of time, and the plaintiff's negligence. He and his associate plaintiffs must abide the consequences of the delay.

The construction put upon the statute and its effect upon the remedy are fully sustained in a recent adjudication of the Supreme Court of Massachusetts upon an act in force in that State very similar in its provision to ours. *Thornton v. R. R.,* 123 Mass., 32. The facts of the case are briefly these: The plaintiff at July Term, 1875, recovered judgment in the Superior Court of Suffolk County against the Marginal Freight Railway Company for money due before 6 May, 1872, and caused execution to issue on which nothing could be made. The charter of this company was repealed by an act of the Legislature, passed at the date mentioned, at which time it owned cer- (477) tain railroad tracks in the streets of Boston. The repealing act incorporated the Union Freight Railroad Company, the other defendant, and it took possession of the property. The value thereof as damages due the dissolved corporation by its successor was the fund which the plaintiff in his bill sought to reach as belonging to his debtor and apply to the payment of his claim. The new company demurred to the bill on the ground that more than three years had passed since the dissolution of the former company and before the recovering of the judgment, and hence the judgment was a nullity and the debt extinct. The demurrer was sustained and the bill was dismissed. GRAY, C. J., who de-

livered the opinion from which we quote so much as relates to the present case, declares, that no judgment can be rendered against a corporation which has ceased to exist, and that the maintenance of this proposition is not in conflict with the right of creditors and stockholders to assert their claims against its property in a Court of Chancery *in accordance with the reasonable regulations of the Legislature,* or with the general principles and practice in equity, and proceeds as follows: "Upon the repeal of the Marginal Freight Railway Company by the Statute of 1872, Chap. 342, which was passed and took effect 6 May, 1872, the corporation was nevertheless, by virtue of the general statutes, Chap. 68, Sec. 36, continued a body corporate *for the term of three years afterwards* for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. And under Section 27 of the same chapter this Court sitting in equity *on the application of a creditor or stockholder at any time within three years,* might have appointed receivers whose powers should continue so long as the Court should deem necessary to take charge of the estate and effects of the corporation, to collect the debts and property due and belonging to it, in its name or otherwise, and to do all other
(478) acts which might be done by the corporation, if in being, necessary for the final settlement of its unfinished business. *No application having been made* for the appointment of a receiver, the company *at the expiration of the three years* ceased to have any such existence that a valid judgment could be rendered against it in an action at law."

As the judgment was a nullity and did not admit the interposition of the Court and the pursuit of the debtor's property in equity for its satisfaction, so the total extinction of the debt itself precludes any proceeding not conducted under the statute for enforcing its payment, and the plaintiff is left without remedy.

Other interesting questions were presented and argued which are not free from difficulty, and as their solution is not required in the determination of the controversy, we do not propose to consider and decide them. They spring mostly out of the financial disasters brought upon the banking and other institutions of associated capital by a long and exhausting civil war, and their solution would be fruitful of little real practical advantage. Some have been settled by time, that silent and ever-active worker in the disposal and ending of controversy, to whose influence the prosperity and repose of the country is so largely owing. Time has been the arbiter in the present case, and to his adjustment all parties must submit.

Affirmed.

Cited: *Bronson v. Ins. Co.*, 85 N. C., 415; *Dobson v. Simonton*, 86 N. C., 496; *Marshall v. R. R.*, 92 N. C., 332; *Asheville Div. v. Aston, Id.*, 587; *Heggie v. B. and L. Asso.*, 107 N. C., 591; *Bass v. Nav. Co.*, 111 N. C., 446; *Logan v. R. R.*, 116 N. C., 949; *Wilson v. Leary*, 120 N. C., 93; *Torrence v. Charlotte*, 163 N. C., 566.

Dist.: *Young v. Rollins*, 90 N. C., 132.

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SAMUEL ALBERTSON v. BLAND WALLACE, Sheriff.

Taxation—Constitutional Law.

1. The tax imposed by section 12, Schedule B, of the Acts of 1876-'77, ch. 156, is a privilege tax upon *occupations*, measured by the extent of the business, and not a tax upon the capital invested in such business.
2. The exemption in the foregoing section of purchases from those who have already paid their tax does not apply to dealers in spirituous liquors whose purchases are taxed under section 10, Schedule B, of said act.
3. A tax which discriminates in favor of purchases from wholesale dealers, resident in the State, who have paid their tax, and against purchases from non-residents who have not, is void for repugnancy to the clause of the Federal Constitution, which vests in congress the power to regulate interstate commerce.

INJUNCTION, heard at Fall Term, 1878, of DUPLIN, before *McKoy, J.*

The action in which the injunction was obtained was commenced by the plaintiff against the defendant to test the legality of Sections 10 and 12 of Schedule B, Chapter 156, of the Acts of 1876-'77. The plaintiff obtained a restraining order preventing the sale of certain personal property levied on by defendant as Sheriff of Duplin County for the satisfaction of a tax assessed by the Register of Deeds against the plaintiff. It appeared that plaintiff was a grocery merchant and retail dealer in spirituous liquors, doing business in the town of Kenansville, and had paid all taxes assessed against him, except that assessed under the said sections from 1 January to 1 July, 1877, amounting to seventeen dollars and sixty cents, State and county tax on the amount of purchases of liquors during said period, and also the sum of thirty cents on the amount of purchases of other groceries from wholesale dealers doing business out of this State. It also appeared that the plaintiff's entire purchases of liquors had been made from whole- (480) sale dealers in the State, who had paid the tax to the State and county under said Section 10.

The plaintiff insisted that the tax upon liquors bought as aforesaid, and also that the tax upon the other articles, was unconstitutional, but

the Court being of a different opinion, gave judgment that the injunction be dissolved, and the plaintiff appealed.

Mr. H. R. Kornegay for plaintiff.
Messrs. Reade, Busbee & Busbee for defendant.

SMITH, C. J. The appeal brings before us for consideration the interpretation of the tenth and twelfth sections of Schedule B of the Revenue Law of 10 March, 1877 (Laws 1876-'77, Ch. 156), and their consistency with the Constitutions of the United States and of this State.

The plaintiff is a grocer, dealing in spirituous liquors and other merchandise incidental to his business, and is charged with a tax of $8.80, being five per cent on the amount of his purchases of spirituous liquors for the six months preceding 1 July, 1877, for the State, and a like sum for county purposes. These liquors were all bought of wholesale dealers at Wilmington, who have paid a similar tax as required by Section 10. He is also assessed with a tax for both State and county of thirty cents on the amount of his purchases of other
(481) merchandise out of the State. The purpose of the suit is to arrest the collection of these taxes, on the ground of their illegality. Several propositions have been maintained in the argument of the plaintiff's counsel.

1. There has been an *ad valorem* tax levied and collected on the stock of liquors as a part of the plaintiff's taxable property, and the assessment under Section 10 is a duplication not allowable under the Constitution.

2. The spirituous liquors have been exempt from the tax by virtue of the concluding words of the first sentence in Section 12.

3. The discrimination against goods purchased out of the State is repugnant to the Constitution of the United States, which commits to Congress the exclusive right to regulate inter-state commerce.

The correctness of these propositions we will proceed to examine in their order.

1. The first proposition is founded on a misconception of the meaning of Section 3, Article V, of the Constitution, which prescribes a "uniform rule" of taxation upon property "according to its true value in money." The liquors which the defendant had on hand on the first day of June, and which then consituted a part of his aggregate taxable property, were properly assessed with the *ad valorem* tax, as directed in the first clause of the section. The tax imposed in Sections 10 and 12 of the Revenue Act is not a *tax on property,* but upon the *trade or occupation* of the person, and is authorized by the concluding words of Sec-

tion 3: "The General Assembly may also tax trades, professions, franchises and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed." It is under this clause that the tax is levied under Sections 10 and 12 on the plaintiff's *business* or calling, and the amount of the tax to be paid is measured by the extent and magnitude of that business.

The schedule recites in direct language that "the taxes in this schedule imposed are a license tax for the privilege of carrying (482) on the business or doing the act named," and declares that "nothing in this schedule contained shall be construed to relieve any person from the payment of the *ad valorem* tax on his property, as required in the preceding schedule."

We see no just objection to the mode adopted for ascertaining and determining the amount of the privilege tax and making it dependent upon the extent of the business of which the amount of the aggregate purchase may be as accurate a test or measure as any other that could be adopted. This mode of taxing is, in our opinion, eminently fair and reasonable in its operation. A specific tax of a definite sum upon a trade, without regard to the extent of the trader's operations, and pressing with the same force on one whose business is small as upon the large operator, would be very unequal. The ability to pay increases with an increased and successful business, and it is just and proper to gauge the sums to be paid upon that principle. This is what the statute undertakes to do, and no more, and it lies within the discretion of the taxing power to levy the privilege tax under this rule.

2. The plaintiff insists that upon the proper construction of the associated sections, the exemption of purchases from those who have already paid the tax on their business, applies equally to spirituous liquors as to other kinds of merchandise, and therefore no tax is due from him.

The subject is not altogether free from difficulty, and we have, after careful comparison of those sections, arrived at the conclusion that the exemption in Section 12 does not extend to Section 10. The latter is complete and unconditional, and requires that *"every dealer in spirituous* or vinous liquors, porter, lager beer or other malt liquors, shall pay a tax of five per cent on the amount of *any and all liquors."* There is no qualification or exception, and the language is peremptory (483) and explicit. Section 12 imposes a tax on "every merchant, jeweler, grocer, druggist, and every other trader who, as principal or agent, carries on the business of buying or selling goods, wares or merchandise of whatever name or description, *except such as are specially taxed elsewhere in this act,"* etc., obviously excluding from the scope of the general words of description dealers in spirituous and other

liquors, whose business is taxed in the preceding two sections; and it is to the class specified in the section itself, that is, all other traders except those who deal in spirituous liquors, that the concluding words apply. "But no retail merchant shall be required to pay any tax on purchases made from wholesale merchants residing in the State." The words are all contained in a single sentence, and the exception must be construed as limiting the generality and scope of the preceding language.

This construction is fortified by the fact apparent in all the adverse legislation in relation to the sale and use of spirituous liquors, that the traffic is not favored, but is subjected to heavy burdens and restraints, and in localities is almost entirely prohibited. The same general policy is carried out in the imposition of the license taxes, so much greater for the trade in this than in other articles of merchandise, and without the deductions allowed on the latter. We can not, therefore, so interpret the act as to exempt the plaintiff from the assessment on his business, simply because those who sold to him have already paid a like tax on the amount of their purchases, and these goods constituted a part of their stock, in opposition to a law which taxes *all dealers,* without exception or regard to the source from which they were obtained.

The suggestion that a law, distinguishing between the trade in liquors and other articles of merchandise, is an exercise of power not warranted by the Constitution of the United States, or of this State, is (484) sufficiently answered in what we have said in the opinion in the case of *S. v. Joyner, post,* 534, and we content ourselves by referring to the authorities there cited.

3. The third proposition is that the discrimination in favor of purchases made from wholesale dealers resident in the State, who have paid their privilege tax, and against purchases made from those who have not and from non-residents, interferes with the exclusive power conferred on Congress "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." Cons. U. S., Art. I, Sec. 7 (3).

This objection applies only to the small tax of thirty cents derived from the aggregate purchases of merchandise other than spirituous liquors, from without the limits of the State, since, as we have said, the discrimination does not extend to the latter.

In *Davis v. Dashiel,* 61 N. C., 114, was called in question the validity of a provision in the Revenue Act of 1866, which imposed a tax upon every resident of the State who brings into the State, *or buys from a non-resident,* whether by sample or otherwise, spirituous liquors, etc., for the purpose of sale, fifteen per cent on the amount of his purchases," and on "every person who buys to sell again spirituous liquors, etc., from

the makers in this State, his agent, factor or commission merchant, ten per cent on the amount of his purchases." Upon a review of the authorities, it was held that the discrimination was not repugnant to the clause of the Constitution which forbids a State, without the consent of Congress, to lay imposts or duties on imports or exports. Art. I, Sec. 10 (2). Nor to the clause already cited in regard to the regulation of commerce among the States.

The opinion is based on the theory that when goods are brought into the State and mixed up with the mass of its property, they lose their separate identity as an importation, and may be singled out (485) and taxed at the will of the Legislature, and this tax may discriminate against them, as of foreign origin. The decision was made in 1867, and upon facts occurring antecedent to the change in the Constitution, and when the taxing power was not under its present restrictions. It is quite clear such a statute is not authorized under a system of uniform *ad valorem* taxation now prescribed by the fundamental law. But aside from this, that decision is in conflict with the provisions of the Federal Constitution, as expounded by the Supreme Court of the United States, since it was made in *Welton v. Missouri,* 91 U. S., 275, and the question must now be considered settled. The facts of this case are briefly these: The Legislature, by statute, defined a peddler to be one who "shall deal in the selling of patents or other medicines, goods, wares or merchandise, except books, charts, maps and stationery, which are not the *growth, produce* or *manufacture* of this State, by going from place to place to sell the same," and prohibited anyone dealing as a peddler without license, for which a rate of charge is prescribed under a penalty; while no such license is required from one who sells by going from place to place articles "the growth, produce or manufacture of the State."

The constitutionality of this tax was drawn into controversy, and defended on the ground that it was a privilege tax only, and not a discriminating tax on property made in and out of the State.

The Court say, Mr. Justice FIELD delivering the opinion: "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits, is admitted; but like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly (486) from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress

by the Constitution of the United States, it will not be any the less invalid because enforced through the form of personal license." Then, after a full discussion of the question and examination of the authorities, the result is thus stated: "It is sufficient to hold now that the commercial power *continues* until the commodity has ceased to be the subject of *discriminating legislation by reason of its foreign character.* That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void."

We can not withdraw the tax now under consideration from the condemnation of the principle thus declared, and we yield to the authority of the decision. It is true, purchases from resident wholesale dealers who have not paid the tax, are put on the same footing as purchases from non-residents, but as such wholesale dealers doing business in the State are required to pay the tax, the law makes practically and really the distinction between the home and non-resident merchant in regard to the goods, the very result against which the framers of the Constitution intended to guard, by vesting the power in Congress and denying it to the States.

It is further argued that purchasers from home dealers are freed from the tax in order to put them on an equal footing with purchasers from non-residents, and in both cases one tax only be collected. Otherwise, a double assessment would be borne by the liquors in one case, and a single assessment in the other, to the disadvantage of the home merchant, and this, it is the purpose of the law to remove. But a State can not on such pretext distinguish by legislation against goods
(487) imported, so as to put on them, *as such,* a heavier burden than its own productions are made to bear, neither directly nor by license charges. Much confusion would ensue if the States were allowed thus to discriminate against the productions and manufactures of each other, to favor their own, and hence the Constitution forbids it to be done.

It will be noticed that there is a specific sum of five dollars required to be paid in addition to the per centum on the sales of other commodities as a pre-requisite to engaging in the traffic. It follows, therefore, that when, as in the present case, the trader deals in spirituous liquors and in other merchandise, the tax to be paid upon them will be on the amount of his purchases of the former, the same as if that was his exclusive business, and upon other merchandise such as he would pay if he did not deal in liquors. In a proper sense, he comes under the provisions of both sections.

The plaintiff is therefore entitled to relief from the sum of thirty

cents only, and must pay the residue of assessment in the defendant's hands for collection. With this modification, the interlocutory order is affirmed.

PER CURIAM. Modified and Affirmed.

Cited: *S. v. Cohen,* 84 N. C., 772; *S. v. Miller,* 93 N. C., 515; *S. v. French,* 109 N. C., 724; *S. v. Stevenson, Id.,* 733; *Smith v. Wilkins,* 164 N. C., 140.

PETERSBURG RAILROAD COMPANY v. COMMISSIONERS OF NORTHAMPTON.

Taxes—Railroad—Exemption in Charter.

The Revenue Act of 1874-'75 does not authorize the collection of a tax against a railroad company whose charter exempts its property from taxation, and where the reserved power to alter such charter has not been exercised by the legislature.

CONTROVERSY submitted without action under C. C. P., Sec. (488) 315, and heard at Chambers, in Jackson, Northampton County, on 25 January, 1877, before, *Watts, J.*

The plaintiff company claimed exemption from taxation by reason of the provisions of its charter, and applied for an order restraining the defendant Commissioners from collecting the tax assessed under the revenue law of 1875. The Court held that the levying and collecting of said tax was in violation of the right conferred by the plaintiff's charter and the several amendments thereto, and granted the order as applied for, perpetually restraining the defendants, or their agents, from collecting the same. From this judgment the defendants appealed.

Mr. R. B. Peebles for plaintiff.

No counsel in this Court for defendants.

ASHE, J. This was a controversy submitted without action, and the question presented for the consideration of the Court is, was the Petersburg Railroad Company liable to a tax to the State for that part of the road lying in the county of Northampton under the revenue law of 1874-'75?

The Petersburg Railroad Company was incorporated by an act of the Legislature of this State, ratified on the .. day of ....., 1830, entitled an act to enact, with sundry alterations and additions an act entitled an act to incorporate the Petersburg Railroad Company, passed by the Legislature of Virginia on the 10th day of February, A. D. 1830, and an act passed by the Legislature of this State in the year 1832, supplementary to an act passed by the Legislature of this State in 1830,

entitled an act to enact, with sundry alterations and additions, an act entitled an act to incorporate the Petersburg Railroad Company, passed by the Legislature of Virginia on 10 February, 1830.

By said acts the plaintiff was authorized to construct, and did construct a railroad from Petersburg, in the State of Virginia, to a
(489) point near Weldon, in the county of Halifax, in this State; and the said road was furnished with the usual works, buildings and appliances on railroads, such as engines, coaches, cars, machines, vehicles, depots, warehouses, etc. About eleven miles of the road lies in the county of Northampton, and the company owns no land in said county but such as is used for warehouses, depots, etc.

The seventeenth section of the original act of incorporation, assented to and adopted by the Legislature of this State, reads: "And all machines, wagons, vehicles and carriages, purchased with the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from all public charge or tax whatsoever."

In 1876, the defendants caused the entire property of the company lying within the limits of the county of Northampton, including roadbed, iron rails, cross-ties, fixtures, franchise, engines, carriages, land upon which depots and warehouses were built, and all other property of every description belonging to said company, to be assessed, and an *ad valorem* tax for county and State purposes to be levied thereon, and the Sheriff of said county had taken steps to collect the same when his action in the matter was restrained by the order in this case.

The order of restraint was properly granted. We are of the opinion that the Legislature, by the provisions of the seventeenth section of the above-recited act, intended to exempt from taxation not only machines, wagons, vehicles, carriages, etc., but under the terms "all their works constructed under the authority of this act," the roadbed with its superstructure and all the depots, warehouses and other structures
(490) and buildings, with the lands covered by them, which are necessary to the operation of the said road.

It is true, the Legislature of this State in the above-cited act assenting to the Virginia act of incorporation with sundry alterations and additions thereto, did reserve in the eighth section of said act the right to alter, amend or modify the act of incorporation so far as it applied to the road in this State; but the counsel for the defendant has failed to cite any act of the Legislature of this State, and we have been unable to find any, which has amended, altered or modified the provisions of the seventeenth section of the charter. The plaintiff's property was as-

sessed for taxation by the defendants under the Acts of 1874-'75, Chapters 184, 185; but we are unable to see how they could have supposed their authority to do so was derived from any provisions of either of those acts. So far from warranting any such construction, we think the Legislature, by the provisions of those acts, clearly manifested an intention not to disturb the exemption from taxation which had been granted the plaintiff in the original charter of incorporation. For, in the eleventh section of Chapter 184 (the act known as the Machinery Act), it is provided that "the value of the franchise of every railroad, canal, turnpike, plank road and transportation company, whether lying wholly or partly in this State, unless exempt by law from taxation, shall be given in by the president," etc. And again, in Section 2, Class II, Chapter 185 (being the act entitled an act to raise revenue), it is enacted: "That whenever, in any law or act of incorporation granted either under the general law or by special act, since the 4th of July, one thousand eight hundred and sixty-eight, there is any limitation of taxation, the same is hereby repealed, and all the property and effects of such corporations shall be liable to full taxation like property owned by individuals." From the provisions of Laws 1874-'75, Chapters 184 and 185, we think the purpose of the Legislature is clear that they did not mean to tax any railroad company chartered before (491) 4 July, 1868, whose charter contained any exemption or limitation of taxation.

Affirmed.

Cited: *Worth v. R. R.*, 89 N. C., 306.

WASHINGTON TOLL BRIDGE COMPANY v. COMMISSIONERS OF BEAUFORT.

Constitutional Law—Obligation of Contracts—Repeal of Penalty.

1. *It seems* that the general assembly can not, by contract or otherwise, deprive itself or its successor of the power to provide or authorize those increased facilities for transit over its public waters conferred by the organic law, which the necessities of trade and business may require.
2. An act of assembly which confers upon a private corporation the exclusive right of transporting passengers across a navigable river for a distance of six miles from a certain point opposite a large trading town, in consideration of a reduction, by one-half, of the former toll rates paid by the residents of defined parts of two counties, while full rates are to be paid by all others, is obnoxious to the constitutional inhibition against monopolies.
3. A penalty is no part of the obligation of a legislative contract, and it is competent for the general assembly to repeal it at any time, if other adequate legal means of protection and redress are left unimpaired.

ACTION to recover a penalty, tried at Fall Term, 1878, of BEAUFORT, before *Eure, J.*

On 24 December, 1812, the General Assembly passed an act incorporating "the president, directors and company of the Washington
(492) Toll Bridge," and authorized the company, when constituted according to the provisions of its charter, "to build a bridge across Tar River, above the town of Washington, in Beaufort County, and near the said town, to commence at Bridge street, next above and adjoining the lot belonging to Walter Hanrahan, situate on the northwest end of said town, and to extend across said river to the nearest land on the opposite side of the same, and from thence to make a road and causeway through the marsh and swamp to some convenient place of intersection with the road that now leads from Washington to New Bern," declaring that "the right and property of said bridge and road or causeway, and the emoluments and profits arising therefrom, shall rest in and belong to the stockholders or subscribers composing said corporation, according to their proportionate shares, and to their representatives and assigns."

The seventh section of the act authorizes the erection of a toll-gate on the bridge, and prescribes what "shall be the usual rate of toll" to be charged and collected at the gate on persons and property passing through it. The company was regularly formed and organized under the provisions of the charter, the road opened and the bridge constructed, and tolls levied and collected, until its destruction during the late Civil War, since which time the bridge has been rebuilt and kept up and the conferred franchise exercised as before.

In 1783, a charter was granted and a company formed under it "to build a road through the marsh opposite Washington into a road" then in use, and to open and operate a ferry thence over Pamlico River to said town, for certain tolls, to be fixed and regulated by the County Court of Pitt—the control of which, with the territory, has been since transferred to Beaufort County. Under the act, the road was laid out, and the ferry established and maintained for many years before
(493) and after the grant of chartered privileges to the plaintiff and up to the year 1833, when it was discontinued. One-half of the stock of the ferry company has been purchased by and belongs to the plaintiff.

On 11 December, 1866, an act amendatory of the plaintiff's charter was passed, reducing "the tolls and charges upon the inhabitants of Beaufort County, residing on the south side of Pamlico River between Blount's Creek on the east, including Buck's, Burney's, Haddock's and Taft's districts in Pitt County, extending to the Craven County line on

the south, *to one-half of the rates and charges* specified in the charter and amendments thereto, heretofore granted."

The second section of the act is in these words: "No bridge or ferry shall be kept or established upon said river for the purpose of transporting any person or his effects across the same, either for pay or without pay, *within the distance of three miles* from said bridge, under the penalties prescribed in Section 30 of the one hundred and first chapter of the Revised Code." The act is made to take "effect from the time the president and directors of the Washington Toll-Bridge Company accept the same and signify such acceptance to the Secretary of State." The company two days thereafter assented to the proposed amendment, and filed written evidence thereof in the Secretary's office.

At an adjourned session, beginning in January, 1867, the General Assembly passed an act, which was ratified and went into operation on 21 February, repealing the act of 11 December, 1866; and on 4 March following, by another amendment, conferred upon certain persons therein named authority "to establish and keep up a free ferry across the Pamlico River, opposite the town of Washington, in the county of Beaufort, on the old ferry road," and annulling all laws in conflict with its provisions.

In 1878, the Board of County Commissioners of Beaufort, co-operating with the Township Trustees, appointed and settled a free ferry, according to the requirements of Chapter 104, Bat. Rev., (494) between the end of Gladden street where it touches the river in said town, and the terminus of a public road on the opposite side; and in October last a steam ferry-boat was employed to transport persons and property over the river without charge.

The Rev. Code, Chap. 101, Sec. 30, referred to in the amendment to the plaintiff's charter, declares that "if any unauthorized person shall pretend to keep a ferry, or to transport for pay any person or his effects within ten miles of any ferry on the same river or water which theretofore may have been appointed, he shall forfeit and pay two dollars for *every such offence* to the nearest ferryman."

In this action the plaintiff seeks to recover the accumulated penalties of two dollars for each person gratuitously carried over the river by the defendants' boat, and upon such estimate was adjudged the sum of three thousand eight hundred and forty dollars, double the number of passengers. Judgment for plaintiff, appeal by defendants.

Messrs. G. H. Brown, Jr., and *D. G. Fowle* for plaintiff.

Mr. W. D. Rodman for defendants. (497)

SMITH, C. J. (after stating the case). Numerous points were made and discussed by defendant's counsel, of which it is only needful to specify the following:

1. The grant of an exclusive right to plaintiff to provide means of transit over the river for the space of six miles, contained in the act of 11 December, 1866, is inoperative and void as conferring special privileges without adequate or indeed any proper consideration to the State.

2. The General Assembly can not, by contract or otherwise, divest itself or deprive its successor of the power to provide or authorize those increased facilities for transit over its public waters, conferred by the organic law, which the necessities of trade and business may require.

3. The consideration for the grant is itself a bestowal of special privileges to a few, to the injury of the rest of the people interested, and, as such, illegal and unwarranted.

4. The General Assembly was competent to pass the repealing act and arrest action under it, during the same session, notwithstanding the plaintiff's assent, and the contract was not before final adjournment consummated so as to be within the protection of the Constitution of the United States.

5. The repeal, if ineffectual to withdraw the exclusive privileges conferred, or to impair the legal remedies then existing for their enforcement, is valid in withdrawing the provided penalty.

6. The political body represented by the County Commissioners is not responsible for their illegal acts, nor is the taxable prop-
(498) erty of the people chargeable for the consequences thereof, the liability, if any, being personal to the Commissioners and their agents.

These and other propositions were enforced and combated by the counsel for the respective parties in the argument, and numerous cases cited and commented on. Our attention will be confined to the consideration of some of them only.

While contracts made by a State with corporations or individuals, and embodied in an act of legislation, which the State, under its organic law, is competent to enter into, are protected from violation by the clause in the Constitution of the United States (Art. I, Sec. 10), which forbids the passing of any "law impairing the obligation of contracts," it is equally necessary that the essential powers of government, conferred for wise and useful purposes, should remain undiminished and unimpaired in the legislative body itself and pass in full force to its successor. When a contract undertakes to alienate any of these, it is inoperative, and as no right vests, so no obligation is created under it. The principle is very clearly and strongly stated by Judge COOLEY thus: "To say that the Legislature may pass irrepealable laws is to say that it may alter the very Constitution from which it derives its authority; since in so far as one Legislature could bind a subsequent one by

its enactments, it could in the same degree reduce the legislative power of its successors, and the process might be repeated until one by one the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual." Cooley Cons. Lim., 125, 126. In a note contributed to the edition of Cruise's digest by Greenleaf, a clear distinction is drawn between those restrictions upon legislative power which may be imposed and transmitted as binding upon a succeeding Legislature, and those which attempt to abridge or impair the substantial (499) powers of government, the indispensable attributes of sovereignty itself, the right to exercise which when demanded for the public convenience is vested in the body and inalienable. "It is therefore," says the editor, "deemed not competent for a Legislature to covenant that it will not, under any circumstances, *open another avenue to the public travel* within certain limits, or a certain term of time, such being an *alienation of sovereign powers* and a *violation of public duty.*" The doctrine, as thus announced, would seem to meet the facts of the present case. The General Assembly not only bestows a valuable franchise upon the plaintiff, but undertakes to deprive itself and all succeeding Assemblies of the right to establish or authorize others to establish the same, or any other mode of passing over the river, for a space of six miles up and down a large navigable river open and accessible to seagoing vessels, without regard to the future growth of the surrounding country in population, wealth and business, and the necessity for increased facilities for intercourse which inseparably attends such growth. Practically all water transit below the prescribed limit is interdicted, as the case states, by natural obstructions there met with to the establishment and working of a new ferry, inconvenient if not insurmountable. The monopoly is secured, as the plaintiff contends, against interference by an irrevocable penalty which gives forty times the value of the toll lost on each passenger, and the full measure of the injury to the franchise, for his transportation. We should hesitate to admit the binding force of such a legislative contract with its consequences, and that it was beyond the reach of remedial legislation and correction.

Suppose the town had advanced and prospered until its inhabitants numbered the population of a great city; and as a natural accompaniment, other thrifty and flourishing towns had sprung up on the opposite bank, reclaimed, it may be, from overflow, would the (500) Legislature be disabled by this bartering away of its power to afford any relief by opening or authorizing to be opened new channels of intercourse and new avenues of trade? Would the grant be a perpetual bar to all improvement and progress, unless voluntarily removed by one

interested in keeping it up? Or putting another case: Suppose that the Legislature should incorporate a turnpike company and grant it the exclusive right of constructing a road between two places which had become prosperous and populous cities, demanding new avenues of trade and large facilities for outer communication, stipulating in the charter that no other road for the transportation of goods and the conveyance of persons should be allowed, and providing severe penalties against any invasion of this special privilege, could no railroad or canal be constructed to meet the necessities of trade and commerce, and could the surrendered power never be resumed or exercised to afford the needed relief?

The pressure of the question and its obvious embarrassments have led some of the Courts to intimate that a remedy for the grievance may be found in the right of eminent domain, and making full compensation for the property taken. The object, however, is not the condemnation of the plaintiff's bridge and his right to demand toll from such as use it, but to remove the excluding features of the grant, which rest simply in the contract. If the Constitution inhibits interference with the provisions of the act because it constitutes a contract, how can its obligation be impaired any more by exercising the right of eminent domain than by exercising any other fundamental legislative power? Why should the disability attach to the one more than to the other? If the integrity of the obligation is preserved under the Constitution, it would seem to be protected from invasion in any form by the contracting parties. If a valid contract is entered into, undoubtedly these conse-
(501) quences follow, and the only practical solution of the difficulty is to be found in the doctrine that the Legislature of a State is incompetent to enter into stipulations whose effect is to deprive it of any of its essential powers, and that to this extent the undertaking is inoperative and void. In other words, no such obligation arises out of the act to be protected by the Constitution.

These considerations, in connection with the rapid advance of the country, notwithstanding the numerous decisions in which contracts of this kind have been upheld, and the surrender of legislative power enforced, have drawn the attention of jurists to a fresh examination of the scope and effect of the provision in the Federal Constitution to which such serious consequences are ascribed, and the tendency is to limit it to cases in which no essential function of the government, indispensable to the public good, is abnegated, and to sustain the inalienability of such as are.

Thus, in *Bridge Co. v. R. R.*, 6 Page, 550, where the plaintiff sought to enjoin the defendant from erecting a bridge over the Mohawk River at Schenectady, to be used as a part of its railway, and the relief was

refused, Chancellor WALWORTH incidentally remarks: "The Legislature has indeed protected the Mohawk Bridge Company in the enjoyment of an exclusive right to carry passengers across the river at Schenectady to a certain extent by prohibiting others from establishing a ferry within a certain distance from the toll bridge; but it has not deprived a future Legislature of the right to authorize the erection of another bridge *within the prescribed limits whenever the public good shall appear to require it.*"

In *McRee v. R. R.*, 47 N. C., 186, the plaintiff sought to recover of defendant a penalty incurred by an invasion of the exclusive right conferred by its charter, and wherein it is declared to be unlawful for any person whatever to keep any ferry, build any bridge, *or set any person or property* over the river, for fee or reward, within six (502) miles of the bridge, under a penalty of twenty shillings. The Court held that the grant, upon a strict construction of its terms, did not contemplate the case then presented, and referring to the interpretation contended for by the plaintiff, say: "It was unreasonable on the part of the Governor, Council and Assembly, in consideration of building a bridge, to confer a perpetual monopoly, and take from themselves and their successors, for all time to come, the power of doing that for which all governments are organized—promoting the general welfare by adopting such measures as a new condition of things might make necessary and taking advantage of such improvements and inventions as after ages might originate for the benefit of the public. In other words, it is unreasonable to suppose that they intended to surrender the means by which they and their successors might thereafter be enabled to effect that purpose for which they were created and formed into a government."

The inability of the depositary of legislative power, under the Constitution, to part with any essential portion by an irrepealable enactment, is strongly presented in the opinion in *R. R. v. Reid*, 64 N. C., 155, and the consequent inconveniences pointed out; and although that decision was reversed in the Supreme Court of the United States, the general principle is not denied or impugned. To remove this barrier to the progress of internal improvements and meet the wants of a country so rapidly advancing in numbers and material wealth, the rule of strict construction is applied to such grants, and it is held that, unless upon the clearest intent, they will not be allowed to hamper and restrain the exercise of legislative power. Hence, railroads are permitted to construct bridges as part of their line over streams when the exclusive right of transportation by bridge or ferry across them has been conferred upon another person or company, as has been held in *Thompson v. R. R.*, 3 Sand., Ch. 625, and in *McRee v. R. R.*, (503)

supra. But it is unnecessary, and we do not mean to determine that the exclusive privileges granted to the plaintiff in the present case can be recalled at the will of the General Assembly, and the discussion is intended to direct attention to the difficulties of the subject. We place our decision upon other distinct and independent grounds, which we will now proceed to state:

It is decided in *Carrow v. Toll Bridge Co.,* 61 N. C., 118, that under the charter of 1812 no such exclusive privileges were conferred as interfered with the power of the corporate authorities of the county to order the establishment of a ferry over the river, "notwithstanding its propinquity to the toll bridge of the defendants," and the Court say: "This power is one of the *attributes of the sovereignty* of the State, which is to be exercised by the Legislature itself, or any agent whom that body may authorize to act for it," and that the county authorities are such agents under the act of 1784 (Rev. Code, Chap. 101).

The act of 11 December, 1866, was passed during the pendency of that action, and while noticed in the opinion, was not so brought forward as to be within the judicial cognizance of the Court. The existence of this amendment alone distinguishes the pending action from that case, and requires us to consider its operation and effect. This we will briefly do.

The act proposes to reduce the charges for passing over the bridge to *one-half the existing rates to be paid by the residents of defined parts of Beaufort and Pitt counties, while full rates are to be paid by all others,* and, as the consideration of the partial concession imposes a prohibition against the opening of any other mode of transportation, whether free or for pay, for a distance of six miles, across the river. It not only discriminates between residents of the same county in the tolls to be paid by them, but it forbids future relief to those upon
(504) whom the heavier burden is put. Not only is the special and exclusive privilege of transportation conferred upon the plaintiff, but such special privileges are conferred upon a few at the expense of the many, without any other apparent ground for the discrimination except that those favored may have a more frequent use for the bridge. The people of the town of Washington and others living on one side of the river pay double the rates of those residing on the other, in the boundaries of the favored territory. Was the General Assembly competent to enter into such a contract, and is it within the guaranty of the Constitution beyond modification or repeal by itself or its successors? We should not hesitate in declaring our opinion, were the question original and open, but it is disposed of in *McRee v. R. R.,* already cited, and we can add little to what was said by PEARSON, J., in delivering the opinion in the case: "We are not, however, under the

necessity of putting the decision upon the mere question of construction, for our declaration of rights at once puts an end to such unreasonable pretension or claim to an hereditary and perpetual monopoly as that set up by the plaintiff. Declaration of Rights, Sec. 3: 'That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.' Sec. 22: 'That no hereditary emoluments, privileges or honors ought to be granted or conferred in this State.' Sec. 23: 'That perpetuities and monopolies are contrary to the *genius* of a free State, and ought not to be allowed.' The meaning and purpose was to forbid and abolish all hereditary and perpetual monopolies as contrary to the genius of a free State, and to put in motion the new State they were then organizing as *a free representative republican government,* relieved from all fetters and trammels previously existing by which its action might be cramped or circumscribed, and fully *authorized to do everything necessary* and proper to accomplish its mission, that is, promote the general welfare." The life of the plaintiff corporation, it is true, was (505) limited to eighty years, of which twenty-six remained when the grant was made, yet the case comes within the mischiefs these constitutional declarations were intended to remedy, when then existing, and to prevent their recurrence in the future; and it falls under the denunciation of these utterances of the fundamental law that lies at the basis of free institutions. Discriminating privileges are conferred for no "public services," now or hereafter to be rendered, and for no apparent consideration promotive of the common good; and this partial and unjust discrimination becomes itself the basis for the imposition of innumerable burdens upon the unfavored many. We are unwilling to uphold the validity of a contract, though assuming the form of law, involving distinctions so unequal and unjust, and invading those great elemental truths so clearly enunciated in the fundamental law, as being beyond future legislative correction or control.

In *Bradley v. R. R.,* 21 Com., 306, the Court say, and it meets our full approval: "As between individuals, it is the duty of the State to protect them in the enjoyment of just and equal rights." But there is a further, and, in our opinion, not less fatal obstacle to the plaintiff's recovery, resulting from the operation of the repealing act of February, 1867. Admitting that the franchise and the exclusive privileges attached to it, with the prohibitions against any interfering enterprise, can not be recalled or abridged, it by no means follows that the superadded penalties may not be revoked without impairing the obligation of the contract, while all other legal remedies are left in full force. This effect, then, may be given as the repealing statute, if it is inoperative to recall the grant itself and the remedies there provided by law for its

security against invasion. The penalty is not part of the contract, and its withdrawal does not impair any of the plaintiff's constitutional
(506) rights, and it is not a substitute for his common law remedies. This is so decided in *Taylor v. R. R.*, 49 N. C., 277, wherein the Court say: "It was thought by some that the statute, by inference, denied the common law right against a person who transported any person without pay. The point was made by the case of *Long v. Beard*, 7 N. C., 57. It is there held that the statute is cumulative in regard to the remedy, and left the common law right of ferrymen untouched, and it was decided that the plaintiff had a right of action against the defendant for erecting a free ferry within one mile of his ferry." * * * "whereby the plaintiff's custom was drawn off and his profits diminished."

The sanctity of a contract under the Constitution declared inviolable extends to all such rights and interests as grow out of it, and to the necessary means there provided by law for their protection and for securing redress for injuries done to them. We do not understand the constitutional guaranty as embracing those further provisions, whereby a violation of such rights is made an indictable offense, or a pecuniary penalty is imposed. These constitute no part of the legal obligation, and as they are given from consideration of public interest, so they remain under the control of the law-making power, and may be withdrawn at its discretion. This view is taken and this distinction asserted in the case of *Richardson v. Wicker*, 80 N. C., 172, decided at the last term. It is there held that while the act of 1868-'69, Chap. 137, which forbids a Sheriff to sell property under execution without first laying off to the debtor so much as is exempted under the Constitution of 1868, so far as it relates to debts previously contracted, and increased the exemption, was void, and such additional property remained subject to the debt, yet the act was valid as a repeal of the penalty of $100 imposed upon a delinquent officer by Chapter 105, Sec. 25, of the Revised Code, as the right to the amercement constitutes no part of the obligation.
(507) The Court say: "The imposition of a penalty for a want of official diligence is a matter of State regulation, and it would be no impairment of the plaintiff's right to collect his debt if the Legislature should repeal the amercement law altogether."

So it has been determined that the right to imprison a debtor and coerce payment thereby, forms no part of the contract, and his discharge does not impair his obligation. *Beers v. Haughton*, 9 Peters, 329.

"This Court has often decided," says WAITE, C. J., "that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the law

takes effect," and cites numerous decisions in support of the proposition. *Terry v. Anderson,* 95 U. S., 628.

In *Murray v. Charleston,* 96 U. S., 432, the court was called on to expound this provision of the Constitution, and its application to a tax levied upon public securities held by a non-resident, and STRONG, J., who delivers the opinion, says: "The obligation of a contract depends upon its terms and the means which the law in existence at the time affords *for its enforcement.* A law which alters the terms of a contract by *imposing new conditions,* or *dispensing with those expressed,* is a law which *impairs its obligation;* for such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."

While our researches have not led to the discovery of any adjudicated case directly bearing on the point, nor has such been cited by counsel, our reflections and the reasoning in the cases examined bring us to the conclusion that the penalty is no part of the obligation of a contract, when full legal means of protection and redress are left unimpaired, and that the repealing act effectually withdraws the penalty and leaves the present action without support.

We pass by without comment other interesting points debated before us, such as the capacity of the General Assembly, (508) and during the same session, to revise, modify or annul any of its acts of prior legislation, and the liability of the taxable property within the county of Beaufort for penalties incurred by the action of its corporate authorities in the discharge of public duty, as unnecessary in the decision of the case.

The action must be dismissed.

Action Dismissed.

Cited: Tabor v. Ward, 83 N. C., 295; *R. R. v. R. R., Id.,* 498; *Broadnax v. Baker,* 94 N. C., 680; *Bridge Co. v. Flowers,* 110 N. C., 386; *Board of Education v. Commrs.,* 111 N. C., 585; *Thrift v. E. City,* 122 N. C., 38; *Robinson v. Lamb,* 126 N. C., 497; *In re Spease Terry,* 138 N. C., 222; *Glenn v. Commrs.,* 139 N. C., 417; *Edwards v. Goldsboro,* 141 N. C., 71; *Pedrick v. R. R.,* 143 N. C., 499; *Parrott v. R. R.,* 165 N. C., 309.

Trustee of the UNIVERSITY of N. C. v. JOHN GATLING and others, Executors.

Construction of Will—Conditional Bequest—Duty of Executors.

Defendants' testator bequeathed to the University $5,000 in U. S. bonds, which he directed to be registered in the name of the trustees, declaring his desire to be that the fund should remain in that form, so long as it might be thought safe, regardless of the rate of interest derivable therefrom, and directing that the interest be applied to defraying the tuition at the University of the testator's own sons, or of such students as his children or their heirs lineal might designate. The testator declared his purpose to be the endowment of five scholarships. The defendants insisted that the fund was inadequate, or was likely to become insufficient, to support the designated number of scholarships, and refused to turn it over, unless instructed by the court, until the legatee would undertake to make up any deficiency which might arise, or so reduce the charge for tuition as to meet the condition of the bequest, and sustain the five scholarships; *Held*,

(1) That it was the duty of the executors to pay over the legacy without exacting any conditions.

(2) *Obiter*—The object of the bequest was an endowment of as many scholarships as the yearly interest might suffice to pay for at the then current rates of tuition at the University, and no more.

(509) CONTROVERSY for the construction of a will, submitted without action under C. C. P., Sec. 315, at Spring Term, 1879, of WAKE, before *Eure, J.*

Upon the clause of the will set out in the opinion, the Court below held that the plaintiff was entitled to the bonds mentioned as an endowment of as many scholarships as the interest thereon from year to year may be sufficient to pay for at the then current rates of tuition at the University, and no more, the students who are to receive the benefits thereof to be selected as set forth in said clause; and adjudged that defendant executors pay the costs of the proceeding. From which ruling the defendants appealed.

Messrs. Battle & Mordecai and *Lewis & Strong* for plaintiff.
Messrs. Gilliam & Gatling for defendants.

SMITH, C. J. This is a controversy submitted without action upon a case agreed under C. C. P., Sec. 315, the purpose of which is to recover a specific legacy given in the will of B. F. Moore, deceased, and to determine the conditions on which it is to be received.

The testator, in clause 29 of his will, bequeathes as follows: "I give to the trustees of the University of North Carolina five bonds of the United States, each bond of one thousand dollars, issued under the act of 14 July, 1870, and 20 July, 1871, payable in coin and redeemable

at the pleasure of the government after 1 May, 1881, numbered respectively 14,562, 14,563, 15,775, 16,485 and 16,486, and bearing 5 per cent interest, payable quarterly on the first days of February, (510) May August and November. Said bonds, which are now registered in my name, are to be registered in the name of the trustees of the University of North Carolina. The interest which may become due on said bonds after my decease shall be received by the said University corporation as it may become payable, and shall be appropriated exclusively for the purpose of defraying the tuition at the University of my sons, or of such students and for such periods of time as my children or their lineal heirs may designate; and in case of any disagreement between them as to the choice of the persons to be selected, or in case no selection be made as already provided, the selection shall be determined by the trustees of the University, or the executive committee thereof: *Provided, however,* that any student who may be selected in the manner prescribed shall be subject to the same and like rules and regulations for their government as are provided generally for the government of the students of the University."

"It is expressly provided as one of the conditions of this donation, that the fund hereby donated shall not be subject, directly or indirectly, to any debt now due by the University, or which may hereafter become due by it; and it is provided also, that if at any time the regular exercises of the University should be suspended, so that the proper persons can not be educated at the University, the income of the fund may be used during such suspension for education elsewhere of the persons selected. My purpose is to endow five scholarships with the donation; and I desire the fund to remain invested in United States bonds so long as they may be considered safe, without reference to the rate of interest; and if the fund should be otherwise invested at any time, I direct that it shall be on the safest and most reliable security."

The fund is insufficient, or may soon become so, to support the number of scholarships mentioned from the income and profit arising from the bonds, or from any into which they may have to (511) be converted bearing a lower rate of interest, under the operations of the treasury department of the United States, and the parties differ as to the obligations imposed on the legatee by their delivery. The plaintiff insists that the income must be applied, as far as it will go, in the support of the five scholarships, but that the deficiency is not to be made up by the legatee, nor the charge of scholarships reduced below the established rate, in order to meet the condition of the bequest and sustain the proposed five scholarships.

The defendants insist that such is the testator's intention, the proper

construction of the will and the effect of accepting the bonds. The case is intended to present this point for our determination.

In our opinion, the question is not properly before us in this proceeding to recover the legacy. The unqualified right to demand, and the equally absolute duty of the executors to deliver, if the estate permits, are clearly and unequivocally expressed in the will. The testator requires the five bonds specifically described "to be registered in the name of the trustees of the University of North Carolina," the interest becoming due after his decease to be received by the said University corporation, as it may become payable, and specifies how it shall be used and the mode of appointing the beneficiaries other than his own sons, who have priority of right thereto. It is made one of the *conditions* of the bequest that the fund shall not be applied to the debts of the University, and if the beneficiaries can not be educated there, by reason of suspension of its exercises or other causes, the income shall be used for a similar purpose at some other educational institution. And in the last sentence of the clause, he declares his "purpose is to endow five scholarships with the donation."

Whatever trusts may attach from this declared purpose, and (512) follow the transfer of the bonds to the plaintiff, it is manifest the office of the executors is performed by delivering them. They can impose no terms or conditions, nor exact any security for the discharge of the trusts, the duty of delivering being plainly declared in the words used. Those trusts must be enforced on behalf of the beneficiaries, if the plaintiff should at any time hereafter fail to carry them into effect. The relation of trustee and beneficiary is created between the legatee and those who are to reap the fruits of the legacy in their education. But while not before us, and while the rights of the beneficiaries can not be affected by our opinion upon the question the parties intended to present, we feel at liberty to say we do not interpret the will as imposing an obligation in its nature perpetual on the plaintiff to make the income maintain the five scholarships either by reducing the rates to a sum within the income, or by making up the deficiency out of other resources of the University, the effect of which would be to convert an intended bounty into a heavy and continued burden. The words indicate a wish that the funds may sustain that number of scholarships, but do not import a command that they shall do so, and annex it as an inseparable condition to the legacy itself. The testator's intent will be attained by a careful preservation of the fund in a safe though small interest-bearing investment, and the application of its fruits to the education of as many as it will admit.

It is seldom that much aid can be derived from adjudicated cases in finding out the meaning and in giving effect to the varying words

which testators use in disposing of their estates. The want of fixed forms of expression, and the infinite diversity of language employed, necessarily leave each will, in a great degree, to be interpreted by its own provisions. We think our construction carries out the generous purposes of the testator, and is in full consonance with the (513) pervading spirit of the entire instrument.

Affirmed.

STATE v. PINKNEY SHIPMAN.

Assault and Battery.

Defendant, after using threatening language with reference to the prosecutor and in his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions; the evidence left it doubtful as to whether or not the knife was open; when defendant got within five or six feet of the prosecutor, the latter said, "I shall have to go away," and withdrew from the work on which he was engaged; *Held*, that defendant was properly convicted of an assault.

ASSAULT and battery, tried at Spring Term, 1879, of HENDERSON, before *Gudger, J.*

There was a verdict of guilty, judgment, appeal by defendant.

Attorney-General for the State.
Messrs. J. L. Henry and *T. F. Davidson* for defendant.

ASHE, J. The defendant was indicted with one Charles Shipman for an assault upon the person of John Maxwell, and was put alone upon his trial.

On the trial, it was in evidence that the prosecutor Maxwell had been employed by one Holbert to manage a distillery, which he had erected and was operating upon the land of defendant, with his consent; that the defendant and his son, soon after the prosecutor commenced work, came to the distillery, and that defendant held several (514) private conversations, first with a negro who was there, and then with his son Charles, and while the defendant was out talking with the negro, Charles the son proposed to swap knives and pistols with the prosecutor, who told him he had no pistol. The defendant came again into the house, and while in private conversation with Charles, the prosecutor heard one of them say to the other, "D—n him, if he stays here, I'll kill him." They both then, having knives in their hands, but whether open or not the testimony does not disclose, moved to where the prosecutor was at the furnace, the defendant looking angry and saying, "I am cock of the walk and boss of the place; after I cut

three or four pieces of your liver out, I will boss this place." And when they got within five or six feet of the prosecutor, he said he would have to go away, and did leave.

Upon this evidence, the defendant asked the Court to instruct the jury "that if the defendant was not nearer than six feet at the time of the offense, and although having a knife in his hand not drawn, yet made no threat at the time that he would use it upon the prosecutor, he is not guilty of an assault." The Court declined to give the instruction, and the defendant excepted. The Court then charged the jury that if they believed the evidence, Maxwell had the right to be at the distillery, and if they should find that the conduct and words and acts of the defendant, and the exhibition of his knife (if they found the facts) were such as put Maxwell in fear and caused him to go away from them, the defendant would be guilty. There was a verdict of guilty. The defendant obtained a rule for a new trial, the rule was discharged, and the defendant appealed to this Court.

There was no error in the refusal of the Court to give the instruction prayed for. The instruction was not warranted by the facts in the case. It was predicated upon the idea that there was no threat (515) at the time the defendant approached within six feet of the prosecutor; but the manner and the language of the defendant were certainly very threatening. And while we think his Honor's charge to the jury was rather loosely given, we can not say it was erroneous when considered with the facts of the case.

It is manifest that the defendant intended by violence, if necessary, to drive the prosecutor from his place of business. Those private conversations with a negro and his son, the proposition of the son to swap knives and pistols with the prosecutor, a mere pretense for ascertaining whether he was armed or not, the threat that they would kill him if he stays there, the exhibition of knives, all indicate a hostile purpose.

This Court has decided that if a person be at a place where he has the right to be, and other persons having in their possession dangerous weapons, by following and threatening him, put him in fear and induce him to go home sooner than he would have done, or by a different road from that he was wont to go, they would be guilty of an assault, though never nearer to him than seventy-five yards. *S. v. Rawls,* 65 N. C., 334. This is quite as strong a case against the defendant as that. In that case, the prosecutor was repairing his fence, and one of the defendants, the father of the others, came to the place where he was at work, and, after some conversation, the prosecutor left, and was soon followed by the father and three sons, using threatening and insulting language, and were armed, one with a manure fork, another with a hoe, and the third with a gun, but none of these weapons were taken from the

shoulders of those who bore them, and they never approached nearer than seventy-five yards of the prosecutor, but put him in fear and induced him to hasten home by a different road from that he was in the habit of traveling.

In our case, the prosecutor was where he had the right to be. When he observed the private conferences of the defendant, the negro, and his son, and overheard the threat to kill him if he stayed (516) there, it was sufficient to arouse his apprehensions. But when defendant and his son, each with a knife in his hand, approached within five or six feet of him, the father looking angry and saying, "I am the cock of the walk and boss of this place; after I cut three or four pieces of your liver out I will boss this place," it was calculated to excite in the prosecutor well-grounded fears for his safety; and to show that he was alarmed, he left immediately, saying, "I shall have to go away," evidently to avoid the imminent danger to which he was exposed. The defendant had approached so near to him that with one step forward and opening his knife if shut, the work of but a moment, the prosecutor being unarmed, would have been entirely at his mercy. He had no alternative but to stand and encounter the unequal conflict, or abandon his place of business.

We think, upon the authority of Rawls' case, the defendant is guilty of the assault. There is

PER CURIAM. No Error.

Cited: *S. v. Marsteller,* 84 N. C., 728; *S. v. Martin,* 85 N. C., 510; *S. v. McAfee,* 107 N. C., 817; *S. v. Daniel,* 136 N. C., 575; *S. v. Davenport,* 156 N. C., 609; *Humphries v. Edwards,* 164 N. C., 159.

STATE v. R. J. PRICE.

Bastardy—Fraud.

If a woman in a proceeding in bastardy refuses to declare the father, pays the fine and executes the bond required by law, she can not thereafter sue out a warrant to have the putative father bound over to court to answer the charge upon the ground of alleged collusion between the defendant and the justice of the peace who took the bond. If there be fraud in such case the woman is *in pari delicto.*

PROCEEDING in bastardy, tried at Spring Term, 1879, of HENDERSON, before *Gudger, J.* (517)

On 17 November, 1877, a Justice of the Peace issued a warrant against Mary Key Kendall, the relator in this case, to compel her to declare the father of a bastard child of which she had been delivered, or

otherwise comply with the requirements of the law in such cases. Upon the hearing of the matter, she refused to declare the father, and thereupon a fine was imposed, and a bond for the maintenance of her children executed by her and the defendant, as surety.

Subsequently, to wit, on 4 September, 1878, she made an affidavit before another Justice of the Peace that she had been delivered of two bastard children, and that the defendant was their father. Upon this affidavit a warrant was issued and the defendant arrested and bound over to answer the charge at the Superior Court. When the case was called, the defendant's counsel moved to quash the proceeding on the ground that the woman had refused to declare the father, and had given bond as above set forth. The State, in reply, alleged that this was brought about by a collusion between the Justice and the defendant, and that a fraud had been perpetrated on the woman, and offered to introduce testimony to establish it; that the question should be submitted to the jury, and that there were two children, whereas, the warrant first issued against the woman charged her of having been delivered of only one child. The Court allowed the motion to quash, and ordered the defendant to be discharged, and from this ruling Ferguson, Solicitor for the State, appealed.

Attorney-General and *H. G. Ewart* for the State.
No counsel in this Court for the defendant.

ASHE, J. Any Justice of the Peace, upon his own knowledge, or information made to him, that any single woman within his
(518) county has been delivered of a child or children, may cause her to be brought before him, or some other Justice of the county, to be examined upon oath respecting the father; and if she shall refuse to declare the father, she shall pay a fine of five dollars and give a bond, payable to the State of North Carolina, with sufficient security, to keep such child or children from being chargeable to the county, etc. Bat. Rev., Chap. 9, Sec. 1.

It was not the object of this act to punish the father for having begotten the child, nor to reward the mother for her lewdness, but solely to prevent the maintenance of the child from becoming a charge upon the county. When the woman refuses to declare the name of the father, pays the fine, and gives the bond required, the object of the law is accomplished, and the State has no further concern in the matter, until there is a breach of the bond; and there can be no breach until the county shall have incurred expense in the maintenance of the child.

The woman having made her election to pay the fine and give the bond, there is an end of the matter. She can not afterwards sue out a

warrant of bastardy and have the reputed father bound over to Court. *S. v. Brown,* 46 N. C., 129

As the county has been indemnified, we do not see what the fraud upon the woman has to do with the question. It is a police regulation, adopted solely for the benefit of the community. And where, under the further provisions of said section, the woman swears the child and the reputed father is bound over to Court, and in the order of filiation is directed to pay to the woman a certain sum, her right in the matter is only incidental to the main purpose of the statute, the indemnification of the county; and when that is accomplished, the law is satisfied.

If there was any fraud in the proceedings before the Justice, the woman was *in pari delicto.* The Justice could hardly have (519) had any complicity in it; for upon information that the woman had been delivered of a bastard, he issued his warrant to bring her before him, and then, no doubt, ascertaining there were two children instead of one, he took a bond conformable to the requirements of the statute, conditioned to keep her children, not her child, from becoming a charge upon the county. The obligors of the bond are bound for the maintenance of both the children, and the failure to support either or both of them, whereby that burden should fall upon the county, would be a breach thereof, for which an action would lie in the name of the State for the indemnification of the county.

There was no error in quashing the proceedings in the Court below.

PER CURIAM. Affirmed.

STATE v. LEWIS SPENCER.

Costs, Taxing Against Prosecutor.

The presence of a prosecutor to convict the defendant is in law a presence to answer the latter in costs for the false clamor, if the prosecution be adjudged frivolous; and a judgment entered against him for such costs is valid, though rendered in his absence and without notice.

APPEAL from an order made at April Term, 1879, of NEW HANOVER Criminal Court, by *Meares, J.*

At February Term, 1879, of said Court, the defendant was indicted for a trespass upon the premises of Jere M. Hewlett, (520) and upon the trial the jury returned a verdict of "Not guilty." Hewlett was marked as prosecutor, and the Court finding that the prosecution was frivolous and malicious, on motion of defendant's counsel, adjudged that the prosecutor pay the costs. The prosecutor was not present in Court when the order was made taxing him with the costs,

and at April Term aforesaid, moved to set aside said judgment, on the ground that he was not present when it was rendered. The motion was denied, and the prosecutor, Hewlett, appealed.

Attorney-General for the State.
No counsel in this Court for appellant.

DILLARD, J. One Lewis Spencer was indicted and tried at the Criminal Court of New Hanover, opened and held on the second Monday in February, 1879, under Bat. Rev., Chap. 32, Sec. 3, and Jere M. Hewlett was duly endorsed on the bill of indictment as prosecutor.

After a verdict of not guilty, on motion of the accused, at the same term of the Court, but not on the day in which the verdict was rendered, it was adjudged by the Court, when the prosecutor was not personally present in Court, that he pay the costs, including the fees of the witnesses summoned for the defendant, and afterwards, to wit, at the next term of the Court, the prosecutor, Jere M. Hewlett, came into Court and moved the vacation of the judgment and his discharge therefrom, which motion being overruled, he took an appeal to this Court.

From the record and case of appeal sent up to this Court, we collect that the prosecutor moved to set aside the judgment rendered against him on the ground that he was not present in Court at the time, and therefore it is to be assumed that he was legally constituted prosecutor by being so marked on the bill, and that he had no question to
(521) make as to his liability for the costs, and the judgment was entered against him, except that the judgment was rendered when he was not present.

The question is, was it competent to the Court to give judgment against the prosecutor when he was not present in Court?

Jere M. Hewlett having been legally made prosecutor, as we are taking it to be conceded from the terms and scope of the motion, he was liable, in the event of acquittal of Spencer, to be adjudged to pay all the costs, according to the statutes then existing and the decisions of this Court. C. C. P., Sec. 590; Laws 1874-'75, Chap. 247; *S. v. Lupton,* 63 N. C., 483, and *S. v. Darr, Ibid.,* 516. And this liability might be adjudged immediately on the rendition of the verdict, and sometimes was, but usually it was later, and might be at any time during the term; and the prosecutor being marked as such on the bill, and therefore connected with the cause as a party, it was his interest and duty to be in Court, and in legal intendment he is to be taken as in Court, at all times during the term. If adjudged to pay the costs when present in Court, the prosecutor may be, and generally is, put into the custody of the Sheriff by the express authority of a statute until he pay the same, or be therefrom discharged according to law. Bat. Rev., Chap. 33, Sec. 132.

If not present, then he is liable to be brought up and put into custody for the costs, just as may be done in the case of a defendant sentenced to pay a fine who is omitted to be ordered into custody, or escapes. *S. v. Simpson,* 45 N. C., 80; *S. v. Cooley,* 80 N. C., 398.

In prosecution bonds and appeal bonds the practice is and has always been to enter up summary judgment; and this, upon the idea of assent thereto on the contingency provided for; and just so it ought to be, and in practice is, in the rendition of judgment against a prosecutor on the acquittal of the accused. It is not unjust to the prosecutor, and can be no surprise to him. He, in effect, undertakes and agrees, (522) when he becomes prosecutor, that in the event of the acquittal he will pay the costs and such of the defendant's witnesses as shall be adjudged against him, and assents to the entry of summary judgment therefor. It would be most unreasonable that a prosecutor should be allowed to be present to prosecute and convict, and in case of the acquittal of the accused, then to walk out of the Court and delay to answer his motion for costs on the excuse of being absent from Court and of non-liability to judgment therefor until he can be found and brought before the Court by the service of notice on him.

In our opinion, the presence of a prosecutor to convict a defendant ought to be, and in law is, a presence to answer defendant for his costs for his false clamor; and we hold, therefore, that his Honor was not in error in refusing to set aside the judgment entered against Jere M. Hewlett, for the reason of his not being present in the Court at the time of its rendition.

Judgment of the Criminal Court of New Hanover is

PER CURIAM. Affirmed.

Cited: S. v. Owens, 87 N. C., 567; *S. v. Horton,* 89 N. C., 583; *S. v. Hamilton,* 106 N. C., 661; *S. v. Sanders,* 111 N. C., 701.

STATE v. JOHN LAWRENCE.

Criminal Procedure—Writ of Error—Certiorari—Indictment—Joinder of Counts—Larceny and Receiving—General Verdict—Punishment.

1. The writ of error in criminal cases does not obtain in this State. The only relief which a person convicted in an inferior court can obtain from a court of supervisory jurisdiction is by appeal, or by *certiorari* as a substitute therefor where, without laches, he has lost his right (523) of appeal.
2. Where a prisoner has been properly convicted, but illegally sentenced, and the case is brought to this court by appeal or otherwise, and judgment reversed, he is not entitled to a discharge, but the case will be sent back to the court below for such judgment as the law allows.

3. Where the grade of a common law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law.
4. A count for the larceny of a horse, concluding at common law, may be joined with a count for the statutory offense of receiving the same; and the indictment thus drawn will warrant a general verdict of guilty.
5. Upon such a conviction the punishment should not exceed ten years imprisonment.

PETITION for a *certiorari,* filed and granted at June Term, 1879, of the Supreme Court.

The defendant was indicted for larceny and receiving, etc., and tried at Spring Term, 1876, of COLUMBUS, before *McKoy, J.*

In his petition for a *certiorari,* the defendant says he was convicted of horse stealing and sentenced to the penitentiary for twenty years, and in pursuance of the judgment of the Court, he has ever since been confined therein; that he is advised the said judgment is contrary to law, in that the first count of the bill of indictment concludes at common law, whereas, he was sentenced to twenty years in conformity with the statute, and that there was another count in the bill for receiving said horse, etc.; that there was a general verdict of guilty upon the indictment, it not appearing from the verdict whether he was found guilty of the larceny or the receiving, in which latter case he is (524) advised that he could only be sentenced for ten years; and that the judgment should have been arrested. The petitioner further states that after the trial he was conveyed to the penitentiary, where he has ever since remained in close confinement, by reason of which and of his extreme poverty, he has not heretofore been able to invoke the aid of this Court to review the record in his case.

Attorney-General for the State.
Messrs. Hinsdale & Devereux for the defendant.

ASHE, J. This case was brought from the Superior Court of Columbus County by *certiorari* in nature of a writ of error to review the judgment pronounced upon the defendant in a criminal action against him, tried in that Court at Spring Term, 1876.

The defendant was indicted for stealing a horse, and the bill of indictment contained two counts: First, for stealing the horse; and second, for receiving the same, knowing it to have been stolen. The first count concluded at common law, and the second against the statute. The jury returned a general verdict of guilty, and the defendant was sentenced to twenty years' imprisonment at hard labor in the State's Prison.

He alleges in his petition for the *certiorari* that he has been kept in the penitentiary in close confinement ever since his conviction, and in

consequence thereof, together with his extreme poverty, he has been unable till now to invoke the aid of this Court. He insists, through his counsel, that the sentence pronounced upon him in the Superior Court of Columbus County was not authorized by law, and that the judgment below should be reversed; and then, as the *certiorari* is to be treated as a writ of error, he must be discharged; or, if it shall have the effect to give him a new trial, that he will be entitled to his dis- (525) charge upon the ground that no person can be put twice in jeopardy of life or limb.

We do not think there is any force or application in these propositions; for the writ of error in criminal cases does not obtain in this State. The only relief which a person convicted in an Inferior Court can obtain from a Court of supervisory jurisdiction, is by appeal or a writ of *certiorari* as a substitute therefor, where, by any means otherwise than by his own fault, he has been deprived of the right of appeal. And as to the second proposition, we do not see, in the view we take of the case, how that question can arise. In no event will the defendant be entitled to his discharge. The practice settled in this State, where a prisoner has been convicted and an illegal sentence pronounced against him, and the case is brought to this Court by appeal or otherwise, is, to send the case back for such judgment as the law allows. *S. v. Sue,* 1 N. C., 277; *S. v. Cook,* 61 N. C., 535.

Was the sentence in this case illegal?

The receiver of stolen goods, knowing them to be stolen, by Section 55, Section 32, of Battle's Revisal, is punishable as one convicted of larceny. By Section 25 of the same chapter, the distinction between grand and petty larceny is abolished, and the offense of felonious stealing is to be punished as petty larceny. And petty larceny, by Section 29 of the same chapter, is punished by imprisonment in the State's Prison (or county jail) for not less than four months nor more than ten years. So that larceny and receiving stolen goods, knowing them to be stolen, are subject to the same punishment. And by Laws 1874-'75, Chap. 62, it is provided that the defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. But before the passage of this act, it was held by this Court that it was competent to join these offenses in the same indictment, because they were offenses of the same grade and the punishment was the same. (526) *S. v. Speight,* 69 N. C., 72; *S. v. Baker,* 70 N. C., 530; *S. v. Bailey,* 73 N. C., 70; *S. v. Brite, Ibid.,* 26.

It is, however, insisted in this case that, by Sec. 17 Ch. 32 of Battle's Revisal, the punishment for stealing a horse is increased from the maximum of ten to twenty years, and that the punishment being differ-

ent from that prescribed for receiving stolen goods knowing them to be stolen, they can not be joined. *S. v. Sheppard Johnson,* 75 N. C., 123. That would be true if the first count in this indictment had concluded against the form of the statute, as in that case (Johnson's), but it concludes at common law, by which it was punished with whipping, imprisonment or other corporal punishment. But whipping has been abolished by the Constitution, and imprisonment in the State's Prison substituted for it by Section 29, Chapter 32, of Battle's Revisal. So that, one convicted on an indictment for stealing a horse concluding at common law, is punished the same as one convicted of receiving it knowing it to have been stolen.

If this were an open question, we perhaps might come to a different conclusion; but it has been settled by several decisions of this Court. See *S. v. Ratts,* 63 N. C., 503, where it is held that when the offense at common law is made an offense of a higher nature by statute, the indictment must conclude against the statute; but when the punishment is not increased, but mitigated, it need not conclude against the statute; and that the substitution of imprisonment in the State's Prison for whipping is a mitigation, and the indictment concluding at common law, the defendant was subject to the punishment prescribed in said Section 29; and the decision in this case has been recognized and expressly approved in *S. v. Kent,* 65 N. C., 311, and *S. v. McDonald,* 73 N. C., 346.

We are, therefore, of the opinion that under the law established by this Court, construing the various statutes upon this subject, his
(527) Honor in the Court below had no authority for inflicting a punishment of twenty years' imprisonment upon the defendant, and that the sentence was illegal and should not have exceeded ten years.

The judgment pronounced by the Court below must be reversed, and the case remanded to the Superior Court of Columbus County that the defendant now confined in the State's Prison may be brought before that Court upon a writ of *habeas corpus ad subjiciendum,* to the end that the proper judgment upon the verdict, agreeably to this opinion and the law of the State, may be pronounced upon him.

PER CURIAM. Error.

Cited: *S. v. Garrell,* 82 N. C., 584; *S. v. Green,* 85 N. C., 600; *S. v. Dunn,* 86 N. C., 731; *S. v. Queen,* 91 N. C., 661; *S. v. Thompson,* 95 N. C., 601; *S. v. Walters,* 97 N. C., 491; *S. v. Goings,* 98 N. C., 767; *S. v. Jones,* 101 N. C., 724; *In re Deaton,* 105 N. C., 61; *S. v. Crowell,* 116 N. C., 1059; *S. v. Austin,* 121 N. C., 622; *S. v. Truesdale,* 125 N. C., 701; *S. v. Black,* 150 N. C., 867; *In re Holley,* 154 N. C., 166; *S. v. Cherry, Ib.,* 627; *In re Wiggins,* 165 N. C., 458.

STATE v. STEPHEN HOLDER.

Dogs—Larceny.

Dogs are not the subject of larceny in this State.

LARCENY, tried at Spring Term, 1879, of DAVIDSON, before *Schenck, J.*

The indictment charged the defendant, Stephen Holder, *alias* Stephen Phillips, with stealing "one dog of the value of one dollar," the property of one T. T. Spaugh. The defendant's counsel moved to quash the indictment on the ground that it did not charge an indictable offense. The motion was allowed, and Dobson, Solicitor for the State, appealed. (See *S. v. House,* 65 N. C., 315; Latham, 13 Ired., 33.)

Attorney-General for the State. (528)

No counsel in this Court for the defendant.

ASHE, J. The defendant was indicted for stealing a dog. It is no offense at common law. 4 Bl. Com., 236; Arch. Cr. Pl., 175; 1 Hale P. C., 512. The common law is the law of this State, except where altered by statute; and we have no statute making it larceny to steal a dog; therefore, the indictment can not be sustained.

Affirmed.

Cited: Mowery v. Salisbury, 82 N. C., 177.

STATE v. WILEY LUNSFORD and others.

False Imprisonment—Hoax—Fraud.

False imprisonment is the illegal restraint of one's person against his will;

Therefore, where on trial of an indictment for such offense it appeared that defendants went to the prosecutor's house at night, called him up out of bed, represented to him in changed voices that they were in search of a stolen horse, and offered to pay him to accompany them; and thereupon he mounted behind one of the defendant's on his horse, and went voluntarily, without threat or violence from defendants, and after riding a quarter of a mile in a gallop he complained of the uncomfortable mode of transportation, dismounted and discovered he was the victim of a hoax and was left in the road by defendants;

It was held, that the fraud practiced did not impress the transaction with the character of a criminal act.

INDICTMENT for false imprisonment, tried at Spring Term, 1879, of MACON, before *Gudger, J.*

The bill charged that the defendants, Wiley Lunsford, Leander Bate-

man and Nelson Rogers, did make an assault upon one Robert
(529) Garrison, and him the said Garrison unlawfully and injuriously, against his will, and against the laws of the State, and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison and detain, etc.

The jury returned a special verdict finding the following facts: On the night of the .... day of ....., 1878, the defendants went to the house of Robert Garrison, the prosecuting witness, after he had gone to bed, and called him up and represented to him that they were searching for a stolen horse which they understood had gone in the direction of Swain County, and urged him to go with them in search of the horse. The defendants changed their voices and names. After giving them some directions about the roads, the witness yielded to their request to go with them, they offering to pay him. Garrison thought they were the persons they represented themselves to be, and were in search of a stolen horse, and got behind one of them on his horse, when the defendants rode off in a gallop some quarter of a mile before Garrison discovered who they were. He complained of being hurt from the riding, and defendants proposed that he should change and get on behind another one of the defendants. He then got down, and the defendants rode off, leaving him in the dark about a quarter of a mile from his house. The defendants offered him no violence, nor did him any injury, except such as resulted from the rapid riding. Defendants were not in search of a stolen horse, but used the device only for the purpose of perpetrating a practical joke on the prosecutor. Defendants were young men, and the prosecutor between sixty and seventy years of age.

Upon these facts the Court held that the defendants were guilty. Judgment, appeal by defendants.

Attorney-General for the State.
Messrs. Reade, Busbee & Busbee for defendants.

(530) ASHE, J. False imprisonment is the illegal restraint of the person of any one against his will. The common law was so jealous of the personal liberty of the citizen, that it was regarded as a heinous offense, and the infringement of this right in England, under certain circumstances, was visited with severe punishment. False imprisonment generally included an assault and battery, and always at least a technical assault; and hence the form of the indictment, which is for an assault and battery and false imprisonment; though there may be a false imprisonment without touching the person of the prosecutor, as where a constable showed a magistrate's warrant to the prosecutor

and desired him to go before the magistrate, which he did, without further compulsion. This was held to be a sufficient imprisonment, because the officer solicited a warrant for his arrest, and in going with him, he yielded to what he supposed to be a legal necessity. But there must be a detention, and the detention must be unlawful. 3 Bl. Com., 127.

The prosecutor in this case went voluntarily with the defendants, with the expectation of a reward for his trouble. Instead of walking to the point of destination, a short distance from his house, he preferred to mount on the crupper of one of the horses ridden by some of the party, and after going about one-fourth of a mile and discovering that he was the victim of a hoax, he complained of the uncomfortable mode of transportation, and dismounted without objection from anyone. He was left all the while to the exercise of his own free will. There was no violence, no touching of his person, no threat, no intimidation of any sort. And the *ruse* employed by the defendants to decoy him from his house we do not think was such a fraud as to impress the transaction with the character of a criminal act. It seems to have been one of those practical jokes that is sometimes practised without any intention of doing harm or violating the law; and we are of the opinion that there was no violation of the criminal law (531) in this case.

Reversed.

Cited: *S. v. Reavis,* 113 N. C., 680.

STATE v. W. K. PARKER.

Indictment, Conclusion of.

An indictment concluding "against the peace and dignity," omitting the words "of the State," is not insufficient. The defect is cured by act of assembly.

INDICTMENT for obstructing a highway, tried at Spring Term, 1879, of EDGECOMBE, before *Eure, J.*

After a verdict of guilty, the defendant's counsel moved in arrest of judgment because the indictment concluded "against the statute in such case made and provided, and against the peace and dignity." The words "of the State" were omitted, and the offense was one at common law. His Honor granted the motion, and Collins, Solicitor for the State, appealed.

Attorney-General for the State.
(532) *Messrs. Howard & Nash* for the defendant.

ASHE, J. The indictment in this case is for obstructing a highway, and concludes "against the statute in such cases made and provided, and against the peace and dignity."

The defendant was found guilty by a jury, and, on motion of his counsel, the judgment was arrested upon the ground, we suppose, that the indictment concluded against the peace and dignity, omitting the words "of the State."

The conclusion, against the peace of the king, has been uniformly held in England to be necessary in all indictments, whether for statutory or common law offenses. And in our Constitution of 1776 it was expressly provided that indictments should conclude against the peace and dignity of the State, but the Constitution of 1868 omits this requirement, and ever since 1811, it has been the evident tending of our Courts, as well as law-makers, to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common law, the adherence to which often resulted in the obstruction of justice and the escape of malefactors from merited punishment.

The first step in that direction was the act of 1811, which provided that "every criminal proceeding by indictment, information or impeachment, shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible and explicit manner; and the same shall not be quashed, nor the judg-
(533) ment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the Court to proceed to judgment"; then the act of 1854, providing that no judgment should be stayed or reversed for the want of the averment of any matter unnecessary to be proved, etc.; then the omission in the Constitution of 1868 of the requirement that indictments should conclude against the peace and dignity of the State, which it is to be supposed was done with a purpose; and next the decisions of this Court, construing those statutes, in which it has evinced a strong leaning to the relaxation of the rigid and technical rules of the common law. For instance, it has been held that indictments with the conclusions "against the act of Assembly," "against the statute," "against the force of the statute," are good. *S. v. Tribatt,* 32 N. C., 151; *S. v. Smith,* 63 N. C., 234; *S. v. Davis,* 80 N. C., 384. See also *S. v. Evans,* 69 N. C., 40; *S. v. Moses,* 13 N. C., 452.

It is perfectly manifest that the words in this indictment "against the peace and dignity," mean the peace and dignity of the State. They

can not be understood to have any other meaning. The objection is purely technical; and to arrest the judgment on such a ground would be giving full force to the refinement which it was the purpose of the Legislature to cure by the acts of 1811 and 1854.

Reversed.

Cited: *S. v. Joyner, post,* 539; *S. v. Kirkman,* 104 N. C., 912; *S. v. Barnes,* 122 N. C., 1036; *S. v. Hester,* 122 N. C., 1051; *S. v. McBroom,* 127 N. C., 534; *S. v. Leeper,* 146 N. C., 659.

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STATE v. E. C. JOYNER.

Traffic in Liquor—Indictment—Constitutional Law.

1. It is constitutionally competent for the legislature to prohibit the sale within a specified locality of intoxicating liquors not the manufacture of the vendor.
2. An indictment under a statute, which in one section unconditionally prohibits the sale of liquor in quantities less than a quart, and, in a subsequent section, interdicts all traffic in liquors not of the seller's own manufacture, need not aver that the liquor sold was not made by the defendant, when the offense charged is the sale of less than a quart.
3. An indictment, whether for a common law or statutory offense, which does not conclude "against the peace and dignity of the State," is fatally defective.

INDICTMENT for retailing liquor, tried at Spring Term, 1879, of NORTHAMPTON, before *Eure, J.*

The defendant was indicted in the following words: "The jurors for the State upon their oath present, that E. C. Joyner, late of the county aforesaid, at and in the county aforesaid, on 20 March, 1879, unlawfully did sell to one A. H. Reid one pint of intoxicating liquor, contrary to the statute in such case made and provided." The jury returned a special verdict, to wit, "The defendant sold to A. H. Reid, in Northampton County, on 20 March, 1879, one pint of intoxicating liquor." And thereupon the Court held that defendant was guilty; judgment, appeal by defendant, whose counsel contended that the act under which the indictment was framed is unconstitutional.

Attorney-General for the State.
Messrs. W. Bagley, and *Reade, Busbee & Busbee* for defendant.

SMITH, C. J. The defendant is charged with violating the first (535) section of the local act of 22 March, 1875 (Pr. Laws 1874-'75, Chap. 255, Sec. 1), and the jury rendered a special verdict, in which

they find "that the defendant sold to A. H. Reid, in Northampton County, on 20 March, 1879, one pint of intoxicating liquor," as specified in the bill of indictment. The Court being of opinion that upon this finding the defendant was guilty, pronounced judgment, from which the defendant appeals. The points made in this Court, and strenuously contested for the defendant, relate, first, to the validity of the enactment, and secondly, to the sufficiency of the facts charged and found to constitute an offense under it.

The first and second sections of the act are as follows:

"SECTION 1. That it shall be unlawful for any person to sell within Northampton County any intoxicating liquor by the measure less than one quart: *Provided, nevertheless,* that nothing herein contained shall affect any retail license already granted by the County Commissioners.

"SEC. 2. That it shall be unlawful for any person to sell within said county any intoxicating liquor, other than that made by him or her."

The third section makes a violation of the act a misdemeanor, punishable by a fine of "not less than thirty nor more than two hundred dollars."

It is apparent upon a proper construction of the statute, and to make the sections consistent one with the other, that all traffic in intoxicating liquor, by the small measure less than a quart, is absolutely forbidden, and the selling in larger quantities is restricted to liquor which the seller himself manufactures. The act of selling by measure less than a quart, with which the defendant is charged, by whomsoever done, and wherein the liquor sold may have been made, is under an uncon-
(536) ditional prohibition. Consequently, no negative averments in the bill are required, and no additional facts need be found to constitute the offense.

The argument against the validity of the law, because of the discrimination contained in the second section in favor of the seller's own product, has no application to the general interdict found in the first. The discrimination is not against *citizens of other counties nor liquors elsewhere manufactured,* but every person residing in or out of the county is at liberty to sell and dispose of his own products, above the limited measure, in Northampton as in other counties. There are, therefore, no unequal and illegal distinctions in the act subject to condemnation under the Constitution of the State or of the United States, and the learning contained in the argument for the defendant has no bearing upon the case.

But we do not concede that section two as interpreted by his counsel restrains this exercise of legislative power. The right of a State to regulate, or to prohibit wholly or in part the traffic in spirituous or intoxicating liquor has been asserted and sustained by repeated adjudications in

the Courts of the different States, and is recognized in numerous cases before the Supreme Court of the United States from the License Cases reported in 5 Wall., 452, down to the recent case of *Bartemeyer v. Iowa,* 18 Wall., 129, where it was contended that such restraints were imposed by the new constitutional amendments. "The weight of authority is overwhelming," says Mr. Justice MILLER, delivering the opinion, "that no such immunity has heretofore existed as would prevent State Legislatures from regulating and even prohibiting the traffic in intoxicating drinks with a solitary exception. That exception is the case of a law operating so rigidly upon property in existence at the time of its passage, absolutely prohibiting its sale as to amount to *depriving the owner of his property.*" The subject is discussed and the authorities cited and commented on by Judge COOLEY in his valuable treatise on Constitutional Limitations, at page 583 and following, and the competency of the State thus to legislate fully established.

But if the alleged repugnancy of the second section to the (537) Federal Constitution did exist, it does not affect the validity of the preceding prohibitory clause, under which the indictment is framed. "When a part of a statute," says Judge COOLEY, "is unconstitutional, that fact does not authorize the Courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it can not be presumed the Legislature would have passed the one without the other," and they must be *"essentially and inseparably* connected in substance." *Ibid.,* 178. "An act may be constitutional in part, and unconstitutional in part," say this Court in *Johnson v. Winslow,* 63 N. C., 552. See also *Packet Company v. Keokuk,* 95 U. S., 80.

The law, local in its application, and clear and positive in its mandates, can not be controlled by provisions and restraints found in similar enactments, general or special, passed for the regulation or prohibition of the traffic in other parts of the State, and must be enforced upon a fair and reasonable interpretation of its own terms. Nor is the competency of the Legislature to pass local acts, such as the present, now an open question. The power has been so long and so often exercised and recognized in cases coming before this and other Courts, that its existence must be considered as settled. For the reasons stated, no negative averments in the bill are required, and no evidence relating thereto was necessary on the trial. There were other technical exceptions taken to the form and sufficiency of the bill of indictment, of which we deem it only necessary to say that they are, in our opinion, untenable.

The absence of the usual concluding words of an indictment, and its

effect upon the bill, although not adverted to in the argument,
(538) have not escaped the notice of the Court, and furnish an occasion for us to mark our strong disapprobation of the practice of making needless and unauthorized innovations upon old and well established forms. The framers of our State government inserted in its organic law a clause requiring in express words that "indictments shall conclude against the peace and dignity of the State." Cons. 1776, Sec. 36. And such has been the invariable practice for more than a century past. In most of the State Constitutions a similar mandate is found. 1 Whar. Cr. Law, Sec. 410. And in some of them the Courts declare that an indictment drawn in disregard of this imperative requirement is fatally defective. *Thompson v. Commonwealth,* 20 Gratt. (Va.), 724; *Lennons v. S.,* 4 West. Va., 755; *S. v. Lopez,* 19 Mo., 254; *Anderson v. S.,* 5 Pike (Ark.), 444.

In the latter case, SEBASTIAN, J., says: "This form derives no new consideration from its being found in the Constitution; such would have been the rule by the law without its insertion there. It was only declaratory and in affirmance of an old principle, and not a creation of a new one," and it is used, he adds, "to indicate the sovereign power offended in the violation of the law."

The clause is left out of the substituted Constitution of 1868, and being now without written law on the subject we are confronted with the question of its materiality.

In 2 Hale P. C., 188, it is said that "regularly every indictment ought to conclude *contra pacem domini regis,* for that is not taken away by the statute of 37 Henry VIII., Chap. 8, and therefore "an indictment without concluding *contra pacem,* etc., is insufficient, though it be but for using a trade not being an apprentice, for every offense against a statute is *contra pacem,* and ought to be so laid." The same rule is laid down by Hawkins, with some exceptions not pertinent to the present case. 2 Hawk. P. C., Chap. 25, Sec. 92.

The strictness of the rules of the common law relating to criminal proceedings, has been much relaxed by our own Legislature, and
(539) an indictment is made sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible and explicit manner, so that sufficient matter appears to enable the Court to proceed to judgment. Bat. Rev., Chap. 33, Sec. 60.

Again, it is enacted that the want of certain usual technical averments, such as the words, "with force and arms," or "of any matter necessary to be proved," shall not constitute ground for staying or reversing judgment after conviction. *Ibid.,* Sec. 66.

We have decided in *S. v. Parker, ante,* 531, that the omission of the words "of the State" would not vitiate the bill, and that by intendment

they would in construction be supplied. But we do not feel at liberty to dispense entirely with words, declared by both Hale and Hawkins to be material, which have had a constitutional sanction since the foundation of the State government until the change made in 1868. Whatever may be the proper construction and effect of the legislation referred to, it is manifest it did not cure this defect in the form of an indictment, made material by the Constitution itself; and it ought not, since the change, to have any different or wider scope of application.

For the absence of this averment, then, the judgment must be arrested.

PER CURIAM. Reversed and Judgment Arrested.

Cited: *S. v. Hazell,* 100 N. C., 473; *S. v. Stovall,* 103 N. C., 418; *S. v. Moore,* 104 N. C., 717; *S. v. Kirkman, Ibid.,* 913; *S. v. Barringer,* 110 N. C., 527; *S. v. Moore,* 113 N. C., 705; *S. v. Thomas,* 118 N. C., 1226; *Broadfoot v. Fayetteville,* 121 N. C., 422; *Guy v. Commissioners,* 122 N. C., 473; *Greene v. Owen,* 125 N. C., 222; *S. v. Sharp, Ibid.,* 632; *S. v. Barrett,* 138 N. C., 643; *Durham v. Cotton Mills,* 141 N. C., 644; *S. v. Piner, Ib.,* 762.

(540)

STATE v. RICHARD WILLIAMSON.

Indictment, Form of—Venue.

1. Laws conferring, withdrawing or limiting jurisdiction over preëxisting common law offenses do not become a constituent part of the offenses to which they apply; and *hence,* indictments therefor need not conclude against the form of the statute.
2. A failure to lay the venue properly is not fatal to an indictment, and, *a fortiori* it will not avail to vitiate a justice's warrant.

APPEAL at April Term, 1879, of NEW HANOVER, from *Meares, J.*

The case states: The prosecutor, Simon Richardson, a constable, obtained a warrant against the defendant for assault and battery, which was tried before a Justice of the Peace. The defendant was adjudged to be guilty and fined, and from the judgment he appealed to said Court, moved to quash the proceedings upon the ground, first, because the act of Assembly (1879, Ch. 92), conferring final jurisdiction upon Justices of the Peace in cases of assault and battery creates a statutory offense, and that therefore the warrant ought to have concluded against the form of the statute and the peace and dignity of the State, which it does not do; and secondly, that the warrant does not charge that the offense was committed in New Hanover County. The motion was overruled.

It was proved on the trial that the defendant was in charge of a bar-room kept by one Mary Williamson, when the prosecutor entered to arrest an individual who was supposed to be in the bar-room, or in an adjoining room, where a large number of persons were engaged in dancing. The prosecutor swore that he showed the warrant for the arrest of the person for whom he was searching, and that he was ordered out of the bar-room, and finally pushed out of it by the
(541) defendant. The jury returned a verdict of guilty, and the defendant moved in arrest of judgment upon the grounds above stated. Motion denied. Judgment; appeal by defendant.

Attorney-General for the State.
No counsel in this Court for the defendant.

SMITH, C. J. The defendant was arrested on a warrant issued by a Justice of the Peace of New Hanover County upon the affidavit of Simon Williamson, a constable, in which he is charged with committing an assault upon the person of the prosecutor while in the execution of his official duties. On the trial of the charge before the Justice, he was found guilty, and adjudged to pay a fine of five dollars and costs, and appealed to the Criminal Court of New Hanover. The defendant there moved to quash the proceedings, and the motion being denied, he pleaded not guilty. The jury rendered a verdict of guilty.

The motion to quash was made on the ground that the act of 28 February, 1879, Laws 1879, Chap. 92, conferring jurisdiction of Justices, modifies or affects the offense, and the warrant should have concluded against the statute; and for the further reason that the offense is not alleged to have been committed in New Hanover County. The motion to quash, as well as its renewal in arrest of judgment for these assigned defects, were properly overruled.

Laws conferring, withdrawing or limiting jurisdiction do not enter into and become a constituent part of the offences to which they apply.

And assault and battery is an offense at common law, and though the absent words, if supplied, would not have vitiated the warrant, they were needless and superfluous.

The want of an averment of a proper and perfect venue is not fatal to a bill of indictment where much greater strictness is re-
(542) quired than in forms used before a Justice, and still less should be deemed essential to the sufficiency of a warrant.

On the trial before the jury it was in evidence that the prosecutor had in his hands an order for the arrest of a certain person whom he believed to be in the bar-room, or in the one adjoining in which many persons were engaged in dancing, of which rooms the defendant had

control, and the precept was shown him; that the prosecutor was thereupon ordered away and violently pushed out of the room by the defendant.

No exception is taken to the evidence, nor does it appear whether the person mentioned in the order of arrest was in the dance-room, nor what reasons the prosecutor had for expecting to find him at the place. No exception is taken to the evidence, nor to its sufficiency to authorize conviction, nor are any facts stated to excuse or justify the defendant in his forcible and summary expulsion of the officer, whose business was fully understood, from the premises. If any such existed it was the duty of the appellant to give them in evidence and have them set out in the record, with his exception to the rulings of the Court in reference thereto. This is not done, and as no error to the defendant's prejudice is shown, the judgment must be

PER CURIAM. Affirmed.

Cited: *S. v. Long,* 143 N. C., 674; *S. v. Francis,* 157 N. C., 614.

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(543)

STATE v. JAMES HEATON.

Statement, Form of.

1. Defendant was indicted under a statute which made it his duty to collect a State tax of one dollar on every mortgage given to secure a sum in excess of three hundred dollars, and rendered it an act of embezzlement to appropriate such tax to the collector's own use; *Held,* that the indictment is sufficient if it aver that the defendant, by virtue of his office, collected one dollar as a tax due the State on a certain mortgage deed, described in the indictment, which said sum was the property of the State, and thereafter converted the same to his own use. It need not aver any more explicitly that the mortgage was given to secure a greater sum than three hundred dollars.
2. If there be an exception in that clause of a statute which creates an offense, the indictment should contain a negative averment that the subject of the charge is not embraced by the exception; but when the exception *or proviso* is in a subbsequent clause of the statute, it is a matter of defense, and need not be negatived in the pleading.

EMBEZZLEMENT, tried at April Term, 1879, of NEW HANOVER, before *Meares, J.*

After charging the election and qualification of the defendant as Clerk of the Superior Court of New Hanover County, the indictment further charged that he, by virtue of his office, and in pursuance of an act of the General Assembly, ratified 10 March, 1877, received and collected from one Alexander Oldham the sum of one dollar on a certain mortgage deed as a tax due to the State of North Carolina, which

said sum of one dollar was the property of and for the use of the said State of North Carolina, being a tax as aforesaid, which said sum of one dollar with force and arms the said James Heaton, on the day and date aforesaid, in the county aforesaid, did wilfully, knowingly, corruptly, falsely and fraudulently convert and appropriate to his own use, contrary to the form of the statute entitled "an act to raise revenue," ratified 10 March, 1877, and against the peace and dignity of the State. Upon motion of defendant's counsel, the Court quashed the bill for the causes set out in the opinion of this Court, and Moore, Solicitor for the State, appealed.

(544) *Attorney-General* for the State.
No counsel in this Court for defendant.

ASHE, J. The defendant being the Clerk of the Superior Court of New Hanover County, and *ex officio* Judge of Probate, was indicted at the August Term, 1878, of the Criminal Court of said county for embezzlement. The indictment was founded on the fifth and eighth sections of Chapter 156, Laws 1876-'77.

The fifth section reads: "On each marriage license, one dollar, and on each marriage contract, mortgage deed and deed in trust to secure creditors where amount secured exceeds three hundred dollars, there shall be a tax of one dollar; the tax on marriage licenses shall be paid to the Register of Deeds when he issues the license, and the tax on the deeds to the Judge of Probate in the county in which the instrument is admitted to registration," etc. To this section there is a *proviso* in a separate clause: "That mortgage deeds, deeds in trust, or other conveyances made to secure agricultural advancements shall not be subject to any tax under this section, and no tax shall be collected by any Clerk of a Superior Court as a tax on suits either for the State or county."

The eighth section provides that "any officer convicted of violating the preceding sections, or of appropriating to his own use, any State, county, school, city or town taxes, shall be guilty of embezzlement, and may be punished not exceeding five years in the State Prison, at the discretion of the Court."

The indictment charges that the defendant, being Clerk of the Superior Court of New Hanover, by virtue of his said office, received and collected from one Oldham the sum of one dollar on a certain mortgage deed as a tax due the State of North Carolina, which said sum of one dollar was the property of, and for the use of, the said State of North Carolina, being a tax as aforesaid, which said sum of one dollar, with force and arms, the said James Heaton, on the day and year (545) aforesaid, did wilfully, knowingly, corruptly, falsely and fraud-

ulently convert and appropriate to his own use, contrary to the form of the statute entitled an act to raise revenue, ratified 10 March, 1877.

The counsel for the defendant moved to quash the bill of indictment for the following reasons:

1. That the aforesaid fifth section only applies to mortgage deeds intended to secure an amount in excess of three hundred dollars, and the bill of indictment fails to charge that this was a deed of mortgage securing an amount in excess of three hundred dollars.

2. That the *proviso* of the said fifth section exempts from this tax all deeds of mortgage made to secure agricultural advancements, and that the bill of indictment fails to negative this deed as an agricultural mortgage.

His Honor sustained the motion to quash, and the Solicitor for the State appealed to this Court.

1. Quashing indictments is not favored; and although the Courts have the power to quash upon motion of the defendant before plea, it is purely a discretionary one, and is not usually exercised unless where the defect is gross and apparent; and not then where the offense is a felony, or other heinous offences, such as cheats, extortion and public nuisances. Arch. Cr. Pl., 66; *S. v. Baldwin,* 18 N. C., 195; *S. v. Jeffreys,* 1 N. C., 528. In cases of doubt, they should not quash, because the defendant, if convicted upon the facts charged, can have the same advantage of legal points upon a motion in arrest of judgment as upon a motion to quash. *S. v. Smith,* 5 N. C., 213. And, on the other hand, judgment will not be arrested by reason of any informality or refinement, if in the bill sufficient matter appears to enable the Court to proceed to judgment. Bat. Rev., Chap. 33, Sec. 60.

The indictment in this case is informally drawn, and would be more regular if it had charged that the defendant received and collected a tax of one dollar on a mortgage deed given to secure (546) an amount in excess of three hundred dollars; for the two sections having to be taken together constitute the offense, the words "where the amount secured exceeds three hundred dollars," form a part of the description of the offense. It is safe but not essential to pursue the words of a statute. But if they are substantially followed, or words of equivalent import are used, it is sufficient. 1 Bish. Cr. Pro., Sec. 359; Chitty Cr. Law, 283.

In *S. v. McKenzie,* 42 Me., 392, and *Com. v. Hampton,* 3 Gratt., 590, it was held that the indictment must state all the circumstances which constitute the definition of the offense in the statute, so as to bring the defendant precisely within it.

In *S. v. Little,* 1 Vt., 331, it was decided that an indictment need

not adopt the very words of a statute, the substance to a reasonable intendment is sufficient.

In *Page v. State,* 3 Ohio St., 229, it was held that it was not always necessary to describe the offense in the very words of the statute.

And in *S. v. Fore,* 23 N. C., 378, it has been held that an indictment ought to be certain to every intent and without any intendment to the contrary; but if the sense be clear and the charge sufficiently explicit to support itself, nice objections ought not to be regarded.

We are aware that many of the English decisions which adhere to the niceties and refinements of the common law, are in conflict with those we have cited, which are supported by many other American cases of like import; but we have followed the latter because they are in harmony with the policy of our law as indicated by the act of 1811 and other statutes. And it is upon these authorities we are of the opinion that the decision of his Honor in quashing the indictment for the reason first assigned, is erroneous. Conceding that it was necessary to aver that the tax received was upon a mortgage deed to
(547) secure creditors where the amount secured exceeded three hundred dollars, we think that fact is substantially charged in the bill, so explicitly as to admit of no intendment of the contrary, when it is averred that the defendant received the sum of one dollar on a certain mortgage deed as a tax due the State, which sum of one dollar was the property of and for the use of the State, being a tax, etc. These words exclude any inference that the dollar was received on a mortgage deed not taxed, and as conclusively and explicitly convey the idea that it was received on a mortgage subject to a tax as if it had been charged in the very words of the statute. It is alleged to be a tax on a mortgage deed, the tax when received was the property of and for the use of the State. There was no tax on any other mortgage deed. Had the money been received on a mortgage to secure an amount of less value than three hundred dollars, it would not have been a tax, nor the property of the State. It follows, then, without any intendment to the contrary, that the money received was a tax on a mortgage deed given to secure an amount in excess of three hundred dollars.

2. We think his Honor was equally in error in quashing the indictment for the second reason assigned; for it is a well-established principle that if there be an exception contained in a clause of the act which creates the offense, the indictment must show negatively that the subject of the indictment does not come within the exception; but when the exception or *proviso* is in a subsequent clause of the statute, as in this case, it is a matter of defense for the defendant, and need not be negatived in the pleading. Arch. Cr. Pl., 53; 1 Bish. Cr. Pro., Secs.

381, 382; Chitty Cr. Law, 283. We are of opinion that sufficient matter appears in this indictment to enable the Court to proceed (548) to judgment, and, therefore, that it should not have been quashed.

Reversed.

Cited: *S. v. Lanier,* 88 N. C., 660; *S. v. Bloodworth,* 94 N. C., 919; *S. v. Turner,* 106 N. C., 694; *S. v. Downs,* 116 N. C., 1067; *S. v. Newcomb,* 126 N. C., 1106; *S. v. Burton,* 138 N. C., 577; *S. v. Connor,* 142 N. C., 701; *S. v. Hicks,* 143 N. C., 694; *S. v. Moore,* 166 N. C., 286.

STATE v. W. K. PARKER.

Indictment—Injury to Stock.

An indictment for injury to live stock under Bat. Rev., Chap. 32, Sec. 95, which charges the offense as having been committed unlawfully, omitting the word "wilfully," is defective.

INDICTMENT for a misdemeanor under Bat. Rev., Chap. 32, Sec. 95, tried at Spring Term, 1879, of EDGECOMBE, before *Eure, J.*

The bill charged that the defendant, with force and arms, did unlawfully injure and abuse a certain hog the property of the prosecutor, said hog being at the time in a certain enclosure not surrounded by a lawful fence, contrary, etc. After a verdict of guilty, the defendant's counsel moved in arrest of judgment because the word "wilfully," or some other of similar import, was omitted in the indictment. The motion was allowed, and Collins, Solicitor for the State, appealed.

Attorney-General for the State.
Messrs. Howard & Nash for the defendant.

DILLARD, J. This prosecution is founded on Ch. 32, Sec. 95, of Battle's Revisal, for abusing a hog, the property of another, in an enclosure not surrounded by a lawful fence, and in the bill of (549) indictment the charge is that the abuse was done *unlawfully,* omitting "wilfully."

On conviction of the defendant, his Honor arrested the judgment on the ground that the word "wilfully" should have been used as necessary to a legally sufficient description of the statutory offense.

In *S. v. Staton,* 66 N. C., 640; *S. v. Allen,* 69 N. C., 23; *S. v. Painter,* 70 N. C., 70, and *S. v. Hill,* 79 N. C., 656, the indictment charged the offense, using both words, unlawfully and wilfully, according to the precedents, and no objection was made to the sufficiency of the descrip-

tion in this respect. But in *S. v. Simpson,* 73 N. C., 269, there was an omission of both, and the indictment was held defective.

In the enacting clause of the statute these words are not used, but the injury forbidden is forbidden in general words, so that any killing or abuse being unlawful simply would constitute an offense, although the thing done may have occurred or been done by consent, or from carelessness or accident; and hence it was that in the case of the *S. v. Simpson, supra,* this Court, by construction, held that it was necessary in bills of indictment under the statute in question to use both words to limit the general words of the statute.

We concur entirely in the correctness of the decision in Simpson's case, and the reasons on which it was based, and hold that the omission of the word "wilfully" in the present case leaves the statute too little limited. The abuse charged on the defendant may have been the result of carelessness or accident, without any assent or guilty participation of the mind of the defendant therein; and if so, the case is not one designed by the act to be punished. And we hold, therefore, that in order to limit properly the general words of the statute, it is (550) necessary to allege in the bill the injury or abuse as done unlawfully and wilfully, or by some equivalent words. Besides the cases cited, see *S. v. Ormond,* 18 N. C., 120.

PER CURIAM. No Error.

Cited: S. v. Whitaker, 85 N. C., 569; *S. v. Allison,* 90 N. C., 735; *S. v. Erwin,* 91 N. C., 550; *S. v. Howe,* 100 N. C., 453; *S. v. Powell,* 141 N. C., 782; *S. v. Leeper,* 146 N. C., 668.

STATE v. JOHN SHERRILL and others.

Indictment—Trespass on Land—Variance.

Where an indictment charged the defendant with a trespass upon land in possession of A, and the proof was that the premises were in possession of B; *Held,* to be a fatal variance.

INDICTMENT for a misdemeanor, tried at Spring Term, 1879, of CALDWELL, before *Graves, J.*

The facts appear in the opinion. Verdict of guilty, judgment, appeal by the defendants.

Attorney-General for the State.

No counsel in this Court for the defendants.

ASHE, J. The defendants were indicted at Spring Term, 1878, of Caldwell Superior Court, and the bill of indictment is as follows: "The

jurors for the State upon their oaths present, that Philo Sherrill, John Sherrill, David Brinkley and Van Teague, on 1 September, 1877, in the county aforesaid, with force and arms and a strong hand, did assemble together to disturb the peace, and being so assembled together, they, the said Philo Sherrill, John Sherrill, David Brinkley and Van Teague, with force and arms and a strong hand, into a certain enclosure surrounding the dwelling-house of Goodwin Harris, in the county aforesaid, did break and enter; and then and there, at and against (551) the said dwelling-house of him the said Goodwin Harris, the wife, children and servants of the said Goodwin Harris being in the said dwelling-house, at and against the said dwelling-house, unlawfully and against the will of him the said Goodwin Harris, his wife, children and servants, did cast, throw and hurl a great number of stones and other missiles, and unlawfully, forcibly and with a strong hand, and in a violent and tumultuous manner, did pull down the fence and enclosure surrounding and about the said dwelling-house, to the great terror and affright of the wife, children and servants of the said Goodwin, and against the peace and dignity of the State." It was found and presented a true bill as to all the defendants except Van Teague; and at Spring Term, 1879, of said Court the defendants moved to quash the indictment. The motion was overruled and the defendants pleaded not guilty, and upon the trial were found guilty. They then moved for a new trial, which was refused by the Court, and they appealed.

The statement of the case by his Honor shows that upon the trial before the jury, evidence was offered tending to show that the premises upon which the alleged trespass was committed, were in possession of one Lewis; that he himself was absent; that his son and son's wife, who were members of said Lewis' family, together with another son and his wife, who were visitors, were in the house; that there was a road, whether public or not did not appear, passing by the house; there was a fence between the house and the road, and enclosing the premises; that defendants and another in the night time came riding along the road, cursing and swearing, and when they came opposite the gate, one of the defendants said, "Come out, d—n you, we want to whip you"; that a sound was heard as if throwing rocks against the gate; that the wife of the son who lived there was greatly terrified; that they remained some two or three minutes, cursing, swearing and bel- (552) lowing like a bull, and next morning prints of rocks were found on the gate, and some two or three rails thrown off the fence.

From the statement there seems to have been no proof that Goodwin Harris, or his children or servants, were in the house, or that it was occupied by them or any of them.

The Court instructed the jury that if the defendants entered the

premises with a strong hand and a multitude of people, in such a manner as was calculated to put the owner of the house in fear, and tended to bring on a breach of the peace, they would be guilty. The instruction was erroneous. There was a fatal variance between the proof and the allegations of the bill of indictment. His Honor should have charged the jury that there was no evidence in the case to warrant the conviction of the defendants upon that indictment.

PER CURIAM. Error.

Cited: *S. v. Sherrill,* 82 N. C., 695.

STATE v. RACHEL MIKLE.

Irrelevant Testimony—Consequences of its Admission.

1. On a trial for murder it appeared in evidence that the deceased was, probably slain while chasing a hog. To connect the prisoner with the homicide the State was permitted to prove (prisoner excepting) a declaration by her that "the hog was bruised, and when salted down after it was killed, was nice, clean meat, but that when she put it in warm water, it would look like clotted blood;" *Held,* that the testimony, standing alone, had no tendency to implicate the prisoner.
2. The admission of irrelevant testimony, over objection properly interposed, is ground for a new trial.

(553) INDICTMENT for murder, tried at Spring Term, 1879, of CHEROKEE, before *Gudger, J.*

There was a verdict of guilty, judgment, appeal by the prisoner.

Attorney-General for the State.
Messrs. Battle & Mordecai for the prisoner.

SMITH, C. J. The prisoner is charged with the murder of one James Ross, and two others who on the trial were acquitted, as being present aiding and abetting in the crime.

The prisoner and the deceased lived not far apart upon the same branch, and between their places of residence, but visible at neither, was a cultivated field of the deceased, into which the hogs of Baty Mikle, one of the accused, had broken and committed depredations. Early in the morning of the day of death of the deceased, he started from his house, going in that direction with his dog, and said he would look and see if hogs were in the field. Soon afterwards the dog returned wet and muddy, and on searching, the dead body was discovered in the field, and upon the ground near it were dog and hog tracks and signs of a

scuffle, and a hog's tail was found. The body bore marks of violence inflicted on the left side of the neck, and, in the opinion of the physician, who made an examination by cutting into the bruised part, the deceased was killed by a blow from some heavy weapon dealt upon the neck.

There was no direct proof of the guilt of any of the accused persons, and the evidence was entirely circumstantial. In order to show the prisoner's complicity in the crime, the Solicitor pro- (554) posed, and, after objection, was allowed to prove certain declarations of hers, made in the presence of a witness, the purport of which was reduced to writing and submitted to her counsel and to the Court, that its admissibility might be passed on before it was heard by the jury.

The witness was then introduced and testified that on the morning of her arrest the prisoner spoke of the hog that had been dogged at the time when the dead body was found, and said "the hog was bruised, and when salted down after it was killed was nice clean meat, but that when she put it in warm water, it would look like clotted blood."

The evidence, so far as the case discloses, is connected with no facts or circumstances pointing to the guilt of the prisoner, by which its bearing or materiality can be seen. The declarations stand out alone and unsupported, and the jury were left to draw therefrom their own deductions as to the prisoner's participation in the homicide. The evidence might be rendered competent, in association with other facts, to prove the prisoner's guilt, and if so, these facts should be made to appear, upon which its competency depends, so as to remove the force of the objection.

We can not undertake to measure the influence it may have exercised over the minds of the jury in conducting them to the conclusion expressed in the verdict. The declarations alone certainly furnish no reasonable grounds for the inference that the prisoner committed the criminal act. They only show she was in possession of the hog after its death, but not that she was present when the deceased was slain, or was in any manner a party to the deed. The language ascribed to her is but the expression of a diseased imagination or superstitious fancy, entirely consistent with innocence, and yet the jury may have regarded it as the outcropping of conscious guilt, and given it a force to which it is in no manner entitled. In order to a conviction, the evi- (555) dence must do more than raise a suspicion or conjecture of the fact found; it must reasonably warrant the verdict in which such fact enters as a material element.

"It is true," says BATTLE, J., in *Patton v. Porter,* 48 N. C., 539, "that if it were testimony at all, it was too slight to have any legitimate effect upon the minds of the jury; yet it may possibly have misled them

by inducing them to find for the defendant, upon the principle of setting off one warranty against the other. This was, of course, improper, and as the jury *may have been misled,* we think that the plaintiffs are entitled to a *venire de novo.*" Much more forcibly does the rule apply to a conviction for a capital crime, when the verdict may have resulted from the prejudicial effect of the evidence. See also *Lynes v. State,* 36 Miss., 617; *Smith v. Ross,* 22 Wis., 439, to the same effect.

The verdict can not be allowed to stand. There is error, and the prisoner is entitled to have her case tried before a new jury.

Venire de Novo.

Cited: Evans v. Howell, 84 N. C., 464; *S. v. Shields,* 90 N. C., 695; *S. v. Jones,* 93 N. C., 612.

STATE v. ASBERRY THORNE.

Juror—Indictment—Burning Gin-house—Statutes Construed—Punishment.

1. One who had been summoned on a special venire, but not drawn on the jury, within two years next preceding the term of court at which he is summoned as a talesman, is not thereby disqualified under the Act of 1879, Chap. 200. To render such talesman incompetent, it must be shown that he "has acted" or served upon a jury within the time prescribed by the act.
2. An indictment for burning a gin-house charging the offense to have been done unlawfully, *maliciously* and feloniously, is sufficient under the Act of 1869, Chap. 167, Sec. 5. The words used in the bill as descriptive of the intent imply that the act was done "*wilfully.*"
3. An indictment for such offense under the Act of 1875, Chap. 228, can not be supported, though where it was intended to be drawn thereunder, and is sufficient under the former act, a conviction will be sustained. The two are not inconsistent, but the words "any house" in the latter act do not include "gin-house."
4. Where the punishment imposed by the sentence of a court is unauthorized, the judgment will be reversed and the case remanded to the end that a legal judgment may be pronounced.

(556)

INDICTMENT under the act of 1874-'75, Ch. 228, for burning a gin-house, tried at Spring Term, 1879, of EDGECOMBE, before *Eure, J.*

The bill charged that the defendant did unlawfully, maliciously and feloniously set fire to and burn the gin-house of V. B. Sharpe and W. H. Weathersbee, the gin-house being used for the purpose of ginning cotton, and in the possession of said owners, Sharpe and Weathersbee, and with the intent to injure and defraud them, contrary, etc.

During the trial a juror was called as a talesman and challenged by the defendant for cause under the act of 1879, Chap. 200, and it

appeared that within the two years next preceding said term of the Court he had been summoned on a special venire issued in a case of felony then pending, and had attended Court under the summons, but a jury being had before his name was drawn, he did not serve thereon. The cause of challenge was held to be insufficient. Defendant excepted, and then challenged the juror peremptorily, and before a full jury had been drawn the defendant exhausted his peremptory challenges.

The evidence in the case was that the defendant burned the gin-house in the night time; that the gin-house was used for ginning cotton, the property of said Sharpe and Weathersbee; but there was no evidence that they ginned cotton other than their own. The defendant asked the Court to charge the jury: 1. That there was no evidence (557) the defendant had done any act made criminal or penal by the statute under which the indictment is drawn, and that the gin-house used as above set forth was not in the scope or purview of that statute. 2. That the act in Bat. Rev., Chap. 32, Sec. 6, was in force and has not been repealed, and defendant can not be convicted under that act because the indictment does not charge the burning to have been done *wilfully,* and that the words used in the indictment are not a sufficient substitute for the word "wilfully," and that the jury should acquit the defendant. The Court declined to charge as requested, and defendant excepted. Verdict of guilty, judgment that the defendant be confined at hard labor in the penitentiary for twenty years; appeal by defendant.

Attorney-General for the State.
Messrs. W. B. Rodman and *W. P. Williamson* for defendant.

SMITH, C. J. The indictment charges that the defendant did unlawfully, maliciously and feloniously set fire to and burn a gin-house of V. B. Sharpe and W. H. Weathersbee, with intent to injure and defraud them, and the jury find him guilty.

The act of 10 April, 1869, makes "the wilful burning of any gin-house or tobacco barn, or any part thereof, or in the night time any stable containing a horse or horses, or a mule or mules," an offense punishable by confinement in the State's Prison from five to ten years. Bat. Rev., Chap. 32, Sec. 6.

Subsequently, the act of March 22, 1875, was passed, which declares the unlawful and malicious setting fire "to any church, chapel or meeting-house," or "to *any house,* stable, coach-house, out-house, warehouse, office, shop, mill, barn or granary," or "to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender or in the possession of any other person, (558)

with intent thereby to injure or defraud any person," to be a felony for which, on conviction, the offender shall be subject to confinement in the State's Prison for a term "not less than five nor more than forty years." Laws 1874-'75, Chap. 228.

The indictment is intended to be drawn, and the judgment of the Court pronounced, under the last act.

During the trial an exception was taken by the defendant to the overruling of his challenge to a tales juror tendered, based on the act of 12 March, 1879, for the reason "that such juror has acted in the same Court as grand or petty juror within two years next preceding such term of the Court." Laws 1879, Ch. 200. The facts do not come within the statute, and the objection is not tenable. The juror had been summoned on a special venire and had attended a term of the Court within that time, but his name was not drawn, and a jury being obtained without him, he was discharged. The disqualification attaches to the juror who "has acted" or served as such, and not to one who has been at the Court under a summons, liable only to be called on for such service. The juror was therefore not incompetent.

The defendant further excepts to the sufficiency of the bill of indictment to warrant judgment against him under either of the before-recited acts:

1. Not under the latter, for the reason that a gin-house is not named among the houses and buildings mentioned therein, and is not, therefore, within its scope and operation; nor

2. Under the first, for that the bill fails to allege the burning to have been *"wilfully"* done.

The acts are not inconsistent, nor does the one interfere with and supersede the other, though both relate to the offense of burning houses. The first is confined to a few designated buildings, the wilful burning of which, and of one containing a horse or mule when done in
(559) the night season only, is made an indictable offense. The other extends to houses and other buildings, specifically named, and requires as constituents of the crime that the act be done maliciously and with an intention to injure or defraud the owner, which are not ingredients in the criminal act described and denounced in the former. A gin-house is not mentioned in the latter act, and unless embraced in the word "house," is not within its scope and meaning. The question suggests itself, if the word is used in its most comprehensive sense, and is intended to include every kind and form of building or structure, why are others mentioned at all? The enumeration would be, upon such a construction, wholly superfluous. The term must have a more restricted import, and such seems to be the interpretation put upon similar language contained in the English statute of 7 and 8 George IV., Chap. 30,

Sec. 2, which punishes the burning of "any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof." A house in the Latin, *domus,* is a dwelling place or mansion, as known at common law, distinguishable as such from all other buildings, used for different purposes, and entitled to peculiar favor and protection. Hence, in the old forms of indictment for arson, the subject of the offense is sufficiently described as the "house" of the prosecutor, which imports it to be a dwelling-house. 2 East P. C., 1020 and 1033; *Rex. v. Donevan,* 2 Wm. Bl., 682; 1 Leach Cr. Cases, 69. In the same sense must the word be understood in our act, and hence the burning of a gin-house is not under its condemnation.

But in our opinion the conviction may be sustained under the prior act of April 10, 1869. While the indictment makes allegations not required by the act, it embodies every charge essential to the constitution of the crime, and the unnecessary averments may be (560) treated as harmless surplusage. They do not vitiate a verdict which finds them all to be true, nor afford ground for an arrest of judgment.

For the defendant, the substitution of the words "unlawfully, *maliciously* and feloniously" as descriptive of the defendant's intent in place of the *"wilful"* burning mentioned in the act is relied on as a fatal defect in the bill. The objection is without force. It is difficult to conceive how an act can be done *maliciously* and not *wilfully.* The former is the more comprehensive, and includes the latter. And so it is held that the charge that perjury had been committed "falsely, maliciously, wickedly and corruptly, implied that it was done *wilfully."* 2 Whar. Cr. Law, Sec. 1673, and authorities referred to in note.

The punishment imposed in the sentence of the Court is, however, in excess of that authorized by the act of 1869, and the judgment must be reversed. This will be certified to the end that judgment be pronounced according to law, as declared in this opinion.

Error. Reversed and Remanded.

Cited: S. v. Howard, 82 N. C., 627; *S. v. Merritt,* 89 N. C., 507; *S. v. Wright, Ibid.,* 509; *S. v. Green,* 92 N. C., 783; *S. v. Whitfield, Ibid.,* 833; *S. v. Keen,* 95 N. C., 648; *S. v. Wilson,* 106 N. C., 721; *S. v. Hart,* 116 N. C., 978; *S. v. Pierce,* 123 N. C., 746; *Burnett v. Mills Co.,* 152 N. C., 40.

STATE v. JAMES GREEN.

Larceny—Asportation.

The removal from a safe of a drawer containing money, and a handling of the same, in the drawer, at the door of the safe, is a sufficient carrying away to constitute the element of asportation in the crime of larceny.

(561) LARCENY, tried at Spring Term, 1879, of PITT, before *Seymour, J.*

The evidence was that the defendant, who was in the employ of the prosecuting witness, took the key of the witness's safe from his pocket one morning before the witness had dressed, and went to his office, unlocked the safe, took therefrom a drawer containing money, completely removing the same from the safe, and was handling the money when the witness detected him; but the money was not removed from the drawer. Thereupon, the defendant's counsel requested the Court to charge the jury that there was no evidence of an *asportavit*. The Court declined, but instructed the jury that if the defendant removed the drawer from the safe with the felonious intent to steal the money in such drawer, he was guilty. Defendant excepted. Verdict of guilty, judgment, appeal by defendant.

Attorney-General for the State.
No counsel in this Court for defendant.

SMITH, C. J. The defendant has been twice convicted under an indictment containing two counts, one for the larceny of one dollar in money, and the other for feloniously receiving the like sum, once in the Inferior, and again on his appeal to the Superior Court of Pitt County. The judgment in each Court was the same, that the defendant be confined in the State's Prison for three years.

The only exception taken and presented in the appeal is to the refusal of the Court to charge that the evidence failed to prove such asportation of the money as is necessary to constitute larceny.

We think the Judge was correct in declining to give the instruction. "A bare removal from the place in which the thief found the goods, though he does not make off with them," says Mr. Justice BLACK-
(562) STONE, defining an element in larceny, "is a sufficient asportation or carrying away." 4 Blackstone Com., 231.

Accordingly it has been held that where one broke open a chest in the dwelling-house of another, nobody being there, and took out the goods and laid them on the floor of the same room, and is then ap-

prehended, or where one drew out a book from the inside of the prosecutor's pocket, an inch above its top, and then, on a movement of the prosecutor's hands, let the book drop and it fell back into the pocket, or where an ear-ring was separated from the ear of a lady in which it was worn, and it fell and lodged in the curls of her hair,—in all these cases the asportation was sufficient. 1 Hale, 508. And, so have been the adjudications in this State.

"It is a sufficient carrying away to constitute the offense of larceny," says SETTLE, J., "if the goods are removed from the place where they were, and the felon has for an instant the entire and absolute possession of them." *S. v. Jackson,* 65 N. C., 305. "The least removal of an article from the actual or constructive possession of the owner, so as to be under the control of the felon," says DICK, J., "will be a sufficient asportation." *S. v. Jones, Ibid.,* 395.

The case before us clearly comes within the principle of these adjudications. The defendant had removed the drawer from the safe and was handling the money found in it at the time of his detection, and the act of stealing was complete.

PER CURIAM. No Error.

Cited: *S. v. Craige,* 89 N. C., 478; *S. v. Gray,* 106 N. C., 735.

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(563)

STATE v. THOMAS LONG.

Overseer of Road—Liability of.

1. Where one assumes to be overseer of a road and acts as such, he is liable to indictment for failure to keep it in good order.
2. An overseer can not free himself from the duty imposed by law, by surrendering his order of appointment to the clerk of the board of township trustees; nor is he relieved at the expiration of a year, except by order of the board, on showing his precinct of road to be in the condition required by law. Bat. Rev., Chap. 104, Sec. 7.

INDICTMENT against the defendant as overseer of a public road, tried at Spring Term, 1879, of ALEXANDER, before *Graves, J.*

The facts necessary to an understanding of the case are set out by Mr. Justice DILLARD in delivering the opinion of this Court. There was a verdict of guilty; judgment, appeal by defendant.

Attorney-General for the State.
Messrs. Folk and *Linney* for defendant.

DILLARD, J. On the trial in the Superior Court, from which the present appeal comes, the case states that there was evidence tending

to prove that defendant was overseer at and during the summer of 1875, and for several years prior to that time; that in June, 1875, he had summoned hands and worked the road, and about that time the brother of defendant, during his absence from the county, had also warned in the hands and worked the road; when one Pennell, clerk to the Board of Township Trustees, and a witness for the State, was on the stand, the defendant, on cross-examination, proved by him that about a year or more before he went out of office as clerk to the board, which was
(564) in 1876, he handed to him his order, the Justices of the Peace of the township being absent at the time, saying it was the only order he had ever had. It is also stated that there was proof on the trial that the board did not appoint a successor to defendant as overseer until January, 1876, and that the defendant's road was out of order in 1874 and 1875, and until the new overseer was appointed in January, 1876.

Such being the substance of the evidence adduced, the defendant, in the course of his Honor's charge, asked the instruction that although the jury should find that defendant had got together hands and worked the road, after surrendering his order, yet if they believed that it was not done as overseer, but as a citizen, and to improve the road to his store (he being a merchant, as it was proved), these acts done in such capacity would rebut the inference that might otherwise be drawn from them as showing that he was overseer. The Court refused to instruct as requested, on the ground that there was no evidence on which to base such instruction, and this refusal is assigned as error.

1. The case was less favorable to the defendant on the last trial than on the first trial. On the first trial, the assuming to be overseer and acting as such, it was held, concluded him, and was legally sufficient to fix him with liability to indictment for the non-repair of the road. *S. v. Long,* 76 N. C., 254. On the last trial, besides the facts in proof on the first trial, the defendant, by way of defense, showed that he was possessed of and returned his order of appointment to Pennell, clerk of the Board of Township Trustees, about a year or more before the expiration of his office, which being in August, 1876, would make the return of the order in August, 1875, or possibly earlier in the year. Such possession of the order by the defendant and return of the same established his character and responsibility, not as an overseer *de facto,* but as an overseer *de jure.*

2. The defendant being appointed and notified of his appointment, as shown by his possession and return of the order, he thereby
(565) became overseer, and was liable to perform the duties incident to the place, until he was relieved therefrom by the Board of Trustees; and this by express provision of the statute might be not

sooner than the end of a year from the appointment; but not then, nor at any later period, except by order of the board on showing his road to be in the condition required by law. Bat. Rev., Chap. 104, Sec. 7.

3. The case states that the order of appointment was delivered by him to the clerk of the board, when the Justices of the Peace composing the board were not present; and no order of the board relieving the defendant on the condition of his road's being in good order being passed, the defendant was and continued to be responsible for neglect of duty as an overseer, until his successor was appointed in January, 1876, just as he would have been if he had held his order up to that time. In this view of the defendant's responsibility as to its extent, notwithstanding the return of his order, his duty was to keep his precinct of road in legal repair with the hands assigned him; and it mattered not what character he supposed himself to fill, whether overseer or citizen, if he failed to perform his duty, it would be unavailing to excuse him even if the jury should find that defendant, after the surrender of his order worked the road in June, 1875, as a citizen and from convenience to his customers in getting to and from his store. Defendant owed the duty to keep his road in repair, and it being stated as a fact in the case sent up that the road was out of repair in 1874 and 1875, notwithstanding the work he claims to have done as a citizen, it was entirely immaterial to submit any inquiry to the jury in the aspect contemplated by the special instructions asked for by the defendant.

In our opinion, there was no error in the Court below in the charge given, nor in the refusal to give the instructions requested (566) by the defendant.

PER CURIAM. No Error.

STATE v. JOHN W. ALPHIN.

Practice in Criminal Actions.

A judge has no power to make an order in a criminal action after the expiration of the term.

APPEAL from an order in a criminal action made at Spring Term, 1879, of WAYNE, by *Seymour, J.*

The facts are stated in the opinion. From the order made in the Court below, Galloway, Solicitor for the State, appealed.

Attorney-General for the State.

Mr. H. R. Kornegay for the defendant.

ASHE, J. The defendant was tried at the Fall Term, 1878, of the Superior Court of Wayne County, for the offense of obtaining goods by false pretences, and was convicted and sentenced, and after conviction he obtained a rule for a new trial; the rule was discharged, judgment pronounced, and an appeal taken to this Court.

Three weeks after the expiration of the Fall Term, 1878, of Wayne Superior Court, without the knowledge or consent of the Solicitor, and without any notice to him, and while the Judge was holding Court in another county, he, Judge McKoy, sent a paper to the Clerk of the Superior Court of Wayne County, of which the following is a copy:

"State against John W. Alphin.

(567) "Rule for new trial. Rule made absolute, and new trial granted. Let the Clerk enter this on the minutes of Fall Term, 1878, Wayne Superior Court."

At the Spring Term, 1879, of said Court the cause was called; the defendant appeared and insisted on another trial before the jury. The Solicitor for the State urged that Judge McKoy had no power to grant a new trial after the expiration of the Fall Term, 1878, and moved for judgment against the defendant, which, we suppose, meant the execution of the sentence; but his Honor refused the motion, and ordered a jury to be impaneled to try the case, from which order the Solicitor appealed to this Court.

The judgment rendered in the case at Fall Term, 1878, was regular, but there was no statement of the case made by the counsel or the presiding Judge.

It has been well settled that a judgment regularly entered at one term of the Court, can not be set aside at a subsequent term. *Sharpe v. Rintels,* 61 N. C., 34, and case cited. And if it could be done at a subsequent term, we know of no authority by which a Judge may set it aside in vacation. After the expiration of the term of the Court he is *"functus officio," quoad* the proceedings of that Court.

The only case we have been able to find where this exercise of power on the part of a Judge, after the expiration of Court, is *Hervey v. Edmunds,* 68 N. C., 243; but that was a civil action, and the jurisdiction of the Judge out of term was sustained purely on the ground that the consent of the parties had been given, which, it was held, by virtue of Section 315 of the Code of Civil Procedure, gave the Judge jurisdiction. But in our case there was no consent, and upon reference to that section of The Code, it will be found that it applies exclusively to civil actions, and is no authority for the exercise of such power in

(568) criminal actions. Mr. Justice RODMAN, in delivering the opinion

of the Court in that case, said that before the C. C. P., the Judge had no such jurisdiction out of term time.

We are of the opinion that the Judge had no power to make the order after the expiration of the term, that the order is a nullity, and should be stricken from the record.

We have thus expressed our opinion on the matter intended to be reviewed for the guidance of the Court in its further action in the premises. But as the appeal was improvidently taken, and the case is not properly before us, we render no judgment, except to dismiss the appeal.

PER CURIAM. Appeal Dismissed.

Cited: *Moore v. Hinnant,* 90 N. C., 166; *S. v. Bennett,* 93 N. C., 505.

STATE v. FRED BROWN.

Practice—Power of Grand Jury—Record of Finding.

1. A bill of indictment returned "not a true bill" can not be reconsidered by the same grand jury, but a new bill may be sent.
2. It is as essential that the finding of a grand jury be recorded as the verdict of a petty jury.

LARCENY, tried at April Term, 1879, of NEW HANOVER, before *Meares, J.*

The case states: This bill of indictment was sent to the grand jury at February Term, 1879, of said Court, and returned with the endorsement, "Not a true bill," and signed by the foreman. On a subsequent day of the same term the foreman consulted with the State's Solicitor, and was advised by him that the grand jury had the power to investigate the charge a second time and return another bill against the defendant if the testimony was sufficient. The foreman then sent for and obtained the bill which had been ignored; three additional wit- (569) nesses were sworn and sent before the grand jury, who proceeded to investigate the charge a second time; and they returned the bill into Court with the word "not" stricken out of the endorsement, but the same signature of the foreman.

At April Term, 1879, the Solicitor sent another bill against the defendant upon the same charge, which the grand jury ignored.

The defendant's counsel moved to quash the indictment and discharge the defendant, for that,

1. When a grand jury passes upon a bill of indictment and returns it to Court endorsed "Not a true bill," that is the end of the case so far

as the grand jury of that particular term is concerned; and if they possessed the power to consider it a second time, then the foreman should have written his name a second time after striking out the word "not" from the first endorsement.

2. Because another bill had been sent against the defendant at this (April) term upon the same charge and had been ignored.

The Court held that the grand jury had the power to correct a clerical error within the proper time, but had no power to investigate the charge a second time upon the facts stated, and gave judgment sustaining the motion to quash, and Moore, Solicitor for the State, appealed.

Attorney-General for the State.

No counsel in this Court for defendant.

ASHE, J. The bill of indictment in this case was returned by the grand jury "Not a true bill," at the February Term, 1879, of the Criminal Court of New Hanover County. At the instance of the Solicitor for the State, the grand jury, during the same term of the Court, (570) were induced to send for the bill and give it a second consideration, who, after examining additional witnesses, returned the same bill into Court "A true bill," when, upon motion of defendant's counsel, the bill was quashed by his Honor, and the Solicitor appealed to this Court.

We are aware that the practice has obtained in some, if not all, of the districts of the State, when a bill has been presented by the grand jury "A true bill," and has been found to be defective, for the Solicitor to amend it and send it back to the jury to be acted upon a second time, and upon its being returned again "A true bill," no objection has been taken to its informality; for the reason, we suppose, that in such a case there is no inconsistency in the record of the findings of the grand jury. But this is a practice which has been rather tolerated by the Courts and the legal profession than warranted by strict law. Mr. Justice BLACKSTONE holds that where a bill has been returned not a true bill, or not found, the party is discharged without further answer; but a fresh bill may afterwards be preferred to a subsequent grand jury. 4 Bl. Com., 305. From which it is to be inferred it was his opinion that a new bill for the same offense could not be sent to be acted upon by the same grand jury. But let that be as it may, we are of the opinion that the grand jury, having once acted upon a bill and returned it publicly into Court not a true bill, and a record has been made of its finding, it is a final disposition of that bill.

When the grand jury returns a bill into Court, it is the duty of the

Clerk to record the finding of the jury; and this is so essential when the bill is returned "A true bill," the omission in that respect can not be supplied by the endorsement of the foreman, nor by the recitation in the record that the defendant stands indicted, nor by his arraignment, nor by the plea of guilty. It can not be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury, it is said, is as sessential as the (571) recording of the verdict of the petty jury. Arch. Cr. Pl., 98 (Waterman's notes); 2 Hale P. C., 162; *S. v. Cox,* 28 N. C., 440.

When a bill is presented with the endorsement, "Not a true bill," and a record is made of the finding, and then the same bill is sent back to be reconsidered by the same grand jury, and is returned by them "A true bill," and a record is made of that finding, there is but one bill, as in this case, and the record of the finding is contradictory. In every such case a new bill should be sent.

PER CURIAM. No Error.

Cited: S. v. Harris, 91 N. C., 658; *S. v. Ewing,* 127 N. C., 559.

*STATE v. GEORGE SWEPSON.

Practice—Removal of Causes.

1. A cause must be at issue before it can be removed from one county to another for trial, but when the defendant, *ore tenus*, pleads "not guilty" and "former acquittal," the cause is at issue on both pleas, and ready for instant trial, a general replication being implied.
2. The cause being thus at issue, it is error for the court, *ex mero motu*, to remand it for trial to the county from which it was removed.
3. Where there is a defect in the record of the cause as it stood in the county from which it was removed, the proper course is to move an amendment in that county, and, upon suggestion of a diminution of the record, to have the amended record brought up by *certiorari* to the court in which the cause stands for trial.

PETITION for *certiorari,* filed by the State, and granted at (572) June Term, 1879, of the Supreme Court.

The indictment was found in Wake (see same case, 79 N. C., 632), and removed to Franklin for trial, and the case was called at Spring Term, 1879, of FRANKLIN Superior Court, before *Buxton, J.*

The facts are sufficiently set out by Mr. Justice ASHE in delivering the opinion. The State asked for an appeal from an order made by his Honor, which was refused, and the State then applied for a writ of *certiorari* to bring up the record for review.

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

Attorney-General, and *A. M. Lewis, Mason & Devereux* and *Gilliam & Gatling,* who prosecuted in the Court below, for the State.

Messrs. Merrimon, Fuller & Ashe, Fowle, Snow and *Badger* (573) for defendant.

ASHE, J. This is a criminal action, commenced in the Criminal Court for the county of Wake. The bill of indictment was found by the grand jury of said Court at the November Term, 1878, and transferred to the Superior Court of Wake County.

At the January Term, 1879, of the Superior Court of Wake County the case was called, and the defendant pleaded "former acquittal" and "not guilty," and without more appearing upon the record in regard to these pleas, the cause was removed, upon the affidavit of the Solicitor, to the Superior Court of the county of Franklin; and at the Spring Term, 1879, of said Court the case was called, and when the State announced itself ready for trial, the defendant brought to the attention of the Court the fact that there was no replication in the transcript to the defendant's plea of "former acquittal."

The Solicitor for the State then moved the Court to be permitted to file several replications to the plea of "former acquittal." The motion was refused.

The defendant then moved that the State be required to reply (574) to his plea of "former acquittal, *ore tenus,*" in the words, "acquittal obtained *per fraudem,*" the defendant alleging that such was the form of the reply actually made at the time of pleading in Wake Superior Court. This motion was also refused, when his Honor made the following order: "It appearing to the Court now here, from an inspection of the transcript of this cause from Wake Superior Court, that the order for the removal of this cause to this Court was made before the pleadings were completed, and that there is no issue to be tried upon the plea of 'former acquittal,' for the want of a replication thereto, and the counsel in this cause on the part of the State and of the defense being unable to agree upon the character of the replication to supply the defect, it is ordered that this cause be removed to the Superior Court of Wake County, from which it came." From this order of the Court the Solicitor for the State prayed an appeal to this Court, which was refused by his Honor. The Solicitor for the State then had recourse to a *certiorari* by which the case was brought to this Court.

1. The sections 115, 116, 117 and 118 of Chapter 31 of the Revised Code were omitted in Battle's Revisal and were re-enacted by the act of 1874-'75, with the exception of the latter clause of section 115. The construction put upon these sections of the Revised Code by RUFFIN, C. J., in *S. v. Reid,* 18 N. C., 377, and by all the Judges on the circuit,

so far as we are informed, has uniformly been that a cause must be put to issue before it can be removed, and the fact that our Reports furnish no case where a cause has been removed, that was not put to an issue to be tried by jury is strongly confirmatory of the correctness of this construction. Was this cause, then, at issue in the Superior Court of Wake? The pleas were "former acquittal" and "not guilty." They were entered *ore tenus.* We are of the opinion the cause was at issue upon both of these pleas. The *similiter,* which is but the general replication of the plea of not guilty, is implied, and upon (575) the same principle the general replication to the plea of former acquittal will be implied. "In the case of a plea of *autrefois acquit,* a jury are sworn *instanter* to try the issue, and therefore there is no replication actually pleaded on the part of the crown, but a replication and *similiter* must be entered upon the record when afterwards made up." Archbold Cr. Pl., 90. In Chitty's Criminal Law, 460 and 461, it is laid down that "where the plea (*autrefois acquit*) has been taken *ore tenus,* the replication of the crown may be immediately put in the same way, and issue will be joined and an immediate *venire* awarded. But if the plea be put in writing, the replication can not be *ore tenus,* but must be on the parchment." According to these authorities, then, as soon as the plea of *autrefois acquit* is taken *ore tenus,* the cause, without more saying, is immediately submitted to the jury, which could not, of course, be done without an issue.

In the English practice, when the plea is taken *ore tenus,* and the replication is taken the same way, it need not be entered at the time, but must be when the record comes afterwards to be made up and completed. But in our practice it is different. The omission to enter the *similiter* of the record is not error, and the same doctrine must apply to the general replication to the plea of "former acquittal." *S. v. Chavis,* 80 N. C., 353; *S. v. Carroll,* 27 N. C., 139; *S. v. Lamon,* 10 N. C., 176; *S. v. Reeves,* 30 N. C., 19.

2. The cause, then, having been legally at issue in the Superior Court of Wake County, was properly removed to the Superior Court of Franklin County, and being by the removal regularly constituted in the latter Court, it had as full and complete jurisdiction over the case as if it had originated there; and the Judge of that Court, under the circumstances, had no right *ex mero motu* to remand it to the county of Wake. After the cause was constituted in the county of Franklin, it would of course stand for trial on the issues made up in the county of (576) Wake, unless the Judge presiding in the former Court, in the exercise of sound discretion, with the view to attain the ends of justice, should see proper to permit other or special replications to be taken to the defendant's plea of former acquittal. He most unquestionably would have such power.

3. The transcript from Wake Superior Court does not show what replication was taken to the plea of "former acquittal," and we must therefore presume that it was a general replication. But it is insisted by the defendant that in fact a special replication was taken by the State in Wake Superior Court, and that the case was properly remanded that the record might be properly made up, but that is not the proper course. If there is anything omitted in the record of the cause as it stood in the Superior Court of Wake, that Court has the power to so amend its record as to make it speak the truth; and then, after such amendment, upon a suggestion of the diminution of the record in the Superior Court of Franklin, to have the amended record brought up by *certiorari* from the county of Wake. *S. v. Reid,* 18 N. C., 377; *Murray v. Smith,* 8 N. C., 41.

The order of the Judge below remanding this case to the county of Wake is

PER CURIAM. Reversed.

Cited: *S. v. Perry,* 83 N. C., 267; *S. v. Swepson, Ibid.,* 588; *S. c.,* 84 N. C., 828; *S. v. Washington,* 89 N. C., 536; *S. v. Haywood,* 94 N. C., 852; *S. v. Harrison,* 104 N. C., 731; *Fisher v. Mining Co.,* 105 N. C., 125; *S. v. Flowers,* 109 N. C., 845; *S. v. Griffis,* 117 N. C., 713; *S. v. Ledford,* 133 N. C., 720.

STATE v. JASON FOX.

Practice—New Trial, When Refused.

A defendant who appealed from a judgment against him in a criminal action is not entitled to a new trial (where the judge who tried the case went out of office before making up a case of appeal) upon an affidavit merely reciting that he was guilty of no neglect, and failing to state any effort on his part to perfect his appeal, and allowed two terms of this court to elapse before making his application.

(577)

INDICTMENT for fornication and adultery, tried at Spring Term, 1878, of BURKE, before *Cloud, J.*

The record shows that the defendant and one Eliza Lackey were found guilty of the offense charged in the indictment, and moved for a new trial, which motion was overruled. The Court then pronounced judgment that the defendant, Jason Cox, be imprisoned in the county jail for thirty days, and be discharged on payment of costs; and as to the other defendant, the judgment was suspended on payment of half the costs. From which the defendant Jason Cox prayed an appeal,

which was allowed upon his filing an affidavit which sets forth his inability to secure the costs of the appeal, etc.

And at this term of the Supreme Court he filed an affidavit stating substantially the above facts, and also "that it was through no neglect of his that Judge Cloud failed to make a case for the Supreme Court, and that he is informed and believes that the term of office of Judge Cloud expired in August, 1878, and there is no one who can make up a case." Thereupon, the defendant insisted that he was entitled to a new trial.

Attorney-General for the State.

Messrs. Johnstone Jones, G. M. Smedes and *John Devereux* for defendant.

DILLARD, J. The defendant was convicted and sentenced at Spring Term, 1878, of Burke Superior Court, and prayed an appeal to this Court; and, on his motion, on the filing of the requisite affidavit of inability to give the usual appeal bond, the Judge below (578) ordered that he have leave to appeal without giving security for the costs.

The record of the case below, properly so called, is not filed till the present term of the Court, and it is unaccompanied with any statement in the nature of a bill of exceptions containing the exceptions taken to the proceedings in the Court below; and no error being assigned, the rule is, in such case, to affirm the judgment, unless upon an examination of the record an error can be seen. *S. v. Edney,* 80 N. C., 360; *S. v. Gallimore,* 29 N. C., 147. We have examined the record, and no error appears therein. The defendant, although convicted and the initiatory steps taken at Spring Term, 1878, fails to bring up the record proper until this term of the Court, having allowed two terms to elapse without looking after the appeal. And now, at this term, on affidavit, he shows forth that Judge Cloud, before whom the case was tried, and who alone could sign the statement, has gone out of office; and so he has lost his appeal without laches on his part, and thereupon he moves as his only relief that a new trial be granted him.

We would grant a new trial according to the rule in such cases as is laid down in *S. v. Murray,* 80 N. C., 364, if it appeared that the defendant was guilty of no laches in having his appeal perfected. It is certainly not due diligence in a defendant to pray an appeal and give bond, or to be excused from one, and afterwards altogether dismiss the matter and make no effort to have a statement made as required by law. The affidavit filed merely recites that defendant is guilty of no laches, but fails to state any activity or effort to perfect his appeal, and seeing

his omission to bring up the record proper, it seems to be a case of appeal for delay, and nothing more.

PER CURIAM. No Error.

Cited: *S. v. O'Kelly,* 88 N. C., 610; *S. v. Randall, Ibid.,* 613; *S. v. Crook,* 91 N. C., 538; *Simmons v. Andrews,* 106 N. C., 202.

(579)

STATE v. J. C. CROSSET.

Prosecutor, Power of Court to Make—Trespass on Land—Bona Fides.

1. The court has no authority to order one against whom an offense is alleged to have been committed, to be marked as prosecutor after indictment found, without his consent. (By the Act of 1879, ch. 49, such person may be notified to show cause why he shall not be made the prosecutor of record.)
2. One who enters upon the land of another under a *bona fide* claim of right is guilty of no criminal offense; *Therefore,* where an employee of a railroad company was ordered to fell trees upon land adjacent to its track, which had been conveyed by the owner for right-of-way, etc.; *Held* not to be indictable for a wilful trespass. Bat. Rev., ch. 32, sec. 116.

INDICTMENT for misdemeanor under Bat. Rev., Chap. 32, Sec. 116, tried at Spring Term, 1879, of ROWAN, before *Schenck, J.*

The bill was found at Fall Term, 1878: The jurors, etc., present, that defendant, with force and arms, etc., upon the lands and premises of one Jesse W. Miller, etc., did then and there wilfully and unlawfully enter upon and fell and destroy the timber growing thereon, after being forbidden to enter upon said premises by the said Miller, and without a license from him to do so, contrary, etc.

The defendant was in the employ of the North Carolina Railroad Company, as section master, and acted under the orders of the company in committing the acts alleged to be in violation of law. And the company claimed the right to enter upon the land adjacent to the railroad track for the purposes mentioned in the indictment, under a deed executed by Henry Miller, the ancestor of the said Jesse W. Miller,

(580) which is substantially as follows: We, whose names are hereunto subscribed, and over whose land the track of the said company passes, or will pass, being desirous that the road shall be constructed, and willing to lend our aid to effect this object, in consideration, etc., do hereby, for ourselves, our heirs and assigns, grant, assign and give the right of way over our lands to the president and directors of said company, to be used by them so long as this corporation shall exist, for the purpose of constructing the track over our lands, and to use any part thereof convenient and adjacent thereto which may be

necessary for its construction, etc.; it being expressly understood that we reserve the right to use our lands up to the road, so that we in nowise obstruct or interfere or endanger said road, in track or culverts or ditches thereto belonging; or that we do not erect any buildings or stacks, or put up any other material within one hundred feet of the centre of the road; and if we or our heirs or assigns should do so, it is done at our own risk and not at the risk of the company. This deed was signed by several persons, among them the said ancestor.

The jury found a special verdict, which is set out in the opinion of this Court, and upon it the Court below held that the defendant was not guilty, and Dobson, Solicitor for the State, appealed.

When the case was called for trial, the Court, on motion of defendant's counsel, ordered Jesse W. Miller to be marked as prosecutor, and upon acquittal of defendant, judgment was rendered against Miller for the costs. Exception and appeal by Miller.

Attorney-General for the State.
Mr. Kerr Craige for Miller.
Mr. J. M. McCorkle for defendant.

ASHE, J. The defendant was indicted for entering upon the (581) land of one Jesse W. Miller, and blazing and felling trees on the same after having been forbidden so to do by the owner of the premises. At Spring Term, 1879, of Rowan Superior Court, the case was brought to trial by jury, who returned a special verdict finding the following facts: "The defendant, as section master of the Richmond and Danville Railroad Company, entered upon the premises of one Jesse W. Miller, after being forbidden so to do, and blazed the timber for the distance of one hundred feet from the centre of the railroad track. Henry Miller, the ancestor of the said Jesse W. Miller, executed a deed to the North Carolina Railroad Company for the right of way, as the defendant alleges, and also for the use of one hundred feet of said lands measured from the centre of said railroad track; but, as the State alleges, only covering the right of way, and reserving to the grantor the use and enjoyment of the land up to the line of the railroad track." They further find as a fact "that the defendant acted under orders of the North Carolina Railroad Company, and felled and destroyed the timber as aforesaid for the purpose of keeping leaves from falling on the railroad track and filling up the ditches, and for the purpose of letting the sun shine on the track, and so as to enable the company to have a view of said track."

Upon the finding of the jury, his Honor rendered a judgment in favor of the defendant, from which the State appealed.

When the case was called for trial, upon motion of the defendant's

counsel, the Court ordered Jesse W. Miller, the owner of the land upon which the alleged trespass was committed, to be marked as prosecutor; and there was judgment against him for the costs of the indictment, to which order and judgment he excepted, and from which he appealed.

The record presents two questions for our consideration: First, did the Court have authority to order Miller to be marked as prosecutor and adjudge him to pay the costs of the prosecution? And second,
(582) was the defendant guilty of any violation of the criminal law of the State in entering upon the land in question?

As to the first point:

We are of the opinion that his Honor had no authority to order Miller, the owner of the land, to be marked as prosecutor, and in consequence, none to tax him with the costs. Where a person is marked as prosecutor when the indictment is sent to the grand jury, and on the trial it appears that the prosecution is frivolous or malicious, the Court unquestionably has the right to order the prosecutor to pay the costs. But in such case the person so taxed with the costs must be marked on the bill as prosecutor. Laws 1874-'75, Ch. 247; C. C. P., Sec. 560; *S. v. Lupton,* 63 N. C., 483; *S. v. Darr, Ibid.,* 516. The Court has no right to order him to be marked as prosecutor without his consent. *S. v. Hodson,* 74 N. C., 151. And when he has been ordered to be endorsed as prosecutor and has been taxed with the costs, and has excepted to the order and judgment, he has the right of appeal, and his appeal brings up both questions. *S. v. Hodson, supra,* which is a case on "all fours" with ours.

It is insisted on the part of the defendant that if there was no other law authorizing his Honor to have Miller marked as prosecutor, he had the right to do so by virtue of the act of 1879, Ch. 49. But the authority can not be derived from that act, for it is expressly provided that "no person shall be made a prosecutor after the finding of the bill, unless he has been notified to show cause why he shall not be made the prosecutor of record." No such notification was given to Miller in this case, and the order and judgment of his Honor having been endorsed as prosecutor after the bill was found, and taxing him with the costs, are unwarranted by either legislation or judicial decision in this State.

As to the second point:

The defendant plead specially that he had the right to do the
(583) acts as stated in the bill of indictment, and relied for his defense upon the deed made by Henry Miller and others to the president and directors of the North Carolina Railroad Company, conveying to said company the right of way, and the facts which were found by the jury in their special verdict.

In constructing the deed, the first rule to be observed is to ascertain the intention of the parties, to be gathered from the words of the deed and the purposes of the grant in contemplation of the parties. The deed was made by the ancestor of Jesse W. Miller to the president and directors of the North Carolina Railroad Company, avowedly to secure to them the right of way for a railroad to be constructed over and across his land, and the right to use any part thereof convenient and adjacent to said track which may be necessary for its construction; reserving the right to use the land up to said road, so that he in nowise obstruct, or interfere, or endanger said road in track, culvert or ditches; and the grantor stipulated that he was not to put any building or other material within one hundred feet of the centre of said road except at his own risk.

The deed having been made for the purposes indicated, it follows that everything which was necessary to the use and enjoyment of the right of way, within the power of the grantor to convey, would also pass. The grant of a thing will include whatever the grantor had the power to convey, which is reasonably necessary to the enjoyment of the thing granted. 3 Wash. Real Prop., 341. And where a thing is granted, all the means to attain it and all the fruits and effects of it are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis,* or such like words. Broom Leg. Max., 98. It is evident from the words of the deed that it was the intention of the grantor that the grantee should (584) have the right to use his land adjacent to the track *for the necessary uses and requirements* of the road, to the distance of one hundred feet from its centre. And this construction is especially aided by the stipulation in the deed that the grantor will in "nowise obstruct, interfere or endanger said road in track, culvert or ditches," and would put no building, etc., within one hundred feet of said road, except at his own risk.

In this view of the case, we think the railroad company had the same use of the land of the grantor for the purposes of constructing, protecting and repairing their road as they would have had if the one hundred feet on each side of said road had been condemned in the mode prescribed in the charter. And if it had been condemned according to the provisions of the charter, the company would certainly have had the right to fell the trees along the track within the one hundred feet, "to keep the leaves from falling on the track and filling up the ditches, and for the purpose of letting the sun shine on the track of said road, and so as enable the company to have a view of the track." *Brainard v. Clap,* 10 Cush., 6. And the exercise of this right by the company, would not interfere with the grantor's qualified right, as reserved by him, to use the land up to said track.

But aside from this view of the case, we hold that as the defendant entered upon the land by the orders of the railroad company, who held the deed of Henry Miller, under whom Jesse W. Miller claimed, for the right of way, his entry was *bona fide,* and therefore not in violation of the provisions of the Act of 1866, Chap. 61, which was intended to prevent trespassers and "interlopers," after being forbidden by the owners from entering upon their lands, and does not apply to persons who enter under a *bona fide* claim of right. *S. v. Ellen,* 68 N. C., 281; *S. v. Hanks,* 66 N. C., 612.

We are of the opinion that there was error in the order and
(585) judgment of his Honor ordering Miller to be endorsed as prosecutor on the bill and taxing him with the costs, and they are reversed; but there was no error in giving judgment for the defendant upon the special verdict.

PER CURIAM. Judgment Accordingly.

Cited: S. v. Hughes, 83 N. C., 666; *S. v. Whitener,* 93 N. C., 592; *S. v. Byrd, Ibid.,* 628; *S. v. Winslow,* 95 N. C., 652; *S. v. Lawson,* 101 N. C., 719; *S. v. Crawley,* 103 N. C., 355; *S. v. Jacobs, Ibid.,* 403; *S. v. Hamilton,* 106 N. C., 661; *S. v. Boyce,* 109 N. C., 744; *S. v. Wells,* 142 N. C., 595.

STATE v. G. W. MCMINN.

Removing Fence—Cultivated Field—Town Lot—Judge's Charge.

1. On trial of an indictment for removing a fence, under Bat. Rev., ch. 32, sec. 93, it appeared that the rails of which the fence was built had been taken from a fence on an adjoining tract of land claimed by defendant, and in a short time thereafter the defendant retook them, by which removal the cultivation of the prosecutor's field was prevented; and the court told the jury that if the land had been cultivated the year before, it was a field as charged in the bill, and a verdict of guilty was rendered; *Held,* not to be error.
2. *Held, also,* That a town lot is a "field" within the scope and meaning of the act. But if the trespass be upon a garden, the bill should so charge, to conform to the act.
3. *Held, further,* A tract of land cleared, fenced and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, is a "cultivated field" within the description of the statute.

INDICTMENT for removing a fence under Bat. Rev., Chap. 32, Sec. 93, tried at Spring Term, 1879, of HENDERSON, before *Gudger, J.*

The bill of indictment charged that the defendant did wilfully
(586) and unlawfully pull down, injure and remove a fence surrounding a cultivated field.

The facts and exceptions to the charge of the Court are sufficiently set out in the opinion. Verdict of guilty, judgment, appeal by defendant. (See *S. v. Hovis,* 76 N. C., 117.)

Attorney-General for the State.
No counsel in this Court for defendant.

ASHE, J. This case comes before this Court upon exceptions to the ruling of the Court below upon special instructions asked by defendant, and to the charge of his Honor to the jury. The indictment is for the removal of a fence surrounding a cultivated field. The land enclosed by the fence removed was a lot in the town of Hendersonville, which had been cultivated the year preceding that in which the alleged offense was committed, and was prevented from being cultivated in the latter year by the removal of the fence. The rails of which the fence in question, or some part thereof, was built, had been taken by one Dr. Allen, a short time previous, from a fence on the adjoining tract of land, of which the defendant had been in possession, and to which he had set up some claim.

Upon the trial the defendant asked the Court to charge:

1. "That if Dr. Allen took McMinn's rails from his possession without his permission, and McMinn, as soon as he learned it and within two weeks after the first taking the rails by Allen, retook the rails, Allen not being present, the defendant would not be guilty."

2. "That if the jury should find that the enclosed ground, from around which the fence was removed, was a lot in the town of Hendersonville, it was not a field as described in the indictment, and for this variance the defendant ought to be acquitted." The Court declined to give either of these instructions, and the defendant (587) excepted. The Court then proceeded to instruct the jury that if the land had been cultivated the year before, it was a field within the description as laid in the indictment, to which the defendant also excepted. The jury returned a verdict of guilty, and the judgment of the Court was pronounced against the defendant, from which he prayed and obtained an appeal to this Court.

There was no error in the charge of his Honor, or in his rulings upon the instructions asked.

As to the first instruction: Admitting the rails were taken from the land to which the defendant had a rightful claim, while the rails are being removed from the one tract to the other, and before they are laid as a fence, they would be his personal property, and he would have had the right to retake them, if he could have done so without a breach of the peace, but by incurring a liability to a civil action for trespass upon

the land of the prosecutor; but as soon as they are made up into a fence on the land of the prosecutor, they become real property, and he would not have the right to retake them, but would be driven to his civil action for relief.

We hardly think it worth while to consider the second exception. Worcester says a lot is a "piece of land," and a field is "a cultivated tract of land." The term "lot" is usually applied to parcels of land lying in cities and towns. It may consist of one acre, or more or less; and if enclosed and cultivated, is just as much a "field," according to the definition, as if it lay in the country. An acre of land, lying in the country, fenced and cultivated, would certainly be called a field. The fact of its lying on the one or the other side of the corporate boundary of a town would make no difference. If it is a garden, of course it should be so charged in the bill of indictment.

But the main question for our consideration is in regard to the correctness of his Honor's charge, whether the land from about
(588) which the fence was taken was such a cultivated field as comes within the description of the act of 1846. In the case of *S. v. Allen,* 35 N. C., 36, which is a case almost identical in its facts with this case, this court gave a construction to the statute. There, the proof was that the prosecutor had cultivated the land or field in question under a fence in the year 1849, and in the ensuing year, while there was nothing actually growing in the field, and before the ordinary time for pitching the crop, the defendant removed some fifty or one hundred yards of the fence surrounding the field, and the prosecutor was thereby prevented from making a crop; and the Court held it was a cultivated field within the meaning of the statute. The construction given to the act by that decision, we take to be, that where a piece or tract of land has been cleared and fenced, and cultivated or proposed to be cultivated, and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a "cultivated field" within the description of the statute.

PER CURIAM. No Error.

Cited: S. v. Campbell, 133 N. C., 642.

STATE v. CHARLES W. CRAIG.

Roads—Bar Pilot not Exempt From Working.

1. A "bar pilot" otherwise liable under the Act of 1879 is not on that account exempt from working on the public roads.
2. But if his presence is required in any matter connected with the pilotage on the day he is summoned to work the road, it would avail him as a defense in a criminal action for a refusal. His performance of the one duty would excuse the nonperformance of the other.

(589)

ACTION for failure to work public road, commenced before a Justice of the Peace, and tried on appeal at May Special Term, 1879, of NEW HANOVER Criminal Court, before *Meares, J.*

The jury found a special verdict: "That defendant was duly summoned by the overseer of the road to work upon the same; that the road was a public one, and the overseer duly appointed; that defendant refused to work on the ground that he is a bar pilot on the Cape Fear River and exempt from road duty; that defendant is a licensed bar pilot, and has given bond required of him by law, and is subject to the rules and regulations of the Board of Commissioners of Navigation for the Cape Fear River and bar; that said rules require a pilot to forfeit and pay one hundred dollars if he fails or refuses to go to the assistance of any vessel on the coast having a signal for a pilot, if he shall see the same, or shall hear the report of a gun of distress off the coast; that under said rules no pilot shall absent himself from his station for over twenty-four hours without the permission of the chairman of said board; that if any pilot shall fail to be on board of any vessel at the time set for sailing, he shall forfeit and pay ten dollars a day, unless he has personal charge of some other vessel; and that pilots have never been required to work on public roads within the memory of man." And thereupon the Court held that the defendant was not guilty, and Moore, Solicitor for the State, appealed. (See *S. v. Cauble,* 70 N. C., 62.)

Attorney-General for the State.
Messrs. Gilliam & Gatling for the defendant.

ASHE, J. The only question presented by the record in this (590) case is whether the defendant, being a regularly appointed pilot, was exempted from working on the public road in the township in which he resided.

There is no doubt but that pilots should be relieved from this and every other public duty, which would divert them from the constant vigilance which their calling demands; and if we had the power we

would unhesitatingly grant them an exemption, but to do so would be encroaching upon the province of the legislative branch of the government.

An act was passed by the Legislature of 1879, entitled "An act to provide for keeping in repair the public roads of the State," the fourth section of which reads: "All able-bodied male persons between the ages of eighteen years and forty-five years shall be required under the provisions of this act to work on the public roads, except the members of the Board of Supervisors of Public Roads, not less than three days in each and every year." Laws 1879, Chap. 82, Sec. 4.

The act is very broad in its terms, and exempts no male person who is physically able to perform the requisite work on a road, except the members of the Board of Supervisors of Public Roads, who are incorporated by that act, and consist of the Justices of the Peace in each township. These are the only able-bodied male persons of any class or condition that are exempted. If any person is disqualified by disease, infirmity, or any other physical disability, he is not required to perform this duty, and while the act is silent as to the mode of obtaining an exemption, we take it that the certificate would have to be obtained from the Board of Supervisors of Public Roads, who in this regard succeed to the powers of the Township Board of Trustees.

While pilots are not exempted, we are of the opinion that if, on the day they are summoned to work on the roads, any emergency should arise, or there should be any call to duty in any matter connected (591) with the pilotage which should require their presence elsewhere, it would be a good defense to a criminal action for refusing or failing to work on the road. There might be two public duties to perform, as in this case, of so different natures that they could not be discharged on the same day. In such a case the performance of the one duty should excuse the nonperformance of the other; as in the case of a witness subpœnaed to attend two Courts on the same day, he may elect which he will attend, and as the law does not require impossibilities at the hands of anyone, his obedience to the one subpœna is a good excuse for failing to comply with the commands of the other. The Judgment is

Reversed.

Cited: *S. v. Craig,* 82 N. C., 669.

STATE v. FRANK BELL.

Tampering With Jury—Discharged Before Verdict—Jeopardy.

1. The necessity of doing justice arising from the duty of courts to guard its administration against all fraudulent practices, is an exception to the rule that a jury sworn in a capital case can not be discharged without the prisoner's consent until they have given a verdict.
2. *Therefore*, where the jury were sworn and impaneled in a trial for murder, and the Court ordered a mistrial on the ground that one of the jury had fraudulently procured himself to be selected at the instance of the prisoner to secure an acquittal, *It was held* that there was no jeopardy, and that an order remanding the prisoner for another trial was proper.

PETITION for a *certiorari*, filed by the prisoner and granted at (592) June Term, 1879, of the Supreme Court.

The prisoner was put upon trial for murder at Spring Term, 1879, of PITT, before *Seymour, J.*

After the jury was sworn and impaneled, his Honor, upon the facts set out in the opinion of this Court, ordered a mistrial, refused to discharge the prisoner, and remanded him to jail, to be held for another trial. And thereupon the prisoner obtained a writ of *certiorari* to bring up the record and review the ruling of the Court below. Upon the argument here, the State relied mainly upon *S. v. Wiseman*, 68 N. C., 203.

Attorney-General for the State.
Messrs. Gilliam & Gatling for the prisoner.

ASHE, J. The prisoner was indicted at Spring Term, 1879, of PITT, with Reuben Harris, for the murder of one John Briley. Harris was charged in the indictment as principal, and the prisoner as being present, aiding and abetting the said Harris in the said felony and murder. On their arraignment they plead not guilty, and a special *venire* was issued, and from those returned a jury of twelve men were drawn, sworn and impaneled to try the issue between the State and the prisoners.

After the jury were charged with the prisoners, but before any evidence was offered by the State, the Solicitor for the State moved for a mistrial as to the prisoner Bell; and in support of his motion introduced two witnesses, to wit, one Forbes and one Harrington, from whose testimony his Honor found the following facts:

1. "That J. G. Bell, the brother of the prisoner, Frank Bell, was his agent in conducting the defense."

2. "That by the consent and procurement of the prisoner Bell, one Naseby Mills, who had previously, as was known to the said

(593) prisoner, been engaged in assisting him in his defense, was procured and impaneled as a juror. That said Naseby Mills, by the procurement of said prisoner, procured himself to be sworn upon the jury by taking a false oath, viz., that he had not formed and expressed an opinion that prisoner was not guilty, when in fact he had formed and expressed such opinion, for the purpose of acquitting the prisoner."

And from these facts the Court found as conclusions of law:

1. That the jury were by the fraud of the prisoner impaneled with the view of securing his acquittal.

2. That said prisoner was never in jeopardy.

Thereupon the Court ordered a mistrial as to the prisoner Bell, to which he excepted. The prisoner then moved for his discharge, which was refused, and he was remanded to jail for another trial, and his case was brought to this Court by a writ of *certiorari*.

It is insisted that his Honor committed an error in ordering a mistrial and refusing to discharge the prisoner. The facts found are conclusive and not the subject of review in this Court, but the conclusions of law from them are reviewable. *S. v. Prince,* 63 N. C., 529; *S. v. Jefferson,* 66 N. C., 309; *S. v. McGimsey,* 80 N. C., 377. And the question for our consideration is, whether his Honor's reason for refusing to discharge the prisoner was sufficient.

It is a well-established and it is a sacred principle of the common law, that a man cannot be put twice in jeopardy of life or limb; and the same principle has been declared in the Constitution of the United States. Hawkins lays it down that a jury sworn and charged in a capital case can not be discharged without the prisoner's consent till they have given a verdict. Vol. 2, Chap. 2, Sec. 1. But to this general rule, cases of necessity are excepted, and these cases of necessity are of two classes, and numerous: 1. What are denominated physical necessities, as where during trial the Judge, juror or prisoner

(594) is taken suddenly ill; the Judge dies; or the prisoner or a juror becomes insane; or a juror abandons his fellows; or where there is no possibility for the jury to agree and return a verdict, and such like cases. 2. What is termed *the necessity of doing justice,* which arises from the duty of the Court to prevent the obstruction of justice by guarding its administration against all fraudulent practices, such as tampering with the jury, keeping back the witnesses; and to which may be added as especially belonging to this class, the fraudulent introduction into the panel of a perjured juror, who at the instance of the prisoner has procured himself to be selected on the jury for the purpose of acquitting the prisoner. *S. v. Wiseman,* 68 N. C., 203; *S. v. Bailey,* 65 N. C., 426; *Com. v. Cook,* 6 Serg. & Rawle, 577.

If a Judge were to sit on the bench and allow such a fraud as is disclosed in the facts found by his Honor in this case, the trial by jury would be a farce, and the administration of justice a mere mockery. It is his duty to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt or fraudulent practices on the part of either the prosecution or defense. Fraud vitiates every transaction into which it enters; and whenever it is of such a character and extent as necessarily to prevent a valid conviction, there is no jeopardy, and the prisoner may be held for another trial. Bish. Crim. Law, Sec. 852. In this case the prisoner had every assurance of an acquittal if the trial had proceeded to a verdict. His friend in his anxiety to serve him and save his life, had, through fraud and perjury wormed himself into the jury for the express purpose of acquitting him. His life was not in danger. There was no jeopardy.

We therefore hold that the conclusion of his Honor in the Court below from the facts found by him, that a proper legal necessity existed for ordering a mistrial, was not erroneous, and that the (595) prisoner was properly remanded for another trial.

PER CURIAM. No Error.

Cited: *S. v. Washington,* 89 N. C., 537, 538; *S. v. Fuller,* 114 N. C., 896; *S. v. Dry,* 152 N. C., 814, 815.

STATE v. JOHN F. BRYSON.

Trespass on Land—Evidence—Title—Judge's Charge.

1. On the trial of an indictment under Bat. Rev., Chap. 32, Sec. 116, for a trespass on land, the defendant can not claim an acquittal on the ground that he *believed* he had a right to enter after being forbidden. To constitute a valid defense, there must be proof of a claim of title, or facts shown upon which he could reasonably and *bona fide* believe he had the right.
2. Where the prosecutor in such case sold a field to the lessor of defendant and permitted the use of a way for three years over his land to the field, which was being cultivated by defendant, and withdrew such permission by notice forbidding further entry, there being another way over the lessor's land which adjoined a public road, though of greater distance to said field, *It was held,* not to be error in the Judge to refuse to submit to the jury as a question of fact the *belief* of the defendant that he had license to enter after forbiddance.

INDICTMENT for a misdemeanor under Bat. Rev., Chap. 32, Sec. 116, tried at Spring Term, 1879, of JACKSON, before *Gudger, J.*

The bill charged the defendant with entering upon the land of E. C. Chastain, after being forbidden to do so. The evidence was that the

defendant in the summer of 1877, was cultivating the land of
(596) Nathan Coward, which adjoined the lands of Chastain, the prosecuting witness, and that he was in the habit of going through a part of witness's farm to get to Coward's land, and continued doing so after being forbidden by Chastain. On cross-examination the witness stated that he formerly owned the land which the defendant was cultivating, and had sold it to Coward. He also stated that he had notified defendant that he did not allow Coward or any of his tenants to pass through his field, and that about fifty yards distant was a cart-way on Coward's land which his tenants traveled, and leading from a public road to defendant's field. Coward testified that he had usually passed over Chastain's land to get to the tract purchased of him, about three years ago, and rented to defendant; that Chastain's land cut him off from the public road for a distance of seventy-five yards, and that to go through Chastain's field the defendant would have to travel about two hundred yards, but to get out otherwise he would have to go through two other farms and at a distance of about two miles, except by a ford which was said to be impassable. It was also in evidence that the defendant hauled his corn through the prosecutor's field after being forbidden to do so, to obviate the necessity of building a bridge over said ford.

The defendant asked the Court to charge the jury upon the authority of *S. v. Hause,* 71 N. C., 518, "that if defendant believed he had the right to enter or travel over the prosecutor's land because he and the former owners and tenants of the land had done so for some ten or eighteen years, he would not be guilty." The Court declined to give the instruction on the ground it was not applicable to the facts of this case, but told the jury if they found that Coward's land joined the public road, the defendant should have entered the field through Coward's land, and if defendant entered the same through the prose-
(597) cutor's land after being forbidden, he would be guilty. Defendant excepted. Verdict of guilty, judgment, appeal by the defendant.

Attorney-General for the State.
No counsel in this Court for the defendant.

DILLARD, J. This was an indictment against the defendant under Ch. 32, Sec. 116, Battle's Revisal, for entering and passing through a field of one Chastain, the prosecutor, after being forbidden to do so.

To constitute the offense intended to be punished by the statute under which the bill of indictment was framed, there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, accident, or under a *bona fide* claim of right or license.

S. v. Hanks, 66 N. C., 612; *S. v. Ellen,* 68 N. C., 281; *S. v. Hause,* 71 N. C., 518.

The constituents of the offense we find in this case, on examination of the testimony set out in the case of appeal, to be as follows: Defendant entered upon and passed through the field of the prosecutor after being forbidden, and he did so wilfully and without a claim to the land on which the trespass was committed, or a claim of a right-of-way, or license therein by grant or prescription. And so, the defendant had nothing to excuse him or screen him from conviction, unless *his belief* that he had the right or license of way under the circumstances specified in the terms of the instruction refused took away guilt and authorized his acquittal.

The charge requested was that if the jury should find that defendant believed he had a right to enter or travel over the prosecutor's land, because he and the former owner and tenants had done so for some ten or eighteen years, he would not be guilty and the case of appeal states that the request was made on the authority of *S. v. Hause,* 71 N. C., 518; but his Honor refused to charge as requested, and (598) in lieu thereof charged that if the lands of Coward, under whom defendant was lessee, adjoined a public road, the defendant should have entered his field through Coward's land, and if he did not do so, but entered the same through the field of the prosecutor, he would be guilty.

We concur with his Honor that *Hause's case* is not like the present in its facts, and did not authorize the instruction requested by the defendant. In *Hause's case,* a road led from his land across a narrow strip of the prosecutor's land to a public road, which was opened some fifteen or sixteen years before, and had been used by the defendant and prior owners and occupants of his land, until notified a short time before the finding of the indictment; and it was proved that defendant and former owners and occupants had been accustomed to cross the said strip at different points for more than thirty years without any objection from the prosecutor, and it was held that Hause might have *bona fide* had the belief and acted on it; that the user for so long a time had clothed him with a right or license to travel over the land; and if so, there would be wanting an essential to the offense, and the defendant would not be guilty under the statute. But in this case the facts were far otherwise. The field cultivated by defendant at the time of the trespass, together with the field or enclosure trespassed upon, had both been the property of the prosecutor, and used and occupied by him and his tenants and servants, passing to and from the field of the defendant, through the field trespassed upon at pleasure, up to the sale to Coward, whose tenant the defendant is, which was about three years before the trial of this cause in the Court below; and that the only user of this way

through the prosecutor's enclosed grounds by Coward and the defendant claiming under him, was since the sale under notice just before the beginning of this prosecution.

Upon the facts in *Hause's case,* the claim of a license by presumption of a grant from the length of the user by the defendant and for-
(599) mer owners of the same land, may not in law have been well founded. But it was such that defendant might thereupon reasonably and *bona fide* claim a right-of-way, or license to pass and repass. And, therefore, in such case it was material to inquire into the existence of such belief on the part of the supposed trespasser, and to submit it as a question of fact to the jury, with instructions to convict or acquit as they might find the fact to be.

In this case the entire lands, including the field cultivated by defendant, had been the property of the prosecutor until the sale to Coward about three years before the trial. There had been no user of the way through the prosecutor's field by defendant or Coward, except for this short period of time, and that was permissive rather than as of right. When the permission was withdrawn by notice to defendant, there was no fact or facts on which defendant could claim a right by presumption, by way of adverse user, against the prosecutor, or on the foundation of which he could reasonably and *bona fide* believe he had a license to pass through the prosecutor's field.

The defendant, however, claimed that he *believed* he had a license, notwithstanding the forbiddance of the prosecutor, and he desired of the Court to submit such his belief as a question of fact to the jury, with instruction to acquit if found to be true. If a party be indicted for a trespass on land, and in the proof there be no evidence of a claim of title, or such facts and circumstances upon which he could reasonably and *bona fide* believe he had a right to do what he did, the Court will not submit an inquiry to the jury as to a mere abstraction, and, therefore, we hold there was no error in the refusal to charge the jury as requested, and none in the charge as given.

PER CURIAM. No Error.

Cited: S. v. Whitener, 93 N. C., 593; *S. v. Winslow,* 95 N. C., 653; *S. v. Crawley,* 103 N. C., 355; *S. v. Boyce,* 109 N. C., 744; *S. v. Fisher, Id.,* 820; *S. v. Glenn,* 118 N. C., 1195; *S. v. Durham,* 121 N. C., 550; *S. v. Mallard,* 143 N. C., 667.

(600)

STATE v. REBECCA LYON.

Witness—Accomplice, rights of—Executive Clemency—Nol. Pros.

The fact that an accomplice is introduced as a witness and testifies to such facts as are within his knowledge, withholding nothing because of its tendency to self-incrimination, does not constitute a legal defense to a prosecution against him. He has an equitable claim to executive clemency or the Solicitor may enter a *nolle prosequi.*

PETITION for a *certiorari,* filed by the prisoner and granted at June Term, 1879, of the Supreme Court.

The facts upon which the motion for the discharge of prisoner is based are sufficiently stated by the Chief Justice in delivering the opinion of this Court.

Attorney-General for the State.
Messrs. Thomas Ruffin and *J. W. Graham* for prisoner.

SMITH, C. J. The prisoner, Rebecca Ann Lyon, was examined in the summer of 1877 as a witness upon an inquisition of the Coroner's jury into the causes of the death of Nannie Blackwell, and on behalf of the State, before two successive grand juries in Orange Superior Court, on bills of indictment charging Robert Boswell with the murder of the deceased, and again upon his trial at Fall Term, 1878, before the petty jury by whose verdict he was convicted. At the same term the prisoner herself was indicted for the same crime, as an accomplice, mainly upon the testimony of Robert Boswell, and at Spring Term, 1879, another bill was found against the prisoner in which she is charged with the murder of one Ned Lyon. The record does not show, nor is it suggested that the testimony was obtained upon any assurances of leniency or favor to be extended to the prisoner or that it was not voluntarily given in. After the verdict was rendered against Boswell, the Solicitor proposed to put the prisoner on trial for complicity in (601) the same crime, which her counsel resisted, insisting that by reason of her having been used as a witness on these several occasions, and the materiality of her testimony, she was equitably entitled to be discharged from this prosecution and asked the Court so to rule. In answer thereto the Court made an order, so much of which as is necessary to a proper understanding of the case is as follows: "It further appearing to the Court here that the present indictment against the accused charges her with the murder of Nannie Blackwell, of which said offense one Robert Boswell hath been tried at this term, and against whom this accused, Rebecca Ann Lyon, was used and examined as a witness on behalf of the State, it is declared by the Court that it is not

just and right that the accused be tried for the crime whereof she now stands indicted, and it is, therefore, ordered that the said Rebecca Ann Lyon be not put to answer the present indictment and to say whether she be guilty or not guilty of the felony and murder whereof she stands charged."

Upon the announcement of the decision the Solicitor remarked that he had other charges against the prisoner and was awaiting the results of an analysis of the contents of the stomach of Ned Lyon, and thereupon the prisoner was remanded to the custody of the Sheriff.

At Spring Term, 1879, the Solicitor proposed again to arraign and try the prisoner for the murder of Nannie Blackwell, and on the renewal of the motion of her counsel for an order of discharge, he stated that it was not his intention at the present term to bring on the trial of the charge for the murder of Ned Lyon, if the prisoner was entitled to be discharged from the other indictment. The Court refused the motion for the prisoner, but continued the case that she might have time to apply for such relief as her counsel should advise.

This is a summary of the material facts contained in the (602) application for the *certiorari* and in the record sent up in obedience to the writ, and they do not call for or authorize any interference by this Court in the proceedings depending in the Superior Court below. It is plain they constitute no legal defense against the prosecution, or if they did, they could be put in proper form and made available at the trial. The prisoner's evidence was not elicited upon any promise or expectation, aside from that produced by the act of examination, of release or other individual advantage to the witness to be derived therefrom; and if such assurance had been given, its only effect would be to influence the Solicitor to enter a *nolle prosequi* under a proper sense of official duty, which the Court might affirm, but would not undertake to control. The pardoning power after conviction is vested alone in the Governor, and the Court can do no more than to forbear and give opportunity to the prisoner to make application to him with a recommendation for its favorable exercise. This is the practice deduced from an examination of the cases in which judicial action has been invoked. The subject is discussed in one of the series of cases lately determined in the Supreme Court of the United States (*United States v. Ford,* not yet reported) tracing the rule of practice from its origin through successive precedents down, and we are content to reproduce some of the authorities cited and views expressed in the very elaborate opinion of the Court as delivered by Mr. Justice CLIFFORD: "In the present practice, says Mr. Starkie, when accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly

and openly, although they are not entitled of right to a pardon, the usage, lenity, and practice of the Court are to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy." 2 Stark. Ev., 15.

"They can not plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their (603) trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for executive clemency." Ros. Cr. Ev., 597. "Interviews for the purpose mentioned" (between the prosecuting officer and the accomplice proposing to testify, to ascertain the value and materiality of the evidence) "are for mutual explanation, and do not commit either party, but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the Courts allow."

The difficulty of giving specific effect to the usage from a want of power in the executive (as in this State) to pardon until after trial and conviction may be removed by the exercise of the right vested in the Solicitor, when, in his judgment, the case calls for it, to enter a *nolle prosequi* and allow the prisoner's discharge, which practically accomplishes the same ends as the pardon.

The opinion refers to a suggestion of Mr. Bishop that the prisoner may be permitted to plead guilty, under an arrangement with the prosecuting officer that he may "retract his plea and plead one to the merits, if his application for a pardon shall be unsuccessful." 1 Bish. Cr. Proc., Sec. 1006, note. The suggestion does not commend itself to our approval. If the record discloses the entire transaction, the application could not be entertained, since there has been no such conviction as the constitution contemplates; and if the supposed outside arrangement is withheld, it is an attempted evasion of a plain provision of law and makes the record present an incomplete and untruthful statement of the facts. To this no judicial tribunal should be a party. In such case the power to relieve and the responsibility for its exercise must remain in the sound discretion of the prosecuting officer (604) where the law places them.

In the quotation from Starkie it is said the witnesses "must give their testimony *fairly and openly*," and the opinion of the Court speaks of the equitable claim of the witness as depending "upon the condition that he makes a *full and fair disclosure of the guilt of himself and that of his associates.*" If it be meant by these expressions that the witness must disclose what he knows and withhold nothing because of its ten-

dency to self-crimination, the qualification is wise and proper. But if it be intended to say that the testimony must be full and fair, and of this the Court to be the judge, the restriction does not meet our concurrence. It is sufficient if the witness testifies to such facts as are within his knowledge and refuses no material and admissible information which he possesses, whether the evidence be favorable or adverse to the State, to entitle him to the recommendation to executive clemency, since it is the introduction and examination of the witness upon the incriminating facts of the *corpus delicti* that form the basis of his claim, and not the character and effect of the testimony delivered. Any further qualification tends to intensify an eagerness to convict and weakens confidence in the truthfulness of the evidence.

What has been said applies exclusively to the one prosecution for the murder of Nannie Blackwell. With another indictment pending for a similar crime, while the prisoner is entitled to a speedy trial according to the course of the Court, she can not ask for a discharge. Nor in our opinion is the case affected by the order of Fall Term, 1878. It was not warranted for the reasons assigned, and its operation was suspended if not neutralized by the suggestion of the Solicitor that there was another charge depending against the prisoner. The application to us
(605) for a discharge must be refused and the cause be left in the Superior Court to be proceeded with according to law.

PER CURIAM. Motion Refused.

Cited: *S. v. Hooper,* 151 N. C., 647.

STATE v. WILLIAM ROBERTS.

Witness, examination of—Impeaching Testimony—Collateral Matter.

1. If a witness make statements in the course of his evidence and as a part thereof as to any fact constituting the subject matter under investigation, he may be impeached by proof of statements to the contrary.
2. Statements elicited on cross-examination collateral to the issue are conclusive, and the witness can not be contradicted by proof of statements inconsistent therewith, unless they tend to show the temper, disposition or conduct of the witness in relation to the cause or parties.

INDICTMENT for a misdemeanor, under Bat. Rev., Chap. 32, Sec. 95, tried at Spring Term, 1879, of BUNCOMBE, before *Gudger, J.*

The bill charged that the defendants, William Roberts, James Dixon, and others, did wilfully and unlawfully abuse and kill one hog, the property of M. M. Harper, in an enclosure not surrounded by a lawful

fence, etc. The facts constituting the grounds of the exception taken in the Court below appear in the opinion. Verdict of guilty as to William Roberts, judgment, appeal by defendant.

Attorney-General for the State.
Mr. J. M. Gudger for the defendant.

DILLARD, J. On the trial, Harper was put on the stand as a witness for the State, and the defendant in his cross-examination asked him if he had not said to one Erwin Wells, "that rather than be (606) outdone by a negro, he would swear any amount of lies"; and also, if he had not admitted on a trial before one Robinson, a Justice of the Peace, that he had declared "he would have all the corn cut down on Sandy Marsh Creek (on which creek he and the defendant resided) and would poison all the stock on said creek."

To these questions the witness made answer denying the making of such statements, and thereupon the defendant introduced a witness and proposed to contradict said Harper by him as to the said declarations, but on objection his Honor excluded the testimony, to which defendant excepted.

The appeal presents the question as to the correctness of his Honor's ruling in rejecting the proposed evidence, and the solution of the question is to be made in connection with the admission of the defendant in the case of appeal, that the alleged false statements of Harper were not made in reference to this indictment, nor the matters involved in the same, nor in reference to defendants.

The general rule, is that when a witness makes statements in the course of his evidence, and as a part thereof, as to any fact or facts constituting the subject-matter under investigation, he may be impeached by proof of statements or representations to the contrary; but as regards statements of a witness drawn out on cross-examination collateral to the investigation, the same are to be taken as conclusive, and it is not admissible to contradict him by showing declarations or statements inconsistent therewith; with an exception, however, that disparaging evidence of inconsistent statements in matters collateral may be received, where it tends to show the temper, disposition or conduct of the witness in relation to the cause or parties. *S. v. Patterson,* 24 N. C., 346.

The statements of the witness proposed to be proved on the trial in contradiction of his denial of his having made such, were in fact purely collateral to the subject-matter under examination, (607) and they were admitted by the defendant to have no reference to this indictment or any matter involved therein, or to any party to the same. The evidence was properly excluded unless the proposed declara-

tions of the witness on other occasions should be receivable as showing his feelings or conduct towards the indictment or the defendants therein.

The statements proposed to be proved, referring altogether as admitted by defendant to some other transaction and persons than those included in the present indictment, might tend to show the temper, disposition or conduct of the witness as to the matter and parties in such statements referred to; but how is it possible they can show anything of the witness' bias or feelings with respect to this bill of indictment and the parties to it, when the defendant admits, according to the recitals in the case of appeal, that the same have no reference thereto? We can not see how the statements proposed to be proved could have had any possible influence on the issue being tried, or how the admission thereof can be claimed under any rule of evidence known to the law. There is no error. Let this be certified, etc.

PER CURIAM. No Error.

Cited: *S. v. Ballard,* 97 N. C., 446; *S. v. Rollins,* 113, N. C., 732; *Burnett v. R. R.,* 120 N. C., 519; *S. v. Hooper,* 151 N. C., 647.

S. v. Scott, from Jones.—No error being assigned or appearing in the record, the judgment below was affirmed.

RULES

OF THE

SUPREME COURT

(ADOPTED JUNE TERM, 1879.)

Order in which the Districts will be called.

1. The first district will be called as heretofore on Wednesday of the first week, and if necessary the call will be continued until and including Tuesday of the next week.

2. The second district will be called on Monday of the second week if causes from the first have then been disposed of, and the call continued through that and the following week.

3. The third district will be called on Monday of the fourth week, and allowed one week.

4. The fourth district will be called the fifth week, commencing on Monday.

5. The fifth district will in like manner be allowed the sixth week.

6. The sixth district, the seventh week.

7. The seventh district, the eighth week.

8, 9. The eighth and ninth districts together will be allowed the ninth week, and if necessary to dispose of the causes, two days of the week ensuing—causes on the ninth being taken up as soon as those on the eighth are concluded.

On Monday of the tenth week, or as soon as the dockets of the eighth and ninth districts are perused, not later than Wednesday, the Court will enter upon the call of causes at the foot of the docket and proceed until they are disposed of.

Petition to Rehear. (610)

Any party before the end of the term ensuing a judgment of this Court, may apply to have the cause reheard upon any matter of law, and may file his petition therefor in the Clerk's office. The petitioner must distinctly point out and assign the error, or the material matter overlooked; and must allege that the judgment has been performed, or that its performance has been properly secured, or dispensed with by the other party; and it shall be accompanied with the certificate of at least two members of the bar who did not appear in the cause at the first

hearing and who have no interest in the cause, that they have carefully examined the case and the law relating thereto, and the cited cases appearing in the opinion, and that in their opinion the judgment is erroneous, and wherein it is erroneous.

JOHN KERR, Judge of the Fifth district, died 5 September, 1879, and on the 10th, JOHN A. GILMER was appointed by Governor Jarvis to fill the vacancy.

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