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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1882.

REPORTED BY

THOMAS S. KENAN

(VOL. II)

Annotated through Volume 243

RALEIGH:
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CASES REPORTED

CASES OVERRULED.

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1882.

MARY TUCKER, EXR'X, v. GEORGE S. BAKER, ADM'R.

Complaint—Practice.

Objection to a complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, may be taken by motion in this court.

CIVIL ACTION tried at Fall Term, 1881, of FRANKLIN Superior Court, before *Gudger, J.*

The action was brought to Fall Term, 1879, and the entry was then made on the docket—"Time to file pleadings." The complaint was filed just before Spring Term, 1881, and is as follows:

1. That James Murphy on the 25th of May, 1859, executed to H. Harris his promissory note under seal in the sum of three hundred dollars, in words and figures as follows, to wit, One day after date I promise to pay H. Harris, or order, three hundred dollars for value received. Witness my hand and seal, May 25th, 1859. (2) (Signed and sealed by Jas. Murphy.)

2. That on the 17th day of October, 1859, there was paid on said note the sum of one hundred dollars, which payment is endorsed thereon, and no other payment has been paid on account of it.

3. That James Murphy died in Franklin County in 186—. W. H. Spencer was his administrator, but died in 1877, and letters of administration *de bonis non* were issued to the defendant Baker, and he is now such administrator.

4. J. B. Tucker died in 1862, leaving a last will and testament in which the plaintiff was named executrix, and the will was duly admitted to probate and the executrix qualified as such.

5. That there is due and owing on said note, with interest to October 17th, 1879, four hundred and fifty-five $^{62}/_{100}$ dollars, of which two hundred and seven $^{1}/_{100}$ dollars is principal money.

Wherefore the plaintiff prays judgment against the defendant for said sum, with interest, and for costs of action.

When the case was called for trial at Fall Term, 1881, the defendant asked for leave to file an answer, which was resisted by the plaintiff. His Honor overruled the defendant's motion to file an answer, and rendered judgment against him for want of an answer, from which the defendant appealed.

Mr. J. J. Davis, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. In this court the counsel for defendant moved that the action be dismissed for the reason, that the complaint does not state facts sufficient to constitute a cause of action, and we are of the opinion the objection is well founded.

(3) The Code of Civil Proccedure provides (section 95) that the defendant may demur to the complaint when it shall appear upon the face thereof, either,

1. That the court has no jurisdiction of the person of the defendant or the subject of the action, or,

2. That the plaintiff has no legal capacity to sue, or

3. That there is another action pending between the same parties for the same cause of action, or

4. That there is a defect of parties, plaintiff or defendant, or

5. That several causes of action have been improperly united, or

6. That the complaint does not state facts sufficient to constitute a cause of action.

By section 98: That when any of the matters enumerated in section 95 do not appear upon the face of the complaint, the objection may be taken by answer.

And by section 99: If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the *objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.*

Thus it would seem that the two last objections may be taken either by demurrer or on motion *ore tenus.* Such is the construction which

has been given to these sections by this court. In *Pescud v. Hawkins,* 71 N. C., 299, Mr. Justice BYNUM, speaking for the court, said: "By the latter system of pleading (C. C. P.) the objection to the jurisdiction can now be taken only by answer or demurrer, the demurrer being either written or *ore tenus;*" and in *McDougald v. Graham,* 75 N. C., 310, it is held that "whenever it shall appear to the court that a cause of action is not stated in the complaint, the action should be dismissed."

In the case before us the complaint does not allege that the plaintiff or his intestate had any interest in the note sued on, either legal or equitable, nor does it state to whom the note is due, except that it was executed to H. Harris, but fails to connect himself (4) or his intestate with the title of Harris. There is nothing stated in the complaint to show that the plaintiff has the right to recover upon the said note. The action must therefore be dismissed.

PER CURIAM. Dismissed.

Cited: Clements v. Rogers, 91 N.C. 64; *Hunter v. Yarborough,* 92 N.C. 70; *Burbank v. Comrs.,* 92 N.C. 258; *Johnson v. Finch,* 93 N.C. 208; *Knowles v. R. R.,* 102 N.C. 63; *Peacock v. Stott,* 104 N.C. 156; *McKinnon v. Morrison,* 104 N.C. 360; *Blow v. Vaughan,* 105 N.C. 209; *Baker v. Garris,* 108 N.C. 225, 227; *Conley v. R.R.,* 109 N.C. 696; *Joyner v. Roberts,* 112 N.C. 113; *Farthing v. Carrington,* 116 N.C. 327; *Milliken v. Denny,* 135 N.C. 24; *Miller v. Roberts,* 212 N.C. 129; *Raleigh v. Hatcher,* 220 N.C. 616; *Barker v. Barker,* 232 N.C. 495; *Anderson v. Atkinson,* 235 N.C. 301; *Aiken v. Sanderford,* 236 N.C. 762.

WILLIAM J. BEST v. WILLIAM P. CLYDE, AND OTHERS.

Pleading—Impertinent Matter—Appeal.

A motion to strike alleged improper matter from a complaint will not be considered after answer or demurrer, or even after an order for time to plead. Nor will an appeal lie from a refusal to grant such motion.

MOTION heard at Chambers in Raleigh on the 11th of February, 1882, before *Graves, J.*

The plaintiff filed his complaint within the first three days of Fall Term, 1881, of the superior court of Rowan and the record shows an order to have been then entered "that the defendants have sixty days to answer the complaint"; or, as stated in the accompanying case,

"in which to answer or demur." Before the expiration of the time limited, it was prolonged by agreement of plaintiff's counsel to the first day of March.

Meanwhile, notice was served on one of the plaintiff's counsel of an intended application for a still further extension until the ensuing term of the court; in pursuance of which at chambers on February 4th, the day appointed, a motion was made before the judge for the
(5) proposed extension and also to have stricken from the complaint certain objectionable parts, enclosed in brackets, for immateriality and impertinency. In support of the motion, the defendants produced and read in evidence the affidavit of one of their number, taken on the 9th day of January preceding, the substance of which is that the complaint being voluminous and the defendants' counsel closely occupied with other professional business during the term, they were unable to bestow upon it the attention and scrutiny necessary in preparing the defence, and were allowed sixty days' time to prepare and put in their answer; that upon a subsequent careful and full examination given by counsel, affiant was advised by them that the complaint contains much irrelevant and immaterial matter; that the defendants ought not to be required to answer or litigate; and that further time still was needed and should be asked for putting in the answer, in order that the defendants might apply to strike such obnoxious matter from the complaint and have it reformed. The plaintiff's counsel insisted that the motion to strike out should not be entertained, inasmuch as no notice had been given, and "he was not then prepared to proceed to the hearing." Notice was then drawn up and accepted and an order entered in the following terms:

"The motion of the defendants for further time to answer was argued by counsel and heard by the court, and by consent it is ordered that the time of sixty days, given for the defendants to answer, shall be extended to such time as hereafter indicated by the court. It is further agreed by the counsel for both parties, that this court shall hear a motion of the defendants to strike out portions of the complaint, as irrelevant and redundant, and immaterial and impertinent, at Raleigh on Saturday, February 11th, 1882.

(Signed) J. F. GRAVES, Judge, etc."

(6) Accordingly upon the hearing on that day, upon the facts stated and after argument, his Honor adjudged that "the motion to strike out be overlooked," and gave time for answering until the 25th day of April. From the refusal to grant the defendants' motion, they appeal.

Messrs. Merrimon & Fuller, John Gatling and J. S. Henderson, for plaintiff.

Messrs. D. Schenck and Reade, Busbee & Busbee, for defendants.

SMITH, C. J., after stating the above. The fit and appropriate time for making the application for the removal of obnoxious and improper matter from a complaint, is and must be before answer or demurrer and before the granting of further time for either.

In New York, from which state our code system of procedure is derived, the practice is controlled by a rule, and in its construction and enforcement it is held, that motions to correct or to render pleadings more definite and certain are waived by the service of an answer to an impeached pleading, *or by an extension of time to plead; or by any act legally admitting that a sufficient issue is raised...* New York Practice; (Tiffany & Smith 430) *Bowman v. Sheldon,* 5 Sandf. (N. Y.) 657; *Wall v. Buf. Wat. Works Co.,* 18 New York, 119.

Such also is the rule that prevails in equity. "For mere impertinence," says a standard author, "a reference cannot be obtained after the defendant has answered, or *submitted to answer by obtaining an order for time.*" 1 Dan. Ch. Pr., 405.

After an answer, or even *after an order for time to answer,* the defendant cannot move to refer the bill for *impertinence,* though he may obtain a reference for *scandal.* 2 Mad. Ch. Pr. 276. See also Coop. Eq. Pl. 19; Story Eq. Pl., Sec. 270. While we have no peremptory written rule, and the rule put in form is but the enunciation of a mode of judicial procedure under the new practice, (7) found to be both convenient and useful, and a party is not debarred from making the motion, because of his omission to make it in apt time, the application afterwards is addressed to the sound discretion of the judge exercised in view of all the attending facts and circumstances.

While he possesses the undoubted power to grant the motion, so he may in his discretion refuse it, and the refusal is not an error in law admitting of correction by appeal; nor does it "affect a substantial right" within the meaning of section 299 of the Code.

When the refusal to exercise a discretionary power vested in the judge proceeds from a supposed defect of power, and this plainly appears in the record, the error will be corrected to the end that the discretion may be exercised. *Powell v. Jopling,* 47 N. C., 400; *Stephenson v. Stephenson,* 49 N. C., 472; *Henderson v. Graham,* 84 N. C., 496.

But the grounds for the refusal must not be left to uncertain inference or conjecture, but the fact must be shown; or it will be assumed

to be an act of discretion, the sufficiency of the reasons for which must be conclusively determined by the judge himself.

It is unnecessary, therefore, to enter upon an examination of the merits of the controversy as to the form of the complaint, as they might have been presented, had the application not been deferred, and we purposely refrain from doing so. Nor do we concur in that interpretation of the record which treats the assent of counsel to the hearing of the motion at the adjourned time, as a waiver of any ground of resistance to it, nor was it so understood and acted upon by counsel or by the judge.

The very objection was urged and pressed, when it came up to be considered and decided as it has been in argument here upon the appeal from the ruling below.

(8) The want of notice was removed, but not the grounds of resistance to the motion, as well based upon the inopportune time of making it, arising out of the precedent action and delay, as upon the merits of the proposition itself. The opposition to it was not impaired by a consent that the motion should be heard, at the time, to which the hearing of the other for a further extension of time and to fix it, was adjourned.

We are therefore of opinion that the refusal complained of is not the subject matter of appeal, and the appeal must be dismissed, and it is so adjudged.

Let this be certified to the superior court of Rowan.

PER CURIAM. Appeal dismissed.

Cited: Thames v. Jones, 97 N.C. 126; *McGill v. Buie,* 106 N.C. 246; *Smith v. Summerfield,* 108 N.C. 288; *Conley v. R.R.,* 109 N.C. 696; *Hensley v. Furniture Co.,* 164 N.C. 152; *Lee v. Thornton,* 171 N.C. 212; *Parrish v. R.R.,* 221 N.C. 297.

P. H. CAIN AND OTHERS v. COMMISSIONERS OF DAVIE COUNTY.

Fence-Law—Local Option Legislation—Taxation—Local Assessment.

1. Under the provisions of the "fence law" act of 1881, ch. 172, the commissioners of Davie County were proceeding to collect the tax assessed upon land to defray the expenses of building the fence, and the court refused to grant an injunction to rstrain them; *Held* no error.
2. *Held further:* The provision in said act that it should take effect upon the happening of a contingent event, to-wit, upon its being approved by the

necessary number of qualified voters, is not a transfer of legislative power to the voters.

3. The ruling in *Simpson v. Commissioners*, 84 N. C., 158, that the decision of the commissioners to the effect that a majority of the voters favored the enactment is final, approved.

4. The constitutional provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended.

MOTION by plaintiffs for an injunction to restrain defendant (9) commissioners from collecting a certain tax, heard at Fall Term, 1881, of DAVIE Superior Court, before *Eure, J.*

The general assembly, at its session in 1881, passed an act intended, as expressed in its title, to prevent live stock from running at large in the counties of Davie and Anson, by erecting a fence around their boundaries, the fifteenth section of which is in these words:

"Whenever a majority of the qualified voters of said counties, or any township thereof, as appears by the returns of votes cast for the various electors of president of the United States at the last presidential election, shall by petition, duly signed, signify to the board of county commissioners of Davie and Anson counties, their approval of the provisions of this act, that thereupon the provisions of this act shall be in full force and effect; and the said board of county commissioners shall thereupon advertise by posted notices at five or more public places in each township in said counties, and in a newspaper in the town of Mocksville, the enforcement of the provisions of this act, and proceed to execute the duties imposed upon them by the provisions of this act; and the board of commissioners of Anson county shall likewise advertise by posting as aforesaid, and by publication in a newspaper established in Wadesboro; provided that before the commissioners of Anson county shall declare the provisions of this act in force, they must be satisfied that a majority of the qualified voters of said county have signed the petition herein provided for." Acts 1881, ch. 172.

The duties the board of commissioners are directed to perform are prescribed in the tenth, eleventh and twelfth sections, as follows:

Sec. 10. It shall be the duty of the board of county commissioners of Davie and Anson counties to erect a good and lawful fence around the entire counties of Davie and Anson, or such townships therein as shall avail themselves of the provisions of this act, and to erect gates on all the highways leading into said counties, and (10) to keep the same in good repair.

Sec. 11. If the owner of any land shall object to the building of any fence, herein allowed, his land not exceeding twenty feet in width shall be condemned for the fence-way as land is now condemned for railroad purposes by the North Carolina railroad company; provided that no fence shall divide a tract of land against the consent of the owner, but may follow the boundary lines thereof; provided further, that when a public highway divides a tract of land, the fence may follow the highway even against the consent of the owner of the land so divided.

Sec. 12. That for the purpose of carrying out the provisions of section ten of this act, the county commissioners may levy and collect, as they do other taxes, a special tax upon all the real property taxable by the state and county within the county or township which may avail themselves of the provisions of this act.

A petition approving and accepting the act and intended to fulfill the condition preceding its going into effect, containing the signatures of more than a majority of the electors who voted at the election designated, was presented to the commissioners; and, adjudging a compliance with its requirements, they proceeded to give public notice of the fact and to declare that the act had been approved by the necessary number of qualified voters, and would go into operation and be enforced on and after the first day of May, 1881.

The present action was instituted on April 30th, the day preceding that fixed by the commissioners, and a complaint then filed reciting the substance of the enactment, and the action of the commissioners under it, and alleging as grounds of objection thereto, that

1. The necessary number of qualified voters had not signified
(11) their approval, many of those whose names were signed not being such.

2. The boundary fence would be thirty-five miles in length, onerously expensive to those who were to be taxed for its construction.

3. The tax required would exceed the constitutional limit.

4. The act had not been submitted to a vote and received the popular approval.

5. The restriction of the tax to real estate violates the equality and uniformity prescribed in article five, section three, of the constitution.

6. The taking and appropriating lands for the fence-way cannot be done without indemnity to the owner.

7. The requirement that stock be penned before the construction of the fence is premature and unwarranted.

On May 2nd application was made to the judge at chambers, supported by the verified complaint as evidence, for an injunction, and thereupon it was ordered that the commissioners show cause before

him at Winston, on May 17th, why an injunction should not issue, and meanwhile they were restrained from taking further action in the premises. At the hearing of the motion an affidavit of one of the plaintiffs was introduced, containing lists of names of persons on the petitions of approval, who are alleged not to be on the registry of the different townships from which the several petitions profess to come, and also an affidavit of one of the commissioners, avowing the integrity of the conduct of the board in making the canvass and ascertaining the result, and his belief, then and still, that the approval did proceed from a majority of the qualified voters of the county, his Honor denied the motion for an injunction and taxed the plaintiffs with the costs, from which ruling they appeal.

At the fall term following, the plaintiffs make a second application to the succeeding judge for an injunction, and in its support offer an additional affidavit, and say that the commissioners have levied a tax upon the lands in their county, (while the state and (12) county taxes for general purposes are 69½ cents upon the hundred dollars valuation) of 25 cents additional in disregard of the limitations imposed in the constitution, and that they have improperly used and misappropriated portions of a balance in the county treasury collected for county purposes under the general law. This charge is met by a counter-affidavit of the same commissioner, who states that the fund applied to the building of the fence was intended to be replaced out of the tax levied under the act, none of which had yet come in, and that they intended to use no more of it, and that the 25 cent tax had been assessed in the manner prescribed by law.

This motion was also denied, and the plaintiffs again appealed.

Transcripts in both appeals are sent up and constitute two cases in this court.

Messrs. Watson & Glenn and Furches, for plaintiffs.
Mr. J. M. Clement, for defendants.

SMITH, C. J. After stating the above. It was wholly unnecessary, and attended with useless expense, to prosecute both appeals, since every exception to which the first refusal of the writ is liable lies with equal force against the last, and the same relief is attained by allowing it upon either application. We should be disposed therefore to tax the appellants with the costs of a needless record, if the merits were found to be with them upon the subject matter in dispute, and if we should direct the issuing of the injunction.

The arrest of proceedings to enforce the act is asked upon the several grounds that the form of legislation adopted, making the opera-

tion of it dependent upon the volition of voters, is unwarranted as an attempted abnegation of legislative functions; there has not
(13) been a compliance with the precedent condition of a written approval of a majority of the qualified voters; and the provisions of the enactment are repugnant to the constitution.

These we propose to examine.

1. The form of legislation:

It has not been seriously questioned that the legislature may make an enactment to take effect only upon the happening of a contingent event; but it has been earnestly maintained that when the events is the expression of the popular will, ascertained by an election, it is in effect a transfer of legislative power to the voters. In reference to this distinction, REDFIELD, C. J., in an elaborate opinion delivered in *State v. Parker,* 26 Ver., 357,says, that "the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy and sound reasoning." What differences may be found in the adjudications elsewhere, it is settled by the decision in *Manly v. City of Raleigh,* 57 N. C., 370, that such power may be exercised by the legislature, and it is declared that "when it is provided that a law shall not take effect unless a majority of the people vote for it, or it is accepted by a corporation, the provision is in effect a declaration that in the opinion of the legislature the law is not expedient, unless it be so voted for or accepted." This principle underlies all "local option" legislation and is fully recognized and established in this state. *Caldwell v. Justices,* 57 N. C., 323.

2. The operation of the act:

The plaintiffs insist that the requisite number of voters have not given their sanction to the law, and that many of them whose names are signed to the petitions are not of the class of qualified voters of the county.

It does not appear, however, that the number of subscribing petitioners exceeds half the number of those who voted at the preceding election of electors of president, and the commissioners have
(14) adjudged the fact that the preliminary condition to the operation of the act has been fulfilled, and acting upon the decision they have entered upon the duties it has enjoined, and given public notice thereof. The proposal is to show the necessary number have not approved, by impeaching the electoral qualifications of a large number of those who have signed the petitions, upon which the action of the commissioners is based, and thus practically reverse their judgment. Is it admissible to do this? In *Simpson v. Commissioners of Mecklenburg,* 84 N. C., 158, a similar attempt was made to go be-

hind the determination of the commissioners as to the result of an election to ascertain the will of the voters, and it was said "that under the statute which requires the commissioners after examination of the returns to ascertain and declare the result, their decision upon the returns of an election regularly and properly held is *final and conclusive.* * * * Upon the fair and honest exercise of their judgment in determining the vote, the validity of the act is suspended, and its operation is not left to the uncertainties of a future inquiry." This is decisive of the point, and we can see no ground upon which the present case can be distinguished from that, except that in the latter the duty is prescribed in more explicit terms. They must act when the necessary number of qualified voters "shall by petition signify to the board of commissioners of Davie and Anson counties their approval of the provisions of this act." The commissioners must therefore ascertain and determine the fact when such approval is given, and this being declared, the law by its terms takes effect and they are to proceed to the execution of its commands. It is of the highest importance that laws should be known and certain, and when they are to go into operation upon some contingent event, that event should be conclusively settled and not left open to question by any suitor who may choose to contest the fact upon which its validity depends. This has been left to the decision of the commissioners, and their (15) decision ought to be and in our opinion is final.

The serious inconveniences and embarrassments that will follow the recognition of the right of the citizen to controvert the truth of the declared fact, are pointed out in the recent case of *Norment v. Charlotte*, 85 N. C., 387, and need no reiteration.

3. The method of taxation:

The constitution directs that taxes be imposed by a uniform rule upon moneys, credits and investments, and upon real and personal property according to its true value, (Art. V, Sec. 3,) and that such as are "levied by any county, city, town or township shall also be uniform and *ad valorem* upon all property therein." Art. VII, Sec. 9.

These restraints are referable to taxation of objects in which all have a common interest, and when disregarded render the levy invalid. *Young v. Henderson*, 76 N. C., 420, and cases cited. But there is a class of taxes, or as they are often designated, local assessments, which are imposed only upon those owners of property who in respect to such ownership are to derive a special benefit in the local improvements for which they are to be expended, and are not within the restraints put upon general taxation.

After enumerating various objects for which local assessments are made, such as opening streets, constructing levees, laying pipes for

drainage, Judge COOLEY remarks, that to warrant the levy of local assessments, there must not only exist in the case the ordinary elements of taxation, but the object must also be one productive of special local benefits, so as to make applicable the principles upon which special assessments have hitherto been upheld." Cooley Tax., 428.

Referring to provisions in the constitution of several states which require uniform and equal taxation on property, the same author says: "The view generally expressed is that though assessments are laid under the taxing power and are in a certain sense taxes,
(16) yet they are a peculiar class of taxes and *not within the meaning of that term, as it is usually employed in our constitutions and statutes.*" *Ib.*, 446.

"A constitutional provision that taxation shall be equal and uniform throughout the state," observes Mr. Justice DILLON, "does not apply to local assessments upon private property to pay for local improvements." 2 Dill. Mun. Corp., Sec. 617. To like effect, Burroughs Tax., Sec. 39.

In *Moore v. Stocker,* 1 Allen, 150, HOAR, J., lays down the rule in these words: "When the assessment is made upon persons in respect of their ownership of a particular species of property which receives a peculiar benefit from the expenditure of the tax, it is valid, although it does not operate upon all persons and property in the community." *Dargan v. Boston,* 12 Allen, 223.

In *People v. Mayor, etc., of Brooklyn,* 4 N. Y., 410, the court declared: "The amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty, and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation however for special purposes, the local benefits may in many cases be seen, traced and estimated with reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of this matter, being within the scope of its lawful power, is conclusive. "The reasoning in this case," is the comment of Judge COOLEY, "has been generally accepted as satisfactory, and followed in subsequent cases," which are referred to in the margin. Cooley Const. Lim., 506.

We can scarcely conceive a case more clearly within the compass of the rule than that now under consideration. The general law requires a sufficient fence to be built and kept up around all cultivated land to protect it from the depredations of stock, at a very great and
(17) unceasing expense, becoming the more onerous as the material used in its construction becomes scarcer and more costly. The enactment proposes to dispense with separate enclosures for each

man's land, and substitute a common fence around the county boundary to protect all agricultural lands from the inroads of stock from abroad, and the fencing in of stock owned within its limits. It creates a community of interest in upholding one barrier in place of seperate and distinct barriers for each plantation, and thus in the common burden lessens the weight that each cultivator of the soil must otherwise individually bear. As the greater burden is thus removed from the land owner, he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This and no more is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land-proprietor, as it is free from any constitutional impediments.

4. The excess over the limits of taxation:

From what has been said, this as well as the other provisions of the constitution which prescribe the mode of taxation, are not intended to be, and are not restraints upon the species of local assessments to which the present belongs But if it were, the objection is removed by the special approval of the general assembly given in the act itself. Const., Art. V, Sec. 6, interpreted in *Brodnax v. Groom*, 64 N. C., 244, and in numerous legislative acts.

In our opinion all the grounds upon which the court is asked to interpose and frustrate the execution of the enactment are untenable, and the injunction was properly refused.

We, therefore, declare there is no error, and sustain the ruling of his Honor. Let this be certified.

No error. Affirmed.

Cited: Shuford v. Comrs., 86 N.C. 554; *Smallwood v. New Bern*, 90 N.C. 40; *Comrs. v. Comrs.*, 92 N.C. 183; *Busbee v. Comrs.* 93 N.C. 148; *McDowell v. Construction Co.*, 96 N.C. 532; *S. v. Emery*, 98 N.C. 772; *Raleigh v. Peace*, 110 N.C. 38, 51; *Claybrook v. Comrs.*, 114 N.C. 461; *Bank v. Comrs.*, 116 N.C. 365; *Smalley v. Comrs.*, 122 N.C. 611; *S. v. Sharp*, 125 N.C. 632; *Black v. Comrs.*, 129 N.C. 126; *Harper v. Comrs.*, 133 N.C. 110; *Comrs. v. R.R.*, 133 N.C. 220; *Smith v. School Trustees*, 141 N.C. 148; *R.R. v. Comrs.*, 148 N.C. 235; *Sanderlin v. Luken*, 152 N.C. 741; *Tripp v. Comrs.*, 158 N.C. 186; *Gill v. Comrs.*, 160 N.C. 182; *Newell v. Green*, 169 N.C. 463; *Cottrell v. Lenoir*, 173 N.C. 144; *Gastonia v. Cloninger*, 187 N.C. 768; *Reed v. Engineering Co.*, 188 N.C. 43; *Saluda v. Polk County*, 207 N.C. 184; *Raleigh v. Bank*, 223 N.C. 298, 300.

(18)

COMMISSIONERS OF DAVIE COUNTY v. HARRISON COOK.

Appeal—Condemnation of Land—Jurisdiction.

1. No appeal lies from an interlocutory order appointing commissioners to assess damages for condemnation of land for a fence-way under the act of 1881, ch. 172.
2. Where a court of record of common law jurisdiction in the county in which the land is situate, is authorized to appoint commissioners to condemn the land for certain purposes, *it seems* that the judge riding the district in which said county is embraced, though not in the county, may exercise the jurisdiction.

APPEAL from an order made at Winston on May 17, 1881, in a case pending in DAVIE County, by *Seymour, J.*

The defendant appealed from an order appointing commissioners to assess damages for the condemnation of land, for the purposes set out in the opinion.

Mr. J. M. Clement, for plaintiffs.

Messrs. Watson & Glenn and Furches, for defendant.

SMITH, C. J. To carry out the directions of the act for the construction of a fence around the boundaries of Davie County, (which we have examined at the present term in the appeal in the case of Cain against the present plaintiffs) and in pursuance of notice served on the defendant, the plaintiffs applied to the judge holding the spring terms of the superior courts of the seventh district, at Winston, on May 17th, 1881, for an order appointing commissioners to view the lands of the defendant and assess his damages for the condemnation thereof for a fence-way along the county line. Acts 1881, ch. 172, secs. 10 and 11. The statute requires this to be done, "as land is
(19) now condemned for railroad purposes by the North Carolina railroad company," and the method of procedure is pointed out in section 17 of chapter 82 of the acts of 1848-49, incorporating that company. The commissioners are there required to be appointed "by any court of record having common law jurisdiction in the county where some part of the land or right of way is situated."

The constitution declares that "the superior courts shall be at all times open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury." Art. IV, Sec. 22. And we do not see any well founded objection to the exercise of this jurisdiction by the judge who may then be riding the district, though not in the county where it is exercised, that does not, in the attending

inconveniences, lie with equal force against his making interlocutory orders in pending causes. The change in our judicial system, and the necessary adaptation of laws enacted under the old to the condition and requirements of the new system of administration, seem to sustain the course pursued in the initial act of the present proceeding. But without deciding the point, since the appeal has in our opinion been improvidently taken, the cause is not regularly constituted in this court.

The clause in the charter of the company referred to, contains a proviso "that if any person or persons over whose land the road may pass, should be dissatisfied with the valuation of said commissioners, then and in that case, the person or persons so dissatisfied may appeal to the superior court," etc., contemplating an appeal to a higher jurisdiction only when the damages have been assessed and the court is called on to confirm the commissioners' report.

The proceeding for condemnation of lands for works of public improvements is intended to be summary and direct, and its useful purpose in facilitating the proposed work would be defeated, if the progress of the work could be arrested by an appeal wholly needless in this incipient stage, for the protection of any right (20) or interest of the unwilling land-holder. The very object of this prompt method of procedure in such cases is to avoid the delay and interruptions incident to an ordinary action, and promote the completion of the authorized public enterprise.

The case is not in principle distinguishable from that of *The Telegraph Co. v. The Railroad Company*, 83 N. C., 420, and as was then decided, so now we hold that the appeal of the defendant is premature, and must be dismissed.

PER CURIAM. Appeal dismissed.

Cited: Hendrick v. R.R., 98 N.C. 432; *R.R. v. Newton*, 133 N.C. 133.

WILLIAM GILCHRIST v. MARY A. KITCHEN.

Pleadings, Amendment of—Discretionary Power of Court.

The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with.

CIVIL ACTION to recover land tried at Fall Term, 1881, of ROBESON Superior Court, before *Graves, J.*

The summons in the case was returned to Spring Term, 1881, and the complaint was not filed until the fourth day of the term. No answer was filed by the defendant.

At the following fall term, the defendant having still failed to file an answer, the plaintiff moved for judgment for want of an answer, and at the same time the defendant moved to dismiss the action for the reason the complaint had not been filed within the first three days of the return term.

(21) His Honor overruled the defendant's motion, but sustained that of the plaintiff and gave judgment against the defendant for want of an answer, informing the plaintiff that no judgment for possession would be signed until it was shown to the court that the party upon whom the service of the summons was made, was in possession of the land sued for at the time of service thereof. The defendant then asked the court for leave to file an answer, which the court refused, upon the ground, that after the time which the law fixed, in which the answer must be filed, had fully elapsed, the court had no power to allow an answer to be filed.

The defendant then moved to make James A. Kitchen and his brothers and sisters parties defendant, and showed by her affidavit (upon which the motion was based) that they were in possession with her and were entitled to a homestead in the land, all being infants, and that she was only entitled to dower in said land, which had never been allotted, but the court refused the motion, and it being made to appear upon affidavit that the defendant was in possession of the land at the time the summons was served upon her, the court rendered judgment for possession and the defendant appealed.

Mr. John D. Shaw, for plaintiff.

Messrs. McNeill & McNeill, for defendant.

ASHE, J. It has been well settled in this state that no appeal lies to this court from the exercise of a discretionary power of the superior court. But if the exercise of a discretion by that court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of that court is reviewable.

In *Hudgins v. White*, 65 N. C., 393, it is held, "if a judge refuses to entertain a motion to set aside a judgment for any of the causes

(22) mentioned in section 133 of the Code, because he thinks he has no power to grant it, he fails to exercise the discretion confided to him by the law, and there is error.

To the same effect are *Winslow v. Anderson,* 19 N. C., 9; *State v. Locust,* 63 N. C., 574.

Section 133 of the Code and the act of 1868-69, amended by acts of 1870-71, ch. 42, and 1872-73, ch. 14, being *in pari materia* must be construed together. By the act of 1868-69 as amended, it is provided that "the plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit shall, on motion, be dismissed by the court at the cost of the plaintiff; and the defendant shall appear and demur, plead, or answer at the same term to which the summons is returnable, otherwise the plaintiff may have judgment by default, as is now allowed by law."

It is probable that it was in view of this provision of the law that his Honor held he had no power to allow the answer of the defendant to be filed, but there is nothing in the act of 1868-69, with its amendments, which takes away or in any degree impairs the discretionary powers given in section 133. By that section it is provided that the judge may in his *discretion,* and upon such terms as he may deem to be just, allow an answer or reply to be made, or other act to be done after the time limited by this act."

It was insisted by the defendant that this section applied only to the pleadings existing before the Code was suspended by the act of 1868, but we think that that act, with the amendatory acts, was an amendment of the provisions of the Code, and the section (133) applies to these, as it did to the original pleadings prescribed in the Code.

In the case of *Austin v. Clarke,* 70 N. C., 458, the defendant answered the complaint and the plaintiff demurred to the answer. His Honor sustained the demurrer; whereupon the plaintiff moved for judgment, and the defendant moved for time to file an amended (23) answer. The plaintiff's motion was refused and time given to defendant. BYNUM, J., speaking for the court, said: "The C. C. P. invests the court with ample powers, in all questions of practice and procedure, both as to amendments and continuances, to be exercised at the discretion of the judge presiding, who is presumed best to know what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of this discretion we cannot interfere, and it is not the subject of appeal."

But independent of the Code, we hold that the right to amend the pleadings of a cause and allow answers or other pleadings to be filed at any time, is an inherent power of the superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with.

How the discretion of his Honor should be exercised in this case we are not authorized to indicate an opinion, but we hold there was error

in his ruling, that he had not the *power* to allow the motion of the defendant. But before concluding we would suggest that the act suspending the Code was as much imperative upon the plaintiff to file his complaint within the first three days of the term, to which the summons was returned, as it was upon the defendant to file his answer during that term.

There is error. Let this be certified.

Error. Reversed.

Cited: Henry v. Cannon, 86 N.C. 25; *Long v. Logan,* 86 N.C. 537; *Reynolds v. Smathers,* 87 N.C. 27; *Clemmons v. Field,* 99 N.C. 402; *Brown v. Mitchell,* 102 N.C. 374; *Griffin v. Light Co.,* 111 N.C. 438; *Gwinn v. Parker,* 119 N.C. 19; *Woodcock v. Merrimon,* 122 N.C. 735; *Smith v. Smith,* 123 N.C. 233; *Cantwell v. Herring,* 127 N.C. 82; *Best v. Mortgage Co.,* 131 N.C. 70; *Bernhardt v. Dutton,* 146 N.C. 208; *Church v. Church,* 158 N.C. 565; *S. v. Casey,* 201 N.C. 628; *Hughes v. Oliver,* 228 N.C. 685; *Goldston Brothers v. Newkirk,* 234 N.C. 282; *Wheeler v. Wheeler,* 239 N.C. 649; *Exterminating Co. v. O'Hanlon,* 243 N.C. 466.

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(24)

R. M. HENRY v. R. H. CANNON.

Judge's Discretion—Pleading.

Allowing or refusing amendments to pleading is a discretionary matter and not reviewable on appeal.

MOTION to amend an answer, heard at Fall Term, 1881, of MACON Superior Court, before *McKoy, J.*

The original complaint and answer were filed at Spring Term, 1873. At Fall Term, 1881, the defendant moved for leave of the court to amend his answer by adding the following plea: "That the claim or pretended claim of the plaintiff, upon which the action was brought, accrued more than three years before the bringing of his suit, and is barred by the statute of limitations."

It appeared that a similar motion had been made and refused at a former term of the court, and his Honor refused to allow the amendment, from which ruling the defendant appealed.

Mr. G. M. Smedes, for plaintiff.

No counsel for defendant.

ASHE, J. We had supposed that questions like that presented in this record for our consideration had been too well settled by repeated adjudications to be the subject of appeal at this day. But as the case has been brought before us, we proceed to cite some of the cases in which the question has been decided, lest by the omission to do so we might be thought wanting in respect to the member of the profession who took the appeal. In *Johnson v. Rowland,* 80 N. C., 1, which (25) was an application to the court by the defendant to be allowed to file the plea of set-off or counterclaim at the trial, the court held that the reception of the plea was a matter addressed to the discretion of the court, and not matter of absolute right in the defendant. Defendant having failed to make his defence in the justice's court, he could do so only at the discretion of the judge in the appellate court, and the rejection or reception of the plea was altogether a matter of discretion which this court could not review.

And again in *Austin v. Clarke,* 70 N. C., 458, BYNUM, J., speaking for the court, said: "The C. C. P. invests the court with ample powers in all questions of practice and procedure both as to amendments and continuances, to be exercised at the discretion of the judge presiding, who is presumed best to know what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of this discretion we cannot interfere, and it is not the subject of the appeal." C. C. P., Sec. 133; *Hinton v. Deans,* 75 N. C., 18; *State v. Lamon,* 10 N. C., 175; *Cannon v. Beemer,* 14 N. C., 363; *Bright v. Sugg,* 15 N. C., 492; *Phillipse v. Higdon,* 44 N. C., 380; *Ingram v. McMorris,* 47 N. C., 450; *Henderson v. Graham,* 84 N. C., 496; *Gilchrist v. Kitchen, ante,* 20.

We have cited all of these authorities upon the discretionary power of the courts in allowing or refusing amendments, hoping it may now be considered a "settled question."

There is no error. The case is not reviewable in this court, and the appeal must be dismissed.

No error. Affirmed.

Cited: Long v. Logan, 86 N.C. 537; *Wiggins v. McCoy,* 87 N.C. 500; *Brooks v. Brooks,* 90 N.C. 144; *Bank v. McElwee,* 104 N.C. 307; *Sheldon v. Kivett,* 110 N.C. 411; *Brendle v. Reese,* 115 N.C. 552; *Johnson v. Telegraph Co.,* 171 N.C. 131; *S. v. Sauls,* 190 N.C. 813.

(26)

MILLER AND GREEN v. W. T. JUSTICE.

Decree—Power of Court to Change.

An interlocutory decree may be modified or rescinded during the pendency of the suit, upon sufficient grounds shown, to meet the justice and equity of the case.

MOTION heard at Special Term, 1881, of BUNCOMBE Superior Court, before *McKoy, J.*

The defendant appealed.

Messrs. C. A. Moore and H. B. Carter, for plaintiff.

No counsel for defendant.

ASHE, J. The action in which the motion is made, was brought by the plaintiffs, J. M. Miller and William Green, against W. T. Justice and David P. Welch, to the Spring Term, 1879, of Buncombe superior court. The parties above named, on the 21st day of August, 1876, entered into a co-partnership in writing to build a saw and grist mill on a certain creek in the county of Buncombe, on a lot of land belonging equally to the parties, without limit to the time of its continuance; each of them by the said articles of co-partnership agreeing to furnish one-fourth of the capital stock, either in money or labor, necessary to complete said mills, and share equally in the profits and losses according to their respective shares.

Welch, not long after the formation of the co-partnership, sold out his interest to J. M. Miller, who thereby became the owner of one-half of the stock of the company.

After commencing work on the mills, the partners soon disagreed about the advancements which each had or should make accord-
(27) ing to the "articles of partnership," to carry on the work. From misunderstandings, bad feelings and mutual complaints ensued. The one side charged the other with fraud, keeping false books, applying the partnership property to private uses, and obstructing the other members in the enjoyment of the property; while the latter charged the others with withholding their stipulated contributions to the construction of the mills, and misappropriation of the profits to private purposes. There were criminations and recriminations, and things went from bad to worse until the parties came to blows, and each side charged the others with continued threats of violence. So that a state of things was brought about wholly destructive of that unanimity and consort of action which is so essential to the success of a joint enterprise.

All of which resulted in a dissolution of the co-partnership by the plaintiffs, by their giving to the defendant the following notice, dated February 10th, 1879:

To W. T. Justice: You are hereby notified of our withdrawal from the partnership in the mill property jointly owned by us with yourself. You are also further notified that it is our intention to bring a suit against you for a settlement and winding up our said partnership at the very earliest practicable moment. (Signed J. M. Miller and Wm. Green.)

Very soon thereafter this action was brought and the pleadings alleged the facts substantially as above recited.

The plaintiffs in their complaint prayed that an account might be taken, and that the property might be sold under the direction of the court. The defendant, after recriminations upon the plaintiffs as aforesaid, and denying the charges of keeping false books or other fraudulent practices, consented to an account, and a sale of the property after the account should be taken and the report of the commis- (28) sioner confirmed.

In pursuance of this consent of parties, his Honor, Judge Shenck, at Spring Term, 1880, of said court, rendered the following decree: "This action coming on to be heard, and being heard, it is by consent of parties referred to Messrs. A. T. Simmons and J. E. Rankin with power to choose a third person to act with them in case they cannot agree between themselves, to take and state an account of the partnership dealings between the plaintiffs and defendant in this action, and report the same to the next term of this court. That they shall show in their said report the amount due from each to the other, together with what interest each partner has in the partnership property. It is also by consent adjudged and decreed that the land and mills mentioned and described in the pleadings in this action, be sold at public sale at the court house door in the town of Asheville and county aforesaid, after thirty days' advertisement at the said court house door and at three or four other public places, for ten per cent of the bid in cash, the remainder at six and twelve months' credit, secured by notes and good security, with interest from date of sale till paid, in two equal instalments. Title to be retained until the purchase money is paid. That Foster A. Lindly be and he is hereby appointed a commissioner to make such sale, according to the terms as hereinbefore mentioned, and to report his proceedings to the next term of this court. The parties hereto shall be allowed to purchase at said sale, in case they or either of them may see proper to do so. And they or either of them shall be entitled to a credit on the bid so made, of the amount to be due them or either of them,

upon the account to be taken by the referee above named, when the same is confirmed by the court; and it is further adjudged and decreed that the costs of this action shall be equally paid by the parties hereto, excepting D. P. Welch, who is to pay no costs. The sale not to
(29) take place until the report of the referees is filed and confirmed by the court."

No account was taken by the referees. It appears from the affidavit of J. E. Rankin, one of the referees, that they never appointed but one day for taking the account, which was agreed to by all the parties, and that was fixed upon by their consent, and on said day the parties met and notified the referees that they had by consent postponed the taking the account, and thereupon the referees caused it to be postponed, and had never since been applied to by either side to set a day for taking the same.

Each party laid the fault at the door of the other, but it was needless to inquire who was to blame for the miscarriage in taking the account.

The plaintiffs moved the court to order a sale without waiting for the report of the referees, upon the ground that the property was daily decreasing in value for the want of attention, and its exposure to the weather in consequence of its incomplete condition, and the insufficiency of the profits to meet the needful repairs.

They proved these facts by the testimony of several witnesses, and it was not denied by the defendant, Justice.

Green, one of the plaintiffs, stated in his affidavit filed in support of the motion for an immediate sale, that the property was, and had been for some time in a very bad condition on account of the grist and saw mill fixtures being exposed to the inclemency of the weather, there being no roof over either mill except a few loose planks that partially covered them.

The affidavit of S. F. Young states that he was well acquainted with the property in question, and that there was no shelter to protect the same from the weather except a few loose planks immediately over said mills, and that on account of the condition of the property, in his
(30) opinion, the rents and profits were insufficient to pay for repairs and keep the mills in running order.

D. P. Welch, who was originally one of the stockholders, testified that the property was exposed to the inclemency of the weather and in such a state of dilapidation that in his opinion the interest of all parties concerned would be promoted by an immediate sale of the same; that the mills were only covered with a few loose planks, and that in his opinion the rents and profits of the property in its then condition would not keep the same in repair and in running order.

The affidavit of the plaintiff, Miller, was to the same effect as to the constant deterioration in value of the property, in consequence of its roofless and exposed condition.

Upon the motion of the plaintiffs and consideration of the facts set forth in the above affidavits, which were uncontradicted, his Honor, Judge McKoy, at the Special Term, 1881, of the superior court of Buncombe County, ordered and decreed as follows: "Upon notice it is ordered that the sale of the premises described in the pleadings be made upon the terms and conditions of the decree of sale hereinbefore filed, as soon as may be, according to the requirements of said decree, and that the said sale do not await the taking of the account between the parties, and that the funds arising from said sale be held subject to the said account."

This decree was excepted to by the defendant, Justice, upon the ground the court had no power to change or modify the decree rendered in the case at the Spring Term, 1880. But the decree was interlocutory, and it was clearly in the power of the court to modify it at any time to meet the justice and equity of the case, upon sufficient grounds shown for the same. In *Worth v. Gray,* 59 N. C., 4, it is held: "The orders and decrees of a court of equity are not necessarily absolute, but may be moulded and shaped during the pendency of the suit to meet the exigence of each particular case; and in *Ashe v. Moore,* 6 (31) N. C., 383, it was decided that every order made in the progress of a cause, may be rescinded or modified upon a proper case being made out. To the same effect is *Shinn v. Smith,* 79 N. C., 310.

The affidavits laid before Judge McKoy in support of the motion for an order of immediate sale of the partnership property, were amply sufficient to warrant the modification of the decree of Spring Term, 1880.

There is no error. Let this be certified to the end that the superior court of Buncombe may proceed with the sale of the property described in the pleadings, without further delay, upon the terms prescribed in said decree, and that the account may be taken as the court may direct.

No error. Affirmed.

Cited: Welch v. Kingsland, 89 N.C. 181; *Maxwell v. Blair,* 95 N.C. 321; *Russ v. Woodard,* 232 N.C. 41.

MARY W. HAVENS v. WILLIAM A. POTTS.

Notes and Bonds—Negotiable Instruments.

The assignee of non-negotiable paper succeeds only to the rights of the assignor, and is affected by all the defences against him at the date of the assignment or before notice thereof.

CIVIL ACTION tried at Spring Term, 1881, of BEAUFORT Superior Court, before *Gilmer, J.*

The plaintiff declares as the endorsee of the following bond: "On the first day of January, 1862, we or either of us promise to pay George A. Latham or order the sum of one hundred and fifty dollars for the hire of negro man John, and we further agree to furnish said
(32) negro with all the usual summer and winter clothing and to pay his town tax. (Signed and sealed the 4th day of January, 1861, by William A. Potts and Joseph Potts.") The bond was indorsed, "Pay to the order of Mary W. Havens." (Signed by George A. Latham.)

The execution of the bond and its endorsement to plaintiff were not denied, but the defendant relied upon the plea of "set-off."

In support of the plea the defendant alleged, and the jury so found, that in 1859, George A. Latham, the payee of the bond sued on, executed his note, to one Blount for $175, which was indorsed by said Blount to Joseph Potts in 1860, and by him indorsed to the defendant before the commencement of this action, and before any notice to him of the assignment to the plaintiff of the bond sued on. Upon these facts, the same being either admitted or found by the jury, the court gave judgment for the defendant, from which the plaintiff appealed.

No counsel for plaintiff.
Messrs. J. E. Shepherd and G. H. Brown, for defendant.

RUFFIN, J. We think the judgment clearly right. The bond sued on, not being for money only, is unnegotiable. *Knight v. Railroad Company,* 46 N. C., 357.

One who takes by assignment an unnegotiable instrument succeeds only to the rights of his assignor, and is affected by all the defences against him, which subsisted at the date of the assignment, or may have accrued *before notice thereof* to the maker. *Moody v. Sitton,* 37 N. C., 382; *Bank v. Bynum,* 84 N. C., 24, and C. C. P., Sec. 55.

The language of this section of the Code is so broad, says Chief Justice PEARSON—evidently in great dissatisfaction with its provisions—that a note several times assigned after it is due (and an unnegotiable one stands on the same footing exactly) will be subject to any

set-off, or other defence, that the maker had against any one (33) or all of the assignees, at the date of the assignment, or before notice thereof. *Harris v. Burwell,* 65 N. C., 584.

No error. Affirmed.

Cited: Spence v. Tapscott, 93 N.C. 249; *S. v. Hargrave,* 103 N.C. 334; *Rice v. Hearn,* 109 N.C. 151; *Trust Co. v. Trust Co.,* 190 N.C. 471; *Iselin & Co. v. Saunders,* 231 N.C. 647.

ADAM TREDWELL v. THOMAS H. BLOUNT.

Notes and Bonds—Negotiable Instruments.

1. A negotiable note endorsed before maturity, is not subject in the hands of the endorsee to a set-off in favor of the maker of a debt due by the payee at the time of making the note.
2. The law presumes that the holder of such paper is the owner, and took it for value and before dishonor, and that an undated endorsement of the same was made at the date of the note.

CIVIL ACTION, tried at Spring Term, 1881, of BEAUFORT Superior Court, before *Gilmer, J.*

The plaintiffs (Tredwell & Mallory, partners in trade,) declared as endorsees of a promissory note which is as follows: "On the first day of November, 1879, I promise to pay to the order of J. Rosenthal, the sum of two hundred and twenty-eight $^{25}/_{100}$ for value received." (Dated January 20th, 1879, at Washington, N. C., and signed by Thomas H. Blount.)

They allege in their complaint that Rosenthal, the payee of the note, on the 21st day of January, 1879, assigned the same to them for value, and that no part of the same has been paid.

The defendant in his answer denied the assignment, and especially that it was made before the maturity of the note, and for a further defence alleged, that Rosenthal, the payee, was indebted to him at the time of making the note, and is still indebted to him in the sum of one hundred and thirty dollars, with interest thereon from January 2nd, 1879, for cotton sold and delivered by defendant to Rosen- (34) thal at said time, and which Rosenthal promised to pay on demand, but failed to do so. It was admitted upon the trial, that Rosenthal was indebted to the defendant as alleged in the answer.

The plaintiffs proved that the endorsement on the note was in the handwriting of Rosenthal, the payee, and then offered in evidence a letter written by Rosenthal to Tredwell & Mallory, dated Washington, N. C., January 21st, 1879, purporting to send to them a note on Thomas Blount, payable to said Rosenthal for $228.25. It was proved that this letter was in the handwriting of Rosenthal, and also proved by Jas. E. Shepherd that Adam Tredwell, one of the plaintiffs, handed him the letter, with the note sued on enclosed.

The admission of the letter was objected to by the defendant, but the objection was overruled and the letter received in evidence by the court, upon the ground, as stated by his Honor, that it was a circumstance showing that Rosenthal wrote a letter of that date, referring to a note enclosed of the description of the one sued on, as bearing upon the date of assignment. The defendant excepted, and contended:

1. That there was no evidence of assignment before due, and that the note was subject to the set-off claimed.

2. That there was no evidence of a good consideration for said assignment, which plaintiffs must affirmatively prove.

3. That the court erred in allowing the introduction of the letter, and that the declarations were incompetent evidence, to show a good consideration.

4. That the court allowed proof as to the reception of the letter, only as a circumstance to show the assignment; the declarations of the letter were not competent evidence, under that ruling, and that throwing out the declarations of the letter, there was no evidence of a good consideration.

His Honor held that the law presumed a consideration, and that no proof was necessary. There was judgment for the plaintiffs, and the defendant appealed.

(35) *Mr. J. E. Shepherd, for plaintiffs.*
Mr. G. H. Brown, Jr., for defendant.

ASHE, J. There is no error in the ruling. The evidence of the letter offered by the plaintiffs and objected to by the defendant, was totally immaterial, for as the court held, the law presumed every fact, for the proof of which, the letter was offered in evidence.

The note was a negotiable paper, and there is a *prima facie* presumption of law in favor of every holder of a negotiable paper, to the extent, that he is the *owner* of it, that he took it for *value and before dishonor,* and in the regular course of business. Parsons on Notes and Bills, p. 255, and the references to cases cited in notes S. T. and U. And in Daniel on Negotiable Instruments, Sec. 728, the same doctrine is enun-

ciated in the following language: "If the endorsement of a bill or note be undated, it will be presumed, when the paper is in the hands of a third party, to have been dated at the time of the execution, or at least before maturity and dishonor. It is difficult to see how a more definite presumption, than that the endorsement before maturity can be sustained, and this seems all that is necessary to the protection of commercial paper. As was said in *Ranger v. Carey*, 1 Metc., 369, a negotiable note being offered in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due, and if the defendant would avail himself of any defence that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was over due."

The note having been indorsed before its maturity, the defence of set-off relied upon by the defendant cannot avail him.

There is no error. The judgment of the superior court is (36) affirmed.

No error. Affirmed.

Cited: Lewis v. Long, 102 N.C. 208; *Southerland v. Fremont*, 107 N.C. 569; *Bank v. Burgwyn*, 108 N.C. 63; *Farthing v. Dark*, 111 N.C. 245; *Barden v. Hornthal*, 151 N.C. 10; *Bank v. Drug Co.*, 152 N.C. 145; *Bank v. Walser*, 162 N.C. 60; *Bank v. Wilson*, 168 N.C. 559.

JOHN J. ROWLAND v. GEORGE L. WINDLEY, ADM'R.

Notes and Bonds—Presumption of Payment, Evidence to Repel.

1. Proof offered to repel the presumption of payment of a bond from lapse of time, must, in order to be effectual, run through the entire period of ten years next after the maturity of the debt; Therefore in a suit on the bond of an intestate executed and payable in 1854, evidence of the administrator that he had not paid it after his qualification in 1859, is not sufficient.
2. And evidence of a joint obligor that he had not paid it, is also inadmissible to repel such presumption.

CIVIL ACTION tried at Spring Term, 1881, of BEAUFORT Superior Court, before *Gilmer, J.*

This action commenced on the 12th December, 1877, in a court of a justice of the peace, and is brought by successive appeals to this court. The plaintiff declares upon a bond for two hundred dollars, executed to Horace Oden, by defendant's intestate (James S. Camp-

bell), and Samuel B. Latham, on the 10th day of October, 1854, and payable one day after date—which bond had been indorsed to plaintiff. Amongst other defences the plea of payment was relied upon, and to rebut a presumption thereof the plaintiff proved by the defendant, who qualified as the administrator of his intestate in September, 1859, that he had not paid the bond since that date. He also offered to prove by a witness that the other obligor (Latham)
(37) had admitted to the witness, since the action begun, that he had never paid it, but upon objection this evidence was excluded. There being no other evidence, the court held that the presumption was not sufficiently rebutted, and thereupon the plaintiff submitted to a non-suit and appealed, assigning as error this ruling of the court, and the exclusion of the testimony as to the admission of the co-obligor Latham.

Mr. J. E. Shepherd, for plaintiff.
Mr. G. H. Brown, for defendant.

RUFFIN, J. There can be no question, we think, as to the correctness of his Honor's ruling. Relying upon the decisions heretofore made in *Buie v. Buie*, 24 N. C., 87; *Walker v. Wright*, 47 N. C., 156, and *Woodhouse v. Simmons*, 73 N. C., 30, it was recently held in the case of *Grant v. Burgwyn*, 84 N. C., 560, that the presumption of payment, arising under the statute, from the lapse of time, is one which the law makes, and gives to it such artificial weight, that whenever the facts are known, the court must apply it as a legal intendment; and so, too, that the question of its rebuttal is one of law, and as such, to be decided by the court, whenever the facts are ascertained.

His Honor, therefore, properly assumed the duty of determining the question in this case, there being no conflict in the testimony bearing upon the point.

In the same case, relying upon the authority of *Powell v. Brinkley*, 44 N. C., 154, it was said, that the presumption of payment under the statute, unlike that which is raised, by law, of the death of a party from a continued absence of seven years, has reference to the *particular time at which the debt became due*, and that anything offered to repel the presumption—whether it be proof of insolvency or of actual non-payment—must, in order to be effectual, run through the
(38) entire period of ten years next after the maturity of the debt.

This view of the law is clearly supported by the case of *McKinder v. Littlejohn*, 26 N. C., 198, though at first glance, it may seem not to be so. There, the debt was contracted in this state, but the debtor being insolvent soon removed to Mississippi—more than a

thousand miles distant—where he resided until his death, many years afterwards. His administrator being sued for the debt, pleaded payment and relied upon the statute, which the plaintiff undertook to repel, by showing the insolvency of his intestate. The proof was, that he was in destitute circumstances, during the whole of his sojourn in Mississippi, except for an interval of eighteen months, at one time, when he had possession and seemed to be the owner of property sufficient in value to satisfy the debt. It was thereupon insisted, that his was not a case of *continuous insolvency,* running through the entire time, since the debt became payable, and hence insufficient to repel the presumption. The court made the case turn upon the *distance* which separated the creditor and debtor, and the improbability of the former's having notice of an improvement in the latter's condition, which lasted only eighteen months out of twenty years, and held that these circumstances were properly left to the consideration of the jury, as somewhat in aid of the debtor's general insolvency and destitution, and therefore they refused to disturb a verdict in favor of the plaintiff.

As said by Mr. Justice RODMAN in *Woodhouse v. Simmons, supra,* it is difficult to see how a ruling—going even that far—could be consistent with the true theory of a statutory presumption, having an artificial and technical weight. But be that as it may, it is manifest that without those additional circumstances—make-weights as it were—the court would have held that a break in the debtor's insolvency, extending only over so short a space of time as eighteen months, out of twenty years, would have defeated the plaintiff's effort (39) to get rid of the legal presumption.

In the present case, there is no pretence of any inability to pay the debt, on the part of the defendant's intestate, and nothing looking to its non-payment, by him, for the first five years after it matured. That his administrator, or co-obligor, had not paid it, afforded no room for an inference that he had not done so. Indeed, the fact that he had paid it may have been the very reason why they had not been required to do so.

If the joint obligors to an instrument are thus allowed to operate on one another, and because one has not paid to beget an inference of a like failure on the part of the other—and so *vice versa*—it would be impossible ever to raise the presumption, except in the case of a bond with a single obligor. Upon the ground if its inutility, it might be questioned whether under the circumstances of this case, direct proof of the non-payment by the joint obligor, Latham, would have been admissible—and very certainly *hearsay* evidence on that point was not competent. The declarations of one man are never

competent against another, if made without the sanction of an oath, and the opportunity for cross-examination. *Murphy v. McNiel,* 19 N. C., 244.

No error. Affirmed.

Cited: Grant v. Gooch, 105 N.C. 281; *Cox v. Brower,* 114 N.C. 424.

THOMAS G. PUGH v. J. W. GRANT, ADM'R.

Notes and Bonds—Negotiable Instruments—Evidence—Burden of Proof—Competency of Witnesses at Common Law.

1. The possession of negotiable paper by an endorsee, whether past due or not, is a *prima facie* presumption that he is the true owner, and for value; and the burden of proof to rebut this presumption is upon him who alleges any defect in the title.
2. But upon proof of fraud or illegality being offered, the burden is shifted to the holder, and he must show that he received it *bona fide* for value.
3. The assignee of a bond after its maturity, holds it subject to every defence existing between the assignor and the maker at the date of the assignment and before notice thereof, and hence the finding in this case that the assignment was not made in good faith and for value is immaterial.
4. The effect of the act of 1879, ch. 183, amending section 343 of the Code, is to restore *all* the common law rules of evidence, applicable to a suit on a bond executed prior to August, 1868.
5. And by the common law, all parties to an action and those having a direct legal interest in the event thereof, were excluded as witnesses, except where the interest of the person offered was equally balanced; and coming within this exception is an endorser of a note, who is a competent witness for either party in a suit between his endorsee and the maker.

(40) CIVIL ACTION tried at Spring Term, 1880, of NORTHAMPTON Superior Court, before *Gudger, J.*

This action was begun in a justice's court, and brought by the appeal of the plaintiff to the superior court. In both courts the pleadings were oral, and so intricate as to make it somewhat difficult to state them intelligently.

The plaintiff declared as indorsee of two bonds executed by the defendant's intestate to one John A. Vincent, and by him indorsed to the plaintiff. The bonds were both payable on demand—one being for $51.88, dated the 5th day of January, 1861, and indorsed the 15th day of April, 1875, and the other for $100, dated the 4th March, 1861, and indorsed the 15th day of April, 1876.

The defendant denied the title of the plaintiff to the bonds, and alleged that there was fraud in their indorsement, and by way of set-off and counterclaim, he pleaded certain bonds, in all (41) amounting to $1,000, which the plaintiff's assignor was owing to his intestate, and a further sum of $463.73 which defendant as administrator had paid to use of said assignor, prior to the alleged indorsement on a note in which he and the defendant's intestate were jointly bound.

In reply, the plaintiff denied the fraud alleged, and pleaded accord and satisfaction of the claims against his assignor, attempted to be set up in defendant's plea of set-off and counterclaim.

In turn, the defendant denied that there had been any accord and satisfaction of said claims, and alleged fraud on the part of the plaintiff's assignor in procuring the instrument purporting to be such (which instrument is referred to in the case as exhibit "C.") This allegation of fraud the plaintiff denied.

At the trial two issues were agreed to by counsel and submitted by the court:

1. Were the bonds in action assigned as alleged in good faith and for a valuable consideration?

2. Was the agreement marked "C" procured from defendant by the plaintiff's assignor (Vincent) with intent to defraud intestate's estate, by concealing from the defendant the fact that he had in his possession, or had recently transferred to the plaintiff, the bonds sued on?

In support of the first issue, the plaintiff, after putting in evidence the bonds sued on, and the indorsements thereon, read the deposition of his assignor, Vincent, going to show that the indorsements were truly made at the times they respectively bear date, to-wit, the 15th April, 1875, and the 15th April, 1876, and that the consideration of their transfer to plaintiff was a debt due from the witness to the plaintiff, and the sum of twenty dollars paid him in cash at the time of the transfer.

As tending to show fraud in the assignment of the bonds to plaintiff, the defendant proved that the plaintiff was a brother- (42) in-law of his assignor, Vincent, who was at the time in failing circumstances, and that no one was present at their settlement, and no memorandum thereof made, or receipt taken. That the plaintiff himself had no visible property, being a clerk in a store at a salary of $65 per month, with a family to support, and that very soon after the transfer of these bonds, the said Vincent conveyed to the plaintiff all his real estate situate in North Carolina.

Upon this issue his Honor instructed the jury, "that the question was whether the assignment of the bonds was an honest transaction? If that was so, and they should find that money, or money's value, was paid as the consideration of such assignment, its amount, unless grossly inadequate, was immaterial; *but that the burden of proof was upon the plaintiff to establish this issue.*"

Under the second issue, the plaintiff offered in evidence the writing marked "C," which is as follows: "Feb'y 10th, 1877—Rec'd of J. B. Vincent the sum of $238.48, being the amount of three notes and interest, held by the said J. B. Vincent against the estate of James Vincent, to be applied to the credit of the said J. B. Vincent on bonds I hold against him, due the said James Vincent, and when the said J. B. Vincent surrenders to me an account he holds in favor of Pugh & Vincent, I agree then to give him a discharge from any claim that may be due from him to the said James Vincent"—which paper, it is admitted, is signed by the defendant, as administrator; and he showed by the deposition of J. B. Vincent the circumstances under which it had been executed. He also offered to prove, by reading the same deposition, the nature and extent of the witness' indebtedness to the defendant's intestate, and that the money which defendant claimed to have paid to his use, was not in fact so, for that while he and said intestate had been partners, and the note, upon which said payment was made, was given in their firm name, still it was for a
(43) debt of said intestate, and the witness was, by agreement between them, to be bound only as surety. This evidence was objected to by the defendant at the time the deposition was taken, and the objection renewed at the reading thereof, upon the ground that the witness was incompetent under section 343 of the Code, to speak of a transaction or communication with his deceased partner, and upon that ground the evidence was excluded.

The defendant then offered evidence in support of his plea of set-off and counterclaim.

Upon the second issue his Honor instructed the jury that "where a contract is made between two parties, and any fact material to the consideration moving said contract is exclusively in the knowledge of one of said parties, it is the duty of such party to make known such fact, and if he intentionally fails to do so, it is a fraud upon the other contracting party," and further, that it was a question of fact for them to determine, whether there was such a concealment of any material fact in this case, and that the burden of proof under this second issue was upon the defendant.

To the first issue the jury responded in the negative; and to the second they said, that the agreement marked "C" was procured from

the defendant by the plaintiff's assignor, with the intent to defraud the estate of his intestate.

After judgment for the defendant the plaintiff appealed, assigning as errors: 1. That his Honor erred in instructing the jury that the burden of proof to support the first issue was upon the plaintiff; whereas he should have told them that it was for the defendant to show, by a preponderance of testimony, that the plaintiff had used fraud in procuring the indorsement of the bonds to himself. 2. That he erred in excluding the testimony of the witness, Vincent, as to the nature of his alleged indebtedness to the estate of the defendant's intestate. 3. That he erred in not explaining to the jury, in his charge upon the second issue, what should be considered by them as (44) material to the consideration of the contract—the only alleged fraud being the failure on the part of the assignor, Vincent, to inform the defendant of the fact that he had transferred the bonds sued on, when he entered into the agreement set forth in the exhibit "C."

Mr. Thomas W. Mason, for plaintiff.
Mr. R. B. Peebles, for defendant.

RUFFIN, J., after stating the case. If the first issue, and his Honor's charge with reference to it, stood alone in the cause, we should unquestionably sustain the defendant's first exception.

As we interpret that portion of the charge, and as we think the jury must have understood it, its effect was to throw upon the plaintiff, suing as the endorsee of negotiable bonds, the burden of establishing affirmatively, not only the genuineness of their indorsement, but that he acquired them *bona fide*, and for a valuable consideration.

Conceding that, in the existing state of the pleadings, the burden of proving *the fact* of the endorsement did rest upon the plaintiff (though that, we think, by no means certain) our understanding of the law is, that upon the production of the instruments, accompanied with such proof as entitled him to read in evidence the endorsements thereon, there was a *prima facie* presumption in his favor, to the extent, that he was the true owner, and that he took them for value. It is a presumption that in a proper case might be rebutted, but the burden of the proof would undoubtedly lie upon the person who might allege any defect in his title. In 1 Daniel on Neg. Inst., Sec. 812, the law is thus stated: "The mere possession of a negotiable instrument produced in evidence by the endorsee, imports *prima facie* that he acquired it *bona fide* and for value, and that he is the owner thereof. In other words, the production of the instrument and (45) proof that it is genuine (when indeed such proof is necessary),

prima facie establishes his case, and he may there rest it." And in *French v. Barney*, 23 N. C., 219, this court held that there was an implication of law in favor of every holder of a negotiable note, until something be shown to the contrary, that he gave value for it, and came fairly and rightfully by it. And to the same effect is 1 Parsons on Notes, 255, and the case of *McArthur v. McLeod*, 51 N. C., 475.

In this respect the law makes no discrimination between notes overdue and those not due at the time of assignment, and neither should it. For, if allowed to be negotiated at all, the circulation of past due notes should be upheld by the same presumption in favor of the *title* of the holder, as exists in case of instruments of the other sort. To this rule in favor of the holder of a negotiable instrument, an exception is made when there was any fraud or illegality in its inception. Upon such proof being offered, the holder is required to show that he acquired it *bona fide* for value, there being at such a juncture, says Daniel at Sec. 815, "a shifting of the burden of proof from the defendant to the plaintiff." In the present case, there is no pretence of any fraud practiced at the execution of the bonds sued on, and no suggestion of any illegality in their original consideration—so that it came strictly within the general rule.

But conceding this to be so, and that there was error, it still remains to be determined how far it was made immaterial and harmless, by reason of the finding of the jury upon the other issue.

Becoming the owner of the bonds after their maturity, the plaintiff holds them subject to every defence, whether of set-off or equity, existing between his assignor and the defendant, at the date of the assignment, or before notice thereof given. He stands in the shoes of his assignor, just as if the action were brought in his name, and cannot,
(46) any more than he could, avoid the consequences of the fraud, which the jury have said was used in procuring the settlement (exhibit "C"), wherein the claims, relied on to support the defendant's plea of set-off, were attempted to be adjusted. It is therefore, manifestly, immaterial upon what consideration, or with what intent, he procured the assignment of the bonds. So long as the second finding of the jury stands, he cannot succeed in his action, and hence, as it seems to us, the first issue, itself, was unnecessary, and without any decisive bearing upon the real merits of the case. If so, then, no error committed in connection with it could be of such weight as to justify the court in disturbing the verdict and judgment, on account of it.

Thus it becomes necessary that we should consider the other branch of the case. And here as we conceive, an error was committed in excluding the testimony of the witness, Vincent, in explanation of the

claims against him, held by the defendant, and sought to be used as set-offs against the plaintiff—even though the inquiry with regard to them should embrace transactions, or communications, between the witness and the defendant's intestate.

There can be no question made, but that under section 343 of the Code, as it originally stood, the witness, while competent generally, would have been incompetent as to these particular transactions. Indeed, being the "assignor of the thing in controversy" he was excluded by the very terms of the proviso to that section, as against the defendant administrator. But the question is, as to the effect upon his competency under the act of 1879, ch. 183, adopted as an amendment to that section. By that act it is provided in substance that no person who is a party to an action founded upon a bond to pay money, executed prior to August, 1868, shall be a competent witness, *but that the rules of evidence in force when said bond was executed shall be applicable to said suit.* For the defendant it is insisted, that this latter clause of the statute should not be construed literally, (47) and so as to restore *all* the rules of evidence, which obtained at the date of the execution of the bonds sued on, but only such as had reference to the competency, or incompetency of *parties to actions.* His argument is, that the statute was intended to be a disabling act—declaring incompetent some who, under the original section, were competent, and that to give a larger signification to the words of its latter clause, would convert it into an enabling statute, and thus defeat its primary intention. There seems to be much force in this course of reasoning, and were the terms of the statute *in the least,* less certain and precise than they are, we might, and in fact would feel at liberty to yield to it our concurrence; but courts ought not to resort to interpretation (which at last is but conjecture) when there can be no need for it because of the certainty of the language used in a statute.

The true rule for construing a statute, and we may say the only honest rule, for a court really seeking to observe the will of the legislature, is, to consider and give effect to the natural import of the words used. If they be explicit and express a clear definite meaning, then that meaning is the one which should be adopted, and no effort should be made by going outside of the words used, to limit or enlarge its operation. Above all, is it not to be presumed that the legislature intended any part of a statute to be inoperative and mere surplusage, and yet such must be our conclusion with reference to this particular clause, if we should interpret it as suggested for the defendant. The rules of evidence in force at the date of the execution of the bonds declared on, were those of the common law, and with reference to *parties,* that law has but one rule, which is, to exclude them

all as being incompetent. Now, that much was accomplished by the first clause in the act of 1879, by a clear declaration that no
(48) party to an action, based upon a bond executed before a given date, should be a competent witness, and if we should give no other operation than this to its latter clause, it would be simply to pronounce it redundant and meaningless.

Guided then by the only legitimate rule, we feel constrained to give to the statute, and every part thereof, just that meaning which its unambiguous words import, and to hold its effect to be to restore the whole law of evidence applicable to the subject as it stood in 1861, when the bonds sued on were executed.

As we have said, the law of evidence then in vogue was that of the common law, which excluded all parties to actions, and so, too, every person who had a direct legal interest in the event of the action, though not actually a party. But to this last rule there was this exception: If the interest of the person offered as a witness was *equally balanced,* so that he had as much interest on one side as the other, he became a competent witness in the case, and might be called by either party. As coming within the exception, it was held by the common law, that the endorser of a note was a competent witness for either party to an action between his endorsee and the maker. 1 Greenl. on Ev., Sec. 400. In such case, if the plaintiff (endorsee) should recover of the maker (the principal), then the endorser (the surety) would be discharged of all liability. But if the plaintiff should fail in his action against the maker, he could recover the debt of his endorser, who in turn, could recover it of the maker, and so he stood indifferent between them, and was competent for either. *Gilliam v. Henneberry,* 51 N. C., 223; *Peebles v. Stanley,* 77 N. C., 243.

We therefore conclude that the witness, Vincent, was competent to speak as to the matters for which he was called, and that his exclusion was such an error as entitles the plaintiff to a *venire de novo.*

The other exception it is needless to consider.

Error. *Venire de novo.*

Cited: Robertson v. Dunn, 87 N.C. 193; *Bank v. Burgwyn,* 108 N.C. 63; *Horne v. Bank,* 108 N.C. 120; *Bank v. Burgwyn,* 110 N.C. 272; *Bank v. Atkinson,* 113 N.C. 480; *Johnson v. Gooch,* 116 N.C. 68; *Mfg. Co. v. Tierney,* 133 N.C. 635; *Highway Com. v. Varner,* 181 N.C. 44; *Cameron v. Highway Com.,* 188 N.C. 93; *Carlyle v. Highway Com.,* 193 N.C. 47; *Lister v. Lister,* 222 N.C. 560.

(49)

D. W. BAIN, AND WIFE AND OTHERS v. THE STATE OF NORTH CAROLINA.

Claim Against the State.

1. The original jurisdiction conferred upon this court by article four, section nine, of the constitution, is for the benefit only of such plaintiffs, and to be used only in such cases, as cannot otherwise obtain a footing in court by reason of the state's being a party.
2. The claim against the state must be such as, against any other defendant, could be reduced to judgment and enforced by execution.
3. An agent of the state is liable to an action of trespass committed in his capacity as such.
4. The Insane Asylum of North Carolina is a body corporate with capacity to sue and be sued.

CLAIN AGAINST THE STATE, heard at February Term, 1882, of THE SUPREME COURT.

Messrs. Gray & Stamps, Batchelor, Wilson and Strong, for plaintiffs.
Attorney General, for the State.

RUFFIN, J. This action begun in this court under article four, section nine, of the amended constitution.

In their complaint the plaintiffs allege title in themselves to one fourth part of the lands used and occupied by "The Insane Asylum of North Carolina," and their prayer is, that this court will cause the facts connected with their title to be ascertained and reported to the general assembly of the state, with a recommendation that the state shall purchase their several interests in the lands and make compensation to them for its use and occupation.

The Attorney General appearing for the state at first interposed a demurrer, but at this term moved to dismiss the action upon the ground of a want of jurisdiction in this court to entertain it.

Several reasons occur to us why this motion to dismiss should (50) be allowed, but it is only necessary to state a prominent one.

The original jurisdiction, the exercise of which the plaintiffs invoke, was conferred upon this court for the benefit only of such plaintiffs, and to be used only in such cases, as could not otherwise obtain a footing in the courts, by reason of the state's being the party against whom the claims were to be asserted. If, by the ordinary process of the law issuing from a court of ordinarily competent jurisdiction, a plaintiff can constitute his case regularly in court, as against a defendant interested in the subject matter of the action, and under a judgment against whom complete relief can be had, then the case falls

neither within the spirit of the constitution, nor the mischief which it was intended to remedy.

In the case in hand, "The Insane Asylum of North Carolina" is a body corporate—so expressly declared to be, and invested with all the title to the lands mentioned in the complaint, which was ever acquired by the state. See act of 1868-69, ch. 67. It is too, in express terms, endued with a capacity to sue and be sued, and is in the actual possession of the premises; so that as against it, the plaintiffs can have full and adequate relief afforded them for every injury complained of, in the superior court of Wake County, where the land lies, and there is no necessity for resorting to the exceptional jurisdiction of this court, which at best is poorly provided with facilities for the trial of the facts of any cause.

As to the objection urged that inasmuch as the state, the real party in interest, could not be brought before the superior court, so neither should her agent, the Asylum, be permitted to be sued there, as that would be, in effect, to sue the state, and to do indirectly what could not be done directly, we need only to refer to the opinion delivered by Chief Justice MARSHALL, In *Osborn v. Bank,* 6 Curtis, 251. The very point was there discussed, and it was held after much con-
(51) sideration that the action could be maintained against the agent, and he be held to answer for trespasses committed in his capacity as such.

To this may be added, even if the question of jurisdiction were out of the plaintiffs' way, there is no authority resting in this court to make any such recommendation to the legislature as that suggested in the complaint.

It is our duty, when a case is properly constituted before us, simply to declare the legal rights of the party presenting a claim against the state; and it must be just such a claim as, against any other defendant, could be reduced to a judgment and enforced by execution. As to the propriety of purchasing the interests of the plaintiffs in the land: that is a matter falling peculiarly within the province of the general assembly, and any suggestion from us in regard to it might seem officious.

The motion to dismiss the action is allowed.

PER CURIAM. Dismissed.

Cited: Board of Education v. Board of Education, 106 N.C. 83; *Nelson v. Relief Department,* 147 N.C. 104; *Carpenter v. R.R.,* 184 N.C. 403, 404; *Cohoon v. State,* 201 N.C. 314; *Vinson v. O'Berry,* 209 N.C. 289.

GEORGE W. CLODFELTER v. THE STATE OF NORTH CAROLINA.

Claim Against the State.

1. The state is not answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence of its officers or agents.
2. The original jurisdiction conferred upon this court by article four, section nine, of the constitution, "to hear claims against the state," is confined to such as are legal, and could be enforced if the state, like one of its citizens, was amenable to process.

CLAIM AGAINST THE STATE, heard on complaint and demurrer at February Term, 1882, of THE SUPREME COURT.

Mr. J. B. Batchelor, for plaintiff. (52)
Attorney-General, for the State.

SMITH, C. J. The demurrer to the complaint raises the question of the responsibility of the state for the consequences of the misconduct or negligence of its officers and agents. The plaintiff, a convict sentenced to hard labor in the state prison for a series of years, was assigned to work on the Cape Fear and Yadkin Valley railroad, and, while engaged in blasting rock, by a premature explosion sustained an injury in the loss of both his eyes. The complaint ascribes the explosion to the gross negligence of the supervising manager, under whose authority and control he was placed, in not supplying water in sufficient quantity to use in the operation and prevent the accident. This is the case made in the complaint, and the liability of the state to make compensation is sustained upon the ground of the coerced labor put upon the plaintiff, and the taking from him all volition in avoiding danger and providing for his own safety.

The constitutional provision which confers jurisdiction upon this court "to hear claims against the state" is confined to such as are legal, and could be enforced if the state, like one of its citizens, was amenable to process, and the decision when made is recommendatory merely.

The only question then presented is, whether the state, in administering the functions of government through its appointed agents and officers, is legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence.

That the doctrine of *respondeant superior* applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public

agents, is too well settled upon authority and practice to admit of controversy.

(53) "No government," says Mr. Justice MILLER, "has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents." *Gibbons v. United States,* 8 Wall., 269. And Judge STORY declares in his work on Agency, section 319: "The government does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

Admitting the general principle, the plaintiff's counsel undertakes to withdraw the present claim from its operation, for that, the convict was put to work in constructing a railroad, a private enterprise, and not employed at any public work when the accident occurred, and thus the state has voluntarily assumed the responsibilities of one of its own citizens incurred under like circumstances. We cannot recognize the distinction as affecting the results, nor feel the force of the reasoning by which it is sustained. We do not perceive why, when convicts are employed in quarrying rock for the construction of the penitentiary itself, the rule of liability should be different from that which controls when they are engaged in similar work to aid in the building of a railroad or other less public work. They are in both cases under the control and supervision of managers or overseers appointed by the public authorities, and the protection of law.

The substitution of hard labor outside of the walls of the prison when the convict's condition is normal, and he has, in fresh air, pure water and wholesome food, superior advantages over a close confinement, is a humane and ameliorating policy in reference to the convict himself, as well as a more profitable use of his labor for the state, and not coming in competition with the trade of private persons, and yet it is the performance of an imposed service for crime and answers all

(54) the purposes of punishment for its commission.

We are clearly of opinion that the state has incurred no legal liability for the negligence imputed to the overseer, and he alone, if any one, is answerable for the consequences of his neglect. The demurrer must therefore be sustained, and the action dismissed.

PER CURIAM. Dismissed.

Cited: Moody v. State Prison, 128 N.C. 14; *Jenkins v. Griffith,* 189 N.C. 634; *Gentry v. Hot Springs,* 227 N.C. 667.

ELIJAH MURRILL AND OTHERS v. H. H. SANDLIN, ADM'R.

Removal of Administrator—Jurisdiction of Probate Court.

The original and primary jurisdiction of a proceeding to remove an administrator is in the probate judge (with the right of appeal to either party), who ascertains the facts upon which his legal discretion may be exercised, and to this end he may require issues of fact to be tried by a jury in the superior court. C.C.P., Secs. 418, 470.

PROCEEDING to remove an administrator, commenced before the clerk as probate judge, and heard at Spring Term, 1881, of ONSLOW Superior Court, before *Graves, J.*

The case was transferred to the superior court for the trial of issues of fact, and the plaintiff moved to remand it to the probate court on the ground of a want of jurisdiction of the subject matter of the controversy, as now constituted. The motion was denied, and the plaintiff excepted. Upon the trial, judgment was rendered for the defendant, and the plaintiff appealed.

A statement of the facts set out in the case is not necessary to an understanding of the opinion.

Messrs. Simmons & Manly, for plaintiff. (55)
Mr. H. R. Bryan, for defendant.

SMITH, C. J. The jurisdiction to grant, and, for sufficient cause, recall letters testamentary and of administration, is conferred by law upon the clerk of the superior court, acting as judge of probate. C. C. P., Sec. 418; *Simpson v. Jones,* 82 N. C., 323. The mode of proceeding to revoke letters that have been issued is summary, and pointed out in section 470, which provides that when "it appears to the probate judge, or if complaint is made to him on affidavit that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of a default or misconduct in the due execution of his office, or that the issue of such letters was obtained by false representations made by such person, the judge of probate shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease."

It is thus incumbent on the probate judge to make the inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer, is to be exercised. The original authority to act is delegated to him alone, and he

may require the whole issue made between the parties, or any specific question of fact, to be tried by a jury, under the supervision of the judge of the superior court. When these have been determined by the jury, the probate judge, with such supplemental findings of fact by himself as may be necessary, proceeds to decide the question of removal, subject to the right of either party to the contest to have the cause reheard upon appeal.

This was not the course pursued in the present case, but the
(56) voluminous allegations, explanations and denials in the complaint and answer, were transmitted to the superior court, and tried in the first instance before the judge upon the submission of two issues to the jury. Thus the appellate or reviewing jurisdiction of the superior court is made to usurp the original and primary jurisdiction vested in the probate judge, and which he has never exercised. This irregularity renders it necessary to remand the cause in order that the probate judge may himself first act upon the application. See *Capps v. Capps*, 85 N. C., 408.

We can only determine, upon the case made in the court below, the sufficiency of the facts to require or warrant the removal, but it is not improper to say that the management of a trust fund ought not to be committed to, or left in the hands of an appointee whose interests or personal bias may be found hostile to the demands of official duty, when made to appear, and the estate thus deprived of that legal protection to which it is entitled.

Let the cause be remanded.

PER CURIAM. Cause remanded.

Cited: Edwards v. Cobb, 95 N.C. 8, 10; *In re Will of Palmer*, 117 N.C. 139; *In re Battle*, 158 N.C. 392; *In re Estate of Loflin*, 224 N.C. 232; *McMichael v. Proctor*, 243 N.C. 484.

THOMAS W. KENDALL v. WILLIAM K. BRILEY AND WIFE.

Action Upon a Judgment—Refusal of Leave to Bring.

Where leave to sue on a judgment under section 14 of the Code, is refused by the judge below, his decision upon the question whether "good cause" is shown, is conclusive. (Mr. Justice RUFFIN dissenting.)

(57) APPLICATION for leave to sue heard at Fall Term, 1881, of ANSON Superior Court, before *Graves, J.*

This was a motion made on October 10th, 1881, by the plaintiff to the presiding judge, for leave to bring an action upon a judgment in favor of the plaintiff against the defendants, Briley and wife.

The affidavit of the plaintiff upon which his motion was founded, stated, that the plaintiff at Fall Term, 1871, being the 18th day of October, obtained a judgment against the defendant and wife on a note under seal executed on the 16th day of January, 1868, for the sum of four hundred and twenty-four dollars and sixty-four cents, with interest. That no part of said judgment has ever been paid or release given to the defendants, nor assigned by the plaintiff to any one.

The defendants filed a counter-affidavit, but his Honor found the facts as stated in the affidavit of the plaintiff, and refused to grant his application, from which ruling the plaintiff appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Mr. George M. Smedes, for defendants.

ASHE, J. The application of the plaintiff was made under section 14 of the Code, which reads: "No action shall be brought upon a judgment rendered in any court of this state, which shall be rendered after the ratification of this act, except a court of a justice of the peace, between the same parties, without the leave of the judge of the court, either in or out of term for good cause shown, on notice to the adverse party."

This section of the Code has received a construction by this court in the case of *Warren v. Warren*, 84 N. C., 614, where an application like this was made for leave to bring an action upon a judgment, and it was held that the judge's decision upon the question, whether "good cause" was shown, was conclusive. (58)

The Chief Justice in delivering the opinion of the court, said: "The leave is to be granted when 'good cause' is shown—that is, when satisfactory reasons were given. If then he is and must be the judge, his decision that good cause does exist is not reviewable in this court. What general rule can be prescribed to guide the judge in determining the application, or this court in reviewing the exercise of his discretion?"

If his decision that good cause does exist, is not reviewable, it must follow that his decison that it does not exist is equally conclusive.

What is *good cause* is *sufficient cause*. They are synonymous terms. In the Revised Code, ch. 31, sec. 13, it is provided that a continuance of a cause standing for trial, may be had for sufficient cause shown to the court by affidavit. And what is *sufficient cause* for a continu-

ance has been uniformly held by this court to be within the discretion of the judge, and the exercise of his discretion is not the subject of review. *State v. Duncan,* 28 N. C., 98; *State v. Lindsey,* 78 N. C., 499; *Moore v. Dickson,* 74 N. C., 423; *Isler v. Dewey,* 71 N. C., 14; *Austin v. Clarke,* 70 N. C., 508. Constrained by these authorities we must hold there was no error. And as the appeal has been taken from the ruling of his Honor upon a matter of discretion, the appeal must be dismissed.

RUFFIN, J. *Dissenting.* I cannot bring my mind to concur in the conclusion to which my learned brethren have come in this case, and I regard the subject as one of sufficient importance to justify me in setting out the grounds of my dissent.

The purpose of the statute, under which the plaintiff is proceeding, is manifest. At common law a plaintiff in a judgment had a right to sue upon it at his own pleasure, and seeing that this right
(59) might be used for the purpose of oppression, the legislature interposed a check upon it, by providing that no such action should be instituted without the leave of the judge of the court, in which the judgment had been rendered, for good cause shown.

The *good cause,* then, required to be shown is anything from which the court can see that the object sought to be obtained by the new action, is a legitimate one, and not the mere purpose to harrass and oppress by needless litigation.

In this case the judgment was rendered on the 18th of October, 1871, and the motion for leave to sue was made on the 10th day of October, 1881, just ten days before the bar of the statute of limitation would attach to it, and the effect of the ruling is, not to shield the defendant from vexatious litigation, but to give him an absolute discharge from a debt, not one cent of which, as his Honor finds, had he ever paid.

It is impossible for me to conceive that the law intended to confer upon any judge the power thus to destroy, by the exercise of an unrestrained discretion, the property of a citizen, and to leave him altogether without any remedy. I search in vain for a precedent to justify such a decision. As to the discretion allowed, in passing upon the sufficiency of an affidavit for the continuance of a cause referred to in the opinion of the court as being analogous, I confess I cannot so view it. In that case, no substantial right is affected—no defence taken away or advantage bestowed on either party—nothing beyond a delay deemed necessary, that both may meet on equal terms.

The same lack of analogy exists, as it seems to me, in the case of an order made for the removal of a cause from one county to another for trial; there again, no substantial right of either party is impaired,

and no advantage bestowed upon either, and the law might well, therefore, commit its determination to the discretion of a single judge.

As I understood it, the decision in the case of *Warren v. Warren,* cited by the court, was made to turn upon the very dis- (60) tinction which I have attempted to make here; and the finding that good cause for a new action was shown, and the grant of leave to bring it, were held to be conclusive, because, as said by the Chief Justice, such *"granting of leave impairs no legal right of the debtor, and every just defence may still be set up when the action is brought, as it may be in other cases when the plaintiff sues at his own pleasure and requires the consent of no one."*

Thus understanding it, I yielded my full assent to it, but should have been slow to do so if I could have supposed its authority would ever be used in support of a decision, like the present, so destructive of the rights and interests of a party.

Even if it were conceded that the law intended to commit the right of the party to sue, under such circumstances, wholly as a matter of discretion to the judge of the court in which the judgment had been obtained, I should still be disposed to hold that its exercise might be reviewed in this court, if seen to be clearly erroneous and injurious.

When anything is left to any person to be done according to his discretion, says 1 Lil. Abr. 477, as quoted in Tomlison's Law Dictionary, the law intends it must be done with sound discretion, and according to law; and the court of King's Bench hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them.

As applied to a court of justice, *discretion* means a *sound discretion,* guided by law and right, or as defined in Co. Lit., Sec. 366, p. 227 b., *"discretio est discernere per legem quid sit justum*—that is—to discern by the right line of the law and not by the crooked cord of private opinion."

Pitiable indeed, is the condition of a judgment creditor under the operation of such a law. If made before the bar of the statute becomes imminent, his prayer for leave to sue is taken as evidence of a purpose to vex his debtor with needless litigation, and (61) therefore rejected; and if made when that danger is staring him in the face, he is told that he has waited too long, and the law grants favors only to the diligent. Far better would it be to deny him, in plain terms, every right of action, than to beguile him after such a manner with false hopes.

Believing that in thus withholding from the plaintiff his leave to sue, his Honor inadvertently exercised an unreasonable discre-

tion, and that "nothing that is contrary to reason is consonant to law," I am of the opinion that the judgment of the court should be reversed.

PER CURIAM. Affirmed.

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*HINSON & CUMMING v. ADRIAN & VOLLERS.

Mortgage, Foreclosure of—Parties.

In foreclosure proceedings, all the mortgagees and judgment creditors as well as the mortgagor should be made parties, in order to a full adjustment of the rights of each.

CIVIL ACTION tried at Fall Term, 1881, of ANSON Superior Court, before *Graves, J.*

The plaintiffs, Hinson & Cumming, having recovered several judgments against the defendant, Knotts, have caused the same to be docketed in January, 1878, in the counties of Anson and Union. Their co-plaintiffs, Aaron & Rheinstein, having also recovered judg-
(62) ments, against the same debtor in the superior court of New Hanover in the same month, transmitted a transcript thereof to the same counties, and caused them to be docketed in Anson County, in February, 1878, and in Union County in April, 1880. They unite in the present action to enforce a foreclosure and sale of lands of the debtor, lying in both the counties last mentioned, which had been in 1876 conveyed by deed of mortgage to the defendants, Adrian & Vollers, to secure a large indebtedness then due them, reduced, as stated in their answer and computed to May 16, 1881, to the sum of two thousand seven hundred and forty-six dollars and fifty cents. They assent to the foreclosure and sale.

The defendant Knotts, while in his answer he demands proof of some of the allegations of the complaint, and denies none in the form prescribed in the Code, not disavowing "any knowledge or information thereof sufficient to form a belief," (Sec. 100) proceeds to state that after the execution of the mortgage and prior to the liens acquired by the docketed judgments, he made a second mortgage to R. T. Bennett and conveyed to him his equity of redemption in the same lands to secure a debt due to the said Bennett which is still unadjusted.

While upon a strict construction of the rules of pleading under the new system, the averments in the complaint may not be legally controverted, issues, not appearing in form in the record, were submitted

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

to the jury and found in favor of the plaintiffs. Just before the trial was entered upon, the defendant, Knotts, filed an affidavit in which he recites a further indebtedness to other creditors, who also have docketed judgments and liens upon the debtor's equitable estate in the lands, and one of which, belonging to Whittkowski & Rintels for about five hundred dollars, has precedence of the plaintiff's liens. He asks that these creditors be made parties to the action as interested in the sale, and disposition of the fund. The application was denied, but in the rendition of judgment, after the verdict, for (63) the sale of the lands, unless the debts were paid within a limited time, an account is directed to be taken of the several liens upon the lands, their amounts and priorities. From this judgment the defendant, Knotts, alone, appeals.

Mr. John D. Shaw, for plaintiffs.
Messrs. Burwell & Walker, contra.

SMITH, C. J., after stating the above. While there is some diversity of opinion as to the practice in requiring the presence of prior and posterior mortagees in a foreclosure suit, the preponderance of authority favors the propriety, if not the necessity of their being parties, in order to a full and final adjustment to all the equities involved. The following rule is laid down by a writer on the subject, which seems reasonable and just:

In general all incumbrances, as well as the mortgagor ought to be made parties to a bill of foreclosure, and that, whether they are prior or subsequent incumbrances; those prior, because their rights are paramount to the foreclosing party; those subsequent, because their interests would otherwise be concluded without any opportunity to assert or protect them. Welf. Eq. Pl., 50; Mitf. Eq. Pl., 194; 2 Mad. Ch. Pr., 188; Story Eq. Pl., Sec. 72; *Winchester v. Beaver,* 2 Ves., 313.

This would seem to result from the fact that the subordinate and inferior liens are, by the sale, transferred from the *corpus* to the fund into which it is thus converted, with their respective priorities unimpaired and must be then asserted and settled in its distribution. *Cannon v. Parker,* 81 N. C., 320. More especially should the second mortgagee be before the court, because his mortgage debt intercepts what remains of the fund after discharging the first mortgage, before it reaches any of the plaintiff's demands, and must be first satisfied. The Code has not in this respect changed the practice in (64) courts of equity.

We think the second mortgagee, whose interest is set up in the answer of Knotts, and not (as in respect to the other creditors) in an affi-

davit offered just as the jury trial begins, ought to be made a party, and the decree of sale suspended until he is served with notice and has opportunity to come in and assert his claim; and perhaps the same course should be pursued toward all the judgment creditors who have liens, in order that the rights of each may be adjusted in the action, and all controversies among them ended in the apportionment of the moneys arising from the sale. The court recognizes the propriety of their presence before final distribution, in the provision in the decree for a reference and account, but it is more appropriate they should be before the court when the decree of sale is made, and be heard, if they have aught to say against its being made, or as to its terms, and at least before the sale is confirmed. The verdict will remain. The judgment was therefore premature and must be reversed at the costs of the appellees, plaintiffs, and remanded for further proceedings in the court below.

Error. Reversed.

Cited: Kirkman v. Phipps, 86 N.C. 431; *Kornegay v. Steamboat Co.,* 107 N.C. 118; *LeDuc v. Brandt,* 110 N.C. 291; *Vanstory v. Thornton,* 112 N.C. 209; *Springer v. Sheets,* 115 N.C. 379; *Gammon v. Johnson,* 126 N.C. 65; *Jones v. Williams,* 155 N.C. 189; *Beaufort County v. Mayo,* 207 N.C. 214; *Rostan v. Huggins,* 216 N.C. 390.

J. P. ALLEN v. A. B. AND H. GILKEY, ADM'RS.

Witness—Section 343.

A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected: *Held,* in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under section 343 of the Code.

(65) CIVIL ACTION tried at August Special Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

The plaintiff, as the deputy for the sheriff of Rutherford County, collected taxes to the amount of two hundred dollars, and deposited the same with the defendants' intestate, with instructions to pay it to his principal, which it is alleged he failed to do. In a settlement with his principal, credit was refused him for this amount so paid to said intes-

tate, but the plaintiff was required to pay, and did pay, to the sheriff the full amount collected, and thereupon this action was brought to recover it of the estate of said intestate, he having in the meantime died.

On the trial the plaintiff introduced the sheriff as a witness, for the purpose of showing that the money had not been paid to him by the intestate, but the defendants objected on the ground that the witness had an interest in the result of the action, and is therefore incompetent under section 343 of the Code. The court overruled the objection and admitted the witness as competent. Defendants excepted. Verdict for plaintiff, judgment, appeal by defendants.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiff.
Mr. J. A. Forney, for defendants.

RUFFIN, J. We are at a loss to discover any interest which the witness had in the event of the action, that could possibly affect the question of his competency. He is no party to the action; nor had he at any time a legal or equitable interest, such as could be affected by the event thereof. He is no assignor of anything in controversy in the action; nor could his examination, or any judgment or determination therein, affect any interest he then had, or had previously owned. While possibly under some bias of feeling or partiality, yet he was literally devoid of all *interest,* whether past, present or future—so much so, that even at the common law he would have been entirely (66) competent as a witness, and if so, then certainly under a statute professing to remove all incompetency upon the ground of interest, with the few exceptions above enumerated.

It is true that he might have given his sanction to the deposit of the money made on his account by his deputy, and upon its non-payment might have sued the intestate of the defendants for money had and received to his use, but he was under no obligation to do so, and having repudiated it and received the full amount due him, directly, from the deputy himself, no man could have had less *interest,* as distinguished from bias, than he had. His testimony was properly received by the court.

No error. Affirmed.

S. T. MORGAN, ADM'R, v. J. N. BUNTING AND OTHERS.

Witness—Bond Prior to 1868—Section 343.

1. The act of 1879, ch. 183, which renders incompetent as a witness a party to an action "on any bond for the payment of money, or conditioned to pay money," executed prior to August 1st, 1868, does not apply to official bonds to secure fidelity in the discharge of duty, but is confined to money obligations to pay a fixed sum.
2. A party to a suit is not disqualified as a witness by section 343 of the Code, to speak of transactions with a deceased agent of a deceased principal.

(67) CIVIL ACTION tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

S. D. Morgan died in 1864, and William Laws was appointed his administrator and died in 1871, before making a final settlement of the estate, but he had obtained judgment against divers parties indebted to his intestate, upon which executions were issued and money paid to the defendant, Bunting, as clerk of the superior court. Soon after the appointment of the plaintiff, S. T. Morgan, as administrator *de bonis non* of the intestate, in 1879, he made demand of the defendant for the money received by him as aforesaid, but the same has never been paid, and thereupon the plaintiff brought this action on the official bond of said Bunting.

On the trial the defendant, Bunting, was offered as a witness for himself and his sureties, to prove that he paid the amount of said judgments to the attorney of record of William Laws; the said attorney died before this suit was brought. The plaintiff objected, and the court held the witness incompetent. Verdict for plaintiff, judgment, appeal by defendants.

Messrs. Gilliam & Gatling and Walter Clark, for plaintiff.

Messrs. Hinsdale & Devereux, Argo & Wilder and Reade, Busbee & Busbee for defendants.

SMITH, C. J. The action is on the official bond executed by the defendant Bunting on his qualification as clerk of the superior court in July, 1868, and the other defendants, his sureties, to recover several sums of money due the intestate, collected under executions and paid into office during the former administration. To sustain the defence the said Bunting was offered as a witness on behalf of himself and the other defendants to prove payments made to the attorney of record of the first administrator, since deceased, and on objection was held
(68) to be incompetent to give the proposed testimony.

This ruling and the exception thereto present the only question for solution on the appeal. The action of the court is supported in the argument before us upon two grounds: first, the testimony is excluded by the act of 1879, ch. 183; and secondly, it is within the prohibition of the proviso in section 343 of the Code.

1. The act of 1879 renders a party to the action incompetent as a witness, in an action "founded on any judgment rendered previous to the 1st day of August, 1868, or on any bond under seal for the payment of money or conditioned to pay money," executed previous to that date, thus restricting its operation not only to obligations incurred before that time, but also to such as are for the *payment of money.* The statute contemplates such judgments and such bonds as are for a specific and ascertained sum of money, expressed upon their face, or in case of penal bonds, expressed in the condition.

The bond sued on is not one of this class, but is intended to secure diligence and fidelity in the discharge of official duties. Although in the condition he is required among other things to "account for and pay over, according to law, all moneys and effects which have come, or may come, into his hands, by virtue or color of his office," (C. C. P., Sec. 137,) yet these are unascertained sums, and are recovered as damages assessed for the breach of the obligation, and the bond is not, nor is the condition, an absolute undertaking to pay a fixed sum, or in the words of the statute, "for the payment of money." As all judgments not of this class are excluded, so are all bonds executed for other purposes; the object of the enactment being as stated in *Tabor v. Ward,* 83 N. C., 291, to exclude the testimony of parties to a suit on these causes of action, and prevent its being used to rebut the presumption of payment, and hence in terms it is confined to money obligations as distinguished from others.

2. Nor is the refusal to admit the evidence warranted by the (69) proviso in section 343.

A party to the action, and the others specified, are not allowed to be "examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, as a *witness against a party then prosecuting or defending as executor, administrator,*" and the other designated persons in privity with the deceased. The testimony is not rendered inadmissible generally, but only when offered against the representative of a deceased party (and the others specified, associated with or succeeding him in interest) who are "then prosecuting or defending the action in one of these capacities."

This interpretation is put upon the statute, and such is its obvious meaning, in *Howerton v. Lattimer,* 68 N. C., 370; *Shields v. Smith,* 79 N. C., 517, and *Hawkins v. Carpenter,* 85 N. C., 482.

In the former of these cases the defendant was permitted to testify as to his own transactions with a deceased agent of the plaintiff, and RODMAN, J., having quoted the clause in the proviso, the substance of which has been recited, adds: "The plaintiff is not prosecuting this action any of these characters. It may seem that the plaintiff comes within the mischief intended to be remedied. Whether that be so or not, we would not be justified in extending the scope of the act to include the case of a principal of a deceased agent, upon any conjecture that the legislature would have included such a case, if it had occurred to them."

This construction is in accordance with the rulings in the courts of New York upon a similar act which we have borrowed from the Code of that state.

In *Coller v. Wenner,* 45 Barb., 397, the defendant was allowed to prove usury in the consideration of a note executed by him to one Jacob Coller, and endorsed after maturity to John Coller, his son, both of whom were dead, in an action prosecuted by the executor of
(70) the assignee to recover the money due, and this testimony was received because it was not used against the representative of the payee, as a party to the suit. But the point is expressly adjudicated in the recent case of *Hildebrand v. Crawford,* 65 N. Y., 107, where both principal and agent were dead. The court declared that "while the declarations and transactions of Kellogg as agent, might bind his principal, it is impossible to discover how conversations and transactions with him, as agent, can be brought within section 329 of the Code, as conversations and transactions with his principal, so that in case of his death, they could not be proved by a party in an action seeking to enforce the obligations resulting therefrom. We are not at liberty to add to the enactment cases not within its terms, because we may think them within the spirit of the act, and are cases to which the remedy may seem to be equally applicable."

The transactions meant in the statute are *personal transactions,* to which the deceased, if alive, might testify, and its policy as declared by Chief Justice PEARSON in *McCanless v. Reynolds,* 74 N. C., 301, and reiterated in *McLeary v. Norment,* 84 N. C., 235, is, that unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction.

If the deceased principal were living, he would not know and could not tell what occurred between his agent and another, and as the agent's death does not suppress the evidence, it follows that the defendant,

Bunting, is not disqualified, and the ruling by which his testimony was excluded is erroneous in law.

The judgment is therefore reversed, and this will be certified to the end that the verdict be set aside and a *venire de novo* awarded, and it is so ordered.

Error. *Venire de novo.*

Cited: Lockhart v. Bell, 86 N.C. 450; *Gidney v. Moore,* 86 N.C. 491; *McKee v. Lineberger,* 87 N.C. 186; *Clanton v. Price,* 90 N.C. 99; *Lockhart v. Bell,* 90 N.C. 504; *McRae v. Malloy,* 90 N.C. 526; *Coggins v. Flythe,* 113 N.C. 106; *McGowan v. Davenport,* 134 N.C. 536.

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(71)

J. B. SUMNER, ADM'R, v. THOMAS J. CANDLER.

Witness—Transaction With Person Deceased.

The defendant in an action for money demand is disqualified to testify as to the time and place of signing a receipt by plaintiff's intestate, in support of his plea of satisfaction. C. C. P., Sec. 343. The competency of evidence is determined by the substance of the witness' answer, and not by the form of the question put to him.

CIVIL ACTION tried at Spring Term, 1882, of BUNCOMBE Superior Court, before *Gilliam, J.*

This action is for money had and received, the plaintiff alleging that his intestate, who was the sheriff of Buncombe County, had placed in the hands of the defendant claims against the treasurer of the state amounting to one thousand dollars, which he had collected and failed to pay over.

The sole defence relied on was that of accord and satisfaction—the defendant alleging that said intestate had accepted of him a horse, saddle and bridle and a suit of clothing in full satisfaction and discharge of his entire liability. At the trial the defendant offered in evidence a receipt, and upon showing that it was in the hand-writing of plaintiff's intestate, was allowed to read it as follows: "Received of T. J. Candler the balance in full of all claims, together with all moneys placed by me in his hands for settlement with the treasurer for the years 1868, 1869 and 1870, including the Lusk and Henry claims as solicitors, for which he has my receipt—this February 18th, 1875." (Signed by Jesse Sumner, the plaintiff's intestate).

After introducing several witnesses in regard to the declaration of the intestate touching the settlement, and there being some discrepancy in their statements as to the time when it occurred, the defendant himself was introduced as a witness, and his counsel proposed to ask
(72) him when the receipt above referred to was signed by the intestate, to which the plaintiff objected upon the ground that he was incompetent to testify as to a transaction with the deceased.

His Honor ruled him to be competent, and he thereupon testified that the receipt had been signed by the intestate at a mill about two miles from defendant's house. Plaintiff excepted. Verdict for defendant, judgment, appeal by plaintiff.

Mr. J. H. Merrimon, for plaintiff.

Messrs. C. A. Moore and H. B. Carter, for defendant.

RUFFIN, J. The counsel who argued the cause for the defendant in this court, almost conceded the incompetency of the witness to testify as to the matter excepted to, and we think might well have done so altogether. It is difficult to conceive of testimony that could more certainly involve a transaction with a deceased person, than did that of the defendant when he testified to the signing of the receipt by the intestate, and described the place where the same was done.

For aught we know, it may have been this direct testimony, rather than the proofs as to the hand-writing of the intestate, that influenced the jury in determining the genuineness of the receipt, relied upon to support the plea of satisfaction. The question as to the competency, or incompetency, of evidence must be determined by the substance of the witness' answer, and not by the form of the inquiry put to him.

There must be a *venire de novo.*

Error. *Venire de novo.*

Cited: Lockhart v. Bell, 90 N.C. 504; *Buie v. Scott,* 107 N.C. 182; *Bright v. Marcom,* 121 N.C. 87; *Hicks v. Hicks,* 142 N.C. 232.

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(73)

GEORGE W. WYNNE v. JOSEPH P. PRAIRIE.

Excusable Neglect Under Section 133 of the Code—Judgment Final and Interlocutory—Writ of Inquiry.

1. On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon

the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the balance of the term was absent in obedience to a summons as a witness; *Held*, that defendant's neglect is excusable.

2. Suggestions of the court indicating the present status of the law, in reference to judgments final by default upon sworn complaint in actions to recover money; and to the old practice of a writ of inquiry to ascertain amount of an unliquidated demand. (A decision upon this question was subsequently made in *Rogers v. Moore, post.*)

MOTION to set aside a judgment upon the ground of excusable negligence, heard at January Term, 1881, of WAKE Superior Court, before *Graves, J.*

The judge allowed the motion and the plaintiff appealed.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. Argo & Wilder and Fowle & Snow, for defendant.

SMITH, C. J. The plaintiff sued out his summons in September, 1879, returnable to the term of Wake superior court, held on the second Monday in February, 1880; filed his complaint in the clerk's office, under oath, on the last day of January preceding; withdrew and amended it by leave of the court, also under oath, on February (74) 20th during the second week of the term; and on the last day, no counsel appearing, caused judgment final to be entered for the aggregate sum demanded. The causes of action set out in the complaint are an indebtedness contracted by the defendant with G. W. Wynne & Co., between September 1st, 1869, and February 13th, 1872, for board and attention to his horses, for goods sold and delivered, for horses and carriages furnished for his use, and for money loaned; and a further indebtedness, for similar objects, incurred with Wynne, Yancey & Co., between May 17th, 1872, and February 5th, 1877, both of which claims have been assigned to the plaintiff and make the amount of $190.59, demanded. The defendant after notice obtained a writ of *supersedeas*, suspending further action of the sheriff in the enforcement of the execution which had been issued on the judgment, and upon his affidavit, stating the grounds of the application, moved the court for an order to set aside and annul the judgment. This motion was heard at January Term, 1881, and allowed, and the facts found upon which the decision was rendered, are set out in the record.

We concur in the ruling that the case presented is one of excusable neglect under the interpretation heretofore put upon the statute, and warrants the exercise of the discretionary power conferred upon the judge. The defendant had engaged counsel to defend the action, and

as he alleges, is not indebted to the plaintiff in any sum. He twice called on the clerk, once before the beginning, and again on the second day of the term, informing that officer of the name of the counsel employed, and requesting his appearance to be entered, if it had not already been done, and this the clerk promised him should be done. The attorney himself also applied at the clerk's office to see and examine the complaint, but was unable to see it, and being summoned to appear before a committee of the United States Senate, as a witness, left
(75) during the first week for Washington, and was absent during the rest of the term. This summary recapitulation suffices to show the active and persevering efforts of the defendant to secure the services of counsel, and reasonably relying upon his defending the action, he is not chargeable with the inattention and neglect which debar him from asking relief against the judgment.

It was his duty to have counsel, and the duty of his counsel to see that the action was properly defended. An examination of the complaint and the causes of action therein set out, was necessary to an intelligent conference between them, and that the former should put the latter in possession of the facts to be put in the answer in opposition to a recovery.

The present case is not unfavorably distinguishable from *Griel v. Vernon,* 65 N. C., 76, in which an early construction was given to section 133 of the Code.

"In this case," remarks RODMAN, J., "the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may be fairly considered a surprise on the client."

The same view of the act is taken in the subsequent case of *Bradford v. Coit,* 77 N. C., 72, in which READE, J., referring to the preceding adjudication, says: "We have said that where a party employs counsel to enter his plea and the counsel neglects it, in consequence of which judgment is given against the party, it is excusable neglect in the party and the judgment may be vacated." And this is again reaffirmed in *Mebane v. Mebane,* 80 N. C., 34.

The plaintiff however insists that the defendant was himself negligent, in that, he failed to communicate to his attorney the grounds of his defence, and for this no sufficient excuse is given. But before this it is obvious the attorney should have seen and known the charges contained in the complaint, and with the knowledge thus obtained,
(76) to confer with the client and ascertain from him the material matters to be embodied in an answer to the demand; and the laches in this particular is not attributable to the defendant. But the attorney did endeavor to see, and failed to see the complaint before he

left. Moreover the complaint itself was afterwards withdrawn, though with permission of the court, and amended in some particular not stated, but it must be deemed material or it would not have been done, and it is this complaint upon which the judgment is founded.

In view of these attending circumstances it was within the sound discretion of the judge to set aside the judgment and re-open the cause for a trial upon the merits.

We do not deem it necessary to enquire whether there was irregularity in entering up a final judgment at the return term for the defendant's failure to appear and answer, for though the complaint is for goods sold and services rendered during several years, it avers a positive promise to pay the specified balance claimed, and a judgment final is authorized when the complaint is sworn to and the action is upon a contract for the recovery of money only, as it is when the complaint is not so verified and the cause of action set out is a written instrument for the payment of money only. In both cases, whether the contract be in writing or rests in parol, it seems to be the intent of the act that it should be for the payment of some definite sum and not for a money demand, whether arising out of contract or not which is but the measure of damages for its breach, nor for the implied contract to pay what the goods or services are reasonably worth.

But very material changes in this section of the Code (217) result from the amendatory legislation which requires all process to be returned to a regular term of the court, and reduces the summons to one form in requiring it to be for the relief demanded in the complaint. Bat. Rev., ch. 18. Acts 1876-77, ch. 241.

The judgment is no longer rendered by the clerk representing (77) the court, but is the act of the presiding judge, and should be signed by him, although his omission to authenticate it by his signature is not essential to its validity. *Mabry v. Erwin,* 78 N. C., 45; *Rollins v. Henry, Ibid.,* 342.

The requirement in the Code that upon default the clerk "shall enter judgment for the amount mentioned in the summons" has become impracticable by the change in its form, and it would seem that the provisions in regard to ascertaining the amount of an unliquidated demand by the clerk, have been superseded by the restoration of the old practice of a writ of inquiry following the interlocutory judgment that the plaintiff ought to recover, and that he do recover his damages, until they have been assessed and determined. This court has also extended the right to a final judgment, as in *Mabry v. Erwin, supra,* to cases which do not rest on contract, but where the judgment is for a definite and liquidated demand according to the former mode of procedure. *Hartsfield v. Jones,* 49 N. C., 309; *Parker v. Smith,* 64 N. C., 291; *White v.*

Snow, 71 N. C., 232; *Mayfield v. Jones,* 70 N. C., 536;*Oates v. Gray,* 66 N. C., 442; *Sutton v. McMillan,* 72 N. C., 102.

In the latter case the court intimate that the clerk must still himself ascertain the amount of an uncertain demand, because the judgment by default is to be "as now allowed by law," but decline to express "any positive opinion on the question."

We have made these suggestions as the possible result of legislation, and indicating the present status of the laws regulating the practice, but without a committal which may interfere with their calm and impartial consideration when the questions come up directly for judgment. There is no error and this will be certified.

No error. Affirmed.

Cited: Francks v. Sutton, 86 N.C. 79; *Rogers v. Moore,* 86 N.C. 86; *Ellington v. Wicker,* 87 N.C. 16; *Comrs. v. Lash,* 89 N.C. 166; *Roulhac v. Miller,* 89 N.C. 197; *Alford v. McCormac,* 90 N.C. 153; *Roulhac v. Miller,* 90 N.C. 176; *Wiley v. Logan,* 94 N.C. 566; *Whitson v. R. R.,* 95 N.C. 387; *Anthony v. Estes,* 101 N.C. 547; *Taylor v. Pope,* 106 N.C. 271; *Scott v. Life Asso.,* 137 N.C. 527; *Sircey v. Rees,* 155 N.C. 299.

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(78)

SARAH A. FRANCKS v. W. J. SUTTON, SHERIFF.

Excusable Negligence—Amercement of Sheriff.

On motion to set aside a judgment against defendant sheriff for an alleged failure to make due return of process, the facts of this case entitle him to relief under section 133 of the Code. (Proceeding to change a conditional into an absolute amercement, discussed by SMITH, C. J.)

MOTION of defendant to set aside a judgment on the ground of excusable negligence, heard at Spring Term, 1881, of JONES Superior Court, before *Graves, J.*

The motion was allowed and the plaintiff appealed.

Messrs. Simmons & Manly, for plaintiff.

No counsel for defendant.

SMITH, C. J. The facts found by the court clearly bring the present application within the provisions of section 133 of the Code, as it has been heretofore construed, and authorize the exercise of the discretion conferred in setting aside the judgment. The defendant who

had been amerced *nisi* for an alleged failure to make due return of an execution issued to him, as sheriff of Bladen, at the plaintiff's instance from the superior court of Jones, had filed his answer to the plaintiff's complaint; had from the beginning of the action employed counsel for his defence; had with his counsel attended at a previous term of the court, and on the day appointed for the hearing, but before which the session had ended, was assured by his counsel that he had given the necessary attention for the protection of the defendant; did not know until late Tuesday night of the term when the judgment was made absolute, and it was not practicable for him thereafter to reach the court, distant two days travel from his own residence, in time for the trial, and to maintain his defence; and the judg- (79) ment was entered upon motion, in the absence of his counsel and himself, and without evidence upon the matters controverted in the pleadings.

It is also found that the defendant was at the time engaged in official duties before the board of county commissioners of his own county.

If this be not a case of neglect *excusable* under the statute, we should be at a loss to find one that does come within its purview. But we have had occasion at the present term to consider the subject in the case of *Wynne v. Prarie, ante,* 73, and it is needless to add to what is said in the opinion in that case.

But the plaintiff insists that her proceeding to change the conditional into an absolute amercement, required the defendant to show cause on oath, and that his answer, not being sworn to, is a nullity and was properly so regarded when final judgment was rendered.

But while this would be so if the plaintiff had pursued the course pointed out in the act of 1872, enacted soon after the decision in *Thompson v. Berry,* 64 N. C., 79, in which it was held that the penalty given against a defaulting sheriff for his failure to make due return of process (Bat. Rev., ch. 106, sec. 15) must be enforced under the Code, by an action begun by summons and prosecuted as there directed, the plaintiff has elected to pursue the latter course, by issuing and causing to be served on the defendant, a summons for relief, and filed his complaint, not under oath, specifying the relief she demands. The defendant is thus at liberty to assert his defence to the demand in an unverified answer, and thus to make the issues by which his liability is to be tested, in the same manner in which the plaintiff asserts her claim to the penalty.

The service of the notice to be given by the clerk under the statute (Bat. Rev., ch. 17, sec. 259d) of "a motion for a judgment absolute, or for execution" after judgment *nisi* has been entered, (80) would have conveyed information of the nature of the claim

and of the prior action of the court, and called on the officer to show cause upon his affidavit; but the process used gives no information itself, but refers to the complaint to be filed as showing the cause of action.

When the plaintiff seeks the remedy by an independent action, which was open to her by the summary method of a rule, she gives to the defendant an equal right to avail himself of the mode of defence applicable to actions prosecuted under the new practice.

The ruling of his Honor might be sustained therefore upon the ground of the irregularity in which the judgment was entered up, without ascertaining the disputed facts in any way, as because the neglect of the defendant to be present at the trial was excusable, and warranted the exercise of his discretion which is not subject to our review.

It must be declared there is no error in the order vacating the judgment, and the cause must proceed in the court below, and to this end let this be certified.

No error. Affirmed.

Cited:Pickens v. Fox, 90 N.C. 372; *Winborne v. Byrd,* 92 N.C. 10; *Taylor v. Pope,* 106 N.C. 271; *Gaylord v. Berry,* 169 N.C. 736; *Schiele v. Ins. Co.,* 171 N.C. 431.

W. D. NORWOOD AND WIFE v. KING KING.

Excusable Negligence—Discontinuance.

1. On motion to set aside a judgment on the ground of excusable negligence, it appeared that the judgment was rendered by default in 1875, six months after return of summons; defendant did not employ counsel to attend to the case, but relied upon the assurances of another to do so; no defence was made to the action by reason of the attorney's mistaking the case, and no further attention was given to the matter until a year after judgment and eighteen months after the attorney was spoken to; *Held,* that the neglect was inexcusable.
2. *Held further,* that the institution of an independent action in respect to the subject matter of the controversy, in lieu of a renewal of the motion, is such an abandonment of the remedy by motion as work a discontinuance of the same.

(81) MOTION to set aside a judgment under section 133 of the Code of Civil Procedure, heard at Fall Term, 1880, of NORTHAMPTON Superior Court, before *Graves, J.*

The following are the facts found by the court:

1. That a summons was issued and served on the defendant returnable to Fall Term, 1874.

2. That as soon as the summons was served on defendant, he went to John W. Pugh, his grantor of the land sued for, and asked what he should do, and Pugh told him to make himself easy, that he had already employed James Vinson, an attorney at law, resident at the court-house of said county, to defend the action.

3. That relying upon this assurance, the defendant took no further action in the matter then, and at Spring Term, 1875, judgment by default was rendered against him.

4. That he did not know of the judgment until May, 1876, when Pugh informed him of it, and told him he had better go at once and see Mr. Vinson; that he went immediately to see Vinson, and was told by him that judgment had been taken at Spring Term, (May) 1875, and he further told affiant that Pugh had employed him to defend the action, but supposing the action had been brought against Pugh, he had missed the case, and had made no defence, and had only discovered his mistake a few days before.

5. That at Spring Term, 1876, on Wednesday of the second week, in May, affiant made affidavit setting forth substantially the foregoing statement, and upon it moved to have the said judgment set aside, and his Honor (Judge Henry) refused to set aside the judgment, on the ground that he did not have jurisdiction, and that it belonged to the jurisdiction of the judge of the 6th judicial dis- (82) trict, (Judge Watts) of which the said county of Northampton formed a part.

6. That no record was made of the action of the judge at Spring Term, 1876.

7. That the judge then presiding (Henry) took the papers and forwarded them to Judge Watts.

8. That Judge Watts took no action and the papers were never returned, and are lost.

9. That a writ of possession on the judgment was issued and executed in August, 1876, and all the costs paid by the defendant in the latter part of the same year.

10. That at the instance of the defendant, by the advice of counsel, a suit was instituted in the name of the said Pugh against the plaintiff, Norwood, which is still pending.

11. That on the 8th of May, 1879, the defendant being so advised filed his affidavit setting out the grounds upon which he renewed his motion to set aside the said judgment under section 133 of the Code.

12. That on the 18th day of March, 1879, T. W. Mason, counsel for the defendant, read to R. B. Peebles, who had appeared as counsel for the plaintiffs, a notice of the said motion of the 8th of April, and Mr. Peebles said he was not authorized to accept the service, but that he appeared as counsel for plaintiffs to resist this motion.

13. That upon the hearing, the defendant offered a paper writing purporting to be a notice of the motion, and proposed to prove that it was duly served by proving an alleged indorsement of service, signed by one M. A. Moore, a constable now dead, to be in the handwriting of said Moore, which proof of service was adjudged insufficient.

The motion to set aside the judgment was resisted by the plaintiffs upon the grounds: 1. Want of notice of the motion. 2. Motion
(83) not made within a year and a day. 3. A motion in cause was not the remedy. 4. No case of excusable neglect was made out.

The motion was refused and the defendant appealed.

Mr. R. B. Peebles, for plaintiffs.
Mr. Thos. W. Mason, for defendant.

ASHE, J. Conceding the notice of the motion to have been legally made, that it was made within a year after the rendition of the judgment, and that the defendant pursued the proper remedy, we are of the opinion the facts found are not sufficient to entitle him to the relief sought by his motion, and that there was no error in the ruling of the court below.

The judgment sought to be set aside was rendered by default at May Term, 1875, six months after the return term of the summons. The affiant had not employed a lawyer, but relied upon the assurances of his grantor, (Pugh), that he had employed a lawyer to attend to the case. What claims he had upon his grantor to perform this service for him does not appear; but he recognized him and relied upon him as his agent to manage the case for him.

Pugh spoke to Mr. Vinson, a member of the bar, to attend to the case, and this was all the attention given to the cause by the affiant, his agent, or attorney, until a year after the rendition of the judgment, and at least eighteen months after the attorney was spoken to, to attend to the case. It is true the attorney alleged that he failed to make an appearance in the case, because he looked on the docket for the name of Pugh, supposing it was he who was sued, and did not find such a case.

It was very great negligence in the affiant and his agent in permitting all this time to pass without one word with the attorney in regard to the defence of the action.

The action was in nature of ejectment, to recover land, and the affiant and his agent ought to have known that in such an (84) action something more was necessary to be done than simply to have an attorney's name marked to the case, that a defence could not be made, without an answer, and an answer could not be filed without a bond for costs. In any action which it is proposed to defend, it would be inexcusable neglience in the defendant to allow so many terms to pass without seeing his attorney and apprising him of the grounds of his defence.

For a further excuse, the affiant says that he did not know of the existence of this judgment against him until May Term, 1876, and that within a year after its rendition, he made a motion before Judge Henry, then presiding in said court, to have the judgment set aside, but he declined to do so upon the ground as alleged by him that he had no jurisdiction, and that application should be made to Judge Watts, the resident judge of the district; that the papers were sent to him by Judge Henry and he lost them; that thereupon, upon the advice of counsel, Pugh, his grantor, brought an action against the purchaser of the land under the execution on the judgment; and that action is still pending; and that in May Term, 1879, he renewed his motion to set aside the judgment.

We cannot see that these facts at all improve the affiant's grounds for relief.

Instead of moving the court, at the first term after it was discovered that his affidavit and accompanying papers could not be found, to put his motion upon the docket *nunc pro tunc*, or even renewing his motion at the first opportunity, he relied for relief upon an action brought by Pugh to recover the land, and did not renew the motion until the spring of 1879, three years after his first motion was made. The recourse, with his consent, to the action of ejectment in lieu of his motion, was a clear abandonment of that remedy. It was such an abandonment as worked a discontinuance of the motion. *Caldwell v. Parks*, 61 N. C., 54. There, a petition for a public road (85) having been carried by appeal from the county to the superior court, the judge made a decree in favor of the petitioners, and thereupon ordered a *procedendo* to be issued to the county court, and it was held, "that although the latter part of this judgment was erroneous, and the court should have ordered a writ to issue from its office, yet, inasmuch as the parties had obeyed it, and carried the case back into the county court, the petition was thereby *discontinued*, and therefore after several years of unsuccessful litigation in the cause had occurred, in both courts, the petitioners could not resort to the judgment above

mentioned, and move for an order to summon a jury and lay out the road."

On the point of excusable neglect under section 133 of Code, we have had numerous decisions, which it is to be regretted are not always reconcilable, but the case of *McLean v. McLean,* 84 N. C., 366, is similar to this, and the principle there decided, we think, governs and disposes of this case. That was a case where the summons was regularly served upon the defendant, and the counsel employed by him failed to enter his pleas, and the defendant made no inquiry as to the disposition of the case until nearly five years after rendition of the judgment, and it was held that his laches were inexcusable. No error.

No error. Affirmed.

Cited: Brown v. Hale, 93 N.C. 190; *Stallings v. Spruill,* 176 N.C. 122; *Pate v. Hospital,* 234 N.C. 639; *Stephens v. Childers,* 236 N.C. 351.

WILLIAM T. ROGERS v. GEORGE B. MOORE.

Judgment, Final and Interlocutory—Writ of Inquiry—Damages.

1. Judgment final may be rendered in an action for the recovery of money where a specific sum is contracted to be paid, and where the complaint is sworn to and no answer filed. C. C. P., Sec. 217.
2. But in an action for goods sold or services rendered, and the like, even though the complaint be verified and no answer filed, the judgment is interlocutory, and the former practice of referring the inquiry of damages to a jury under the supervision of the judge, is restored by the act suspending the Code. Bat. Rev., ch. 18.

(86) CIVIL ACTION tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The plaintiff filed a verified complaint demanding payment for the sum of $514.30, alleged to be due on account of money lent, board and lodging furnished, and goods sold and delivered, and at the trial judgment by default final for want of an answer was rendered, and the defendant appealed.

Messrs. Argo & Wilder, for plaintiff.
Messrs. Gatling & Whitaker, for defendant.

SMITH, C. J. In the opinion delivered at the present term in *Wynne v. Prairie, ante,* 73, we adverted to section 217 of the C. C. P. and

the proper construction to put upon its provision for a final judgment in "an action arising on contract for the recovery of money only," where the complaint was sworn to and no answer filed. We expressed the opinion that the cases contemplated were those in which a specific sum was contracted to be paid, and the section did not extend to those implied contracts to pay for goods sold or services rendered, whatever they were reasonably worth and whose value was to be determined by others. The present appeal is of this kind. The action is for goods sold and delivered, board and lodging furnished and money lent, not at an agreed price, but which the complaint declares "were reasonably worth" the sum of $514.30.

Under the former practice, if the action be in *assumpsit*, case, covenant or the like, to recover an unliquidated demand, or uncertain damages for an injury sustained, it is called an interlocutory (87) judgment, it being necessary before such judgment can be finally entered up, to take some further steps in order to get such demand or damages liquidated or assessed. This is done by a writ of inquiry. 1 Sell. Pr., 347; Step. P., 105.

Referring to the practice in actions of assumpsit, BATTLE, J., says: Upon a default in that action which *sounds in damages*, the judgment is necessarily interlocutory. *Hartsfield v. Jones*, 49 N. C., 309.

The rule prescribed in the Revised Code, ch. 31, sec. 91, dispensed with a jury and directs the clerk to compute the interest preparatory to a final judgment by default in suits "instituted on a single bond, a covenant for payment of money, bill of exchange, promissory note, or a signed account," contemplating the rendition of such judgment upon written instruments which themselves specify the precise sum to be paid, and need only an estimate of accrued interest. The like general rule has been recognized and followed under the new procedure.

DICK, J., speaking for the court in *Parker v. Smith*, 64 N. C., 291, uses this language: "The case before us is an action of *assumpsit* for goods, wares and merchandise, sold and delivered, and the specific articles are not set forth in the declaration. The judgment by default admitted the cause of action, and the plaintiffs were entitled to nominal damages, without introducing any proof. But in seeking substantial damages, they were not relieved from the necessity of proving the delivery of each article and the value thereof." See *White v. Snow*, 71 N. C., 232; *Mayfield v. Jones*, 70 N. C., 536; *Oates v. Gray*, 66 N. C., 442.

In the last case the judgment was reversed for irregularity, having been entered up as final, on an unsworn complaint for goods sold, etc., and the court adverts to the fact that the complaint was not verified, but does not attempt to mark the line of discrimina- (88)

tion between the cases in which the judgment may be final and those in which it must be interlocutory. The section of the Code under review, so far as it undertakes to delegate judicial power to the clerk which he might exercise in vacation, has been seperseded and rendered inoperative by subsequent legislation which makes the summons returnable to terms of the court, and the judgments the act of the judge and not of the subordinate officer under him. Bat. Rev., ch. 18; *Mabry v. Erwin,* 78 N. C., 45.

The result seems to restore the old practice in this particular, and to refer the inquiry of damages after an interlocutory judgment to the jury acting under the supervision of the judge, and not to leave this to the mere oath of the plaintiff as to what he supposes those damages to be.

The judgment must therefore be reversed for irregularity, and this will be certified to the end that the cause proceed in the court below.

Error. Reversed.

Cited: Comrs. v. Lash, 89 N.C. 166; *Roulhac v. Miller,* 89 N.C. 197; *Alford v. McCormac,* 90 N.C. 152; *Roulhac v. Miller,* 90 N.C. 176; *Witt v. Long,* 93 N.C. 392; *Anthony v. Estes,* 101 N.C. 547; *McQueen v. Bank,* 111 N.C. 516; *Kiger v. Harmon,* 113 N.C. 408; *Osborn v. Leach,* 133 N.C. 432; *Scott v. Life Asso.,* 137 N.C. 522, 527.

CITY OF WILMINGTON v. JACOB I. MACKS.

Tax on Lawyers—Municipal Power.

The city of Wilmington has the power to impose a tax upon the defendant, as a resident practicing attorney at law.

CIVIL ACTION, tried at Fall Term, 1881, of NEW HANOVER Superior Court, before *Shipp, J.*

This action was brought before a justice of the peace to recover the sum of twenty-five dollars, laid as a tax upon the defendant,
(89) as a resident practicing attorney of the city of Wilmington.

The case was brought by appeal to the superior court, where, upon a case agreed judgment was rendered against the defendant, from which he appealed to this court.

NOTE.—The decision in *Wilmington v. McRae,* at this term, is the same as in the above case.

It was agreed that the city of Wilmington is a municipal corporation duly chartered organized under an act of the general assembly of the state of North Carolina. That by an act to incorporate the inhabitants of the town of Wilmington, ratified February 1st, 1866, by which said act, the town of Wilmington was created the "City of Wilmington," and the mayor and board of aldermen of the city of Wilmington were invested with all the powers, duties and privileges of the commissioners of the town of Wilmington. The mayor and board of aldermen of the city of Wilmington did on the — day of ——, 1880, levy a tax of twenty-five dollars upon the defendant, as a tax for being a resident practicing attorney at law of the city.

The defendant is a resident practicing attorney of said city, having obtained a license from the supreme court of the state in June, 1877, and was duly qualified as an attorney by taking the oaths of office prescribed by law in such cases provided, upon producing before the June term of the superior court for the county of New Hanover, the receipt of the clerk of the supreme court that he had paid his license tax.

It was further agreed that all resident lawyers are assessed and required to pay, as well as all other citizens of said city, the tax upon real and personal property, and upon the income from the practice of their profession.

Under an act entitled "an act concerning the town of Wilmington," ratified February 20, 1861, it was provided by section 2 thereof, "that the commissioners of the town of Wilmington may, from year to year, fix the sums and rates of taxes on the several professions, callings, trades, occupations, and other subjects of taxation em- (90) braced in this act, and the sums and rates so fixed during any year may continue from year to year, unless altered, and the commissioners shall have power to make all such ordinances which to them may seem expedient, in reference to the payment of such taxes, the issuing of license to the persons liable for the payment of the same, the terms of such license and the penalties for breach of same, and the penalties for nonpayment of such taxes."

This power of taxing professions was one of the powers belonging to the commissioners of the town of Wilmington, which was vested in the mayor and aldermen of the city of Wilmington by its charter.

Messrs. Stedman & Latimer, for plaintiff.
Mr. E. S. Martin, for defendant.

ASHE, J., after stating the case. I was not on the bench when this case was argued in behalf of the defendant, but the case having been

duly considered in conference, the court is of the opinion it is not now an open question, the principle involved having been decided in the case of *Holland v. Isler*, 77 N. C., 1.

The plaintiffs in that case were the commissioners of the town of Goldsboro, and the defendants were lawyers and physicians residing in said town. The charter of said corporation empowered the commissioners to tax lawyers, physicians, etc. The plaintiffs under that power given in their charter had assessed a monthly tax upon the defendants, which they resisted.

The court below held that the plaintiffs had the right to impose and collect said tax, and from the judgment rendered the defendants appealed to this court, where the judgment of the superior court was affirmed, and READE, J., speaking for the court, said: "The con-
(91) stitution provides that the general assembly may tax trades, professions, etc. Art. V., Sec. 3. The general assembly has authorized the town of Goldsboro to lay and collect a monthly tax on lawyers and physicians, etc. Private Laws 1866. The defendants are lawyers and physicians in the town of Goldsboro, and the town has laid a tax upon them which they refuse to pay. This would seem to make a clear case against them."

We think this case is decisive of that before us.

There is no error. The judgment is affirmed.

No error. Affirmed.

Cited: Winston v. Taylor, 99 N.C. 213; *Guano Co. v. New Bern*, 158 N.C. 355.

HENRIETTA ALLEN v. M. A. BAKER.

Breach of Promise to Marry—Evidence—Damages—Practice.

1. An action for damages for breach of promise to marry does not abate upon the death of the defendant.
2. Contracts of this character differ from ordinary contracts, and upon a trial for breach of same, *it was held;* 1. All the circumstances of the case, and the surroundings of the parties, should be submitted to the jury. 2. Evidence of the value of the defendant's estate, and of the mortification and pain of mind the plaintiff suffered from his refusal to fulfil his promise, is competent to be considered by the jury as a standard by which to measure the plaintiff's disappointment and the extent of her loss.
3. Where defendant failed to perform such contract upon the ground that he was afflicted with a disease which rendered him unfit for the married state, *it was held* that he would be answerable in damages if the disease was

contracted subsequently to the time of making the promise, or if before, and he knew his infirmity was incurable; but if it was contracted prior to the promise and he had reason to believe it was temporary only, he is excusable for a breach resulting from a knowledge afterwards acquired that it was of long duration.

4. Where the issues submitted do not cover the whole merits of a case, this court will retain the cause and frame other issues to be passed upon by the jury in the court below.

CIVIL ACTION tried at Fall Term, 1881, of WAYNE Superior (92) Court, before *Shipp, J.*

This action in which the plaintiff complains that J. B. Baker, the defendant's intestate, was guilty of a breach of a contract of marriage with herself, was begun in the lifetime of the intestate. He died after filing his answer, and the defendant as his administrator was made a party. It was insisted for the defendant that the action abated upon the death of his intestate, but his Honor held otherwise, and directed the trial to proceed, to which the defendant excepted.

The plaintiff alleged that the said Baker on the 13th of February, 1875, contracted to marry her, and the said contract was to be consummated according to the agreement of the parties on the 14th of March following, with which agreement he refused to comply.

The said Baker in his answer admitted that there was an indefinite agreement between the plaintiff and himself to marry, but that no definite time was agreed on, and that a very few days after entering into said agreement, he was advised by his physician that he was so diseased as to be unfit to marry, which fact he immediately communicated to the parents of the plaintiff, and asked that the marriage might be postponed until his recovery, to which they assented. He further alleged that he was still diseased at the time of filing his answer, and that at no time since making his contract with plaintiff, had he been in a condition to marry.

On the trial, after offering testimony tending to prove that there was a contract of marriage between defendant's intestate and herself, and his refusal to comply therewith, the plaintiff proposed to show by her father the effect produced upon her by such re- (93) fusal. This evidence was objected to by the defendant, but admitted by the court, and the defendant excepted.

The plaintiff then offered in evidence the value of the estate of said intestate, to which objection was also made, but the court admitted it and the defendant excepted.

The defendant then introduced as a witness the attending physician of his intestate, who testified that he was greatly diseased with a venereal affection; that such was his condition at the time of the al-

leged contract of marriage, and that at no time thereafter, up to the day of his death, was he relieved.

The defendant's counsel asked that the following instructions should be given to the jury, to wit: That if the intestate was unable to perform the contract on the day appointed, and assigned no reasonable cause therefor, he was entitled to a reasonable time within which to perform it. 2. If during a necessary delay, the performance of a personal contract is rendered impossible by unforeseen circumstances, such as the death of the party, then his estate is not responsible.

His Honor, without making any express reference to the instructions prayed for, charged the jury that if they were satisfied that a contract of marriage was entered into between the parties, and the defendant refused to perform the same, the plaintiff would be entitled to compensation; that this contract was of a peculiar nature and no certain rule could be given whereby to estimate plaintiff's damages, but they should consider all the facts and circumstances of the case—though they would not be justified in awarding vindictive damages; that in mitigation of damages, they had a right to take into consideration the testimony as to the health and condition of the deceased at the time of the engagement, and his refusal to comply therewith, and if there was an agreement to postpone the marriage to some defi-
(94) nite time, and the intestate died before the time and was consequently unable to perform the contract, then the plaintiff would not be entitled to recover.

The issues submitted and the responses thereto were as follows:

1. Did defendant's intestate promise to marry plaintiff? Yes.

2. Did plaintiff consent that the marrriage should be postponed, on account of the disease of defendant's intestate, until his recovery? No.

3. Did the intestate refuse to marry plaintiff? Yes.

4. What damages did plaintiff sustain? Two thousand dollars.

After judgment for the plaintiff, the defendant appealed.

Messrs. Grainger & Bryan, for plaintiff.

Messrs. W. J. Clarke and Hinsdale & Devereux, for defendant.

RUFFIN, J. In *Shuler v. Millsaps*, 71 N. C., 297, the act of 1868-69, (Bat. Rev. ch. 45, secs. 113, 114,) received a construction by this court, and it was held that by reason of the provisions thereof, an action for a breach of promise of marriage did not abate upon the death of the defendant, but survived as against his personal representative. We feel ourselves bound by that decision, though were it an open question, we are inclined to think we should hold differently, in a case like that

and the present one, in which no special damages were laid in the complaint.

As stated by his Honor, contracts of this sort differ from ordinary contracts, as for the sale of goods and the like, in which damages are awarded according to some well settled rule of the courts, and when the financial condition of the defendant can have no bearing on the question. About the only instruction that could be given was the general one which his Honor did give, to the effect, that all the circumstances of the case and the surroundings of the parties (95) should be fairly considered, and just compensation allowed for the anguish endured by the plaintiff, and the injury inflicted upon her prospects in life. In estimating them, it is proper, according to the great weight of modern authority, that the jury should consider the pecuniary condition of the defendant as some standard by which to measure her disappointment, and the extent of her loss. *Harrison v. Swift*, 13 Allen, 144; *Sprague v. Craig*, 51 Ill., 288; Sedgwick on Damages, (7 Edition), 146. The same authorities are full to the point, that the jury should take into consideration whatever mortification and pain of mind the plaintiff may have suffered, resulting from a refusal of the defendant to fulfil his promise. So that, in the judgment of this court no error was committed with reference, either to the testimony admitted, or the instructions given to the jury, of which the defendant can rightly complain.

We are of the opinion, however, that the issues which were submitted do not cover the whole merits of the case, and that without other findings on the part of the jury it is impossible to do full justice to the rights of both parties. Assuming it to be true, as we do from the verdict, that the plaintiff did not give her assent to a postponement of the marriage, and that the defendant's intestate refused to consummate it, it is still important to know from what cause that refusal proceeded—whether from a disregard of the plaintiff's feelings and his own plighted word, or from a consciousness, supervening his engagement, that he labored under a loathsome disease, incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with any one. In his answer he alleged that his failure to comply really depended upon such a conviction on his part, and if such be true, this court could not hold that he was responsible in damages by reason thereof. We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the (96) individual, but against society itself.

However once doubted, it is now generally conceded that if the performance of a contract be rendered impossible by the act of God

alone, such fact will furnish a valid excuse for its non-performance and such a stipulation will be understood to be an inherent part of every contract. It is likewise true, that whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract, the fulfilment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them?

Our attention was called by counsel to the decision made by the court of Queen's Bench, and afterwards by the court of Exchequer, in the case of *Hall v. Wright*, 96 Eng. C. L. Rep. 746, where a defendant was held liable, who, after promise and before breach, became afflicted with bleeding from the lungs, whereby he became incapable of marrying without imminent hazard to his life. In making that decision, the court treated a contract for marriage as they would any other contract, saying, that though in bad health, the man might nevertheless so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate; and if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal service, which, if not capable of
(97) being wholly performed, may be partially so; and in the next place, we believe it to be contrary to the understanding of men generally, that the acquisition of property or social position, either does or should constitute a main and independent motive and inducement for entering into such a contract.

The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are, the comfort of association, the *consortium vitæ*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then, the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so.

In Pollock on Contracts, 370, (a book in which the principles of contract are treated of more philosphically than by any author known to

us) the decision in *Hall v. Wright, supra,* is referred to, with the remark, that it is so much against the tendency of the later cases as to be now of little or no authority, beyond the mere point of pleading decided therein.

We are not unmindful of the fact that the malady under which the party in this instance labored, was the legitimate result of his own imprudence; or, that the evidence offered showed that the disease was upon him, when he gave his promise to the plaintiff. As to the first point, the same might have been said of consumption, or any other fatal and disqualifying disease; it too may have proceeded from imprudent and sinful indulgence, but if contracted when he owed no duty to the plaintiff, we cannot see how that can vary the case.

The other is a point of more consequence; if knowing, or by (98) using extraordinary diligence he might have known, that his infirmity was incurable, or of long duration, he entered into a contract with the plaintiff, his subsequent incapacity to perform it would furnish no excuse for its breach—so far from it, it would amount to a gross aggravation. But on the other hand, if he had reason to believe his disease was a temporary one, which might be healed in time to enable him to complete his agreement, then, the law would hold him excusable for a breach resulting from a knowledge subsequently attained, that his disease was in fact not only incurable, but such as must necessarily be communicated to his wife, and probably to their offspring, in case he made her such and availed himself of his conjugal rights.

The law will constrain no man to assume a position so full of peril, as to have placed within his reach the lawful means of gratifying a powerful passion, at the risk of another's health or life, and the possibility of bringing into the world children in whose constitution the seeds of a father's sin shall lurk. As said in the dissenting opinion in *Hall v. Wright,* it would seem to be strange that a man should be liable in damages for not doing that which is against all law, human and divine.

Under the rules, without sending the case back, and without depriving the plaintiff of the benefit of the verdict in her favor upon the issues already submitted, the court directs these further issues:

1. Did the defendant's intestate refuse to perform his contract of marriage with the plaintiff, because of his being so diseased as to be unfit for the married state?

2. Was he diseased at the time of making his agreement with the plaintiff, and if so, had he reason then to believe that his disease was permanent, or likely to be of long duration?

(99) This course we pursue by virtue of the example set in *Barnes v. Brown*, 69 N. C., 439.

PER CURIAM. Judgment accordingly.

Cited: Jones v. Swepson, 94 N.C. 706; *McDonald v. Carson*, 95 N.C. 381; *Strother v. R.R.*, 123 N.C. 200; *Benton v. Collins*, 125 N.C. 91; *Hinnant v. Power Co.*, 189 N.C. 128; *Winders v. Powers*, 217 N.C. 582; *Lamm v. Shingleton*, 231 N.C. 15.

WILLIAM BURNETT AND OTHERS v. THOMAS W. NICHOLSON AND WIFE.

Mill-Dam Act—Damages for Ponding Water—Married Women—Tort—Evidence.

In an action for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream; *Held*,

(1) That the measure of damages is the value of the injury actually sustained by the plaintiff up to the time of trial, and in estimating the same, the decrease of custom (in the matter of toll) cannot be considered.

(2) Evidence to show how much it would cost the plaintiff to raise his dam and water-wheel to escape the injury complained of, was properly excluded.

(3) In the absence of an allegation in the answer raising an issue of the liability of the *feme* defendant, she cannot be permitted to set up her coverture as a defence to the alleged tort.

CIVIL ACTION tried at Fall Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

This action was brought under the statute (Bat. Rev., ch. 72) to recover damages to plaintiffs' grist mill, on Fishing creek in Halifax County, caused by the erection of a mill-dam by defendants which ponded the water back on plaintiffs' mill.

(100) It is alleged in the complaint that the mill was built more than fifty years ago and has been in constant use, except for about a month several years since; that the defendants, or the defendant Thomas W. Nicholson as the agent of his wife, Martha E. Nicholson, are now building a mill on Fishing creek, at a point about ten hundred yards below the plaintiffs' mill, and have erected a dam about six feet high across the creek, and also an obstruction called a "float," thereby causing the water to flow back upon plaintiffs' water-wheel, lessening its rapidity and sometimes preventing it from turning at

all, to the great injury of the plaintiffs. Wherefore plaintiffs ask that commissioners may be appointed under the provisions of the statute to view the premises, and assess the damages to which plaintiffs may be annually entitled.

The allegations of the complaint are substantially admitted by the answer, except that which charges that the injury to plaintiffs water-wheel is caused by the building of the dam, and this the defendants positively deny.

The plaintiffs amended their complaint—demanding damages to the amount of three hundred dollars for each year since the erection of the dam by defendants, and praying judgment for two thousand dollars and costs.

Issues submitted to the jury by the court are as follows: 1. How long had plaintiffs' mill been used by them, and those under whom they claim, before the erection of defendants' dam? Ans. One hundred years. 2. Have plaintiffs sustained damage by the erection of said dam, and if so, how much, up to the present term of the court? Ans. One hundred dollars annually (without interest) from the time of the erection of the dam by defendants.

There was much conflicting evidence as to whether the erection of the dam had caused the injury complained of, and also as to the amount of the damage sustained.

Upon the question of damages, the defendants offered to show how much it would cost the plaintiffs to raise their dam and (101) water-wheel, so as to relieve them of the water ponded back by reason of defendants' dam, but upon objection this was ruled out, and defendants excepted.

The court instructed the jury that the measure of damages would be the injury actually sustained by plaintiffs, up to the trial, and that in estimating the same, they could not take into consideration the diminution of toll on account of decrease of custom caused by erecting a mill near the plaintiffs'.

The plaintiffs moved for judgment against the separate estate of the feme defendant, which was allowed. Verdict and judgment for plaintiffs, appeal by defendants.

Messrs. J. B. Batchelor and Spier Whitaker, for plaintiffs.
Mr. Walter Clark, for defendants.

SMITH, C. J. Upon the question of damages caused by the dam built below the plaintiffs' mill and the increased accumulation of water upon their water wheel from this obstruction to its flow, interfering with the working of the mill, the jury were directed, and the issue was

so framed as to call for this response, to inquire and ascertain the annual damage from the time of erection of the dam up to the trial; that the measure thereof was the value of the injury sustained by the ponding back of the water upon the mill; and that in making their estimate, they should not consider the loss of toll resulting from the near presence of the new mill put up by the defendants, and the consequent diminution of patronage. The defendants had offered, and not been allowed, to introduce testimony to show at what expense the plaintiffs' mill could be so altered as to lift their water wheel above the increased volume of water and prevent injury therefrom.

(102) The jury assessed the damages for no fixed period, but at one hundred dollars for each year.

The defendants objected to the rendition of judgment for damages accrued since the commencement of the action, and for any sum against the feme defendant because of the presumed coercion of the husband in causing her to commit the alleged tort. The court gave judgment against both defendants, and against the seperate estate of the feme, for the sum of five hundred dollars. These are the assigned errors appearing in the record, and requiring a review.

1. The rule of damages was correctly explained, and the court properly refused to hear evidence not bearing upon the question of the extent of the actual injury caused by the obstruction placed in the stream. It was not less the direct result of the defendants' wrongful act, and for which they are responsible, that the plaintiffs could have reconstructed or so changed their mill as to have prevented further injury at an expense less in amount than the damages sustained. The instruction was as favorable to the appellants as they could ask, and their counsel does not press that point in the argument before us.

2. The defendants insist that the judgment should be for such damages only as were sustained up to the commencement of the suit, and for none accruing afterwards. If this is the correct rule, its requirements could be easily met by deducting from the sum recovered the part accruing during the interval, upon the basis of an estimate at the rate of one hundred dollars per annum, and entering judgment for the residue. With this deduction there would remain but about seven months preceding the action, of the five years covered by the judgment given, and the share can be readily ascertained.

Some confusion in determining the present status of the law in regulating proceedings of this kind is produced by the amendatory act of 1877, which repeals a part, and leaves in force other sec-

(103) tions of the previous statutes which relate to the same subject, and are inter-dependent one upon the other. The apparent re-

pugnancy between the amendments and the sections retained is pointed out in the recent case of *Hester v. Broach,* 84 N. C., 251, by Mr. Justice ASHE, the removal of which seems to require the correcting hand of the law-making power.

Assuming, as we must, from the record, that *actual* and not *prospective damages,* have been assessed, and none are adjudged which did not in fact accrue before the trial, the question is, whether the plaintiffs in this action are entitled to compensation for the continual injury sustained up to the trial, as well for that done since as before the institution of their suit. The point is not disposed of in *Hester v. Broach,* and now requires a decision from us.

In *Gillet v. Jones,* 18 N. C., 339, where the act of 1809 was carefully examined and construed, a verdict in the superior court to which the case had been removed by appeal, was rendered for fifty dollars as the annual damage, and seven years had elapsed from the point of time to which the damages related, and judgment was given for five several sums of fifty dollars and up to the time when the injury ceased. This judgment was affirmed.

Delivering the opinion, the eminent Chief Justice who for so long a period presided over this court, and in a large degree shaped the jurisprudence of the state, thus expounds the statute: "The fifth section is a provision altogether for the benefit of the plaintiff, which gives him the election of the statute remedy for the *whole injury,* or of that remedy for the damages of one year, and that of the common law for the residue. It is in the nature of a proviso to the previous enactment, that the judgment shall be binding for five years, and declares that notwithstanding that enactment, 'the person injured shall not be prevented from suing' at common law, when the damages shall be found as high as twenty dollars. When that happens, the (104) party shall not be prevented from recurring to his ancient remedy; that is to say, he shall be at liberty to do so, 'and in such cases the verdict and judgment shall only be binding for one year.' *'In such cases'* does not mean those merely in which the damages have been assessed to twenty dollars; but those in which that has taken place; and also, the plaintiff using the liberty allowed by the act, *sues 'as has heretofore been usual.'* Then and in that case the verdict shall not conclude. But if the plaintiff chooses not to sue at common law, then *it is conclusive."*

And so PEARSON, J., says in *Beatty v. Conner,* 34 N. C., 341, that "where the second statute allowed an appeal to the superior court and a trial at bar, under which the proceedings would most usually be pending for several years, there was then no reason why the jury should not find the actual damages up to the time of the trial."

While the section directing an assessment for the space of five years from the date of the summons to the finding between the parties, if the mill is so long kept up, unless the damages shall be increased by raising the water or otherwise, is repealed (Bat. Rev., ch. 72, sec. 15) by the act of 1877; yet, as is said in *Hester v. Broach,* the assessment of *annual damages* is recognized in the unrepealed parts of the former law, without the limitation to the period of five years, and hence we interpret the law as admitting the assessment up to the time when the cause is determined. No reason has occurred to us why, in a proposed change in the mode of procedure which is contemplated by the act of 1877, this feature in the original law, commending itself for its many advantages, should be deemed to have been stricken out, in the absence of any express provision to that effect, or from which such legislative intent can be reasonably inferred. The damage is continuous and proceeds from the same unlawful cause; and why should
(105) the injured party be driven to successive actions for a redress which could as easily be afforded in a single action? This, it is held, can be done in actions for the recovery of land and the damages for the wrongful withholding; and why not in a proceeding for a continuing injury like the present? In *Whissenhunt v. Jones,* 78 N. C., 361, the plaintiff was permitted to recover his damages for the wrongful withholding of possession of his land, up to the time of trial, and upon an exception to the ruling by which this was allowed, BYNUM, J., speaking for the court, declares that "the purpose of the Code in actions of this nature, *as it is in all others,* is that a complete determination shall be made of all matters in controversy, growing out of the same subject of the action," and that the action "would fall short of that consummation, if the plaintiff could only recover damages up to the commencement of the action, and should be put to another action to recover the damages sustained subsequently, but before the time of trial."

3. The defendants' counsel further excepts to the rendition of any judgment against the feme defendant, and refers to numerous authorities to show that a married woman, uniting with her husband in committing a tort, is presumed to be acting under his influence, and is not civilly responsible for the act. The cases cited fully sustain the proposition; and if in a controversy as to her personal legal liability, the facts had appeared, it would have been the duty of the court so to instruct the jury. But no issue to raise this question was submitted and no evidence offered upon the point. The complaint avers that the defendants, or the defendant Thomas W., as the agent of the other defendant, were then building the mill and had already constructed the dam by which the plaintiffs' mill suffered injury; and the defend-

ants both admit in their answer that they have erected the dam, and are preparing to put up their grist mill; and no question is made of the civil responsibility of each for the alleged tortious (106) act. It must be then understood that an equal and common liability rests upon both, and so no issue was eliminated from the pleadings admitting evidence to exempt the feme defendant by reason of her coverture and want of freedom in the act. Although coercion is *presumed it may be disproved.* "Coverture does not deprive the wife of her capacity," remarks an eminent author, "to commit crimes and civil torts. Coverture with actual or presumed coercion by the husband does, but not coverture alone." 2 Bish. Mar. Wo., Sec. 703. "A wife, like any other individual, is liable to be sued for a civil wrong committed by her on a third person, when she acts freely, and not under what the law deems to be a coercion from her husband." *Ibid,* Sec. 905.

Trespass lies against both husband and wife for an assault by both; or for a trespass to the plaintiff's goods by both. Brown Act. at Law (43 Law Lib.) 249.

In *Barnes v. Harris,* 44 N. C., 15, an attempt was made to hold a married woman personally responsible for the misuse of a horse bailed to her husband and driven by her, and NASH, C. J., says: "It is sought to subject her, by deserting the contract and suing in tort, upon the ground that a feme covert is answerable for her own personal trespasses, etc. The principle is correct in the abstract, and if the facts set forth in the case amounted to such a trespass on her part, then the suit is properly prosecuted against her." As the feme defendant may commit a tort, and render herself personally liable, the defence arising out of her coverture and the presumed want of freedom to act, should have been made in the answer, and thus an issue presented in which the facts of the matter could be ascertained and her legal liability determined. The admission of the plaintiffs' charge, that she did the act complained of, is an admission of its legal consequences, and it is too late to make the objection, after all disputed matters have been settled by the verdict. It cannot now be assumed that the (107) attending circumstances, if developed, would not show a case of personal liability, and it is enough to say that no personal exemption of either was relied on in answer to the action.

There is no error, and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Reed v. Exum, 86 N.C. 727; *Burnett v. Nicholson,* 86 N.C. 728; *Grant v. Edwards,* 88 N.C. 250; *Goodson v. Mullen,* 92 N.C. 210;

Loftin v. Crossland, 94 N.C. 84; *Pearson v. Carr*, 97 N.C. 196; *Morisey v. Swinson*, 104 N.C. 565; *Wilhelm v. Burleyson*, 106 N.C. 389; *Jones v. Kramer*, 133 N.C. 448; *Dunn v. Patrick*, 156 N.C. 250; *Kinsland v. Kinsland*, 191 N.C. 118.

SAMUEL WILLIAMS v. RICHARD C. WINDLEY.

Contract of Master of Vessel—Agent and Principal—Presumptive Evidence.

A contract made by the master of a vessel for fitting out, victualling and repairing, and which personally binds him, binds the owner also, unless it is clearly shown that the credit is given to the one exclusive of the other. The very nature of the office of master furnishes presumptive evidence, that he is authorized by the owner of the vessel to act for him in such matters, subject to be rebutted by proof to the contrary. Evidence of the actual agency in this case, warranted the jury in finding for the plaintiff.

CIVIL ACTION tried at Fall Term, 1881, of BEAUFORT Superior Court, before *Bennett, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. J. E. Shepherd and C. F. Warren, for plaintiff.
Mr. George H. Brown, Jr., for defendant.

SMITH, C. J. The action begun before a justice, and removed by appeal to the superior court, is prosecuted for the recovery of the value of certain goods furnished and money advanced on September 14th, 1880, by direction of one Burrus, master of the vessel
(108) named "W. P. Cox," and for her use while lying at the port of Washington in this state, whereof the defendant was sole owner. The vessel had been under command of this officer for the six months succeeding the defendant's acquirement of title in January, 1879, on wages at the rate of seventy-five dollars per month, and thereafter she was run until her destruction, in March, 1880, under a contract between him and the defendant, upon shares, in which the former agreed to man and victual the ship at his own expense, and pay a moiety of port charges, while the latter was to keep the vessel in repair and pay the other moiety of port charges. This arrangement was not known to the plaintiff, when the supplies were furnished.

The defendant denied his liablity for any of the charges for want of authority in Burrus to enter into a contract binding upon him person-

ally, or on account of his ownership of the vessel. Several issues were prepared and submitted to the jury, which, with their responses, are as follows:

1. Were the supplies furnished to the vessel at her home port? Yes.

2. Was the home port the defendant's place of residence, or was he in easy access? No.

3. Was the defendant generally present at the home port, during the stay of the vessel afloat? He was not.

4. Did the plaintiff know that defendant had a general agent in the town of Washington? No.

5. Was Burrus specially authorized to act as the agent of the defendant, in the matter of purchasing supplies at this point? He was.

6. Was the defendant the owner of the vessel? He was.

The defendant proposed to amend by adding to the 4th issue the words "or could he have ascertained the fact by reasonable enquiry?" which was disallowed by the court, and this refusal is the only matter of complaint, shown in the record previous to the rendition of the verdict.

It was in evidence, that the defendant resided twelve miles (109) from Washington, but he was often in the place, and that his vessel was lying, on the day of the delivery of the articles, at a wharf in the rear of the plaintiff's store.

Upon the defendant's application for a new trial, he assigns as the grounds therefor:

1. That there was no evidence to warrant the findings in response to the 2nd, 3rd and 5th issues; and

2. That the 4th issue was insufficient and the finding defective, in the absence of the proposed amendatory words.

Upon the trial of the 5th issue, repeated acts of the defendant were given in recognition of the authority of Burrus to make contracts for supplies for the vessel, and of his payment for them. This it becomes necessary briefly to refer to and recapitulate.

One Crabtree testified, that Burrus was the agent for the defendant, and as master of the vessel, he, (the witness) had let him have supplies, without direct previous authority of the defendant, for which, except some disputed items, he had afterwards paid.

J. M. Roberts swore that his firm, (Waters & Roberts), had furnished similar goods upon Burrus' application, without being so directed, and they were paid for by defendant.

A third witness stated he had paid a certain sum to a seaman, for his wages; and another, that he had sold tallow—both being upon the order of Burrus, and payment therefor was made by the defendant,

who however then directed the latter witness not to credit Burrus further without his direction.

The defendant testified that he never authorized Burrus to procure supplies on his credit; that he had an agent in the town to attend to his business, and that he paid the several creditors: one, be-
(110) cause the seaman's wages were a lien upon the vessel, and the others, for an accommodation only.

"Masters," says Mr. Justice STORY, "are peculiar and special agents, and as incidental to their employment, are ordinarily entrusted with the shipment of officers and crew; of superintending the ordinary outfits, equipments, repairs and other preparations of the vessel for the voyage." Story Agency, Sec. 119.

So remarks another eminent writer: "As the master in general appears to all the world as the agent of the owner, in matters relating to the usual employment of a ship, so does he also in matters relating to the means of employing the ship—the business of fitting out, *victualling,* and manning the ship, being left wholly to his management, in places where the owner does not reside, and has no established agent, and frequently also even in the place of his own residence. *His character and situation furnish presumptive evidence of authority from the owner to act for him in these cases,*" liable indeed, to be refuted by proof that some other person, for the owner, managed the concern in any particluar instance, and that the fact was actually known to the particular creditor, or was of such general notoriety that he cannot be supposed to be, because he ought not to have been, ignorant of it." Abb. Ship., 126.

So MASON, J., delivering the opinion of the court of appeals in *Provost v. Patchin,* 5 Seld., 235, uses this language: "But as I understand the master's power as agent for the owners in the home port, he may bind them for all reasonable contracts for *fitting out, victualling,* and repairing the ship, unless it be shown that the owners themselves, or a ship's husband, managed the vessel, and the party contracting with the master was aware of this.

To same effect are *Rich v. Cox,* Cowper Rep., 636, and *Farmer v. Davis,* 1 Term., 109.

The contract made by the master, and which personally binds
(111) him, binds the owner also, unless it is manifest that the credit was given to the one exclusive of the other, and "so the mere fact, that the repairs are made, or the supplies furnished, either in the home port or in a foreign country at the request of the master, will be sufficient to charge him, but will not discharge the owner, unless such intent is manifest; nor will any private agreement between them as to how these expenses are to be met, or for whose use the ship is to

be run, vary the rights of third persons." Story Ag., Secs. 294, 296, 297, 298; 2 Pars. Ship, p. 7.

But aside from the presumption raised from the nature of the office of master, and his general control and management of the ship, placed under his command by the owner, it is quite apparent there was evidence of an actual agency in Burrus to contract for necessary supplies for the ship, in the fact that the defendant recognized his obligation to others upon similar contracts, and paid their several demands, without, so far as the case discloses, disclaiming his personal responsibility or the want of power in the master to purchase and obtain the needed articles. From these facts the jury were certainly at liberty to draw the inference of an authority, delegated to the master to procure what was necessary, and to render him responsible therefor.

If the finding of the 5th issue, resting upon the recited testimony is to stand, it disposes of the entire controversy, and renders needless an examination of other exceptions to the ruling upon other matters.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Huntley v. Mathias, 90 N.C. 104.

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(112)

WILSON & EBON v. JAMES T. RESPASS.

Landlord and Tenant.

Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery; and in such case, the lessor being solvent and required to give bond of indemnity, the court will not restrain him from selling the crop. (Review of the landlord and tenant act of 1877, ch. 283, and the method of proceeding to determine the rights of parties thereunder, pointed out by SMITH, C. J.)

MOTION for Injunction heard at Fall Term, 1881, of BEAUFORT Superior Court, before BENNETT, J.

The motion was refused and the plaintiffs appealed.

Mr. Geo. H. Brown, for plaintiff.

Mr. Jas. E. Shepherd, for defendant.

SMITH, C. J. The plaintiffs allege that on December 15th, 1880, an agreement was entered into between themselves and the defend-

ant, under which, with mules provided and fed and necessary farming implements furnished by him, they were to cultivate certain of his lands during the year succeeding, and deliver to him one-half part of the crops made and gathered, except that he was to have one-third only of the corn grown in a certain specified field, and to do certain other work on the premises, described in the complaint. That they accordingly entered upon the demised land and cultivated the same, raising crops of cotton, corn, rice, etc., for division between the parties to the contract, and performing in all respects the obligations assumed by them therein. That on the last of November, during their temporary absence, the defendant entered upon the demised land, took possession of the crops, except some corn that was used by them,
(113) refused to allow them to re-enter or in any manner interfere with the standing or gathered crops, and claims to hold them for himself alone.

The relief sought is that the defendant be restrained from removing, selling, or disposing of any portion of the crops; the crops and the land be restored to the possession of the plaintiffs and sold; and the proceeds held to await the future order of the court, and an account of the dealings between the parties under the agreement be taken, and reported by the clerk, or other appointed referee.

Upon this verified complaint, offered as an affidavit, a temporary restraining order was issued, and a day designated, of which notice was given to the defendant, for the hearing of the plaintiffs' application.

At the appointed time his Honor made the following interlocutory order:

This cause having been heard upon complaint, answer and affidavits, it is ordered and adjudged that the restraining order herein be vacated, and an injunction until the hearing is refused upon the execution of a bond in the sum of $2,000 by the defendant conditioned upon the payment by him to the plaintiffs, or either of them, of any sum that may be adjudged to be due by him to the plaintiffs. It is also ordered that the plaintiffs' application to give bond and take possession of the crops, and also for the appointment of a receiver, be denied.

From this judgment the plaintiffs' appeal and assign for error in law the refusal of the court to allow the bond and direct the restoration of the crops to them.

The solvency of the defendant is not disputed, and the plaintiffs' rights to be restored to the possession by the order of the court, on giving the bond, is asserted to be conferred, irrespective of the solvency of the defendant or the safety of the property in his hands,

by the third section of the act amendatory of the Landlord and (114) Tenant Act of March 12th, 1877. Acts 1876-77, ch. 283.

This aspect of the case dispenses with the duty of ascertaining the facts established by the evidence, and it is sufficient to say that the material allegations made in the complaint are denied or controverted in the answer, and that imputing insolvency to the defendant, disproved in the accompanying affidavits.

In deciding the appeal we are consequently required to examine the provisions of the statute and inquire whether it furnishes the specific relief, the denial of which constitutes the assigned error in the ruling of the judge.

The first section of the act gives to the lessor of lands to be used for agricultural purposes, a lien upon the crops raised thereon for the rent and for the fulfilment of the other stipulations in the contract, and for securing the same, vests in him the legal possession of the crops, while the actual and subservient possession remains and must of necessity remain with the tenant. It also confers upon the lessor the right to sue and recover, as "in an action upon a claim for the delivery of personal property," any part of the crops removed from the premises without his consent, and in possession of the tenant or other persons before the satisfaction of the lien.

The second section confers upon the tenant, when the lessor or his assignee has acquired possession by his own act and not in the mode prescribed in the preceding section, the like remedy for the recovery of *"such part of the crop as he in law, and according to the lease or agreement may be entitled to."*

Section three prescribes a mode of adjusting a controversy which may arise "between the parties and neither party avails himself of the provisions of the first and second sections," by a proceeding which either may institute before a justice or in the superior court, as the jurisdiction may be determined by the amount claimed, and adds: "But in case there shall be a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or (115) the assigns of either, shall be *allowed to retain possession of said property* upon his giving bond to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim," etc., "with good and sufficient security to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action."

It is quite apparent that this section contemplates an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is

very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to the possessory actions authorized in the antecedent parts of the statute. The lessee, cropper, or assignee is to be allowed to *retain* possession of the property," that is, his subsisting possession shall remain without disturbance or other interference of the court, upon his executing the prescribed bond of indemnity, and this when the decision is deferred by a continuance or an appeal.

The act under such circumstances requires non-intervention on the part of the court, not the removal of the crop from the possession of the lessor to the possession of the lessee. For this the remedy is furnished in the preceding section, and it extends even then, not as maintained in the argument, to the entire crop, but to the proportionate part to which the lessee is entitled according to the terms of agreement. The court could not, therefore, properly make the order asked, for a change of the custody of the crops, under the directions of the act.

But if the action be regarded as an equitable proceeding to secure the common property, and place it in the custody of a receiver, with the auxiliary process of injunction, the case made upon the (116) proofs does not call for the proposed interference. Aside from the fact, disclosed in the evidence that one of the plaintiffs has by deed of mortgage conveyed his interest and share in the crops to the defendant, which the latter holds in addition to his rights as lessor, it is not questioned that the defendant is solvent and capable of answering any demand which the plaintiffs may have against him for their shares of the property, he is permitted by his Honor to retain possession only on his giving an adequate security for the protection of the interests of the defendant in the premises, as may be ultimately determined. In this view, the appointment of a receiver, if not resting in the discretion of the court, was wholly unnecessary.

The interlocutory decree in the subject matter of complaint, we are called on to revise and correct, is in our opinion obnoxious to no just exception, and seems to have been made in conformity with the suggestion made in *Oldham v. Bank,* 84 N. C., 304, as abundantly protective of the interests of all, and consonant with the rules in equity.

It must be declared there is no error, and the judgment be affirmed. Let this be certified to the court below.

No error. Affirmed.

Cited: Deloatch v. Coman, 90 N.C. 188; *Hargrove v. Harris,* 116 N.C. 421; *Arey v. Lemons,* 232 N.C. 535.

JULIAN M. BAKER v. J. G. M. CORDON.

Proceeding in Contempt.

In a proceeding for contempt, the judge finds the facts, and if it be ascertained that a judicial mandate is wilfully and intentionally disregarded, the penalty is incurred, whether an indignity to the court or contempt for its authority was or was not the motive. In this case the defendant is held guilty of contempt in disobeying an order enjoining him from carrying on the business, which with his good will he had sold to the plaintiff under an agreement to discontinue it himself.

RULE on defendant to show cause why he should not be at- (117) tached for contempt, heard at Spring Term, 1881, of EDGECOMBE Superior Court, before *Shipp, J.*

The pleadings show that in May, 1880, Joseph H. Baker, father of the plaintiff, for the benefit of plaintiff and for the purpose of starting him in business on his own account, bought of defendant, who for a number of years had been engaged in the business of selling drugs and medicines and preparing prescriptions of physicians in the town of Tarboro, his stock of drugs, etc., and the good will of his business, for $1,500, then paid, and the defendant agreed in consideration thereof not to carry on said business in the town while the plaintiff was engaged in it.

The defendant is charged with violating an injunction, issued in pursuance of an interlocutory order in the cause and restraining him from "commencing and engaging in and carrying on the said business of selling drugs and medicines, and preparing prescriptions in the town of Tarboro." Upon a rule to show cause why he should not be attached for contempt in disobeying the order, and on the coming in of the answer, evidence was offered and heard, from which the court finds the following facts:

Within a week after the denial of the defendant's application for a dissolution of the restraining order, which the record discloses was on the 22nd day of February, 1881, the defendant conveyed by a bill of sale to Lane Lawrence and J. J. Britt, his entire stock of drugs and medicines, bought since the making the contract mentioned in the pleadings, and which he had been forbidden to dispose of in the way of business; and immediately thereafter, professing to act as manager and superintendent of his vendees, proceeded in the same building and room to sell and dispose of the same goods, and to prepare and fill prescriptions as he had before done. Lawrence and Britt are farmers residing in the country several miles distant from the town, have no practical knowledge of the drug business, gave it no (118)

personal attention, and left it entirely to the conduct and control of the defendant.

The business as carried on depends entirely on the good will of the defendant, and the patronage extended to the new firm consists largely of that possessed by the defendant before. Lawrence and Britt have no knowledge or skill in dealing with drugs; and the reason they assign for becoming purchasers is that they are sureties to the defendant for the money borrowed and used in payment for the stock, and they took the assignment for their indemnity against loss. The stock has had accessions since they became owners, and they have contracted with the defendant to pay him for his services. Britt has declined an offer from two persons to purchase the stock and discharge the notes on which himself and Lawrence are co-sureties.

There are now three drug stores in the town, while at the time of sale to the plaintiff's father there was but one other besides that of the defendant. There is no finding that the sale to Lawrence and Britt, and the continued prosecution of the business by the defendant in their name, was an attempted evasion of the force and effect of the injunction, and none can be drawn by us from the recited facts.

The court adjudged that the acts of the defendant were within the purview of the prohibitory mandate, and in contempt of the authority of the court, and sentenced him for his offence to an imprisonment in the county jail for the term of ten days. From this judgment the defendant appeals.

Messrs. Battle & Mordecai, for plaintiff.
Mr. John L. Bridgers, Jr., for defendant.

SMITH, C. J., after stating the facts. It is quite manifest the injunction contemplated (and such is a fair interpretation of the
(119) words in which its extent is expressed) the defendant's personal disconnection with the drug business in the town, and the securing to the plaintiff the full measure of the expected fruits of his father's contract. Under the subsequent arrangement by which other proprietors are nominally substituted for himself, and he remains in possession of the assigned stock and continues to deal with it in all respects under the supervision of no superior, as before, for all practical objects contemplated in the order, and with the same injurious consequences to the plaintiff, the defendant is "engaged in and carries on the business of selling drugs and medicines and preparing prescriptions," in direct disregard of the commands of the writ. He still pursues his calling, from which he is required to desist, doing the very acts inhibited, and not the less so because in the form of an assumed

agency for other absent owners. Full obedience to the mandate required his personal separation from the drug business, and that he should neither be instrumental in inducing others to embark in it, or carry it on himself within the prescribed limits. A less comprehensive meaning given to the terms of the order, and the exemption of the facts of the present case from the scope of its operation, would be to permit its essential and manifest purpose to be defeated, and render illusory the relief it professes to afford. After the first sale made with the understanding that the defendant would retire, and by refraining from competition leave to his successor the good will and patronage he had secured, upon the assumed existence of which understanding the restraint is imposed, and but a few days after his non-successful effort to have the injunction annulled, he transfers the very stock he was prohibited from using and disposing of in the occupation of a druggist, to two persons without knowledge or experience, and who exercise no controlling supervision in the management, and himself, with no perceptible change except in the name of the proprietors, continues precisely as he had done, to deal in (120) the articles and to fill prescriptions for those who might apply. Surely such acts might be deemed, notwithstanding a valid assignment, evasive of the personal obligation imposed, and a violation of the restraining order.

We do not in thus holding say, nor do we suppose that the defendant could not have entered the drug store of another and acted in the subordinate character of clerk to the proprietor, without over-stepping the restraints of the order; but his action and direct agency in this transaction, with the obvious design that the business he was then engaged in should be still carried on by himself, though nominally for others, renders him amenable to the charge of disobeying the mandate of the court, and not the less so on account of the assumed agency.

The brief filed by defendant's counsel points us to two alleged errors in the action of the court.

1. The defendant was entitled to a jury trial of the controverted facts:

The exception is untenable. The proceeding by attachment for violating an order of the court made in furtherance of a pending action, is necessarily summary and prompt, and to be effectual it must be so. The judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so, or not. *State v. Yancy*, 4 N. C., 133; *State v. Woodfin*, 27 N. C., 199; *Moye v. Cogdell*, 66 N. C., 403; *Crow v. State*, 24 Texas 12.

But if it were not so, it is sufficient in meeting the exception, to say, that a jury trial was not demanded and the judge proceeded to pass upon the case, if not with the consent, at least without objection from either party. *Isler v. Murphy,* 71 N. C., 436.

(121) 2. The disavowal of the imputed intent purges the contempt and exonerates the defendant:

This objection rests upon a misapplication of the rule laid down and acted on in the matter of *Moore* and others, 63 N. C., 397. That rule is confined to the "class of cases" in the language of the Chief Justice who delivers the opinion, *"where the intention to injure* constitutes the gravamen" of the offence. The violation of a judicial mandate stands upon different ground, and the only inquiry is whether its requirements have been wilfully disregarded. If the act is intentional, and violates the order, the penalty is incurred whether an indignity to the court, or contempt of its authority, was or was not the motive for doing it. A party is not at liberty by a strained and narrow construction of the words, and a disregard of the obvious and essential requirements of the order, to evade the responsibility which attaches to his conduct. In an honest desire to know the meaning and to conform to its directions, a mistaken interpretation of doubtful language would be a defence to the charge, but when its language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order, by indirection, the penalty must be enforced, or the court would be unable to perform many of its most important functions. Bat. Rev., ch. 24, sec. 1, par. 4. High on Injunction, Sec. 852; *Pain v. Pain,* 80 N. C., 322.

There is no error, and this will be certified.

No error. Affirmed.

Cited: Boyett v. Vaughan, 89 N.C. 29; *Pasour v. Lineberger,* 90 N.C. 162, 163; *Green v. Griffin,* 95 N.C. 96; *In re Patterson,* 99 N.C. 417, 418; *In re Deaton,* 105 N.C. 64; *Shooting Club v. Thomas,* 120 N.C. 335; *Delozier v. Bird,* 123 N.C. 694; *King v. Fountain,* 126 N.C. 198; *In re Gorham,* 129 N.C. 489; *Disosway v. Edwards,* 134 N.C. 257; *Anders v. Gardner,* 151 N.C. 605; *Wooten v. Harris,* 153 N.C. 46; *Weston v. Lumber Co.,* 158 N.C. 273; *Lodge v. Gibbs,* 159 N.C. 72, 73; *Faust v. Rohr,* 166 N.C. 191; *In re Brown,* 168 N.C. 420; *Shute v. Shute,* 176 N.C. 464; *In re Parker,* 177 N.C. 468; *In re Fountain,* 182 N.C. 51.

(122)

MARY E. JOHNSON v. IRA W. FUTRELL.

Service of Summons—Jurisdiction to Sell Land for Assets—Administrators.

1. The acceptance of service of summons by one is sufficient to authorize the court to proceed against him as a party to the cause.
2. An administrator obtained an order in 1869 from the judge of the superior court to sell lands for assets; *Held* no error. The jurisdiction in such case was not exclusively in the clerk, as probate judge. (Acts of Assembly curing defects in jurisdiction, etc., reviewed by SMITH, C. J.)

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

The plaintiff appealed from the judgment below.

Mr. R. B. Peebles, for plaintiff.

Messrs. D. A. Barnes and S. J. Wright, for defendant.

SMITH, C. J. The plaintiff claims the land in dispute under proceedings instituted in the county court of Northampton in the year 1865, by the heirs at law of Elisha Johnson, for partition of the lands descending from him and an assignment of her share in severalty. The defendant derives title to this assigned share by virtue of a sale made by the administrator, James H. Vinson, on a license obtained from the judge of the superior court upon a petition filed therein against the said heirs at law, at Spring Term, 1869, and a deed for the land. In support of his title the defendant introduced record of the said suit, from which it appears that upon the back of the summons issued is endorsed the words, "service accepted," followed by the names of the heirs at law, children of the intestate, the plaintiff (123) being one of them. The plaintiff objected to the sufficiency of the evidence to divest the estate of the plaintiff, for the reason that it does not appear that she was a party to the action, and if it did the superior court had no jurisdiction in the premises. The court expressing the opinion that the evidence was admissible, the plaintiff in submission thereto suffered a non-suit and appealed. These exceptions are presented for review.

1. The practice of proceeding with a cause when a written acknowledgment of service signed by the defendant is endorsed upon the process, in like manner as when service is returned by the officer to whom the process is directed, has been uniform and universal in this state, and its regularity and sufficiency are not open to question. It is true

the genuineness of the entry as the act of the defendant must be made to appear to the court in which the action is depending, and to have legal force must proceed from one possessing capacity to do the act, in order to the validity and binding effect of subsequent proceedings upon the defendants. But when the court proceeds with a cause in which the defendants are thus made parties, it must be assumed that the genuineness of the entry was satisfactorily shown, without any express adjudication of the fact appearing in the record. *Nicholson v. Cox,* 83 N. C., 44. If the signatures are not endorsed by any of the defendants, nor by their authority or consent, with intent to dispense with service by an officer and make themselves parties to a cause instituted in court, the record can be corrected only by a direct application, as pointed out in *Doyle v. Brown,* 72 N. C., 393, as its verity cannot be collaterally assailed. Nor is it required that the judgment, predicated upon the fact of the defendants' presence by their own voluntary act, shall in direct terms declare the sufficiency of the service, in order to its regularity and validity, inasmuch as the
(124) service appears upon inspection of the process, and does not depend upon proof of some extrinsic fact to be adjudged, as in case of parties made such by publication.

2. The want of jurisdiction in the superior court to entertain the application and grant the relief: This exception we deem equally untenable. The act of 1868-69, ch. 113, the forty-second section of which directs the representative of a deceased debtor, when the personal estate is insufficient to pay the debts and charges of administration, to apply by petition to the superior court of the county wherein the intestate's lands or some part of them are situate for license and authority to sell, went into effect on July 1st, 1869, and was not in force when the decree of sale was made at spring term preceding. Sec. 116.

The subsequent explanatory act of 1869-70, ch. 58, declares, that the previous enactment "shall apply to the estates of such deceased persons only whereof original administration has been granted since July 1st, 1869," and that all estates whereof administration was granted prior to that date, "shall be dealt with, administered and settled according to the law as it existed just prior to that date," and it is declared that "such was the true intent and meaning" of the former act. The proviso annexed is "that nothing herein contained shall be construed to prevent the application of said act, so far as it relates only to the courts having jurisdiction of any action or proceeding for the settlement of an administration, or to the practice and procedure."

If the *"superior court"* designated in the section be that held by the clerk in his capacity of probate judge and not that over which the

judge presides, (and the term would be applicable to either,) it had not displaced the pre-existing law which confided the jurisdiction to both the county and superior courts under the former judicial system, and did not control the present suit, the decree of sale in which was rendered at Spring Term, 1869. Rev. Code, ch. 46, sec. 45.

In this uncertainty as to the proper jurisdiction, the general (125) assembly passed the remedial and curative statute which declares "all proceedings heretofore had in the superior courts (designated in the preamble as 'superior courts before judges and superior courts before the probate judges and clerks of the superior courts') of the state in any action, petition, special proceeding in dower, for partition of real estate, widow's year's allowance, *by administrators to sell real estate to pay debts,* which may have been improperly or irregularly instituted and begun in said courts, be and are hereby in all things confirmed and made valid so far as regards the question of jurisdiction in such cases, to the same extent as if such proceedings had been originally begun in the proper court." Acts 1870-71, ch. 108. This statute was followed by another, re-enacting the former in the same words, and adapting it to similar cases then existing. Acts 1872-73, ch. 175. This statute soon after came before this court, and its corrective efficacy recognized in the cases of *Bell v. King*, 70 N. C., 330; *Herring v. Outlaw, Ib.*, 334, and *Johnston v. Davis, Ib.*, 581.

The clerks, as probate judges, were vested with jurisdiction, not declared exclusive, by article 4, section 17, of the constitution of 1868, (it is omitted in the amended constitution of 1875,) in certain specified matters, and such other matters as shall be prescribed by law. This does not prohibit the conferring of jurisdiction in applications for the sale of lands of deceased debtors, upon the superior courts presided over by the judges as curative measures rendered necessary by the uncertainties, leading to irregularities, mentioned in the statute. *McAdoo v. Benbow*, 63 N. C., 461.

It must therefore be declared there is no error in the record, and the judgment is affirmed.

No error. Affirmed.

Cited: Stancill v. Gay, 92 N.C. 460; *Fowler v. Poor*, 93 N.C. 470; *Cates v. Pickett*, 97 N.C. 26; *Gay v. Grant*, 101 N.C. 218; *Banks v. Lane*, 171 N.C. 509.

(126)

WM. DEVRIES & CO. v. D. L. SUMMIT.

Process—Sunday—Arrest and Attachment.

1. It is unlawful for an officer to execute any writ or other process on Sunday. Rev. Code, ch. 31, sec. 54.
2. The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired.
3. Upon vacating such warrant, the property attached and money collected under any process or order in the action, shall be delivered to the defendant. C. C. P., Sec. 212.

MOTION to vacate an order of arrest in an action pending in GASTON Superior Court, heard at Chambers on May 14, 1881, before *Eure, J.*

The plaintiffs instituted their action on December 18th, 1880, to recover a debt alleged to be due for goods sold and delivered, and on the same day obtained an order of arrest and warrant of attachment upon the affidavit of Harris Hopkins, their agent and salesman, who states the amount of the claim, and further on information and belief;

1. That the defendant is about to leave the state and with intent to defraud his creditors;

2. That with like intent he is about to remove his property beyond the limits of the state;

3. That he is, and for some time past has been concealing himself to elude the service of process and avoid the payment of his debts;

4. That he has collected and has under his control about nine hundred dollars, paid upon an insurance on his stock of goods that
(127) were destroyed by fire, and there is still due on the policy near twelve hundred dollars, which if collected will be wholly lost to the creditors.

The arrest of the person of the defendant was made on the next day, Sunday, and several writs of attachment against his estate issued to different counties without result, except as to those directed to the sheriffs of Edgecombe and Gaston, the former of whom levied the attachment upon the residue of the insurance money due from the Pamlico Banking and Insurance Company of Tarboro, which is returned at the sum of $982.38; and the latter seized and took into possession a buggy belonging to the defendant.

On February 12th, 1881, another action was commenced by the plaintiffs and other creditors, reciting and associating their several demands, when in both causes the following order was entered in reference to the insurance fund:

Whereas it appears that the Pamlico Banking and Insurance Company of Tarboro, N. C., is indebted to the defendant in the above stated causes in the sum of $982.38, and that the same has been levied on by the plaintiffs in the first above named cause by virtue of an attachment issued therein; therefore by consent of attorneys for both plaintiffs and defendant in both said causes, it is ordered, that the said Pamlico Banking and Insurance Company pay the full amount of said debt into the office of the superior court clerk of Gaston, and that the same when paid in be retained to await, and be subject to further orders in said cause; both parties plaintiffs and defendant reserving all rights and claims to said fund, and waiving no right, except that the money be paid into the office, and that when so paid in, the said company shall be discharged from all liability therefor, and the attachment against it be discharged so far as it effects said company.

The order is subscribed officially by the clerk, and also bears the attesting signatures of the several attorneys (who represent the several creditors in the action) and the defendant in ap- (128) proval.

Upon the return of the summons, at spring term, the plaintiffs filed their complaint in the first suit, and charged that the defendant purchased and obtained possession of the goods at the price of $938.85 with the fraudulent purpose which he is still endeavoring to carry out, of avoiding the payment thereof. The defendant also filed an affidavit accompanied and sustained by the affidavits of several others, specifically denying the charges contained in the complaint, and those upon which the arrest was ordered, and stating further that he was under twenty-one years of age when the debt was contracted, as well as when the writ issued. The complaint verified and used as an affidavit is supported by that of one G. T. Coleman, the agent of another creditor firm interested in the second suit, in which he testifies to the defendant's concealing himself and avoiding an interview with affiant on the 28th day of December, when affiant sought to collect the account due his firm, and reiterates upon information the allegation of the defendant's possession of a large sum of money which he refuses to appropriate to his debts, but fraudulently withholds and conceals to avoid their payment. The evidence, which it is unnecessary to set out more in detail, was presented to, and heard by the presiding judge upon a motion to vacate the order of arrest and warrant of attachment, made before the clerk and by consent transferred to be decided by him. His Honor in passing upon the application of the defendant found as facts, that,

1. The defendant was not about to depart the state to defraud his creditors;

2. Nor to remove his property therefrom with such intent;
3. Nor did he conceal his person to elude the service of process or defeat the claims of creditors; and that
(129) 4. He was an infant when the goods were bought and received.

Thereupon judgment was rendered vacating the order of arrest—discharging the bail bond, dissolving the attachment and directing the restoration of the property attached and the payment of the money deposited to the defendant, or to his agent; from which ruling the plaintiffs appealed.

Messrs. Hoke & Hoke, and Battle & Mordecai, for plaintiffs.
Messrs. Schenck & Cobb, for defendant.

SMITH, C. J., after stating the above. It is insisted that the ruling is erroneous, in that, the findings of fact are imperfect, and do not dispose of all the controverted matters upon which the revoked order and warrant depend, and especially in the omission to pass upon the charge of the defendant's evasion and concealment (while holding a large amount of money) of his person from the witness, Coleman, when in search of the defendant.

We think the objection untenable for several reasons.

The regularity and validity of these ancillary remedies must be determined upon the facts existing, and made to appear at the time when they were sought and awarded, and not upon what may have afterwards transpired. The subsequent conduct of the defendant is pertinent to an inquiry as to the truth of the allegations then made, and as the development of a preconceived fraudulent purpose, but it is not substantive and sufficient evidence to sustain the clerk in issuing the writs upon the proofs then laid before him of the defendant's acts, and his imputed fradulent purpose, of which they were in furtherance. The testimony of Coleman is little more than a narrative of his own unsuccessful efforts to find the defendant, and urge upon him the payment of the claim of his principals in his hands for collection, and while the fact of concealment is in itself contradicted by
(130) other witnesses, if accepted as true, it only shows that the defendant sought to escape a personal interview and the importunity of a pressing creditor—not to avoid an officer or legal process; and this constitutes no ground for arrest or attachment. Besides, this occurred ten days previous to the awarding of either, and cannot avail in justification of their issue. The additional evidence admissible upon the hearing of the motion to rescind, is confined to the proof or disproof of the facts alleged in the original affidavit, and is not to be

extended to new matter since transpiring. New matter may however warrant a second issue of these auxiliary remedies, if the first be adjudged irregular, or the facts charged be shown to be without foundation afterwards upon an application to recall them.

The cases cited (*Clark v. Clark*, 64 N. C., 150; *Brown v. Hawkins*, 65 N. C., 645; and *Palmer v. Bosher*, 71 N. C., 291) are not antagonistic to the view we have expressed. In these there was a substantial defect in the form of the affidavit, which was removed, and the necessary absent allegations supplied from the opposing proofs offered in the motion to vacate. They did not change the original grounds of the application, nor furnish new material in its support. But where the evidence goes beyond this, and is offered to show other and different ground to sustain the action of the clerk, that originally laid before him being sufficient to warrant the arrest, but being effectively controverted, to allow this would be to legalize and render right that which was erroneous and wrongful when done. Even if this were competent, the refusal to act upon the new facts alleged rests in that sound judicial discretion the exercise of which we cannot undertake to revise. The proper course in such a case would be to ask for another order of arrest and attachment. *Wilson v. Barnhill*, 64 N. C., 121.

Delivering the opinion of the court in *Palmer v. Bosher*, RODMAN, J., uses this language: "We do not wish to be understood (131) as holding that an affidavit for an attachment defective in substance, may be amended so as to sustain the warrant of attachment. We are inclined to think that, as in the parallel case of an injunction, if the original affidavit was insufficient in substance to sustain the attachment, it could not be amended so as to do so."

For a stronger reason should a plaintiff, who has assigned grounds legally sufficient to authorize the arrest and seizure, not be permitted, when they are falsified upon the proofs, to change them and assign others. A defendant would never be safe if he could be arrested on one charge, and that failing, be held in custody upon another.

2. The service of the writ and the arrest of the defendant on Sunday were also unlawful, and in violation of the statute, Rev. Code, ch. 31, sec. 54, which so expressly declares.

3. The appellants further except to so much of the judgment as directs a return of the money and property attached to the defendant.

It will be noticed that the deposit of the money paid in by the insurance company with the clerk, is on the terms that it be "retained in said office to await and be subject to the order of the court." This is also the requirement of the statute which provides, upon a dissolution of the attachment, that "*all the proceeds of sale and moneys*

collected in such action remaining in the hands of any officer of the court, under any process or order in such action, shall be delivered or paid to the defendant or his agent and released from the attachment." C. C. P., Sec. 212. The undertaking required in the next section is not necessary when the warrant "on its face appears to have been issued irregularly, or for a cause insufficient in law, or false in fact." *Bear v. Cohen,* 65 N. C., 511.

Upon a review of the whole case, we discover no error in the record and affirm the ruling of the court below.

No error. Affirmed.

Cited: Hale v. Richardson, 89 N.C. 64; *Harriss v. Sneeden,* 101 N.C. 278; *S. v. Moore,* 104 N.C. 749; *Knight v. Hatfield,* 129 N.C. 194; *Mahoney v. Tyler,* 136 N.C. 45; *Grain Co. v. Feed Co.,* 179 N.C. 656; *McCollum v. Stack,* 188 N.C. 463; *Collins v. Norfleet-Baggs,* 187 N.C. 660; *Mintz v. Frink,* 217 N.C. 103.

(132)

IN DEVRIES AND OTHERS v. SUMMIT AND OTHERS at this term:

SMITH, C. J. This action commenced on February 12th, 1881, is prosecuted in the name of the separate creditors uniting as plaintiffs, against their common creditor, Summit, and the associate defendants who are charged with cooperating and aiding in the attempt to secrete and screen his property from the payment of their several demands. At the same time, and upon the affidavits of agents of some of the parties plaintiff, one of which bears date on the 5th day of that month an order of arrest was obtained and a warrant of attachment awarded, the proceedings under which were essentially similar to those had in the single action of the plaintiffs, Devries & Co., that have been considered and decided in their appeal.

Upon the hearing of the defendants' motion to vacate the arrest and attachment, and the numerous affidavits heard in support of and in opposition thereto, the judge acting in place of the clerk, with consent of counsel, finds as facts:

1. That the defendant did not conceal himself to avoid the service of legal process;

2. That he has committed none of the acts that authorize the issue of either writ, and

3. That he was under twenty-one years of age when the debt was contracted.

Thereupon the judge vacated the arrest, discharged the attachment, and directed the return of the money deposited, and the other property attached, to the defendant. From this order the plaintiffs appeal.

We see no sufficient reasons for reversing or modifying the ruling in this case, that do not apply with equal force to the other. The object of both is to enforce contract liabilities incurred in the purchase of goods, and by aid of the auxiliary remedies to pursue and subject the property of the debtor to their satisfaction. The pres- (133) ent complaint also asserts the obligation resting upon the debtor, and imputes to him fraud in contracting the debts, and an intention not to pay for the goods then entertained and since fully manifested in his persistent efforts to conceal and keep his funds beyond the reach of creditors, and his refusal to appropriate any part of them to the payment of what he owes. The action does not proceed upon the idea of a recession of the original contract by the defendant's repudiation of his own obligation on the plea of legal incapacity, and the revesting of title to the goods in the vendors respectively, for the complaint alleges that they did not know at the time of sale of the infancy of the debtor, "and do not now know such to be the fact," thus putting in issue the anticipated defence.

The rule is well settled that where an infant has purchased property, and has it in possession after coming of age, and then avoids the sale, he must restore it; and for a tortious use or disposition of any part of it after such avoidance, he renders himself liable to those from whom it was obtained. But he cannot be sued in tort for any disposition made of the goods previously and during his minority, any more than he can be held responsible upon the contract. Tyler Inf. and Cov., Sec. 36; 2 Kent Com., 240; 1 Am. Lead. Ca., 115; *Kitchen v. Lee,* 11 Paige, 107; *Skinner v. Maxwell,* 66 N. C., 45.

But the complaint does not present a claim to the destroyed goods, or to the insurance money paid therefor upon the basis of an annulled contract, revesting title in the vendors, (if such a claim can be entertained for the money, as a substitute for the goods), but proceeds upon the existence of a valid obligation, or of such fraudulent conduct in obtaining the goods as to make the defendant liable in an action for the tort. But whatever construction the complaint may bear, the fund in the hands of the clerk is collected and paid in under the attachment, the dissolution of which is followed by the restoration to the debtor of his property thus taken. (134)

We are asked to correct the judgment so as to leave the money where it is, until final judgment, upon the ground that a disputed fund *in custodia legis* will be retained until the conflicting claims of parties

are determined, and for this is cited, among other cases as to the rule in equity, that of *Bruff v. Stern,* 81 N. C., 183. None of them however sustain the contention of the appellants, that a fund taken under judicial process from a person wrongfully, will not be restored when the wrong appears and is adjudged. *Perry v. Tupper,* 70 N. C., 538; *Meroney v. Wright,* 84 N. C., 336.

In *Bruff v. Stern,* most in point, the assignee in a deed of trust was allowed to interplead and set up title to the property attached, and issues thus raised between him and the plaintiff were directed to be made up for trial before a jury, pending which the court refused to restore the property to the defendant, and thus to his assignee acting in coöperation. But here, the fund belongs to the debtor, and there is not a contest about the title requiring its retention and an interference with the order of restitution.

It is insisted further for the appellants that the finding of facts is partial and does not cover the entire ground assigned in the affidavits, and in this respect is insufficient.

An examination of the affidavits does not satisfy us that the alleged defect really exists. The first in time repeats the account of the ineffectual visit to defendant's place of residence for the purpose of securing payment of his principal's claim, the purchase of goods and their insurance, the defendant's collection of part of the insurance money and refusal to apply it to his debts, and upon information that he intends to collect the residue and fraudulently conceal it, and thus evade the payment of his debts. The second affidavit repeats the same charges—that the defendant has in his hands or under control funds amply sufficient to meet all his debts, and,
(135) with the connivance of the other defendants except the insurance company, is endeavoring fraudulently to secrete the same as well as conceal himself, to defeat the payment of his debts and escape the service of process, and to leave the state.

It is difficult from such loose allegations to ascertain the specific acts charged, which in connection with the imputed fraudulent purpose are relied on to justify the arrest and attachment, though each affidavit is full of epithets of fraud and fraudulent designs. The court therefore in negativing the allegation of a fraudulent concealment of the person of the defendant to avoid process, finds in the same indefinite manner in which the charges are made, the absence of any just grounds for either of the writs. We are not therefore at liberty to correct the judgment for this assigned error. When the allegation is distinct and specific, the responsive finding should be so.

We do not wish to be understood as giving our sanction to the form of the present suit in the union of so many separate causes of action

in separate plaintiffs, whether the action be founded in contract or tort, unless when in pursuit of a common fund in which each has an interest, to which class the present action as we interpret the statements in the complaint does not belong.

We confine ourselves solely to the interlocutory ruling which the appeal brings for review.

It must be declared there is no error, and this will be certified.

No error. Affirmed.

(136)

W. J. ROBERTS AND WIFE v. REUBEN LISENBEE AND WIFE.

Husband and Wife—Liability of Husband for Torts of Wife—Abatement of Action.

1. Where husband and wife are jointly sued for the wrong of the wife and the wife die, the action abates.
2. Common law and statutory liability of the husband for the contracts and torts of the wife, discussed by ASHE, J.

CIVIL ACTION tried at Spring Term, 1881, of BUNCOMBE Superior Court, before *Gilliam, J.*

The action was brought to Madison superior court by the plaintiffs, William J. Roberts and wife Kate P. Roberts, against Reuben Lisenbee and wife Lucinda Lisenbee, for slanderous words spoken by the wife of the defendant of and concerning the wife of the plaintiff; and at fall term thereof the case was removed upon the affidavit of the defendant to the county of Buncombe, where it was continued from term to term until Fall Term, 1881, when the defendant Reuben Lisenbee suggested the death of his wife, the codefendant, since the last continuance of the cause, and moved for judgment that the action abate. The cause was then continued until Spring Term, 1882, when it came on to be heard upon the motion, and it was ordered and adjudged that the action abate, from which judgment the plaintiffs appealed.

Mr. J. H. Merrimon, for plaintiffs.

Messrs. C. A. Moore and H. B. Carter, for defendant.

ASHE, J. It has been the policy of our law-makers since 1868, and even before that date to some extent, to emancipate the wife from many of the disabilities of coverture, resulting from the common law doctrine of the merger of the legal existence of the (137) wife in that of her husband.

This legislation commenced with the act of 1848, which restricted the common law initial rights of the husband as tenant by the courtesy, in the lands of his wife acquired by her since the first Monday of March, 1849; then the act of 1871-72, styled the "marriage act," (Bat. Rev., ch. 69) which invested the wife with many of the rights of a feme sole over her seperate property, so that she may devise and bequeath her separate property; and all the property she acquires before or after marriage is her seperate estate by virtue of section 6, article 10 of the constitution. She may make certain contracts with her husband which are binding upon her. She may sue alone when the actions concerns her separate property, and under some circumstances may even sue her husband without the intervention of a next friend. But while the wife has been thus legislated into a state of independence of her husband, as regards her separate estate, the legislature as a sort of compensation to the husband has relieved him from responsibility for the debts of the wife contracted before marriage, and from liability for her torts committed while being in a state of separation from him.

By the common law the husband was held liable to third persons for injury done by his wife, when they afforded ground for a civil action, though done without his knowledge or instrumentality; and this, not because there was any delict on the part of the husband, but from the necessity of the thing, arising from the incapacity of the wife to be sued without him. For as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsiblity, the injured party would be without redress. Hence the rule of the common law, that the husband and wife are both liable and must be joined in an action to re-
(138) cover damages in an action for a tort committed by the wife, alone, without the direction and not in the presence of her husband. *McElfresh v. Kirkendall,* 36 Iowa; *Luse v. Oaks, Ib.*, 562; *Kowing v. Manly,* 49 N. Y. Rep., 192-198; *McKean v. Johnson,* 1 McCord, 578; *Flanagan v. Tinen,* 53 Barb. Rep., 587.

This liability of the husband to be sued jointly with his wife for her torts, attached to him at common law, notwithstanding that he and his wife were living at the time of the wrong done by her, in a state of separation; but the liability continued only so long as the matrimonial relation subsisted between them. McQueen on Husband and Wife, p. 90. In 5 Car. & Payne, p. 484, it was held that "whether the separation was temporary or permanent except for the adultery of the wife, it made no difference. It did not affect the question."

We think it more than probable it was this principle of the common law, holding the husband responsible for the torts of the wife

committed in his absence and without his knowledge or connivance, that induced the legislature to enact that provision of the act of 1871-72 (Bat. Rev., ch. 69, sec. 25) which provides that "every husband *living* with his wife shall be jointly liable with her, for all damages accruing for any tort committed by her." It was not intended as we believe to enlarge his responsibility, but to abridge his liability at the common law, so as to fasten responsibility upon him only so long as they should live together in the matrimonial relation, and as soon as that terminated, whether by separation or the death of the wife, the liability should no longer exist.

The qualification of the liability of the husband for the torts of his wife committed without his presence or knowledge, as subsisting only during the estate of marriage, was recognized by the common law. The wrong of the wife was not imputed to him. He was only joined with her "*ex necessitate*," because she could not be sued alone. The wrong was hers, not his. He was liable to the (139) action only because of her liability, and therefore when her liability ceased, his also ceased.

In *Capel v. Powell*, 17 C. B. (N. S.), 744, it is held that the "husband is not joined as a co-defendant on the ground that the wife's guilt is imputed to him, but so long as the marital relation continues the wife is incapable of being sued alone, and his liability continues only as the relation of marriage subsists." The corollary from this is, that where as in our case the wife who committed the injury dies, the liability of the husband must cease.

But independent of the conclusion to which the "reason of the thing" brings us, we find an authority in *Kowing v. Manly, supra*, for the position that when husband and wife are jointly sued for the wrong of the wife, and she dies during the pendency of the action, it will not survive against the husband.

We are of the opinion the action abated by the death of the wife.

No error. Affirmed.

Cited: Young v. Newsome, 180 N.C. 316.

F. T. WARLICK AND OTHERS v. PETER WHITE AND OTHERS.

Husband and Wife—Deed—Equity.

A deed from husband immediately to wife, conveying the whole of his real and personal property, will not be upheld in equity where the wife is shown to be unworthy of the interference of the court by reason of her being an adultress; or where the provision for the wife, as here, is extravagant and exhaustive of the husband's estate.

(140) CIVIL ACTION tried at Fall Term, 1881, of CATAWBA Superior Court, before *Seymour, J.*

Joseph Carpenter intermarried with the defendant, Naomi, and had by her an only son. He owned a tract of land which is the subject of controversy, two slaves, two mules, some cattle and hogs, and the ordinary farming implements and household and kitchen furniture. In September, 1863, being about to enter the Confederate service, he executed a will, wherein he gave to his son one-half of his tract of land and one negro, and all the balance of his property he gave to his wife.

In August, 1864, he came home from the army on furlough, and his son having in the meantime died, he executed while at home a deed to his wife for the whole of his land and a bill of sale for all of his personal property. He returned to the army, and died in the spring of 1865. Soon after his death, his wife gave birth to the defendant, Sarah. The deceased and his wife were both white persons, and the defendant, Sarah, is a mulatto, the fruit of an adulterous intercourse between her mother and a negro, commenced before and continued during the husband's absence. The plaintiff, Catherine Eason, is the only sister and nearest collateral relation of the deceased. The defendant, Naomi, has since intermarried with the defendant, Peter White, and they are now in possession of the land.

The deed, which was made directly from the husband to the wife, has been lost without being registered, and the will has been regularly admitted to probate.

The plaintiff claims to be entitled to one undivided half of the land as heir to Joseph Carpenter, insisting that the deed from the husband to the wife is inoperative at common law, and can only be set up in a court of equity, and that such a court will not lend its aid to the defendant, Naomi; first, because of her gross moral de-
(141) linquency, and secondly, because of the unreasonableness of the provision attempted to be made for her by her former husband.

The defendant insists upon the validity of her title and prays that the lost deed may be set up by the court.

The jury found all the issues in favor of the defendants, judgment, appeal by plaintiffs. (See same case 76 N. C., 175.)

Messrs. M. L. McCorkle, Hoke & Hoke and Battle & Mordecai, for plaintiffs.

Messrs. D. Schenck and G. N. Folk, for defendants.

RUFFIN, J. The opinion of this court is against the defendants upon both of the propositions stated in the case.

By the rule of the common law, which regards man and wife as one, every deed of gift made directly from husband to wife is void. But a court of equity, having a greater regard to the intention and convenience of the parties, and treating the deed merely as a defective conveyance, will uphold it in favor of the wife, if a clear and present purpose on the part of the husband to make the gift, can be seen, and the gift itself appear to be no more than a reasonable provision for the wife.

But in the early case of *Elliott v. Elliott,* 21 N. C., 57, this court intimated that under no circumstances would it interpose to remedy a defective conveyance in behalf of a wife, whose own conduct had not been meritorious, though as there was in the case another clear ground, besides the wife's delinquency, on which to rest the decision, the court did not press that matter further. The opinion thus advanced in that case, has since been referred to by another eminent judge, and in terms of such evident approbation, as to give to it much of the weight and authority of a positive adjudication. *Paschall v. Hall,* 58 N. C., 108. And if there be any virtue in an analogy, it is most strongly supported by the current of decisions of the (142) English chancellors with reference to a kindred matter.

In *Carr v. Esterbrooke,* 4 Ves., 145, a wife, who was separated from her husband upon the ground of adultery, petitioned the chancellor to have a sum of money belonging to her, settled to her separate use, but the order was refused upon the ground of delinquency. A like refusal and for a like reason was made by the same chancellor in *Ball v. Montgomery,* 2 Ves., 189, and again by LORD HARDWICKE in *Watkyns v. Watkyns,* 2 Atk., 96. All these cases are brought forward in Roper on Husband and Wife, 275, and the deduction made from them by the author, is, that if a wife be an adulteress living apart from her husband, no court will interfere to have a settlement made for her, even out of her own choses, *"because she is unworthy of the court's notice or interference."*

Such being the tendency of the decisions, both here and elsewhere, this court could not feel at liberty to interpose and give effect to an instrument, which the law pronounces inoperative, in behalf of a wife possessing so little claim to consideration as the present feme defendant, but will rather leave the law to determine the rights of the parties. Indeed, would it not be manifestly inconsistent to do so, and make provision for her out of her husband's estate, when we are obliged to take notice of the fact that if he were now living and seeking a divorce, the court would be bound to grant it, under the existing circumstances, and thereby dissolve every bond between the parties and shut her out from all participation in his estate? Circumstanced as she is, she is forced to seek the aid of a court of equity to give effect to her husband's intentions in her favor; and the court, finding her unworthy of its interference, simply declines to act, upon the principle now conceded that he who seeks equity must do so with clean hands.

In considering the point as to the extravagance of the pro-
(143) vision attempted to be made, it must be borne in mind that by means of the deed and the bill of sale, executed together and both to take effect upon delivery, it was intended to pass the whole estate of the husband, real and personal, immediately to the wife. The question, therefore, is exactly the same as if he were living and the attempt to set up the deed was directed against him, and not his heir. The leading case on the subject is *Beard v. Beard,* 3 Atk., 72, in which LORD HARDWICKE emphatically pronounced it to be against the policy of the law of England, that any husband should exhaust his estate and impoverish himself in an effort to make a provision for his wife, and that the court would not uphold a conveyance from him to her, if such should be its effect. Still more to the point is 2 Story's Equity Jurisprudence, sec. 1374, where it is said that if a husband should by deed grant all his estate or property to his wife, the deed would be held inoperative in equity, as it would be in law; for it could in no just sense be deemed a reasonable provision for her, which is all that the courts of equity hold the wife entitled to; and in giving her the whole, he would surrender all his interests.

On both occasions, heretofore mentioned, when the question as to the effect to be given to the husband's conveyance has been before this court, especial pains seem to have been taken to declare the policy of the court to be, that no support will be given to an extravagant provision, exhaustive of the husband's estate.

Our opinion therefore is that the deed relied upon by the feme defendant, Naomi, is ineffectual to pass the title of the land sued for to her, and that the judgment of the court below should have so

declared. Accordingly, that judgment is reversed, and judgment will be entered here for plaintiff according to the prayer of her complaint.

Error. Reversed.

Cited: Walton v. Parish, 94 N.C. 263; *Summers v. Moore,* 113 N.C. 405; *McLamb v. McPhail,* 126 N.C. 222.

(144)

R. F. HACKETT AND OTHERS v. QUINCEY SHUFORD AND OTHERS.

Husband and Wife—Sale of Wife's Land, When Proceeds Belong to Husband—Evidence of Agreement.

1. Money received by a husband, prior to the adoption of the constitution of 1868, from the sale of his wife's real estate, belongs to him absolutely, unless at the time he received it he agreed to repay it to her, and obtained possession of it upon the faith of such agreement.
2. And proof that the wife requested the husband to invest the proceeds in the purchase of other land, but expressed no wish that the purchase should be made in her name or for her benefit, is no evidence of such agreement.

CIVIL ACTION tried at Spring Term, 1881, of WILKES Superior Court, before *Seymour, J.*

This action was brought by the plaintiffs against the defendants for the specific performance of a contract to convey a certain tract of land, which their ancestors had convenanted upon a valuable consideration to convey to them.

The following are the facts proved by the plaintiffs which are uncontradicted:

In April, 1858, Benjamin F. Petty contracted in writing to sell the *locus in quo* to R. F. Hackett and J. W. Hackett for $2,700. J. W. Hackett agreed by parol to assign his interest to R. F. Hackett, and R. F. Hackett assigned to J. F. Graves, as trustee for the wife of R. F. Hackett. The whole of the purchase money was paid to Benjamin F. Petty. The Hacketts entered into possession of the land at the time, bond for title was made to them, and have been in possession ever since, but no deed was ever made by Petty. The $2,700 was a full price for the land, and the plaintiffs had no notice at the time of the purchase of the defendants' alleged equity. Petty died intestate in 1872, and the defendant, Rosseau, took out letters of administration on his estate. The said Petty was married three times. (145) His first wife was Cynthia, the daughter of John Bryan, by

whom he had issue, the defendants, Julia, intermarried with the defendant Quincey Shuford; Lucinda, intermarried with L. D. Parks; Laura, intermarried with the defendant Henry Shuford; Joanna, intermarried with defendant J. T. Porter; Adelia, intermarried with the defendant F. S. Doughton; and a son named William, now dead, who left surviving him three children of tender years, whose christian names are not known. The other heirs of the said Petty are defendants and his children by his other wives.

The defence set up by the defendants was that the land in controversy, known as the "Gilreath land" lying on the south side of Yadkin river in the county of Wilkes, was purchased by Benjamin F. Petty with money which was the separate property of his wife, Cynthia, and that under an agreement between Cynthia and himself that it should be invested in land, this land was purchased by him and paid for with the money of Cynthia, but the title was taken to himself.

The defendants, with the view of sustaining the defence, offered in evidence the last will and testament of John Bryan, deceased, the father of Cynthia Petty, and grandfather of the defendant. The said Bryan in his will, among other things, devised and bequeathed as follows, to wit: "I give and bequeath to my beloved wife all my estate real and personal, that is to say, all my lands, negroes, money on hand, notes, bonds, deeds of trust, farming utensils, household and kitchen furniture, and stock of every kind during her natural life, and she may give any part of it to our children, as she pleases, so that they have equal shares. * * * My will is that my wife Nancy Bryan, whom I appoint to be sole executrix of this my last will and testament, shall have the sole disposal of my estate, both real and personal, so as to make as equal division as possible, and do
(146) hereby authorize and empower her to dispose of and convey the same by deed or otherwise, in the manner heretofore directed, and according to what is hereafter stipulated. * * * My desire is that my land on the south side of the Yadkin river, should not be divided, but remain in one tract, as I think that dividing it would hurt its value, and that if any of my children should wish to purchase it to live upon, my other children should give them the preference."

Nancy Bryan, appointed executrix, renounced the right to execute the will, and John Rosseau was appointed administrator with the will annexed.

On the 20th day of October, 1847, all the lands belonging to the said John Bryan, lying on the south side of the Yadkin river, consisting of about twelve hundred and six acres, were sold to Wm. Parks for the sum of about six thousand dollars, and a deed of con-

veyance for the same was executed to him by Elisha Martin, James M. Parks, Mary Parks, B. F. Petty, Cynthia Petty and Nancy Bryan.

The execution of the deed was proved by one of the subscribing witnesses, and the privy examination of Cynthia Petty was taken before two justices of the peace in the county of Wilkes, by virtue of a commission issued to them for that purpose from the county court of said county.

It was in proof that the proceeds of the sale of this land belonged, under the will of John Bryan, to his four daughters, of whom Cynthia Petty was one. There was evidence going to show that her husband, B. F. Petty, received into his possession her share of the proceeds of this sale, amounting to some sixteen hundred dollars. One Leland Martin testified that John Bryan died in 1842. His land was sold in 1847 for $6,600. The money was considered the property of his four daughters, $1,650, the amount due to each. Mrs. Bryan died in 1847. B. F. Petty was living in 1847 on a tract of land worth $2,000 or $3,000; owned another tract, and also a good many negroes (147) before the death of John Bryan, but had sold them.

Julia Shuford, one of the defendants, and a witness in behalf of the defendants, testified that she was the daughter of B. F. Petty and his wife Cynthia, and that her father received a large sum of money, the amount not remembered, from the estate of John Bryan. She said she knew that her father purchased the land in controversy with a portion of the same money; and her mother requested her father to invest the money in the land, remarking that it would be of some benefit to her children, and he did so at the request of her mother the said Cynthia. Her father had no means of his own, at the time of the purchase of the land, with which to buy the same. In a second deposition of this witness, she said, she often heard her father and mother talk about it. The talk was to the effect that the money derived from the Bryan estate ought to be invested in land by my father for the benefit of the children. She was somewhere between 15 and 18 years old at that time.

John Rosseau was examined as a witness for the defendants, knew nothing about the money with which the land was purchased by Petty, but stated that Petty did not have the means of his own sufficient to enable him to pay for the land, for about that time he had loaned him money. He had the character of being a close, saving, tight man.

Jordan Petty testified that he had heard of the sale of the Bryan land in the fall, and Petty on one occasion said he had got the money for his part of the land. The May after, he heard a conversation between Petty, his wife and daughters. The old lady said, "You and the

children want to run through all my money. I want you to take it and buy land to do me and the children some good."

Peggy Rosseau was also examined by the defendants, and stated that she heard a conversation between Petty, his wife and children a short time after the Bryan land was sold, about 30 odd years
(148) ago. Petty on one occasion came in and said he had the calico. The daughter wanted him to buy a centre table. The old lady said, "you shan't have either, I want my money put in land." He asked her, "what kind? do you want my children to settle in this poor country?" "I want you to go and buy land with it." Not a year after I heard him talking with his wife about buying the Lenoir place —the name of the *locus in quo*. The conversation first mentioned might have been five months after the sale of the Bryan land.

In the statement of the case on appeal his Honor says that the defence made upon the trial was that the *locus in quo* was purchased by B. F. Petty with money which was the separate property of his wife, Cynthia, and that, under an agreement between Cynthia and himself that it should be invested in land, this land was purchased by said Petty and paid for with the money of said Cynthia, but the title was taken to himself.

After the evidence was all introduced, the court intimated that in its opinion this defence was not made out by the evidence; and further, that if the facts alleged were proved, they would not avail against the plaintiffs' equity. Thereupon the defendant's counsel stated that they had nothing to say in opposition to a verdict, *excepting upon this defence*. The jury thereupon rendered a verdict for the plaintiffs, and the defendants appealed.

Mr. J. M. Clement, for plaintiffs.
Messrs. J. M. Furches and G. N. Folk, for defendants.

ASHE, J. This narrows down the case on the appeal to the question whether the land in controversy was bought by B. F. Petty with money which was the separate property of Cynthia, his wife, and if so, whether there was an agreement at the time of his receiving
(149) the money between him and Cynthia that it should be invested in land in controversy. There was certainly some evidence, sufficient we think, to be left to the jury, that the Gilreath land was purchased by B. F. Petty with money which he had received from the sale of the lands belonging to the Bryan estate, in which his wife had an interest. But it does not follow that the money so received by her husband was her separate property. The land was sold and the deed was executed by Petty and his wife Cynthia, Nancy Bryan

and others. The consideration was $6,600, of which Cynthia's share was about $1,600. This amount it is insisted by the defendants was paid to her husband. Admitting that to be so, how did he hold it? As trustee for his wife, or in his own right as husband by virtue of his marital rights?

If the transaction had taken place since 1868, it may be that the money received was held by the husband in trust for his wife, as her separate estate. But this transaction occurred before the constitution of 1868. And under the law, as we understand it to have existed, when money was received by a husband from the sale of his wife's real estate, it belonged to the husband absolutely unless *at the time he received it,* he promised the wife to repay it, and obtained possession of it upon the faith of such promise.

In *Plummer v. Jarman,* 44 Md., 637, it was held that, "the money arising from the sale of the wife's inheritance, was not her separate estate, as it would be now under the provisions of the Code; but on the contrary it was subject to the control of the husband by virtue of his marital rights having attached; the money received by him was at his disposal absolutely, and any mere promise that he may have made to his wife was purely voluntary and without consideration." In *Label v. Slingluff,* 52 Md., 132, the court held that the money received by the husband from the wife's real estate, before the Code, became the absolute property of the husband, unless at the time he received it, he promised the wife to repay it, and ob- (150) tained possession of it upon the faith of such promise.

In this state in the case of *Temple v. Williams,* 39 N. C., 39, which was a bill in equity for the conveyance of a tract of land, the equity set up in the bill was that the complainant was the owner in fee of a tract of land, and her husband proposed that they should sell her land and invest in the purchase of another tract more desirable, and take the deed in her name, but the husband purchased the other tract with the proceeds of the sale of her land and took the deed to himself, and died before conveying any part thereof to her. Chief Justice RUFFIN, who delivered the opinion of the court, said: "It is true that a husband and wife may in equity deal with each other in respect to her inheritance, but it is extremely difficult to do so with any security to her, without the intervention of a third person as trustee, because it is hard to tell in many cases, whether she means to stand upon her separate rights, or to surrender them to him; and therefore when she and her husband turn her land into money, and she does not place her money in the hands of some third person for her, and as her separate property, but suffers the whole to be paid to him, the clearest proof

is requisite to rebut the presumption that it was paid to and accepted by the husband for himself, and not as trustee for his wife."

In *Dula v. Young*, 70 N. C., 450, and *Smith v. Smith*, 60 N. C., 581, the court came to different results from that reached in the above cited cases, and gave relief to the wife, whose money arising from the sale of her land, had been used by the husband in the purchase of other lands in his own name. But in each of these cases the equity of the complainants was put upon the ground of an express *agreement* between the husband and wife, that her land might be sold and the money invested in other lands for her benefit. In the former case the *agreement* was that if the wife would join the husband in
(151) the conveyance of a tract of land descended to her from her father, he would convey to her another tract in lieu of the one conveyed. In the latter, the *agreement* was that the wife would consent to the sale of land held in her own right, upon her husband's agreeing that he would convey to her, as a consideration for her land, another tract, or slaves of equal value with her land, or in some other way secure her from loss.

In putting the relief granted in these cases upon the ground of the *agreement* between the husband and wife, these decisions sustain the opinion of Chief Justice RUFFIN in the case of *Temple v. Williams, supra.*, if the legal opinion of so great a jurist could ever need support.

But our case is distinguished from those cited, in the particular that there was here no evidence of any *agreement* between B. F. Petty and his wife, Cynthia, *at or before the time* he received her money, that he would invest it in other lands. The proof falls short of establishing any such agreement. Taking the testimony of Julia Shuford, which is the strongest evidence offered by the defendants in regard to the use of the money received by Petty from the Bryan estate, and it tended only to prove the fact that the money received by her father was invested in the purchase of the Gilreath land. She speaks of no agreement, but that her mother, Cynthia Petty, requested her father, B. F. Petty, to invest the money in the land, remarking "that it would be of some benefit to her children."

The witness, Jordan Petty, testified to no agreement, but that he heard a conversation between Petty and his wife and daughters, and the wife said to her husband, "you and the children want to run through all my money. I want you to take it and buy land to do me and the children some good." The testimony of Peggy Rosseau is not more to the point. She stated that sometime after the Bryan land was sold, about thirty years ago, she heard the old lady say, "I want
(152) my money put in land;" her husband asked her, "what kind? Do

you want my children to settle in this poor country?" "I want you to go and buy land with it."

This is the substance of the testimony offered upon the point, and in our opinion it does not tend to prove an agreement between Petty and his wife *at or before the time of receiving the money,* that he should invest it in land for her benefit.

She requested that the money should be invested in other land, just as she might have done if the money had belonged to her husband in his own right. She wished land bought that it might be of benefit to her and the children. No wish was expressed that the land should be purchased in her name. The money was invested in the land in the name of the husband. The purchase enured to the benefit of herself and children. It is to be presumed she was satisfied with it as no complaint was made by her. The land was afterwards sold for a price considerably in advance of the amount paid by him for it. He and his children reaped the benefits and they have acquiesced in the transaction for thirty-five years.

We concur with his Honor that there was no evidence to be left to the jury in support of the defence set up by the defendants.

We have not considered other positions taken and urged in this court by the defendants, as it appears from the "statement of the case" the *sole defence* in the court below was rested upon the facts, that the money used by B. F. Petty in the purchase of the land in question was the separate estate of his wife Cynthia, and an *agreement* between them that it should be invested in this land for her benefit.

Nor have we taken into our consideration the respective rights of the plaintiffs *inter sese,* in the land in controversy. That is a matter to be inquired of upon a reference for that purpose.

There is no error in the judgment of the superior court. The (153) case is remanded to that court that further proceedings may be had in conformity to this opinion.

No error. Affirmed.

Cited: Black v. Justice, 86 N.C. 511; *Giles v. Hunter,* 103 N.C. 201; *Woodruff v. Bowles,* 104 N.C. 208; *Kirkpatrick v. Holmes,* 108 N.C. 209; *Beam v. Bridgers,* 108 N.C. 278; *Tyndall v. Tyndall,* 186 N.C. 276; *Bullman v. Edney,* 232 N.C. 467.

ANDREW SYME v. N. B. BROUGHTON.

Executors and Administrators—Wills.

An executor, or administrator c. t. a., after the will is proved in common form, may sue and be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or exercise other special powers given in the will, where issues upon a caveat are pending; the right to execute the will is suspended until the determination of the suit. Bat. Rev., ch. 119, sec. 25, and ch. 45, secs. 11, 13.

CIVIL ACTION tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

The action was brought by plaintiff as administrator of W. R. Pepper against the defendant as administrator with the will annexed of W. G. Lougee, to recover the amount due on an inland bill of exchange drawn by the defendant's testator on one T. L. Love in favor of the plaintiff's intestate. It was alleged by the plaintiff that he was the administrator of W. R. Pepper; that sometime in the month of July, 1876, W. G. Lougee died leaving a will in which no executor was appointed, and which was duly admitted to probate in common form, in the probate court of Wake County on the 26th day of July 1876; that the defendant duly qualified as administrator with the will annexed, on the 27th day of said July; that on the — day of
(154) October, 1876, the said W. R. Pepper having in the meanwhile produced another paper writing purporting to be the last will and testament of the said Lougee, in which the said T. L. Love was appointed executor, an issue was made up to try which, if either of the said wills, was the last will and testament of the said Lougee; that thereupon an order was issued by the judge of probate to said Broughton, commanding him to suspend all further proceedings in relation to the estate of the said Lougee, except the preservation of the property and the collection of the debts of the estate, until a decision was made of the issue arising on the said caveat; that said issue has been tried and found in favor of the will first above named, but no further proceedings have thus far been taken; and that said Lougee executed at Raleigh on the 3rd day of June, 1876, an instrument of writing of which the following is a copy:

"At sight pay to the order of W. R. Pepper five hundred dollars, value received, and charge the same to account of

W. G. LOUGEE."

"To T. L. Love."

That all the parties to this instrument were at the time it was drawn citizens of the city of Raleigh, and that the draft was duly

presented to the said Love, the drawee, who refused to accept the same, and at the time Lougee drew the draft he had no funds in the hands of Love, and after the refusal of Love to accept the same and with a full knowledge of the facts, Lougee requested Love to pay it.

The defendant denied having any knowledge sufficient to form a belief whether the draft had been drawn as alleged, or whether it had been presented for acceptance, and refused.

When the issues raised by the pleadings were submitted to a jury, upon an intimation of an opinion by the court that the plaintiff could not recover, because the law authorized no action against the defendant for any liability of the said Lougee, the plaintiff (155) submitted to a nonsuit, and from the judgment rendered in behalf of the defendant, the plaintiff appealed.

Messrs. Reade, Busbee & Busbee and Strong & Smedes, for plaintiff.
Messrs. Fowle & Snow and Gilliam & Gatling, for defendant.

ASHE, J. The question presented for our consideration is, can this action be maintained against the defendant Broughton as the administrator with the will annexed of W. G. Lougee, deceased.

Prior to the adoption of the Code of Civil Procedure, in case of a controversy concerning the probate of a will, it was the practice of our courts to grant limited letters of administration during the continuance of such controversy, called letters of administration *pendente lite.* The person to whom such letters were granted was required to give bond with security for the preservation of the estate, and the faithful discharge of the duties of the limited authority with which he was vested.

Such an administrator was merely an officer of the court, and held the property of the decedent only until the termination of the controversy, and as soon as it was concluded he was required to pay over all he had received in his character of administrator to the persons pronounced by the court entitled to receive it. He had no power to sell any of the effects of the decedent, except perishable property. He might maintain actions to recover debts due the decedent, but had no power to vest or distribute the assets. Iredell on Ex., 349, 350; 1 Williams on Ex., 435. But we find in neither of these authors, nor in any other treatise or report on the subject of administrators *pendente lite,* that actions might be maintained against them as against some other limited administrators.

Our Code of Civil Procedure has however made an altera- (156) tion of the law in this respect.

In Bat. Rev., chap. 119, sec. 25, (C. C. P., Sec. 448) it is provided that, "when a caveat is entered and bond given, as directed in the

last two sections, the judge of probate shall forthwith issue an order to any personal representative having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of the debts, until a decision of the issue is had."

By section 11, chapter 45 (C. C. P., Sec. 463) it is provided that whenever for any reason a delay is necessarily produced in the admission of a will to probate, the judge of probate may issue to some discreet person or persons at his option letters of collection, authorizing the collection and preservation of the property of the decedent; and by section 13 of the same chapter, "every collector has the authority to collect the personal property, take possession and receive the rents and profits of the real property, preserve and secure the estate and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell under the direction and order of the probate judge any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts."

Under the former system, letters of administration *pendente lite* were only issued when there was no one in the rightful charge of the estate of the decedent, and were granted merely for the purpose of preserving the estate. When the will had been admitted to probate, and the executor qualified, or when there was no executor nominated in the will, or the one appointed had renounced, and letters of administration had been issued *cum testamento annexo,* there was no need for an administrator *pendente lite.* The executor or the admin-
(157) istrator had authority to act. The granting of probate by a court having jurisdiction was a judicial act, and while it remained in force it could not be contradicted. The probate having been made was conclusive evidence of the existence of the will until annulled. Williams on Ex'r., 522, and note 1; *Floyd v. Herring,* 64 N. C., 409; *Hyman v. Gaskins,* 27 N. C., 267.

The object of the legislature in enacting section 25, chapter 119 of Battle's Revisal, was evidently intended to restrict the powers of an executor or administrator with the will annexed, but that the restriction extended no further than to restrain such officer from executing the will according to its provisions, not affecting the other powers of his office, such as the right to bring suits and the liability to be sued. The section (25) is *in pari materia* with the 11th and 13th sections of chapter 45 of Battle's Revisal. Reference may therefore be had to these latter sections in order to ascertain the intention of the legislature in enacting section 25. Section 13 expressly provides

that the collector may commence and maintain or defend suits, and may be sued.

When one whose office is that of a mere collector may be sued, it would be unreasonable to suppose that the legislature intended to divest of that attribute one who has been regularly vested with the full powers of an administrator or executor. There is no reason for such a distinction, and we cannot believe the legislature contemplated any such thing.

We think the proper construction of section 25 is, that after probate granted in common form, and there is an executor who acts, or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the powers and is subject to all the liabilities of an administrator or executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. Like a collector, he may sue and be sued, and (158) by leave of the court may sell property for the payment of debts, but cannot pay legacies, or exercise other special powers given by the will.

In our case Lougee's will was proved in common form before a court of competent jurisdiction, and letters of administration were duly granted to Broughton with the will annexed, and then there was a caveat and an issue made up to try the validity of the will, which was found in favor of the will. The letters granted to Broughton were never revoked; so far from it, his administration was sanctioned and continued by said section 25, and we can see no reason why this action may not be maintained against him.

There is no error. Let this be certified, that further proceedings may be had according to law.

Error. Reversed.

Cited: Randolph v. Hughes, 89 N.C. 432; *Hughes v. Hodges,* 94 N.C. 59; *In re Will of Palmer,* 117 N.C. 137.

ELIZABETH BARBEE, ADM'X, v. CALVIN J. GREEN.

Executors and Administrators—Payment of Funeral Expenses.

A claim for funeral expenses is a charge upon the estate in the hands of a personal representative, and the amount thereof may be pleaded as a set-off in a suit brought by the representative for a debt due the intestate. Such

expenses are of the highest dignity, except debts which are a specific lien on the estate; and the court intimate that such charge may also be set up as a counter-claim under section 101 of the Code, upon the implied contract of the representative to pay the expenses.

CIVIL ACTION tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

(159) The action was brought in a justice's court by the plaintiff, as administratrix of Mary Herndon, deceased, upon two notes due by the defendant to her intestate. The defendant set up a counter-claim for goods sold and delivered to the intestate, and also the price of a metallic coffin furnished by him for the burial of the intestate and in which he was buried.

To which the plaintiff replied, payment and the statute of limitations. Judgment was rendered for the plaintiff, and the defendant appealed to the superior court, where at June Term, 1880, the case was referred under the Code of Civil Procedure, and a report made by the referee to January Term, 1881, of the superior court, in which it was found by the referee that a part of the counter-claim set up by the defendant was barred by the statute of limitations, and without assigning any reason he found that the defendant was not entitled to the counter-claim of the metallic coffin furnished, although it was in evidence that the defendant had given one hundred dollars for the same, and that the plaintiff's intestate was buried in it, with the consent of the heirs and the mother who afterwards administered. By consent however of the plaintiff, the defendant was allowed a credit on the notes, on account of coffin, to the amount of eighteen dollars, but that was allowed only *ex gratia.*

There were several exceptions taken to the report, but the only one pressed in the argument before this court, was that to the ruling of the judge in overruling the exception taken by the defendant to the finding and conclusion of the referee in regard to the metallic coffin. In overruling this exception and confirming the report and giving judgment for the plaintiff, the judge supplemented his judgment with the qualification that "this judgment is without any prejudice to defendant's right to assert his claim, for the metallic case furnished, in any settlement of the estate hereafter had before the probate

(160) judge." Judgment for plaintiff, appeal by defendant.

Messrs. Lewis and Flemming, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

ASHE, J., after stating the case. There is no reason assigned by his Honor for making the ruling on this exception, but we must infer

from the qualification of the judgment, that it was based upon the idea that the defendant's demand could not be set up as a counterclaim or set-off to the action of the plaintiff; and this presents the only question raised in the record.

All the authorities concur that an executor or administrator may be sued for the funeral expenses of his testator or intestate, and having assets is liable to a judgment for them suitable to the degree and circumstances of his testator or intestate.

In the case of *Ward v. Jones, administrator,* 44 N. C., 127, this court held that the expenses necessary for the interment of a deceased person and suitable to the estate which he leaves behind him, are *a charge upon the assets* in the hands of the executor or administrator, and have a preference over all other debts. They bind the assets, independent of any promise by the executor or administrator, provided he is notified that they are claimed as a funeral charge before the assets are exhausted in the payment of other demands.

So in *Hopgood v. Haughton,* 10 Pick., 154, it is held that an action would lie against an administrator for funeral expenses, though money so paid was not strictly a debt from the deceased; and in *Tugwell v. Hayman,* 3 Camp., 298, which was an action against an executor for funeral expenses when the defendants had given no orders whatsoever respecting the funeral, LORD ELLENBOROUGH in his opinion held that the defendants were liable in the action, and said "it was their duty to see that the deceased was decently interred; (161) and the law allows them the reasonable expense of doing so above all other debts and charges. It is not pretended that they ordered any one else to furnish the funeral, and the dead body could not remain on the surface of the earth. It became necessary that some one should see it consigned to the grave, and I think the executors having sufficient assets, are liable for the expense thus incurred."

If the administrator then may be sued for funeral expenses in his representative character, and the judgment against him would be *de bonis testatoris,* as it must be in every case where he has sufficient assets, because these expenses are a charge upon the assets, it must follow as a legal corollary that the same may be pleaded as a counterclaim or setoff to an action brought by him in his representative capacity for a debt due to his intestate. For a counterclaim is defined to be, "such a demand as will enable the defendant to bring a suit upon it. It must constitute a cause of action in the defendant against the plaintiff to the record, independent of the plaintiff's cause of action and which would entitle the defendant to maintain an action against the plaintiff, if the plaintiff had brought no suit against the defendant." Waterman on Set-Off, etc., page 9 and note.

In Massachusetts it has been expressly held, that in an action by an administrator to recover a debt due to his intestate, the defendant may file in set-off a demand for money paid by him to defray the funeral expenses of the deceased. *Adams v. Betts*, 16 Pick., 343. In this state it has been held, where a creditor of one deceased, by note, (there being no other debt of equal or higher dignity) became purchaser at a sale by the administratrix, and gave bond on that account in less than the amount of his claim, and this bond constituted the whole assets of the estate; after the bond became due the administratrix, who with her sureties was then insolvent, assigned it by
(162) indorsement for value to one who was to a small amount creditor of the estate by account; that a creditor by note was entitled to bring in his debt as a *counterclaim* against an action upon his bond, whether by the administratrix or her assignee. *Ransom v. McClees*, 64 N. C., 17.

The plea of counterclaim in our case cannot be obnoxious to the objection that it might change the administration of assets and take from the administrator the right to prefer claims of equal dignity and confer that right upon the creditor, for that right under our statute can no longer be exercised by an administrator where he has sued out letters since July 1st, 1869, and debts of the highest dignity are to be first paid, and all debts of equal dignity are paid *pro rata*. The funeral expenses are of the highest dignity, except debts which are a specific lien on the property of the deceased, and there is no pretence that there was in this case any such debt.

We are aware it may be made a question whether funeral expenses, not being a debt contracted by either the administrator or his intestate, and not being strictly a contract, can be set up as a counterclaim under sub. div. 2, section 101, of the Code, but inasmuch as there is an implied promise by the administrator having assets sufficient to reimburse one who has defrayed such expenses, we are not prepared to say that such a case does not come within the purview of the section; but admitting it may not be pleaded as a counterclaim, we are of the opinion it would be available as a set-off. 1 Tiffany and Smith, p. 379. *Adams v. Betts, supra.* And this we think should be so upon the reason and convenience of the thing, for since a claim for funeral expenses is a charge upon the assets, why require such a creditor to pay his debt to the administrator and then recover back what is due him?

We do not mean to express the opinion that in this case the defendant should be allowed the full sum of one hundred dollars, but
(163) we think, he was entitled to an inquiry before the referee as to the value of the burial case, and to be allowed so much thereof

as was suitable to the circumstances of the intestate; and in refusing this we held there was error.

There must be a new trial in this particular. Let this be certified.

Error. *Venire de novo.*

Cited: Ray v. Honeycutt, 119 N.C. 512.

J. M. GALLOWAY, EXR., AND OTHERS v. WM. BRADFIELD, ADM'R, AND OTHERS.

Executors and Administrators—Payment of Judgments.

1. An administrator must pay off judgments against the estate according to priority, that is, the date of docketing.
2. Distinction between the rules governing the application by a sheriff of funds raised by sale under several executions, and the distribution of assets by a personal representative, pointed out by ASHE, J.

CIVIL ACTION tried at Fall Term, 1881, of ROCKINGHAM Superior Court, before *Gudger, J.*

This is an action in nature of creditor's bill brought by the plaintiffs as executors and executrix of Thomas S. Galloway, deceased, in behalf of themselves and the other creditors of the testator, against William Bradfield as administrator of Isaac N. Hand, deceased, and the several sureties on two administration bonds given by the said Bradfield alleging breaches of the bonds, and the misapplication of the assets of his intestate.

After answer filed by the defendant Bradfield, the case was referred by consent to the clerk of the court to take and state the account of the defendant administrator, including a statement of all the debts according to priorities, who, at Fall Term, 1881, made (164) his report upon his findings of fact and conclusions of law.

The referee found as facts: That Isaac Hand died intestate in the spring of 1874, and was seized at the time of his death of a tract of land situate in the county of Rockingham, containing about one hundred and seventy-one acres; that at the time of his death the following judgments subsisted against him which had been duly docketed in the superior court; one in favor of Pleasant H. Price for the sum of $200, with interest from March 1st, 1862, and costs, rendered by a justice of the peace, January 5th, 1871, and docketed January 7th, 1871; one in favor of Thomas S. Galloway rendered in a justice's court January 14th, 1871, for $199.20, with interest from January 14th, 1871,

and costs, docketed January 17th, 1871; one in favor of Mary S. Galloway for $192, with interest from January 14th, 1871, and costs, docketed January 17th, 1871; and another in favor of Susan Lemons against the said Hand, Thomas R. Williams and J. B. Garrett for $606.66, with interest on $400 from March 18th, 1872, and costs, docketed in the spring of 1872; that Bradfield was duly qualified as administrator of Hand, and gave successively two bonds with the usual conditions, the first in the penal sum of $1,000, with B. G. Wilson and John P. Wilson as sureties; and the second in the penal sum of $1,100 with like conditions with B. G. Wilson and J. M. Kallam as sureties; that he filed no inventory and made no returns to the probate court; that in pursuance of special proceedings had, the administrator sold the land belonging to his intestate for the net sum of $526.29, and applied the proceeds of sale to the Lemons judgment. There were no other debts of the estate than the judgments above mentioned.

The referee's conclusions of law were that all the judgments above set forth constituted liens of the several plaintiffs upon the real
(165) estate of the said Hand for ten years from the docketing thereof, and that the legal priority of the judgments is fixed by the date at which they were severally docketed; that the net proceeds of the sale ($526.29) should have been applied first to the satisfaction of the oldest lien, to wit, the judgment in favor of Pleasant H. Price, and the residue to the satisfaction of the judgments in favor of Mary S. Galloway and Thomas S. Galloway *pro rata*, and that by the failure of the administrator to so apply the assets, he has failed to comply with the conditions of his two said bonds and is liable for breaches thereof. The referee found also that the junior judgment for Lemons had been kept alive by regular and continuous executions, and the plaintiff's judgments had been duly revived.

The plaintiff excepted that the finding that the Lemons judgment had been kept alive by regular and continuous executions, and the defendants excepted to all the other conclusion of law, except that which found that the plaintiff's judgments were duly revived.

At the hearing upon the exceptions, his Honor sustained that taken by the plaintiffs and overruled all of those taken by the defendants, which rulings the defendants assign for error on their appeal from the judgment rendered in favor of the plaintiffs against the administrator Bradfield and his sureties on the two administration bonds.

Messrs. Mebane & Scott, for plaintiffs.

No counsel for defendants.

ASHE, J. In the court below there was a good deal of stress laid upon the questions whether executions had been issued in proper time to keep alive the judgments, and whether proper notice had been given to revive them. We think these questions are aside from the merits of the case and were altogether immaterial. The principle which applies to the distribution of funds received by a (166) sheriff by sale of land under several executions in his hands, has no application to the distribution of the assets of an estate by an administrator. The sheriff looks to the executions for his guide, and the administrator to the priorities of the debts of the estate. When there are judgment liens, as in this case, the one looks to the exigency of the executions, and the other to the judgments. So far as an administrator is concerned, the executions on a judgment have no effect to create, or perpetuate the lien; as has been repeatedly decided by this court, the office of an execution upon a judgment creating a lien on land is to enforce the lien of the judgment; therefore when it is issued upon a judgment rendered before the death of the defendant, but bearing teste after his death, it is inofficial and has no effect.

The only question in the case is, which of the judgments had the prior lien; and it was the duty of the administrator to pay these according to their priorities. Judgments fall within the fifth class to be paid. Bat. Rev., ch. 45, sec. 40. They constitute a class of debts to be paid in its order, but to be paid in that class according to their priorities, which is to be determined by the dates of their docketing, otherwise the creditor who has been the most diligent in obtaining his lien would lose the benefit of his vigilance, which it is the purpose and policy of the law to preserve.

We therefore hold that there was no error in the ruling of the court as to the application of the proceeds of the sale, to-wit, first to the satisfaction of the judgment of Pleasant H. Price; secondly to the satisfaction of the judgments in favor of Mary S. Galloway, and Thomas S. Galloway, *pro rata,* and the residue, if any, to the judgment of Susan Lemons.

The judgment of the court below is therefore affirmed.

No error. Affirmed.

Cited: Tarboro v. Pender, 153 N.C. 428, 431.

(167)

J. B. MILLER AND OTHERS v. BARTLETT BRYAN AND WIFE.

Arbitration—Boundary.

1. Where an arbitrator intends to be governed by the rules of law but misconceives them, he may be reviewed.
2. In determining the boundary of land, none of the calls must be disregarded when they can be fulfilled by any reasonable way of running the lines, which will be deflected only when necessary to give effect to the intent of the parties as expressed in the instrument.

CIVIL ACTION heard upon exception to the report of a referee at Fall Term, 1880, of WATAUGA Superior Court, before *Bennett, J.*

The report was confirmed and the defendants appealed.

No counsel for plaintiffs.
Mr. D. M. Furches, for defendants.

SMITH, C. J. The controversy is one of boundary, and by consent of parties at Spring Term, 1878, the matter was "referred to W. W. Lenoir to find the facts and the law, and his decision to be final." After several continuances, he made his report accompanied with a plat of the disputed land at Fall Term, 1880, the substance of which, so far as is necessary to a proper understanding of the point presented in the appeal, is as follows:

The northeast corner of the defendants' tract of land is admitted to be at the place designated by figure 2, and the lines as claimed by the opposing parties running thence southward diverge and terminate respectively at figure 1 and the letter D in the southern boundary, the disputed land forming an elongated triangle included in these lines and a connecting line at their base. It was proved before the
(168) referee, and he finds and so decides, that the southeast corner of the tract is at the terminal point marked with figure 1, at a white oak by the road in a Spanish oak now gone, which stood on the east side of and in contact with the white oak, and that the defendants' grant is a straight line from said corner to the white oak at 2 on the plat, and that the land in dispute is not included in his grant.

The plaintiffs derive title from the state to a tract of forty acres, which calls for a line running east one hundred and twelve poles, coincident with the northern boundary of the defendant Bryan's land —"to his (Bryan's) corner" at 2, its admitted position, and then proceeds "south with his line eighty poles to a Spanish oak in David Miller's line, thence east," etc. The Spanish oak mentioned according to the referee's finding, is now but a stump, and stands a short dis-

tance east from the eastern boundary of the defendants' land as established by him.

The referee decides that the boundary of the forty acre tract, under the descriptive words used in the grant, must pursue Bryan's land, as located, until it reaches a point opposite and nearest to the stump, and run thence direct to the stump, thus enclosing the disputed territory within its limits.

The referee further finds that by virtue of a continuous possession for more than seven years before the suspension of the statute of limitations, under a deed from the defendant to certain school commissioners, the plaintiffs had lost their title to the part of this territory, north from and above the stump to a poplar, in the line from 1 to 2, but still owned the land above the apex of the triangular space, and were entitled to recover the same with the costs of the suit.

The defendant excepts to the referee's conclusion of law as to the location of his line, and assigns for cause that it should run a direct line from the conceded corner at 2 to the stump, and thus divide the tracts.

While a referee or arbitrator under the terms of such a refer- (169) ence, when his award or report upon its face shows that he intended in making it, to be governed by the principles of law, but has misconceived and misapplied them in reaching his conclusion, may be reviewed and his errors in law corrected, (*King v. Neuse Man. Co.*, 79 N. C., 360,) we concur in the rulings of the referee, upon the ascertained facts as to the manner of running the controverted line.

1. His location meets all the requirements of the grant and adjusts the line to all the descriptive words employed in defining it, while no other location will. The line runs from the starting corner the distance specified—"*with his* (the defendant's) *line*" fixed by the referee— "*to the Spanish oak in David Miller's line.*" A well settled rule in determining the boundary lines of a conveyed tract of land, allows none of its calls to be disregarded, when they can be fulfilled in any reasonable way of running the lines around the land. They will be deflected when necessary to give effect to the instrument and carry out the intent of the parties, from a single into several lines. Thus when a boundary is described as beginning at an ascertained point, and running thence direct "to Ramsey's ford, so however as to include the cleared part of Shingle Island," and a direct line between those termini would exclude the island altogether, it was held that it must go to the "cleared part" around it, and thence to the ford, thus making this a bent and angular boundary instead of a single and straight line. *Long v. Long*, 73 N. C., 370. Again in *Clarke v. Wagner*, 76 N. C., 463, the island called for in the grant having been

identified by the verdict of the jury, its upper end was established as the beginning, and the lower end as the second corner. These being natural objects, the line would be run direct from the one to the other, but that it is described as "including two small islands" and to fit it to this description, it was decided it must run from the upper (170) end of the first island to the upper end of the second, then along its western margin to its lower end; and thence a direct course to the lower end of the first island, thus pursuing a tortuous course in order to embrace both the islands.

2. If the location of the defendants' line as fixed by the finding of the referee upon the evidence, remains, and the plaintiffs' line instead of pursuing it deviates and diverges, as the defendant claims it should there would be vacant land uncovered by either title, while it is manifest there is but a single dividing line up to which the parties must hold on the respective sides of it. That must be when one or the other party claims it to be, and as that of the defendants' earlier grant is determined by own terms, and has been fixed by the referee, it follows unavoidably that the plaintiffs' tract must come up to that line, and embrace all outside of it. The referee does not undertake to pass upon the title to the disputed territory, south of the stump, but leaves either party in possession of his legal rights therein.

The exception must be overruled and the judgment below affirmed.

No error. Affirmed.

Cited: Redmond v. Stepp, 100 N.C. 218; *Reizenstein v. Hahn*, 107 N.C. 158; *Allen v. Sallinger*, 108 N.C. 162; *Smith v. Kron*, 109 N.C. 105; *Herndon v. Ins. Co.*, 110 N.C. 287; *Bowen v. Lumber Co.*, 153 N.C. 370; *Lumber Co. v. Lumber Co.*, 168 N.C. 95; *Power Co. v. Savage*, 170 N.C. 629.

JOHN E. OSBORNE v. R. S. COLVERT.

Arbitration and Award.

The members of a firm agreed to submit to arbitration a certain matter "concerning the dealings and mutual accounts kept between them for the last several years, and all things and considerations relating thereto." In an action upon the award, and in support of his plea of counter-claim, it was held competent for the defendant to show, (1) that the arbitrators considered only matters relating to the partnership; (2) that the plaintiff is indebted to him individually by note given before the date of the agreement to refer and before the partnership was formed, which note was not in-

tended to be embraced in the submission, and for that reason was not produced on the trial before the arbitrators.

CIVIL ACTION tried at Fall Term, 1881, of IREDELL Superior (171) Court, before *Seymour, J.*

The plaintiff sues upon an award, made in pursuance of a written agreement of reference, the condition of which is as follows:

The condition of the above obligation is such, that whereas a certain matter of controversy has arisen between the above bounden, *about and concerning the dealings and mutual accounts kept by and between themselves for the last several years;* and whereas they have mutually agreed to refer and submit to the arbitrament and award of John A. Stikeleather, J. W. W. Weaver and T. M. Gill, arbitrators indifferently chosen by and between them, and *all things and considerations relating thereto,* and it is agreed that the said arbitrators shall hear such statements of the parties and such evidence as they may deem proper, and make their award in writing and deliver it to the parties, provided it be made in writing and delivered to the parties at the time and place of making their award. Now, therefore, if the above bounden, etc. (Signed and sealed by J. E. Osborne, T. J. Osborne, J. C. Colvert and R. S. Colvert.)

The award is as follows: We, the referees chosen to make a settlement between John Osborne and R. S. Colvert, do make this settlement.

That Colvert is due Osborne in first settlement	$325.00
On settlement with Tom Osborne	268.75
Interest	10.75
	$604.50

(Signed by the arbitrators.)

The plaintiff introduced as a witness the arbitrator, Weaver, (172) who testified to the delivery of the award to the parties, and that in making the settlement between them, the arbitrators received all the evidence of claims offered by any of the parties; and that evidence relating to the individual accounts of the parties against each other, and possibly of notes of that character, was offered and received by the arbitrators, as well as of claims concerning their partnership dealings, and that all claims offered were considered by the arbitrators.

On cross-examination this witness stated, there were two firms existing between the parties—one composed of the plaintiff and defendant, engaged in making whiskey, and the other of Tom Osborne and defendant, engaged in making brandy, and of this latter firm J. C. Colvert was a member.

The defendant, having pleaded a counter-claim in his answer, offered in evidence a note for $200 given to him by the plaintiff, more than two years before the date of agreement to refer, and proposed to prove that nothing was actually considered by the arbitrators except matters relating to the firm, and that the note in question was given before the partnership was formed, and that it was never before the arbitrators in any manner, but, upon plaintiff's objection the court excluded the evidence, upon the ground that by the terms of the submission, *every* claim of either party existing prior to the submission and award was embraced in the same, and that if defendant did not produce this claim upon the note, he might have done so, and was therefore concluded.

After verdict and judgment for the plaintiff, the defendant appealed, assigning as error the refusal of the court to allow him to offer proof in support of his counter-claim.

Mr. J. M. Clement, for plaintiff.
Messrs. Scott & Caldwell, for defendant.

(173) RUFFIN, J., after stating the above. In the opinion of this court, the evidence tendered by the defendant was improperly excluded.

Allowing the decision of arbitrators, when acting within the scope of their authority, to have the force and effect of a judgment between the parties, in so far as it estops them from again litigating any matter embraced in the submission, and conceding as is insisted by the plaintiff, that in every such case, the estoppel is co-extensive with the submission, and affects not only those claims that were actually introduced before the arbitrators, but all that might have been, according to the terms of the latter, still we think, that it was open to the defendant under the circumstances of this case, to show, as he proposed to do, that the demand, upon which he now insists, was not intended to be embraced within the submission, and that for that reason, it was not produced, or considered by the arbitrators, at the time of their trial.

Looking to the article itself as signed by the parties, a doubt is at once suggested, as to whether it was intended to embrace the individual claims of the parties, as distinguished from their partnership dealings.

The fact that a controversy had arisen between them, "about and concerning *the dealings and mutual accounts* kept by and between themselves for the last several years," is recited as that which had given occasion to the arbitration, and the matters referred seem to be

only such "things and considerations" as bore some relation to those *dealings and mutual accounts.*

The note, now produced by the defendant, ante-dates those mutual dealings, and if any presumption is to be indulged, it must be in favor of his present right to it, since it does not belong to that specific class of claims, about which the controversy had arisen, and the adjustment of which constituted the chief inducement for making the reference.

The plaintiff himself seems to have felt the force of this pre- (174) sumption, and therefore undertook to show, affirmatively, that the arbitrators, with the knowledge and consent of all parties, enlarged their functions, so far as to enquire into and adjudicate the individual matters, as well as the partnership dealings.

If the terms of the written agreement to refer had been clear and explicit in themselves, his liberty thus to show that matters foreign to them, had been embraced in the award, might be the subject of some doubt.

But conceding his right to do so, it surely must have been equally admissible for the defendant to show, if he could, that his present demand came neither within the scope of the original intention of the parties, nor the action of the arbitrators; and the evidence offered by him, with that view, should have been received by the court.

The plaintiff's counsel also called our attention to the complaint, wherein the note, pleaded as counter-claim, is said to be one for $300, and insisted that this allegation could not be supported by proof of a note for $200, and that therefore the evidence with regard to the latter, was properly excluded. No such exception is set out in the case, as having been taken in the court below; and if taken, it might have been avoided by an amendment, such as the court had the power to allow, and doubtless would have been allowed, if deemed necessary to meet the ends of justice and right between the parties. We do not feel at liberty, therefore, to notice it here now, but will leave it to be acted on hereafter by the parties as they may be advised, subject to the discretion of the court.

The judgment of the court below is reversed, and a *venire de novo* awarded.

Error. *Venire de novo.*

Cited: Robertson v. Marshall, 155 N.C. 172; *Yelton v. McKinney,* 203 N.C. 787.

(175)

ANDREW SYME, ADM'R, v. JOHN N. BUNTING AND OTHERS.

Pleading—Complaint—Suit on Official Bond.

1. A complaint in an action upon two official bonds given for separate terms of office, against a clerk and a single surety to both, alleging misapplication of funds paid into the clerk's office during the two terms, is not demurrable for misjoinder of independent causes of action; and this, even though the penalties of the bonds are in different sums.
2. A reference ought not to be ordered before issues are raised between the parties to the cause.

CIVIL ACTION tried at Spring Term, 1882, of WAKE Superior Court, before *Bennett, J.*

Defendants appealed from the ruling below.

Messrs. A. Jones, W. H. Pace and Walton Busbee, for plaintiff.

Messrs. Reade, Busbee & Busbee and Hinsdale & Devereux, for defendants.

SMITH, C. J. Upon the filing of the complaint which charges a breach of the official bond of the defendant Bunting, executed to secure the faithful discharge of his duties, as clerk, for the term expiring in 1878, it was ordered by the court "that this case be referred to A. W. Haywood to take account, etc., under the Code of Civil Procedure." During the reference, the relator obtained leave of the referee to amend his complaint by inserting a cause of action arising upon a bond given for a preceding term of office which expired in 1874, and was allowed "to take a non-suit," as erroneously miscalled in the case, instead of "to enter a *nolle prosequi*," as to one of the sureties, a defendant, who had not executed the first bond, leaving the

(176) action to proceed against the principal and the single surety to both. The defendants excepted to the amendment and demur to the amended complaint. The referee, without proceeding further in the hearing made his report to the court, to the referee's rulings in which a similar objection is made in the form of exceptions thereto, and his Honor gave judgment sustaining the referee and overruling the dumurrer and exceptions, and the appeal presents a single point.

The complaint alleges a misapplication of funds paid into the clerk's office, during two terms, the one following the other, and the action is against the clerk and the common surety upon the bonds given for the separate terms.

Is this admissible, or is it a demurrable misjoinder of independent causes of action?

We concur in the opinion of his Honor that there is no such misjoinder, and the causes of action may be united in the same complaint. It will not be questioned that separate actions between the same parties can be maintained for breaches of the separate bonds, and as both are founded on contract and embraced in section 126 of the Code, we see no reason why the relator should be put to the expense and inconvenience of prosecuting two suits against the same obligors, where full relief may be attained in a single suit.

It is the common practice to sue upon two notes or bonds, and recover in one action against persons who are liable on each, and this, notwithstanding there may be others liable on one or the other only, who are not parties to the suit; and this results from the fact that the obligation is several as well as joint under the statute. Acts 1871-72, ch. 24, sec. 1, C. C. P., sec. 63; *Merwin v. Ballard*, 65 N. C., 168. Why should a different rule be applied to official bonds, and the relator be forced to seek in several actions the relief to which he is entitled against the same defendant, and that can as well be administered in one? In *Matthews v. Copeland*, 79 N. C., 493, the plaintiff (177) was allowed to insert in his complaint causes of action arising out of alleged breaches of the bonds of a clerk and master, given for distinct terms of office, against sureties who with their principal had executed both. In the argument, some stress was laid upon the words used by BYNUM, J., delivering the opinion—"As the defendants are the *only sureties* upon both bonds, their liability is the same, whether the breach was of the one or the other"—yet the principle announced, that the same defendants are liable for the breaches assigned, must equally govern when there are others not sued also liable upon one or the other. It is the common liability of the defendants for the default of the clerk, (and this irrespective of its being shared with others,) and arising out of contract, which allows the association of two distinct causes of action in one and the same complaint, and removes the imputation of duplicity.

It is suggested that as the penalties are in different sums and the responsibilities of the sureties for contribution, in case of a recovery against the present defendant, variant and unequal, confusion will result in an attempt to adjust the equities that may arise, and therefore separate actions should have been brought upon each bond. This result may or may not follow a recovery against the present surety, alone a party, but it cannot affect the right of the relator to enforce his own obligation against him and compel him to pay for the clerk's official delinquencies during both terms of office.

But the difficulty is apparent rather than real. If the defaults are several and the measure of damages assessed for each, the judgment could be rendered for each penalty to be discharged on payment of the damages severally assessed; or if the recovery is confined to one bond, the judgment would be upon that only, and the apprehended contingency would not arise.

But if there were force in the objection, that inconvenience (178) in adjusting the responsibilities among the different sets of sureties, *inter sese*, may be produced by prosecuting the action to judgment against a surety belonging to each class, it does not furnish a reason for depriving the relator of his right to assert, in one action, his claim against a party who has entered into both bonds, and is equally liable in damages for the official delinquencies of the clerk during both terms. The subject has been so recently examined that we refrain from doing more than to refer to the case of *Young v. Young*, 81 N. C., 91.

We advert to an irregularity, lest our silence be deemed an approval of the course pursued, in making the reference before any issues are raised between the parties by the pleadings or otherwise, and without the interlocutory judgment consequent upon the failure to demur or answer. But as the demurrer arises solely upon the complaint in its amended and not in its original form, the referee properly suspended further proceedings under the order, and reported his action and rulings to the judge for his consideration and decision. This places the case in the same position as if there had been no reference, and the amended complaint and the demurrer thereto had been filed in the court.

There is no error, and the judgment must be affirmed.

Let this be certified to the court below for further proceedings.

No errror. Affirmed.

Cited: Brown v. McKee, 108 N.C. 391; *Williams v. R.R.*, 144 N.C. 502.

T. H. WEBSTER AND WIFE v. WESLEY LAWS AND WIFE.

Pleading—Defence of Pendency of Another Suit Between Same Parties.

Where a summons was issued by a justice and the defence set up at the trial is the pendency of another action before another justice for the same cause of action, and no further steps were taken in the first, until some time after-

wards when an entry of nonsuit was made by the justice; *Held* that the first action terminated on the day when the second was begun.

APPEAL from an order made at Fall Term, 1881, of ALEXAN- (179) DER Superior Court, by *Seymour, J.*

The only question in this case arises out of the ruling of the court upon the sufficiency of the defence to the action, the material facts of which as found by the judge, a trial by jury being waived, are these:

The summons in the present action was issued by a justice of the peace on August 9th, 1879, and the cause tried on the 20th day of the month. The defence set up was the pendency of another suit, instituted before another justice for the same cause of action and between the same parties, the warrant in which was returnable on the same day when the second suit was begun, but it does not appear to have been served. On the return day, the justice who issued the first warrant was absent from the county and remained away several days. No further action was taken therein until some time afterwards, when an entry of nonsuit was made on the docket of the justice by himself.

Upon these facts the court declared, as matter of law, that the first action was depending and undetermined at the time of the issuing and serving of the summons in the second action, and gave judgment against the plaintiffs, from which they appealed.

Mr. G. N. Folk, for plaintiffs.
Mr. D. M. Furches, for defendants.

SMITH, C. J., after stating the above. We do not concur in the ruling that, upon the facts found, the first action was pend- (180) ing when the second action was begun. The process not having been served was exhausted on the day fixed for its return, and the action was in law then discontinued. This has been repeatedly decided in this court. *Fulbright v. Tritt*, 19 N. C., 491; *Governor v. Welch*, 25 N. C., 249; *Hanna v. Ingram*, 53 N. C., 55; *Etheridge v. Woodley*, 83 N. C., 11.

A discontinuance of process is different from a discontinuance of the action. "When a plaintiff leaves a chasm in the proceedings of his cause," says Mr. Sellon, "as by not continuing the process regularly from day to day and term to term as he ought to do, the suit is discontinued and the defendant is no longer bound to attend." 2 Sellons' Prac., 458; 3 Black. Com., 296.

But if the summons had been served we think it would not have affected the result.

The first action, then, terminated on the same day at which the second was begun, and if fractional parts of a day can be counted in such a case, there is no finding as to which is prior in time. But the form of the plea avers that the said former suit "is still depending," having reference to the commencement of that which is to be abated by the plea, (2 Ch. Plead., 468), and hence to be available this priority should be alleged and shown. But we are disposed to hold an inquiry into the hours of the day, when the one ended and the other begun, as immaterial, and the second action will not abate when the summons was sued out on the same day, the plaintiff not being required to await its close before proceeding.

But it is sufficient to say that the legal conclusion drawn by his Honor from the facts found by him, was not warranted in law, and his judgment based thereon is erroneous. We attach no importance to the entry of nonsuit on the justice's docket, since the cause (181) had already been disposed of by the discontinuance resulting from the plaintiffs' failure to prosecute it. The more recent cases in our reports where this defence has been set up, are, *Harris v. Johnson*, 65 N. C., 478; *Woody v. Jordan*, 69 N. C., 189.

There must be a *venire de novo* and it is so adjudged.

Let this be certified.

Error. *Venire de novo.*

Cited: Webster v. Laws, 89 N.C. 226; *Ditmore v. Goins*, 128 N.C. 329; *Pettigrew v. McCoin*, 165 N.C. 474, 475, 476; *Hatch v. R.R.*, 183 N.C. 623; *Green v. Chrismon*, 223 N.C. 727.

HOLLAND HODGES AND OTHERS v. JAMES COUNCIL AND OTHERS, ADM'RS.

Guardian and Ward—Sureties—Limitations and Presumptions.

1. A guardian appointed in 1841, is not himself protected by lapse of time against an action on his bond and for an account of the trust fund; but his sureties are discharged if the ward does not within three years after attaining majority call upon the guardian for a full settlement. Rev. Stat., ch. 65, sec. 7.

2. In such case, only a presumption of payment arises within ten years after the right of action accrues (Rev. Stat., ch. 65, sec. 13); and *it seems* that the period of time for the presumption is to be counted from the arrival of the several wards at full age—excluding the interval during which the statute was suspended.

HODGES *v.* COUNCIL.

CIVIL ACTION tried at Spring Term, 1881, of WATAUGA Superior Court, before *McKoy, J.*

This action commenced on the 19th day of April, 1880, is prosecuted against the defendants, as administrators of Benjamin Council, guardian, for an account and settlement of the trust estate committed to the hands of the intestate, and for the recovery of the sums which may be found due to the several wards. The material facts (182) admitted, or if controverted, found by the jury, are as follows:

Joseph C. Mast, the grandfather, from whose estate the funds were obtained, died in 1841, intestate, and thereafter during the same year the said Benjamin Council who had married a daughter, then deceased, was appointed and qualified before the proper court, as guardian to their infant children, the plaintiffs Elizabeth and Joseph, and the intestates of the other plaintiffs in the action, and as such received their distributive shares. The plaintiff Elizabeth married the plaintiff Holland in 1852, and attained her majority in 1856; the plaintiff Joseph became of full age in 1854, and of the intestates, Jacob died in 1865 at the age of 42 years, Sarah (who, while still an infant married one Ebenezer Smith, who died during the late civil war,) died herself in 1878, having reached her 53rd year, and John, neither begotten nor born in wedlock, the remaining ward, died about 1859, when 36 years old. It thus appears that Elizabeth had attained her majority, 24 years; Joseph, 26 years; Sarah, 33 years; John 35 years, and Jacob 36 years, previous to the issuing of the summons in the suit.

Upon the rendering of the verdict and at the instance of the plaintiffs' counsel, the court adjudged they were entitled to an account, and ordered a reference to ascertain and report the property and effects, and the value thereof which came, or ought to have come into the possession of the guardian by virtue of his said office and his administration of the trust fund. From this judgment the defendants appeal.

Mr. J. F. Morphew, for plaintiffs.
Mr. G. N. Folk, for defendants.

SMITH, C. J., after stating the foregoing facts. Two defences are set up against the maintenance of the action, and exception is also taken to the order of reference consequent upon the adverse rulings:

1. The bar of the statute of limitations. (183)

2. Payment and satisfaction, the presumption of which arises under the statute from the lapse of time since the wards became of full age.

I. There is no statutory limitation of time prescribed for bringing the action to obstruct the plaintiffs' recovery, and the first defence is untenable.

The guardian has entered into bond for the faithful discharge of his official duties in securing, managing and delivering over the trust estate added his personal covenant to perform to the obligation incurred by the acceptance of the appointment, and growing out of the legal relations subsisting between himself and them; and the law in force and governing the present case fixed no determinate period in which the remedy on the bond must be pursued against *him,* while it did protect the sureties after a delay of three years. Rev. Stat., ch. 65, sec. 7. The present suit to enforce this legal obligation against the guardian only, encounters no such legal impediment.

II. It has been repeatedly declared by this court, that the statutory presumption of payment or satisfaction on all judgments, contracts and agreements arising within ten years after the right of action accrues, (Rev. St., ch. 65, sec. 13,) has no application to an express trust, open and unperformed, because the relations thus formed are not adversary until they are made so by some act of the trustee, in repudiation of the trust and known to the *cestui que trust;* and then, as in case of a trust declared by the court, and founded in fraud or the like, the latter must assert his equity within a limited time, in analogy to the rule at law, or relief will be denied. Where this occurs, the statute is put in motion and the presumption it draws from long inaction prevails alike when the proceeding is in equity as when the action is presented at law. *Edwards v. University,* 21 N. C., 325; *State v. McGowen,* 37 N. C., 9; *Hamlin v. Mebane,* 54 N. C., (184) 18; *Davis v. Cotten,* 55 N. C., 430, and other cases. See also *Godden v. Kimmell,* 99 U. S., 201. "It has been invariably maintained," is the conclusion reached by the author of the work on limitations, after a careful consideration of adjudged cases, "that if a trustee should deny the right of his *cestui que trust,* and assume absolute ownership of the property he holds in trust, he abandons his fiduciary character, and the *cestui que trust* must commence legal proceedings against him within the prescribed time;" and he adds as illustration that "after a ward comes of age the fiduciary relation of the guardian ceases, and they thereafter stand as debtor and creditor," and the ward's claim falls under the operation of the restricting statute. Angel Lim., Secs. 174, 178. The proposition is fully sustained by the reference.

In *Green v. Johnson,* 2 Gill and John., (Md.) 389, the court say that "when the ward is emancipated from the authority of his guardian by reaching the age prescribed by law, his *cause of action is com-*

plete. The relation which existed between them *ceases to be a subsisting trust;* an action of account may be immediately instituted in a court of law, and from that time, the act of limitation dates the commencement of the action."

In *Ivy v. Rogers,* 16 N. C., 58, the bill was filed before the passage of the act of 1826, reducing the time prescribed by the common law for raising the presumption of adjustment. TAYLOR, C. J., dates the beginning of the period to the time when the final administration account was rendered, because, as he explains, "the account thus stated enabled all parties concerned in interest to ascertain the sum acknowledged to be respectively due them; to enforce the payment if they were satisfied with the correctness of the accounts, or to reopen them if they were dissatisfied."

It would seem the like effect should be given to the rendition of the guardian account after the infant attains his majority, and the matter is adverted to and left undecided in the opinion of (185) PEARSON, J., in *Hamlin v. Mebane, supra,* wherein after reiterating the rule which protects express trusts from the consequences of the lapse of time, he adds, "we do not feel called upon to say whether the case of a ward who fails to call his guardian to account is within the scope of the rule."

The instructions of the court proceed upon the idea that the plaintiffs' claim remain in full force, unimpaired by delay, until by a demand of settlement and a refusal, the intestate's relations, as trustee, are changed and become antagonistic towards his wards, and thus the statute is put in motion. Accordingly the question of a precedent demand was submitted to the jury and they find there was none.

Upon the trial of the issues the defendants insisted that the claims were presumed to have been satisfied and there was no rebutting evidence. The court did not so direct the jury, but instructed them that if a demand was made more than three years before the commencement of the suit, then as to such of the plaintiffs as made the demand, their right of action would be barred.

While the court properly refused to say there was no rebutting evidence furnished in the testimony of the witness who, seven years previous to the trial, saw the guardian in apparent distress and heard him say "that Holland (husband of his daughter Elizabeth) had threatened to sue him on an old bond, and that he ought not to do so as he was adding to his estate, and they would get it all when he died," asking the witness at the same time to see Holland and stop it; yet in our opinion it was an error not to inform them of the legal presumption, and leave the force of the repelling evidence to be weighed against it.

It will be noticed that there is no saving of the rights of married women in the enumeration of the disabilities of others in the act which limits the action against the sureties to a guardian bond to the
(186) space of three years next after the ward's attaining his majority, an omission to which attention is called and the reason assigned for it given in the case of *Hamlin v. Mebane,* and that in the act of 1826 shortening the period for the presumption, there is no saving clause and no personal disabilities are placed beyond its reach.

At the same time this is not like a statute limiting the action, an inflexible rule of law, but a rule of evidence to which an artificial effect is added, and open to disproof of the inferred fact. Doubtless this negative evidence would be strengthened by showing such relations between the parties as may tend to explain the inaction and delay, as does continuous insolvency, in bringing the suit.

We have considered the action as intended to enforce the covenant obligation, and not as a mere equitable suit substituted for an action of account.

Under the former acts of limitation by which the facts of this case are governed, there was no time prescribed for suing upon an instrument under seal, and hence the only defence, to which the plaintiffs' claims are exposed, must be drawn from the presumption created at common law and sanctioned by our own statute.

While we leave the point undecided, we are inclined to hold that the period of time for the presumption is to be counted from the arrival of several wards at full age, excluding therefrom the interval during which the statutory presumption was suspended. The case was not so presented to the jury, but the right of action made to depend entirely upon the question of demand. We do not see why if the statute of presumption begins to run, as held in *Ivey v. Rogers, supra,* against a personal representative from the filing and auditing of his final administration account, when sued by those entitled to the fund, it does not begin, as against a guardian, from the termination of his
(187) office and his rendering to the proper court his final guardian account. It does not appear here that the intestate made any returns, but even in their absence it was his duty to settle and the wards' right to make him settle as soon as the ward had legal capacity to act, and to this definite obligation the statute must apply.

For the error mentioned there must be a new trial and it is so adjudged.

Error. *Venire de novo.*

Cited: Vaughan v. Hines, 87 N.C. 448; *Tucker v. Baker,* 94 N.C. 165; *Grant v. Hughes,* 94 N.C. 237; *Mull v. Walker,* 100 N.C. 51;

Alston v. Hawkins, 105 N.C. 9; *Kennedy v. Cromwell*, 108 N.C. 3; *Nunnery v. Averitt*, 111 N.C. 396; *Faggart v. Bost*, 122 N.C. 521; *Norton v. McDevit*, 122 N.C. 758; *Self v. Shugart*, 135 N.C. 198; *Wise v. Raynor*, 200 N.C. 571; *Hicks v. Purvis*, 208 N.C. 660.

BANK OF STATESVILLE v. ROXANA SIMONTON.

Trusts and Trustees—Land Charged with Payment of Fund.

The managing officer of the Bank of Statesville became indebted to the bank in a large sum of money which he used in the purchase of land, and died leaving a will devising it to his wife; *Held*, that the fund used in the purchase is the property of the bank and the land charged with its payment. The case of *Attorney General v. Simonton*, 78 N. C., 57, approved, as to the existence of the bank as a corporation.

CIVIL ACTION tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

Verdict for plaintiff, judgment, appeal by defendant.

Messrs. J. M. Clement and D. M. Furches, for plaintiff.
Mr. G. N. Folk, for defendant.

SMITH, C. J. The Bank of Statesville, professing to act under the act of incorporation granted by the general assembly in 1870, commenced operations and a banking business under the management of R. F. Simonton, as cashier, and so continued for some (188) years, and until his death in 1876, when it and his estate were found to be insolvent.

Simonton deposited in the bank, as part of its capital stock, ten thousand dollars in bonds issued by the county of McDowell, which he subsequently withdrew and used in the purchase of certain real estate in or near Statesville, then known as the "Concord Female College," and since, as the "Simonton Female College," the title of which he caused to be made to his wife, the defendant. The testator who, as cashier, had the entire control of the banking operations, became himself also indebted to the bank, for its funds taken and used in a large sum which he was owing at the time of his death, and this action is prosecuted by the receiver, on behalf of its creditors, to recover the same from the executrix and to pursue and charge the said

lands, so conveyed to her, with the value of the funds used in the purchase.

The defence set up is that there never was any legal organization under the charter, and that the corporate name was assumed by the testator, in which he conducted a banking business separate from his other business, and that the liabilities incurred in both are personal and alike to be provided for out of his personal and real estate, as such.

The defendant insists that the gift to her of the land is valid under the act of 1840, as the testator then had ample funds to satisfy all of his then creditors, and she relies upon the protection of the statute of limitations.

In the suit instituted to annul the charter and dissolve the corporation, (*Attorney General v. Simonton,* 78 N. C., 57,) when all the irregularities and defects, attending the origin of the corporation, were, as they now are, before the court, RODMAN, J., delivering the opinion, says: "Certainly all who so held themselves out are estopped to deny 'the existence' of the corporation. * * * As to those who dealt with it, it did exist. It would be strange indeed if after a bank has been held out to the world, as a corporation for many years, and
(189) through persons calling themselves its officers has had large and various dealings with the public, and has perhaps acquired large corporate property in money and lands, it should be competent or just for any court to declare, that there never was such a corporation, and thus in some cases destroy or impair the rights of those who *bona fide* dealt with it upon the ground that it does not appear to have been regularly organized or that its capital was paid up."

If the separate existence of the bank as a corporation is to be assumed for the benefit of those to whom it has become indebted for moneys deposited or otherwise, and for whose benefit the receiver is suing, it is plain the testator's debt must be treated like that due by any other debtor, and the action is the proper mode of ascertaining and establishing its amount.

It is not less clear, that the trust funds may be followed in their investment in the female college property, and it, in the defendant's hands, be charged with the payment of the value of the fund thus appropriated and expended. 2 Story Eq., Sec. 1210; Ath. Mar. Sett., 443; *King v. Weeks,* 70 N. C., 372; *Cooper v. Landis,* 75 N. C., 526.

The title in the defendant cannot be sustained as a gratuity under the act of 1840—Bat. Rev., ch. 50, sec. 3—for the reason that it was not the property of the testator which he undertook to bestow upon his wife, but in equity that of the bank, and of which his attempted disposition was an act of spoliation and abused trust.

The statute of limitations has no application to the case and has not been relied upon in the argument before this court.

There is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

Cited: Dobson v. Simonton, 86 N.C. 494; *McEachin v. Stewart,* 106 N.C. 343.

(190)

SAMUEL RUFFIN AND OTHERS v. C. B. HARRISON AND OTHERS.

Trusts and Trustees—Administrators—Guardian.

1. The decision in this case, reported in 81 N. C., 208, affirmed.
2. Where the same person is administrator and guardian, the balance in his hands as administrator, ascertained by judgment and directed to be applied to the ward's debt, is presumed to be held by him as guardian. The transfer of the fund is the work of the law, and it occurs and extinguishes the debt due from the administrator *instanter.*
3. The exception that the administrator did not at any one time have enough money raised by sale of realty to pay the ward's debt, is untenable, because by the terms of the decree, the payment of the debt is directed to be made out of assets then on hand and such as should come to hand—the sale of land being partly for cash and partly on time.

PETITION to rehear heard at February Term, 1882, of THE SUPREME COURT.

Messrs. E. G. Haywood and Reade, Busbee & Busbee, for plaintiffs.

Messrs. Fowle & Snow, Davis & Cooke and A. M. Lewis & Son, for defendants.

RUFFIN, J. As asked to do, the court has carefully reconsidered its decision heretofore made in this cause, and fairly weighed the several objections that have been urged against it. The result of our present deliberations is to confirm us in the conviction that the law governing the case was then properly expounded, and that the principles then enunciated, as those which should regulate the rights and liabilities of the parties, are just in themselves, and supported by the very highest authorities. (81 N. C., 208.)

Although the facts were before stated in detail, we recapitulate them, in order that the points objected to may be correctly (191) apprehended.

In 1867, Alexander McKnight, who had previously been the guardian of the defendant, Lee A. Jeffreys, died leaving a last will under which his two daughters, the defendants Mrs. Harrison and Mrs. Ellis, and his widow, were the only beneficiaries. Upon the renunciation of the nominated executors, his son-in-law, C. B. Harrison, qualified as his administrator with the will annexed, giving bond with the defendants W. F. Green, W. H. Mitchell, and the testator of the defendant, Mrs. Eaton, as his sureties. An action was instituted in the name of the ward by her next friend, against the administrator, for a settlement of such guardianship, and at Spring Term, 1868, the court of equity of Franklin County passed a decree in favor of the ward, for the sum of $5,997.86; and thereupon the said administrator commenced proceedings in the same court, for a sale of the lands belonging to the estate of his testator for assets to pay debts, making the before mentioned beneficiaries and all the creditors of the estate, including the said infant, parties defendant. In the proceeding, which pended for several years, the final account of the administration of the personal assets by the said Harrison was taken and settled, and at Fall Term, 1871, a judgment was rendered whereby it was declared that he then had in hand assets derived from the personalty to the amount of $1,773.01, and that the estate of the testator was indebted as follows:

1. The amount of said decree in favor of Miss Jeffreys for $5,997.56.

2. To Mrs. Ellis and her daughter, Penelope Egerton, the sum of $5,584.47; and

3. To Mrs. Harrison sums amounting in the aggregate to $2,363.73.

For the purpose of paying said debts, leave was given to the administrator to sell the testator's lands for cash as to one-fourth
(192) of the purchase money, and the balance payable in two equal installments of twelve and eighteen months, and it was declared that the debts so ascertained should be paid out of the assets then on hand, and as they should come to hand from the sales of the lands—"the debt due to the defendant Lee A. Jeffreys however to be paid in preference to all other debts."

The sales took place in October, 1871, when Mrs. Ellis purchased a portion at $3,857.03; Mrs. Harrison a portion at $3,819.75; W. F. Green some at $2,083, and W. Boulton some at $1,749.94.

By a subsequent order, made in the same cause, other lands were sold in December, 1872, and purchased by Mrs. Harrison at the price of $3,336.00.

On the 7th of November, 1871, just after the date of the first sales, the said Harrison qualified as guardian to the infant, Lee A. Jeffreys, and continued to be such until the 7th of September, 1875, when he was removed by order of the judge of probate.

At the time of the rendition of the decree fixing him with personal assets to the amount of $1,773.01, and also at the time of his qualification as guardian in November, 1871, the said Harrison had that sum, and a much larger amount, to his individual credit in bank, and so continued to have until after the 25th of May, 1872, when he made his first guardian return, in which he elected to hold that sum as guardian, charging himself therewith as such, and crediting himself with a still larger sum expended in the maintenance of the infant before he became her guardian, and he afterwards withdrew the amount from bank and used it in his private business.

Of the several purchasers at the sales of land, Green and Boulton only paid the one-fourth cash as required by the terms of the order, and the amounts paid by them were consumed in paying attorney's fees, costs, commissions, etc. In October, 1872, the (193) administrator received from Green and Boulton, as their second installment the sum of $1,437.35, and in May and July, 1873, he received of them, as their last installment the sum of $1,450.24—making an aggregate of $2,887.59—all of which he deposited to his own account in bank, and afterwards misapplied to his own use, though he charged himself therewith in his returns made as guardian in the years 1873 and 1874.

In 1872 Mrs. Harrison resold a portion of the lands purchased at the administrator's sale, to one Porter, and realized therefrom the sum of $1,508.00 which she paid to Harrison as administrator towards the purchase money due from her. She also sold another portion in 1874 for which she received $1,000, and in May, 1875, by mortgaging, still another portion, she procured a further sum of $1,555.23 which last two sums she applied in the same way, by paying them to Harrison administrator. All these sums were misapplied by Harrison, the first two being wasted and the last paid to Mrs. Ellis in discharge of the balance due her and her daughter, after deducting the amount of her land-purchase, upon the decree made in their favor in 1871.

Upon this state of facts the plaintiffs, who are the sureties of Harrison on his guardian bond, insist that they are entitled to be indemnified by the sureties on the administration bond, for so much of the assets as was wasted by Harrison, the administrator, and such is the object sought to be attained by this action. They also seek to charge Mrs. Harrison with the debt due Lee A. Jeffreys, alleging that she is still owing that amount, as the unpaid purchase money of her lands.

For lack of certain information deemed to be necessary to a satisfactory determination of the points raised as to the liability of

Mrs. Harrison, the court at the time of its former adjudication in the cause, wholly pretermitted that branch of the case, after
(194) directing an inquiry to be made as to some material facts; and the decision rendered was exclusively with reference to the rights and respective liabilities, as between themselves, of the two sets of sureties. It is that part of the former adjudication which we are asked to reverse.

In considering it, the court adopted what seemed to be a clear legal proposition, that if the legal consequences attending the possession by Harrison, as administrator, of assets applicable, and by the decree ordered to be applied to the ward's debt, the duty of collecting which devolved upon him as guardian, amounted to a payment, then, the liability for all subsequent mismanagement and waste would be shifted from the administration to the guardian bond, and the sureties on the former would be discharged.

That such consequences did attend the possession of assets under the circumstances of this case, seemed clear to the court then, as it does to us now. The two well defined characters of debtor and creditor were united in the same person. Harrison was both to pay and receive, and if payment had been refused by him, there was no one to enforce it. Whenever such a state of facts exists, the law by its own implication considers the fund in the hands and possession of the party, in that representative character in which it *ought* to be held.

The application of the assets to the debt was the act of the law, and it occurred and effectually extinguished the debt, the very moment that they touched his hands. Being thus extinguished, and by legal intendment paid, it is impossible that the debt could be revived, as against the sureties to the administration bond, by any subsequent misapplication of the fund, whether proximate or remote.

It cannot be necessary to reproduce all the authorities adduced by the Chief Justice, who spoke for the court. Their application to the subject can be readily seen, as well as their conclusive force upon the respective rights of the parties.

We propose however to refer to some others, in order that
(195) it may be seen how universally the principles relied on for the decision have been recognized.

In *Modawell v. Hudson*, 27 Ala., 75, it was held that when on a final settlement a balance was found against an administrator who thereupon resigned, and became administrator *de bonis non*, a presumption of payment immediately arose, and he and his sureties on his last bond alone were liable, and the decision rested solely upon the ground that the same person filled both trusts, and must needs be

both plaintiff and defendant in any proceeding to enforce payment; hence no step could be taken in that direction, and therefore the rule of presumed payment operated. In *Bell v. Evans*, 94 Ill., 230, the supreme court of that state ruled that when an administrator of an estate was also guardian for a distributee, it would be presumed after he had substantially closed the administration, that he held the funds as guardian, and the sureties to the administration bond were released. The court of appeals for the State of Maryland decided in *Seegar v. Belton*, 6 Har. and Johnson, 162, that when the same person was administrator and guardian to the next of kin, the balance in his hands at the rendition of his final account as administrator, was presumed to be in his hands, not as administrator to the deceased, but as guardian to the next of kin; and in commenting on the case, it was said that the transfer took place by operation of law, and was predicated upon the ground, that the same hand was to pay and to receive; and therefore that which the law required to be done, should be deemed to have been done.

But it is said for the plaintiffs that this doctrine of extinguishment has its qualifications, and in order that it may operate in any case, it is essential that the debtor hand should have the money *actually in possession*, and not merely on deposit in bank to his private account, as was the case with the $1,773.01 of personal assets fixed upon the administrator by the decree of Fall Term, 1871.

The course of their argument is that such a mode of deposit (196) was in itself a breach of the administration bond, for that, when thus placed to his own credit, it ceased to be money belonging to the estate, and was converted into a solvent credit due to Harrison in his private capacity; and that such a breach could not be repaired by his subsequent appointment as guardian; nor could he, by his mere election on paper and when his hands were empty, shift the responsibility for his *devastavit* from one set of sureties to the other. It is needless to follow this very ingenious argument, as the facts of the case furnish no support for it. However a doubt as to the respective liabilities of the two sets of sureties might have arisen, in case the money so deposited had never again reached Harrison's hands, and had been lost through the failure of the depositary, or any other like cause, no such question can be raised under existing circumstances, since it is put beyond all cavil, by the proofs in the cause and the finding of the referee, that after Harrison's qualification as guardian, he not only elected to hold that sum in that capacity, but sought to apply it to his own charges for maintenance of his ward, and with that view drew the money from bank and used it. Thus it was, that after its appropriation to this particular debt by the decree to which both

were parties, and after Harrison occupied the dual relation of administrator and guardian, or debtor and creditor, the very sum came actually to his hands, and being in his hands, its immediate application to the ward's debt was the work of the law.

Again it is said, that the principle cannot operate unless there has been some act done, looking to a separation of the fund from the other administration assets, or some distinguishing mark put upon it, so as to manifest an election to hold it as guardian. What more could have been done in this direction than was accomplished by the decree? After ascertaining how much the administrator had
(197) in hand from the personalty, it made an express and specific appropriation of the amount to the debt due to the infant, and gave a positive direction that it should be so applied, and not otherwise. Why then speak of designating a part of the fund when the whole of it was hers?

A point is made too as to the several sums that came at different times to the administrator's hands from the sales of the realty. It is insisted that as to them the doctrine of extinguishment did not apply, because the paying hand did not hold *enough at one time* to satisfy the entire debt due the receiving hand, and that as no creditor can be compelled to accept payment in installments, so neither should a receiving hand be forced to do so, by having a part of the claim extinguished by operation of law. The terms of the same decree furnish the surest answer to this suggestion also. The debt due the infant was declared to be of the highest dignity, and was directed to be paid first of all the claims against the estate. It was to be paid with the assets then on hand, and such as should come to hand, from the sales of land, which sales were ordered to be made partly for cash and partly on time. The decree bound all the parties to it, and it is impossible to mistake the purpose to make a gradual application of the assets to the infant's debt, at such times and in such sums as they should come in hand, until its liquidation was complete.

These several sums thus set apart and appropriated, it was Harrison's duty to have paid upon the debt due himself as guardian, as soon as they reached his hands, and there being no one to enforce that duty, the law made the application of each, and thereby extinguished so much of that debt.

The result is as declared in the opinion of the Chief Justice. So much of the personal assets as was found to be in his hands by the decree of Fall Term, 1871, and those which came to him from the sales of lands, except so far as they were necessarily con-
(198) sumed in paying fees and other charges, were by legal intendment applied to the ward's debt, and Harrison thereafter held

the same as parts of her estate secured by the guardian bond, and *pro tanto* were the sureties on the administration discharged.

The judgment of the court as heretofore rendered is affirmed, and the petition to rehear is dismissed.

PER CURIAM. Judgment accordingly.

Cited: Ruffin v. Harrison, 90 N.C. 571; *Grandy v. Abbott,* 92 N.C. 38; *Halliburton v. Carson,* 100 N.C. 109; *Moore v. Garner,* 101 N.C. 379.

W. J. SUTTON AND WIFE v. JAS. T. SCHONWALD AND OTHERS.

Judicial Sales—Irregularity in Proceeding does Not Invalidate the Title of Innocent Purchaser.

The court of equity has full general jurisdiction over the estates of infants, and where land of an infant was sold under its decree upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the proceeding, of which the purchaser had no notice.

CIVIL ACTION tried at Fall Term, 1881, of NEW HANOVER Superior Court, before *Shipp, J.*

The plaintiffs in this action seek to have set aside a decree of the late court of equity. As made by the pleadings and exhibits the case is as follows:

David Smith died in the year 1862, seized of a parcel of land situate in the city of Wilmington, and leaving as his only heirs at law, the feme plaintiff and a son named David, both being infants of tender years.

At December Term, 1862, of the county court for New Han- (199) over County, the defendant Schonwald applied to be appointed guardian of both of said infants, and supposing that such appointment had been conferred upon him, gave a bond sufficient to cover their joint estates, but the records of the court show his appointment as guardian for David only. In 1863, at the fall term of the court of equity held for said county, the said defendant Schonwald, as guardian of both infants, filed a petition for the sale of the land, assigning as a reason for its sale, that it yielded small rents and that the interest of the children would be promoted thereby. At the same term, it was referred to the master to ascertain and report whether the sale as asked for, would be conducive to their interests. The master took

evidence in the shape of affidavits, as to that point, which he returned with his report recommending the sale to the court; and thereupon the court made a decree directing a sale of the land after advertisement, for cash.

The sale was made as directed, and a report thereof made to Spring Term, 1864, for said court, one C. E. Thorburn being the purchaser at the price of ten thousand dollars, and a decree of confirmation and for execution of the title to the purchaser. The purchaser paid the money to the clerk and master of the court, who paid it to the defendant Schonwald as guardian of the infants, and being Confederate currency, it perished in his hands by the results of the war. The master made the purchaser a deed, who afterwards sold it to the defendants, Kidder and Martin, for value and without any notice of any irregularity in the proceedings, and they in turn sold it to the other defendants. The feme plaintiff intermarried with the co-plaintiff before becoming of age and has been covert ever since. At the trial certain issues were submitted, and responded to as follows:

(200) 1. Was James T. Schonwald appointed guardian of the infants, Kate and David, and if so, when? No.

2. Was a petition filed in the court of equity, and an order of sale made after a reference to the master, and his report that it was for the interests of the infants, and did the sale take place, and was the same reported and confirmed, and order for title made, and deed executed to the purchaser as alleged? Yes.

3. Had Schonwald been appointed guardian of the feme plaintiff at the time of the filing of the said petition, or was he appointed at any time before payment of the purchase money and the execution by the clerk and master of the deed to the purchaser? No.

The court thereupon gave judgment declaring that the order of sale made at Fall Term, 1863, of said court of equity, be annulled and vacated as to the feme plaintiff and her interest in the land, and also the order confirming the sale and the deed made in pursuance thereof, so far as related to her title and interest in said land, from which judgment defendants appealed.

Messrs. Russell & Ricaud, for plaintiffs.
Messrs. E. S. Martin and A. T. London, for defendants.

RUFFIN, J. We cannot concur in the view taken by His Honor. The most that can be said towards impeaching the decree of the court of equity, the vacation of which is the purpose of the present action, is, that it was irregular. It was the work of a court of com-

petent jurisdiction pertaining to the whole cause, its subject matter, and its parties, and was but an instance of that general authority over the estates of infants, which the courts of equity have so long exercised, that it is now found impossible to trace the source from which it was derived. 2 Story Eq., Sec. 1328.

The plaintiff's counsel indeed insisted, that in this state the power of the court of equity to sell the lands of an infant at (201) the instance of his guardian, was a special one, and wholly derived from the statute of 1827 (Rev. Code, ch. 54, sec. 32), and that unless every requirement of the statute was strictly complied with, no attempted sale of an infant's lands could be valid; that in such case it would be an act void, because done wholly without authority, and not one irregularly done within the scope of the court's authority.

If the premises assumed by counsel be true, then certainly his conclusion is correct. For all the authorities agree in saying, that those powers which are created and conferred specially by statute, are to be strictly construed, and whatever formalities are prescribed must be punctually fulfilled, as the courts have no power to dispense with the requirements of a statute, and most especially is this principle rigidly adhered to, in the case of judicial and probate sales. Freeman on Void Judicial Sales, Sec. 53; *Leary v. Fletcher,* 23 N. C., 259.

But since the decision made in *Williams v. Harrington,* 33 N. C., 616, there can be no longer room for doubt as to the extent of the jurisdiction vested in the courts of equity of this state, to dispose of the estates, whether real or personal, of infants for their benefit. That was an action at law it is true. But the very point upon which it hinges, was the character and extent of the jurisdiction of the court, whose decree was then the subject of attack—if general, it could not be collaterally impeached, but if special, then it was open to attack. Without any sort of reservation, it was declared that in this state the courts of equity, as constituted by the act of 1782, had the full jurisdiction and authority over the estates of infants, that was ever lodged in the court of chancery, than which no jurisdiction over any subject could be more extensive; and that in its exercise, the acts of those courts were to be regarded as those of a tribunal possessing a *general* jurisdiction over the subject, and not a limited one, with power to proceed only for special purposes, or in a particular (202) way. To the same effect is *Campbell v. Baker,* 51 N. C., 255, in which it is also said that the act of 1827 was never understood either by the courts or the profession, as having ousted the prior jurisdiction of the courts over the subject. Also *Rowland v. Thompson,* 73 N. C., 504, in which it was held that a court of equity, *as the guardian of in-*

fants, had full power in its discretion to authorize or confirm a private sale of lands belonging to such a person.

We have been thus particular in determining the question of jurisdiction, because upon it depends another principle decisive, as we regard it, of the rights of the parties, and indicating very clearly that so much of the judgment in the court below as annulled the title acquired by the purchaser at the master's sale, is erroneous.

The title acquired at a judicial sale of lands made by a court of competent jurisdiction, is not rendered invalid by reason of the reversal of the decree for irregularity in the proceedings, of which the purchaser could have no notice. There is no case in our reports, coming within our observation, that goes the full length of this doctrine. The nearest approach to it is in *Chambers v. Brigman,* 75 N. C., 487, in which the title of the purchaser (he being also the plaintiff in the proceeding) was held inoperative, upon the ground that the defendant had not been really a party to it, and Mr. Justice RODMAN expresses a doubt whether it could have been done, in case a stranger without notice had been the purchaser. A similar doubt as to the effect of a decree reversing for fraud a judgment at law, upon the title of a purchaser at execution sale, was expressed in *Dudley v. Cole,* 21 N. C., 429. We find, however, the principle broadly laid down in Rorer on Judicial Sales, Secs. 138, 139, expressed almost in the very terms we have stated it. In *Gaudy v. Hall,* 36 Ill., 313, the supreme court of
(203) that state thus state it: If the court has jurisdiction to pronounce the decree, that is, if it has jurisdiction over the parties and the subject matter, then upon principles of universal law, acts performed, and rights acquired by third persons, under the authority of the decree and while it remains in force, must be sustained, not withstanding its subsequent reversal. And again the principle was recognized and acted upon by that court in *Fergus v. Woodworth,* 44 Ill., 374. In *Vorhees v. The Bank,* 10 Peters, 450, and *Gray v. Brignardillo,* 1 Wall., 627, the supreme court of the United States say, that it is a well settled principle of law, that the decree of a court, which has jurisdiction of the person and subject matter, is binding until reversed; and although it may be reversed, yet all rights acquired under it while in force and which it authorized will be protected, and all that a third person is required to observe is, whether the court did in fact possess such jurisdiction and exercise it, and that the order, upon the faith of which he purchased, was made and authorized the sale.

In such cases the law proceeds upon the ground, as well of public policy, as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country; and

though they may know of their liability to be reversed, yet they have a right so long as they stand, to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the court, or the laches of parties.

A contrary doctrine would be fatal to judicial sales and values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might, at some distant day, be declared void, because of some irregularity in the proceeding altogether unsuspected by him, and of which he had no opportunity to inform himself. Under the operation of this rule, occasional instances of hardship (as this one of the present plaintiffs seems to be) may occur, but a different one would much more certainly result in mischievous consequences, and the general (204) sacrifice of property sold by order of the courts. Hence it is, that a purchaser who is no party to the proceeding, is not bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense, who had a right to rely upon the order of the court as an authority emanating from a competent source—so much being due to the sanctity of judicial proceedings.

In the case of *Williams v. Harrington, supra,* the plaintiff's land had been sold under an order of the court of equity, upon a petition filed for him by one Chalmers, professing to be his guardian. He sought to avoid the sale upon the ground that he had no such guardian, and as a means of testing its validity sued at law for the land. The court held that, admitting it to be true that his petition was filed by one not truly his guardian, its only effect was to render the proceeding irregular, and that it could not be collaterally assailed. So we say in this case, the proceeding under which the plaintiff's land was sold was certainly irregular; but being nothing more, and possessing so much virtue as not to admit of its impeachment by any other tribunal, then, upon every principle of policy, or strict right, it should not be allowed to be reversed (though in a direct proceeding in the same court) at the cost of an innocent purchaser.

If injured, the plaintiff must look for redress, either to him who falsely assumed to be her guardian, or the officer who incautiously passed her estate into his hands. Though, if it be true that an appointment of a guardian for her was really made, and that the omission of the clerk to record the same is the source of trouble between the parties, it would be better, perhaps, to have the record of the county court so amended as to show the truth—which amendment can

(205) be made under the sanction of the superior court. *Stanly v. Massingill,* 63 N. C., 558.

The plaintiff's action must be dismissed with costs to all the defendants except the defendant Schonwald.

Error. Judgment accordingly.

Cited: Gilbert v. James, 86 N.C. 251; *Morris v. Gentry,* 89 N.C. 252; *England v. Garner,* 90 N.C. 200; *Tate v. Mott,* 96 N.C. 22; *Branch v. Griffin,* 99 N.C. 182; *Tyson v. Belcher,* 102 N.C. 115; *Herbin v. Wagoner,* 118 N.C. 661; *Barcello v. Hapgood,* 118 N.C. 726; *Harrison v. Hargrove,* 120 N.C. 104; *Millsaps v. Estes,* 137 N.C. 544; *Card v. Finch,* 142 N.C. 148; *Rackley v. Roberts,* 147 N.C. 208; *Rutherford v. Ray,* 147 N.C. 262; *Yarborough v. Moore,* 151 N.C. 119, 120; *Lawrence v. Hardy,* 151 N.C. 129; *Hughes v. Pritchard,* 153 N.C. 144; *McDonald v. Hoffman,* 153 N.C. 256; *Harris v. Bennett,* 160 N.C. 344, 346; *Thompson v. Rospigliosi,* 162 N.C. 153; *Massie v. Hainey,* 165 N.C. 179; *Pinnell v. Burroughs,* 168 N.C. 320, 321; *Wooten v. Cunningham,* 171 N.C. 126; *Starnes v. Thompson,* 173 N.C. 468; *Welch v. Welch,* 194 N.C. 637, 638; *Graham v. Floyd,* 214 N.C. 83; *Coxe v. Charles Stores Co.,* 215 N.C. 384; *Powell v. Turpin,* 224 N.C. 70.

WILLIAM HOLMES AND WIFE v. DUNCAN HOLMES AND WIFE.

Deed—Equitable Estate—Contract of Sale of Land—Married Women—Purchaser Affected with Notice of Trust.

1. An equitable estate in fee may be declared without the use of the word "heirs," if an intention to pass such estate can be gathered from the instrument.
2. A parol contract of sale of an equitable (as well as a legal) estate in land is void under the statute.
3. The decision in *Scott v. Battle,* 85 N.C. 184, that a married woman's contract affecting her estate in land is void unless made in strict compliance with the statute in reference to taking her privy examination, is approved.
4. One who uses a deed in the necessary deduction of his title, which discloses an equitable title in another, is affected with notice of the trust.

CIVIL ACTION tried at Spring Term, 1880, of NEW HANOVER Superior Court, before *Avery, J.*

On the 20th day of June, 1851, Williams S. Campbell conveyed the land in controversy to W. C. Bettencourt and four other persons and

their heirs, or the survivor of them, "in trust for Sarah Moore"—now the feme plaintiff Sarah Holmes. In declaring the trust there were no words of inheritance used. (206)

On the 13th December, 1858, the said trustees conveyed the same land to T. C. Worth—the said Sarah being then covert. In 1862 Worth died, and his executors, under a power contained in his will, conveyed it to one Fitzgerald, who, in 1864, conveyed it to the feme defendant Elizabeth Holmes. In all these several mesne conveyances, the land is described as that "which was conveyed to the said Bettencourt and others in trust for Sarah Moore by William S. Campbell, by deed, bearing date the 20th June, 1851, and registered," etc.

The plaintiffs offered evidence going to show that the feme plaintiff had not assented to the conveyance of the land to Worth by her trustees; and on the other hand the defendants offered evidence not only of such assent on her part, but that the real consideration of the conveyance was the emancipation by Worth of a certain slave, who was the sister of the feme plaintiff.

The first issue submitted to the jury was as follows: Was the deed executed to Worth, by the trustees, with the verbal consent of the feme plaintiff? Ans. No.

Another was: Did the plaintiff verbally consent to the execution of the deed to Worth, in consideration of the emancipation of her sister by him? Ans. Yes.

The jury also find that the plaintiff received no valuable consideration for such conveyance to Worth, and that all the purchasers had notice of the trust at the time of purchasing. The defendants moved for judgment in their favor, upon the findings as made by the jury, which being refused, they moved for a mistrial on account of the contradictions in the findings. This motion was also refused, and judgment rendered, whereby it was declared that the defendants were seized of the lands in trust for the feme plaintiff, and directing that the same be conveyed to her in fee. Thereupon the defendants (207) appealed.

Mr. D. J. Devane, for plaintiffs.
Messrs. Russell & Ricaud and McRae & Strange, for defendants.

RUFFIN, J. The first exception, we consider, is the one taken to the judgment rendered in the court below. It is insisted that inasmuch as no words of inheritance are used in declaring the trust in favor of the plaintiff Sarah, she took but a life estate, and it was error therefore to have adjudged a conveyance to her *in fee* from the defendants.

As a general proposition it is unquestionably true, that in dealing with equitable estates, the courts of chancery adopt the same rules of construction that the courts of law do, with reference to legal estates; but to this there are some few exceptions, and one is, that the use of the word "heirs," is not *always* necessary, in order to give to an equitable estate the character of inheritability, if it appear from the context that such was the clear intention of the party declaring the trust. 2 Wash. on Real Property, 186. In Lewin on Trusts, 44, it is said that to declare a trust, one need only to make his meaning plain, as to the interest he intends to give, without strictly regarding the technical terms of the common law, in the limitation of legal estates; and as instances, it is remarked, that "an equitable fee may be granted without the word "heirs," and an equitable entail without the words "heirs of the body."

Looking to the deed to the trustees in this case, we think it sufficiently appears to have been the intention of the maker, Campbell, to confer upon the plaintiff an equitable estate in fee. The language of the instrument is—"to W. C. Bettencourt, etc., and their heirs, or the survivor of them, in trust for Sarah Moore." The whole estate
(208) and interest of the bargainor passed to the trustees, and everything they took was charged with the trust in favor of the plaintiff. The trust was certainly intended to be coextensive with the legal estate, and as the one is in fee, so was the other intended to be, and so must we consider it to be.

The next position assumed for the defence is that the plaintiff, in assenting to the sale by the trustees to Worth in consideration of the emancipation of his slave, her sister, had parted with her trust estate; and this it is insisted she could do by parol, for that, as a trust estate may be created by parol, so may one be disposed of in that manner. We were furnished with no authorities in support of this position, and so far as our researches have gone, they are all against it. In *Maxwell v. Wallace,* 45 N. C., 251, a contract for the sale of an equitable interest in land was held to be within the statute of frauds, and void unless in writing; and so too in *Simms v. Killian,* 34 N. C., 252, and *Rice v. Carter,* 33 N. C., 298. In fact, all the authorities, whether taken from the text-writers or from adjudged cases, concur in saying, that wherever anything is done, which substantially amounts to a transfer, or parting with an interest, whether legal or equitable, in lands, the contract is for the sale of "an interest in or concerning lands," and comes within the statute. The distinction which obtains between such a transfer and an original declaration of a trust is clearly pointed out by PEARSON, C. J., in *Shelton v. Shelton,* 58 N. C., 292, and by the present Chief Justice in *Shields v. Whitaker,* 82 N. C., 516.

But apart from the statute of frauds, the feme plaintiff was covert at the time of the alleged assent to the sale of the property, and incapable of making *any* contract, either parol or written, that could effect her estate in the land without a strict compliance with the statute which prescribes the manner in which the deeds of married women shall be executed and authenticated. Her contract then was void, and so absolutely void, that no equity of any kind (209) can arise against her under it. In the very recent case of *Scott v. Battle*, 85 N. C., 184, this whole question was discussed, and it was held that a married woman, who had agreed by parol to sell her lands and had received the purchase money and *spent it*, could not be required to refund it, before taking back her land. To hold otherwise it was thought, would be to nullify the statute regulating the contracts of a married woman, and to enable that to be done indirectly, which the law in express terms forbids to be done directly.

This renders it unnecessary to consider the point as to the contradictions in the verdict. For whether she assented to the sale or not, and whether her assent was founded on a valuable consideration or not, were all matters perfectly immaterial, and their solution by the jury, in no wise tended to a disposition of the controversy between the parties to the action.

The deed to the trustees, besides that it conferred upon them no power to sell the land, contained a clear declaration of a trust in favor of the plaintiff Sarah, and that deed was referred to in the recitals of all the subsequent conveyances. And it is a well established rule, that where a purchaser in the necessary deduction of his title must use a deed which discloses an equitable title in another, he will be affected with notice, and will be bound by any trust that rested upon him from whom he purchased. *Thompson v. Blair*, 7 N. C., 583.

The defendants were properly declared to be trustees for the plaintiff, and we do not feel at liberty to disturb the judgment rendered in her behalf.

No error. Affirmed.

Cited: Bond v. Moore, 90 N.C. 242; *Justice v. Baxter*, 93 N.C. 408; *Dover v. Rhea*, 108 N.C. 92; *Fulbright v. Yoder*, 113 N.C. 457; *Clark v. Cox*, 115 N.C. 96; *Helms v. Austin*, 116 N.C. 753; *Wilson v. Leary*, 120 N.C. 91; *Hughes v. Pritchard*, 122 N.C. 62; *Allen v. Baskerville*, 123 N.C. 127; *Johnson v. Blake*, 124 N.C. 109; *Smith v. Proctor*, 139 N.C. 319; *Gaylord v. Gaylord*, 150 N.C. 237; *Smith v. Fuller*, 152 N.C. 15; *Thompson v. Power Co.*, 154 N.C. 21; *Eubanks v. Becton*, 158 N.C. 237; *Hollowell v. Manly*, 179 N.C. 264; *Whichard v. Whitehurst*, 181 N.C. 80, 81, 83, 84; *Davis v. Robinson*, 189 N.C.

600; *Tire Co. v. Lester*, 190 N.C. 415; *Hardy v. Fryer*, 194 N.C. 423; *Randle v. Grady*, 224 N.C. 656.

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*JAMES McLEOD v. C. W. BULLARD AND OTHERS.

Mortgage—Sale of Equity of Redemption to Mortgagee—Burden of Proof—Judge's Charge.

1. Where a mortgagor conveys his equity of redemption to the mortgagee (the deed for the land containing a power to foreclose by sale) and the former brings an action for possession, and an account of the rents, and cancellation of the deed, the burden of proof is upon the mortgagee to show by evidence other than the deed itself, that the transaction was fair and that he paid for the property what it was worth, in order to rebut the presumption of law that the conveyance is fraudulent—a mortgagee being included in the class of trustees to whose dealings with their *cestui que trust* the presumption is applied.
2. A proposition of law, given in a charge to the jury, which is in terms too comprehensive or without its necessary limitations, cannot for that reason be assigned for error, if it be appropriate to the case and not calculated to mislead.

PETITION to rehear filed by defendants and heard at February Term, 1882, of THE SUPREME COURT.

The facts are fully stated in same case, 84 N. C., 515.

Messrs. Shaw, McNeill, and Hinsdale & Devereux, for plaintiff.
Messrs. Burwell & Walker, for defendants.

SMITH, C. J. At the trial of this cause in the superior court, the jury were charged that while ordinarily he who alleges fraud in a transaction must prove it, yet when the relation of mortgagor
(211) and mortgagee exists, and while it exists, the former conveys his equity of redemption in the land to the latter, the burden of proof is shifted from the mortgagor to the mortgagee, and the presumption of law will arise that the conveyance is fraudulent, but the presumption may be rebutted by showing that the consideration of the deed was fair and adequate, and no fraud actually practiced. This ruling approved on the former hearing, we are now asked to review and reverse, as erroneous in law.

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

The substance of the instruction is, that between such parties, something more is required than the mere production of the deed and proof of execution, to repel the inference that the conveyance or release of the equitable estate of the mortgagor, was not fairly obtained, and to give it validity and operation.

The argument has been full and exhaustive, and numerous cases cited, examined and criticized, to show that a mortgagee is not included in the class of trustees to whose dealings with their *cestuis que trust* the presumption is applied, and especially when the power of sale is not conveyed in the mortgage deed. The benefit of this distinction between mortgages with and without a power of sale cannot be made available to the defendants, whatever of force it may possess, since the deed is not an exhibit, nor its provisions set out in the record so that we can see whether it belongs to the one or the other class, and it is a well settled rule, that one who alleges error must show in what it consists, and hence the plaintiff should make it appear that no such power was vested in the mortgagee and the decision heretofore rendered was predicated upon the idea that the mortgage did not contain a power of sale, and nothing now appears to controvert that fact. We know that the prevalent practice is to insert such a provision in a mortgage, as in other conveyances to trustees to secure debts, and more especially in such as are intended to secure future advances, in order that the coerced repayment may be prompt and inexpensive, and upon such an instruction, in the absence of evi- (212) dence to the contrary, we must assume the instruction to have been predicated; and if such was not the character of the mortgage, it was the duty of the appellant to make the fact appear.

The discussion has been confined to the abstract proposition, announced in the charge to the jury as a rule of law, and without regard to the facts of the case then depending. But a proposition of law, laid down in terms too comprehensive, or without its necessary limitations, if appropriate to the case and not calculated to mislead, cannot for that reason be assigned for error, because it could not be prejudicial to the complaining party. It is necessary therefore to consider the aspect of the case and the antecedent relations of the parties, as they were presented by the evidence when the instruction was given.

The essential allegations of the complaint are set out in the report of the case, (84 N. C., 515) and need not be repeated. The findings of the jury upon the issues outside of that to which the instruction is pertinent, in a condensed form, may be thus stated:

The debt due to McKeithan, the money to pay which had been furnished by the plaintiff, was used in obtaining an assignment of it, and with the plaintiff's consent, to the end that the land might be sold

under execution and bid in for the plaintiff, and this was a mutual agreement between them. At the sale the defendant suppressed competing bids by representing to those present that he was buying for the plaintiff, and becoming the purchaser at a price far below its value, which is estimated by the jury at $3,000, took the sheriff's deed conveying the title to himself. The allegations made by the plaintiff in regard to the agreement for the purchase of the property at the sheriff's sale, and any equity set up in that behalf, are expressly denied. The deed conveying the defendant's equity of re-
(213) demption, or as expressed in the language of the mortgagor in the instrument, "all my legal and equitable interest in and to a certain tract of land," describing it, without mention of the antecedent mortgage, or the equity arising out of the parol contract in regard to the sale under execution, recites as its consideration the discharge of a debt of no specified amount and the sum of $400 then paid. It was furthermore charged and denied that this release of January 3rd, 1873, had been procured by the defendant's misrepresentation that it was a bond for the arbitration of their unsettled matters, and from the plaintiff when so drunk that he did not understand what he was doing or the consequences of his act.

These then were the relations between the parties, when the jury were directed to require some evidence beyond that furnished by the deed itself, that its consideration was fair and adequate, and that there was no fraud practiced in procuring its execution. Surely if the presumption from a supposed undue influence exercised, can arise in any case and call for explanation, it does arise out of the fiduciary relations subsisting between these parties.

But considered as an abstract proposition disconnected with the special attending circumstances, we do not hesitate to affirm its correctness in its application to dealings between the parties to a mortgage containing a power of sale vested in the mortgagee, to the same extent as to other fiduciary or confidential relations. It becomes therefore necessary to refer to our own adjudications and other authorities bearing upon the question.

In *Chapman v. Mull*, 42 N. C., 292, the late Chief Justice declares in express words that a mortgage does not create the trust to which the rule applies, that presumes a deed to have been fraudulently obtained, and requires affirmative support in order to its validity, yet he adds that "the relation is always a circumstance which *creates suspicion and aids in the proof of an allegation of oppression*
(214) *and undue advantage,* when there is gross inadequacy of price and other circumstances tending to show fraud." He also says "that the court is inclined to the opinion that the principle, as between

trustee and *cestui que trust,* may be applicable to a case, when the conveyance is absolute upon its face, and the *fact of its being a mere security rests in parol proof,* and is controverted." This principle, as explained and defined in *Allen v. Bryan,* in the same volume at page 276, by the same eminent judge, is, "that in dealings between the trustee and *cestui que trust,* while not prohibited, are watched with great jealousy, and the trustee is required to show affirmatively that the dealing was fair and for a reasonable consideration." To the same effect is *Baxter v. Costin,* 45 N. C., 262. So in *Whitehead v. Hellen,* 76 N. C., 99, it is said that "courts of equity look with jealousy upon all dealings between the trustee and his *cestui que trust,* and *if this mortgagor* had by deed released *his equity of redemption, we should have required the plaintiff to take the burden of proof and satisfy us that the man whom he had in his power, manacled and fettered by a mortgage and a peremptory power of sale, had, without undue influence and for a fair consideration, executed a release of his right to redeem the land."*

The reason why a mortgagee is not allowed at the making of the deed to contract for a beneficial interest out of the mortgaged premises, is, says Chancellor Kent, "because the mortgagee from his situation wields a very *influential motive and has great advantage over the mortgagor in such a transaction."* 4 Com., 143.

In deciding upon transactions between the parties to a mortgage, courts of equity, remarks another author, will *"jealously examine"* whether the mortgagee has taken advantage of the necessities of the mortgagor; when the loan has been coupled with or followed by any other transaction beneficial to the lender, the inequality in the situation of the parties will be *evidence that the dealing was produced by the influence derived from the mortgage,* and on that ground (215) it will be set aside as fraudulent. 2 Hov. Frauds, ch. 22, p. 130.

"To give validity to such a sale by the mortgagor," is the language of Mr. Justice Swayne speaking for the court in *Villa V. Podriquez,* 12 Wall., 323, *"it must be shown that the conduct of the mortgagee was in all things fair and frank,* and that he paid for the property what it was worth."

Although the equity of redemption may be released, yet it is "subject to the qualification," says another author, "that the court looks upon such transactions *with jealousy,* and will set aside a purchase where from the influence of his position, the mortgagee has bought at a less price than others would have given." 2 Jones on Mort., Sec. 711.

The language of Lord Redesdale to the same effect is quoted with approval by Sir John Stewart in *Ford v. Olden,* 3 Law Rep. Eq., 461.

Mr. BIGELOW classes this among the confidential relations governed by the rule, as is mentioned in the former opinion, and reiterates the words of Mr. Justice SWAYNE, that "to give validity to such a sale by the mortgagor, it must be shown that the conduct of the mortgagee was in all respects fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to this title. Every doubt will be resolved against him." Big. Est., 259.

What practical force can be given to these expressions, declaring the jealousy and scrutiny with which such dealings are watched, unless it be meant that the naked production of the mortgage deed will not suffice unless accompanied with some evidence of the fairness of the transaction in which it had its origin? and what is this but another mode of saying that the presumption is against it and must be repelled?

Look at the incidents of the relation itself. The mortgagee is
(216) the depositary of the legal estate, and holds it for the security of his own debt and then in trust for the mortgagor. He may enter upon the land or recover it by action for the purposes of the trust. He may sell and dispose of the land under the power conferred. Is not his influence potential and the mortgagor's condition dependent, if not to the same degree, as in other cases of trust? And why should the rule vary?

We have held that if he buys at a sale made under a prior mortgage, he does not acquire the title for his own personal benefit, but removes an incumbrance and charges the cost of it, as a prior lien, upon the property itself—and this because he cannot take advantage of his position to the injury of those whose interests are committed to his protection. *Taylor v. Heggie*, 83 N. C., 244, and the cases there cited.

We suppose when it is said that a release to the mortgagee is not obnoxious to the imputation of fraud, as in other trusts, reference is had to such as contain no power of sale, and the foreclosure of which must be sought in the action of the courts alone. But even if this was one of that class, there is the superadded trust growing out of the parol contract and adhering to the sheriff's sale and conveyance of the equity of redemption, and with this complication the case comes directly within the terms in which the court thinks in *Chapman v. Mull, supra.*, the unfavorable presumption will be raised.

We are gratified to find in the accompanying certificate of counsel, required in applications for a re-hearing, that it is not inconsiderately given, but is the result of research into the authorities and a careful

examination of them. It was to secure this that the rule has been lately modified.

The extension of the rule, as indicated, to mortgages in the form so generally in use, and in which the foreclosure after default is left to the discretion of the creditor mortgagee, will tend to promote open and fair dealing between the parties, and the possession (217) and production of evidence of the transaction when it is drawn in question. This will be of little inconvenience to the one and a great protection to the other. We must therefore adhere to our former ruling, and refuse to disturb the judgment.

No error. Affirmed.

Cited: Tillery v. Wrenn, 86 N.C. 220; *Dawkins v. Patterson*, 87 N.C. 387; *Cole v. Stokes*, 113 N.C. 274; *Jones v. Pullen*, 115 N.C. 472; *Trust Co. v. Forbes*, 120 N.C. 359; *Hauser v. Morrison*, 146 N.C. 251; *Cauley v. Sutton*, 150 N.C. 329; *Ray v. Patterson*, 170 N.C. 229; *Hardware Co. v. Lewis*, 173 N.C. 302; *Jones v. Williams*, 176 N.C. 246; *Lawrence v. Beck*, 185 N.C. 201; *Hinton v. West*, 207 N.C. 715; *King v. Lewis*, 221 N.C. 317; *Dobias v. White*, 239 N.C. 415.

MARY E. TILLERY AND OTHERS v. A. WRENN AND OTHERS.

Injunction—Mortgagor and Mortgagee.

An injunction was properly granted until the hearing to restrain the sale of land (under terms embraced in a contract of purchase) to secure payment, not of the original debt, but of a disputed portion of it, alleged to have been incurred by reason of the necessitous circumstances of the vendee (or mortgagor). Review of cases where equity will relieve against a contract, by SMITH, C. J.

APPEAL from an order continuing an injunction made at Fall Term, 1880, of HALIFAX Superior Court, by *Graves, J.*

The material facts set out in the complaint as the grounds of the relief demanded, are these:

The plaintiffs, on March 15th, 1875, entered into a contract with the defendant, Wrenn, for the purchase of the tracts of land described in the complaint, for the sum of $2,266.64 whereof one-fourth was to be paid in cash, and the residue secured in three several bonds, each for an equal part thereof, bearing interest from that date, and maturing successively on the first day of January in the years next

(218) ensuing. The vendor, thereupon, executed to the plaintiffs his obligation to make title on the payment of the purchase money and interest at the rate of eight per cent. accruing thereon, and reserving the right to sell the lands upon default.

Divers payments were made in reduction of the debt, and when the last bond became due, the unpaid residue was $1,264.30, as shown in a statement of the account rendered by the said Wrenn. Being unable from bad crops, low market prices, and the loss occasioned by the failure of a consignee to raise the sum of $400, demanded as a condition of further indulgence by the creditor, Wrenn, or instead of the money, the assumption of a large insolvent debt due to him from the firm of H. L. Tillery & Bro., the members of which soon after were adjudged bankrupts, and for which the plaintiffs were in no manner responsible, and compelled by the pressure of their necessities, they accepted the alternative proposition. Accordingly the lands embraced in the contract for title were conveyed by the vendor to the plaintiffs; the latter executed their three several notes of $707.45, each bearing eight per cent. interest from date, and payable on January 1st of the next and two succeeding years, respectively, in an aggregate sum nearly double the amount then owing by them, and the plaintiffs reconveyed the said lands to the defendant Dunn, in trust to secure the notes, with a power vested in him to make sale in default of payment. Some payments have been since made, and the notes being due, the trustee, by direction of the secured creditor, has advertised and would proceed to sell unless prevented by the interference of the court.

The plaintiffs using the complaint, sworn to by both, as an affidavit in support of their application, moved for an injunction, forbidding the sale, before the judge, who designated a future day for the hearing of the motion before *Graves, J.*, upon notice to the defendants,
(219) and meanwhile directed a restraining order to issue. The matter coming on to be heard before him, the defendants introduced their separate answers to the complaint, admitting the material allegations of fact in reference to the antecedent transactions between the parties, denying, however, every imputation of fraud, oppression or unfairness on the part of either defendant, practiced, threatened or intended, and declaring that the assumption of the debt of their brothers by the plaintiffs was their own unsolicited and free act, in order to obtain an extension of time and avoid the sale and foreclosure authorized in the contract for title. There were other affidavits produced by the plaintiffs in corroboration, which it is unnecessary to notice in detail. His Honor upon the evidence adjudged and ordered "that so much of the restraining order theretofore granted, as restrained the defendants from selling for the H. L. Tillery & Bro. debts, as

set out in the complaint, or any part thereof, be continued to the hearing," and that, as to what remained, constituting the original indebtedness, and reduced by payments made thereon by or for the plaintiffs, the restraining order be dissolved, and the trustee, Dunn, left at liberty to proceed and sell for its satisfaction. From that part of the judgment which continues in force the restraining order, the defendants appeal.

Messrs. Walter Clark and Mullen & Moore, for plaintiffs.
Messrs. Gilliam & Gatling and Kitchen & Dunn, for defendants.

SMITH, C. J., after stating the case. The gravamen of the complaint, and the ground upon which the interposition of the court is asked, are the imposition of this large additional burden of indebtedness, for the sole consideration of delay and submitted to from the necessitous circumstances to the plaintiffs, by one who occupied towards them, at the time, a relation very similar to that sub- (220) sisting between mortgagee and mortgagor, of which position the creditor took an unreasonable advantage and should not be allowed to avail himself.

A court of equity will not relieve against a contract voluntarily entered into, and not superinduced by misrepresentation or oppression, though its terms may be very onerous, where the parties deal on equal terms, and there are no confidential relations from which an undue influence may be inferred. Those who make bargains must ordinarily abide by them, for the court will not interfere with the enforcement of contracts, because of their consequences, unless the inequality of the contracting parties is such as to give one of them the opportunity of dictating to the other his own terms, and the contract itself is so unreasonable as to indicate that the power was exercised in bringing about its execution, involving duress. *Potter v. Everitt*, 42 N. C., 152.

In *Futrill v. Futrill*, 58 N. C., 61, the court declare it to be "a great principle of public policy, that without any proof of actual fraud, such conveyances obtained by one whose position gave him power and influence over the other, should not stand at all if entirely voluntary, or should stand only as a security for what was actually paid or advanced upon them, where there was a partial consideration." This is repeated and re-affirmed in *Hartly v. Estis*, 62 N. C., 167, and *McLeod v. Bullard, ante*, 210.

We do not mean to say that the plaintiffs are entitled to be exonerated from that portion of the debt embraced in the injunction order, nor to pass upon the merits of the controversy at this prelimi-

nary stage of the suit; but to annul the order would be virtually to decide the cause, since the relief sought of a perpetual injunction would become impossible if the land has been already sold, and would be confined to a return of the proceeds wrongfully applied. The plaintiffs under the interlocutory order, must pay their original debt (221) to avoid a sale, and if this is done the property becomes a much greater security for the part in dispute. The defendant, Wrenn, is not damaged, nor his interests affected, except by the delay, as to this portion of his claim, if adjudged to be entitled to it, and for this the large interest it bears affords ample compensation. As was remarked in a late case: "Nor will the court upon an interlocutory application pass upon the merits of the controversy, but leave them to be determined upon the final hearing." *Morris v. Willard*, 84 N.C. 293, and cases cited in the opinion.

While the postponement of the sale for the disputed portion of the debt cannot injuriously affect the creditor, the enforcement of it under the deed in trust may inflict irreparable damage upon the plaintiffs, should they ultimately prevail in the suit.

Under these circumstances, we think the modified injunction was entirely proper, and the judgment appealed from must be affirmed.

Let this be certified.

No error. Affirmed.

ROBERT H. PARKER, ADM'R, v. WILMINGTON & WELDON RAILROAD COMPANY.

Negligence—Railroads.

1. While crossing a railroad track the plaintiff's intestate was killed by a train which had left a station on schedule time and attained a speed of twenty miles an hour; the deceased was working at a steam-mill located near the track; when first seen by the engineer he was about 100 feet from the engine, and making no effort to get out of the way; the engineer put on brakes and shut off steam, but gave no signal by bell or whistle; *Held* that the contributory negligence of the deceased relieves the company of responsibility.
2. One crossing a railroad track must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to an alleged injury, does not impose a liability upon the company.

(222) CIVIL ACTION for damages tried at Fall Term, 1879, of HALIFAX Superior Court, before *Avery, J.*

Verdict for the defendant. Motion to set aside verdict refused. Judgment for defendant, appeal by plaintiff.

Messrs. J. B. Batchelor, Thos. N. Hill and Day & Zollicoffer, for plaintiff.

Messrs. Spier Whitaker and Gilliam & Gatling, for defendant.

SMITH, C. J. The facts out of which arises the present action for damages in causing the death of James W. Parker, the plaintiff's intestate, are few and undisputed. The deceased was employed, and had been for sometime previous, at a steam mill erected on land of the defendant company, and with their consent, near the track of the road and about three-fourths of a mile distant south from the town of Enfield. Near the mill was a crossing over the road-bed, used by persons visiting it. On the afternoon of December 14th, 1878, according to schedule time, the regular passenger train with six coaches attached left the station at Enfield, and proceeding towards Wilmington had attained a speed estimated at the rate of 20 miles an hour, and was nearing the crossing, when the deceased, emerging from behind a building, was seen to enter upon the crossing and turn and move two or three steps in the direction of the advancing train. When first observed by the engineer, he was about 100 feet from the engine, and apparently unconscious of danger, and making no effort to get out of the way; the latter at once put on brakes and shut off steam to diminish the speed of the train, and give him longer time to escape. No signal was given by bell or whistle, and the officer in charge says it was impracticable to do all, and he then, as now, thought the course (223) pursued was best calculated to avert a collision. The intestate was stricken down and so severely injured as to live but a few hours afterwards. The brakes were of the most approved kind, and with the cutting off of the steam could be made to bring the train, moving at the rate stated, to a halt in 350 feet, and the superintendent of the road, with many years' experience in running trains, concurred in the opinion that the most prudent course in such emergency was that taken by the engineer to slacken the speed of the advancing train, and give more time for the deceased to extricate himself from his perilous position. A witness at the place, who saw what occurred, saw the deceased come out and enter upon the crossing and move a step or two forward with his hat covering his forehead and eating an apple when he was stricken down. The road at this point towards Enfield was nearly straight, and the train could be seen for several hundred yards in that direction by any one who would look. There was no signal given at the approach towards the crossing, nor was it customary to

give any, as a warning; and the working of the machinery of the mill when in operation, made so much noise that the rumbling of a train would hardly be discernible, until one entered near the track and was beyond the houses which obstructed both the view and hearing of it. There was evidence of drinking habits of the deceased, and that he had drunk something that day, but none to show intoxication when he was smitten and killed, nor did any witness testify to any indications of his being in this condition by his conduct or speech. The deceased was 33 years of age and unmarried, and was at once removed to Enfield. As soon as the train could be stopped, the engineer went back to the place where the deceased had fallen, and asked him if he was much hurt, but received no answer.

During the examination of the plaintiff on his own behalf, (224) he was asked the two questions, which, after objection from the plaintiff, were allowed, and with the responses, are as follows:

1. Did you go back to Enfield to see about him?

I did not go, owing to the condition of my family. I could not leave them. My wife was so shocked at hearing the news, she went into spasms, and I did not think she would live till I got back, and I did not think it proper he should be brought home.

2. Could not your son have been buried at home without your wife's knowing it?

There was no burying ground there.

The questions were permitted as affecting the witness' credit.

The finding of the jury upon the series of issues submitted are in substance these:

The plaintiff's intestate was guilty of negligence at the time of receiving the injury, and could have avoided it by using ordinary care on his part.

The defendant, through the conduct of its agents, did not negligently run against the person of the deceased, nor was that conduct wanton and careless, nor was the intestate's negligence in being on the track known in time to enable the manager of the train to avoid the collision by the exercise of ordinary care and prudence.

The instructions asked for the plaintiff may be condensed in the following propositions:

It was gross negligence in the company's agent not to blow the whistle when approaching the crossing, and again when the deceased was first seen. When the perilous position of the deceased on the track and in front of the engine was seen, it was the engineer's duty to use ordinary care to avert the consequences of this negligent self-exposure, and if he fail to exercise such care, the company notwithstanding intestate's negligence, would be liable. The court declined

these requests, and so far as the instructions are the subject of (225) exception, charged the jury as follows:

The rule of law in this state applicable to the case is that when an injury arises neither from malice, design, or gross and wanton neglect, but only from the want of ordinary care, and both parties are in fault, the party injured is taken to have brought the injury on himself. Then adverting to the rule that while the jury must ascertain the facts, the court must declare whether they import negligence as a matter of law, His Honor proceeds to say:

If the plaintiff's intestate went upon the track and suffered injury from the passing train, he would be deemed negligent in so exposing himself to danger, if by ordinary care and attention he could have either seen or heard the approaching train from his position or from the place of collision in time to have made his escape, and this would be so whether he was then at a regular or public crossing-place, or elsewhere on the road track. Upon these facts the intestate would be chargeable with negligence and an affirmative response should be given to the first issue. If however he was in the use of and passing over a public crossing-place, part of a road or highway, or used by defendant's license as a means of access to a public mill, and the engineer omitted to give the signal of his approach by blowing the steam-whistle, and the intestate was stricken and killed, not being able by the exercise of ordinary care and prudence to see or hear the noise of the coming train in time to have moved from the track without injury, then the intestate would not be guilty of such concurring negligence as would deprive the plaintiff of redress. Could the deceased with ordinary care and attention have seen, had he looked, or heard the noise of the train in time to have left the track and removed to a place of safety, and failed to so protect himself, his own negligence would be deemed the cause of his injury, and the company would not be responsible. That it would be negligence in the company, if nearing the crossing, whether public or used generally by license (226) as a way to the mill, the engineer failed to give notice of his approaching train by blowing the whistle, whether any one was seen or not upon the track, and so if the engineer saw the intestate on the track and had reason from his manner or apparent condition to believe he did not see or hear the train, and failed to use the means at command to warn the intestate and had sufficient time to do so before the collision, the defendant would be negligent and responsible.

The charge is expanded to great length, but what we have reproduced presents the law as laid down and as resting upon the different hypotheses which the jury may adopt with sufficient precision to enable us to determine the correctness of the rulings.

Indeed the conceded facts leave little to the jury to pass upon. It is not controverted that the defendant's engineer did not and could not, by reason of an obstructing house, see the deceased until he was within about one hundred feet of him, and did then, as the expert testifies, do what was best to be done, and all that could be done to prevent the injury.

The intestate for some unaccountable reason seems to have been insensible to his danger, in full view of the rapidly advancing engine, and as if paralysed, made no attempt to get out of its way. The only possible imputation upon the prudent conduct of the engineer is in the omission to give the warning in season to keep off persons about to cross, but even this does not dispense with all personal attention to one's own safety. If the omission be neglect in the company, much greater is the neglect of the deceased who, when aware of the runnings of the regular trains, and just when one was expected, walks and remains upon the track without looking out for its approach, or making any movement to get out of its way, until rushing on, it strikes
(227) him to the earth. It is to be presumed that a rational being will not needlessly venture into places of peril, and if he does, that he will use proper precautions to guard against injury. If he fails to do either and suffers damage in consequence, it must be regarded as caused by his own rash act and inattention to his own security. "Negligence is a relative term," remarks the court in *N. J. Ex. Co. v. Nichols*, 3 N. J., 439, "depending upon the circumstances under which the injury was received, and the obligation which rests on the party injured to care for his personal safety. A person crossing a railroad track, though rightfully there, must be on the alert to avoid injury from trains that may happen to be passing."

"The company's servants may ordinarily presume," is the conclusion derived from an examination of numerous cases by a recent author whose work exhibits large research and precision of statement, "that a person of full age and capacity who is walking on the track at some distance before the engine, will leave it in time to save himself from harm; or if approaching the track, that he will stop, if it becomes dangerous for him to cross it. This presumption may not be justified under some circumstances, as when the person on the track appears to be intoxicated, asleep or otherwise off his guard." Pierce Railroads, 331.

"The more approved statement of the doctrine of contributory negligence," says the same author, "is that a person cannot recover for an injury to which he contributed by his own want of ordinary care." *Ib.*, 323.

The only culpability which can be charged upon the company is the failure to give the precautionary signal of the approach to an intersecting way where travelers might be expected to be found, and thus prevent their moving upon the track, but this omission when in no manner causing or contributing to the injury, does not impose a liability upon the company. If the traveler knew by other means of the coming train, the omitted warnings could not be (228) deemed the cause of the collision. *Ib.*, 351.

But without accumulating references to the numerous decided cases, of which the defendant's counsel has furnished us many very much in point, we prefer to rest our decision upon the authority of a recent case, clearly resembling that before us, and in which a large array of cases was brought to the attention of the supreme court—*Railroad Company v. Houston,* 95 U. S. Rep., 697; Mr. Justice FIELD says: "If the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the negligence, unskillfulness or criminal intent of the defendants' engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. * * * * * * The *failure of the engineer to sound the whistle, or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety.* Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track in order to avoid an approaching train, and not to walk carelessly into the place of danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly on the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No (229) railroad company can be held for a failure of experiments of that kind."

The instructions of the court are quite as favorable as could be asked for the plaintiff, and he at least has no grounds of complaint of the charge. It may be a question whether the facts admitted of any hypothesis upon which the jury could find negligence in the defendant.

The testimony was that but 3 or 4 seconds would elapse before the engine would traverse the distance from it to the point at which the deceased was first seen, and that brief interval allowed only the use of the means adopted to slacken the speed of the train and afford more opportunity for him to escape.

But the verdict settles the fact that while the deceased was, the defendant was not negligent in causing the loss of the life of the former.

An exception to the evidence received remains to be considered. This is in our opinion also untenable.

The indifference to his son's death which the inquiry proposed to elicit from the plaintiff, who testified, and who would be entitled to whatever should be recovered, might have some bearing upon the value of his evidence in estimating the pecuniary damages resulting from the death of the son. But it is a sufficient answer to the objection to the question allowed, that the witness made no statement derogatory to himself, and fully explained his reasons for not allowing the body of the deceased to be removed and buried at his own residence. The objection lies not to the question, but to the evidence it elicits, and when no answer is given, or an answer in direct opposition to the intimation conveyed in the query, no ground is afforded for exception.

The error, if there be error in admitting the question, is harmless and does not vitiate the verdict.

Upon a review of the whole case, we see no error, and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Rigler v. R.R., 94 N.C. 610; *Walker v. Reidsville*, 96 N.C. 385; *Troy v. R.R.*, 99 N.C. 307; *McAdoo v. R.R.*, 105 N.C. 153; *Daily v. R.R.*, 106 N.C. 307; *Deans v. R.R.*, 107 N.C. 691; *Meredith v. R.R.*, 108 N.C. 617; *Clark v. R.R.*, 109 N.C. 453; *Matthews v. R.R.*, 117 N.C. 642; *Purnell v. R.R.*, 122 N.C. 848; *Bessent v. R.R.*, 132 N.C. 941; *Hodgin v. R.R.*, 143 N.C. 97; *Crenshaw v. R.R.*, 144 N.C. 323, 325; *Smith v. R. R.*, 145 N.C. 104; *Austin v. Charlotte*, 146 N.C. 339; *Beach v. R.R.*, 148 N.C. 160, 163; *Coleman v. R.R.*, 153 N.C. 327; *Exum v. R.R.*, 154 N.C. 411; *Ovens v. Charlotte*, 159 N.C. 333; *Patterson v. Power Co.*, 160 N.C. 580; *Talley v. R.R.*, 163 N.C. 577; *Abernathy v. R.R.*, 164 N.C. 94, 95; *Ward v. R.R.*, 167 N.C. 151, 155; *Treadwell v. R.R.*, 169 N.C. 699; *Davis v. R.R.*, 170 N.C. 586; *Davidson v. R.R.*, 171 N.C. 636; *Boyles v. R.R.*, 174 N.C. 623; *Perry v. R.R.*, 180 N.C. 307; *Wagoner v. R.R.*, 238 N.C. 173.

(230)

L. N. WILSON AND OTHERS v. A. M. POWELL AND OTHERS.

Confederate Currency—Scale of Legacy.

A legacy of one thousand "dollars" given in a will executed in June, 1863, the testator dying soon afterwards, is subject to the legislative scale of depreciation which is also applicable to payments made thereon in Confederate money, according to the date of each.

APPEAL from an order made at Fall Term, 1881, of CATAWBA Superior Court, by *Seymour, J.*

This was a special proceeding commenced in the probate court for a settlement of the estate and construction of the will of Mahala Sherrill, in which, on a former appeal, the question involving the amount of assets in the hands of the executor was passed upon. 75 N. C., 468.

The question now is as to the proper distribution of the fund, and from the ruling of His Honor, as set out in the opinion of this court, upon exceptions to a referee's report, the defendants appealed.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiffs.
Messrs. J. M. Clement and M. L. McCorkle, for defendants.

SMITH, C. J. Mahala Sherrill made her will on June 19th, 1863, and died during that summer. The testatrix divides her lands by a place on Ball's creek, called the "High Shoal," giving the portion above to L. N. Wilson, as trustee, for the use of her niece, Elizabeth M. Wilson, during life with remainder to her lawfully begotten heirs of her body, and the portion below to Middleton D. Hobbs, as trustee, for the use of her niece, Belza A. James, during life, with a similar limitation over upon her death. The testatrix bequeaths to the (231) same trustees respectively, three slaves to each, to be held for the said nieces for life and with like limitations.

In the second clause the testatrix gives a pecuniary legacy of one thousand dollars to the trustee for the use of the said Elizabeth M., and after several other bequests in money and personal property, disposes of the residue of her estate as follows:

Item 17. "My will and desire is that all the rest of my property, not herein disposed of, be sold, and all my debts paid, and the balance of the moneys arising after my debts are paid to be equally divided between Elizabeth M. Wilson and B. A. James in trust as aforesaid."

The executor paid in October and November of the year in which the testatrix died, the aggregate sum of $1,477, in confederate currency to

the trustee of the legatee B. A. James; and in January, 1878, to the legatee herself the further sum of $861 in national currency. The executor has paid to the trustee of Elizabeth M. in the month of August, 1863 and 1864, in confederate currency the amount of $690.25, and in 1867 and 1868 the additional sum of $28.33 in currency of the United States.

In considering the report of the referees and the exceptions thereto, his Honor was of opinion, and so ruled, that the $1,000 legacy is payable in currency, and not subject to the scale, bearing interest after one year from the death of the testatrix; and that the payments made to the legatees in confederate money should be reduced by the application of the scale to each as of the several dates of each. It was thereupon adjudged that the residuum, after payment of the pecuniary legacy to said Elizabeth M. and deducting certain specified charges, be divided equally between the said residuary legatees, the share of each being charged with the several sums paid to the
(232) legatee in national currency; and that they have execution *de bonis propriis* against the executor for the several sums found to be due. It was by consent further adjudged that the sum recovered by said Elizabeth or her trustee, after deducting his commissions and one-half the allowance to the referees, when paid into the office, be distributed by the clerk in equal parts to the said Elizabeth and her six named children, one seventh to each.

The appeal is from the rulings in reference to the application of the scale to the legacies and the confederate currency received towards their discharge; and the case states that counsel on both sides agree that these rulings cover the matters in controversy that arise upon the exceptions, and it is therefore needless to set them out in detail.

The convention which assembled after the close of the late civil war, passed an ordinance declaring that "all executory contracts solvable in money, whether under seal or not, made after the depreciation of said (confederate) currency before the first day of May, 1865, (except official bonds and penal bonds payable to the state) shall be deemed to have been made with the understanding that they were solvable in money of the value of the said currency, subject to rebuttal."

This was to *effectuate,* not to *frustrate,* the intent of the contracting parties, in affixing to the term used a sense in which it was at the time understood by both.

So in *Thorington v. Smith,* 8 Wall., 1, it was held by the supreme court of the United States, Chief Justice CHASE delivering the opinion, that it was competent to show in an action brought on a promissory note executed in Alabama in November, 1864, for the payment of ten thousand dollars, that confederate treasury notes constituted the cur-

rency at that time in the state, and they were intended in the contract. The rule seems to be that when a currency is designated, that which is in universal use in the country where the contract is made, will be deemed to be the intended medium of payment. And (233) the same rule is applied in the construction of pecuniary legacies, with slight modifications.

A legacy must be paid, says Mr. Toller, in the currency of the country in which the testator was resident at the time. Toller Ex., 321.

Thus it is held that an annuity charged upon lands in Ireland, in a will executed by a testator residing in England, must be paid in England. *Wallis v. Brightwell*, 2 Per. Wms., 88.

If a bond be given at Dublin or a note at Jamaica, it must be paid in the current money. So, if in either place there is a sum of money left by will, it shall be paid to the legatee in current money. LORD HARDWICKE in *Saunders v. Drake*, 2 Atk., 465.

Recognizing the general rule for determining the currency in which a bequest is to be paid, it is decided in *Barham v. Gregory*, 62 N. C., 243, that in a bequest of "one thousand dollars," contained in the will of a person who died in January, 1864, as of which date it speaks, the testator could not have meant it to be paid in confederate money, inasmuch as it had then ceased to be the currency. A similar construction is put upon a pecuniary legacy of $2,500, given in the will of a testator who died in 1864, and the court declare the general rule to be "that a legacy is payable in the currency of the country at the date of the will, *but here we had no currency*, confederate notes having become so far depreciated as not to deserve the name." *Alexander v. Summey*, 66 N. C., 577. Yet in this very case the emancipation of the slaves had so reduced the estate, and the payment of this legacy in good money would have absorbed so large a portion of what remained, that the legacy was cut down to a sum bearing the same ratio to that which its nominal amount would bear to the whole estate (234) unreduced by the loss of the slaves.

We are reluctant, from any general intent inferred from the tenor of the will, to interfere with the clear and positive dispositions of property made by the testator, because of subsequent casualties or losses in kind or value, the consequences of which he has not thought proper to correct, and we are not disposed to go beyond the strict limits of the precedent. It is our province to ascertain and give effect to the intention of the testator, *as expressed in the will*, and we are not at liberty to mould its provisions to suit the changed condition of the estate, whether resulting from a conversion of one kind into another, or from the loss of a portion of it, because the testator has failed to make modifications in the instrument.

It is a more reasonable method of interpretation to give to testamentary dispositions in money, while confederate money was the only currency in use and was received in discharge of *ante bellum* debts, to consider them payable in the *value* of such currency of which the legislative scale is the measure.

The court below inferred the kind of currency intended from an examination of the provisions of the instrument, and a supposed equality in the bounty provided for the legatees. We think from the fact that the residue is directed to be sold, the testator must rather have contemplated the appropriation of the proceeds in excess of the debts to the discharge of the several moneyed legacies, and none but confederate currency could have been commanded by a sale. We must not overlook the fact that notwithstanding the great depreciation reached, it was the only currency in circulation, (all other having disappeared,) and used in the transactions of daily life.

We have lately recognized confederate treasury notes as the currency in use in July, 1863, and extended to that date the non-
(235) liability of a fiduciary who has acted in entire good faith in receiving it, and closing up a collection, in *Robertson v. Wall,* 85 N.C., 283. We recognize it now in putting a meaning upon the word "dollars" employed in the bestowal of the gratuity upon the legatees.

It follows, that as the face value of the legacies is to abate, so must the successive subsequent payments be reduced by the application of the scale to each according to its date.

We do not think those adjudications applicable, which require an endorsed credit upon an ante-war debt to be counted for its full nominal amount, although made in confederate currency. Those decisions proceed upon the ground that the receiving creditor voluntarily and by his own act extinguishes the debt *pro tanto,* and cannot complain. Here, the real value of the legacy is unascertained, and the same rule which determines that value should determine the value of the payments. Besides, this is a dealing between the trustee and his *cestui que trust,* and stands upon different grounds from those transactions which take place between a creditor and his debtor.

There is error, and this will be certified for further proceeding in accordance with this opinion.

Error. Reversed.

W. A. ELIASON v. THADDEUS COLEMAN.

Office and Officer—Chief Engineer of Railroad.

The office of chief engineer of the Western North Carolina Railroad is not a public office. The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a *quo warranto* only will lie to recover the same.

CIVIL ACTION tried at Fall Term, 1881, of IREDELL Superior (236) Court, before *Seymour, J.*

This action is brought to recover so much of the salary of the chief engineer of the Western North Carolina railroad company as was received by the defendant for services while in possession of the office and in discharge of its duties, for the period immediately preceding his retirement therefrom in June, 1872. The company was organized under an act of the general assembly passed in 1855, the substance of which, so far as it affects the present controversy, may be thus summarily stated: The management of the affairs of the company is committed to a general board consisting of twelve directors, of whom eight were to be appointed by the Governor with the advice and consent of the senate, and the others elected by the individual stockholders. The directors who must be citizens of the state and resident therein, and also hold each at least five shares of the capital stock, are required to elect one of their number president of the company. Contracts authenticated by the president and secretary of the board of directors are made binding upon it. With the exception of the commissioners designated by the name to open books of subscription to the capital stock, no other officers of the corporation are created or expressly recognized in the act. Acts 1854-55, ch. 228.

The concluding paragraph of section 6 confers among other rights and immunities the authority to "make all such by-laws, rules and regulations, as are necessary for the government of the corporation, or for effecting the object for which it (the company) is created, not inconsistent with the constitution and laws of the state."

At a meeting of stockholders held in August, 1869, an ordi- (237) nance or by-law was adopted in these words: "The following are declared officers of the company, to wit—the president, directors, secretary, treasurer, superintendent and chief engineer. All other persons whose services shall be necessary shall be considered as employees." Another ordinance or by-law declared that the chief engineer should hold his office for one year and until his successor is duly elected

and qualified, and fixed his salary at $2,000 per annum. The plaintiff was appointed to this place in November, 1869, and again on the 13th day of that month, in the year following.

In February, 1871, was passed an act, as its title declares, "for the benefit of the Western North Carolina railroad company," conferring upon the stockholders the right to remove the then acting directors, and any of the agents or officers of the company, and to appoint others in their place, and in the event of such removal, designating the state directors by name. Under this act the stockholders met on April 4th, 1871, and after organization against the written protest of the plaintiff proceeded to remove him and elected the defendant to the vacated place of chief engineer, to serve until their next annual meeting. The defendant entered upon the discharge of his official duties and continued to discharge them up to the time of his resignation. For his services during this period he received the stipulated compensation, amounting to $2,338.74, the last portion of which was paid in February, 1873.

Upon this showing his Honor intimated an opinion that the position of chief engineer was not such an office as to give the plaintiff a tenure and vested right thereto, and he could not maintain the action. The plaintiff in submission thereto, suffered a non-suit and appealed.

Messrs. J. M. Clement and D. M. Furches, for plaintiff.

Messrs. J. M. McCorkle and W. R. Henry, for defendant.

(238) SMITH, C. J., after stating the case. The only question therefore before us is as to the correctness of this ruling. We are not required to decide upon the redress which the plaintiff may have against those who displaced him, or the corporation for which they professed and undertook to act in disregarding the conditions of the contract, as to the term of service and rate of compensation, involved in the ordinance in force, and entering into the contract when the election was accepted. Nor is it necessary to consider and determine the legal effect upon the defendant's right to the office, as the appointee of the stockholders, *de facto* if not *de jure,* representing the corporation by virtue of an unconstitutional enactment in making the appointment.

The principle governing in such cases is clearly laid down in the cases of *Ellis v. N. C. Inst. for Deaf, Dumb, and Blind,* 68 N. C., 423, and in *Norfleet v. Staton,* 73 N. C., 546, with a mere reference to which we are content, for the reason that the ruling under review is entirely independent of those decisions.

The inquiry is this: Can the plaintiff recover the salary or fees received by the defendant for personal services rendered as chief engineer to the corporation? Has the defendant taken and converted to his own use moneys belonging to the plaintiff, and for which the action for money had and received will lie?

We concur in the view taken by his Honor and for the satisfactory reason he assigns. The controversy does not hinge upon the meaning given to the words, "office and officer," as designating corporate agencies of a higher grade than those denominated employees who are serving their employers under contract.

But is the office of chief engineer of a railroad corporation, created by itself and for its own convenience, such an office as entitles one who has been displaced to recover its possession from the incumbent, and has he a vested estate in it with the right to all its emolu- (239) ments and fees by whomsoever received as compensation for his own personal services? The subject has been heretofore before the court, and the following have been held to belong to this class:

1. A tax-collector. *Patterson v. Hubbs,* 65 N. C., 119.

2. The presiding officers of the two houses of the legislature in exercising a power conferred upon them as such to appoint proxies and directors in corporations in which the state has an interest. *Clark v. Stanley,* 66 N. C., 59; *Howerton v. Tate,* 68 N. C., 547.

3. The directors of the asylums for the Insane and the Deaf, Dumb and Blind, of the Penitentiary, and the trustees of the University. *Nichols v. McKee,* 68 N. C., 429; *Welker v. Bledsoe, Ib.,* 457.

4. The president of this railroad who brought his action and it was sustained in *Howerton v. Tate, supra.*

These cases come within the purview of section 366 of the Code which authorizes the Attorney General "to bring an action 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, 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." It is manifest, as the action may be instituted by the Attorney General "upon his own information," as well as "upon the complaint of any private party," that the act has reference to such usurping occupants as are exercising public functions or conferred franchises, wrongfully, and is confined to an office which, as is said in *Nichols v. McKee,* "is a part of the government and part of the state polity," and to an office, such as to properly come within the legitimate scope of a *quo warranto* information, may be defined," says a recent author, "as

a public position to which a portion of the sovereignty of the
(240) country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public." High Ex. Leg. Rem., Sec. 620.

"The three tests to be applied in determining whether an information will lie," are in the words of the same author; "first, *the source of the office;* second its *tenure;* and third, its duties. The source of the office should be from the *crown or soverign authority,* either by charter or legislative enactment; its tenure should be fixed and permanent, and its duties should be of a *public nature.*" So it has been held that an information will not lie to remove officers of a railroad company who hold office under an election of the directors, as these are merely agents or servants of the company removable at the will of the appointing power. *People v. Hill,* 1 Lans. N. Y., 202. In *Burr v. McDonald,* 3 Gratt., (Va.) 215, the court declare that the officers of a joint stock company created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless.

The plaintiff's counsel insists that inasmuch as the power to make all necessary by laws, rules and regulations is vested in the company by its charter, and the stockholders have under this authority created and declared the office, limiting its duration and determining the salary, and its duties concern the public, the office partakes of a public nature and the same remedy should be afforded to the ejected incumbent to regain possession.

The right to conduct and carry on its business and to constitute the necessary agencies for that purpose is not a delegation of authority to make one of its agents a public officer. The company is essentially a private corporation, its outlays and emoluments private property, but the road when constructed becomes a public highway, and hence land may be taken from an unwilling owner upon making compen-
(241) sation to him. *R. and G. R. R. Co. v. Davis,* 19 N. C., 451.

The true test of a public office seems to be that it is parcel of the administration of government, civil or military, or is itself created directly by the law making power.

It is only such as can avail themselves of the remedy by action under the provision of the Code superseding the former method of procedure by information in the nature of a *quo warranto* to recover possession of the office from which they may have been ejected, that can maintain the suit for the recovery of the fees and emoluments which the usurping intruder has wrongfully received.

We therefore find no error in the record and affirm the judgment.

No error. Affirmed.

Cited: Doyle v. Raleigh, 89 N.C. 136; *Foard v. Hall,* 111 N.C. 372; *Lenoir v. Improvement Co.,* 117 N.C. 474; *Harkins v. Cathey,* 119 N.C. 662; *Barnhill v. Thompson,* 122 N.C. 496; *R.R. v. Dortch,* 124 N.C. 667; *Surry County v. Sparger,* 200 N.C. 402; *Brigman v. Baley,* 213 N.C. 122; *In re Advisory Opinion in re Phillips,* 226 N.C. 777; *Harrington & Co. v. Renner,* 236 N.C. 327.

A. J. COTTINGHAM & BROTHER v. S. A. AND J. H. McKAY.

Agricultural Advances—Power of Court in Proceedings Under the Statute.

1. The clerk of the superior court has power to revoke and supersede a warrant issued under the act to secure agricultural advances, where it is improvidently issued.
2. Where, in a proceeding under Bat. Rev. ch. 65, Secs. 19, 20, the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and files an affidavit that defendant is insolvent.

PROCEEDING to enforce an agricultural lien, commenced before the clerk and heard on appeal at December Special Term, 1880 of ROBESON Superior Court, before *Avery, J.*

The plaintiffs on affidavit sued out of the clerk's office a war- (242) rant directed to the sheriff and commanding him to seize and after due notice sell certain crops raised by the defendants, subject to a lien for money and supplies alleged to have been advanced to the defendants, in the cultivation of the land upon which they were raised. The sheriff having taken possession of the crops, the defendants applied to the clerk to recall the warrant and arrest its execution for defects apparent in the affidavit upon which it issued. The motion being refused, the defendants appealed to the superior court, where upon the hearing at Fall Term, 1879, the proceeding was dismissed, and the property ordered to be restored to the defendants. The crops were however sold under the mandate on December 5th, 1879, and (with the exception of a few pounds of lint cotton sold to one James McBryde for $5.61) bought by the plaintiffs, the aggregate of the proceeds of sale being $186.20, whereof $127.64 were left in the hands of the plaintiffs in satisfaction of their claim, and the costs incurred in the prosecution.

To the order of restoration the sheriff made return in substance, that before he had notice, he had disposed of the property for the benefit of the plaintiffs who refused to surrender the goods, or refund the money paid them.

The defendants then moved that the damages sustained by them be inquired of and assessed, the hearing of which was continued at the instance of the plaintiffs on condition that they within five days deposit the sum of $127.64 received by them, with the clerk, to be held to await the assessment of said damages, and to be applied, as far as necessary, to the satisfaction of any judgment the defendants might recover.

At a special term held in December, 1880, the plaintiffs filed an affidavit, reciting the proceedings which had taken place, the institution of another action to enforce their agricultural lien, the in-
(243) solvency of the defendants, and the probable, if not certain loss of their debt, if the defendants are allowed to withdraw the fund from the office; and they ask the court for an order, directing the clerk to retain the moneys until their action can be prosecuted to a successful issue and the fund reached.

The court declined to grant the motion, and the damages having been assessed at $127.83, adjudged that the clerk pay over the amount in his hands to the defendants or their counsel, and the plaintiffs be taxed with the costs. From this judgment the plaintiffs appeal.

Mr. John D. Shaw, for plaintiffs.
Messrs. McNeill & McNeill, for defendants.

SMITH, C. J., after stating the case. There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under the act of 1867, as amended by the act of 1873, Bat. Rev., ch. 65, secs. 19, 20. The remedy given is however summary and prompt, and as a special proceeding has for its object the appropriation of the encumbered crops to the satisfaction of the debt created in making them. When this appropriation has been made, the proceeding is exhausted and comes to an end.

If the debt is disputed, and notice thereof given to the officer accompanied with the defendant's affidavit denying the indebtedness claimed, he is required to hold the proceeds of sale until the issue of the controverted indebtedness can be tried in the superior court. If the warrant is revoked, the goods or the proceeds of sale must be returned, as must be the excess when they are more than sufficient to meet the plaintiff's demand and costs, as stated by himself, or as re-

duced by the verdict of the jury. The statute in direct terms makes no other provision for the intervention of the debtor to stop the progress of the proceeding. *Gay v. Nash,* 84 N. C., 333. (244)

We do not wish therefore to be understood as passing upon the regularity of the action in the superior court, if it was properly removed by appeal from the decision of the clerk, since it is not necessary to do so in determining the appeal to this court. The judge was under no legal obligation to the plaintiffs to order the continued retention of the fund to await the result of the newly instituted action, and the restoration of it to the defendants was a necessary and obvious consequence of the refusal of the plaintiffs' application. Their property had been taken from their possession by process wrongfully issued, and its return must follow the setting aside that process, when it is ascertained and declared to have been issued without authority of law. *Perry v. Tupper,* 70 N. C., 538; same case, 71 N. C., 385 and 387.

There is no error and the judgment must be affirmed.

No error. Affirmed.

J. F. GILBERT AND OTHERS v. WILLIAM G. JAMES.

Agent—Evidence—Trial—Deed—Parties—Presumption—Fraud.

1. An agent's declarations, accompanying an act, are not admissible to prove his authority, unless the agency be first shown *aliunde.*
2. Where a judge commits an error in excluding proper evidence, or allowing improper evidence, it is his duty to correct it before the jury retire.
3. A deed conveying the estate which the grantor has or may hereafter have as heir to the ancestor, does not operate to include an interest subsequently acquired in the share of a deceased brother; it embraces no more than the grantor owned at the date of the deed.
4. A commissioner making sale of land under an order of court and receiving the purchase money, is not a necessary party to an action to impeach the decree.
5. The law presumes that proceedings in court were fairly and regularly conducted, where it is admitted they were begun and prosecuted by an attorney of good character and professional standing; but this presumption may be rebutted by proof of actual fraud in the transaction.

CIVIL ACTION tried at Fall Term, 1881, of ALEXANDER Supe- (245) rior Court, before *Seymour, J.*

Solomon Martin died intestate in 1862, owning the tract of land described in the complaint, leaving a widow, Rebecca, and four children, Nancy, wife of G. C. Meadows, of full age, and Abraham, Frank-

lin and Mary, infants, to whom, as heirs at law and subject to dower, the said land descended. Franklin left the state in 1872, and never since being heard from is supposed to be dead.

On March 23d, 1871, Meadows and wife and Abraham Martin conveyed their rsepective shares, constituting an undivided moiety to the defendant William G. James, and he caused a petition to be filed in probate court, employing John A. Stephenson, a practicing attorney, for that purpose, in the names of himself and the tenants, Franklin and Mary, represented by their mother, appointed guardian *ad litem*, for partition and sale.

The petition itself (verified by one James F. Stephenson, whose relations to the cause do not appear, and sustained by his affidavit and that of one Abraham Mayberry, the latter having been taken sometime afterwards) was granted by the probate judge, and a decree entered directing a sale of the premises and appointing the said attorney commissioner to conduct it. These proceedings all transpired on the same day, to-wit, on March 23d, when the defendant acquired his title. The land was sold to the defendant, on a credit of six
(246) months at the price of $725 and he executed his note with surety for that sum. The commissioner's report was confirmed on August 23d, and he was ordered to proceed to collect the purchase money when due, and when paid, to make title to the defendant.

The order of sale, the report of the commissioner, and the final decree of confirmation and for title were severally presented to the judge of the district and approved by him. The commissioner collected the moiety of the purchase money due the infant petitioners, and leaving the residue in the hands of the defendant, on November 10th conveyed the land to him. The fund collected by the commissioner was deposited in the Bank of Statesville and has been lost.

The present action, instituted by the plaintiffs, (children and grand children of the intestate, Solomon) seeks to impeach the decrees and the proceedings connected therewith, for fraud practiced by the defendant, in order to secure title to himself; and they allege that the names of the two infant tenants, as also that of their mother, as guardian *ad litem*, were used without the knowledge or consent of either, and with no lawful authority from any source, as were all the proceedings in the cause—hurried to a conclusion through the agency of the attorney acting in behalf of the defendant, and by a sale at a price below the value of the land; and they ask that the recited decrees, thus obtained through the falsehood and fraud of the defendant, may be set aside and annulled his pretended conveyance of title be declared void, and for general relief.

The defendant does not controvert the plaintiffs' allegations of matter appearing of record in the suit for partition and sale, but he avers that the mother had full knowledge of what was done and made no objection thereto, nor to the sale at which she was present, and denies the imputed fraud, and any wrong intended or done to his associate petitioners in any respect. In an amendment to his answer the defendant insists that the deed from Nancy Meadows to him, (247) executed in June 1868, estops the plaintiffs, who claim as heirs under her from setting up title to the share descended from their uncle Franklin, and that the same if any vests in him under that conveyance.

The matters in controversy were submitted to the jury and their findings are for the plaintiffs. From the judgment thereon the defendant appeals.

Mr. D. M. Furches, for plaintiffs.
Messrs. Robbins & Long, for defendant.

SMITH, C. J., after stating the foregoing facts. With this succinct narrative of facts, and of the action of the court, we proceed to consider and dispose of the exceptions shown in the record.

1. The defendant proposed to prove by a witness that the deceased attorney, J. A. Stephenson, in his life-time asked witness to become guardian to the infants, Franklin and Mary, and receive their share of the proceeds of sale, and that in the conversation he stated he was their attorney. This evidence, on objection, was rejected for incompetency. The declaration, as evidence of an antecedent professional employment in a cause then in progress, cannot be defended, as accompanying and explaining an act, for an agent's declarations are not admissible to prove his authority. The agency must be first shown *aliunde,* before the declarations can be received to affect an alleged principal. *Williams v. Williamson,* 28 N. C., 281; *Grandy v. Ferebee,* 68 N. C., 356; *Francis v. Edwards,* 77 N. C., 271. These tenants were then respectively of the age of 17 and 14 years, and had no legal capacity to contract or constitute an agent for the disposition of their property, and it was not proposed to prove employment by the mother on their behalf, acting as guardian *ad litem.*

The excluded evidence is but mere hear-say, and is not admissible as part of the *res gestæ.* 1 Greenl. Ev., Secs. 109, 110. (248) *Roberts v. Roberts,* 82 N. C., 29.

Besides, the record shows and the defendant testifies to the fact that the attorney did, in filing the petition, act for all the parties, and the excluded evidence goes no further, for it does not profess to show the authority for representing the infant owners, but only that

he was the attorney for them, a matter not in dispute. No harm could, therefore, come from the exclusion.

2. The second exception is to the refusal of the court to permit proof of the good character of the attorney to be introduced when offered during the examination of witnesses. Whatever force there may be in the objection to this ruling, it is removed by the intimation of the court afterwards and before the retirement of the jury, that the evidence would be heard, and the plaintiff's admission of what it was proposed to prove. It is not only the right but the duty of the judge who may have committed an error during the progress of a trial, to correct it as soon as discovered, and this was done in the present case.

The proved fact was before the jury and not mere evidence of it, and in this respect the defendant's case was more favorably presented than if the evidence had been permitted. As the court may withdraw evidence improperly admitted when the error is discovered and instruct the jury to disregard it, so that which has been wrongfully excluded may be allowed to be introduced before the jury retire, and in either case the grounds of complaint of the first rulings are removed. It is true the appropriate time for the introduction of testimony is during the examination of the witnesses, and before argument, but the conduct of the trial must be left largely to sound discretion of the presiding judge, and unless an uncorrected error has been committed, no objection to its exercise will be entertained. This is the import of

(249) the cases upon this point referred to in the brief of defendant's counsel—*Parish v. Fite*, 6 N. C., 258; *Kelly v. Goodbread*, 4 N. C., 468; *State v. Rash*, 34 N. C., 382; *Brown v. Commissioners*, 63 N. C., 514.

3. The defendant also objects to the limited effect given to the deed from Meadows and wife to himself, and in not extending its operation to the interest afterwards acquired by the feme in the share of her supposed deceased brother Franklin. The construction put upon the deed by the court is, in our opinion, correct. It conveys in terms "all their right, title, interest and claim they have now, or may hereafter have in and to the estate, personal and real, belonging to the estate of Solomon Martin, deceased, Nancy Meadows being a daughter of Solomon Martin, deceased, and they being *heirs to one-fourth of the real estate*, there being three other children, and one-fifth of the personal estate, there being a widow also." The deed was executed in June, 1868, when Franklin was living, and it is apparent, was not intended to embrace more than the grantor, Nancy, *then owned* and was able to convey. Her share in the estate of her brother is as distinct and separate an estate as if he had derived his title from some other source, and did not exist in any form when the deed was made.

4. The next objection is that the personal representative of the attorney, Stephenson, is not a party to the action. If this were necessary to a full adjudication and adjustment of the matter in controversy he has no direct interest in the determination of the issues made in the pleadings.

It is not material to his estate whether the proceeding for partition and sale are successfully impeached or not, nor is it important to the parties to the action that he should be before the court, and if it were he can still be brought in without disturbing what has been already done.

Whoever may be entitled to the fund which was in the hands of the commissioner may pursue it still. The results show that it belongs to the defendant, and he can maintain suit for its recovery.

This is expressly decided in the case of *Smith v. Moore,* 79 (250) N. C., 82. See also *Curtis' Heirs,* 82 N. C., 435.

5. The last exception to be noticed is taken to the charge of the court, and in this we discover no error prejudicial to the defendant. The instruction was in substance, that the admission that the proceedings were begun and prosecuted by a regular attorney of the court, of good character and professional standing, made a *"conclusive presumption of law that they were regular and the parties properly made, unless the parties show actual fraud in the transaction,"* meaning, as we understand, fraud perpetrated by the defendant in securing the title to the land through the instrumentality of the suit. There is nothing in this obnoxious to objection, for fraud in obtaining the property of another can no more prevail when its object is sought to be attained through the form of a judicial proceeding, than when it is attempted by means of a deed. When entering into a judgment, as when entering into a conveyance, it alike vitiates and annuls.

Nor was it wrong in the court to tell the jury that "the character and *bona fides* of the attorney who filed the petition, were not necessarily involved in the issue," as he may have acted upon the false information of the defendant. This aspect of the case was certainly presented by the evidence, and while there may have been complicity between the defendant and the attorney, it was by no means a necessity arising out of their relations, and the latter may have acted upon representations in the integrity of which he fully confided, when he undertook to represent all the parties interested.

We take the occasion to say that courts should be slow to disturb judicial proceedings conducted regularly to final judgment, under the constant supervision of the judge, upon the application of one who alleges that the attorney acted without his authority. It is of the highest importance that the integrity of judicial action be (251)

maintained, and rights and interests determined by the adjudication be protected. Generally it must be assumed that those who undertake to act as attorneys for a party to the litigation, and are recognized by the court as such, possess the required authority to represent them; and we simply refer to what is said on this subject to the cases of *University v. Lassiter*, 83 N. C., 38, and *Sutton v. Schonwald*, at this term, ante, 198.

The present case stands upon a different footing, and the absence of authority to act for the infants, petitioners, is among the proofs of the fraudulent conduct of the defendant in the initiation and prosecution of the proceeding to its intended result.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Morris v. Gentry, 89 N.C. 252; *England v. Garner*, 90 N.C. 200; *Robbins v. Harris*, 96 N. C. 560; *S. v. Anderson*, 101 N.C. 759; *Toole v. Toole*, 112 N.C. 157; *Taylor v. Hunt*, 118 N.C. 173; *Summerrow v. Baruch*, 128 N.C. 204; *Daniel v. R.R.*, 136 N.C. 521; *Brittain v. Westall*, 137 N.C. 35; *Jackson v. Telegraph Co.*, 139 N.C. 351; *Cooper v. R.R.*, 163 N.C. 151; *Stephenson v. Raleigh*, 178 N.C. 170; *Bourne v. Farrar*, 180 N.C. 139; *Lewis v. Lewis*, 185 N.C. 7; *Hunsucker v. Corbitt*, 187 N.C. 503; *Hyatt v. McCoy*, 194 N.C. 763; *Peal v. Martin*, 207 N.C. 109; *Parrish v. Mfg. Co.*, 211 N.C. 11.

CHARLES MALLOY AND OTHERS v. THOMAS J. BRUDEN AND WIFE AND OTHERS.

Remark of Judge—Statute of Limitations—Dower—Adverse Possession.

1. The remark of a judge, that he felt compelled to exclude a certain deed as evidence of title but regretted to do so, is not the subject of exception—especially so where the objection is not made in apt time.
2. In order to put the statute of limitations in motion against the true owner of land, it is necessary that there should be an actual, open, visible occupation of the land by another, begun and continued under a claim of right. The assertion of a mere claim of title, as for instance the payment of taxes thereon, is not sufficient.
3. A widow to whom dower is assigned comes in under the heir to whom her possession can never become adverse.
4. Adverse possession under color of title must be *continuous;* a gap, though occurring during the period the statute was suspended, is sufficient to destroy its continuity.

CIVIL ACTION to recover land tried at Spring Term, 1881, of (252) RICHMOND Superior Court, before *Gudger, J.*

Archibald Fairley died in 1831, seized of the lands in controversy, and leaving a widow and an infant child Mary Ann. The lands consisted of several distinct, but contiguous tracts, two of which were allotted as dower to his widow, who took possession thereof, and continued it until her death in 1857, she having in the meantime intermarried with one Stewart. The daughter, Mary Ann, was born in 1827, and was married to Alexander Malloy in 1842, by whom she had one child, Alexander Malloy, Jr., born in September, 1846, and a few days thereafter her husband died. In 1852 she intermarried with Archibald Patterson, and had by him four children, to wit, Catherine, born 20th of July, 1853; Eliza, born 20th May, 1855, and two others subsequently born, all of whom, with the husbands of such as are married, constitute the defendants. Their mother, the said Mary Ann, died in 1863, and her second husband, Patterson, died in 1871. Alexander Malloy, Jr., died in 1878, and the plaintiffs are his heirs at law on the paternal side, and so claim the lands, while the defendants are those, who, together with himself (Alexander Malloy, Jr.) were the only heirs at law of his mother, the said Mary Ann, and claim through her. The action begun on the 20th of January, 1880. On the trial, the plaintiffs offered in evidence a deed from Alexander Malloy, sen., and wife Mary Ann to Charles Malloy, dated October, 22nd, 1844, which was objected to by the defendants on account of a defect in the probate thereof, and the judge sustaining the objection, excluded it, remarking at the time, and in the presence of the jury, that while he felt compelled to exclude the deed as evidence of title, he regretted to do so.

The plaintiffs then offered the same deed as color of title, and also one from Charles Malloy to the said Alexander, sen., dated 7th May, 1845, in both of which the lands were alike described as consisting of six distinct tracts, all contiguous, but each with its own (253) separate and distinct boundaries, covering, however, the lands described in the complaint, and two of them being subject to the widow's dower.

The plaintiffs introduced one Charles Malloy, who testified that soon after the death of Alexander Malloy, sen., in 1846 he qualified as guardian of Alexander Malloy, jun., and as such took control and management of the lands outside of the dower of the widow of Archibald Fairley (then Mrs. Stewart) and listed them for taxation, and paid the taxes thereon from 1846 to 1867, when his said ward became of age. That he took possession of the part covered by the dower in 1857, at the death of Mrs. Stewart, by placing a tenant on the land, and that he continued the possession thereof, cultivating it,

either himself or by tenants, until 1864, when the actual possession was discontinued, and was not resumed until 1866, when he again put a tenant upon it, who cultivated it until the ward became of age in 1867, who then took possession for himself and continued to cultivate it until his death in 1878, the lands being known, all the while, as the "Fairley Lands."

After the death of the said Alexander, jun., the defendants took possession, and have continued to hold it ever since.

At the request of the plaintiffs' counsel the following instructions were given to the jury:

1. If they should believe that the six tracts of land described in the two deeds, were embraced and included in one common boundary, then the possession of one tract would be construed as the possession of all embraced in that common boundary.

2. If the statute of limitations began to run against Mary Ann Malloy at the death of her first husband in 1846, and before her second marriage in 1852, then no supervening disability of either
(254) coverture or infancy would have the effect to stop it.

For the defendants, the following instructions were asked:

1. That if the jury believe all the evidence offered on the trial the plaintiffs were not entitled to recover.

2. That there was no evidence of any adverse possession of the lands described in the complaint sufficient to ripen color of title.

3. That there was no evidence of the possession of any of the six tracts of land described in the deed under which the plaintiffs claim title.

4. That there was no evidence of adverse possession by the guardian, Charles Malloy, before the year 1857.

5. That the fact of his paying taxes on the land was no evidence of adverse possession sufficient to ripen color of title.

6. That when land consists of several distinct tracts, the possession of one, although adjoining, will not ripen color of title into a good title for such of the tracts as are not taken into actual possession.

7. That the possession of land under color of title, to enable a party to recover it, must have been continuous and adverse and under a claim of title.

His Honor declined to give the first, second, third and fourth instructions prayed for by the defendants, and in response to the others, told the jury that the deeds offered in evidence were color of title, and that there was no evidence of title in the plaintiffs, other than that which could be derived from the possession of the land under color of title. That to enable them to recover under such color of title, the jury must be satisfied that those under whom they claimed

had taken actual possession of the lands, and continued to hold it adversely and notoriously for seven years claiming the land as their own, not counting the time elapsing between the 20th May, 1861, and the 1st January, 1870; and that if any of the parties against whom such possession was held were at the time of its (255) commencement under disability, either of coverture or infancy, the statute of limitations would not run against them. But on the other hand, if they believed the statute began to run against Mary Ann Malloy, after the death of her first husband in 1846, then no supervening disability would obstruct it. And he further instructed them, that the possession of the guardian, Charles Malloy, would be the possession of his ward; and that there was some evidence of his having taken such possession as would ripen color of title, as to the sufficiency of which they were to determine. That his paying taxes on the land would not, of itself, be evidence of such possession, but they should believe "that the widow of Archibald Fairley held her dower in conjunction with, and subordinate to the claim of the guardian of Alexander Malloy, jun., her possession would not be adverse to said guardian, and the plaintiff would be entitled to recover, if the guardian had thus had possession for seven years."

The jury rendered a verdict in favor of the plaintiffs. The defendants moved for a new trial, assigning for cause:

1. Errors committed in the instructions given to the jury.

2. Those committed in withholding instructions asked for by the defendants.

3. The remark of the judge in the presence of the jury, that he regretted to exclude the deed from Malloy and wife to Charles Malloy as evidence of title—with reference to which last assignment, his Honor states that no exception to the remark was taken at the moment, and none until the motion for a new trial was heard.

After consideration and argument, the motion for a new trial was allowed and the verdict set aside, from which order the plaintiffs appealed.

Messrs. Burwell & Walker, for plaintiffs.
Messrs. Battle & Mordecai and McNeill, for defendants.

RUFFIN, J. From the manner of stating the case on appeal, (256) it is apparent, we think, that the new trial was given to the defendants, in the court below, not as a matter of discretion on the part of the judge, but because it was thought that, in law, they were entitled to it; and that his Honor anticipated, and intended that the correctness of his action in that particular, should become the subject of

review in this court, as a question of law. So understanding it, we have considered the question, which otherwise we should not have assumed to do.

As to the remark made to counsel by the judge, at the moment of excluding the deed offered in evidence by the plaintiffs, we do not perceive how it can be legitimately complained of. It surely was no intimation of any opinion on his part whether any fact was fully or sufficiently proved; nor was there anything in its nature that could possibly influence the jury and incline their minds for or against either party. So far as appears from the statement of the case, it was simply an act of complaisance to counsel, intended to lighten the effect of the disappointment, which the rejection of the testimony had produced. The position of a judge would be rendered intolerable, if every word uttered during the progress of a trial could be thus wrested, and made the subject of an exception; and especially should this not be permitted when a party takes his chances for a verdict, and only urges an objection when the opportunity for correction has passed away.

Upon other grounds, however, we are of opinion that a new trial was properly awarded to the defendants. It is not necessary that we should consider them all, for if any one of the exceptions taken was, in fact, well taken, it is the same, in its consequences, as if all were so, since it is impossible to know certainly upon which of the several phases of the case the jury acted in determining their verdict.

(257) As we understand a portion of the charge to the jury, it was in effect, to tell them, that notwithstanding the guardian of Alexander Malloy, jun., may not, upon the death of the father in 1846, have taken actual possession of the land unaffected by the grandmother's dower, and his whole management thereof consisted in merely listing it for taxation, and paying the taxes thereon, still if they believed that the grandmother recognized her grandson's title, and consented to hold under him, then her possession became his, and would ripen his title under color into a perfect title. Thus interpreted, we conceive it to be unsupported by authority, or any just reason.

Although the guardian, when examined as a witness, made a general statement that at the death of Alexander Malloy, sen., in 1846, he took the management for his ward, of so much of the land as was not covered by the dower of the widow of Archibald Fairley, it clearly appears, when taken in connection with other parts of his testimony, that such management was confined to his having listed the land and paid the taxes due thereon, and that there was no such actual occupation of the land by him, or any one for him, as would give notice to the true owner, Mrs. Mary Ann Malloy, and put in motion the

statute of limitations against her. To have that effect, it was not sufficient to assert a mere claim of title, but there must have been some actual, open and visible occupation of the land, or some part thereof, begun and continued under a claim of right. "The principle on which the statute of limitations is predicated," says Angell on Limitations, Sec. 390, "is not that the party in whose favor it is invoked, has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of another as to give him a cause of action, which, having failed to prosecute within the limited time, he is presumed to have surrendered." A mere claim of title of itself gives no right of action to the owner, and there can be no *adverse possession* against which the true owner cannot have an action to recover the (258) possession.

Nor is it possible that the want of such notoriety and openness of hostile possession, could be remedied by any concessions that might be made to the ward's title by the tenant of the dower. Upon the decease of the ancestor, Archibald Fairley, the title and the possession of the land, subject to his widow's right to dower, was cast upon his daughter, Mary Ann, as his only heir; and upon the assignment of her dower the widow took possession, not adversely to the heir, but in subserviency to her title, and so continued to hold; and neither she, herself, nor any one claiming under her, could acquire any right against the heir by virtue of the statute of limitations, at least not without some open positive change of possession, accompanied with some manifestation of an unequivocal purpose to hold adversely to her, such as would have subjected the party coming in under such change of possession to an action at the instance of the heir. There is no pretence in the case that anything occurred to disturb the relations established by law, between the dower tenant and the heir, or which could possibly justify an action on the part of the latter against the former. Upon the termination of the dower estate by death in 1857, the guardian took actual possession for his ward, and then it was, and not until then, that adverse possession, visible and exclusive, and such as challenged the owner to an action, commenced for the first time; and it was the duty of his Honor so to have instructed the jury, and his failure to do so amounted to an error, such as entitled the defendants to have the verdict against them set aside, and a new trial given them.

And even if his Honor had fixed that period as the one at which the adverse possession was first taken as against the owner, (then Mr. Patterson,) there was still another error committed, of which the defendants might justly have complained. It is not denied that the actual possession of the guardian, after having continued (259)

from 1857 to 1863, was then interrupted and abandoned during the year 1864-65—no one occupying the land, throughout the whole of those two years, in any way that could possibly put the owner to bringing a possessory action for it; and according to all the authorities this hiatus occurring in actual occupation of the land, put a stop to the statute then running against the owner. Ang. on Lim., Sec. 413. *Holdfast v. Shepard*, 28 N. C., 361.

At all times there is a presumption in favor of the true owner and he is deemed by law to have possession coëxtensive with his title, unless actually ousted by the personal occupation of another; and so too whenever that occupation by another ceases, the title again draws to it the possession, and the seisin of the owner is restored; and a subsequent entry, even by the same wrongdoer and under the same claim of title, constitutes a new disseisin, from the date of which the statute takes a fresh start.

The fact that such an interruption occurred during the interval between 1861 and 1870, when the statute of limitations was suspended, cannot affect the case. In contemplation of law, it was a fact accomplished that in 1864-65 the owner made entry upon the land, and thereby destroyed the effect of all prior adverse possession; and as a *thing done*, it must be attended with all the consequences as if done at any other time.

We take it that it would hardly be disputed that the acknowledgment of a debt, as still subsisting made in 1865 by a bond debtor, could be given in evidence against him, in an action brought upon the bond in 1870, and thereby repel the presumption of payment, and if so, why not the fact that, by entry, the owner of land had broken that continuity of possession upon which the bar of the statute depended?

(260) It must be apparent from the foregoing considerations, that the new trial was properly awarded the defendants, and we need not therefore consider the other points made in the case.

As to the suggestion made here, that the plaintiffs were entitled to recover of the oldest defendant, since as to her the statute prevailed, even if it commenced to run in 1870, it is sufficient to say, that no such judgment was asked for. So far as the case discloses, a judgment as to all the defendants was insisted on; and even if satisfied therefore that they had established their case as to that one (which, however, is far from being so,) we could not say that the court erred in not granting them that which they failed to ask for.

The judgment of the court below in granting the new trial is affirmed.

No error. Affirmed.

Cited: S. v. Brown, 100 N.C. 524; *Brinkley v. Smith,* 131 N.C. 133; *Woodlief v. Wester,* 136 N.C. 164; *Monk v. Wilmington,* 137 N.C. 324; *Graves v. Causey,* 170 N.C. 176, 177; *Clendenin v. Clendenin,* 181 N.C. 473; *Forbes v. Long,* 184 N.C. 40; *Freeman v. Ramsey,* 189 N.C. 796; *Rook v. Horton,* 190 N.C. 183; *Perry v. Alford,* 225 N.C. 147; *Newkirk v. Porter,* 237 N.C. 119.

R. O. BURTON, ADM'R, v. L. A. FARINHOLT AND OTHERS.

Insurance—Fraudulent Transfer of Chose in Action—Remedy of Creditor in Equity—Executors and Administrators—Estoppel.

1. A life insurance policy issued to one for the benefit of himself, executors, etc., becomes upon his death a part of his estate, like any other chose in action; but otherwise, where the same is taken in the name and for the benefit of the wife or children.
2. A voluntary transfer of a chose in action by an insolvent donor to his children, without valuable consideration, is fraudulent and void, and the same may be reached in equity by creditors and subjected to the payment of their debts.
3. An administrator is estopped by the act of his intestate, who in his lifetime assigns personal property even though fraudulently, to deny the title of the assignee, and cannot maintain an action to recover the same. But an action will lie at the instance of the creditors of the estate against the holders of the property—the intestate's act being void as to them.

CIVIL ACTION tried at Fall Term, 1881, of HALIFAX Superior (261) Court, before *Gilmer, J.*

On the 13th of June, 1866, the late Edward Conigland effected an insurance of five thousand dollars on his life with the Ætna Insurance Company, of Hartford, for the benefiit of himself, his executors, administrators and assigns, and procured a policy for the same payable ninety days after notice and proof of death. On the 14th of June, 1877, he made a voluntary assignment of said policy to his three daughters, the defendants Fanny, Annie and Margaret—he being then insolvent and without retaining property sufficient to pay his debts.

In December, 1877, he died intestate leaving surviving him his said three daughters, all minors—the defendant Fanny having since intermarried with the defendant L. A. Farinholt. Since his death the amount due on the policy has been paid to the defendant Hervey as guardian of the said daughters, who, upon the marriage of the said Fanny, paid over to her husband fourteen hundred dollars of the amount.

The combined real and personal estate of said intestate is insufficient to pay his debts, and hence it is necessary to resort to the insurance fund, and the plaintiff, who is his administrator, insists that he has a right to subject so much of that fund as may be needed for the purpose, to the payment of the debts. This is the nature and scope of the action.

The defendants demurred to the complaint and from the judgment overrruling the demurrer they appeal.

(262) *Mr. Thomas N. Hill, for plaintiff.*
Messrs. J. B. Batchelor and Day & Zollicoffer, for defendants.

RUFFIN, J. On the argument here three points have been raised for consideration:

First. Whether the transfer of the policy can be held to be fraudulent as to creditors, upon the mere ground that it was voluntary and without valuable consideration, and that the assignor was at the time insolvent.

Second. Whether the fund derived from the policy can be followed in the hands of the daughters, and subjected to the payment of debts, since the policy was but a *chose in action* and not itself the subject of execution.

Third. Whether the plaintiff as administrator can maintain this action, or whether he is estopped by the assignment of his intestate.

The court has very decided convictions as to the law upon every question suggested by the demurrer.

The life policy in question was the property of the plaintiff's intestate. As soon as delivered, it vested in him, and like any other *chose in action* became an integral part of his estate, subject to every rule of property known to the law. Being indebted to a state of clear insolvency at the time of its voluntary assignment to his daughters, his act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not. It is principle of the common law, as old as the law itself, and upon which the preservation of all property depends, that, except so far as the same may be exempt by positive law, the whole of every man's property shall be devoted to the payment of his debts. He cannot gratuitously give away any part of it, the law meaning that he shall be just to his creditors before he is generous to his family. From the fact that he was at the time insolvent, and that his transfer to his daughters was without valuable consideration, it results, as a conclusion of law, that
(263) the assignment was void as to his creditors. As said in *Gentry v. Harper,* 55 N. C., 177, it is against conscience for debtors to

attempt in any way to withdraw property or effects from the payment of debts, and if the courts of law cannot reach the debtor's interest, a court of equity will. True, the constitution of the state (Art. X, Sec. 7) provides that a husband may insure his life for the sole use of his wife and children, and that in case of his death the amount insured shall be paid to them free from the claims of his creditors; and counsel here insist that the assignment of the policy, already procured, to his daughters was in effect the same as if the intestate had taken out a new one professedly for their benefit. But is it so? If taken directly in their names and for their benefit, it would have been, *ab initio,* their property, and would never have constituted a part of their father's estate, upon the faith of which he could, and perhaps did, obtain credit—and that is the test. If his creditors, when trusting him, relied or had a right to rely upon his life assurance as a source of payment, then the law will not permit them to be disappointed by a free gift of it to another. It will put it into the power of no man to obtain a false credit.

As to the second point, the defendants' counsel insist, that the assignment being of a *mere chose in action,* which could not be subjected to execution by creditors, the case does not fall within the statute of frauds, and for this they cite Story's Eq., Jur., Sec. 367, where, in defining the English doctrine on the subject, it is said, "that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should convey property which would be liable to be taken in execution for the payment of debts; that the statute of 13th of Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution which was not already, in law or equity, subject to the rights of creditors."

The author, however, admits that there has been, and still is, a great diversity of opinion on the point, and no one who (264) will take the pains to examine the precedents bearing upon it, can avoid a feeling of surprise at the extent to which that diversity has been allowed to proceed upon a matter of such practical importance.

In the early English adjudications very decided ground was taken in favor of the creditors' right to pursue the *choses in action* of their debtors, in the hands of fraudulent alienees. *Taylor v. Jones,* 2 Atkyns, 600; *Horn v. Horn,* Ambler's Rep., 79. But the later decisions are all clearly the other way, and settle the rule to be as stated in Story.

In *Bayard v. Hoffman,* 4 Johns., ch. 450, the late learned CHANCELLOR KENT carefully reviewed those recent decisions of the English

courts, and the reasoning upon which they proceeded, and did not hesitate to characterize them as having a tendency to encourage fraudulent alienations, and as being injurious to creditors and subversive of justice; and he declares that he should be sorry to see their doctrine become the settled resolution of the courts. According to him, the right of a creditor to subject the property of his debtor applies to whatever is in law the property of the debtor, except such portions as may be specially exempted by law; and if this right cannot be made available *at law,* because of some peculiar condition or nature of the property, that very circumstance furnishes a reason why it shall be enforced in a court of equity. This exposition of the law has been accepted by a large majority of the courts, (as may be seen by reference to the notes of Kent's Commentaries, vol. 2, p. 574, and Bump on Fraud. Conveyances, 263, where the cases are collated,) and certainly we conceive it to be founded on the better reason and more equitable principle.

The jurisdiction of a court of equity to enforce the application of equitable assets to the payment of debts, is conceded and of every day experience, whenever the remedy at law shall prove to be in-
(265) effectual, and the property cannot be reached by execution. Would it not be singular, beyond measure, that such a court should be incompetent to administer relief as to assets fraudulently transferred and placed beyond the creditor's reach, when we reflect that fraud is one of the very sources from which its jurisdiction flows? The statute of frauds would be shorn of half its vigor and virtue in the suppression of fraudulent contrivances, if its operation is to be confined to transfers of such property as may be taken in execution. Indeed, such a construction given to it would be to invite debtors to convert their tangible property into securities, for the purpose of defrauding their creditors and bestowing them upon their own families.

In *Pool v. Glover,* 24 N. C., 129, and *Doak v. State Bank,* 28 N.C., 309, decided by this court—the first in 1841 and the latter in 1848—it was held that choses in action could be made liable to the satisfaction of a judgment, neither upon execution nor by a decree of a court of equity; not by the former, because they were not *goods and chattels;* nor by the latter, because they were legal, and not equitable rights; and that the only way by which a creditor could reach them was by taking execution against the body of the debtor, and thereby coerce him to surrender them in satisfaction of the debt—a remedy which, it was said, the court of equity deemed adequate, and therefore saw no necessity for coming in to aid the law. This was evidently spoken with reference to the *choses* held by the debtor and subject to his control. But in no reported decision of this court, have we been able to

find a suggestion even of a purpose to curtail the jurisdiction of the court of equity over fraudulent transfers of a debtor's property, and make its exercise dependent upon the character of the property alienated. So far from that, we have a precedent for the actual exercise of that jurisdiction, and in relation to just such property as is here involved, in *McGill v. Harman,* 55 N. C., 179. There, a son had received from his father, without consideration, and in contemplation of the latter's insolvency, *a note* on a third person due (266) the father, and had used the same in payment for a tract of land, and it was held that the creditor had a right to hold the son liable for the amount of the note, and to look to the land as his security.

But, should there be a doubt as to the general power of the court to aid creditors under such circumstances, we should be disposed to hold that it obtained, in this particular instance, from the very necessity of the case.

In the present state of our law, as altered since the decisions in *Pool v. Glover* and *Doak v. Bank,* choses in action, whether held by the debtor himself or another for him, are made available for the payment of debts by proceedings supplemental to execution; and in *Sutton v. Askew,* 66 N. C., 172, it was held that a bond in the hands of a fraudulent alienee could be reached by a creditor after that manner. Here, however, the principal debtor is dead, and his personal representative, as we shall presently see, is incapacitated, by the estoppel growing out of his intestate's assignment, to intervene in the matter in any way. So that, there is no judgment in the case, and by possibility can be none under which supplemental proceedings can be conducted, and unless an action will lie directly against the present holders of the property transferred, then the law would be guilty of the inconsistency of allowing a right and affording no remedy for its enforcement.

Our conclusion therefore is that the life policy, notwithstanding its intangible form, or its proceeds in the hands of the defendants, may be reached, with the aid of the court, and made subject to the debts of the intestate by any one who occupies such a relation to him, as confers a right of action.

And this brings us to inquire of the plaintiff's right in this particular.

In *Coltraine v. Causey,* 38 N. C., 246, cited by counsel for the defendants, this court ruled that an administrator could not (267) maintain a bill for setting aside a deed on the ground that it was given by his intestate to defraud creditors, for that, he occupied the exact relation to the deed that his intestate did, and was equally estopped thereby, but that the defrauded creditors might have their action against the fraudulent alienee as executor *de son tort.* To the

same effect are the cases of *McMorine v. Storey,* 20 N. C., 329, and *Sturdivant v. Davis,* 31 N. C., 365. But the most striking instance of the application of the rule is found in *Norfleet v. Riddick,* 14 N. C., 221, in which case a regular administrator, who held property of his intestate under a conveyance fraudulent as to his creditors, was sued by them, as executor *de son tort,* and their action was sustained. In discussing its propriety, Chief Justice HENDERSON said, it must be so *from necessity;* that the conveyance operated alike as an estoppel on the intestate and his administrator, but did not bind the creditors as to whom it was void; and as they could not reach the property through the defendant as administrator, they must be allowed to have their action against him as executor *in his own wrong,* or else there must be a failure of justice.

From a resolution of the court, so explicitly pronounced and reiterated, we do not feel at liberty to depart, because of any difficulty that may exist (as is suggested) in enforcing it, under the present law touching the administration of deceased persons' estates, at least, not without some more specific expression of the legislative will to that effect, than is to be found in any law yet enacted.

Winchester v. Gaddy, 72 N. C., 115, and *Henry v. Willard,* 73 N. C., 35, were both actions, brought under the present system, against the defendants as executors *de son tort;* and while the plaintiffs failed in both, on other grounds, there was no suggestion in either case of any difficulty in maintaining such actions because of the law which
(268) directs a *pro rata* application of the assets, and we cannot suppose that so important a matter was overlooked.

Whether in such an action, instituted at this day, the plaintiff will be permitted to sue in his own name and thereby acquire a preference in the particular assets recovered, or whether he shall sue, as in a creditor's bill, for himself and all others alike interested, are questions not now necessary to be determined, and too important to be lightly determined, especially, as we do not find oursleves in the present state of the argument fully in accord with regard to them. But be it either way, we apprehend it will be found in actual practice to interfere with the general administration of estates by lawful representatives, less frequently and seriously than seems to be supposed, and certainly not sufficiently so to justify the court in dispensing with a long and well established principle of law.

The plaintiff being estopped by his intestate's act of assignment to deny the title of the defendants to the policy or its proceeds, cannot maintain this action, and the judgment of the court below is therefore reversed and the demurrer sustained.

Error. Reversed.

Cited: Gidney v. Moore, 86 N.C. 488; *Kiff v. Weaver,* 94 N.C. 281; *Burwell v. Snow,* 107 N.C. 87; *Markham v. Whitehurst,* 109 N.C. 309; *Taylor v. Lauer,* 127 N.C. 163; *Herring v. Sutton,* 129 N.C. 109; *Michael v. Moore,* 157 N.C. 465; *Pearsall v. Bloodworth,* 194 N.C. 631, 632; *Strayhorn v. Aycock,* 215 N.C. 47.

EMMA RENCHER v. JAMES C. WYNNE.

Judge's Charge—Fraud—Married Woman—Notice.

1. A judge need not give instructions in the very words asked, even when correct in law; certainly not if in any particular erroneous. But he shall declare the law as applicable to the facts in proof, and any reasonable inference from them.
2. He should declare what constitutes a fraudulent intent in law vitiating and annulling, as against creditors, an accompanying assignment otherwise effectual; and what knowledge prevents the assignee from deriving title thereunder, especially if the denial of such knowledge is only as to the fraudulent purpose of the assignor and not as to his acts and objects, which were material for the jury to consider in fixing the extent of the assignee's notice of the fraudulent intent.
3. Although a loan, with an agreement to be secured if the debtor finds himself failing, may be upheld, however suspicious the transaction, yet if there be further and principal purpose to give the debtor false credit, and induce a creditor to rely upon it for payment, a conveyance effecting such understanding which hinders and defeats the creditor, will be inoperative and void.
4. As a wife now has legal capacity to contract with her husband, make loans to him, and take security therefor, she will not be supposed in such matters to act under the marital influence, but will be affected by the rules applicable to other persons.

CIVIL ACTION removed from Franklin County and tried at (269) Spring Term, 1880, of WARREN Superior Court, before *Gudger, J.*

The plaintiff is the wife of D. W. Rencher to whom she was married in 1866, and brings this action to recover in damages the value of the property described in the complaint, (carriage, horses, mules and other stock, farming implements, etc.,) and sold by the defendant sheriff of Franklin County, under execution against her husband.

Verdict and judgment in favor of the plaintiff, appeal by defendant.

Messrs. Merrimon & Fuller, for plaintiff.

Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. The defendant, sheriff, under an execution issued against D. W. Rencher, seized and sold for its satisfaction the several articles of personal property described in the complaint and for recovery of the value of which the action is brought.

(270) The plaintiff derives her title under a deed from the said Rencher, her husband, to her executed on November 11th, 1874, and proved and registered a few days thereafter; and the controversy is as to the *bona fides* and legal sufficiency of the conveyance against the creditors who had sued out the process, under whose authority the defendant acted in taking and appropriating the property to their demand.

The issues submitted to the jury and their finding upon the question of fraud were in these words:

1. Was the deed from D. W. Rencher to his wife, Emma Rencher, dated the 11th day of November, 1874, executed for the purpose and with intent to delay, hinder and defraud the creditors of D. W. Rencher? Yes.

2. If so, did the plaintiff have knowledge of such purpose and intent? No.

It was shown at the trial that D. W. Rencher who with his wife after their marriage in 1866, removed from Alabama and became residents of Franklin County in this state on January 1st, 1870, bought at the price of $1500 and paid for out of his own means a house and lot in Franklinton, and caused the same to be conveyed to the plaintiff. He was not then in debt. With the plaintiff's consent, he rented out the premises, took notes for the rent in his own name, and managed the property as his own, and such it was understood in the community to be, the deed not having been registered until December 11th, 1874.

The lot was sold in the latter part of 1872, for $1200, and both joined in the deed to the purchaser. This money with her knowledge and consent was used in payment for a plantation bought by him, situated near the town, and the title thereto taken in his own name.

At the same time he promised the plaintiff to secure the amount thus appropriated, if he should become involved in debt. During the intervening period between the marriage and the impeached assignment, the mother of D. W. Rencher sent to the plaintiff at dif-

(271) ferent times sums of money in the aggregate $600, which was loaned to him, and this sum and the proceeds of sale of the town lot constitute the consideration of the assignment. The debts reduced to judgment, and on which issued the execution by virtue of which are claimed by the plaintiff, were contracted with the firm of J. S. & W. H. Joyner during the years 1873 and 1874. There was no evidence that any persons in the county, except the plaintiff and her

husband, were acquainted with the fact that the conveyance of the title to the town lot had been made to the plaintiff, the bargainors residing in the city of Baltimore and the deed having been there executed, or that Rencher was indebted in any manner to his wife.

The plaintiff examined on her own behalf testified that the assignment was truly and honestly made, and accepted on her part in discharge of his indebtedness to her, in the sum recited as its consideration, and that in the entire transaction she acted in good faith and without knowledge of any fraudulent purpose in the assignor or any one else.

The defendant requested that these instructions be given to the jury:

1. If the deed from Rencher to the plaintiff (his wife) was made with intent to hinder, defraud and delay creditors, and the plaintiff permitted him to use the property with an agreement, known to themselves only, that he should secure the debt due her in the event he should become embarrassed, then she is affected with notice and the deed is void.

2. That if the plaintiff permitted her husband to use her property as his own, with the agreement known to themselves alone, that if he should become involved or embarrassed he would secure her, and the deed was in pursuance of the agreement, then it was fraudulent as against his then subsisting creditors.

The court refused so to charge, and told the jury that "if the deed to the plaintiff was voluntary, without a valuable consid- (272) eration, with the corrupt intent to delay, hinder or defraud creditors, it is void; but if made as an absolute conveyance and for a valuable consideration to the plaintiff, it would be good notwithstanding his fraudulent purpose, if she was not a party to such fraud and bought in good faith without knowledge of his corrupt intent."

The exceptions needful to be considered grow out of the refusal to charge in the manner requested, or to give any directions as to what constitutes a criminal complicity on the part of the assignee in the fraud, or knowledge of the fraud practiced by the assignor, which enters into and infects the legal validity of the instrument through which it is attempted to be made successful.

In this we think there is error, and that the law, bearing upon the facts, as the jury might find them upon the evidence, not properly and sufficiently explained to guide them in making up their verdict. While the judge is not required to give an instruction in the very words in which it is prayed, even when correct in law, and certainly not when in any particular erroneous, yet it is to be expected that he shall declare the law as applicable to the facts in proof, and any reasonable

inferences which may be drawn from them in order to an intelligent and rightful determination of the issues before the jury. He should tell them what constitutes the fraudulent intent meant in the law, which accompanying an assignment, otherwise effectual, vitiates and annuls the instrument as a conveyance operating against creditors, and leaves the property still liable to their action.

He should also have explained to them what knowledge or information possessed by the assignee would prevent her from deriving a title under a deed fraudulently made by the assignor; more especially was this explanation needed in view of the plaintiff's denial, not of knowledge of the mediated acts and objects of her husband but
(273) "of any fraudulent purpose in him" which might easily be misinterpreted as meaning to deny that his purpose, though understood, was fraudulent. The plaintiff might suppose there was nothing wrong in retaining and trading upon the credit of the property, as long as the business was prosperous, and yet with an executory (as efficient in its consequences as if executed) agreement by which practically it is rendered inaccessible to the demands of creditors, contracting upon the faith of the debtor's ownership, and who are thus misled and deceived. If the arrangement was entered into with the concurrence of both, that the husband should retain the legal title and possession as a basis of future or continuing credit in the conduct of his business, but that upon the approach of insolvency it should be transferred to her, and thereby be placed beyond the reach of those to whom he might meanwhile become indebted, this fraudulent intent, understood by both, and entering into and consummated by the deed, would defeat its operation, notwithstanding the debt paid or secured was truly due and owing.

We do not say that a loan with an agreement that it shall be secured when the debtor finds himself in failing circumstances, is not valid and effectual; with no other ingredient in the intent, it would, we think, be upheld, however suspicious the transaction may appear. But if in association with that is the further and principal purpose to enable the debtor to obtain a false credit and to hold out to the creditor this, as among the resources of the debtor, upon which he can and does rely for payment of the incurred liability, the conveyance in pursuance of such understanding which does hinder and defeat the creditor, if allowed to stand, must be deemed as to him inoperative and void.

"It is true," remarks the eminent judge who for so many years presided in this court, "that when the debt is a just one, the covinous intent is difficult of proof, and can seldom be proved, because, *prima facie*, a just debt makes the deed *bona fide*. Nevertheless, when the

intent (before described as fraudulent) can be reached, it is (274) not the less fraudulent because it assumes a more specious appearance." *Leadman v. Harris,* 14 N. C., 144.

The verdict of the jury fixes the fraudulent purpose in the maker of the deed, and it became therefore material to inquire if these acts and that conduct attending the execution of the deed, from which his intent is deduced, were not equally within the plaintiff's knowledge, and from which she might and ought to have drawn the same inferences as the jury. That which naturally and necessarily follows an act intentionally done, must be deemed to have been intended when the act was done. "A party cannot be heard to say he did not intend the necessary consequences of his own voluntary act." *Babcock v. Eckler,* 24 N. Y., 623.

And so a complicity in or assent to a deed which undertakes to convey a beneficial interest to another, and is fraudulent in fact, is implied in the knowledge of those acts and purposes in which the fraud consists, and takes away all claim to its benefits as against unsatisfied creditors.

The validity of the assignment is not to be determined by the declared motive of the plaintiff in accepting, but upon her knowledge of the facts which render it a fraud in the assignor to make it. *If his unlawful purpose* was brought to her notice, and the making the deed, its result, assented to, she is a participant in the fraud and derives no title under it to the prejudice of his creditors. "If the motive to be ascertained, not from the act itself and its results, but from the subsequent declarations of the parties to the transaction, is to be the test of the validity of conveyances, they would depend, not upon the clear and well settled principles of law, but upon the capricious and uncertain temper of individual persons." *Cheatham v. Hawkins,* 80 N. C., 161.

The case seems not to have been presented in the charge upon the material point to which the attention of the judge was called in the proposed instructions, in such a manner as to enable them (275) to comprehend the bearing and effect of the evidence, and the correct legal principles upon which rests the assignment as an effective and unassailable transfer of the property to the plaintiff. The charge is not in substance that which was asked, nor does it attempt to impart the information upon matters of law, which the jury ought to have had to aid them in their findings; and in consequence, the issues should be submitted to another jury.

It is suggested that the plaintiff, being the wife of the assignor, is not free from his supposed material influence, and ought not to be affected by the same rules which would govern in deciding upon a trans-

action between independent persons. But if the wife has legal capacity to contract with her husband, make loans to him, and take security for repayment, she must act in subordination to the general laws as well as others. A fraudulent conveyance to her, with her assent, can no more be supported and allowed to defeat creditors, than if made to a stranger. She can no more participate in a fraudulent conveyance and seek benefit under it, than can an indifferent person. She may lose her own property by actual fraud, uncoerced. She cannot acquire property from her husband through the instrumentality of his fraud, known to herself, to the injury of his creditors.

There must be a new trial. Let this be certified.

Error. *Venire de novo.*

Cited: Cannon v. Young, 89 N.C. 266; *Guggenheimer v. Brookfield,* 90 N.C. 235; *McDonald v. Carson,* 94 N.C. 507; *S. v. Thomas,* 98 N.C. 606; *Michael v. Foil,* 100 N.C. 191; *Thurber v. LaRoque,* 105 N.C. 313; *S. v. Booker,* 123 N.C. 725; *Graves v. Jackson,* 150 N.C. 385; *Carter v. R.R.,* 165 N.C. 253; *Shaw v. Public-Service Corp.,* 168 N.C. 615; *S. v. Baldwin,* 178 N.C. 697; *Jones v. Taylor,* 179 N.C. 296; *S. v. Lee,* 196 N.C. 716.

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JOHN A. SMITH v. J. T. GOOCH, ADM'R.

Married Woman, Contracts of—Proceeding Against.

The separate estate of a married woman could under the former practice be subjected to the payment of her debt (contracted in 1860) only by bill in equity—a proceeding *in rem,* not *in personam.* Her contract is void and will not support an action at law against her.

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

On the 12th day of October, 1860, the defendant's testatrix, Virginia A. Johnson, who at the time was a feme covert, being the wife of James A. Johnson, purchased a female servant from one Samuel Douglas for the sum of seventeen hundred dollars and gave her note under seal for the same with the plaintiff John A. Smith and O. A. Smith as her sureties.

In the year 1867 an action was brought on this note by Douglas against the plaintiff, and a compromise effected by the plaintiff's paying Douglas six hundred and forty-four dollars and eighty-one cents. At the time of this payment, and ever since, the said O. A. Smith has been insolvent.

Virginia A. Johnson died in the year, 1871, leaving a will, which was admitted to probate and the defendant was appointed and qualified as her administrator *de bonis non* with the will annexed, in the year 1878.

Prior to the marriage between the said Virginia (then Bynum) and James A. Johnson in the year 1859, a marriage settlement by deed was made between them, in which all of her real and personal estate was conveyed to John J. Long in trust for her sole and separate use during her life, and to pay the proceeds thereof to her or her order. And it was stipulated therein that, "if the said Virginia shall die, leaving issue of the said marriage, then the same is to be held (277) by trustee for the benefit of the said issue; and if the said Virginia shall die without leaving issue of the said marriage, then the trustee is to hold the same for such purposes as she may declare by deed executed in her life time, or by her last will and testament, or other writing in nature of a will. The said trustee is not required by this instrument to take possession of any of the property herein conveyed, unless specially required to do so by the said Virginia, and unless required by her to take possession of the trust estate and effects, he is to allow her to continue in possession and to receive all the proceeds thereof according to the true intent and meaning of this instrument. It is, however, understood and agreed between the parties, that if the said Virginia shall desire to have any of the property herein conveyed sold, it shall be the duty of the trustee to sell the same in such mode and manner as she may direct, and to invest the proceeds of the sale for the benefit of the parties concerned, according to their rights and interests in the property sold, prior to the sale thereof."

The following issues raised by the pleadings were submitted to the jury:

1. Did Virginia A. Johnson execute the bond mentioned in the complaint? and by consent the jury responded to this issue as follows—"Mrs. Virginia A. Johnson being a married woman signed, sealed and delivered the bond declared on."

2. If so, did John A. Smith execute the bond as surety? The jury responded by consent—"He did."

3. If so, did John A. Smith pay any part of said bond, if so, how much and when? The jury responded by consent—"He did, in June or July pay $640.81."

4. Was the consideration of said note the purchase by the said Virginia A. Johnson of a female house servant? The jury responded by consent—"Yes."

5. Did John J. Long, trustee, assent to the purchase of said (278) servant?

On this last issue the plaintiff introduced the marriage settlement, and the plaintiff was then introduced as a witness in his own behalf and offered to prove that the trustee gave his assent to the purchase of said slave by Virginia A. Johnson. The witness was objected to by the defendant as being incompetent under section 343 of the Code and the testimony as irrelevant. The court sustained the objection and the plaintiff excepted.

The plaintiff also proposed to prove the insolvency of James A. Johnson, which was objected to by the defendant as immaterial and irrelevant; the objection was sustained and the plaintiff excepted, and thereupon the jury responded to this issue—"No."

It was admitted on the trial that John J. Long was dead. Upon the finding of the issues by the jury the court rendered judgment in behalf of the defendant, from which the plaintiff appealed.

Messrs. T. W. Mason, T. N. Hill and W. C. Bowen, for plaintiff.
Messrs. R. B. Peebles and Day & Zollicoffer, for defendant.

ASHE, J. The exceptions taken by the plaintiff on the trial to the rulings of his Honor in rejecting the testimony offered by him, were properly overruled. Whether the plaintiff was a competent witness under section 343, it is needless to consider; for whether competent or not, the testimony he proposed to give touching the assent of J. J. Long to the purchase of the slave by the defendant's testatrix, was clearly irrelevant to the fifth issue, the issue itself was immaterial, and if the rejected testimony had been admitted and the issue found in the affirmative, it could in no manner have affected the case;
(279) and the exception to the refusal to admit proof of the insolvency of Johnson is, for the same reason, untenable.

The action is in nature of assumpsit for money paid to the use of the defendant's testatrix, founded upon her implied promise to repay to the plaintiff the money he had expended for her use. The alleged consideration was, that the plaintiff as her surety on the bond given by her for the purchase of a female slave, had been compelled to pay the sum sued for in this action.

The action cannot be maintained. There is no consideration to support an implied promise on the part of the defendant's testatrix. She was a married woman at the time of giving the bond to Douglas, and there is no principle of law better settled than that the contract of a married woman is not only voidable, but absolutely void. The effect of the marriage for most purposes is to render husband and wife one person, in contemplation of law, and her legal existence is merged in that of her husband, and having no legal entity, she is on that ground

incapable of binding herself by a contract, and consequently no action will lie against her for a breach of it.

Huntley v. Whitner, 77 N. C., 372, is directly in point. The action was upon a bond given by a feme covert as a tenant in common upon the partition of land for owelty of partition. The court say, "to put it in the strongest light for the plaintiff, it was a bond given for the acquisition of property to make equality of partition of land between her and her sisters. She is not bound upon the bond."

But the plaintiff says, although the testatrix was a married woman at the time she executed the bond to Douglas, she had a separate estate, and the bond was a charge upon that property—was so intended to be at the time of its execution—and he has the right to subject the property to the satisfaction of his debt, which stands upon the same footing with the bond. Admitting that to be so, the separate estate of the defendant's testatrix cannot be subjected (280) to the payment of her debts in this form of action. The separate estate of a married woman could under the former practice only be reached by a bill in equity. It was a proceeding *in rem* and not *in personam*. There is no error, the judgment must be affirmed.

No error. Affirmed.

THOMAS G. WALTON AND OTHERS v. JOSEPH C. MILLS.

Injunction—Water Rights.

1. An injunction will not be granted to restrain defendant from a contemplated diversion of water, (by means of canals in process of construction) intended to be used in gold-washing operations, upon an allegation that the same will cause injury to similar operations of plaintiffs, the lower proprietors on same stream.
2. The relative rights of upper and lower proprietors of land over which a natural water-course flows, to the running water, discussed by SMITH, C. J. Such right should be established by finding of a jury. Injuries—when compensated in damages at law, and when irreparable and calling for injunctive relief.

APPEAL from an order continuing an injunction, made at Spring Term, 1881, of BURKE Superior Court, by *McKoy, J.*

The defendant appealed.

Messrs. Merrimon & Fuller and W. W. Fleming, for plaintiffs.

Mr. G. N. Folk, for defendant.

(281) SMITH, C. J. The object of this action, brought by several proprietors of land on an unnavigable stream which proceeds from an upper tract belonging to the defendant, is to restrain him from a contemplated diversion of its waters from their proper channel by means of canals and conduits in process of construction, and which the defendant intends to use in gold washing operations, to injury of the gold mines and mills on the plaintiffs' lands which require the uninterrupted flow of the water. Upon an *ex parte* application of the plaintiffs the judge appointed a day for the hearing, and meanwhile issued an order requiring the defendant to desist "from diverting or changing from their natural course, the waters of Hall's Creek and its upper tributaries, or otherwise obstructing or interfering with the natural and regular flow thereof." At the hearing upon the complaint, answer and accompanying affidavits offered as evidence, his Honor "adjudged that the restraining order be continued and the defendant enjoined as directed in the restraining order from doing the acts therein forbidden, until the hearing of the cause." From this judgment the defendant appeals.

It does not appear that any damage to the property of the plaintiffs has yet accrued from any act of the defendant whose canals and conduits have not tapped the creek to drain its waters, and it is from the apprehended consequences and injury to follow when this is done that the coercive power of the court is sought in advance.

The relative rights of lower and upper proprietors of land over which a natural water-course flows, to the running water, are well settled, and have been so considered ever since the elaborate judgment rendered in *Mason v. Howard,* 5 B. and A. 1, and the true principle, *"most perspicuously stated,"* as observed by BARON PARKE in *Embrey v. Owen,* 6 Exc., 369.

(282) "Every proprietor of land on the bank of a river has naturally an equal right to the use of the water which flows in the stream, adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has the right to use the water, to the prejudice of the proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere* is the language of the law. Though he may use the water while it runs on his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel, when it leaves his estate. * * * Streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the

universal sense of mankind, to debar any riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned." 3 Kent. Com., 439, 440.

The reasonable use of the water as it passes in its onward course so that no damage is done by withholding it, is the rule by which the rights of riparian owners are regulated. Ph. Rights of Water, 26, 27; and this is recognized in *Pugh v. Wheeler,* 19 N. C., 50; *State v. Glen,* 52 N. C., 321. Conceding the general principle, it does not follow that when the injury from the excessive appropriation of the water by an upper proprietor to the land of a lower proprietor is inconsiderable, and may be compensated in damages, while the stoppage of the works of the other will entail on him large and irreparable loss, the restraining power will be exercised; and still less when the injury to the complaining party is uncertain in fact and degree, and mainly conjectural and apprehended. It is not every case in which an action will lie that a court of equity will interpose.

"There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion (283) a constantly recurring grievance which cannot be otherwise prevented but by an injunction." 2 Story Eq. Jur., Sec. 925. And usually the right should be established by the finding of the jury. High on Inj., Sec. 517. "It is not every slight or doubtful injury," remarks NASH, C. J., in *Wilder v. Strickland,* 55 N. C., 386, "that will justify the courts in exerting their extraordinary power of injunction in restraining a man from using his property as his interest may demand, when the benefit is mutual to the public and the owner."

The present interlocutory order of restraint suspends the operations of the defendant, looking to the successful working and development of a new and valuable industry, with the possible loss of a large expenditure towards that object when no damage has yet been received, and if it should come, may prove less than the defendant's apprehensions may have estimated, and measurable in a money remuneration. We have so recently had occasion to consider this aspect of the case and the practice appropriate thereto, that we simply refer to *Dorsey v. Allen,* 85 N. C., 358, and avoid needless repetition.

Looking into the evidence which we find much difficulty in understanding from the want of a map to show the locality of the different objects to which it refers, it seems that the defendant proposes to conduct the waters of Hall's creek and some of its tributaries by means of canals to his gold mine and there to use and waste it in washing

the auriferous earth, and separating from it the gold which it contains, by a process suitable to that end. The plaintiffs allege that this withdrawal of the water will seriously injure their similar gold operations and interfere with the working of their mills, for which the water supply will be wholly insufficient. The defendant on the contrary avows that he owns over two thousand acres of land
(284) valueless except as a gold mine, for which the water is an indispensable necessity; that he has made large expenditures in preparation for his work; that the intended diversion of part of the waters will still leave a sufficient supply for all the plaintiffs' purposes, milling, mining or agricultural, for which their lands have hitherto been, or are now, or intended to be used, and they would still have double the quantity abstracted by the canals of the defendant, and he attempts to explain the sources from which this supply will be derived. The plaintiffs assert their property also to be valuable, if the waters of the creek and its branches are permitted to flow on free from obstruction or drainage, and the serious detriment it will sustain if the defendant is allowed to carry out his designs. Thus it would seem that while on the one hand the plaintiffs would sustain great injury if the current of the creek and its tributaries are diverted from the proper channel, and their needed supply cut off; so on the other hand would the defendant be subjected to much loss from the moneys he has expended in the impaired value of the land if frustrated in the only feasible way of mining upon it. In the one case, there may be adequate compensation in damages obtained, in the other, there may be none or a very imperfect redress. The defendant denies that any injury not easily remedied will arise from his use of the water, and it does not appear that any mining operations are now carried on by the plaintiffs. There has been no jury verdict to settle these disputed issues of fact, and will be before final judgment. If the defendant is ultimately required to fill up his canals, he will have no cause of complaint for expenditures made since the institution of the suit and in view of its unfavorable results to himself.

There has as yet been no damage; if there shall be hereafter before trial, application can then be heard for a restraining order, founded upon actual and ascertained, not upon conjectural damages merely. We think, therefore, the injunction attended by such
(285) consequences was prematurely issued and there was error in awarding it. This new industry of gold washing may from necessity require some modification of the general law, since for mill and mechanical purposes the use of the passing water as a moving power does not destroy, or in any considerable degree, reduce the volume which still flows on for the use of others. The diversion for

gold washing often at remote points, involves its total loss to others. How these conflicting industries are to be reconciled may present a problem not easy of solution upon the rule hitherto established. But the question does not arise and we now simply decide that there is error in continuing the injunction, but without prejudice to the plaintiffs' right to move for it hereafter when the case then presented will admit.

The judgment must be reversed, and this will be certified.

Error. Reversed.

Cited: Adams v. R.R., 110 N.C. 330; *Hyatt v. DeHart*, 140 N.C. 271; *Griffin v. R.R.*, 150 N.C. 315; *Rope Co. v. Aluminum Co.*, 165 N.C. 576; *Smith v. Morganton*, 187 N.C. 803; *Cook v. Mebane*, 191 N.C. 452.

COMMISSIONERS OF WAKE COUNTY v. A. MAGNIN AND OTHERS.

County Commissioners—Parties—Demand—Official Bonds—School Fund.

1. The commissioners of a county are proper parties relator to sue upon the official bond of a county treasurer to recover county school fund—approving case between same parties, 78 N. C., 181; and no demand is necessary before suit brought, where the officer collects and retains the money or fails to pay it over to his successor.
2. The bond of a county treasurer, conditioned, "that whereas he has been appointed treasurer and become disburser of the school money, now therefore if he shall well and truly disburse the money coming into his hands, under the requirements of law," etc., covers an alleged defalcation from the school fund.
3. The act in reference to official bonds (Bat. Rev., ch. 80,) does not operate to add provisions, which are not, but should have been incorporated in the condition, but simply cures certain irregularities which might otherwise affect the validity of the instrument as an official undertaking.

CIVIL ACTION tried at Fall Term, 1881, of WAKE Superior (286) Court, before *Gilmer, J.*

The action was brought in the name of the state on the relation of the board of commissioners of Wake County, upon the official bond of the defendant as county treasurer. The defendant, Bunting, demurred to the complaint, and from the judgment of the court sustaining it, the plaintiffs appealed.

Messrs. George H. Snow and T. R. Purnell, for plaintiffs.

Messrs. E. G. Haywood, Hinsdale & Devereux, D. G. Fowle and Walter Clark, for defendants.

SMITH, C. J. The defendant, Magnin, on his appointment to fill a vacancy in the office of county treasurer in September, 1873, as principal, and the other defendants, as sureties, executed the bond set out in the complaint and containing this condition: "The condition of the above obligation is such, that whereas, the above bounded, Albert Magnin, has been duly appointed treasurer of Wake County and become disburser of the school money; now, therefore, if the said Albert Magnin shall well and truly disburse the money coming into his hands under the requirements of law, then in that case, the above obligation to be void, otherwise to remain in full force and effect."

When his term expired on the first Monday in Septemebr of the year following, the said Magnin had, or ought to have had, of the moneys received by virtue of his office for county school pur-
(287) poses, an unexpended balance of $2,648.38, as appears upon his own sworn return annexed as an exhibit to the complaint, for which sum, reduced by about $34, the present suit is prosecuted by the board of county commissioners. To the complaint making these allegations, the defendant, Bunting, alone demurs, the record being silent as to the others, assigning several causes of demurrer, the substance of which is embodied in the following:

1. For that the relators are not proper parties, and the action can only be maintained by, and on the relation of the successor in office to whom the fund is due.

2. For that no sufficient demand was made before bringing the action; and

3. For that the default set out is not covered and protected in the condition of the bond.

His Honor sustained the demurrer and adjudged that the defendant, Bunting, go without day and recover his costs. From this ruling the relators appeal.

I. The objection, based upon the form of the action, we consider settled and disposed of in the former action between the same parties, (78 N. C., 181,) and upon the construction of the different statutory provisions relating to the subject.

II. The second cause of demurrer assigned is equally untenable.

The cases cited in the argument of counsel for the appellants, *State v. McIntosh*, 31 N. C., 307, and *State v. Woodside*, Ib., 496, which were actions upon the sheriff's bond, and *Little v. Richardson*, 51 N. C., 305, which was upon the clerk's bond, decide the general propo-

sition that a demand before suit is not necessary, when a public officer collects and retains money which he ought to pay over, and it embraces the case of a retiring officer who is required to deliver and pay over to his successor the funds and other effects in his hands.

But the objection, if it possesses any force, does not lie against the complaint which does sufficiently aver a demand. (288) It alleges the failure of Magnin to disburse and account for the sum due, "although *demand has been made upon him, the said Albert Magnin, by the plaintiff,*" and that his failure consisted in not "well and truly accounting therefore or by paying over the said sum of $2,613.70 to his, the said Albert Magnin's successor in office." This is clearly a demand, and a demand that the moneys be paid, not to the state, nor to the relators, but to the *county treasurer, his successor in office.*

III. The remaining question raised by the demurrer, as to the sufficiency of the terms employed in the condition to cover the default set out in the complaint, is not free from difficulty, and we reach its solution with some hesitancy.

The county treasurer becomes, *ex-officio,* "treasurer of the county board of education." Bat. Rev., ch. 68, sec. 32.

The county treasurer of each county shall receive and disburse all public scshool funds. But before entering upon the duties of his office he shall execute a bond with sufficient security in double the amount of money which may come into his possession during any year of his official term for the faithful performance of his duties, as treasurer of the county board of education. Sec. 34.

All orders upon the county treasurer for school money * * * shall be signed by the school committee of the township * * * which orders, duly endorsed by the persons to whom the same are payable, shall be the only valid vouchers in the hands of county treasurers, for disbursements of school money. Sec. 35.

These are the principal special provisions relating to the functions and duties appertaining to the office of treasurer of the county board of education, as separate from that of county treasurer, with which it is blended.

The disbursements mentioned in the section last referred to, and of which the orders taken up are declared to be the only valid vouchers for moneys paid out, have reference to the administration of the fund, and contemplates a settlement of the (289) treasurer's account. In this restricted sense the word is there used, and this is its ordinary meaning. In the section next preceding, when his duty is declared to be to *"receive and disburse"* the fund, the term seems to have a wider scope, and as he is to be *charged*

with whatever moneys he may *"receive,"* so is he to be *discharged* and *exonerated* to the extent he may *disburse* or rightfully pay out to those who may be entitled to receive; and it is not an unreasonable interpretation of the language to extend the obligation it imposes, to a delivery or payment to the successor of any residue, not expended in taking up the orders. The only obligation imposed in express words is, to *"disburse all public school funds,"* and if this includes the official duty of a final settlement with the successor, the similar language employed in the condition of the bond, must have an equally comprehensive import and be construed to cover the alleged defalcation.

We do not ascribe to the act of March 28th, 1870, Bat. Rev., ch. 80, (which is but a re-enactment of the act of 1842, with the modification necessary to adapt it to the new system of municipal government,) the effect of introducing into an official bond provisions which are not, but ought to have been inserted in the condition, so as to extend the liabilities of the obligors; but the purpose is to cure certain defects and irregularities in conferring the office and accepting the instrument, and to maintain its validity as an *official undertaking, as far as it goes,* notwithstanding the penalty or condition may vary from those prescribed by law. *State v. Pool,* 27 N. C., 105; *State v. McMinn,* 29 N. C., 344; *State v. Jones,* Ib., 359; Bat. Rev., ch. 80, sec. 16.

In the interpretation of every written instrument, we must ascertain from the words employed the common understanding and intent of the parties to it, and a literal and strict meaning should not be
(290) put upon it repugnant to that intent. The safe keeping, disbursement, and delivery over of the funds are the official duties enjoined, and it is no constrained construction of the defendant's undertaking that their principal "shall well and truly disburse the money coming into his hands under the requirements of law," that it should extend to the entire fund, and his legal disposition of it in full discharge of himself and his sureties. This was manifestly the purpose of the bond and the common understanding of its import when entered into.

It is to be regretted that there should be such negligence and inattention in those who are required to take public securities, as the present case discloses, endangering alike their own and the public interest, and leading often to protracted and expensive litigation.

But for the reasons stated we uphold the sufficiency of the condition of the present bond as a protection against the official delinquency assigned as the cause of action. The judgment sustaining the demurrer must be reversed and the demurrer overruled.

Let this be certified.
Error. Reversed.

Cited: Furman v. Timberlake, 93 N.C. 67; *County Board of Education v. Bateman,* 102 N.C. 58; *McGuire v. Williams,* 123 N.C. 357; *S. v. Gant,* 201 N.C. 232; *Midgett v. Nelson,* 214 N.C. 397.

J. C. HALLYBURTON AND OTHERS, EXR'S, V. JOHN CARSON, EX'R.

Wills—Effect of Codicil.

The testator by will executed in 1857, devised different tracts of land to nephews—the tract upon which he lived, among others, to his nephew, John; and gave his executor power to sell all his real and personal estate not thereinbefore mentioned. In 1863, some of the devisees having died, the testator executed a codicil disposing of lands given to them, and making other changes, in which he devises to said John all his "out lands" in a certain locality, and "all his lands not devised in the within specifically"; *Held* that by virtue of the codicil, the sole estate in the lands mentioned is given to the devisee, John, unconditionally and without charge, and that the same are not primarily liable for the testator's debts.

CIVIL ACTION for construction of a will tried at Fall Term, (291) 1881, of MCDOWELL Superior Court, before *Seymour, J.*

The defendant appealed from the ruling of the court below.

Messrs. W. H. Malone and P. J. Sinclair, for plaintiffs.
Mr. J. M. McCorkle, for defendant.

SMITH, C. J. The plaintiffs, as executors of Jacob Harshaw, prosecute their action against John Carson, to enforce the sale of certain lands alleged to be charged in the testator's will with the payment of debts and the appropriation of the proceeds to the satisfaction of the residue of a judgment recovered by their testator against the defendant in his two-fold representative capacity, as executor of the said George M. Carson and of William M. Carson, and against A. Burgin as administrator of J. L. Carson.

The plaintiffs allege the insolvency of the estates of the other debtors, the exhaustion of the personal estate of the testator, George M., in the course of administration and by the emancipation of his slaves, and the consequent necessity of a sale of the lands devised for that purpose to the defendant.

The defendant in his answer insists that large amounts of personal property bequeathed and delivered to various legatees, should be accounted for by them before resort can be had to the devised real estate, and that the land devised to himself is not specifically charged, and is liable only to contribute its ratable part to pay the testator's indebtedness.

The other devisees and legatees come in and by their answer controvert the claim of the executor, and insist that the undescribed
(292) lands mentioned in the last clause of the will, are primarily charged with the debts, and the authority and direction therein given to the defendant to make the sale for that purpose, are not revoked by the modification made in the codicil.

In this state of the pleadings, the defendants, other than the said John Carson, move the court for an order requiring him, as executor, to sell the lands comprehended in the last clause of the will, and apply the proceeds to the indebtedness of the testator, and that he account for the rents and profits received by him since he took possession—there being no personal property left.

The court refused to so adjudge, being of opinion that the provision for the sale in the will had been revoked in the codicil, and that the primary liability did not rest upon those lands.

The appeal from this ruling brings up, as the only question in the case, the construction of the testator's will, as modified in the codicil, in its application to the lands referred to.

The testator, whose will was executed in 1857, devises different tracts of land to his several nephews named, and among others to his nephew John, the defendant, the tract whereon he then resided, and bequeathes certain slaves to him, and to the testator's nieces, and concludes as follows: I do nominate John Carson, William's son, executor of this my last will and testament, with power and authority to sell all my estate, real and personal, not hereinbefore mentioned, and collect all debts due me, and after paying all my just debts, to divide the remainder equally between the children of my brother William M. Carson. In testimony whereof, etc.

In July, 1863, some of the devisees having died, the testator executed a codicil disposing of the lands given to them, and making other changes in the will, and concluding thus: The land given
(293) to Mary and Margaret Carson in item 5 of the within, known as the "Long Field," is hereby revoked, and I give and bequeath the same to John Carson and his heirs, and I likewise give, bequeath and devise to John Carson all my interest in the out lands in this county or Yancey, *and to have all my lands not devised in the within specifically*, except my undivided interest in the place known as the

"Fork Place," adjoining Elijah Hall, which I devise to Catherine Carson, daughter of William M. Carson, and their heirs. Given under, etc.

The testator died and his will was offered by the executor for probate and proved the same year.

Had the original will remained without change, it would admit of but one interpretation, and the residuary fund, the personal estate first and the land afterwards of which it consists, be successively applied to the discharge of the indebtedness and in exoneration of the special devises and legacies previously mentioned, and the residue not required for that object, he divided among the children of his brother, William, the executor being one of the number. The codicil indicates a purpose of larger generosity towards the nephew, upon whom he devolves the administration and settlement of his estate in the clause recited therefrom. Not only does he revoke the gift in the fifth clause of the will to Mary and Margaret, daughters of a deceased brother, J. L. Carson, and devise the "Long Field" tract to John, but he adds to it, "all my (his) interest in the out-lands" in the counties of McDowell and Yancey, and "all my (his) lands not devised in the within specifically," except an undefined interest in the "Fork Place," which he devises to Catherine, daughter of said William. The change made by the codicil in the last clause of the will is radical and pervading.

In the will authority is conferred upon the executor to sell the residuary personal and real estate, and a share only in the surplus, if any, produced by the sale and collection of moneys due the estate. In the codicil the residuary estate, less the excepted in- (294) terest devised to Catherine, is itself directly devised to John, coupled with no condition and burdened with no express charge. The one gives the power of sale to the executor, and directs the appropriation of the proceeds, with a contingent and undivided interest, in common with several others, in so much of the fund as may not be used for the specified purpose; the other vests at once upon the testator's death a sole estate in the land for the devisee's own use.

To transfer the provisions relating to the sale and contained in the will, and attach them to the devise in the codicil, would be substantially to destroy its value and defeat the manifest purpose of the testator in making the change. Where the codicil is in irreconcilable conflict with the will, it must prevail as a revocation, since it is the last expression of the testator's intent in the disposition of his property.

We have not been aided with an argument in behalf of the appellee, but our conclusion as to the proper interpretation of the concluding clause of the codicil and its operation upon the concluding clause of

the will, is not at variance with the rule of construction laid down in the authorities cited for the appellant. They establish the proposition that a codicil, which does not in terms revoke a clause in the will, but modifies it in some of its features, entirely consistent with the retention of its other provisions, will only be allowed to have that partial effect, and the clause thus changed will remain as the embodiment and expression of the testator's intent.

"If the codicil is expressed to allow the will in one particular, the presumption is," says a recent author, "that it confirms and republishes the rest of the will." O'Hara on Wills, p. 6. "It is an established rule not to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil." 1 Jar. Wills, 343, note.

(295) Thus a change of devisees to whom land is given subject to a rent charge, will not revoke the rent charge, but the substituted devisee will take the land *cum onere*. *Becket v. Hardin*, 4 M. and S., 1. The object in all cases is to arrive at the intent of the testator and give effect to both instruments when they can operate in harmony. But in the case before us the absolute and unqualified gift in the codicil is incompatible with the disposition of the land made in the will, and must have a revoking efficacy or be itself nugatory. The undisposed of lands with debts collected were to constitute a fund for the payment of the testator's liabilities; they are in the codicil (with the reservation mentioned) divested of any charge, as is the "Long Field," directly given to the devisee. These provisions cannot stand together, and we therefore sustain the ruling of the court as to the legal effect of the codicil in this particular.

There is no error, and this will be certified to the superior court of McDowell.

No error. Affirmed.

Cited: Halliburton v. Carson, 100 N.C. 103; *Baker v. Edge,* 174 N.C. 103; *Armstrong v. Armstrong,* 235 N.C. 735, 736.

JOHN W. COLE AND OTHERS v. H. W. COVINGTON AND OTHERS.

Wills—Devises and Bequests.

1. A testator is presumed to use words in their strict primary acceptation, unless it is discovered from the context of the will that they were used in a different sense.

2. After *devising* lands and *bequeathing* personal property, the testator in the residuary clause devises and bequeaths to his executor all the residue of his estate, real and personal, to be sold, and directs that debts and legacies be paid, and that the balance of proceeds of sale be divided among legatees in proportion to legacies severally given; *Held* that the devisees as such are not entitled to share in the distribution of the proceeds.

3. A bequest of a debt to a debtor does not extinguish the debt, but operates as a *legacy*, and is liable like other assets to the payment of debts of the estate. And hence under the residuary clause here, the *legatees* whose legacies consisted of their own debts, as well as the other legatees, will share in the distribution.

CIVIL ACTION for construction of will tried at Spring Term, (296) 1881, of RICHMOND Superior Court, before *Gudger, J.*

Stephen W. Covington died in the county of Richmond, leaving a last will, in which he disposed of his estate as follows:

Item 1. I give to my nephew Harrison W. Covington what he owes me and two hundred dollars in addition.

Item 2. I give and bequeath to each of the children of my deceased brother, Benjamin H., one hundred dollars.

Item 3. I give and bequeath to Elizabeth Wheeler and Sallie Dowd, children of my deceased sister, Sarah A. Little, five hundred dollars each.

Item 4. I give and bequeath to Caroline H. Cole, wife of A. T. Cole, and to Martha H. Covington, wife of E. D. Covington, six hundred and twenty-five dollars each.

Item 5. I give and bequeath to Fannie Dockery, wife of H. C. Dockery, and to Henrietta Walker, wife of P. D. Walker, five hundred dollars each.

Item 6. I give and bequeath to the children of my deceased nephew, William C. Covington, five hundred dollars to be equally divided between them.

Item 7. I give and bequeath to my sister-in-law, Rachel C. Covington, wife of my deceased brother, C. C. Covington, one hundred dollars.

Item 8. I give and devise to my nephews, James M. Covington, C. M. Covington and W. W. Covington, my tract of land on the northwest side of Hitchcock creek, known as the "Lamply Place," to hold to them and their heirs as tenants in common. I also give and bequeath to each of them the amount of the debts they sever- (297) ally owe me.

Item. 9. I give and devise to my nephew, Calvin C. Covington, and to my niece Corinna Horne, my "Home Place," to have and to hold as tenants in common. I further give and bequeath to each of them

five hundred dollars, and to C. C. Covington my gold watch and chain, and whatever he may owe me.

Item 10. I give and devise and bequeath to my executors hereinafter named, all the rest and residue of my estate, real, personal and mixed, to be sold by them, and after the debts and costs and charges of administration of my estate and the legacies herein provided for are paid in full, then the balance of the proceeds of sale and amount collected on debts due me, is to be divided among my nephews and nieces herein mentioned in proportion to the legacies severally given to them herein.

Both parties appealed from the judgment of the court below.

Mr. Frank McNeill, for plaintiffs.

Mr. John D. Shaw, for defendants.

RUFFIN, J. The action is brought for the purpose of obtaining the advice of the court in construing the will of Stephen W. Covington. In the complaint several difficulties are suggested, as to all of which the parties received the advice of the court below, and a judgment was rendered in accordance therewith, from which a portion of the plaintiffs, to-wit, J. M. Covington, C. M. Covington, W. W. Covington, C. C. Covington, and the defendant, H. W. Covington, appealed, presenting for the consideration of this court but two points as to which advice is asked:

1. Whether, in the distribution of the estate under the residuary clause, and ascertaining the share of each of the nephews and
(298) nieces therein, the lands devised to some are to be considered, and if so, how the same are to be valued.

2. Whether in such distribution the debts forgiven to some are to be considered, and if so, how their values are to be ascertained.

His Honor was of the opinion that neither the devises nor the debts forgiven should be taken into account in determining the shares of the several parties in the distribution under the said residuary clause, and so declared in the judgment rendered.

As to the first point. We fully concur in the opinion expressed by his Honor. It is unquestionably true that in several instances, both in England and this state, the term "legacy," which in its technical sense is peculiarly applicable to personal estate, has been so construed by the courts as to embrace lands. *Hope v. Taylor,* 1 Burr., 268; *Hardnell v. Nash,* 5 Dum. and East, 716; *Ladd v. Harvey,* 1 Foster, 514; *Holmes v. Mitchell,* 6 N. C., 228; and *Williams v. McComb,* 38 N. C., 450.

But in each of those cases the wills were inartificially drawn, and were evidently the work of some one not versed in technical, legal phraseology, and the courts felt constrained by the context thus to interpret the term, in order to give effect to the testator's intentions as manifested by the whole will. In this instance, we find nothing in the context to control the strict, legal signification of the word used. The testator, if he himself drew the instrument, and if not, then the person employed, was evidently conversant with the correct use of legal terms, as is apparent from the change of phraseology in the different clauses, and sometimes in the same clause of the will, with reference to dispositions of real and personal estate. This being so, the case falls absolutely under that of *Ellis v. Meadows,* 84 N. C., 92, in which the present Chief Justice quotes with approbation the rule laid down by SIR JAMES WIGRAM, that every testator must be presumed to use words in their strict primary acceptation, unless it be dis- (299) covered from the context that they were used in a different sense.

As to the other point: We feel ourselves constrained by the authorities to adopt a view differing from that which his Honor seems to have taken of it. "If a testator expressly bequeaths the debt to his debtor, this being nothing more than a release by will, operates only as a *legacy,* and the debt is assets, and subject to the payment of the testator's debts." Williams on Ex'rs., 1174. Again at page 1235, the same author says, if a testator by will forgive a debt due to him, it is to be regarded in the light of a *legacy,* and like all other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts.

In *Rider v. Wager,* 2 Piere Williams, in speaking of a bequest of a debt to a debtor, the LORD CHANCELLOR said, it was no more than a release by will, which though not in strictness a release, being by will, could only operate as a *legacy,* and must be assets and liable to pay the testator's debts. In *Anthony v. Smith,* 45 N. C., 188, where a testator bequeaths to his debtor the bond which constituted the debt, and after making the will, caused it for certain reasons to be renewed, this court held, that such a renewal was no ademption of the *legacy.* But in *Cheshire v. Cheshire,* 19 N. C., 254, the very point for consideration was, whether such a bequest of a debt to the debtor, should be regarded as an *extinguishment* of the debt, or as a *legacy* requiring the assent of the executor, and the court say that, after an examination of all the conflicting *dicta* on the point, they adopt the conclusion that it is a *legacy,* as being most in accordance with principle and best sustained by the authority.

Such being the nature of a bequest of this character, it needs no straining of the testator's words to admit those persons to whom their

debts were forgiven, to participate in the distribution provided
(300) for in the general residuary clause of the will, and to allow them the benefit of those debts in ascertaining the amounts they severally are to take thereunder, unless there be something beyond the mere use of the term "legacy," which indicates a purpose of the testator to exclude them.

In the case of *Sholl v. Sholl,* 5 Barb., 312, cited in 2 Redfield on Wills, 133, to which reference was made by counsel, the supreme court of New York held, that a specific bequest of one's indebtedness to the testator was not such a legacy as to entitle the debtor to share with other legatees in a contingent residuary fund. But there, the testator after having bequeathed to his brother a debt due from him, gave money legacies to divers other persons, and directed "that the said legacies, *except that portion given to his brother,* should be a lien upon his real estate, which real estate should be sold, and from the proceeds thereof *the said legacies* paid; and it was held that the testator, by excepting the bequest to the brother from the operation of the clause making the legacies a lien upon his real estate, indicated a clear intention of excluding him from the participation in the proceeds of that estate.

In our case, however, we can discover no such purpose on the part of the testator to exclude that class of legatees. On the contrary, it occurs to us that full effect cannot be given to his main, primary intention, as expressed in the tenth clause of his will, except by admitting them as participants thereunder. What is that intention? Most obviously, that after the payment of his debts and specific legacies, the residue of the fund arising from the sale of his property shall be divided amongst *all* his nephews and nieces previously mentioned —"the balance to be divided amongst my nephews and nieces herein mentioned" are the comprehensive words used, and "the legacies severally given to them," are referred to, not to indicate who shall take, but the proportions of their respective shares.

(301) The limited construction insisted on would wholly defeat the operation of the testator's words, by excluding the three nephews mentioned in the eighth clause; whereas the more liberal one, and which seems to us to be the true one, leaves every word written to operate according to its natural import.

We are therefore of opinion that it was error to exclude those parties, whose legacies consisted of their own debts, from all participation in the residuary fund, and to that extent the judgment of the court below should be modified.

There must be a reference to ascertain the values of those debts, and supposing that the convenience of the parties will be subserved

thereby, we direct that the cause shall be remanded to the court below, to the end that the reference may be there had.

Error. Judgment accordingly.

Cited: Patterson v. Wilson, 101 N.C. 588.

MARTHA GILMORE v. D. C. AND J. C. GILMORE.

Wills—Evidence.

Where the validity of a will was contested on the ground of undue influence and want of testamentary capacity, the caveators proved by a witness that the propounder (surviving wife of testator) was crying while sitting on the bed whereon her deceased husband was lying, and said that the caveators "did not treat her with any respect, and if the will stood, they would treat her like a dog," it was held error to exclude the testimony of the propounder in rebuttal, under the circumstances of this case.

ISSUE of *devisavit vel non* tried at Fall Term, 1881, of MOORE Superior Court, before *Graves, J.*

Verdict for defendants, judgment, appeal by plaintiff.

Mr. John Manning, for plaintiff. (302)

Messrs. Hinsdale & Devereux, for defendants.

SMITH, C. J. The script being produced and offered for probate before the probate judge, as the will of J. J. Gilmore, by his surviving wife, Martha Gilmore, the executrix therein nominated, and a caveat entered by J. C. Gilmore and D. G. Gilmore, sons and heirs at law of the deceased, the cause was removed to the superior court, and there the following issue prepared and submitted to the jury:

"Is the paper writing, or any part thereof, and if so, what part, the last will and testament of J. J. Gilmore?"

Upon the trial the formal execution of the instrument was proved by the subscribing witnesses, and not controverted by the caveators, who contested its validity upon these assigned grounds:

1. The exercise of undue influence over the deceased.
2. The practice of fraud in procuring the making of it.
3. The want of sufficient testamentary capacity in the deceased.

Upon the trial the caveators introduced and proved by one Rachel Gilmore, that on one occasion the witness saw the propounder crying

and sitting on the bed whereon her deceased husband was lying, and heard her say, that "the boys (referring to the caveators) did not treat her with any respect, and if his (the deceased's) will stood they would treat her like a dog."

At the conclusion of the impeaching evidence, the court remarked that there was not such evidence on the questions of undue influence and fraud, as could be left to the jury. In rebuttal, the propounder proposed by her own testimony to prove conversations and communications between her husband and herself, and especially to *contradict and correct* the witness in her statement of what occurred, and what was said at the bedside of the deceased. The court, on ob-
(303) jection of the caveators excluded the testimony as bearing upon the questions of fraud and undue influence, as it had been already ruled that none had been offered in their support, but declared that the evidence was competent to show *capacity*, and would be received for that purpose only. The propounder excepted to this ruling, for that, the testimony of the witness Rachel Gilmore, having been heard by the jury, that offered in disproof of her statements should also be heard by them.

This ruling proceeds upon the idea of a withdrawal from their consideration of the two first questions, and of all impeaching evidence adduced by the caveators to sustain either; and it thus became the duty of the court to confine the argument to the sole question of testamentary capacity, and the presentation and discussion of the testimony admitted and pertinent thereto; or, if these limits were overstepped, to instruct the jury to inquire only as to whether the deceased had a disposing mind and memory, when he executed the script.

Without adverting to the harsh terms in which some of the propounder's witnesses and relations are spoken of, the caveators' counsel characterized the instrument as "a *put up job*," "a Dowd will," "a family job"—one Dowd being a subscribing witness and a brother of the propounder, who had been with the deceased during his sickness.

The attack upon another subscribing witness who testified to having drawn both scripts at the instance of his brother, the deceased, and to his sanity when they were made, was in terms not less vituperative and severe.

The course of the argument and the terms in which the script is spoken of, derive their force from the personal relations of the witnesses to the instrument, its executrix, and to the propounder, its principal beneficiary, and tend to produce the conviction that it was the result of their influence exerted over, or fraud practiced
(304) upon the deceased; and it is impossible to tell what effect the

uncontradicted evidence of the witness, Rachel Gilmore, may have had in guiding the jury to their verdict. It certainly gave countenance to the argument and tended in that direction. The propounder was not permitted to give her own version of the matter, and hence either the argument to show influence or fraud should have been arrested, or corrected afterwards by proper explanations in the charge of the jury. Neither seems to have been done, and the absence of the excluded evidence under such circumstances must have been prejudicial to the propounder's case. We are not at liberty to speculate upon the weight it might have with the jury; it is enough that it was pertinent to the question of undue influence, and the counsel were permitted to press upon the jury its exercise in bringing about the making of the script.

It is obvious that the propounder has not had a fair trial, and her case properly laid before the jury.

If it had appeared that the judge instructed them wholly to disregard the argument based upon the evidence of fraud and fraudulent influence, and decide simply the question of testamentary capacity, the ground for a new trial would have been removed, for our theory of judicial practice supposes the eradication from the minds of the jury of the effect of testimony inadvertently admitted and afterwards ruled out, or corrected, and removes the legal objection thereto, however difficult it may be in fact to obliterate the impressions which its introduction may have produced. But this was not done so far as the record shows in the present trial.

There is error, and this will be certified to the end that the verdict be set aside and a *venire de novo* awarded, and it is so ordered.

Error. *Venire de novo.*

Cited: Luton v. Badham, 129 N.C. 8.

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(305)

JAMES P. BRITT, ADM'R, v. TABITHA E. SMITH AND ANOTHER.

Wills—Residuary Bequests.

1. The rule, that where personal property is given by will to one for life with remainder over, the executor shall sell so much of it as is of a perishable nature, applies only to the case of a residuary bequest given *eo nomine* as such; and this rule, being one of construction, must be relaxed when necessary to give effect to the intention of the testator.

2. A testator devised and bequeathed to his wife during her life all his land and all his personal property, and in a subsequent clause of the will (after certain specific legacies) he gives his sister *at* the death of his wife all the balance of his personal property of every description, not heretofore disposed of; at his death, the personal property consisted of farming implements, crop, stock, notes, etc.; *Held* that the widow is entitled to have the specific articles of personalty delivered to her as tenant for life—the several things were given, not the *residue as such.*

CIVIL ACTION for construction of a will, heard at Fall Term, 1881, of GREENE Superior Court, before *Shipp, J.*

This action is brought by the personal representative of B. H. Smith, deceased, for the purpose of having ascertained the respective rights of the defendants, Tabitha E. Smith and Zilpha M. Edwards, under the will of the said Smith, the said Tabitha E. being his widow, to whom was given his estate real and personal for life, and the said Z. M. Edwards being his sister, to whom his personalty was given in remainder. The will provides as follows:

"Item 1. I leave and devise to my beloved wife, Tabitha E. Smith, during her natural life or widowhood, all of my landed estate that I may possess at my death, and also all of my personal property under same restrictions as that of my real estate, except as is herein-
(306) after provided; and after her death or widowhood, and if I should have no heirs of my body, then I give and devise to W. F. Edwards' two daughters, Cornelia and Zilpha, all of my real estate in fee."

"Item 2. I devise at my death that my administrator shall pay to Richard G. Smith and Elizabeth J. Smith, children of my half brother, Thomas Smith, the sum of three hundred dollars each, to be paid out of my personal property."

"Item 3. I give and devise to my sister, Z. M. Edwards, wife of W. F. Edwards, at the death of my wife, all the balance of my personal property of every description, not heretofore disposed of, to have," etc.

The testator died possessed of the tract of land whereon he resided, and of personalty consisting of hogs, cattle, a horse and mule, corn, cotton, pork, lard, bacon, wheat, farming utensils, household and kitchen furniture, cash on hand, and notes and accounts amounting to some $1,400. The notes and accounts have been collected, and the money used in paying the money legacies under the will and the debts of the testator, leaving a balance in the hands of the administrator of some $320.

The question presented is, whether the administrator shall deliver the personalty in kind to the widow as tenant for life, or whether he shall convert it into money and pay her the interest only, reserving the

principal to be paid, upon her death, to the sister as remainderman, and the court held that plaintiff deliver the same to the defendant, Tabitha, from which ruling the defendant, Zilpha M. Edwards, appealed.

Messrs. Grainger & Bryan, for plaintiff.
Mr. W. C. Munroe, for defendant.

RUFFIN, J. There can be no mistaking the rule as laid down (307) in *Smith v. Barham,* 17 N. C., 420, *Jones v. Simmons,* 42 N. C., 178, and *Ritch v. Morris,* 78 N. C., 377, and which must be taken, as was said by Mr. Justice BYNUM in the last of those cases, as the settled doctrine in this state. It is, that whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is, that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder.

The rule, though declared by the courts of England, so long ago as the time of LORD ELDON in *Howe v. The Earl of Dartmouth,* 7 Ves., 137, and frequently affirmed since, has never been a favorite one with those courts; and the effect of the latter cases has been to allow very slight indications of a contrary intention, on the part of a testator, to prevent its application, (*Morgan v. Morgan,* 14 Beavan, 72), and such certainly has been the tendency of the decisions made in this court, as may be seen by reference to *Taylor v. Bond,* 45 N. C., 5, *Williams v. Cotten,* 56 N. C., 395, and *Chambers v. Bumpass,* 72 N. C., 429.

So far as we have been able to inform ourselves, from a critical examination of all the adjudications upon the subject, to which we have access, no operation has, in any instance, been given to the rule, save in the case of a *residuary bequest,* given *eo nomine,* as such. In *Smith v. Barham, supra,* the very point seems to have been made—the language of the judge who delivered the opinion, being thus: "It is clear that where a *residue* is given *as such,* it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving as *corpora,* not knowing how much, or which of them it may be necessary to sell for the payment of (308) debts or other legacies." So too, by the court of appeals of South Carolina in *Patterson v. Devlin,* 1 McMullen Eq., 459, in the case of a bequest of articles necessarily consumable in the use, to one

for life with remainder over, a conversion by sale was allowed, upon the ground that it had been given as a *residuum* of the testator's estate —he having disposed of its bulk in previous clauses of his will, to those for whom it was his purpose mainly to provide—and the reason expressly assigned for making the decree is, that it was a residuary bequest, made up of the odds and ends of his estate, and consisting of things difficult to enumerate, the possession of which was not deemed of consequence to the life-tenant, and not essential to the enjoyment of other provisions made for him.

If such be the true test for the application of the rule, what a gross misapplication would it be to allow it to operate in this case! Here, the bequest to the wife, while in a certain sense it may be said to consist of the residue of the estate, that is, the surplus after the payment of debts and special legacies, differs in every material circumstance from the *residue* spoken of in those two cases. So far from being made up of worthless *corpora,* or the fragments of the estate, it embraces the whole thereof, with the slight exception of six hundred dollars, given in the way of pecuniary legacies, and to be paid, as he must have known, without resorting to a sale; and it is composed too of articles of the very first necessity and daily consumption, and such as he must have had all the while before his eyes.

But, at most, the rule is one of construction, designed to give effect to the intention of the testator, and will yield whenever he manifests a different one, or when it cannot be applied without defeating what seems to be his main purpose; and it is therefore the duty of
(309) the court, in every such case to look at the whole will, to ascertain if possible the intention there disclosed.

Looking to the one we are now called on to construe, we are struck at the very outset with the strong purpose manifested by the testator, to make an ample and certain provision for his wife. By one comprehensive clause he gives her *all* his lands for life, and with the slight exception indicated, *all* his personalty, the latter consisting, in a great degree, of articles absolutely essential to the enjoyment of the former, and indeed, we may say, necessary to her immediate comfort and support, and such as she could not supply, in the event of a sale, without incurring debt, or other inconvenience.

We cannot, therefore, for one moment suppose that contrary to his express words thus used, his real intention was not to give her any part of his personal property, but that it was designed that his representative should sell the same, and pay her its annual income for life; that his lands were to lie idle for want of animals and implements to work it; his home abandoned for the lack of furniture to render it habitable; that for a bed upon which to lie she should be-

come a debtor to his estate; and all this for the benefit of a sister whose claims upon him he evidently regards as secondary to those of his wife. Nor are we left to mere inference in the matter. The will itself, in the very clause in which provision for his sister is made, bears strong, substantive proof as to his real intention. The words used are as follows: "I give to my sister Zilpha M. Edwards, *at* the death of my wife all the balance of my personal property of *every description* not heretofore disposed of." Why speak of its being *"property of every description"* at the death of his wife, if it was intended that it should be converted into money, and could therefore be of but one description?

It is the duty of the administrator to assent to the legacy in favor of the testator's wife, and to deliver to her the money in his hands and other personal property, taking an inventory for (310) the benefit of the remainderman, of all, except such as must be necessarily consumed in its use.

A judgment may be drawn in accordance with this opinion.

No error. Judgment accordingly.

Cited: Haywood v. Trust Co., 149 N.C., 217; *Haywood v. Wright*, 152 N.C. 432; *Simmons v. Fleming*, 157 N.C. 393; *Bryan v. Harper*, 177 N.C. 309; *Burwell v. Bank*, 186 N.C. 119; *Ernul v. Ernul*, 191 N.C. 350; *Woodard v. Clark*, 236 N.C. 194.

BARBARY SIGMON v. JOHN HAWN.

Dower—Title—Estoppel.

1. This cause is remanded to the end that additional facts may be found.
2. In a proceeding for dower, where the land is treated by the parties and recognized by the court as belonging to the estate of the deceased husband, and the title as being in his heirs, the judgment rendered is conclusive between the parties and those claiming under them; and hence the widow in such case will be estopped from setting up title to herself in the land embraced in the proceeding.

CIVIL ACTION to recover land tried at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

The plaintiff, Barbara Sigmon, claiming to be the owner of the land in controversy, brings this action for the recovery of the possession thereof. The defendant considering that the land once be-

longed to the plaintiff, resists her right to the possession upon the ground that her husband, the late Abel Sigmon, disposed of the land in his last will by directing it to be sold by his executors, and by the same will made devises and bequests to the plaintiff, which she has, with a full knowledge of her right to the land, elected to take, and thereby bound herself to submit to the provisions of the will.

At the trial in the court below, a jury was waived by the
(311) parties, and his Honor found the following facts: The defendant is in possession of the land claiming it under a deed from the executors of the said Abel Sigmon who sold it by virtue of the power contained in his will, and have received the purchase money in full. At the time of the execution of her husband's will, the plaintiff executed an instrument which was incorporated in the will, and by which she professed to relinquish her right to her own land, as to which she has never been privily examined, nor has the same been registered. One of the provisions made for the plaintiff in the will is, that if not satisfied with what is given her therein, she may take dower in all the land, and in that event she is to have a certain portion of the personalty. After the lapse of eighteen months from the probate of the will, the plaintiff dissented from the same and filed her petition for dower; but the judge of probate, upon the ground that she had so long delayed declaring her dissent, refused to recognize her right to dower as under the common law, but adjudged her to be entitled to dower under the will of her husband, and so directed it to be assigned; and the same was done. The executors then sold the land in dispute and the defendant became the purchaser, but in making the sale, they professed also to act as the agent of the plaintiff, for which however (as the judge finds) they had no authority. Besides the provision made for plaintiff in her husband's will, there was a legacy given to her only child by the testator larger in amount than the provision made for his other children by a former marriage. The marriage between the plaintiff and her husband took place in May, 1869, and he received of her separate personal property more than she took, of that kind of property, under the will. The dower assigned to her is no greater than it would have been had her husband died wholly intestate.

Upon the foregoing facts, his Honor ruled, as a conclusion of law,
(312) that the plaintiff was never put to her election as to whether she would take, under or against the will; and that the assignment of dower to her, under the circumstances, was no act of election, by which she was barred from setting up claim to her own land; and thereupon it was adjudged that she recover the land of the defendant, from which the defendant appealed.

No counsel for plaintiff.

Messrs. G. N. Folk and M. L. McCorkle, for defendant.

RUFFIN, J. In the complaint, the land which is the subject of the action is described as that which is "known as a part of the David Link lands on the waters of South Fork river, and containing by estimation ninety-four acres"; and in the petition for dower filed by the plaintiff in the probate court, (which is made a part of this case) amongst the lands whereof it is said her husband died seized, mention is made of a tract "known as the David link land, containing one hundred acres more or less, on the waters of South Fork river." Judging from the similarity of the two descriptions, we infer that it is the same land referred to in both, and we were assured by counsel who argued the cause before us for the defendant, that such was his understanding of the matter. If this supposition be correct, and it be true that in the proceeding for dower the land was treated by the parties and recognized by the court as belonging to the estate of the plaintiff's husband, and the title thereof as being in his heirs, we should be constrained to hold that she is estopped by the judgment then rendered, from now setting up title to herself therein.

The very point was made in *Gay v. Stancell*, 76 N. C., 369, and it was held that inasmuch as the right to dower depended upon the title, so that in passing upon the one the court must needs consider the other, the judgment was conclusive between the parties and those claiming under them, and no one would be permitted to again (313) draw in question the title of any portion of the land embraced in the proceeding. We cannot do better than to refer to the opinion of Mr. Justice BYNUM, delivered in that case, for a clear statement of the rule itself, and the reasons upon which it proceeds.

Regarding this as a point upon which the case should turn, independently of the doctrine of election which alone seems to have been considered by the court below, we are unwilling to pass upon it so long as there is the least uncertainty as to the facts of the case, and therefore remand the cause to the end that it be ascertained, in addition to the facts already found by his Honor, whether the land now sued for was really embraced in the plaintiff's petition for dower, and the title thereto recognized and treated as being in the heirs of her husband.

PER CURIAM. Judgment accordingly.

Cited: Sigmon v. Hawn, 87 N.C. 451; *McElwee v. Blackwell*, 101 N.C. 196; *Freeman v. Ramsey*, 189 N.C. 797; *Bryant v. Shields*, 220 N.C. 634.

*THOMAS B. LASH AND OTHERS v. JOHN THOMAS AND OTHERS.

Evidence—Courts.

1. The proceedings of a justice's court, relating to a levy on land, were directed by the statute to be kept in a "bound book" by the clerk of the late county court, merely for their preservation, and where the original papers are admitted as evidence, they are received as evidence of everything that would appear from a certified transcript of the record of their enrollment.
2. The courts which existed under the former system, continued to act and were recognized as courts, until the adoption of the Code of Civil Procedure.

(314) CIVIL ACTION to recover land, tried at Spring Term, 1881, of ROCKINGHAM Superior Court, before *Avery, J.*

The plaintiffs claim the land as heirs at law of I. G. Lash, deceased, who in his life time purchased at sheriff's sale, by virtue of an execution against the defendant John Thomas, under whom the other defendants are in possession.

In support of their title, the plaintiffs offered in evidence a docketed judgment of the superior court of Rockingham County, rendered at Spring Term, 1869, in favor of I. G. Lash, their executor, and against the defendant John Thomas, and the judgment roll consisting of the following papers, admitted to be authentic and on file in the clerk's office, to-wit: 1. Evidence of debt bearing date in February, 1868; a justice's warrant dated May 14th, 1868; the return of service May 5th, 1868; a justice's judgment, execution and levy upon the land in controversy, all of the last named date. 2. A notice from the county court of Rockingham, tested as of May Term, 1868, and issued June 5th, 1868, to the defendant John Thomas, that the said execution had been returned to that court, to said May term, levied on the land, and that an order of sale would be asked for at the ensuing term, to be held in August. 3. A notice issued 8th February, 1869, from the superior court of said county to the same defendant, that the said execution had been transferred to the docket of that court, from the county court, and that an order of sale would be applied for at spring term. 4. Judgment of the superior court at Spring Term, 1869, confirming the justice's judgment and making it a judgment of that court, and directing a writ of *venditioni exponas* to issue to sell the land levied on. The writ issued; the report of sale to I. G. Lash as the last and highest bidder at the price of three hundred dollars; the execution of the sheriff's deed to him, and its registration.

*The decision in *Lash v. Price*, is the same as in this case.

This being the state of proofs, the defendants insisted that the plaintiffs could not recover:

1. For that the papers and proceedings had in the justice's (315) court were not properly authenticated, in that, no record thereof in a well bound book, had been made by the clerk of the county court.

2. That there was no May Term, 1868, of the said county court competent to receive a return of such a levy on land, that court having been abolished under the constitution of 1868.

3. That the action in which the judgment was rendered, having never been properly constituted in either the county or superior court, the latter court had no jurisdiction over it, and the judgment rendered at Spring Term, 1869, was therefore void.

Verdict for plaintiffs, judgment, appeal by defendants.

Messrs. Mebane & Scott, for plaintiffs.

No counsel for defendants.

RUFFIN, J. The plaintiffs' counsel, by his argument and the cases cited in his brief, seems effectually to have met every objection urged by the defendants in the court below.

Upon the first point, the case of *Ward v. Saunders*, 28 N. C., 382, is a direct authority. It was there held that the direction given in the statute (Rev. Code, ch. 62, sec. 17) for recording in a book the proceedings before a justice, was but a provision for their preservation, and that when the original papers are allowed to be read without objection, it must be understood, that they were received as evidence of everything that would appear from a certified transcript of the record of their enrollment.

Notwithstanding the adoption of the constitution of 1868, and the fact that it went into effect in April of that year, (as it was said in *Pemberton v. McRae*, 75 N. C., 497, to have done for purposes of domestic policy,) still the courts, which existed under the old system, did not cease to do so, or to entertain actions, until (316) the adoption of the Code of Civil Procedure. It would appear from the wording of the 25th section of article four of the constitution, as if such a state of things was positively contemplated. For not only is provision there made for the future conduct of actions pending at the adoption of the constitution, but also, for all such as might have been commenced, at any time, before the adoption, by the general assembly, of the new *rules of practice and procedure.*

But whether that be so or not, it is certainly true that generally in the state, the county courts continued to sit and to render judgments

at least so late as May, 1868, and so far as we can learn, their validity has never been questioned. Two striking instances were called to our attention by counsel—*Thompson v. Berry*, 64 N. C., 81, where at the May Term, 1868, of Iredell county court a judgment *nisi* was rendered against the sheriff of Burke for not making due return of an execution returnable to that term, and the same was held good in this court; and *Davis v. Baker*, 67 N. C., 388, where the county court of Wayne County at May Term, 1868, gave final judgment on a justice's attachment and ordered a *venditioni exponas* to issue, under which there was a sale, the validity of which was sustained by this court. It is true no such point as that now raised was made in those cases, and they are referred to only as instances in which the existence of the county courts, at that time, *as courts*, was recognized, and their power to render judgments and enforce their execution.

Being then a cause pending in the county court, it was properly transferred to the superior court upon the adoption of the Code, and under section 402 thereof, was rightly "proceeded in, and tried according to existing laws and rules applicable thereto."

No error. Affirmed.

Cited: Freeman v. Lide, 176 N.C., 435.

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(317)

J. A. COGGINS, EX'R, v. A. J. HARRELL AND OTHERS.

Jurisdiction—Sum Demanded, the Penalty of a Bond.

A justice of the peace has no jurisdiction of an action upon a bond (here a constable's) where the penalty exceeds two hundred dollars. The sum demanded is the penalty, and not the damages claimed for a breach of the bond; nor can a plaintiff remit any part of the amount of such penalty to give jurisdiction to the justice.

CIVIL ACTION commenced before a justice of the peace and tried at Fall Term, 1880, of NORTHAMPTON Superior Court, before *Graves, J.*

No pleadings having been sent up by the justice before whom the action was tried, it was agreed by consent of counsel that all irregularities in the justice's return should be waived, and that the pleadings might be filed in the superior court.

By virtue of this agreement a complaint was filed in which it was alleged: That in the year 1858, one L. W. Boykin was elected constable in Northhampton County, and on the 7th day of March,

1859, executed a bond to the state in the penal sum of four thousand dollars, conditioned for the faithful performance of his duties as constable, with Britton Sykes and Henry W. Ivey as sureties; that soon after the said 7th day of March, 1859, Henry Coggins placed in the hands of the said Boykin, as constable, for collection, and took his receipt therefor, two bonds on Thomas H. Jordan, and on the 25th day of August, 1859, said Boykin, as constable, collected on said bonds the sum of one hundred and forty dollars, which he ought to have paid over to Henry Coggins, but failed to do so; that the said Henry Coggins died in the year 1870, leaving a last will and tes- (318) tament in which he appointed the plaintiff, James A. Coggins, his executor, who was duly qualified as such on the 14th day of November, 1870; that the said Ivey died in the early part of the year 1862, leaving a will in which an executor was appointed; but he renounced, and administration *c. t. a.* was granted to W. T. Harrell and Kader Ivey, both of whom died in the year 1867, and at June court 1868, the defendants, A. J. and John W. Harrell duly qualified as administrators *de bonis non, cum testamento annexo* on the estate of Henry W. Ivey; that the plaintiff releases and forgives all of the penalty of said bond, over and above enough to cover the said sum of one hundred and forty dollars, with interest thereon at 12 per cent. per annum from August 25th, 1859; that Boykin died insolvent before the commencement of this action, and a demand was made upon the defendants, and refused. Thereupon the plaintiff demanded judgment against the defendants, as administrators of H. W. Ivey, for the sum of one hundred and forty dollars with interest at 12 per cent., etc.

The defendants demurred to the complaint and assigned the following grounds:

1. It appears from the complaint that the bond sued on was made payable to the state of North Carolina, and the defendants demur for the want of proper parties, in that the state is not made a party to this action.

2. That one Britton Sykes was one of the bondsmen mentioned in the complaint, and he should either have been made a party, or his insolvency alleged.

3. To the jurisdiction of the justice, for that, this is an action upon an official bond in the penalty of four thousand dollars.

Upon the hearing the court sustained the third cause of demurrer, and dismissed the action for want of jurisdiction in the justice of the peace before whom it was commenced, and gave judgment in behalf of the defendants for their costs of action. From which (319) judgment the plaintiff appealed.

Mr. R. B. Peebles, for plaintiff.
Mr. S. J. Wright, for defendant.

ASHE, J. The only question presented by the record is whether the justice of the peace had jurisdiction.

The action was brought before the justice for the sum of one hundred and forty dollars alleged to have been collected by L. W. Boykin, a constable, and not paid over. It was not against the constable, who was dead, but against the personal representatives of Henry W. Ivey, who was one of the sureties of his official bond. The action then must have been instituted on the constable's bond for four thousand dollars, or under section 13, chapter 80, of Battle's Revisal, which provided that when any constable, etc., shall have received any money by virtue of his office, and shall fail to pay the same to the person entitled to receive it, a justice of the peace may entertain jurisdiction of any demand not exceeding two hundred dollars and costs of action, notwithstanding the amount of the penalty of the bond sued on.

In neither view did the justice have jurisdiction: Not under said section 13 for that section is expressly repealed by the act of 1877, ch. 41. And it has been decided by repeated adjudications of this court that a justice of the peace has no jurisdiction of an action on a constable's bond. In *State ex rel. Fell v. Porter,* 69 N. C., 140, it is held that a justice of the peace has no jurisdiction under the constitution (Art. IV., sections 15 and 33,) of a suit on a constable's bond the penalty of which is over two hundred dollars, although the damages to be assessed is less than that sum, and the act of 1869-70, ch. 169,
(320) sec. 13, (Bat. Rev., ch. 80, sec. 12,) cannot be allowed to affect the conferring such jurisdiction. It was no doubt in consequence of this decision, that section 13, chapter 80 of Battle's Revisal was repealed. In the case of the *State ex rel. Bryan v. Rosseau,* 71 N. C., 194, the case of *State v. Porter,* is cited with approval, and it was there decided that in an action upon a bond, the sum demanded is the penalty of the bond, and not the damages claimed for the breach thereof; therefore when the penalty of the bond exceeds two hundred dollars, suit cannot be brought before a justice of the peace. To the same effect is the more recent decision in *Morris v. Saunders,* 85 N. C., 138.

But the plaintiff undertook to obviate the objection to the jurisdiction by entering in the superior court a release or remittitur of the penalty of the bond down to a sufficient sum to cover his claim of one hundred and forty dollars with interest. We cannot see how this can avail the plaintiff. If allowable, it came too late after the appeal from the justice's judgment. The justice had assumed jurisdiction of the bond for four thousand dollars, and if he had no jurisdiction the

superior court could acquire none upon the appeal. *Boyett v. Vaughn,* 85 N. C., 363.

But admitting it was not too late to enter the remittitur, what right had the plaintiff to remit any part of the penalty of the bond? It was a bond taken by the state. The legal interest was in the state. The state took and held the bond as trustee for all persons that might be injured by a breach of its conditions, who were authorized by law to maintain successive action upon it until the penalty should be exhausted. *McRae v. Evans,* 13 N. C., 383.

If this plaintiff could remit the penalty of the bond as attempted in this case, the bond would be satisfied by the judgment rendered upon it, and no action would lie for any further breaches thereof by other parties claiming to be injured thereby. Such a construction involves the absurdity of defeating the object the law-makers had (321) in requiring such a bond.

There is no error. The judgment of the court below must be affirmed.

No error. Affirmed.

Cited: Joyner v. Roberts, 112 N.C. 114; *Brock v. Scott,* 159 N.C. 517.

VERNON ALLEN, EX'R, v. THOMAS JACKSON.

Justice's Jurisdiction—Amendment of Summons.

1. To give a justice of the peace jurisdiction of civil actions under section twenty-seven, article four of the constitution, the summons, as a substitute for a complaint in such case, must show upon its face that the cause of action is within his legal cognizance; if the action be founded on contract, it must contain the amount of the sum demanded—not exceeding $200; if not on contract, it must specify the value of the property in controversy —not exceeding $50.
2. An amendment of summons in the superior court, that would, if made in the justice's court, have given the justice jurisdiction of the action, was properly refused.

CIVIL ACTION heard on appeal from a justice's judgment, at Fall Term, 1880, of ANSON Superior Court, before *Avery, J.*

The defendant moved to dismiss the action on the ground that it was brought, as appears from the summons, before a justice of the peace "for the recovery of a bale of cotton weighing 500 pounds as rent for a farm," and that the justice had no jurisdiction. The plaintiff thereupon moved to amend the summons so as to show that the action was

brought (on contract) "for the recovery of fifty-five dollars, the value of a bale of cotton, as rent for a farm." The judge held that no amendment could be allowed in the superior court, that would, if
(322) made in the justice's court, have given the justice jurisdiction by reason of the amendment, and ordered the action to be dismissed, and the plaintiff appealed.

Messrs. Battle & Mordecai, for plaintiff.

Messrs. Payne & Vann and Burwell & Walker, for defendant.

SMITH, C. J. The summons issued by the justice commands the defendant to appear at a time and place designated "to answer Vernon Allen and Thomas J. Caudle, executors of William Allen, deceased, in an action for the recovery of a bale of cotton, weighing five hundred pounds, *as rent for a farm*," without specifying its value or the amount of damages sustained by reason of its non-delivery.

Previous to the adoption of the constitution of 1868 a civil warrant issued to enforce a money demand was required to state the sum claimed and how due, and this was held in *Duffy v. Averitt*, 27 N. C., 455, to be a material averment; and since the enlargement of the jurisdiction of the justice in civil causes under that instrument, the statute, prescribing the form of the summons, in express words directs that *"it shall also contain the amount of the sum demanded by the plaintiff."* C. C. P., Sec. 496. As his jurisdiction in such cases is derived entirely from the statute and is limited by the amount sought to be recovered, the summons, which in the absence of a complaint is substituted in its place, should show upon its face that the cause of action is within his legal cognizance and his competency to afford relief.

This principle applies as well to the exercise of "jurisdiction of civil actions not founded on contract" conferred since the amendments to the constitution, as to that possessed before, since it is equally restricted by "the value of the property in contriversy."
(323) Whether then the action be regarded as founded on a contract to pay the bale of cotton *as rent* for the leased premises, or for a tortious withholding of property belonging to the plaintiff, the omission to set out the amount claimed, is in either aspect of the case a fatal defect in the process; and the justice, as well as the judge upon the appeal, properly adjudged that the action be dismissed.

While we see no legal objection to the amendment, removing the defect if made by the justice, not as *conferring*, but to *show jurisdiction* in him, the reason assigned for refusing it in the superior court seems to us fully sufficient.

Where the effect of a proposed amendment would be to reverse a judgment rightly rendered in the inferior court, and confer a jurisdiction wholly derivative and dependent upon that possessed by the justice to entertain the cause, it is properly refused. *Justices of Tyrrell v. Simmons,* 48 N. C., 187; *Henderson v. Graham,* 84 N. C., 496.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Boing v. R.R., 87 N.C. 364; *Noville v. Dew,* 94 N.C. 45; *Grant v. Rogers,* 94 N.C. 760; *Singer Mfg. Co. v. Barrett,* 95 N.C. 38; *Leathers v. Morris,* 101 N.C. 187; *Hodge v. R.R.,* 108 N.C. 34; *McPhail v. Johnson,* 115 N.C. 302; *S. v. Ivie,* 118 N.C. 1229; *Cromer v. Marsha,* 122 N.C. 564; *Moore v. Wolfe,* 122 N.C. 712; *Parker v. Express Co.,* 132 N.C. 130; *Riddle v. Milling Co.,* 150 N.C. 690; *Mitchell v. Moore,* 194 N.C. 353.

BANK OF WASHINGTON v. CREDITORS.

Receiver—Surety and Principal—Practice.

1. A receiver and his surety cannot be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to render his account.
2. Where the receiver's delinquency is manifest and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court.

MOTION in the cause heard at Fall Term, 1881, of BEAUFORT (324) Superior Court, before *Bennett, J.*

The motion was made by Calvin J. Cowles, a creditor of the plaintiff bank, to make R. W. Wharton, administrator of D. M. Carter, deceased, a party defendant, and denied by the court.

Mr. Geo. H. Brown, Jr., for appellant, Cowles.

Mr. James E. Shepherd, for administrator, Wharton.

SMITH, C. J. The bank of Washington, created and organized under the laws of this state, pursuant to the provisions of the act passed "to enable the banks of this state to close their business," (acts 1865-66, ch. 3,) at Fall Term, 1866, of the court of equity of Beaufort County, filed its bill against the creditors of the bank for the dissolu-

tion of its corporate organization and the surrender of its property and effects among them. At the same term John G. Blount was appointed commissioner with the powers and subject to the responsibilities therein specified, and he entered into bond payable to the state in the penal sum of $50,000, with D. M. Carter and others sureties for the faithful discharge of the trusts of his office.

At Spring Term, 1879, of the superior court, the successor of the former court of equity, Calvin J. Cowles, an alleged creditor, who had proved his debt against the bank, in a verified petition, applies to the court for leave to make R. W. Wharton, administrator of said D. M. Carter, since deceased, a party to the action, and therein alleges that funds in a large amount went into the hands of the commissioner and were by him delivered to the intestate as agent for collection, and for the indemnity of himself and his co-sureties on the bond; that no account thereof has been rendered by either, or any money paid in for distribution among the creditors, and he asks that the said
(325) administrator be made a party, and process issue against him for the purpose of enforcing the liability incurred by his intestate by reason thereof.

To this petition the record states that the said administrator demurred on the ground that his intestate in his lifetime was not a party to the cause, and that if the commissioner, the principal on the bond, is in default, and the estate of the intestate is sought to be charged by virtue of the said suretyship, the remedy is by a separate and independent suit upon the bond.

While the filing a demurrer itself makes the demurrant a party to the action and renders the issuing of process for that purpose unnecessary, the counsel, (both of them in their arguments before us,) have treated this as a special intervention for the sole purpose of showing cause why the proposed leave to make him a party should not be given, and the writing filed, (under a misnomer as to its office and purpose,) but a statement of such cause. We shall so regard it.

The mode of procedure adopted by the appellant to enforce an assumed liability of a surety for a supposed default of the principal, an appointee of the court, acting under its authority and subject to its control, when no such default has been ascertained, is anomalous; and counsel for the appellant admits his inability to find any precedent in its support. In our opinion the course pursued is irregular and indefensible on principle or authority.

The creditors are all parties when they have proved their debts, and any one may demand the aid of the court in securing and appropriating the funds in the hands of its appointees. He may by rule bring the commissioner before the court and compel him to make

report of his dealing with the trust funds, and account for what is or ought to be in his hands. If necessary a reference may be made to ascertain the condition and value of the assets, what sum he is properly chargeable with, and in order to a disposition of (326) them. If from the report his delinquency is manifest, and he fails to comply with the directions of the court, such failure will be a breach of his official obligation, and it may be enforced in a proper proceeding as well against the sureties as against himself. The practice is thus stated by a recent author: "When the bond or recognizance given by a receiver is conditional to be void if he shall duly perform his duties, as receiver, and account to the court, the obligation becomes absolute on his failure to do so. It is held, however, that the receiver and his sureties are *not liable to an action upon the bond* until he has failed to obey some order of the court, touching the effects placed in his hands. And the proper practice would seem to be, to first apply to the court for a rule upon the receiver to render his account. After the account is adjusted and approved by the court, and the receiver is ordered to pay the effects in his hands into court, or to the person entitled thereto, a failure to comply with such order renders himself and his sureties liable. The receiver and his sureties cannot, therefore, be sued upon the bond, until the court has adjudicated the question and made some order touching the rights of the parties to the property in his hands." High on Receivers, Sec. 120. *State v. Gibson,* 21 Ark., 140.

So in *Ludgater v. Channel,* 3 Mac. & G., 175, upon application leave was given to bring suit against the sureties to the receiver's bond.

The statute under which the receiver was appointed and which prescribes his duties, does not permit him to disburse the moneys he may collect, but must report the amount and the creditors' claims proved before him, and then he must "pay out as the court shall order and direct." Secs. 3 and 5.

We do not say that a person receiving and misapplying the assets may not be reached by an order in the cause and be made responsible therefor, as is held in *Lord v. Merony,* 79 N. C., 14, (327) upon notice, by virtue of his relations with the officer or defaulting agent. But the remedy against the estate of the intestate as the recipient of the funds placed with him to collect and appropriate, as commissioner is required to do, and thus exonerate the sureties, is expressly disclaimed, and the proceeding is pressed against the representative of the surety solely upon his obligation as such, for the consequences of the delinquency of the principal obligor. The remedy resorted to, to pursue and charge the intestate is premature, and, if the proper course, is open only upon an ascertained default.

It is not necessary to decide whether, when the facts warrant a proceeding, it must be an independent suit. But the general rule is, that redress, when attainable by a motion in the cause, cannot be found in a separate suit, and this would seem to result from the concentration of legal and equitable powers in a single tribunal. But we do not determine the point because it is unnecessary to do so in this appeal.

There is no error. Let this be certified.

No error. Affirmed.

Cited: Atkinson v. Smith, 89 N.C. 74.

RUSSELL & ALGER v. PINKNEY ROLLINS.

Bankruptcy—Delay in Obtaining Discharge.

Unreasonable delay cannot be imputed to a defendant for failing to obtain his discharge in bankruptcy, where it appears that he was prevented from so doing by opposing creditors, and where the record does not show it was his fault that no action was taken in the case for two terms of the district court.

(328) CIVIL ACTION tried at Spring Term, 1882, of BUNCOMBE Superior Court, before *Gilliam, J.*

This action was commenced before a justice of the peace and founded upon an account for goods sold. The case discloses the following facts: On the 30th of August, 1878, the defendant was adjudged a bankrupt upon his own petition, and at the next term of the superior court, thereafter, there was a suggestion of bankruptcy, and further proceedings in the cause were stayed until Spring Term, 1882. He filed a petition for discharge on the 2nd of September, 1879, and in November following some of the creditors filed specifications opposing his discharge. At November Term, 1880, of the United States district court at Asheville, the cause was remanded to the register in bankruptcy for the examination of the bankrupt, and on the 10th of January, 1881, he appeared before the register and amended his schedule. At May term and November term of the said district court, the cause was continued without any further action. And when it was called at Spring Term, 1882, of the superior court, a suggestion of bankruptcy was made, and his Honor ruled that defendant had had a reasonable time in which to obtain his discharge, and ordered him to trial. The jury rendered a verdict for the plaintiff, judgment, appeal by the defendant.

Mr. S. H. Reed, for plaintiffs.
Messrs. C. A. Moore and H. B. Carter, for defendant.

ASHE, J. It was insisted on the part of defendant in the court below, that his Honor erred in submitting his case to the jury when it was called for trial. He contended that by the 21st section of the Bankruptcy Act, the court had no right to put his case to the jury until he had obtained his discharge, he having suggested his bankruptcy upon the record.

That section of the act provides "that no creditor whose debt is provable under the act, shall be allowed to prosecute to final (329) judgement any suit in law or in equity therefor against the bankrupt, until the debtor's discharge shall have been determined, and 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 discharge; provided, there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge."

So that the only question presented for our determination is—was there unreasonable delay on the part of the defendant in endeavoring to obtain his discharge, or in the language of his Honor, "had he had reasonable time in which to obtain his discharge?" which we take to mean a reasonable time under the circumstances of the case.

We are of the opinion the ruling of his Honor was not warranted by the facts found. In the case of *Calvert v. Peebles*, 80 N. C., 334, it was held that the lapse of five years after filing the petition in bankruptcy before obtaining the discharge, was unreasonable delay; in that case there was no explanation or excuse given for the delay; but here, it appears the defendant filed his petition on the 30th of August, 1878, and was adjudged a bankrupt, and at the ensuing term of the superior court suggested his bankruptcy, which stayed the proceedings until Spring Term, 1882. On the 2nd of September, 1879, he filed his petition for his discharge, and in November following some of the creditors filed specifications opposing his discharge. At November Term, 1880, of the United States district court, the cause was remanded to the register in bankruptcy for the examination of the defendant, and on January 10, 1881, he appeared before the register and amended his schedule. There was no *unreasonable* delay up to that time. The defendant seems to have been diligently exerting all his endeavors to obtain his discharge, and was only prevented (330) by the obstacles thrown in his way by others.

But it may be objected that after amending his schedule he relaxed in his endeavors to obtain his discharge, for that, two terms of the district court had been allowed to pass before the trial term of the supe-

rior court, without any further action having been taken in his case. That is true; but it was only eleven months from that time of amending his schedule until the Spring Term, 1882, and there is nothing in the record to show that it was his fault that no action had been taken in the cause in the two intervening terms of the district court. We can well imagine how many hindrances to a determination of his case may have occurred at those terms of the court, without any laches on the part of the defendant—continuances, for instance, for the want of readiness on the part of his opposers; the absence of testimony, or the want of time owing to a crowded state of the docket. We are not informed how that was, but do not think the defendant should be charged with *unreasonable* delay for the failure to bring his case in bankruptcy to a determination at either of those terms of the district court, when we find that up to the first of them he had been using all his endeavors to obtain his discharge. We do not undertake to say how it would have been, if it had been shown that his failure to obtain his discharge had been caused by his fraud or inexcusable negligence.

Error. *Venire de novo.*

(331)

J. L. SHAW v. J. R. BURNEY.

Promise to Pay Debt Discharged in Bankruptcy—Evidence to Be Left to Jury.

1. A promise to pay a debt discharged in bankruptcy, made to an agent of the creditor, is a promise to the creditor himself, and competent evidence to remove the bar.
2. Where the proof was that the debtor said "the debt is an honest one—I always intended to pay it"—refused to execute a note on the ground of false recitals therein, but said "it is an honest debt and I will pay it certain;" *Held*, that the evidence should have been submitted to the jury, under proper instructions, to say whether the debtor intended to promise to pay the debt.

CIVIL ACTION tried on appeal at November Special Term, 1881, of HALIFAX Superior Court, before *Gilmer, J.*

The plaintiff appealed.

Messrs. R. O. Burton and E. T. Clark, for plaintiff.
Mr. Thomas N. Hill, for defendant.

SMITH, C. J. The plaintiff sues to recover the sum of $125, with interest from February 5th, 1872, due on the defendant's bond, and in

reply to the answer setting up a discharge in bankruptcy as a bar to the action, alleges a new and subsequent promise to pay the debt. Upon this only issue submitted to the jury, the plaintiff testified that about the middle of May, 1881, the defendant came to his store and said that "the plaintiff's debt was an honest debt—it had more than any other, relieved him;" and holding up a deed, he added, "that he got the money to make the last payment on the land men- (332) tioned in the deed; he intended to pay the debt, and always intended to pay it."

A clerk in the employment of the plaintiff testified that in June, 1881, he was sent by the plaintiff to the defendant with a note to be signed by the latter in settlement of the debt. The defendant refused to execute the note on the ground of a false recital, that it was for the last payment of the purchase money due for the land, and said, "It is an honest debt and I will pay it certain."

The declaration of the defendant was admitted, not in proof of the promise itself, but as corroborative of the plaintiff's testimony.

The court being of opinion, and so intimating, that upon the evidence the plaintiff was not entitled to a verdict, he submitted to a nonsuit and appealed. There are therefore but two exceptions to the rulings brought up for review.

1. The qualified effect allowed to the evidence of the defendant's declaration to the plaintiff's clerk: This ruling we presume is predicated upon the interpretation put on the language used by the court in *Parker v. Shuford,* 76 N. C., 219, and *Faison v. Bowden, Ib.,* 425, that the promise to pay or acknowledgment of a subsisting debt from which it may be inferred, in order to remove the bar of the statute of limitations, must be to the creditor himself, and is insufficient when made to a third person. This is a misapprehension of the meaning of the court as is explained in the subsequent case of *Kirby v. Mills,* 78 N. C., 124, in which it is said that a promise to the attorney of the creditor, acting on behalf of his principal, is in legal effect a promise to the creditor, as if made to him personally, and that the other cases had reference to a stranger having no such relation to the creditor. As the witness was sent for the special purpose of adjusting the claim and was in the direct exercise of his agency in the transaction, the defendant was in law dealing with the plaintiff, and a promise if made would enure to his (333) benefit. The evidence was therefore original and substantive and should have been received, as such, to support the alleged promise.

2. But the testimony was heard, and supposing it to be competent, the enquiry arises, were these declarations sufficient to go to the jury upon the issue of a re-assumption of the debt?

The authorities are clear that to remove the bar of a discharge in bankruptcy and revive the debt, the proof should show a distinct and unequivocal promise to pay, notwithstanding the discharge, and this is the rule announced by this court in *Fraley v. Kelly,* 67 N. C., 78, and approved in *Riggs v. Roberts,* 85 N. C., 151. In *Stewart v. Reckless,* 4 Zabr., (N. J.) 427, the words relied on were, that he, (the defendant,) had always told Stewart (the plaintiff) he intended to pay him, and the court say "the expression of an intention to do a thing is not a promise to do it. An *intention* is but the purpose a man forms in his own mind; a *promise* is an express undertaking or agreement to carry the purpose into effect."

But a case in its essential features, the same as that now before the court, was decided in 1851 by the supreme court of Massachusetts. A witness swore that, at the plaintiff's instance, he called on the defendant, with the accounts between the parties, and told him, the plaintiff wanted him to do something about the note, and she would be glad to have a new note. To this the defendant replied, "he was not willing to put the principal and interest in a new note, but always said, and still say, *that she should have her pay.*" The Court left the declarations to the jury as capable of meaning or expressing a promise to determine whether the defendant intended by these words to promise to pay the debt. In the supreme court, SHAW, C. J., declared the instruction correct and remarked: "The evidence tended to
(334) prove two forms of expression used by the defendant; one declining to give a written promise, the other amounting to a verbal promise. The words, as he must have used them in the present tense in answer to a claim of payment to be made by him—'I have always said, and still say that she shall have her pay'—are capable of being construed a promise, but might be counteracted by other expression. It was for the jury to decide upon the credit of the witness and the accuracy of his recollection, and thus decide what was said." *Pratt v. Russell,* 7 Pick., 462.

It is the undoubted duty of the judge to construe and determine the legal import of a contract, whether written or parol, and equally in each case where its terms are explicit and well understood, but where they are indefinite or rest upon proofs apparently conflicting, it becomes the province of the jury to ascertain the intent of the parties and the contract entered into from the evidence, guided by suitable directions to aid them in their finding. *Islay v. Stewart,* 20 N. C., 297; *Massey v. Belisle,* 24 N. C., 170; *Festerman v. Parker,* 32 N. C., 474.

Where the defendant in selling his interest in a gold mine said to the plaintiff, "If you will do the work, I will warrant you will make your

money in ten days," an instruction to the jury to enquire upon the whole conversation and subject matter, whether the words were used in commendation of the mine or as importing an obligation, was held to be correct. *Starnes v. Erwin,* 32 N. C., 226. And so it was submitted to the jury to determine from the attending circumstances whether the word "warrant" was used as an affirmation merely, or as an assumed liability, and this ruling was sustained in *Henson v. King,* 48 N. C., 419, NASH, C. J., remarking that whether there was "a warranty or not, was a question of fact for the jury: they were to say whether the parties intended a warranty."

Similar elements of uncertainty and repugnant expressions appear in the testimony of the witnesses in this case, not (335) sufficient, in our opinion, to withdraw the evidence from the jury and conclusively determine its inadequacy to warrant a verdict, but such as required them, under proper instructions, to pass upon and decide. We are unable to distinguish the case, in this feature, from that of *Pratt v. Russell, supra,* and therefore declare there is error. The nonsuit must be set aside and the case submitted to another jury.

Let this be certified.

Error. *Venire de novo.*

Cited: Harris v. Mott, 97 N.C. 106; *Cauley v. Dunn,* 167 N.C. 33; *Trust Co. v. Lumber Co.,* 221 N.C. 95.

JAMES VASSER v. J. A. BUXTON & CO.

Contract—Conditional Sale.

Plaintiff sold a horse to one upon an agreement "that it should be the plaintiff's property until the residue of the purchase money was paid, and subject to a lien therefor;" *Held* to be a conditional sale. (As to the nature of the transaction and the submission of the testimony to the jury, see *Shaw v. Burney, ante,* 331.)

CIVIL ACTION, tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

The plaintiff sues to recover the possession of a bay mare, and the sole controversy was as to his title. On the trial the evidence was as follows:

The plaintiff, examined on his own behalf, testified that one Samuel Story, residing on a farm of his in Virginia, applied to the plaintiff to buy him a horse. The plaintiff consented to do so if the defendant would go to Petersburg after it, stating that he
(336) had money there in the hands of one Jarrett which he could thus use. Accordingly the plaintiff wrote to Jarrett to purchase for himself two horses, which was done, and Story went to Petersburg and brought them out. The bay mare, the property in dispute, worth $130, remained a few days in possession of Story after his return home, when, in company with his brother, he carried her over to the plaintiff's house. There, a settlement was had, and Story gave to the plaintiff his note for $70, the price of the mare, reduced to that sum by deducting a debt due from the plaintiff, and it was agreed she should be the plaintiff's property until the residue of the purchase money was paid and be subject to a lien therefor. Story kept the mare for a year, when the plaintiff, losing one of his gin-horses, sent an inferior horse to Story in exchange for the mare, saying to Story that if the mare worked well in the gin he would credit the note with $30, the difference in their values. The trade was not final. The mare did not work well and the plaintiff retained her until, hearing that a constable had orders to seize her, he returned the mare to Story and took back the horse that had been sent. No credit was endorsed on the note.

George Story, the brother who was present at the transaction, testified that he wrote the note for $70; that it was the understanding of the parties that the mare was to be responsible until she was paid for, and that underneath the signature to the note was a written memorandum to this effect, entered at the same time. Upon this evidence the defendants contended:

1. That no agreement was shown that the property should be in the plaintiff before the delivery to Story.

2. Nor Story's assent to the memorandum put upon his note, and

3. If the contract was made for the retention of title, it was superseded and annulled by the subsequent act of exchange, and the absolute property thereby vested in Story.

(337) In support of these propositions the defendants asked the court to give the following instructions:

1. If the jury are satisfied that the plaintiff agreed to buy the mare for Story, or to sell her to him, and she was delivered to Story, or he permitted to take possession, and that afterwards the parties agreed to let the mare stand responsible for the purchase money, the plaintiff could not recover.

2. If Story was allowed to take possession before the written memorandum of agreement was executed, the title passed from the plaintiff and he could not maintain the action.

The court charged the jury "that in order to find how the matter is, it is necessary for them to ascertain what was the contract entered into between the parties; that a person may contract to sell and reserve in himself the title to the thing sold, until full payment of the purchase money; but that he cannot sell and deliver the thing, whereby the property will pass to and vest in the vendee, and then take a reconveyance to hold as a security, as this would constitute a mortgage and be void. An agreement between parties is what both assent to. It is for you to find whether the plaintiff at the time of sale, and as part of its terms, reserved the title, with Story's assent, until the price was paid. So you will consider the evidence and find how the matter is. If the sale and delivery were without such reservation the plaintiff cannot recover. But if the agreement embraced the retention of the property in the mare, he would be entitled to a verdict, unless the property was divested by what took place afterwards. If there was a swap or exchange—the horse and $30 being the price paid for the mare—and this was a completed or final transaction, the plaintiff must fail in his action, and it was for the jury, upon all the evidence, to say how the fact is, and whether the exchange was or was not consummated and final.

The jury found the issue for the plaintiff, and from the judg- (338) ment rendered thereon the defendants appeal.

Messrs. S. J. Wright and Day & Zollicoffer, for plaintiff.
Messrs. R. B. Peebles and Willis Bagley, for defendants.

SMITH, C. J., after stating the facts. It is manifest the purchase of the two horses in Petersburg and the payment therefor with the plaintiff's money, was intended to be, and was on behalf of the plaintiff, and the delivery to Story, as his bailee, for the purpose of conveying them thence to the plaintiff. It no more put the title to the mare than the title to the horse in the agent, Story. The sale and its terms were concluded subsequently at the plaintiff's house, and the terms were that the property should remain where it already was, in the plaintiff, until the price secured in the note was paid. The testimony is explicit on this point, and the agreement to avoid all misunderstanding of its terms is embodied in the memorandum, then entered upon the foot of the note. The selling is the act of the plaintiff, and conditional upon the payment of the price; the note is the contract of Story to pay the residue of the purchase money. These constitute

and give character to the entire transaction. Its validity is not open to controversy in view of the repeated adjudications of this court, sustaining such conditional sales. *Clayton v. Hester*, 80 N. C., 275.

2. The exchange and delivery of the mare, it is insisted, detached the condition and gave to Story the absolute title.

The real character of this transaction and the intent of the parties are left somewhat obscure and uncertain upon the testimony. The note seems not to have been credited with the difference in value between the exchanged animals. The plaintiff admits the mare did work well in the gin, but he says "the trade was not final," nor does it appear except inferentially that Story assented to the terms
(339) proposed. The court therefore was correct in leaving to the jury to inquire and find from the evidence what were the facts of the transaction, and the intent of the parties to it, with appropriate instructions for their guidance in making up their verdict.

The subject is considered in *Shaw v. Burney, ante*, 331, and further comment is needless.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Brem v. Lockhart, 93 N.C. 192; *Frick & Co. v. Hilliard*, 95 N.C. 119; *Butts v. Screws*, 95 N.C. 217; *Trust Co. v. Motor Co.*, 193 N.C. 665.

JOHNSTON, CLARK & CO. v. C. H. BERNHEIM.

Partnership—Liability of Individual Members.

Where the managing partner of a firm buys goods on time when he ought to have bought for cash according to the terms of their agreement, the firm and each member thereof, (out of his individual estate) is liable for the debt, even though the seller had knowledge of the stipulation against credit; and this, whether the partner sought to be charged derived any individual advantage from the enterprise, or not.

CIVIL ACTION tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

The plaintiffs appealed from the judgment below.

Messrs. W. H. Bailey and J. W. Mauney, for plaintiffs.

Messrs. J. M. McCorkle and T. F. Klutts, for defendant.

SMITH, C. J. The defendant and T. R. Waring, in January, 1873, entered into a written agreement for the formation of a co-partnership in the purchase and sale of sewing machines, the business of which was to be carried on at Memphis in Tennessee under the personal management of the latter, and the defendant furnished to the capital the sum of one thousand dollars. At the same time (340) it was understood and agreed by parol between them (outside of the articles in writing) that all the goods should be bought for cash and none on credit, in prosecuting the joint enterprise. The claim now in suit is for a balance due for articles purchased by the managing partner, and sold to him by the plaintiffs, as the defendant insists, and the jury find, with knowledge of this collateral stipulation against credit. The business did not prosper, and the firm assets have been exhausted under the management of Waring, the acting partner, and the present action is to enforce payment out of the defendant.

It is necessary to notice but one of the numerous exceptions to the rulings of the court taken during the progress of the trial.

The defendant proposed to prove by his own testimony, that no advantages had ever been derived by him from the prosecution of the joint undertaking. The plaintiffs, conceding the admissibility of the enquiry whether any benefit has accrued to the firm from the purchase of the goods, objected to the competency of proof that the defendant personally and outside of the partnership never received anything therefrom, as affecting his liabilities incurred while a member of it. The testimony was admitted, and the witness swore that he never had received any benefit or profit out of their joint operation, and to this ruling the plaintiffs except.

Upon this evidence the court instructed the jury (and there was no objection thereto) that "if there was an agreement, at the time the copartnership was formed, either in the articles or verbally, to purchase for cash only, and the plaintiffs with notice of this agreement, sold the goods to Waring on credit, the plaintiffs could not recover, unless it was shown that the defendant agreed to receive the goods and adopt the account against his firm, or *unless he took* (341) *benefit from the goods purchased.*"

This instruction, while as an abstract proposition unobjectionable, must be interpreted and understood in its application to what the defendant had deposed to, not that the firm did not, and consequently himself as one of its members, derive benefit from the goods purchased in the name of the partnership and appropriated to its use, but that in consequence of the misconduct of Waring, ending in its total insolvency, the defendant received nothing from its business to his in-

dividual and separate advantage. In its relations to the evidence permitted to be given to the jury, the charge was calculated to mislead, for they would naturally understand it to mean, that the defendant was not personally bound, if no fruits accrued to him out of the enterprise in which he embarked.

When the case was before us at the former appeal (76 N. C., 139), the court said: "What either partner does with a third person is binding on the partnership. It is otherwise when the partnership is not general, but is upon special terms, as that purchases and sales must be with and for cash. There the power to each is special in regard to all dealings with third persons, at least, who have notice of the terms. But even in that case, if the terms are violated, as if a partner buy on time, when he ought to buy for cash, and the *thing bought come into the partnership, and the partnership take the benefit, the partnership must pay for it;*" and we may add, so must each member of the firm, if necessary, out of his individual estate.

In the very nature of a partnership, there is an implied delegation of power to each member to act for all within the scope of its purposes, and to make them practically effective, and hence when there is imposed a positive and express limitation upon the legal capacity of one or more to exercise such power, and this restricted agency (342) is known to one dealing with him or them, then a contract or act in excess of such limitation will not bind the others. There is a further proviso, that a partner, not bound by the act of his associate in its inception, assumes the obligation when he takes the benefit of the property thus acquired, and assents to its going into the common stock, as truly as if the right to bind the firm in the premises existed.

But it is not necessary in order to this result, that the benefit should accrue to him separately and peculiarly. It is sufficient if the funds of the firm are augmented by the acquisition, in which he could participate, or the joint liability for expenses incurred in conducting the business are paid or lessened in amount by an appropriation of the proceeds, for the obvious reason that each partner has a direct interest in both.

So then it may be true that the goods in question, as the defendant's invested capital, were exhausted in the effort to carry on the business, and yet the resultant effect is to leave no surplus for distribution, or even to reimburse the sum contributed by the defendant. The jury might well understand and act upon a construction of the charge that the defendant would not be liable, unless he derived some advantage, and he says he derived none from the operations of the Memphis business.

For the error pointed out, and without considering the others assigned or passing upon their legal sufficiency, we think the plaintiffs are entitled to another trial, and it is so adjudged.

Error. *Venire de novo.*

Cited: Sladen v. Lance, 151 N.C. 495; *Oakley v. Morrow,* 176 N.C. 136; *Guano Co. v. Ball,* 201 N.C. 536.

(343)

ARNOLD WORSLEY AND OTHERS v. BATTLE BRYAN AND OTHERS.

Execution—Application of Proceeds of Sale.

Money raised by sale of the debtor's land under execution, must be applied to that execution (and others in his hands) in preference to the claim of a prior judgment creditor whose execution was not in the hands of the sheriff at the time of the sale; but the lien of such prior judgment on the land is not thereby affected.

PROCEEDING in nature of a rule on a sheriff for the application of money raised under execution, heard at Spring Term, 1881, of EDGECOMBE Superior Court, before *Shipp, J.*

The question presented for determination by the record in this case is, as to the proper application of a sum of money, raised by the defendant Bryan, as sheriff of Edgecombe, by virtue of a sale of the land of one Jesse Stancil, under executions in his hands, issued upon judgments duly docketed in the superior court of said county. The facts are as follows: One Andrews obtained a judgment against Jesse Stancil, before a justice of the peace, founded upon a sealed note dated February 3d, 1859, for the sum of one hundred and ninety-two $^{44}/_{100}$ dollars, which was docketed in said county on the 28th day of May, 1878, on which execution was issued on the 1st day of January, 1879, to the sheriff, who advertised the land of the defendant for sale on the 14th day of April, 1879, the same being the first day of Spring Term, 1879, of the superior court of the county. At the instance of the defendant, and with the consent of the plaintiff in the execution, the sale was postponed until one o'clock on the 15th day of April. On the last mentioned day of a judgment founded upon a sealed note bearing date 30th day of June, 1862, in favor of the (344) plaintiffs, Arnold Worsley and wife, against the said Jesse Stancil, for the sum of three hundred and forty-four $^{5}/_{100}$ dollars, was docketed in the office of the superior court clerk, and an execu-

tion returnable to Fall Term, 1879, issued thereon was placed in the hands of the sheriff at about the hour of ten in the morning of said 15th day of April, 1879, and at one o'clock on that day the sheriff sold the land of the defendant, Stancil, for the satisfaction of the two executions then in his hands, and it was bid off for six hundred and two dollars, more than enough to satisfy both executions, and the purchase money was duly paid.

At Fall Term, 1876, of the superior court of said county, one C. H. Jenkins had obtained a judgment against the said Stancil, and had the same docketed the 28th day of August, 1876. An execution had been issued thereon returnable to Fall Term, 1878, but was indulged by the plaintiff's attorney, and no execution on the same was in the hands of the sheriff at the time of the sale. The judgment was on a note bearing date March 22d, 1871, and was assigned in writing on the record to the defendant G. A. Stancil.

It was admitted that the judgment of Worsley and wife had been duly assigned to the plaintiffs, Francis M. Leigh and W. G. W. Leigh.

The execution on the Andrews judgment was satisfied by the sheriff, and he was forbidden by G. A. Stancil and Jesse Stancil from applying any portion of the proceeds of the sale to the Worsley judgment, contending that the Jenkin's judgment was entitled to the preference. But his Honor not concurring in this view, adjudged that the fund remaining in the hands of the sheriff be applied to the judgment in favor of F. M. and W. G. W. Leigh, the assignees of Worsley and wife. Appeal by defendants.

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

ASHE, J. We are of the opinion there was no error in this ruling of his Honor. The judgment in favor of Jenkins is in no view entitled to any part of the proceeds of the sale.

In the first place, the land was sold for six hundred and two dollars, which we must presume was its value, subject to any prior liens. The Jenkins' judgment was founded upon a note given in 1871, and the defendant is entitled to his homestead against it. It created no lien upon the land which could be enforced by a sale under execution. If execution had been issued upon it, and it had been the only execution in the hands of the sheriff, he could not have sold under it, without having first laid off the homestead of the defendant Stancil, and as there was no excess over the one thousand dollars value of the land, there would have been nothing subject to sale under the execution.

And in the next place, even if the Jenkins' judgment had been rendered upon a debt contracted before 1868, and clear of the impediment of the homestead right of the defendant, it still would not have been entitled to any portion of the fund, for the reason that no execution on the same was in the hands of the sheriff at the time of the sale.

It is too well settled in this state, to admit of controversy, that where a sheriff has levied upon property under a *fi. fa.*, and before he has completed execution by sale, another *fi. fa.* comes to his hand with a prior lien, he should apply the proceeds of sale to the first. *Allemong v. Allison,* 8 N. C., 325; *Green v. Johnson,* 9 N. C., 309. And when the executions are of equal testes, or have equal rights of satisfaction, they should be satisfied equally or *pro rata. Palmer v. Clarke,* 13 N. C., 354. Such was the law before the Code and we do not think the principle has been changed by its adoption. It is true, instead of the execution it is now the judgment which (346) creates the lien, and the effect of the execution is to enforce the lien; but the sheriff can only look to it for his guide in making the sale and the application of the money raised thereby. *Motz v. Stowe,* 83 N. C., 434. Though we hold that no part of the money raised by the sheriff's sale is applicable to the Jenkins judgment, yet we do not wish to be understood as deciding that the lien of that judgment upon the land may not be enforced when the homestead right expires.

There is no error. The judgment of the court below is affirmed.

No error. Affirmed.

Cited: Titman v. Rhyne, 89 N.C. 68; *Meyers v. Rice,* 107 N.C. 31; *Bernhardt v. Brown,* 118 N.C. 710.

JAMES KEETER v. WILMINGTON & WELDON RAILROAD COMPANY.

Railroads—Delay in Shipment of Freight.

1. A railroad company is not relieved of liability to the penalty of $25 per day, under the act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient number of cars.
2. By the word "five days" the act means five full running days, including Sunday whenever it intervenes.

3. The company would not incur the penalty until the full expiration of the sixth day after receipt of the goods—the law not regarding the fraction of a day in the enforcement of a penal statute.

CIVIL ACTION tried at Fall Term, 1881, of HALIFAX Superior Court, upon the following case agreed, before *Gilmer, J.*

(347) On Friday, the sixth day of the week, being the 24th day of December, 1880, the plaintiff delivered at the depot of the defendant in the town of Halifax, one bale of cotton for shipment to W. W. Gwathmey & Co., merchants in Norfolk, Virginia, which bale of cotton was so received by the defendant for shipment as aforesaid. Owing to the large accumulation of freight at its depot at Halifax, and the inability of the defendant company to provide the necessary number of cars for shipment of freight, the said bale of cotton was detained at the depot, until Thursday, the 30th day of December, 1880, when it was taken from the possession of this defendant by the sheriff of Halifax County, under and by virtue of an order of John O'Brien, a justice of the peace of the county, made in a certain civil action pending before him, wherein one G. W. Bryan was plaintiff, and the plaintiff in this action was defendant. Between the 24th and the 30th day of December, 1880, a Sunday intervened. Upon this agreed state of facts the court rendered judgment in favor of the plaintiff, and the defendant appealed.

Messrs. Mullen & Moore, for plaintiff.

Mr. Spier Whitaker, for defendant.

ASHE, J. The plaintiff sued for the penalty of twenty-five dollars incurred by the defendant under the act of 1874-75, ch. 240, for allowing a bale of cotton belonging to plaintiff to remain unshipped for one day over five days, from the date of the delivery for shipment. The action is brought under the 2nd section of the act, which provides, that "it shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment, to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars

(348) for each day said freight remains unshipped, to any person suing for the same." The cotton was delivered on Friday and remained unshipped until the next Thursday.

The defendant company contended that it was not liable to the penalty, upon two grounds: First, because owing to the large accumulation of freight at its depot in the town of Halifax, and its inability

to procure the necessary number of cars for the shipment of freight; and secondly, because the legislature by the act of 1879, ch. 197 and ch. 203, prohibited the cars running on Sunday, the effect of which was to eliminate Sunday from the five days, when it intervened, so that it was not to be counted in the computation of the time limited for shipment.

The excuse offered for the delay in the first exception is inadmissible. In *Branch v. R. R. Co.*, 77 N. C., 347, which was an action like this, to recover the penalty under the same section of the act of 1874-75, where the same excuse was set up in defence to the action, it was held that the accumulation of freight beyond the ability of the company to transport the freight delivered, within the five days after delivery, was no excuse, for it was the duty of the company to provide cars for the transportation of all the freight delivered. And it was also decided in that case, that by the words "five days" the act meant five full running days including Sunday whenever it intervened. This construction of the act makes it unnecessary for us to decide the disputed question whether the day of delivery is to be included or excluded.

In our case the delivery for shipment having been made on Friday, the 24th of December, and the five days having ended at 12 o'clock on the night of the Wednesday following, and the seizure having taken place on the next day, Thursday, the 30th day of the same month, the question is, did the defendant incur the penalty imposed for one day's delay.

The seizure on Thursday is the same as if the bale of cotton (349) had been shipped on that day. The act makes it unlawful for any railroad company to allow freight to remain unshipped for more than five days, and any company violating the act shall forfeit and pay the sum of twenty-five dollars for *each day* said freight remains unshipped. Giving then the defendant the full five days, including Sunday, the cotton having been delivered on Friday, the full five days ended on Wednesday. The seizure was made the next day, at what hour we are not informed, but that is immaterial, as the law will not regard the fraction of a day in the enforcement of a penal statute, which is to be liberally construed in favor of him upon whom the penalty is imposed. The defendant is liable to the penalty for the delay of each day—that means each whole day—and the legal day is twenty-four hours. The defendant then would not incur the penalty until the full expiration of the sixth day after the delivery.

This is the construction of the act given by the court in *Branch v. R. R. Co., supra.* There the delivery of the cotton was on the 10th

day of October and the shipment was on the 19th of the same month. The court say, "the full five days expired on Sunday, the 15th day of October, and the first penalty was incurred on Monday, the 16th, the second on the 17th, the third on the 18th. On Thursday, the 19th, the cotton was shipped. The day of shipping should not be counted because no penalty is incurred by any delay of a fraction of a day." Following this construction of the statute, we must hold that the defendant has not incurred the penalty sought to be recovered.

There is error. The judgment of the superior court must be reversed.

Error. Reversed.

Cited: Whitehead v. R.R., 87 N.C. 260; *Branch v. R.R.*, 88 N.C. 572; *Middleton v. R.R.*, 95 N.C. 169; *Alsop v. Express Co.*, 104 N.C. 294; *Hodge v. R.R.*, 108 N.C. 32; *Sutton v. Phillips*, 116 N.C. 505; *Glanton v. Jacobs*, 117 N.C. 428; *Burgess v. Burgess*, 117 N.C. 449; *Carter v. R.R.*, 126 N.C. 442; *Davis v. R.R.*, 145 N.C. 211; *Garrison v. R.R.*, 150 N.C. 579; *Reid v. R.R.*, 150 N.C. 764; *Adcock v. Fuquay Springs*, 194 N.C. 426.

(350)

PATAPSCO GUANO COMPANY v. J. T. MAGEE AND OTHERS.

Agricultural Liens, Void Unless Executed in Accordance With the Statute—Evidence—Custom—Interest—Execution Levied Upon Crop.

1. Under the authority of *Clark v. Farrar*, 74 N. C., 686, an agricultural lien can only be acquired by virtue of the statute and in strict compliance with its requirements. The agreement must be in writing and executed *before* the advancements are made or supplies furnished. Nor will such an instrument be allowed to operate as a mortgage. It was therefore held no error, in an action to enforce an alleged lien, to exclude as evidence an instrument not drawn in accordance with the statute.
2. In such case, evidence as to the custom of the plaintiff to have agreements signed after delivery of supplies to customers, was also properly rejected.
3. Interest is not allowed as a matter of law in an action of claim and delivery (Rev. Code, ch. 31, sec. 90, does not embrace such cases), but the jury may, in their discretion and as damages, allow interest upon the value of the property from the time it was taken.
4. Under a justice's execution the entire crop of a defendant was levied upon by a constable, and advertised for sale; the crop consisted of cotton, matured and standing in the field, and estimated at 20,000 pounds; a few days afterwards the sheriff, under a proceeding in claim and delivery, instituted by the plaintiff in this action, had such a part of the crop gathered as was sufficient to satisfy the plaintiff's claim of 1125 pounds, the

number specified in the mandate: *Held*, that the plaintiff is not responsible to the execution creditors defendant for the residue of the crop, since it remained unmolested in the field and subject to be taken by the constable under the executions in his hands.

5. Evidence that the sheriff delivered the property by an agent or deputy, did not have the effect of contradicting his return, that he himself delivered it.

CLAIM AND DELIVERY, tried at Fall Term, 1881, of NORTH- (351) HAMPTON Superior Court, before *Gilmer, J.*

In September, 1878, the defendant, Magee, as constable, levied upon the entire cotton crop of one Jordan, then matured and standing in the field, and estimated to be about twenty thousand pounds, by virtue of certain justice's executions, amounting in the aggregate to $583.08, in favor of the other defendants. Later, in the same month, the plaintiff commenced this action of claim and delivery for eleven hundred and twenty-five pounds of said cotton, estimated to be worth $112.00, claiming to have a special property in the same for guano furnished said Jordan in the year 1878, to enable him to make a crop, as set forth in the following instrument:

STATE OF NORTH CAROLINA, COUNTY OF ———.

No. 202. On or before the 1st day of November, 1878, I promise to pay to Patapsco Guano Company the sum of eleven hundred and twenty-five lbs. of good lint cotton, for fertilizers furnished for the year 1878. I hereby constitute this obligation a lien on my crops of all kinds for the year 1878, and bind myself, my heirs and assigns for the faithful payment of the same, waiving claims and exemptions allowed by law. Witness my hand and seal June 6th, 1878. (Signed and sealed by A. J. Jordan, and witnessed by W. P. Vick.,) which instrument was duly proved and registered on the 5th day of July, 1878.

Upon the plaintiffs' making the proper affidavit, and giving the required undertaking for the delivery to the plaintiff company of the cotton, eleven hundred and twenty-five pounds of lint cotton were accordingly delivered, and thereafter retained by the plaintiff.

On the trial, the plaintiff offered to introduce the said paper writing as an *"agricultural lien"* but the same was objected to by defendant, on the ground that it did not conform to the statute, inasmuch as it did not appear therefrom, that the fertilizers furnished (352) were to be used in the cultivation of a crop; or that they were used in making the crop upon which the lien is attempted to be enforced; or that the person declaring the lien was *engaged,* or *about to be engaged,* in the cultivation of the soil; and because it did appear, therefrom, that the fertilizers were furnished before the execution of

the instrument and the taking of the lien. These objections were sustained by his Honor, and the plaintiff excepted.

The plaintiff then offered to show by one Vick, the attesting witness to said instrument, that the agreement therein set forth was entered into before the fertilizers were furnished to Jordan, though it was reduced to writing afterwards, and that it was his custom, as agent of the plaintiff, to have the contracts signed after the delivery of the goods to his customers, but upon objection of the defendants the court excluded the evidence, and the plaintiff excepted.

The plaintiff then offered to put the instrument in evidence as a *mortgage*, but upon objection, was not permitted to do so, and again excepted.

The defendants introduced as a witness the defendant Magee, who testified that, at the commencement of this action, he had levied upon, and had possession of, Jordan's entire crop of cotton, then matured and standing, and had advertised the same for sale, estimating it as containing at least 20,000 pounds, and that the sheriff in executing the warrant of claim and delivery, issued at the instance of the plaintiff in this cause, took the whole of the crop out of the possession of the witness.

The plaintiff thereupon introduced the agent Vick, who testified that, while the return of the sheriff showed that he delivered to the plaintiff 1,125 pounds of cotton, that officer did not, in fact, deliver any part of it, but that it was, afterwards, delivered to the witness, as agent, by Jordan himself, and that no claim was laid to any other
(353) part of the crop, or any control taken over it. This evidence was objected to by the defendants, on the ground that its effect was to contradict collaterally the return of the officer, but it was received by the court, and thereupon the defendants excepted.

At the request of the defendants, as contained in a special prayer for instructions, the court charged the jury: "That if they should believe that the sheriff, in attempting to take the 1,125 pounds of cotton out of possession of the defendant Magee, necessarily or actually, took the whole crop out of his possession, then the defendants would be entitled to recover of the plaintiff the value of the whole," but to this, his Honor added, that if the sheriff, after taking the 1,125 pounds of cotton, left the residue of the crop so that it could have been relevied upon by the constable, then it was the defendants' own lookout if they permitted it to be lost afterwards, and that in such case, the jury should give a verdict against the plaintiff for only so much of the cotton as was actually taken and delivered by the sheriff. To this latter part of the charge the defendants excepted.

Upon the issues submitted, the jury found the value of the 1,125 pounds of cotton, taken by the plaintiff, to be $91.35, and that the defendants sustained, by reason of the plaintiff's action, no other damage. The court thereupon gave judgment in favor of the defendants for the sum of $91.35, with interest from the 30th day of September, 1878, from which both parties appealed.

Messrs. Thos. W. Mason and Willis Bagley, for plaintiff.
Mr. Sam'l J. Wright, for defendants.

RUFFIN, J., after stating the facts. The plaintiff assigns as error, the refusal of the court to admit the instrument in evidence, either as an agricultural lien, or as a mortgage, and the exclusion of the testimony of the agent, Vick, as to the agreement of the parties. The plaintiff also contends that no interest should be allowed (354) the defendant on the damages assessed by the jury, but the court gave judgment for that sum with interest from the 30th of September, 1878, that being the date of the seizure of the cotton by the sheriff.

The errors assigned by the defendants were: 1. The admission of the testimony of the witness, Vick, as to the amount of the cotton received by him, and the person from whom it was received. 2. The instructions given by his Honor to the jury.

The case of *Clark v. Farrar*, 74 N. C., 686, is directly in point, and if allowed to have any force as an authority, must be conclusive as to the first three exceptions taken by the plaintiff. It is there said that an agricultural lien can only be acquired by virtue of the statute and a strict compliance with its requirements, and that amongst its requirements is the plain one that the agreement must be reduced to writing and executed by the parties *before* the advancements are made or the supplies furnished.

It is needless to speculate why this provision is made by the statute. It is clearly so written and can be conveniently observed, and if parties will wilfully disregard it, they must abide the consequences.

According to the same authority, an instrument, which is intended by the parties to operate as an agricultural lien, and which purports to be one, must take effect *as such*, or not at all, and will not be permitted to prevail as a mortgage.

The decision is put squarely upon the ground that creditors and subsequent purchasers have a right to know, truly, what encumbrances are upon the property, and their nature and extent, and this information they are entitled to have *ex visceribus*, the deed itself.

Besides this, the instrument now under consideration does not convey, or purport to convey, the title of the property which was the subject of agreement, to the plaintiff, but only provides that his debt shall constitute a lien thereon. In Jones on Chattel Mortgages, Secs. (355) 8, 11, and 12, it is said that a *decisive test* of a legal mortgage of personal property is the use of words which make the instrument one of sale, conveying the title of the property to the creditor conditionally, so that, by the non-performance of the condition by the debtor, the title will be transferred to the creditor, or he shall be clothed with the power to sell. In both of the cases of *Harris v. Jones*, 83 N. C., 317, and *Cotten v. Willoughby, Ib.*, 75, cited by counsel for plaintiff, the deeds contained express stipulations for the sale of the property in case of the debtor's default, and are therefore easily to be distinguished from the one before us. Such instruments have sometimes been enforced as mortgages between the parties themselves, but never, so far as our investigation has gone, as against subsequent *bona fide* purchasers or creditors. Such being the state of the law, it was proper, as a matter of course, to reject the testimony offered, as to the custom of the plantiff to deliver goods to its customers before taking liens from them, and as to the course of dealing in this particular case, since its only effect could be to show, that both the usual custom of the company and this special agreement were in the very teeth of the statute, and consequently void.

In the opinion of the court the plaintiff's last exception is well taken. The rule in this state is, that interest, *as interest*, is allowed only when expressly given by statute, or by the express or implied agreement of the parties. *Devereux v. Burgwin*, 33 N. C., 490; *Lewis v. Rountree*, 79 N. C., 122. The only statute upon the subject is that contained in Rev. Code, ch. 31, sec. 90, which provides that all sums of money *due by contract of any kind whatsoever*, excepting such as may be due on penal bonds, shall bear interest, etc., but there is no provision made for actions of *trover* or trespass *de bonis asportatis*. In such cases, in order to compel the wrong-doer to make full compensation to the injured party, the jury may, in their dis- (356) cretion, and as damages, allow interest upon the value of the property from the time of its conversion or seizure, and it has been usual for them to do so. But there is no rule which gives it as a matter of law and right, and it was error, therefore, in his Honor to have thus added to the damages as assessed by the jury.

The defendants' exceptions, we think, can, neither of them, be maintained. The claim of the plaintiff, as set forth in the affidavit, was for eleven hundred and twenty-five pounds of cotton, and the mandate

to the sheriff was expressly limited to that number of pounds. It may possibly be, as laid down by his Honor, that if the property had been so circumstanced, as that the sheriff, in executing the writ, must *necessarily and in fact* have removed the whole crop out of the possession of the constable, and in so doing had caused its loss to the execution creditors, the plaintiff might have been responsible for the whole, upon the principle that every one must so use his own as not to injure another.

But certainly upon no other principle, either of law or common justice, could such responsibility attach to the plaintiff.

If, in executing the order, the officer abused his authority by exceeding the exigencies of his writ, the responsibility must rest upon him, and not upon the plaintiff, who neither authorized such excess nor gave it sanction.

But the truth is, there is no abuse of authority disclosed in the case. The cotton, though matured and subject to execution, stood in the field, and was incapable of immediate delivery, and all that the officer did, was to have picked and delivered the number of pounds specified in the mandate and secured by the plaintiff's undertaking, leaving the residue unmolested and the rights of the defendants with regard to it entirely unobstructed.

It is not like the case of seizure and sale of property under execution, whereby a trespass may be committed if levied upon the property of a wrong party; but the course pursued was that which the law prescribes, in order that the title of personal property, (357) when disputed, may be gotten before the courts and tested by a trial there had.

As to the residue, left untouched in the field and just in the condition it was before the plaintiff began the action, it was exactly as his Honor said, the duty of the constable to look after it, and if he permitted the same to be lost to the executions in his hands, the fault was his own, and his must be the responsibility.

The sheriff was at liberty, as he saw properly to do, to employ a deputy, or agent, to pick and deliver so much of the cotton as was claimed by the plaintiff; and the evidence going to show that he thus delivered it, and not in person, in no manner tended to contradict his return upon the writ.

The judgment of the court below is reversed, and the defendants will have judgment here for the sum of $91.35, with interest thereon from the first day of the term of the court, at which the judgment appealed from was rendered, and the clerk will divide the costs of this court between the parties.

PER CURIAM. Judgment accordingly.

Cited: Rawlings v. Hunt, 90 N.C. 275; *Reese & Co. v. Cole,* 93 N.C. 91; *Woodlief v. Harris,* 95 N.C. 213; *Wooten v. Hill,* 98 N.C. 54; *Knight v. Rountree,* 99 N.C. 394; *Stephens v. Koonce,* 103 N.C. 269; *Brem v. Covington,* 104 N.C. 594; *Abernathy v. R.R.,* 159 N.C. 343; *Fountain Co. v. Schell,* 160 N.C. 531; *Harper v. R.R.,* 161 N.C. 452; *Hoke v. Whisnant,* 174 N.C. 660; *Bargain House v. Jefferson,* 180 N.C. 33; *Williams v. Davis,* 183 N.C. 93, 94; *Ins. Co. v. R.R.,* 198 N.C. 519.

STATE EX REL. H. R. DELOATCH v. W. J. ROGERS.

Election, Law of Construed.

1. The result of an election will not be disturbed because of illegal votes received or legal votes refused, unless the number be such that the correction would show a majority for the contesting party.
2. And the burden of proof is upon the contestant to show the rejection of a sufficient number of votes, even if they ought to have been counted, to reverse the declared result.
3. The election law of 1877, ch. 275, sec. 20, enumerates three kinds of tickets which are declared void, and must be rejected from the count as to all persons voted for thereon:
   (1) Tickets rolled up together.
   (2) Those containing the names of more persons than the elector is entitled to vote for—whether for a single office, or for one not to be filled, as in this case.
   (3) And those having some device upon them.

(358) CIVIL ACTION in nature of *Quo Warranto,* tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

The plaintiff appealed.

Messrs. D. A. Barnes, Mullen & Moore and W. Bagley, for plaintiff.
Messrs. R. B. Peebles and Day & Zollicoffer, for defendant.

SMITH, C. J. This action is prosecuted under section 366 of the Code to recover possession of the office of register of deeds, which the defendant is alleged to have usurped and to hold, claiming a right thereto by virtue of an election held on the Tuesday next after the first Monday in November, 1880, and into which he was inducted by the board of county commissioners. The relator asserts that he re-

ceived the largest number of votes cast at the election for the said office, and has been wrongfully deprived of it by the illegal action of the registrar and judges at certain election precincts, in refusing to count large numbers of ballots cast for him in making up the returns transmitted to the county convassers. The rejected tickets were adjudged to be illegal because they contained upon their face the name of James D. Boone, and he was voted for, for the office of superior court clerk, which he then held by appointment of the judge to fill the unexpired term, resulting from the resignation of the preceding incumbent, and there was no vacancy to be supplied under the law (359) by a popular election. The form of a ticket is set out in the case. Several issues were submitted to the jury of which those deemed material in considering the appeal, in condensed form with the responses, are as follows:

1. Was the relator voted for at all the election precincts of the county for the office of register? No.

2. Did he receive at the election a majority of the lawful votes cast? No.

3. Did the judges of election, at Rich-Square, Occoneechi and Wiccacone election precincts, refuse to count any votes cast for the relator, and if so, how many? Some at Wiccacone, number not known.

5. How many votes did the relator and defendant respectively receive at these precincts, and how many were returned by the judges of election? For the relator, 2. For the defendant, 549.

6. How many lawful votes were cast in the county for the competing candidates for the said office? For the relator, 1110. For the defendant, 1469.

These findings of the jury were under instructions from the judge that in passing on the second issue they should exclude from the count all such tickets as contained the name of Boone and were cast for him for the office of clerk, as for the others for their respective officers, which tickets his Honor declared to be void; but that in passing upon the third and fifth issues, all the tickets must be counted inclusive of those rejected in determining the second issue.

At the trial one Kinchen Davis, a witness examined for the relator, stated that there were between 150 and 200 ballots put in the box at Wiccacone bearing the name of Boone for the office of clerk, which were rejected, and that the relator's name for register "was on some of said ballots but he could not tell how many."

Another witness testified that "as many as 300 ballots at Rich-Square and Occoneechi with Boone's name for clerk on (360) them and that of the relator for register, were thrown out, but the witness could not state the precise number."

From this summary review of the facts it will be noticed that if all the rejected ballots are restored and added to those returned for the relator, so far as can be ascertained with accuracy from the evidence, the aggregate is insufficient to overcome the majority of 359 accorded in the returns to the defendant. How many in excess of the three hundred were thrown out in the count of votes at Wiccacone, which bore the plaintiff's name, is left wholly uncertain, and there must have been of such at least 59 to neutralize the aggregate vote given to the defendant.

It is a well settled rule in contested elections, scarcely needing a reference to authority for its support, that the result will not be disturbed, nor one in possession of office removed, because of illegal votes received or legal votes refused, unless the number be such that the correction shows the contesting party entitled thereto. If the obnoxious ballots ought to have been counted for the relator, and yet are insufficient to overcome the majority ascertained by the count actually made, the election will stand and the occupant of the place left in unmolested possession of it.

But the argument before us was directed mainly to a review of the ruling of the court in regard to the rejected ballots, and the rendering of the statutory provision relating thereto. Acts 1876-77, ch. 275, sec. 20.

As this is a question of frequent recurrence and practical importance, we have deemed it our duty to consider and decide it also. This section is in these words:

"When the election shall be finished the registrars and judges of election, in presence of such of the electors as may choose to attend, shall open the boxes and count the ballots reading aloud the names of the persons who shall appear on each ticket; and if there
(361) shall be two or more tickets rolled up together, *or any ticket shall contain the names of more persons than said elector has a right to vote for, or shall have a device upon it, in either of these cases, such ticket shall not be numbered in taking the ballots, but shall be void,* and the said counting of votes shall be continued without adjournment until completed and the result thereof declared."

The statute enumerates three classes or kinds of ticket which are not to be numbered and are declared to be void, to-wit: tickets rolled up together, tickets with more names than the elector is entitled to vote for, and tickets having some device upon them. It is plain that tickets of either class are not only inoperative as to the person thus improperly voted for, but as to all others for whom the elector may vote. The entire ballot for all is vitiated and must be rejected

from the count. The case is not governed by the rule laid down in the cases cited in Judge McCRARY's work on the American Law of Elections, section 399, which in the absence of a statute limits the vitiating effect of such a ballot to the vote for one not to be elected, or to all who are voted for to fill an office, when the number voted for is greater than the number eligible to the office, and leaves the ballot effective as to such as are to be elected and for whom the elector may vote. The statute is peremptory, and the entire ticket, when its provisions are disregarded, is rendered illegal and void.

The sole inquiry then is as to the meaning of the act in its description of that immediate class of tickets, which "contain the names of more persons than the elector has a right to vote for," and is the ticket before us within the compass of its *intent,* as it surely is of its *words?*

Upon full consideration we are of opinion that it is one of the prohibited ballots, and we are not at liberty to restrict its comprehensive terms by adding thereto, as suggested in the argument for the relator, the further qualifying words, *for the same office,* when the general assembly has not seen fit to use them; nor do we (362) see any reason for annulling the ballot as to the other persons whose names are upon it when more than the proper number are voted for for a single office, which does not apply with equal force to a ballot for an office not to be filled at all. The illegal and irregular votes are equally severable from the other names on the ticket in the one as in the other form of the ballot.

The purpose of similar enactments in the north-western states is there interpreted by the courts to be, to secure by secret ballot, (not open to inspection nor bearing any distinctive mark by which it can be known for whom the elector has voted) his independence and freedom in the exercise of his political right. Our statute is not intended so much to secure this object, as to protect the elector from imposition and fraud in the use of mere party designations and symbols, and to enable him to vote understandingly, and for persons whom he may prefer, according to the true theory of popular institutions.

"The act prescribing the form of the ballot in Mississippi," remarks the judge delivering the opinion of the court in *Oglesby v. Sigman,* 58 Miss., 502, "must have been intended to secure uniformity in the appearance of ballots, so that ignorance and blind party devotion might not be led to the adoption of ballots by the guidance of some mark and device, as to which they were instructed by their leaders, and which, instead of intelligent comprehension of whom or for what they are casting their ballots, should determine their selection of ballots to be cast."

Any device put upon a ticket is fatal to its validity, because the elector may be misled by it, and not exercise his own unbiased judgment and choice in determining for what candidates to give his vote.

To permit the insertion of inadmissible names upon it, a ballot may be as effectual in influencing the action of the elector as a pro-
(363) hibited device put upon it for the purpose of distinguishing it.

But of the policy and usefulness of a statutory regulation of the ballot as to its form, it is not our province to decide, but to expound and enforce such laws, as the legislature may choose to adopt, according to their true import and meaning. The elective franchise is a valuable right, underlying popular government, and, as all are interested in its honest and intelligent exercise, needs the protection of the law and the repression of all fraudulent practices interfering with the freedom and independence of the elector in casting his vote according to his own choice.

We do not discover any evidence in the present case of fraud or intended wrong on the part of the electors or the judges of election, and our decision rests upon a fair and reasonable construction of the law.

In each aspect of the case, as the burden of proof devolved upon the relator to show the rejection of a sufficient number of votes, even if they ought to have been counted, to reverse the declared result, the judgment of the court must be affirmed.

Nor do we appreciate the force of the objection to the vagueness of the response of the jury to the third issue, since the evidence sent up pertinent to the inquiry does not require, if it indeed authorizes, a more specific finding that can enure to the benefit of the relator.

There is no error and the judgment is affirmed.

No error. Affirmed.

Cited: Deloatch v. Rogers, 86 N.C. 730; *DeBerry v. Nicholson,* 102 N.C. 475; *Baxter v. Ellis,* 111 N.C. 126; *Judicial Term of Office,* 114 N.C. 923; *Farthing v. Carrington,* 116 N.C. 321; *Rodwell v. Rowland,* 137 N.C. 635; *Hendersonville v. Jordan,* 150 N.C. 38; *Wright v. Spires,* 152 N.C. 6; *Casey v. Dare County,* 168 N.C. 288; *Hill v. Skinner,* 169 N.C. 409; *Bray v. Baxter,* 171 N.C. 8; *Woodall v. Highway Com.,* 176 N.C. 388; *Comrs. v. Malone,* 179 N.C. 609; *Phillips v. Slaughter,* 209 N.C. 544.

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MENEELY & CO. v. B. CRAVEN.

Pleading—Counterclaim.

A counterclaim, the amount of which exceeds the jurisdiction of a justice, cannot be entertained by him; and no amendment will be allowed in the superior court, after appeal, which operates to increase the sum demanded beyond the justice's jurisdiction.

CIVIL ACTION tried at Fall Term, 1881, of RANDOLPH Superior Court, before *Gudger, J.*

This action, wherein the plaintiffs seek to recover of the defendant the sum of $150.62 as a balance due from him on the purchase of a bell, was begun in a justice's court, and brought by a succession of appeals to this court.

On the trial in the court below, it was admitted that the defendant had purchased the bell in May, 1876, together with mountings for the same, at the price of $402.09, upon which he had made payments, in the way of cash and the price of an old bell taken in exchange, whereby that sum was reduced to the sum sued for, of $150.62.

By way of defence to the plaintiffs' recovery and as a counterclaim, the defendant alleged that there was a special warranty, on the part of the plaintiffs, as to the tone and metal of the bell, and that the same had failed to come up to the warranty, and in fact was so faulty that he had been forced to sell it and purchase a new one; and the amount due him for such breach of warranty be pleaded as a counterclaim, insisting that he had a right to have the same used as a defence to defeat the plaintiffs' demand for $150.62, and then, as the foundation of a judgment in his own favor for $179.36—thus making the counterclaim, relied on, amount to $329.98. (365)

The plaintiffs insisted that the defendant could not have his counterclaim considered by the court, for the reason that the action having begun in the court of a justice, no counterclaim could be set up which exceeded in its amount, the jurisdiction of that court.

Under instructions from the court, which justified them in so doing in case they so found the facts, the jury rendered a verdict for the defendant, whereby, after setting off the plaintiffs' demand for $150.62, they allowed him the sum of $179.36 as a balance due for breach of warranty.

Thereupon the plaintiffs moved for a new trial, on the ground of error committed in the charge to the jury, and his Honor conceiving that he had given erroneous instructions, set aside the verdict and allowed the plaintiffs' motion, from which ruling the defendant appealed.

Messrs. Scott & Caldwell, for plaintiffs.
Mr. John N. Staples, for defendant.

RUFFIN, J., after stating the case. The question presented by the defendant's appeal has been so recently, and so fully considered by the court, that we cannot suppose it to be necessary that we should go over the ground again.

The decision, at last reached in *Boyett v. Vaughan,* 85 N. C., 363, fortified as it is by the reasoning of the Justices in *McClenahan v. Cotten,* 83 N. C., 332, and *Derr v. Stubbs, Ib.,* 539, must be deemed final, and as settling the law, that a counterclaim, the amount of which exceeds the jurisdiction of a justice's court, cannot be entertained in a court of that character, and also that no amendment can be permitted in the superior court, after appeal, which serves to enlarge the sum demanded beyond the jurisdiction of the original court.

A profound respect for the court who preceded us, a majority
(366) of whom took a different view of the law and made a different ruling, caused us to hesitate long, and weigh well the matter before announcing our conclusion, and nothing short of a conviction, so fixed as not to be gotten rid of, that the law of the case is as we declared it to be, could have prevailed with us to reverse their judgment.

We deem it not unbecoming, however, to say that further thought and reflection upon the point have tended only to strengthen the conviction we then felt, and that we adhere to the decision made with renewed confidence in its correctness.

No error. Affirmed.

Cited: Raisin v. Thomas, 88 N.C. 150; *Hurst v. Everett,* 91 N.C. 403; *Cheese Co. v. Pipkin,* 155 N.C. 396, 401.

J. L. G. ENGLAND AND OTHERS v. EDMUND GARNER AND OTHERS.

Pleading—Complaint—Demurrer.

A complaint containing several causes of action, to wit: 1. To impeach and set aside a decree for fraud and imposition. 2. To annul deeds executed by a commissioner to purchasers of land sold under the decree. 3. To recover possession of the land and to have an account of the rents and profits. 4. And for an injunction against waste, is not demurrable for misjoinder of separate causes of action.

CIVIL ACTION tried at Spring Term, 1882, of MOORE Superior Court, before *Shipp, J.*

The defendants appealed.

Mr. John Manning, for plaintiffs.
Messrs. Hinsdale & Devereux, for defendants.

SMITH, C. J. The facts set out in the complaint and ad- (367) mitted by the demurrer are these:

James W. England, who removed from this state in 1836 to Alabama, died in 1849 intestate, seized of an estate in fee in the three several tracts of land described therein and situated in Moore County, which descended to his five children and heirs at law, to-wit: Thomas H. England, Mary E., who intermarried with A. Hutchison; Cornelia, successively the wife of one Evans, and upon his death, of J. W. Crawford; Julia, who married C. C. Curtis, and J. L. G. England, born after his father's change of residence. In the court of equity of Moore, at Spring Term, 1860, a petition for partition and sale of the lands was filed in the names of the said Thomas H. England, who died in 1864 intestate and without issue, James L. G. England, A. Hutchison, who died in 1865, and Mary E., his wife, J. W. Crawford and wife Cornelia, both since deceased, the latter having died in 1860, leaving the plaintiff J. W. Evans, her son and only heir at law, and C. C. Curtis and wife Julia, who died in 1874, leaving two children, the plaintiffs M. E. Curtis and A. B. Curtis. A decree granting the prayer of the petitioners was rendered at the same term, pursuant to which the lands were sold by the clerk and master and subsequently conveyed to the several purchasers and for the sums following:

1. The tract of 550 acres, for $366, to H. D. McNeill.
2. The tract of 118 acres, for $430, to Edmund Garner.
3. The tract of 200 acres, for $200, to N. R. Brady, the two last named being defendants in the action.

At Fall Term, 1861, the commissioner was directed to collect and pay over the purchase money to the heirs. The cause remained on the docket, so far as appears, without further action until the fall of 1867, when a rule issued against the several purchasers requiring each to pay into the office the sum due by him. They severally ap- (368) peared and answered the rule, and for cause shown it was dis- charged as to Garner and Brady at Spring Term, 1868, and as to McNeill at Fall Term, 1871, since which time the cause has been retired and, as was held when the case was before us at January Term, 1881, on a motion for relief, the proceeding then came to an end. See 84 N. C., 212. McNeill has sold the tract bought by him to the de-

fendant Brady. It is charged that the defendants are committing waste upon their several tracts, and are insolvent.

These are the material facts averred in the complaint and necessary to its being properly understood.

The plaintiffs, in whom vests the title to the lands, if the proceedings in the court of equity and the subsequent deeds shall be declared inoperative and void, assert that the suit for the sale and partition was instituted and prosecuted without authority from the persons who were then owners and tenants in common, and without the knowledge or consent of any of them, or of the present plaintiffs who succeed to their ancestors' estates, and that their first information of what had been done was derived through one Martindale, who communicated to them the matters which appear of record in the said court, in the year 1874, and that none of the interested parties were aware of the use of their names or gave any assent thereto, unless perhaps the said J. W. Crawford, and he gave no information thereof to the others. The plaintiffs further declare that no part of the purchase money has been received by any of the tenants.

The object of the present action is to impeach and annul the several decrees made in the court of equity for fraud, to set aside the several conveyances under which the defendants claim to derive title, to compel the restoration of the lands with an account of rents, profits and spoliation, and meanwhile for an injunction to prevent the commission of further waste.

The demurrer, interposed as a defence, is for an alleged mis-
(369) joinder of separate and distinct causes of action as improperly associated under the Code, and these are thus specified:

1. To impeach and set aside the several decrees for fraud and imposition;

2. To annul the several deeds executed by the commissioner to the purchasers at his sale;

3. To annul the subsequent deed from McNeill to the defendant Brady;

4. For the recovery of possession of the land and an account of the rents, profits and damages; and

5. For a perpetual injunction against waste.

The objection for duplicity rests upon a misapprehension of the nature and scope of the action, as disclosed in the complaint, and is not supported by its allegations. The essential and primary relief sought is the setting aside the decrees, and, this done, the other demands follow as a matter of course. They do not themselves constitute separate causes of action capable of severance and of being

independently prosecuted, but are inseparably connected with the first.

As these supposed causes of action cannot be divided and separately pursued, as may be done, when they are improperly united, under the order of the judge according to section 131 of the Code, the complaint cannot be obnoxious to the imputation of duplicity. Whether the plaintiffs are entitled to the full measure of relief demanded in the one suit, or the additional allegations upon which the demands are made are to be regarded as superfluous, they should not be denied relief from a decree which undertakes to alienate their estates and was procured by fraud practiced upon the court in which it was rendered. It will be sufficient hereafter to consider whether they can proceed and recover the lands and compensation for use and spoliation in the same, or must resort to other actions.

The demurrer seems to proceed, not so much from a supposed (370) multifarious statement of facts, but rather from the numerous forms of relief demanded. But if these demands be incongruous, this is not a sufficient reason for withholding the remedy to which the plaintiffs are entitled, and refusing the other demands. There is no want of unity in the action, and if the obstacle presented in the judicial proceeding is removed, the consequent restoration of title to the land to its wronged owners will involve all the results which are detailed in the complaint as the basis for further and full redress. The cases cited for the appellees fully sustain the ruling of his Honor in the court below—*Long v. Swindell,* 77 N. C., 176; *McMillan v. Edwards,* 75 N. C., 81; *Bank v. Harris,* 84 N. C., 206; *Young v. Young,* 81 N. C., 91.

In affirming the judgment of the court in overruling the demurrer, we intend to express no opinion upon the merits of the case made in the complaint and of the plaintiffs' equity, and only rieterate, what was said in the former appeal, the reluctance of the court to disturb judicial proceedings after a long period to the injury of innocent persons who have confided in the integrity of the action of the court, and that it will interfere when such consequences are to follow, only "upon the clearest proof."

There is no error, and this will be certified.

No error. Affirmed.

Cited: Hatcher v. Hatcher, 127 N.C. 202; *Walker v. Securities Co.,* 205 N.C. 168.

J. A. HANNER, ADM'R, v. C. N. McADOO.

Reference and Referee—Facts Found Not Reviewable.

1. Under a consent reference, with full power in the referee to hear and determine the case upon the law and facts, where there is evidence, as here, bearing upon the subject of the controversy, this court will not pass upon its sufficiency.
2. *Held further*, that the referee did not exceed the limits of the order of reference by finding that there had been a "settlement" between the parties, and that a certain draft, for the recovery of which the action is brought, was taken "into the account"—that matter being distinctly put in issue by the pleadings.

(371) CIVIL ACTION tried at Fall Term, 1881, of GUILFORD Superior Court, before *Gudger, J.*

The defendant appealed.

Messrs. Dillard & Morehead, for plaintiff.
Messrs. Scott & Caldwell, for defendant.

SMITH, C. J. The plaintiff's demand, on behalf of the estate of his intestate for money received upon a draft deposited with the defendant for collection, being met with several counter-claims preferred, an order was entered at Spring Term, 1878, by consent of parties, referring the action to George H. Gregory, "with full power under the law as referee to hear and determine the case upon the law and facts, and report to the next term." The referee accordingly proceeded to take and pass upon the evidence adduced, and made his report wherein he finds upon a statement of the account a balance of $176.16 due from the intestate to the defendant. The only exception taken by the defendant and presented in his appeal is, to the sum of $176.16 charged against the defendant and represented in the intestate's note of $100 to the defendant executed June 27th, 1868, for the assigned reason that the "charge and finding of fact on which it is based is against the evidence." In the argument before the judge in the superior court, the terms of the objection were expanded, and it was insisted that there was no evidence, or if any, it was insufficient to justify the referee in making the charge.

The force and effect of proofs offered to establish a fact rest exclusively with the court below, and the determination then
(372) made is not open to re-examination here. If the finding is without evidence, it is an error in law which can be revised and corrected. But in our opinion there is no just ground of complaint

against the ruling of his Honor in sustaining the conclusions of the referee in this respect, as a brief reference to the testimony heard by him will show.

Frank Erwin, a witness introduced by the defendant, testified that while he knew nothing of the $382 note executed by the two Moffits and the intestate to the defendant (exhibit 1) he heard the intestate at Moffitt's house urge Moffitt to make some arrangement about a debt they owed the defendant; that the next day the parties were at Greensboro in the defendant's store, and in their conversation the intestate pressed Moffitt to relieve him of the debt; and that the intestate afterwards got from the shop of one Causey a carriage known as the Moffitt carriage. This occurred, the witness states, in June, 1867 or 1868, and he subsequently fixes the latter year as the date from his recollection that, in May, Moffitt came to his camp, and the intestate complained of Moffitt's neglect to pay the debt they were bound on to McAdoo, the defendant. The note to which the exception relates was executed eight days after the other, and recites upon its face that it "is for a carriage from W. D. Moffitt." This testimony indicates (we do not undertake to decide upon its sufficiency) that the value of the carriage, and for which the intestate's note was given, was appropriated by Moffitt in reducing his said indebtedness and exonerating the intestate from his liability *pro tanto,* and as such, accepted by the defendant and sold to the intestate. The fact is thus found by the referee and sustained by his Honor; and, there being evidence, we are precluded from inquiring whether it ought or ought not to have conducted the referee to the conclusions arrived at.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

In the same case on plaintiff's appeal: (373)

SMITH, C. J. In this appeal, having already considered that of the defendant in the same cause, we are required to review exceptions of the plaintiff taken to the rulings of the court below upon the referee's report. The plaintiff files three exceptions which are in substance as follows:

1. For that the referee has gone outside of the limits of the reference which is confined to the issues raised by the pleadings, and undertakes to find a settlement between the parties and extinguishment therein of the claim now in suit.

2. For that he should have charged the defendant with the amount of the draft, the receipt of which is admitted in the answer, sub-

ject to the claim for bacon, but undiminished by that claim as it is barred by the statute of limitations.

3. For that the settlement is found without or upon insufficient evidence.

I. The first exception rest upon a misconception of the character of the action as developed in the complaint, and of the defence set up in the answer. It is not for the rendering an account of a continuous agency, in the nature of a bill in equity under our former practice, but to enforce the payment of money received upon a draft placed in the defendant's hands for collection under his contract to account therefor. It would have been, under a divided system of legal procedure, an action of assumpsit, or a demand for money had and received for the plaintiff's use.

The charge is briefly that the draft is deposited with the defendant for collection and his receipt therefor taken, stipulating, if it was paid, to account for the money to the plaintiff's intestate on settlement, and that the defendant has made the collection and fails to account therefore or to pay over the proceeds.

(374) The answer, admitting the possession of the draft, as alleged, and the receipt of the money due on it, asserts that the money has been accounted for and paid over, and that he is not indebted to the intestate in the said sum of $425.75, as averred in the complaint, or in any amount whatever.

The defendant's liability for the claim is thus distinctly put in issue, and indeed lies at the very foundation of the action. The reference is made by consent of parties, and confers upon the referee "full powers under the law, as referee, to hear and determine the case upon the law and facts, and report."

The referee accordingly upon the testimony finds as a fact "that there had been an *accounting together and settlement of all unliquidated balances,* growing out of the mutual dealings between the plaintiff's intestate and the defendant, in the fall or early winter of 1868, and that the *value of the draft* for the recovery of which the action is brought, to wit, $425.75, *was taken into account and adjusted by and between the parties.*"

This is in direct response to the issue of payment and discharge, and an essential element in the controversy, clearly within the compass of the order and necessary to an adjudication of the cause.

II. The second exception is disposed of in what has already been said.

III. The sufficiency of the evidence to sustain the fact found by the referee and also by the court, that a settlement embracing the claim had taken place, is not a question for us to determine. If there be

any evidence, or *reasonable evidence,* as it is sometimes expressed, to warrant the finding, it is conclusive of the fact and beyond revision on appeal to this court. The only inquiry then is, whether there be any evidence on which the referee was authorized to act. He bases his conclusion mainly upon the testimony of two witnesses examined, whose evidence pertinent to this point is in substance as (375) follows:

Frank Erwin relates a conversation with the intestate in 1868, after he had come into possession of the draft drawn by Noah Gibson on the New York house, in which the intestate said, "he was going to let Mr. McAdoo have it and thought he could pay him with it," and witness knew intestate was then in debt to the defendant.

Charles Hunter testified that he heard the intestate say he owed the defendant some $700, and if he would take up the draft, (that described by the other witness) he could pay witness what he owed for a horse, and that the intestate afterwards told him "he had let McAdoo have the draft and he had about paid him up."

The receipt itself as set out in the complaint undertakes in its concluding clause that the money when collected should be accounted for on a settlement, that is, should be applied as a payment upon his indebtedness, and thus harmonises with the declarations of the intestate as to the disposition he intended to make and did make of the draft. This evidence certainly tends to support the referee's finding, that the proceeds of the draft have been accounted for and applied to the intestate's benefit, and thus the defendant's liability has been discharged. Of its sufficiency to establishe the fact the referee and his Honor in reviewing, are the sole judges, and not this appellate court.

We therefore concur with the court in overruling the appellant's exceptions in this appeal also, and affirm the judgment.

No error. Affirmed.

Cited: Usry v. Suit, 91 N.C. 410; *Sturtevant v. Cotton Mills,* 171 N.C. 120.

THOMAS J. CAMPBELL v. BROWN & BROWN.

Presumption of Payment—Promise of One Joint Debtor Does Not Bind the Other.

1. The running of the statute of presumptions (where the right of action accrued prior to 1868) is not arrested by the fact that the maker of a bond removed from the state before it matured and has not since returned. The

proviso in the Revised Code, ch. 65, sec. 10, has no application to the case of a presumed payment arising from lapse of time; it has exclusive reference to the statute of limitations.

2. Nor will the promise to pay such bond by one of the joint obligors bind the other or deprive him of the benefit of payment presumed by lapse of time. (the effect of payment and promise to pay discussed by RUFFIN, J.)

(376) CIVIL ACTION tried at Spring Term, 1882, of BUNCOMBE Superior Court, before *Gilliam, J.*

On the 7th day of April, 1852, the defendants gave their bond to the plaintiff, whereby they covenanted to pay him, nine months after that day, at Pittsburg, in Pennsylvania, the sum of $1,670.50, and upon which they made two payments, as endorsed thereon—one of $334.00 on the 23rd of April, 1855, and the other of $99.75, on the 23rd of January, 1857.

This action, which was begun on the 29th December, 1876, is brought to recover the balance due on said bond. The defence relied on is payment presumed under the statute from lapse of time since the date of the last payment.

On the trial the plaintiff offered in evidence thirteen letters addressed to himself from the defendant W. J. Brown, the first one bearing date June 4th, 1853, and the last September 24th, 1870, and the others
(377) written at irregular intervals between those two dates, and in all of which there were contained express acknowledgments of the debt as still subsisting, and promises to pay it. He also offered in evidence two letters from the defendant John E. Brown—one dated April 15th, 1855, in which he proposed to pay the interest then due and such as should become due in the next ensuing twelve months, provided the plaintiff would agree to extend, for that period, the time for payment of the principal; and the other dated July, 1855, in which was remitted a check for the sum of $334.00, he having been notified of the plaintiff's acceptance of the above proposition. He also offered in evidence a third letter from this defendant, dated the 19th September, 1856, and written from Australia, in which there was a renewed promise to pay the debt as soon as he should be able to do so, and requesting the plaintiff's forbearance. It was also shown in evidence that the defendant John E. Brown left the state of North Carolina in the year 1852, before the maturity of the bond, and that he has not resided here since that date.

The court instructed the jury that the unqualified admissions of the note sued on, and a promise to pay it, by one defendant, made within ten years preceding the bringing of the action, and before the bar of the statute was complete (counting out the time between May the 20th, 1861, and January 1st, 1870,) would rebut the presumption

of payment as to both, and entitle the defendant to recover against both; and further, that if the defendant John E. Brown wrote to the plaintiff that he could not pay the note at the time, and begged indulgence, then the time of such indulgence given in pursuance of such request, would not be counted as to him, and that if the defendant John E. had left the state before the bond matured, and had not since returned, the statute would not run, or the presumption arise, as to him. As to all of which instructions the defendants excepted.
There was a verdict and judgment for plaintiff, and the defend- (378) ants appealed.

Messrs. C. A. Moore and H. B. Carter, for plaintiff.
Mr. J. H. Merrimon, for defendants.

RUFFIN, J. The right of action having accrued in this case prior to the year 1868, it is to be determined by the law as it existed at the date of the contract.

We are of opinion that the court erred in instructing the jury, that no presumption of payment could exist as to the defendant John E. Brown, because of his having departed from the state before the bond sued on had matured, and his being continuously absent since.

The *proviso*, contained in Rev. Code, ch. 65, sec. 10, whereby it is declared that as to a debtor, non-resident at the time a cause of action against him shall accrue, the plaintiff may have his action upon his return within the time limited for such actions, has no application to the case of a presumed payment arising from the lapse of time under the act of 1826, (Rev. Code, ch. 65, sec. 18.) It formed a part of the act of 1715, and had exclusive reference to the statute of limitations proper.

It is the duty of a debtor, regardless of his place of residence, to seek his creditor, for the purpose of making payment; and there will be a presumption in favor of his having done so, in every instance, after the lapse of the time which the statute prescribes.

Though not possessing the force of an absolute statutory bar, the presumption of payment under such circumstances is very strong, and is favored by the law as tending to the repose of society and the discouragement of stale claims. It is one, indeed, that may be rebutted by proof of circumstances which raises a stronger counter-presumption, and as was said in *McKinder v. Littlejohn,* 26 N. C., 198, evidence of a change of residence, or even of a distant residence, (379) may be received for this purpose in aid of other evidence, such as the insolvency and general destitution of the debtor.

But we know of no authority proceeding from this, or any other court, for saying that a mere change of residence is of itself sufficient, wholly to prevent the presumption, which the law, by an intendment of its own, raises from the lapse of the prescribed number of years, without something having been done on the part of the creditor, to enforce the satisfaction of his demand. And more especially would such a rule seem out of place in a case in which, like the present one, the instrument sued on was on its face made payable beyond the limits of this state, and the plaintiff himself so resided, and could have exactly the same remedies against the defendant, and the same opportunity to enforce them, after his removal, that he before possessed. The tribunals of the state of California, whither the defendant removed, were as open to the plaintiff as the courts of this state, or even as the courts of his own domicile; and if he would not avail himself of them, he should not be allowed to take advantage of his own laches to defeat a wholesome provision of the law.

Nor can we concur in the instructions, as given, with reference to the effect, which the admissions and promises of one defendant should have upon the rights and obligations of the other. In England, as well as in most of the states of the Union, it is the generally admitted doctrine, that a *payment* made by one obligor in a bond before the expiration of the time necessary to raise a presumption of payment and within the prescribed period before the bringing of the action, will take the case out of the rule of presumptions as to all his coöbligors. Various reasons have been assigned for thus holding. In some of the cases it is said that a payment is an unequivocal admission of the debt as still subsisting, more reliable than any mere promise,
(380) as being more deliberately made and less subject to misconstruction. Again, it is said to be an *act,* which inures to the benefit of all the obligors alike, and of which each one could avail himself, in case he were sued on the bond within the time, and as they might take the advantage of it, so all must be bound by it. The correctness of the rule itself has been gravely doubted by some of the courts of the very highest respectability, and finally after some fluctuation in its decisions, it has been expressly repudiated by the court of appeals of the state of New York in *Shoemaker v. Benedict,* 1 Kernan, 176, and the broad ground taken, that it is not within the power of the joint obligor, even by an actual payment on the bond, to bind the others—and such is said in 3 Parsons on Contracts, 80, to be the tendency of the modern adjudications on the point.

In this state, however, the rule, which allows the obligations of one coöbligor to be affected by such a *payment* made by another, has been directly applied in *McKeethan v. Atkinson,* 46 N. C., 421; *Wilfong v.*

Cline, Ib., 499; *Lowe v. Sowell*, 48 N. C., 67, and has been clearly recognized in a number of other decisions. It is now too firmly established to admit of a thought of its being disturbed by us. But farther than this our courts have never gone; and there seems to be no warrant of authority for the position that by a naked acknowledgment of the debt and a promise to pay it, whenever made and however unqualified they may be, can one obligor bind his coöbligor, and deprive him of the benefit of that presumption which the law makes in his behalf.

In *Lane v. Richardson*, 79 N. C., 159, we concede, there is a *dictum*, which appears at first sight to give it some support, but upon a closer examination it becomes perfectly manifest that the learned judge, who delivered the opinion of the court, was under no necessity to distinguish between the effect of a payment and that of a mere promise, and that in fact he did not undertake to do so. But in speaking of the effect of "the admissions of one joint debtor," he had in (381) his mind, only the *payment* that had been actually made in the case, and the effect of which was the very matter to be determined. Whenever the question as to the effect of a bare acknowledgment has been presented, so as to render a decision upon it necessary and proper, the rule adopted by the court, as we understand it, has been the very opposite of that laid down by his Honor in the court below. Though somewhat obscurely reported, the point was presented in *Buie v. Buie*, 24 N. C., 87, and it was there held that even if there should be evidence of an acknowledgment sufficient to repel the presumption of payment as to one of two of the makers of a bond, still if the presumption was not repelled as to the other, the case would come within the rule as to both, and both would be protected by the statutory presumption.

Whatever obscurity there may have been about this case, it was afterwards entirely removed by the opinion delivered in *Lowe v. Sowell, supra,* in which the late Chief Justice PEARSON uses the following language: "In 1841, while on the superior court bench, on the supposition that there was evidence to repel the presumption of payment in regard to one of the defendants, I instructed the jury, if the presumption was not repelled also in regard to the other defendant, they should find the issue on the plea of payment in favor of both, for if the presumption held as to one, payment by him discharged the debt. This ruling was approved by the supreme court, and *the distinction was taken between matter which extinguished the debt, and that which only was a bar to the remedy. Buie v. Buie,* 24 N. C., 87."

The rule, as thus expounded, was reiterated and enforced in *Pearsall v. Houston*, 48 N. C., 346, and we do not feel at liberty at this day to depart from it.

All the cases referred to by counsel, in support of the plaintiff's position, had reference to unsealed instruments, and therefore
(382) fell under the "statute of limitations" proper, which affected only the remedy of the parties plaintiff, and as we have just seen, the law makes distinction between such cases and those in which the statute raises a presumption, such as affects the debt itself, and if unrebutted, extinguishes it.

It may be difficult to perceive any just principle upon which to base such a distinction, but it has been clearly marked out by the court and constantly observed. Indeed, if resort be had in the matter to principle, as distinguished from precedent, it is impossible to understand how, in any case, the unauthorized acts and declarations of one party, though he be jointly bound, can be admitted to enlarge the promises or extend the obligations of another, and hence we are not disposed to push the rule one inch beyond the requirements of the adjudicated cases.

To adopt the conclusion of the court below is in effect to say, that one of two joint obligors may, by an acknowledgment of the debt made on the last day of the ninth year after the execution of the bond, so operate upon the liability of his joint obligor, as to continue it throughout another statutory period of ten years; and this, without the assent of the latter, or, as it may be, even without his knowledge.

We, therefore, feel constrained to reverse the judgment of the court below, though with some reluctance, since as disclosed in the evidence we are inclined to the opinion that the promises of each one of the defendants may have been sufficient to repel the presumption as to himself, and that if the case had been so put to the jury, they might properly have returned the verdict they did against both.

Inasmuch, however, as it is impossible to know but that the verdict against one was the result of evidence with regard to the admissions and promises of the other, there can be no alternative other than a *venire de novo.*

Error. *Venire de novo.*

Cited: Rogers v. Clements, 92 N.C. 85, 86; *Rogers v. Clements,* 98 N.C. 184; *Houck v. Adams,* 98 N.C. 522; *Alston v. Hawkins,* 105 N.C. 6, 9; *Johnson v. Lumber Co.,* 144 N.C. 719; *Saieed v. Abeyounis,* 217 N.C. 648.

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A. J. MADDREY v. T. H. LONG AND OTHERS.

Ejectment—Landlord and Tenant—Defences.

Under sections 61-65 of the Code of Civil Procedure, a landlord let in to defend an action of ejectment, is not restricted to the defences to which his tenant is confined—approving *Isler v. Foy*, 66 N. C., 547.

CIVIL ACTION to recover land tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

On the trial the plaintiff tendered the following issues:

1. Is the plaintiff entitled to the possession of the land described in the complaint?

2. What damage has the plaintiff sustained by the wrongful withholding of the possession of the land?

The defendants, Stephenson and Crocker, who were by consent let in to defend the action, tendered the following issues:

1. Are the defendants, J. T. Crocker and R. T. Stephenson, the owners in fee simple of the land described in the complaint?

2. Are the said defendants entitled to the possession of the said land?

In support of his title the plaintiff introduced the record of a judgment rendered at Spring Term, 1878, of the superior court for said county in favor of A. J. Maddrey against the defendant, Thomas H. Long, for $343.95—the bond on which the judgment was obtained having been executed in 1860.

The plaintiff then introduced an execution which was issued on said judgment on the 5th day of June, 1878, and showed that under (384) said execution of the sheriff of Northampton County, on the 30th day of September, 1878, sold the *locus in quo* to the plaintiff and conveyed the same to him and his heirs by deed. All of which proceedings were held to be regular and in form. The plaintiff further proved that Long was in possession of the land and that the annual value thereof was $100, and then rested his case.

The defendants, Crocker and Stephenson, then offered to show—1. That on the first day of October, 1869, W. H. Hughes, as executor of W. M. Crocker, recovered three judgments before a justice of the peace against the defendant, Thomas H. Long, for the sum, in aggregate, of about eighty dollars, and that each of the judgments was regularly docketed on the 18th day of October, 1869. That on the 24th day of December, 1869, executions were issued on said judgments and went into the hands of the sheriff, who after due notice sold the said land on the 5th day of February, 1870, and that J. T. Crocker and R. T. Stephenson became the purchasers and received a deed from

the sheriff for the same. And that since the said 5th day of February, 1870, the defendant Thomas H. Long has continued to live on said land, but there has been no agreement between him and said Crocker and Stephenson touching his continuing in possession of the same.

This evidence was objected to by the plaintiff, and the court being of the opinion that the defendants, Crocker and Stephenson, could not avail themselves of any defence which was not open to their co-defendant Thomas H. Long, ruled out all of said evidence, and Crocker and Stephenson excepted.

The verdict was given in behalf of the plaintiff; there was judgment accordingly, and the defendants appealed.

Mr. S. J. Wright, for plaintiff.
Mr. R. B. Peebles, for defendants.

(385) ASHE, J. There is error. The principle upon which his Honor ruled out the evidence of the defendants (Crocker and Stephenson) has no application to this case. Under the former practice it was a well settled rule that when a landlord was let in to defend an action of ejectment, he stood in the place of the tenant, and could make no defence which the tenant could not have made. *Wiggins v. Reddick*, 33 N. C., 380; *Belfour v. Davis*, 20 N. C., 443; But where a defendant is let in to defend such an action by *consent*, he is not restricted to the defence of the party in possession, upon whom the process was originally served, but any defence he can make is open to him. *Wise v. Wheeler*, 28 N. C., 196, and *Lee v. Flannagan*, 29 N. C., 471, in which case RUFFIN, C. J., said: "We had occasion to look into this question in *Wise v. Wheeler*, and held that when the tenant in possession makes default, and another is let in by consent to defend, upon admission of actual possession in that person, it must be understood, that it was the object of those parties to try the title between themselves at once without the delay or expense of a new suit." These cases were decisions under the old practice.

Since the adoption of the Code it has been held in the case of *Isler v. Foy*, 66 N. C., 547, that under the provisions of the Code, Secs., 61, 65, a landlord let in to defend in a civil action for the recovery of land, is not restricted to the defences to which his tenant is confined, nor is this principle varied by the circumstance that the plaintiff is the purchaser at execution sale against such tenant, and that the latter was in possession at the date of the sale and of the commencement of the action. There is no conflict between that case and *Whissenhunt v. Jones*, 78 N. C., 361. The main questions in that case turned upon

the points of notice and damages—whether the want of notice to leave to the original defendants, who were tenants, could be taken advantage of by those who were allowed to come in and defend the action, and whether the damages were to be assessed to the commence- (386) ment of the action, or up to the trial.

There was error in the ruling of his Honor in rejecting the evidence offered by the defendants, and they are on that account entitled to a new trial.

This will therefore be certified to the court below to the end that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: Bryant v. Kinlaw, 90 N.C. 340.

WILLIAM R. RAY, ADM'R., v. THOMAS W. PATTON, EX'R.

Executors and Administrators—Practice.

Where an administrator denies an alleged debt of his intestate, pleads fully administered and no assets applicable to the same, the issue as to the contested indebtedness must be determined by the jury; and this being settled, an inquiry as to the assets and the disposition thereof must be had by reference or upon issue to a jury—the burden of proof being upon the plaintiff to show a personal liability of the administrator.

CIVIL ACTION, tried at Spring Term, 1882, of BUNCOMBE Superior Court, before *Gilliam, J.*

James W. Patton died in December, 1861, leaving a will in which William A., James A., and Thomas W. Patton, his sons, and N. W. Woodfin are appointed executors. The two first named qualified and proceeded with the administration until their deaths. William died in April, 1863, and James in March of the following year. The remaining executors subsequently assumed the trust and the defendant, Thomas, alone survives.

The present action for work and labor rendered by the plain- (387) tiff's intestate to the testator, was begun on June 12th, 1869, and the executors, on whom process was served, deny the alleged indebtedness, and as a further personal defence, say, they have fully administered and have no assets applicable to the plaintiffs demand.

In June, 1870, a reference of the administration account was made, without prejudice, to the clerk and certain others, and no action being

had under the order, it was amended in February, 1875, by the substitution of the name of J. M. Gudger in association with, and in place of the other referees, and they were directed "to take and state an account of the administration and report to the next term with the evidence on which the said account is stated." The order of reference is made applicable to this and several other causes then depending, in which the account was necessary, "without prejudice to the parties or to the legal rights of the parties."

At Fall Term, 1876, the following order was entered: "This case having at — term been referred by consent to J. M. Gudger and J. E. Reed, the referees at Spring Term, 1876, filed their report, and no exception having been filed thereto, the same is in all respects confirmed."

The report, although full in its statement of the results of the successive administrations by the several executors, fails to ascertain the condition of the assets at the time when the summons was issued, by which the sufficiency of the defence must be determined, or at the period to which the action is brought. The referees represent the disbursements of the defendant as in excess of the moneys received by him, but say there are unadjusted partnership accounts between the testator and others, in which he is largely a creditor; and that there are also unsettled matters between the representatives of the two executors who first qualified and the surviving executor, from which as-
(388) sets may be derived, and also other claims, but the defendant is not charged with negligence in endeavoring to reduce the claims to possession.

At the trial several preliminary motions were made by the plaintiff's counsel:

1. That the court declare and adjudge that no reference has been made in this case.

2. That, if made, it was premature, and should have awaited the determination of the question of the testator's indebtedness to the plaintiff's intestate.

3. That the order of confirmation was also premature and irregular.

4. That the report be recommitted to the referees for a more specific statement, and

5. That it be adjudged that the report in substance charged the defendant with assets.

The motions were overruled, and thereupon the jury, empannelled to try the single issue of indebtedness, find for the plaintiff and ascertain the amount due. Judgment was rendered according to the verdict, and it is declared that "this judgment is only intended to fix the indebtedness of the testator of the defendant to the intestate of the

plaintiff." The court was moved, but refused to render a personal judgment against the defendant, or to allow an execution *de bonis propriis* to issue, and the plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff.
Messrs. C. A. Moore and H. B. Carter, for defendant.

SMITH, C. J., after stating the facts. There is no error in these several rulings of the court. The objections to the order of reference and to the report and its confirmation for any of the causes assigned, are without support from the record and are untenable. The reference was by consent, and the confirmation of the report delayed for six months after it was put in and no exceptions were taken. It is however upon its face incomplete and fails to show the condi- (389) tion of the assets and the funds in the hands of the defendant, or which ought to be, either at the date of the commencement of the suit or that to which the estimates are made, and a re-committal or new reference to ascertain this fact and to extend the inquiry over the period that has elapsed since the report, was a prerequisite to any determination of the state of the assets and of their administration up to the time of trial.

In the former practice all the issues made in the pleadings are determined and disposed of by a single verdict.

In the present case the court submitted to the jury the contested indebtedness alone, and this point being settled, the proper course was to direct an inquiry as to the assets, by a second reference, or to be made upon an issue to the jury, so that the final judgment would be, as formerly, conclusive as to the assets also. This is in accordance with the suggestion of the late Chief Justice in *Heilig v. Foard,* 64 N. C., 710, in assimilating the old to the necessities of the new system of judicial procedure under the requirements of the acts of 1868-69, ch. 113, and of 1869-70, ch. 58.

The plaintiff can have no cause of complaint that the judgment for the debt found by the jury was suspended, until the defendant's possession of assets, and his liability therefor was also determined.

In *Emmett v. Steadman,* 3 N. C., 15 (166), the defendant pleaded the general issue, statute of limitations and fully administered, and the verdict negatived the two first defences and did not dispose of the last. The court declared the finding imperfect, and upon a *scire facias* to show cause why execution *de bonis propriis* should not issue, allowed the defendant to renew his undisposed of plea in the preceding suit, declaring that the judgment was erroneous, but being beyond the power of correction, "the defendants *ex necessitate* must now be

allowed to plead the same matter to this *sci. fa.* to discharge
(390) their own goods, though they would not be entitled to such a plea now, had they not pleaded it to the first action," and that, "it must relate to the teste of the first process by which they were brought into court."

The course thus pointed out must be pursued in the present case, by causing an inquiry into the assets, so as to charge the defendant if he shall appear to be liable, as under the former practice.

The motion for a personal judgment concluding the defendant as to assets, or for an execution against his own property, was properly refused; for this defence is set up in the answer, was not submitted to the jury, and the burden of proof rests upon the plaintiff. It would be a manifest wrong to the defendant to charge him with assets when none have been shown, and no issue submitted to which evidence applicable thereto is pertinent. Even under the former practice, when a defendant is fixed with assets, execution *de bonis propriis* could only issue after a fruitless execution against the goods and chattels of the testator or intestate in the hands of the executor or administrator, and upon notice. *Hunter v. Hunter,* 4 N. C., 558. And it cannot be error to refuse such process upon this qualified judgment.

It must therefore be declared that there is no error, and this will be certified to the end that further proceedings in the cause may be had, if the plaintiff shall be so advised, to ascertain the assets of the testator, if any, in the defendant's hands applicable to the plaintiff's debt.

No error. Affirmed.

Cited: Hawkins v. Carpenter, 88 N.C. 405; *Hinsdale v. Hawley,* 89 N.C. 88; *Little v. Duncan,* 89 N.C. 418; *Gaither v. Sain,* 91 N.C. 307.

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A. H. NEWSOM AND WIFE v. STEPHEN A. EARNHEART.

Boundary—Elections—Registration.

1. The boundaries of a district, in which an election was held upon the question of the "stock law" under the act of 1881, ch. 94, were described in the application to hold said election, as "well defined"; *Held* that the words are not too indefinite to admit of proof to locate the boundaries. And where the beginning is "at a certain tract of land," the difficulty as to the uncertainty of the *point* of beginning is removed where there is a call for the outer boundaries of lands of successive proprietors, thence to a certain point.

2. Review of acts of assembly relating to the "Stock Law" for Rowan County by SMITH, C. J., and the act permitting detached parts of several townships to be formed into a single district, sustained.
3. Where a registrar gave notice that the registration of voters would take place at his residence, but kept the books and actually registered the names at his store some 300 yards distant, he having left word at the house for persons applying there to come to the store, *it was held* that the irregularity did not vitiate the registration and the election held under it.

CIVIL ACTION tried at Fall Term, 1881, of ROWAN Superior Court, before *Eure, J.*

Verdict and judgment for defendant, appeal by plaintiffs.

Messrs. McCorkle & Kluttz, for plaintiffs.
Mr. John S. Henderson, for defendant.

SMITH, C. J. The defendant took into his possession and impounded a cow, belonging to the feme plaintiff and found running at large on his unenclosed land within the limits of the territory hereinafter defined, for the recovery of possession whereof and damages for detaining, the present action is prosecuted. The defendant justifies the taking by virtue of certain acts of the general assembly, to the provisions of which, so far as they bear upon the matters in dispute (392) and tend to elucidate and explain them, it becomes necessary to advert.

In 1879 an act was passed rendering it unlawful for any live stock to run at large within the limits of Rowan, and certain other counties specified by name, upon condition that the qualified voters in them respectively shall adopt the provisions of the act.

A like provision, and upon the same condition of the approval by a majority of the qualified voters therein, is made for a district in Rowan County of definite and described boundaries.

Section 3 suspends the operation of the law until a good and lawful fence has been erected within the boundaries of any county or territory proposed to be enclosed, with gates at all the public roads that enter therein.

Section 7 makes the wilful permitting by the owner of his live stock to run at large in such territory a misdemeanor, and section 8 contains these words: "It shall be lawful for any person to take up any live stock running at large within any township or district, wherein this act shall be in force, and impound the same," with a right to retain the trespassing animal until certain specified charges and damages caused by it have been paid. Acts 1879, ch. 135.

At the next session was passed another act, declared in its title to be "for the protection of crops in Rowan County," and which in section 1 assures to every land owner "the entire and exclusive use of his own soil," and makes an entry thereon without leave, unlawful; and in section 2 forbids the owner of stock to permit it to enter upon the land of another except with his consent.

Section 3 repeals section 40 of chapter 34, and section 1 of chapter 48 of the Revised Code; section 43 of chapter 32 and section 1 of chapter 48 of Battle's Revisal; and section 3 of chapter 135 of the acts of 1879.

(393) Section 5 confines the enactment to the county of Rowan, postpones its operation until September 1st, 1880, and until the county shall have constructed a fence along the boundary line between it and the county of Stanly. Acts 1880, ch. 24.

In the ensuing year the act of 1879 was amended and its provisions extended to four other named counties, and an additional section inserted after section 20, as follows:

"That upon the written application of one-fifth of the qualified voters of any district or territory in Lincoln, Catawba, Alexander, Burke, Guilford, Randolph, Rowan or Gaston counties, whether the boundaries of said district follow township lines or not, made to the county commissioners at any time, and setting forth well defined boundaries of said district, it shall be the duty of said commissioners to submit the question of said "Stock Law" or "No stock law" to the qualified voters of said district." Acts 1881, ch. 94. Again a few days later and at the same session was passed another statute "for the better protection of portions of Rowan County where the stock law now prevails." It adopts sections one, two and three, and repeals sections four and five of the act of 1880, and re-enacts sections eight, nine, ten, eleven, twelve, thirteen and fourteen of the original act of 1879.

Pursuant to the requirements of section two of the first act of 1881, the prescribed number of qualified voters within the district, whose boundaries are set out in their written application to the county commissioners to cause to be submitted to said voters the question whether the stock law should be put in force in those territorial limits, procured an order for an election in which the popular will would be expressed in response to the proposition. An election was accordingly held after a new preparatory registration of the electors, and the necessary number of affirmative votes having been reported, the

(394) commissioners declared the result, and published notice that the law had gone into effect in the district.

The court submitted four issues to the jury, and they find that the feme plaintiff is the owner of the cow; that the defendant took her

into his possession; that the plaintiff had not sustained damage from the defendant's act; and that the cow had been released from the defendant's custody by the plaintiff, A. H. Newsom, with the assent of his wife.

Judgment having been rendered on the verdict for the defendant, the plaintiffs appeal; and the sufficiency in law of the exceptions to the rulings of the court, upon this succinct statement of facts, we now proceed to examine.

1. The first exception embodied in several requests for instructions that were not given to the jury, is to the sufficiency of the descriptive lines surrounding the territory, as contained in the application to the commissioners, within the words of the act which requires a "*setting forth well defined boundaries,*" of the proposed district. It is insisted that the descriptive language is, upon its face and so to be adjudged, so indefinite and vague as not to admit of location by proof.

His Honor declined so to hold and left to the jury to ascertain, if from the testimony they could do so, the position of the several roads, rivers, and other objects called for, as constituting the boundaries, and these located would be "well defined" within the meaning of the statute. In the argument before us the objection was directed mainly to the alleged uncertainty of the place of beginning—being "at the Poor House tract of land (not including the Poor House building)" which is or may be an extended surface, and not a point.

The difficulty is removed by the call in the line to be run of the outer boundaries of lands of successive proprietors, of whom the number is very large, "thence in a north easterly direction to the Yadkin river near the mouth of Crane creek." (395)

The beginning then is at the point of contact and divergence of the line of the Poor House tract and that of the first named proprietor, and the line will proceed along the outer boundaries of the successive proprietors until it meets the waters of the Yadkin at the designated spot.

There would seem to be no difficulty in determining the proposed limits of the district and this was properly left to the jury.

2. The second exception was to the refusal of the judge to charge that before the stock law could have practical force, and the defendant seize the cow, a fence should have been erected around the district.

This was a prerequisite to the exercise of the right to impound under the act of 1879.

But that provision contained in section 3 is expressly annulled by the repealing act of 1880, ch. 24, sec. 3, and again in the re-enactment of this repealing section in the act of 1881, ch. 139, sec. 1. There is then, no necessity for an enclosing fence.

3. The third exception is to the irregular manner of registration, in that, while the notice to the voters desiring to register directed them to the residence of the registrar, the books were kept and the registering actually conducted at his store some three hundred yards distant. This irregularity does not in our opinion vitiate the registration made and the election held in accordance with it. It appears that word was left at the house for every elector, who might there apply to have his name registered, to be advised of the change of place, and while it does not appear, nor is it suggested that a single elector who applied failed to be registered, it is in proof that the registration was full and the books were kept open on the day of election, to enable all who had not been before, then to have their names entered.
(396) Every substantial object of the law has been attained, and a deviation from the directions of the law, in the course pursued, while by no means to be encouraged in those charged with its execution, ought not to be allowed to avoid the election and neutralize its results.

4. The plaintiff insists that the provision of the statute which permits the association of detached parts of several townships into a single district, constituted for the sole purpose of giving effect to a statute within its limits which did not prevail elsewhere, is in violation of the constitution of the state, which recognizes only the territorial division into county and township municipal organizations, and is void. The case cited, *Ex Parte Wall,* 48 Cal., 321, denies validity to all enactments which are contingent upon the approval of the popular vote, indeed to all local option legislation, upon grounds which are expressly repudiated in *Manly v. City of Raleigh,* 57 N. C., 370, and cases determined at the present term. We see no reason why convenient territorial districts may not be formed by the union of several townships or fragmentary parts of them, or by the severance of a single township, as the legislature may deem best for the interests of those who there reside. Certainly the power to pass laws, operating within a limited locality, has been too long exercised by the general assembly to be now called into question, and it is well settled that its operation at all may be made to depend upon the will of the electors within its bounds expressed at the ballot-box.

The various exceptions taken to evidence admitted, based more upon the legal effect of the fact proved than upon the competency of the proof adduced to establish it, have not been pressed upon our attention, and are substantially disposed of in what has already been said. We do not therefore notice them in detail. We find no error in the record, and affirm the judgment.

No error. Affirmed.

Cited: Evans v. Comrs., 89 N.C. 158; *Comrs. v. Comrs.*, 92 N.C. 183; *Busbee v. Comrs.*, 93 N.C. 148; *Smalley v. Comrs.*, 122 N.C. 611; *Sanderlin v. Luken*, 152 N.C. 741; *Hill v. Skinner*, 169 N.C. 409, 411; *Cottrell v. Lenoir*, 173 N.C. 144; *Davis v. Board of Education*, 186 N.C. 229, 233; *Plott v. Comrs.*, 187 N.C. 132; *Reed v. Engineering Co.*, 188 N.C. 43; *Flake v. Comrs.*, 192 N.C. 593; *Monteith v. Comrs.*, 195 N.C. 75.

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A. H. BOYDEN v. GEORGE ACHENBACH.

User of Way—Presumption of Grant.

1. In an action for damages in closing up a way, to which the plaintiff claims a prescriptive right, it is necessary to show, not only that he used the same continuously for more than twenty years, but that the user was adverse and as of right.
2. In such case, where the plaintiff owner put up a fence on either side of the way to protect his land, and the defendant applied for and obtained the consent of said owner to put up an obstructing fence with gates for persons to pass through, but afterwards entirely closed up the way, *it was held*, that there was evidence of an adverse possessory use of the way in the plaintiff, and the same should have been submitted to the jury.

CIVIL ACTION tried at Spring Term, 1881, of ROWAN Superior Court, before *Seymour, J.*

The plaintiff appealed.

Mr. John S. Henderson, for plaintiff.

Messrs. McCorkle and Bailey, for defendant.

SMITH, C. J. The action is for damages in closing up a way, a prescriptive right to which the plaintiff claims, as annexed to land devised to him by his father, leading thence over an adjoining tract belonging to and in possession of the defendant, to a public road, and which has been in use by the plaintiff and his ancestors without hindrance until about the year 1858, for more than forty years. At the date mentioned, one Shaver, the preceding proprietor from whom the defendant derives his title, sent a messenger to the testator, (Nathaniel Boyden), to obtain his assent to the erection of a fence across the way or lane, then having fences along and on either side of it, and was refused; and he was threatened with a suit if the way was (398) thus obstructed, and the gates intended to admit the passing over it as before, were kept under lock. Thereupon the said Shaver

replied, the gates should not be fastened, and no further objection being made, the fence was constructed with gates and the way continued to be used by the testator until the year 1873, when he died. Thereafter the way was entirely closed up and all passing over it obstructed. The testimony offered in support of the plaintiff's alleged prescriptive right was of long use by his ancestors and himself, extending back to the year 1842 at least, without permission of, or interference from, the preceding owner of the defendant's tract, as well as by many others, to whom the use was convenient, until the putting up the fence with gates, under the circumstances mentioned.

Upon this proof the court being of opinion that there was no adverse user shown and the plaintiff had failed to sustain his claim to the easement, and so intimating, the plaintiff submitted to a nonsuit and appealed.

In the former appeal (79 N. C., 539) when the form of the complaint left it uncertain whether the plaintiff was asserting a private right of way, or a right held in common with others, to use a road or public way, the exercise of which had been obstructed by the defendant, READE, J., speaking for the court, uses this language: "In this country, where land cannot be cultivated without being enclosed, it would be a burden which farmers could not bear, if they had to make lanes of every pathway which has been used on their land for twenty years;" and the remark is not less appropriate to the claim set up in the present amended complaint.

It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others, and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from
(399) the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired. And so it is declared in *Mebane v. Patrick*, 46 N. C., 23, and reiterated in *Smith v. Bennett*, 46 N. C., 372, by the late Chief Justice, in his comments upon the charge that if the plaintiff had continuously, and without interruption, used and enjoyed the way for more than twenty years, he was entitled to recover. He says: "The charge is correct as far as it goes, but it does not go far enough. There is another and very essential requisite, in order to raise the presumption of a grant. *The user must be adverse and as of right.*" Again, in *Ray v. Lipscomb*, 48 N. C., 185, referring to those adjudications, he says: "These cases, as it seems to us, put the doctrine of presumption of a right of way from user on its true basis; and as was said in the argument, considering the state of things among us for many years past in regard

to a neighbor's passing on the unenclosed land of another, either on horseback or with his wagon, any other conclusion would have resulted in great and general inconvenience."

There must then be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land. Was there any evidence of the adverse possessory use of the way to submit to the jury tending to prove the fact? In our opinion such evidence is furnished (how strong it is not our province to say), in fact that the owner maintained a fence on either side of the way for the protection of his land, and left open the lane for the use of others, and when the defendant proposed to put up an obstructing fence with gates for persons to pass through, and asked the assent of the testator, Boyden, thereto, he recognized, though he may have made a mistake as to his rights in doing so, a legal claim in the owner of the plaintiff's land, to have the way kept open for use as theretofore. This evidence, whatever (400) may be its force, should have been submitted to the jury for their consideration, and in withdrawing it his Honor erred.

If there be *any evidence,* that is, evidence reasonably sufficient to authorize the jury to find the fact to which it is pertinent, it must be left to them to determine its credibility and its force and effect. For the error pointed out there must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

Cited: S. v. Stewart, 91 N.C. 569; *Snowden v. Bell,* 159 N.C. 499; *Tate v. R.R.,* 168 N.C. 528; *Haggard v. Mitchell,* 180 N.C. 261; *Nash v. Shute,* 184 N.C. 386; *Weaver v. Pitts,* 191 N.C. 748; *Darr v. Aluminum Co.,* 215 N.C. 772; *Williams v. Foreman,* 238 N.C. 302, 304; *Henry v. Farlow,* 238 N.C. 543.

W. H. KNIGHT, EX'R., v. C. L. KILLEBREW.

Trial, Exception to Evidence—Action on Receipt—Judgment.

1. Error cannot be assigned for the rejection of evidence, unless it is distinctly shown what the proposed evidence was, that its relevancy may appear and that a prejudice has arisen from its rejection.
2. A receipt given by the defendant for notes which upon their face are payable to the plaintiff's testator, furnishes evidence of the defendant's agreement to collect the same and account for them.

3. In an action upon such receipt it was held: 1. That the plea of the statute of limitations was no defence, as the notes had not been collected. 2. The judgment for the restoration of the claims, and such sums as the defendant received upon them since the date of the receipt, and an order of reference to ascertain the amount, with interest, was proper.

CIVIL ACTION, tried at Fall Term, 1881, of EDGECOMBE Superior Court, before *Gilmer, J.*

(401) The defendant appealed from the judgment below.

Messrs. Battle & Mordecai, for plaintiff.

Messrs. Walter Clark and A. W. Haywood, for defendant.

SMITH, C. J. The plaintiff, as executor of R. R. Dupree, sues upon the following receipt given by the defendants: Received of R. R. Dupree nine hundred and seventy-two dollars and seventy-six cents in notes against R. R. Williams, bearing interest from date, the 4th day of January, 1876, (signed by C. L. Killebrew, and dated Feb'y 26th, 1876), and alleges that the defendant undertook to collect and account for the claims; that the debtor was solvent and the notes have been or could have been collected, and that upon demand of the plaintiff the defendant has refused and failed to account therefor, or to pay any money to him. In his answer the defendant admits his executing the written instrument, the demand, and refusal alleged; denies (repeating the very words of the complaint) "that the said notes were delivered to him with the understanding, expressed or implied, that he should collect the same and account for the proceeds, either to the said R. R. Dupree, during his life-time, or at his death to his personal representative; and sets up, as a defence, that the plaintiff ought not to have or maintain his action aforesaid against him, because plaintiff's cause of action, on the claim alleged in said complaint, did not accrue within three years next preceding the issuing of the summons in the cause by the plaintiff, and his right of action aforesaid is barred."

The cause was heard by consent before the judge without a jury, and it was conceded that the notes mentioned in the receipt were drawn payable to the testator, while the defendant denied that an accountable agency was thus constituted for their collection.

On the trial the defendant offered himself for examination,
(402) as we must infer from the reason given by his Honor for its exclusion (for the proposed evidence is not stated), to prove facts attending the transaction and connected with the execution of the writing, but was not permitted to testify under the inhibition of section 343 of the Code.

It is not necessary to decide the point whether the introduction of the receipt in evidence, as the declaration of the defendant in regard to a transaction or communication between the parties, opens the door for the explanatory testimony of the defendant under the concluding and exempting clause of the proviso, and the construction of its terms, intimated by BYNUM, J., in *Murphy v. Ray,* 73 N. C., 588, since it is a sufficient answer to the objection that it does not appear what the rejected evidence was, and we cannot see that it was at all pertinent or material. It is a settled rule that error cannot be assigned in the ruling out of evidence unless it is distinctly shown "what the evidence was in order that its relevancy may appear, and that a prejudice has arisen from its rejection." *Whitesides v. Twitty,* 30 N. C., 431; *Bland v. O'Hagan,* 64 N. C., 471; *Street v. Bryan,* 65 N. C., 619; *State v. Purdie,* 67 N. C., 326.

We agree with his Honor that the defendant's written acknowledgment in connection with the fact that the notes were upon their face payable to the testator, and therefore *prima facie* his property, furnishes evidence of the obligation assumed by the defendant when they were placed in his hands.

The defendant further relies upon the bar of the statute of limitations. This defence would be available if the notes had been collected and the demand for the money made more than three years before the action was commenced, since the demand would put the statute in motion. The answer does not contain any statement of facts upon which the validity of the defence rests, as in the case of all pleadings is contemplated by the Code, but makes an averment of a general principal of law, which must arise upon facts stated or (403) found. *Earp v. Richardson,* 75 N. C., 84; *Moore v. Hobbs,* 79 N. C., 535. But waiving exception to the imperfect manner of setting up the defence, the recital in the case prepared and signed by counsel —"no demand being made more than three years prior to the issuing of the summons," while a demand is averred and admitted to have been made, implies necessarily that it was within that interval, and the fact, in the absence of any indication of a different time, must be so assumed from the record. This conclusion is confirmed by the absence of this, from the enumerated exceptions to the judgment rendered.

These exceptions we will now briefly revert to and dispose of, confining our attention to the two which grow out of the adjudication and have not already been considered.

1. The allowance of interest on the amount when part only of the claims has been collected; and,

2. The rendition of judgment for money when it should have been for the return of the notes.

The judgment upon examination will be found to warrant neither exception. It declares that the "defendant is liable to the plaintiff as executor of R. R. Dupree for the *amount received by said defendant* on said notes since the date of said receipts," that is, upon his undertaking, for the sums collected, and no more. And further, that he "is entitled to such part of said notes as have not been collected by defendant," or in other words, to the restoration of the uncollected claims. To ascertain these facts the order of reference is made, and the referee directed to compute the interest. Should the report charge interest in excess of what is due, it is open to correction when made, and the order is not conclusive, nor does it prejudge the time from which it is to be computed. There is no error and the judgment is affirmed. This will be certified for further proceedings in the court below.

No error. Affirmed.

Cited: Lockhart v. Bell, 86 N.C. 454; *Wilson v. Lineberger,* 88 N.C. 426; *Kesler v. Mauney,* 89 N.C. 372; *Sumner v. Candler,* 92 N.C. 636; *S. v. McNair,* 93 N.C. 630; *Watts v. Warren,* 108 N.C. 517; *S. v. Rhyne,* 109 N.C. 795; *Baker v. R.R.,* 144 N.C. 40; *Stout v. Turnpike Co.,* 157 N.C. 368; *S. v. Lane,* 166 N.C. 337; *Lynch v. Veneer Co.,* 169 N.C. 171; *Gibson v. Terry,* 176 N.C. 535; *S. v. Yearwood,* 178 N.C. 821; *Newbern v. Hinton,* 190 N.C. 111.

(404)

JAMES T. LEACH v. ELIZA H. JONES.

Ejectment, Evidence in—Executors and Administrators, Devastavit Committed by—Order to Appeal in Forma Pauperis, Effect of.

1. Where the defendant in ejectment is the defendant in the execution and in possession of the land, he cannot defeat a recovery by showing title in a third person.
2. The liability of an executor for a *devastavit* attaches at the date of qualification as such; and that of an administrator at the date of his bond.
3. An order allowing a party to appeal *in forma pauperis* dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from.

CIVIL ACTION to recover land, tried at Spring Term, 1882, of WAKE Superior Court, before *Bennett, J.*

The plaintiff claimed title to the land described in the complaint by virtue of a judgment of the superior court of Wake, rendered at

June Term, 1878, in favor of J. P. H. Russ and Jesse Perry against the defendant as executrix, in which it was adjudged, upon the report of the referee to whom it had been referred to take an account of her administration, that she was guilty of a *devastavit* of the assets of her testator, (L. Jones), and the judgment was against her as executrix and in her own right by reason of the *devastavit*. The plaintiff offered in evidence the execution issued upon said judgment, the sale, and the deed of the sheriff of Wake conveying to him the land in dispute.

The possession of the land by the defendant was admitted.

The defendant was qualified as executrix of L. Jones, deceased, in the year 1865. Judgment for plaintiff, appeal by defendant.

Messrs. Reade, Busbee & Busbee, for plaintiff. (405)
Messers. Fowle & Snow, for defendant.

ASHE, J. There were several exceptions taken by the defendant to the report of the referee upon which the judgment was founded, which were properly overruled by his Honor. She offered to show in evidence a deed of mortgage executed by her in 1875, conveying the land in question, duly registered, which was still unsatisfied, but his Honor refused to admit the evidence upon the grounds that the mortgagee had no possession, and there was no mention of any mortgage in the answer. There was no error in the rejection of this evidence. The defendant having been the defendant in the execution and in possession when the land was sold and when the summons was served in this action, could not defeat the plaintiff's recovery by showing title in a third person. *Islay v. Stewart*, 20 N. C., 297.

There were some other exceptions taken by the defendant in the argument here, which besides being unimportant were obnoxious to the objection of not having been taken in the court below.

But the defendant insisted that she was entitled to her homestead in the land in controversy, and her right to a homestead was discussed in this court, as depending upon the time when the *devastavit* was committed by her, the defendant contending that she was not fixed with the *devastavit* until the report of the referee was confirmed by the judgment against her in June, 1878; and the plaintiff on the other hand insisting the *devastavit* was committed between the years 1865 and 1867. But we are of the opinion it was an immaterial inquiry when it was committed, so it was done prior to the commencement of this action. For the liability of the defendant attached upon her qualification as executrix in the year 1865. The contract to pay the

debts of the testator then commenced. The obligation then as-
(406) sumed by the defendant as executrix is embraced in the oath then administered to her, to-wit, *that she would well and truly execute the will of the testator by first paying his debts, and then his legacies, as far as the estate should extend or the law should charge her, and that she would well and truly execute the office of executrix, etc.* Such would have been the condition of the bond if she had been required to give one. If instead of being an executrix she had given a bond as administratrix with the will annexed, her obligation to pay the debts of her testator and make a faithful administration of his estate according to law and the directions of the will, would have commenced from the time of her qualification and the execution of the bond, and any *devastavit* she might afterwards commit would have relation to that date, and might be assigned as a breach of the conditions of the bond. The contract would begin from the execution of the bond, and there can be no difference between the obligations incurred by the executrix and the administratrix with the will annexed.

As the liability of the defendant then commenced with the qualification as executrix, she is not entitled to a homestead upon the authority of *Earle v. Hardie,* 80 N. C., 177.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

In same case:

SMITH, C. J. Upon filing the transcript of the appeal the defendant moves the court for a *supersedeas* or restraining order, directed to the clerk of the superior court in which the plaintiff recovered judgment and forbidding a writ of possession to issue in the cause until determination of the appeal, basing the application upon her own affidavit that the clerk has declared his purpose and is about to issue the writ. The record shows that the defendant is allowed to prosecute her ap-
(407) peal *in forma pauperis;* and her counsel insists the order is an equivalent substitute for both the undertakings specified in the Code—not only for that intended to secure the "costs and damages which may be awarded" pursuant to section 303; but for that also mentioned in several succeeding sections, which "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein." Sec. 308.

We cannot give this comprehensive scope and effect to the order, and in our opinion it simply dispenses with the undertaking first mentioned and removes that obstacle in the way of a review of the cause

in this court. The statute (Acts 1873-74, ch. 60,) by virtue of which the appellant claims to be left in undisturbed possession of property adjudged to belong to the plaintiff, pending the appeal, was manifestly enacted to obviate the consequences of a construction put upon the act of 1868-69, ch. 96 in *Weber v. Taylor,* 66 N. C., 412, and *Mitchell v. Sloan,* 69 N. C., 10, in which it is decided that the authority to bring the suit without giving security is exhausted by the trial in the superior court; and the purpose and effect of the enactment are to extend the privilege to the prosecution of the action to a final determination in the court of last resort. When the defeated suitor shall be unable from poverty to give the prescribed security and shall furnish the required professional certificate, it is the "duty of the judge of the superior court to make an order allowing said party to appeal" * * * "as in other cases of appeal now allowed by law *without giving security therefor.*"

It was certainly not the purpose of the general assembly in allowing the appeal, *as a matter of right,* under such circumstances, to arrest the execution of the judgment also, without those securities necessary and prescribed for the indemnity and protection of the other and successful party from losses, which he may thereby sustain. An injunction will not be granted, nor any of those stringent ancil- (408) lary remedies of arrest, attachment and the like, which may occasion damage and yet are in furtherance of the action, unless adequate indemnity is provided by those who seek them.

A defendant convicted of crime may be permitted to appeal without giving security for the costs, but he must enter into bond or recognizance for his future appearance to undergo the sentence which may be pronounced. The *supersedeas* or restraining order, now desired, is in substance and effect an interlocutory injunction, and we do not think the right to have it is granted in an act that only dispenses with the security for costs. The appeal is as truly *perfected,* when it is regularly and properly constituted as a cause to be heard in this court, by compliance with the provisions of section 303, as by a compliance with those which are necessary to a suspension of further action on the judgment. This is all the enabling statute undertakes to secure to the indigent appellant, and this it secures as effectually as if the security for the costs had been provided as required of others. See *Stell v. Barham,* 85 N. C., 88, where the subject is commented on. The motion must be denied.

PER CURIAM. Motion denied.

Cited: Peebles v. Pate, 86 N.C. 440; *Peebles v. Pate,* 90 N.C. 354; *Fisher v. Mining Co.,* 94 N.C. 399; *Syme v. Badger,* 96 N.C. 204; *Wallace v. Bellamy,* 199 N.C. 765.

STATE EX REL. ATTORNEY GENERAL v. ROANOKE NAVIGATION COMPANY.

Judicial Sale—Reopening Biddings Upon an Advance Price.

1. Before the report of a judicial sale is confirmed, the biddings may be reopened and the property resold upon an advance offer of ten per cent made at the term ensuing the sale; and this may be done more than once. The purchaser has no independent right before the sale is confirmed, but is regarded as a mere preferred proposer.
2. Although in such case the court looks with jealousy upon the application of one, who was a bidder at the sale, to reopen the biddings, yet the advance price offered by him will be taken as a compensation for any loss that may have arisen from a want of competition at the sale.

(409) APPEAL from an order made at Spring Term, 1882, of HALIFAX Superior Court, by *Bennett, J.*

At the Fall Term, 1881, of the superior court of the county of Halifax, a judgment was rendered in the above entitled action, appointing Thomas N. Hill, Esq., receiver, and clothing him with all the powers and duties prescribed in the act of the legislature of this state entitled an act for the dissolution of the Roanoke Navigation Company. Act 1874-75, ch. 198.

That by virtue of the power in him vested as such receiver, and after due advertisement, he proceeded to sell on the 6th day of February, 1882, the works and property of the Roanoke Navigation Company, between the town of Weldon and the town of Gaston, and at Weldon, including its canal or canals, together with all its franchise, rights and privileges, one fourth of the purchase money to be paid on the day of sale, and the residue on the first day of the term of the superior court for the county of Halifax next after the sale. And at the ensuing term of said court (Spring Term, 1882) he reported that he had sold the same on the said 6th of February aforesaid to the highest bidder at public auction, and that Robert B. Peebles and others were the last and highest bidders at the price of seventeen thousand seven hundred and fifty dollars, and that they had complied with the terms of the sale. He further reported that he had been noti-
(410) fied that an application to reopen the biddings for said property would be made at the spring term, but that no application had been filed with him; and that should no such application be filed, he believed that, owing to certain claims to a portion thereof which have been asserted, and to the outlay of money which will be needed to put the said property in good condition and suitable repair, the price for

which it sold is as much as it will ever bring, and therefore in that event he recommended a confirmation of the sale.

At the said spring term after the report was submitted, the purchasers moved for a confirmation thereof, and at the same term R. T. and S. P. Arrington, trading under the name and style of John Arrington & Sons, filed a petition in the cause that they were informed and believed and so charged, that the said property and franchise are worth justly more than the sum bid by the said Robert B. Peebles as aforesaid; that they are now willing and ready to bid and pay for said property according to the terms of the sale in said decretal order set forth, a sum ten per cent. larger than that bid by the said Peebles, and prayed for a reopening of the biddings.

The motion of the purchasers was supported by the affidavit of R. B. Peebles who stated that the property brought its full value; that S. P. Arrington was at the sale and was the next highest bidder to the affiant; that he and those connected with him in his bid, had it in contemplation to build a large first-class cotton factory, and in time other factories; and that he and those associated with him are residents, while Arrington and his associates are non-residents and propose to buy only upon speculation.

After hearing the petition and affidavit, his Honor rendered judgment, in which, after reciting amongst other things, that the petitioners had paid to the receiver, Thomas N. Hill, the sum of four thousand eight hundred and eighty-one dollars and twenty-five cents to secure their said offer, to the end that the biddings might be (411) opened, he ordered that the sale be set aside and the receiver repay and refund to the said purchasers the sum of seventeen thousand seven hundred and fifty dollars paid by them, and that the receiver again expose the property and franchise to sale upon the terms prescribed in the judgment.

From this judgment the said Peebles and associates appealed.

Attorney General for the State.

Messrs. W. C. Bowen and Reade, Busbee & Busbee, for the purchasers.

Messrs. Gatling & Whitaker, for the Arringtons.

ASHE, J. The sole question presented by the appeal for our consideration is, was there error in the ruling of the court below in setting aside the sale and re-opening the biddings.

The appellants insist they have rights, acquired by the sale and the report of the commissioner, and the ruling of the court below is in violation of their rights. But the doctrine has been settled in this state,

that the bidder at a judicial sale, such as this, acquires *no right* before the confirmation of the report of the commissioner who made the sale under the order of the court. Until then, the bargain is incomplete. The highest bidder at such sale acquires by the acceptance of his bid, no independent right, but is regarded as a mere preferred proposer, until the confirmation of the sale by the court. *Miller v. Feezor,* 82 N. C., 192, and cases there cited. See also the matter of *Bost Ex parte,* 56 N. C., 482.

All the authorities agree that courts of equity have an absolute power over all sales had under their orders—in confirming or setting them aside and reopening the biddings, etc.

(412) The practice in this respect is found to be variant in different states of the Union. Some of them have adopted the English practice and others have established rules of their own.

In this state, we have adopted the English practice with some modifications as to details. The practice, here, established by long usage in our courts of equity, has been to re-open biddings and order a re-sale whenever an advance bid has been offered of ten per cent. upon the amount bid at the sale, provided it is made before the confirmation of the sale and in apt time, which is at the term ensuing the sale, but never to re-open the biddings after confirmation except in cases of fraud, meaning fraud in its broadest sense. The rule laid down by Mr. Justice RODMAN in *Blue v. Blue,* 79 N. C., 69, is, we think, the correct rule, and is in accordance, so far as our information extends, with the uniform practice which has obtained in our courts in such cases. He says, "the practice in this state is to set aside a sale before confirmation, upon an offer of an advance of *ten per cent.* upon the price. That also is the English rule." S. P. In the matter of *Bost Ex parte,* 56 N. C., 482; *Wood v. Parker,* 63 N. C., 379.

In Daniel Ch. Pr., 1465, we find the English rule laid down, as follows: "When estates are sold before a master under the decree of a court of equity, the court considers itself to have greater power over the contract than it would have were the contract made between party and party; and as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of *"opening the biddings."* that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a re-sale of the property." And again, on page 1466 of the same book, it is said, "that the mere advance of price, if the

(413) report of the purchaser being the last bidder is not absolutely confirmed, is sufficient to open the biddings, and that they may be opened more than once."

The purchasers insist there was error in receiving the advance bid of Arrington, who was present at the sale and bid for the property. It is true, that is an objection that has been sometimes entertained on the ground that it tends to prevent a proper competition, but the objection having been taken before LORD ELDON, in the case of *Tyndale v. Warre,* cited in Daniel, Ch. Pr., 1460, he held, although the court looks with jealousy upon the offer of such a person, yet the largeness of the bid offered will be taken as a compensation for a loss that may have arisen from a want of competition at the sale.

It is further contended that the receiver having reported that the property brought a fair price, the sale ought to be confirmed. But the receiver did not so report. He reported that he had been notified that an application to re-open the biddings for said property will be made at the present term of the court, but no application had been filed with him. However, should no such application be filed, he believed that, owing to certain claims to a portion thereof which have been asserted, and to the outlay of money which will be needed to put the canal property in good condition and suitable repair, the price for which it sold is as much as it will ever bring, and therefore in that event he recommended a confirmation of the sale.

The plain interpretation of the language of the report is, that the receiver will not recommend the confirmation of the sale if an advance bid should be offered, and that he recommends it only in the event it is not offered. That falls far short of reporting that the property brought its full value. And as to his belief that it was sold for as much as it would ever bring, it seems that he was mistaken.

The purchasers rely upon the remarks of Mr. Justice DILLARD, in the case of *Pritchard v. Askew,* 80 N. C., 86, to the effect (414) that as a matter of policy, the courts are slow to set aside a judicial sale, and are careful not to open the biddings unless there be some special circumstances, such as unfairness in the conduct of the sale, want of proper notice of the time and place of sale, fraud in the purchaser, and palpable inadequacy of price, and similar grounds. These remarks apply very appositely to an application to re-open biddings after a confirmation of sale, and seem to have been general observations made by the learned judge upon the subject, without intending them to have any particular application to the case then under consideration, for in that case there was an advance bid of ten per cent. offered, unaccompanied by any one of the "special circumstances" enumerated, and yet the sale was ordered to be set aside and the biddings re-opened.

As biddings are merely opened for the benefit of those who have an interest in the property, this court in making its decision cannot take

into consideration the purposes for which the property is purchased, nor whether the purchasers are residents or non-residents. As Judge Bennett remarked in his judgment, "it is a mere question of dollars and cents."

Before concluding the opinion we have deemed it proper to say that Mr. Justice RUFFIN, who is related to some of the appellants, and Chief Justice SMITH, who has been heretofore connected professionally with the subject of the action, felt a delicacy and reluctance to sit upon the hearing of this appeal, but were constrained to do so by the necessity of the case and a sense of public duty. Such was the course of Judge GASTON while on the bench in a case with which he had been connected as counsel.

We are of the opinion there was no error in the ruling of the court below. Let this be certified that the cause may be proceeded with.

No error. Affirmed.

Cited: Vass v. Arrington, 89 N.C. 13; *Trull v. Rice,* 92 N.C. 574, 575; *Dula v. Seagle,* 98 N.C. 460; *Bass v. Navigation Co.,* 111 N.C. 450; *Marsh v. Nimocks,* 122 N.C. 480; *Vanderbilt v. Brown,* 128 N.C. 500; *Clement v. Ireland,* 129 N.C. 222; *Joyner v. Futrell,* 136 N.C. 304; *Harrell v. Blythe,* 140 N.C. 416; *Uzzle v. Weil,* 151 N.C. 132; *Thompson v. Rospigliosi,* 162 N.C. 155, 156, 162; *In re Brown,* 185 N.C. 403; *Dixon v. Osborne,* 204 N.C. 488.

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(415)

S. C. WHITE, CASHIER, v. MARY E. UTLEY, AND OTHERS.

Reference and Referee.

An order of reference by consent entered of record, is a sufficient compliance with the statute requiring the same to be in writing. C.C.P., Sec. 244. And when entered, it must stand until a full report is made. It was also held error in the judge to pass upon exceptions to an unfinished report.

CIVIL ACTION tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

This action is instituted to recover judgment and enforce payment of two promissory notes, each in the sum of $300, which, with another in the sum of $400, bearing the same date and since taken up by the defendant, Norris, constitute the consideration of $1000, agreed to be paid for two separate tracts of land, were executed on May 20th, 1873, by the feme defendant Mary E. and her husband, William Utley,

to the plaintiff, cashier of the State National Bank of Raleigh. On July 3rd following the defendant, John G. Williams, president of the same bank, executed to the said Mary E. a penal bond in the sum of $2,000, with condition to make title to her to the lands therein particularly described and defined, upon full payment of the said three notes, the larger one recited as maturing on December 20th, 1873, and the others on the same day of the two succeeding years, and all bearing interest from date. The plaintiff demands judgment for the principal and interest of the two retained notes, and if necessary a sale of the said lands in satisfaction of what is due. The defendants, other than the said Williams who is identified in interest with the plaintiff, both being officers of the bank, filed answers to the complaint —the defendants Utley and wife setting up certain equities sub- (416) sisting between the former and Williams antecedent to the purchase of the lands and still unadjusted, and the latter relying upon her coverture and incapacity to contract; while the defendant Norris, asserts his right, as assignee of the larger bond, to participate in the distribution of the proceeds of the sale of the lands.

At Spring Term, 1879, the following order is entered in the cause: By consent of all the parties to this action it is referred to Geo. V. Strong as referee under the Code of Civil Procedure to find all the facts and issues of law, and report the same, together with all the evidence to this court.

Afterwards and during the term this further entry appears: The former reference in this case is stricken out, and the action is referred to S. F. Mordecai.

The referee proceeded to take evidence and hear the issues, and at January Term, 1880, submitted his report, with his findings of fact and conclusions of law, separately stated and numbered, and accompanied by the evidence on which his findings are based. To the report, exceptions were filed by all the parties except Williams, and came on to be heard at Spring Term, 1881, when the court, upon a revision of the report, found the facts to be as set out in the record, reversing many of the findings of the referee, re-opening the matters in controversy between Utley and Williams, growing out of their relations as mortgagor and mortgagee, of which the giving the notes and title bond were the sequence, setting aside the report, and re-referring the cause to said George V. Strong with directions "to take and state an account between the defendants Williams and Utley, setting out the former's administration of the trust funds and the rate and amount of interest charged by the bank against the latter in their precedent transactions."

From this judgment the plaintiff alone appeals.

(417) *Messrs. Gray & Stamps and Fowle & Snow, for plaintiff.*

Messrs. Merrimon & Fuller, A. M. Lewis and W. H. Pace, for defendants.

SMITH, C. J., after stating the case. We interpret the successive orders of reference on the record of Spring Term, 1879, as intended to constitute a single reference, the second being in effect but a change of referees, and thus far only modifying the provisions of the first. It seems to have been so recognized and acted upon as well by the referee as by the parties to the suit.

While under the Code the consent necessary to a reference (Sec. 244) must be in writing, the order declaring the consent and entered of record is a sufficient compliance with the statutory demand, and indeed the highest, and conclusive form of proof of the fact.

If the record were not such evidence, the objection, now made for the first time, could not be entertained after what has occurred, and will be deemed to have been waived, as is held in *Johnson v. Haynes,* 68 N. C., 509. As the consent extends not only to the terms of the reference but to the person of the referee, he, as selected by the parties, must remain in the discharge of its duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. *Perry v. Tupper,* 77 N. C., 413; *Flemming v. Roberts,* Ib., 415.

In the case last cited, in answer to the objection that the second reference was compulsory, the court say: "The first reference was by the express consent of both parties, and *that assent continued and could not be revoked, until the order of reference was complied with by a full report.*"

The court considering the report defective, in that, it fails to dispose of the issues raised in the answer, as to the administration of the trusts of the mortgage which the referee declined to inquire into, for the reason that he deemed those dealings concluded and
(418) settled by the execution of the notes, directs a further reference to an appointee of its own, to report upon these omitted matters at a future day. We think there was irregularity in thus proceeding to pass upon the facts presented in an unfinished reference, and deciding the respective rights of the parties in relation thereto, and that his Honor should have deferred his judgment until all the evidence and the referee's findings are reported, and his adjudication would dispose of the whole controversy.

The inconveniences of a partial adjudication, followed by an appeal, and this from time to time repeated so as to present for review successively fragments of the case instead of the case in its entirety, are

numerous and inconsistent with the system of practice which aims to bring litigation, without needless delay and expense, to a termination. As further information was required, his Honor should have suspended his judgment upon the exceptions until all the facts necessary to a complete determination of the cause were reported.

The rulings predicated upon a partial report may hereafter require modification or be wholly reversed, upon further evidence, and this could not be, if we undertake to decide them upon this appeal.

The rulings of his Honor upon the exceptions were premature and must be set aside, so as not to prejudice a future adjudication upon the merits, and the order of reference corrected by directing it to the referee chosen by the parties, unless they consent to the substitution of another in his stead.

Let this be certified to the court below.

Error. Reversed.

Cited: Usry v. Suit, 91 N.C. 410; *White v. Utley,* 94 N.C. 511; *Stevenson v. Felton,* 99 N.C. 61; *Patrick v. R.R.,* 101 N.C. 604; *Nissen v. Mining Co.,* 104 N.C. 310; *Morisey v. Swinson,* 104 N.C. 561; *Smith v. Hicks,* 108 N.C. 251.

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W. D. McADOO v. CALLUM BROS. & CO.

Landlord and Tenant—Covenant to Renew Lease—Summary Proceeding in Ejectment, Equitable Defence in.

1. Where a lessor agrees with a lessee, that at the expiration of the lease, then subsisting, "he shall have the refusal of the premises for another year," *it was held* that the lessee had the election to rent, or not, the premises on the same terms and conditions, and on payment of the same rent, and that the lessor was bound to renew the same upon said terms, if the lessee so elected.
2. While this provision for renewal is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defence in a summary proceeding in ejectment.

PROCEEDING under the landlord and tenant act heard on appeal at January Special Term, 1882, of GUILFORD Superior Court, before *Gudger, J.*

The plaintiff on June 1st, 1879, leased to the defendants a store-room in one corner of his hotel with the cellar under it, for the term of one year thence next ensuing, for the sum of $200, due in monthly

parts, with condition for the surrender thereof on default of making any payment, and after five days' notice, by a covenant concluding in these words: "W. D. McAdoo (the lessor) agrees with Callum Bros. & Co., (the lessees) that at the expiration of this lease they shall have the refusal of the above-mentioned premises for another year."

In the months of January and February, 1880, the plaintiff notified the defendants that he should require the surrender of the rooms at the end of the term. On May 28th following, the defendants tendered the plaintiff the rent for that month, and a written contract of lease for a second term in the form then in force, for his execution. The plaintiff refused to accept the rent or renew the lease for the same rent. On June 1st, 1880, the plaintiff sued out a warrant under
(420) the landlord and tenant act (Bat. Rev., ch. 64, sec. 20,) to recover possession of the demised premises, and upon the trial therefore, after hearing evidence and argument of counsel, the justice rendered judgment that the plaintiff was not entitled to recover, and dismissed the action at his cost. From this judgment the plaintiff appealed, and notice thereof was accepted by the defendants.

On June 2nd, the day following, the plaintiff caused a notice under his signature to be served on the defendants in these words: "I am offered by a responsible party $350 for the rent of my store-room and cellar, now occupied by you, for the year beginning June 1st, 1880, and ending 31st May, 1881. You can have the refusal of it at that price. If you want to keep it, notify me at once; otherwise I demand possession."

On the same day after service of the notice the plaintiff sued out a second warrant for the possession of the same rooms, which coming on for trial immediately before the same justice, he adjudged that the plaintiff recover the premises and the rent due under the former contract for the preceding month.

From this judgment the defendants appealed, and upon its rendition, the plaintiff recalled his appeal in the former cause. The defendants on the hearing before the justice and upon the trial in the superior court set up as a defence to the action:

1. That under the covenant for renewal they were entitled to a lease of the premises for another year on the same terms and conditions, and were not wrongfully holding over.

2. That the former proceeding and the final judgment therein were a bar to this action.

3. That if entitled to recover the plaintiff could have damages as rent at the rate of that of the preceding year, up to September
(421) 1st, when the defendants abandoned the premises.

The court ruled that the covenant did not obilge the plaintiff to a continuance of the lease for another term at the same rental price, and that his offer of the premises at the increased rent of $350, of which he had a *bona fide* offer from another, was a compliance with the stipulation that the defendants should have the refusal.

The instruction upon the second point was, that if in the first trial the adjudication was against the plaintiff because he had not then made a tender of the rooms at the higher rent, while such tender had been made and refused before the commencement of this action, this element of difference in the cases, not passed on before, would distinguish them and prevent the application of the estoppel.

And, upon the third point, the jury were directed to give such damages as the plaintiff had sustained, not only the rent for the three months' occupancy, but measuring his losses in the inability to rent out afterwards, in consequence of their withholding, to other tenants. The jury assessed the damages at $200; and from the judgment rendered upon the verdict the defendants appeal to this court.

Messrs. Dillard & Morehead and J. N. Staples, for plaintiff.
Messrs. Scott & Caldwell, for defendants.

Smith, C. J., after stating the foregoing. We do not concur in his Honor's interpretation of the plaintiff's contract in reference to the optional renewal of the lease given to the defendants. The meaning of the clause allowing them the refusal of the premises for another year, like the not unusual covenant of renewal found in leases and of equivalent force, ascertained from the language employed to express the common intent of the parties, is, that the defendants may have the rooms for the next succeeding year at their election on the same terms and conditions, and on payment of the same rent. (422) The lessor can no more increase the rent or vary the manner of payment, than he can the other provisions of the existing instrument under which the defendants hold possession. To allow the plaintiff to change the terms of the proposed renewal is to remove the binding force of his obligation altogether. "A covenant to let the premises to the lessee at the expiration of the term, without mentioning any price for which they are to be let; or to renew the lease upon such terms as may be agreed on," in the words of Mr. Taylor, "in neither case amounts to a covenant for renewal, but is altogether void for uncertainty." Tay. Land. & Ten., Sec. 333.

The true and reasonable construction of a contract expressed in such general terms is thus stated by the same author in the preceding section: "A covenant that the lessee *shall have the refusal of the prem-*

ises at the expiration of the lease for a specified time, is a covenant to renew the lease *at the same rent* for such term. It is violated by the lessor if he refuses to renew the lease, except at an increased rent. * * * And the lessee in such case is not obliged to wait until the actual termination of the lease, before he makes his election to have the lease renewed. For the lessor is bound to renew when the lessee makes his election and demands the renewal."

This statement of the law is sanctioned by an express adjudication of the Court of Appeals of New York in *Tracy v. Alb. Ex. Co.,* 3 Seld. 473, the essential features of which are represented in the present case. We state the material facts of it: The lease was made in February, 1847, for the term of two years and six months from the first day of November preceding, at an annual rent of $1000 payable in quarterly installments, and contained this covenant: "The said party of the first part to have the refusal of the premises at the expiration of this lease for three years longer." On February 1st, 1849, the lessee demanded the new lease for the specified term of three years, and at the same rent. This was refused by the lessor, the defendant, unless the lessee, the plaintiff, would agree to pay at the rate of $1200 a year. Subsequently the plaintiff assented to the increase and accepted a new lease for one year at that sum, to prevent the premises from being rented to another, and himself dispossessed, and paid the amount under protest. He then brought his action to recover the excess of $200, and did recover it. The court say: "The plaintiff, in February, 1849, made his election and demanded performances. Defendant refused unless he would take the renewal at an enhanced rent, and gave notice that unless this was accepted he would rent to another. This *constituted a breach of the covenant.* There are several decisions that a covenant in a lease to renew it, without providing in respect to the term to be granted, or the amount of rent to be paid, implies a *renewal for the same term and rent."* See 4 Kent Com., 108. *Renoud v. Darham,* 34 Conn., 512.

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When the defendants three days before the end of the term made their election to renew, proffering the rent for the month and a second lease with the same provisions, except in its adaptation to the time of the new term, and the plaintiff refused both, as he had in January and February preceding declared his intention that they should not have the store another year, and their occupation must cease with the end of their present term, the plaintiff violated his covenant to renew.

While this provision for renewal is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defence to a proceeding for the

ejectment of the defendants under the summary process provided in the statute against tenants holding over after the expiration (424) of their term.

The defendants having exercised their right to demand a renewal of the expiring lease were entitled to it, and to remain in possession, as long as they complied with its requirements and conditions, until the last day of May, 1881, and they are responsible for the accrued rent. It is true the plaintiff, disavowing his obligation, was endeavoring to put the defendants out of possession, and the defendants were meanwhile with equal earnestness and more success asserting their right under the contract to retain the possession, and as we sustain them in their claim of right, they must take it *cum onere* and pay the rent.

This view of the case dispenses with the necessity of considering and determining the other matters of defence, and disposes of the appeal.

There must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

Cited: Lutz v. Thompson, 87 N.C. 337; *Dougherty v. Sprinkle,* 88 N.C. 301; *Berry v. Henderson,* 102 N.C. 527; *Bell v. Howerton,* 111 N.C. 73; *Holden v. Warren,* 118 N.C. 327; *Vance v. Vance,* 118 N.C. 868; *Fidelity Co. v. Jordan,* 134 N.C. 238; *Levin v. Gladstein,* 142 N.C. 494; *Barbee v. Greenberg,* 144 N.C. 432; *Sewing Machine Co. v. Burger,* 181 N.C. 247; *Grocery Co. v. Banks,* 185 N.C. 151; *Fertilizer Co. v. Bowen,* 204 N.C. 377; *Realty Co. v. Logan,* 216 N.C. 28.

W. H. HUGHES v. J. W. NEWSOM AND OTHERS.

Claim and Delivery, Bond in—Duty of Sheriff—Official Bond, Breach of—Statute of Limitations.

Where, in claim and delivery, a sheriff returned the property to the defendant who gave a bond merely to indemnify the sheriff, and not such as the law requires in such case, *Held* to be a breach of the sheriff's official bond, for which an action could be at once instituted; and hence the statute limiting the time to sue upon official bonds to six years, began to run, and was in no way affected by the time at which the action of claim and delivery terminated.

CIVIL ACTION tried at January Special Term, 1882, of NORTH- (425) AMPTON Superior Court, before *Graves, J.*

This action is brought on the official bond of the defendant, Newsom, as sheriff of Northampton County, given in 1873, and on which the other defendants were his sureties. The case was submitted to the judge upon the following state of facts:

On the 19th of March, 1873, the plaintiff commenced an action for claim and delivery for certain horses, against one Capehart, returnable to the spring term of said superior court, and on the same day procured an order to be issued to said sheriff commanding him to take the horses from the possession of Capehart and deliver them to the plaintiff. The sheriff immediately executed the order, so far as to take the horses into his possession, but returned the same to Capehart upon his giving to him an undertaking, not, as the statute directs, for the delivery of the property to the plaintiff in case such delivery should be so adjudged, or for the payment of such sum as might be recovered against him in the action, but merely to save harmless and indemnify the sheriff from all loss on account of his having so restored the property to him.

This action for claim and delivery pended in said court until January Term, 1878, when the plaintiff had a judgment against Capehart for the possession of the horses, or, in case of their non-delivery, for the sum of $140 as their value, and for damages for their detention, and for costs, under which he caused an execution to issue, which was returned *nulla bona.*

On the 11th of September, 1879, the plaintiff brought this action, assigning as a breach of the condition of said official bond, the failure of the sheriff to take from Capehart such an undertaking as the statute directed, before restoring to him the possession of the horses.

(426) The defence relied upon is the statute limiting the time within which actions shall be brought upon bonds of public officers to six years.

Upon the foregoing facts the court held that the plaintiff's cause of action was barred by the statute, and gave judgment for the defendants, from which the plaintiff appealed.

Mr. R. B. Peebles, for plaintiff.

Messrs. S. J. Wright and Willis Bagley, for defendants.

RUFFIN, J. This court can perceive no error in the ruling of the court below. The instrument taken by the sheriff from Capehart (the defendant in the original action) was in direct violation of the duty, which as an officer he owed to the plaintiff; besides that, it was void on the ground of public policy, as being intended as an indemnity to a public officer for omitting to do that which the law, as well as the

positive order of the court, injoined upon him to do. His taking such an instrument was a clear breach of his bond, which exposed him and his sureties to an immediate action at the instance of the plaintiff; and there can be no possible reason, so far as we can see, why the statute of limitations did not begin at once to run, or why it had not ripened into a bar at the institution of the present action.

The case is clearly distinguishable from *Governor v. Munroe*, 15 N. C., 412, where a sheriff to whom a *capias ad satisfaciendum* was directed, failed to take from the defendant a bail bond, such as the law directed; and it was held that for this breach of his bond, neither he nor his sureties were protected by the statute of limitations, until six years after final judgment in the original action. But the decision was put expressly on the ground that the statute, itself, declared that in such case *the sheriff should be deemed to be special bail*, to be proceeded against as bail in other cases—thus creating what Judge GASTON called a *continuing duty*, until the consummation of which the statute could not run, as until then the default (427) was not complete.

So it is too from *Gallarati v. Orser*, 27 N. Y., 324, to which we were also referred by counsel, where it was held that a sheriff who had failed to take a replevin bond as prescribed by law, could not be sued for his failure until after the final judgment in the main action. But this was because the New York Code contains, what ours does not, a provision which makes the sheriff, guilty of such default, liable just as a surety in a proper undertaking would be.

In the case now before us, there was no continuing duty; but the default, when once committed, was absolute and complete. It is true that in an action against the sheriff and his sureties, begun before the judgment fixing his title to the property, the plaintiff might have encountered greater difficulty in establishing his claim as against these defendants, and the extent of his damages by reason of the officer's default; still, this was a mere question of convenience, or of evidence, and not one of right or diligence. In no case, and as to no question, could the judgment in the original action conclude these defendants, as they are in no way privy to the defendant in that action, or parties to the record. And hence there could be no reason for postponing the commencement of this action until the determination of the other, and none, why the running of the statute should not immediately follow upon the commission of the breach.

Our conclusion therefore is that the judgment of the court below must be affirmed.

No error. Affirmed.

Cited: Shackelford v. Staton, 117 N.C. 75; *Mast v. Sapp,* 140 N.C. 541.

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W. L. KIRKMAN v. L. PHIPPS AND OTHERS.

Jurisdiction—Executors and Administrators.

The superior court has jurisdiction of an action by an administrator against the widow, heirs at law, and all other parties interested, for an account and restraining order, in which it is alleged, that the intestate in his lifetime executed several mortgages upon his land—had many dealings with the mortgagee—made sundry payments upon the debt—mortgagee was threatening to sell the land; also, that there were alleged judgment liens upon the land—and that payments had been made on same for which proper credits were not given.

MOTION of defendants to dismiss for want of jurisdiction, heard at January Special Term, 1882, of GUILFORD Superior Court, before *Gudger, J.*

The plaintiff is the administrator of G. W. Phipps, deceased, and the defendants are the judgment and mortgagee creditors of the deceased, and his widows and heirs at law.

The complaint alleges that the intestate died insolvent, having conveyed most of his property by way of mortgage to the defendant, McAdoo, in his life time, and the residue being required to make up his widow's year's support; that he was also owner of two tracts of land—one containing 202 acres, and the other 165 acres—upon which he had given to McAdoo four mortgages, dated respectively, April 18, July 29, September 11, December 16, in the year 1876; and that anterior to these, judgments had been taken against him by Paul Coble (the intestate of the defendants Coble and Hardin) and docketed in December, 1875, and thereby made to constitute liens on his said lands.

The plaintiff further alleged that the intestate had many dealings with McAdoo, and made him many payments, as well in money as produce, which ought to be credited on the several mortgages;
(429) and that without an account taken it was impossible to know certainly whether anything is still due upon the debts thus secured, and if so, how much, and that notwithstanding this, the defendant McAdoo was threatening, and had already advertised, to sell the land under said mortgages. It was also alleged that payment had been made by the intestate upon the Coble judgments, for which proper credits had not been given.

The prayer of the complaint is that an account be taken to ascertain what balances, if any, are due to McAdoo on his mortgages, and to Coble on his judgments; and that the land be sold under order of court to satisfy the same, and the proceeds applied under its direction, and in the meantime the defendant, McAdoo, be restrained from selling under the mortgages.

Neither one of the creditors answered the complaint, but the widow and heirs at law filed an answer in which they aver that they had paid to MsAdoo much the larger part of the amount secured to him under the chattel mortgage given him by the intestate, and had also made him considerable payments upon the debts secured by mortgage on the land; and also, to Coble upon his judgments; and they ask that an account may be taken of said debts, and in the meantime that plaintiff may be enjoined from taking any steps to sell the land of the intestate.

By consent of all parties, a reference was ordered to ascertain what was due on the secured debts, and upon the coming in of the referee's report, the heirs filed exceptions thereto, which were allowed, and then moved to dismiss the action upon the ground that the court had no jurisdiction, but that the same pertained exclusively to the probate court.

His Honor refused the motion to dismiss, and gave judgment directing a sale of the land and an application of the proceeds, first, to the Coble judgments, and next, to the debts due McAdoo according to the dates of his several mortgages; and further di- (430) recting the surplus, if any, to be paid to plaintiff to be used in paying the costs and charges of administration and the other debts of his intestate. Whereupon the defendant heirs appealed, assigning as error the refusal to allow the motion to dismiss the action.

Messrs. Scott & Caldwell, for plaintiff.

Mr. J. A. Barringer, for defendants.

RUFFIN, J. The appellants certainly have no reason to suppose that a whit more favor will be extended to their motion than in the strictest law it is entitled to—delayed as it was to the last moment in the progress of the action, and until after they had assented, so far as by their conduct they could assent, to the jurisdiction of the court, and had asked and received its aid in the premises.

It is not, however, in our opinion, necessary to rely upon any implied waiver on their part, in order to sustain the court's jurisdiction of the cause.

The action is not in form or scope, as counsel seem to think, a special proceeding instituted for the purpose of obtaining a license to sell the land of the intestate for assets; nor is it one that properly, much less exclusively, belongs to the probate court. It is simply an appeal to the equitable powers of the court to avoid a sale and consequent sacrifice of the intestate's property, until the uncertainty and cloud thrown upon it by the numerous and conflicting liens can be cleared up, and the true amount and character of the indebtedness accurately ascertained. To take such action, falls strictly within the line of the plaintiff's duty as administrator—it being incumbent on him to protect the general creditors of the estate, as well as to adjust the respective rights of the judgment and mortgage creditors—and the relief sought was such as could be conveniently and effectually administered by a court of equity only. It was upon grounds
(431) exactly analogous that the jurisdiction of the court was upheld in *Pegram v. Armstrong,* 82 N. C., 326, and *Gulley v. Macy,* 81 N. C., 356.

Having jurisdiction for such purposes, and having taken cognizance of the cause, the court had the power and rightfully exercised it, to settle every question and give complete relief to all the parties. What earthly good could accrue to any one from an order of dismission at this stage of the case? Its only effect could be to dissolve the injunction, and thus leave the way open to the defendant, McAdoo, to sell immediately, and for his single benefit, under his various mortgages, and thereby produce the very inconvenience which it is the object of the action and the policy of the law, to avoid.

Even after a sale by him, and unless the purchaser should voluntarily satisfy them, the judgments liens, though entitled to priority over all other claims, could only be enforced through some proceeding to which the administrator and heirs are parties—thus proving that there could be no course pursued, so simple and satisfactory, as the one taken by the plaintiff, of bringing all the parties before a court competent to have every necessary inquiry and account taken, and to administer the rights of all in one proceeding. See *Hinson v. Adrian, ante,* 61.

There is no error. Let this be certified to the court below that the cause may be proceeded with according to law.

No error. Affirmed.

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STATE EX REL. FRED. ROGERS v. N. R. ODOM AND OTHERS.

Clerk of Superior Court, Bond of Not Liable for His Acts as Receiver, Except Under Statute.

1. The sureties upon the bond of a clerk are not liable for the misappropriation of funds which came into his hands as *receiver*, and over which the court had acquired no control.
2. But where the appointment of receiver is conferred upon him under the statute authorizing the court to commit the estate of an infant to "some discreet person," *it was held* that the same is protected by his bond as clerk. Bat. Rev., ch. 53, secs. 22, 47.

CIVIL ACTION, tried at Fall Term, 1881, of NORTHAMPTON Superior Court, before *Gilmer, J.*

This case was tried upon complaint and demurrer. The allegations of the complaint are as follows: The defendant Odom was clerk of the superior court of Northampton County in 1879, and the other defendants were the sureties on his bond as such. At Spring Term, 1879, of said court, the relators, being infants without guardian and entitled to one thousand dollars each in a fund arising from a life policy in the "Virginia Protective Life Insurance Company," upon the life of their deceased father, filed their petition by their mother as their next friend, in which it was alleged to be "necessary that a receiver be appointed to collect, receive and manage said money for their use and benefit, and prayed judgment that Noah R. Odom, clerk of said superior court, be appointed receiver of said fund with power to sue for, collect, receive and manage the same for their use and benefit."

At the same term, "it was adjudged by the court that the said N. R. Odom, clerk of the superior court of said county, be appointed receiver of said fund, with power and authority to sue for, collect, receive and manage the same for the proper use and benefit of (433) said minors." The said Odom, being clerk as aforesaid, and receiver, collected the money from the insurance company, and having converted it to his own use and become insolvent, failed to pay the relators, though demanded of him. And they thereupon bring this action, in which they seek to recover the amount so collected from the defendant Odom and his sureties.

The grounds assigned for the demurrer are:

1. The facts alleged in the complaint do not constitute a breach of the bond sued on.

2. The facts alleged do not show that the money mentioned in the complaint was received by the defendant Odom "by virtue or color of his office," as clerk of the superior court.

3. It does not appear from the complaint that the judge of the superior court had jurisdiction to appoint a receiver of the estate of the relators.

From a judgment sustaining the demurrer the plaintiffs appeal.

Mr. Thomas N. Hill, for plaintiff.

Messrs. R. B. Peebles and Reade, Busbee & Busbee, for defendants.

RUFFIN, J. The order of the superior court admits of but one construction. After appointing N. R. Odom, clerk of the superior court, receiver of the fund, it confers upon him "the power and authority to sue for, receive, collect and manage the same for the benefit of the minors."

The fund therefore came to his hands as *receiver,* and was never held by him in any other capacity. So that the principal, and in fact, the only question necessary to be considered is, whether a liability attaches to his sureties as clerk, for the misappropriation of the fund (434) so received and held; and as to this, we concur in the opinion entertained by his Honor who presided in the court below.

As he seems to have done, so do we look upon the appointment of *receiver* as altogether distinct from the office of clerk, and as imposing duties in no wise appertaining to that office, and which do not fall within the covenants of the bond given as clerk. And we know of no principle which can justify a court in extending the undertaking of a surety beyond the terms and spirit of the contract into which he has entered.

That the two offices are wholly disconnected, appears to be certain from an examination of the authorities. In 3 Daniel's, Ch. Prac., 1972, it is said, that the rule in England is that a master in chancery *cannot be appointed a receiver,* because it is his duty to pass upon the accounts of those who hold such appointments under the courts. Again, it is said in High on Receivers, Sec. 71, that while there are some reported cases in which the courts have appointed their clerks as receivers, yet the clerk is not by virtue of his office a receiver of the court, his functions being entirely distinct from those of receiver. In *Waters v. Carroll,* 9 Yerger, 102, the supreme court of the state of Tennessee held that the offices of clerk and master in chancery, and of receiver, are in their nature and functions distinct, and that the sureties of a person as clerk and master would not be liable for the loss of money held as *receiver;* and this decision has been twice approved by the same court in *Williams v. Bowman,* 3 Head., 681, and *State v. Blakemore,* 7 Heisk., 638; and by the supreme court of Illi-

nois in *Hammer v. Kaufman,* 39 Ill., 87, where it is said that the clerk is not by virtue of his office a receiver of the court, or bound against his will to act as such.

By reason of a practice which has so long obtained in the courts, that parties are presumed to know of it and to contract with reference to it, the clerks of the courts may have committed to their keeping and management funds that have, for any reason, been (435) brought under the actual custody or immediate cognizance of the court; or by virtue of some express statute, they may by direction of the court be charged with the duty of selling property and with the collection and preservation of the proceeds; and in all such cases the sureties on the official bonds, equally with the principals, are bound for the safety of the funds, and the faithful performance of every duty pertaining to the trust.

Many of the decisions of this court bearing upon the subject were brought under review quite recently, in *Kerr v. Brandon,* 84 N. C., 128, and the grounds upon which they rested adverted to. We still adhere to them all, as well as to the cases cited by counsel in their briefs. But we know of no authority which would warrant the court in affixing to the office of clerk a responsibility for a receivership, such as this, of property over which the court had not only acquired no control, but which consisted merely of a debt due from a foreign corporation, and was thus wholly removed from the court's jurisdiction. Such an appointment as receiver is as absolutely distinct from the office of clerk as if the two had been filled by different individuals, and could never have been within the contemplation of the sureties, when contracting for the fidelity of their principal in his capacity of clerk.

The clerks of our superior courts give bonds in the sum of ten thousand dollars merely conditioned to be void if they shall account for and pay over "all moneys and effects which may come to their hands by virtue or color of their offices," etc. Bat. Rev., ch. 17, sec. 137. The primary object of these securities has been generally thought to be, to insure the certain payment of such sums as may be paid into office upon executions, the fees due to officers and private individuals, the fines and amercements due the state, and the like; and yet how slight a protection do they afford if held to embrace, as well, property of all sorts, that may be received by virtue or color (436) of every receivership, that may be conferred upon the incumbents of those offices.

Take for instance the receivership of a railroad—grown so common of late. Can any one suppose that a court could, in the mere exercise of its discretion, impose such a burden upon its clerk and require its

acceptance? To say nothing of the inconvenience to the public, by reason of the loss of the officer's time and attention to duties more properly belonging to the office, would it not be considered in the highest degree unjust and unreasonable to attach a liability, so unexpected to his sureties, whose contract touched the clerkship alone? if so, why not then in this case, in which the principle is exactly the same, though the risk may be less as to the amount involved. Every consideration, therefore, whether it be the weight of authority or of right principle, constrains us to sustain his Honor's ruling in the court below, as being just to the defendant sureties, though it result in a loss to the plaintiffs. As said in *State v. Long*, 30 N. C., 415, these parties are liable *upon a contract* expressed in definite terms, and their liability cannot be carried beyond the fair meaning of those terms, read in the light of the statutes defining the duties of the clerk, and the powers of the court and its well known practice and custom.

To avoid misunderstanding in future, we deem it proper to notice a position taken by defendants' counsel and argued with ingenuity, to the effect that the sureties of a clerk could not be held responsible for his good conduct as receiver under an appointment conferred upon him by virtue of the statute (Bat. Rev., ch. 53, secs. 22 and 47,) which authorizes the court at the instance of the solicitor of the district to commit the estate of an infant having no guardian, or whose guardian has defaulted, to "some discreet person." In the corresponding sections of the Revised Code the words employed to designate the person to be appointed, are, "the clerk and master or other discreet
(437) person," and the argument is that by thus changing the phraseology, the legislature manifested its intention that such appointments should no longer be conferred upon the officers of the court. In this view of counsel we cannot concur, but rather think that the discrepancy between the two statutes resulted from the fact, that about that time the office of clerk and master was abolished, and hence all mention of it was omitted. The court cannot but take notice of the fact that since the new statute, the court has been in the habit of bestowing such appointments upon their clerks, oftentimes against their will, and under the conviction that their bonds afforded protection for the funds and effects committed to them, and that according to the understanding of all parties both before and after the acceptance of the office of clerk, the courts had the right to do as they have done; hence we conclude that in such cases the sureties are accountable, the office being taken *cum onere*.

But in this case there could have been no such understanding of the parties, and the sureties on the defendant Odom's bond, as clerk, were properly acquitted of all liability to the plaintiffs.

No error. Affirmed.

Cited: Syme v. Bunting, 91 N.C. 51; *Presson v. Boone,* 108 N.C. 83; *Waters v. Melson,* 112 N.C. 93.

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*R. B. PEEBLES v. JOHN W. PATE.

Execution—Ejectment, Evidence in.

Where there have been a previous levy and sale, a subsequent execution confers no authority to resell the same premises; its operation is confined to other property of the debtor. And this the defendant in the execution may show in an action by the purchaser to recover the land. But the rule does not apply to executions issued upon different judgments against the same debtor. (For present form of final process see section 261 of the Code.)

CIVIL ACTION to recover land, tried at Fall Term, 1880, of (438) NORTHAMPTON Superior Court, before *Graves, J.*

The plaintiff claimed title to the land in dispute under an execution sale, and produced in evidence the record of a judgment recovered in the superior court of Northampton by Mary E. Phillips against the defendant for a debt contracted prior to January, 1865, and execution thereon issued on June 8th, 1874, to the sheriff, his deed conveying the land, and proved the sale pursuant to the reguirements of law. He also read the sheriff's return on the execution in these words: "After due and lawful advertisement at the court house in Northampton County and four other places in said county, I did, on the 7th day of November, 1874, expose to sale, and sell, at public auction to the highest bidder for cash, the two tracts of land mentioned in the levy, when and where R. B. Peebles became the last and highest bidder for the same in the sum of five dollars each, complied with the terms of sale and was declared the purchaser." (Signed by Jas. W. Newsom, Sheriff).

The defendant admitted his possession of the land and the value of its rental.

To impeach the plaintiff's title and show that he acquired no estate under the sheriff's deed and the proceedings antecedent to its execution, the defendant proposed to prove and read certain other entries endorsed upon the execution exhibited by the plaintiff and under which he purchased, to wit:

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

"August 9th, 1873. This day levied this execution upon a tract of land containing twenty-four acres more or less, and upon one other tract of land containing two hundred and fifty acres, more or
(439) less, the property of John W. Pate, to satisfy this execution and costs." (Signed by Newsom, Sheriff).

December 6th, 1873. Received two hundred and two dollars from the sale of the above named tracts of land purchased by Wm. T. Stephenson of which thirty $^{99}/_{100}$ dollars are costs and commissions, and one hundred sixty-eight $^{78}/_{100}$ dollars, debt and interest in part of this execution. (Signed by Newsom, Sheriff.)

December 22nd, 1873. Received of J. W. Newsom, Sheriff, the sum of one hundred sixty-eight $^{78}/_{100}$ dollars in part of the within execution. (Signed by R. B. Peebles, Attorney for J. J. Long.)

Received of W. T. Stephenson, administrator *de bonis non* of Newitt Harris, the sum of sixty-five and $^{7}/_{100}$ dollars in full of balance on this execution. (Signed R. B. Peebles).

The defendant proposed further to show that on June 30th, 1873, a previous execution was sued out on the same judgment and delivered to the sheriff who returned it to the next term "not satisfied" and with a levy on the same two tracts of land in the form and words found on the execution under which the plaintiff bought, and that on October 17th, 1873, a second execution issued, bearing the same entry as the preceding, and which was returned by the sheriff with his endorsement of his action under it, and the attorney's receipt, as transferred to the last as already recited.

He also offered to prove the sale to Stephenson and the sheriff's deed to him for both tracts executed in December, 1873.

The evidence was ruled out as inadmissible in this action, and the defendant excepted. The plaintiff had a verdict and judgment, and the defendant appealed.

Mr. R. B. Peebles, for plaintiff.

Mr. S. J. Wright, for defendant.

(440) SMITH, C. J., after stating the case. The rule laid down in the cases cited for the plaintiff is too well established to admit of controversy that "a purchaser at sheriff's sale, as against the defendant in the execution who withholds possession, is entitled to recover as of course, and the defendant cannot justify his act of refusing to give up the possession on the ground of title in a third person." *Wade v. Saunders*, 70 N. C., 277; *McEntire v. Durham*, 29 N. C., 151. See also *Leach v. Jones, ante*, 404.

But to operate as an estoppel, the execution must be valid and sufficient to confer the power to make the sale upon the officer who undertakes to sell. Otherwise the attempted sale is ineffectual against the debtor, and this he may show in the action of the purchaser to recover it. In such cases the estoppel does not apply, and the defect inherent in the process relied on as authority for the act, may be shown by the debtor. In the present case the identical land had been sold under an execution issuing upon the same judgment and after a levy, and the proceeds had been applied to the costs and the residue paid over to the attorney, who bought at a subsequent sale, and these facts appear upon the process itself.

The inquiry then is, did the writ authorize the sheriff, not to levy on and sell other property of the debtor, (for it was clearly valid and effectual for this purpose,) but to resell land already sold by him, and debar the debtor from showing the fact. The question seems to have been decided in the case of *Smith v. Fore,* 46 N. C., 488, and upon its authority we are constrained to award a new trial for the error in rejecting the evidence. When the case was first before the court, (32 N. C., 37,) the lessor claimed title under a second writ of *venditioni exponas* issued upon a levy of a justice's execution upon land returned to and confirmed in the county court, and the debtor was permitted to show the issuing of a previous *venditioni exponas* upon the same levy and a sale thereunder to another person. "This rendered (441) the levy *functus officio,*" say the court, "and there was no authority to issue the second *venditioni exponas* under which the lessor purchased." The estoppel is held not to apply, because a purchaser to avail himself of it, "must show a valid execution." In a subsequent action (46 N. C., 488,) it appeared that the lessor had sued out a writ of *fieri facias* which was levied on the same land and under a *venditioni exponas* it was again sold to the lessor. It also appeared that the first purchaser had leased the land to a son of the debtor, and subsequently sold it to him, and both resided upon the land.

The court held that the son, the defendant, was confined to such defences as were open to the debtor, and NASH, C. J., proceeds thus: "A purchaser at a sheriff's sale, to show a good title, must exhibit a valid execution, authorizing the sale. If he does not, his case does not come within the principle before stated, that a debtor, whose land had been sold under execution, cannot contest the right of the purchaser to possession." Referring to the statute which provided for the issue of a *fieri facias* when the sale under the *venditioni exponas* did not satisfy the debt, he adds: "The *fi. fa.,* then, under which the plaintiff claims (as all other *fi. fas.*) issues against the goods and chattels, lands and tenements of the defendant, and authorizes the sheriff to

collect only the balance remaining due upon the judgment after the sale of the land. But in this case it issues for the whole judgment, and was levied upon the very same land which had been levied upon under the magistrate's judgment. This surely could not have been the intention of the legislature. The land did not at the time of the levy of the *fi. fa.* belong to Lewis Fore, Sr.; he was living with his son, Lewis Fore, Jr., upon the land, and the latter was the tenant of Davis, who had purchased under the first *venditioni exponas.* In law the possession was in Lewis Fore, Jr., and the *father would not have been*
(442) *estopped to deny the title of the plaintiff by showing the defect in it, namely, that the venditioni exponas is not a valid one."*

The principle seems to be that when the record shows a previous levy and sale, a subsequent execution does not confer authority to resell the same premises, and its operation must be confined to other property of the debtor. The present form of final process directs, when no personal estate can be found, that the judgment be satisfied "out of the real property belonging to the debtor on the day when the judgment was docketed in the county or at any time thereafter." C. C. P., Sec. 261.

When any lands thus liable have been sold, the authority conveyed in a second writ, especially when an endorsement shows the fact of a previous valid sale, would seem to be limited to other unsold lands of the debtor. The authority to make the sale as in case of a *venditioni exponas,* following a levy, is exhausted as to the lands already sold upon process issued on the same judgment. Of course the rule has no application to executions issued upon different judgments against the same debtor, nor to the case of an attempted and ineffectual sale.

The plaintiff bought, not only with the constructive notice furnished by the endorsement upon the writ under which he derives title, but with actual notice, for he received a portion of the proceeds of the first sale applicable to the debt. It is true that in the case from which we have quoted, the action was against Lewis Fore, Jr., who was in possession with the judgment debtor, under a lease from the first purchaser, but the court restricts him to the same defences and decides that the judgment debtor himself could defeat the recovery by showing title in the first purchaser, and the want of authority in the officer under the last writ to sell and transfer to the lessor any estate in the land. We are unable to distinguish the cases in principle, and
(443) rest our decision in this case upon the authority of that adjudication which we do not feel at liberty to disregard.

There must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

Cited: Peebles v. Pate, 90 N.C. 353, 354.

S. M. LOCKHART, ADM'X., v. J. J. BELL.

Agency—Contract of Purchase—Evidence—Witness.

1. The defendant bought land of A at execution sale, and contracted to convey the same to another upon payment of price; there are provisions in the contract to the effect that interest is to be paid on bonds first falling due—the vendee to pay expenses of certain litigation—the vendor to have a lien on crops raised on the land to secure payment of the debt. Vendee dies, and the heir, who is also the personal representative, sues for an account and conveyance of title, alleging that purchase money has been paid; *Held* on exceptions to report of referee;

   (1) That defendant was properly credited with amount paid for keeping farm in repair and providing for its cultivation, and for certain expenses incident to litigation; nor ought he to be charged with applying crop to payment of interest, as the referee charged him with the whole sum received from that source.

   (2) Testimony of a witness to show the agency of A, the defendant in the execution, in effecting the contract of purchase as bearing upon his general agency for vendee in managing the farm, was competent, and the subsequent agreement as to rent, material to show the continuing relation of principal and agent; and the proof in this case sufficient to show the sanction of the principal (intestate) to the agency.

2. A witness offered to prove a fact which occurred out of the presence of, and in no sense a transaction with a deceased person, is not incompetent under section 343 of the Code. It is only when the transaction is between the deceased and the living party, that the statute prohibits the latter from testifying.

(RUFFIN, J., dissenting.)

CIVIL ACTION tried upon exceptions to referee's report at Fall (444) Term, 1880, of NORTHAMPTON Superior Court, before *Graves, J.*

The plaintiff appealed.

Messrs. T. N. Hill and R. B. Peebles, for plaintiff.

Messrs. Day & Zollicoffer and Mullen & Moore, for defendant.

SMITH, C. J. The defendant having purchased at a sale under execution against B. F. Lockhart a tract of land in Northampton, known as the "Deans Plantation," and estimated to contain eight hundred and twenty-six acres, on December 16th, 1871, entered into an agree-

ment with Virginia P. Eaton, the mother of his wife, under their seals for the sale of the same to her at the price of twelve thousand nine hundred thirty-seven dollars and eighty-cents, whereof was then paid two hundred dollars in cash, two thousand seven hundred and thirty-seven dollars and eighty cents in a transferred judgment and execution against the same debtor, and the residue in four equal parts secured by her bonds falling due respectively on the first day of January of the next succeeding years and all bearing interest from April 1st of that year, and payable annually.

Upon the full payment of the purchase money, the defendant contracted to convey the estate in the land acquired under the sale and the deed of the sheriff thereafter to be executed. The agreement contains a provision in these words:

"Now although two of said bonds of $2,500 each fall due before the 1st of January, 1874, the said Bell will not undertake to enter on the premises to claim in any way forfeiture of said V. P. Eaton's claim, if all the said interest is promptly paid and no culpable waste committed until that date. But nothing is to be understood by this clause to prevent said Eaton's paying any part of the principal." The
(445) covenant also recites that a sum of $1294.27, due under one of the executions, by virtue whereof the sale was made, and belonging to said Bell, is involved in a controversy in the court whence they issued, as to the disposition and apportionment of the money in the sheriff's hands, and whatever sum he may receive from that source "he is to allow Mrs. Eaton a credit on the said bond to that amount so received, and as a condition precedent to his making a title as aforesaid, the said Virginia agrees to pay to said Bell all expenses that he may be at in attending the said litigation and in making her title also."

The final cause is as follows: "It is expressly understood and agreed that all of the crops produced upon the said plantation, which may belong to Mrs. Eaton, shall be bound to pay the interest and principal of the debt of J. J. Bell, after the payment of taxes, and the same shall not be disposed of to any person or in any way, except with the consent of said J. J. Bell, until all of his debt is paid in full; it being the intent of this clause, under all circumstances, to give the said Bell a perfect lien on all the crops or parts of crops produced on said plantation to which Mrs. Eaton shall be in any way entitled."

The vendee died in February, 1876, having made several payments on her indebtedness from crops of cotton raised on the land during her lifetime, and the present plaintiff, her only heir at law, has administered on her estate. B. F. Lockhart died subsequently, the parties having

all resided as one family from the date of the contract until interrupted by her death.

The present action is for an account, the plaintiff alleging her belief that the purchase money has all been paid, and for the conveyance of the title to the land.

At Spring Term, 1878, the following order was entered in the cause: "It appearing to the court that this case involves the taking of an account between the defendant and the intestate of the plaintiff, it is now by consent referred to Thomas W. Mason to take (446) and report to the next term of the court an account between the plaintiff's intestate and the defendant. It is further agreed that the said reference shall be heard at Weldon on ten days notice."

The referee accordingly proceeded with great care and particularity to take the evidence, documentary and oral, noting such as was objected to and his own rulings upon its admissibility, putting down the obnoxious matter, so that if he erred his adverse rulings could be considered and acted on by the reviewing court. He has also with equal attention and perspicuity found the facts in a series of separate propositions with references to the testimony on which they are based, and stated his conclusions of law as deduced from the facts. We think a word of commendation is due to the referee for the fair, impartial and thorough manner in which his onerous and perplexing labors on the investigation have been performed and reported to the court.

In examining the report we see that he has met at every stage of the hearing, with exceptions to the introduction of evidence, those taken to the report by the plaintiff numbering near eighty, of which the court sustains sixty-two, overrules thirteen, and sustains in part, and overrules in part the others.

The case, accompanying the plaintiff's appeal and containing her assignment of errors, presents seven exceptions to the rulings of the court that we are asked to consider and correct. The exceptions are:

1. To the allowance, as a credit to the defendant of the sum of $136.10 paid by him for buildings or repairs upon the plantation, and to tenants for excess in the rent-cotton delivered above what was due, and the sum of $70.30 for bagging and ties used in baling.

2. To the admission of testimony in explanation of an endorsed credit of $450 on the bonds, interest to the end of the (447) year in which they were executed. This exception is not insisted on in this court and will not be considered.

3. To the receiving of the testimony of M. W. Ransom.

4. To the allowance of attorney's charges and other expenditures, in securing the share of the proceeds of sale under execution, amounting in the whole to the sum of $171.25.

5. To the finding, as a fact, the second contract between the parties for a renting, entered into on August 1st, 1875.

6. To the failure to charge the defendant with the three separate credits of $600 each, endorsed on the bonds, in payment of interest accrued to the beginning of the respective years, 1873, 1874, and 1875.

7. To the reception of the defendant's explanation of the drawing the bonds in form, bearing interest from April 1st preceding the date of their execution on December 16th of the same year.

To these exceptions, omitting the second, we now direct our attention in the order of their enumeration:

1. The equitable estate, the substantive property in the farm vested under the contract in the intestate, and the expenditure complained of, was for her benefit as owner and incurred without objection. In legal effect, it is an appropriation of a portion of the crop to the keeping up the farm, providing for its cultivation, and securing a full product. The excess in the delivered cotton for which the tenants were paid, was a proper deduction from the aggregate sales, enlarged by the addition of so much as belonged to them, for which the intestate's estate has credit. It is but a withdrawal of the excess from the cotton forwarded and sold, and giving it the residue. For the same reason the costs of the material used in baling were a proper deduction.

3. The testimony of M. W. Ransom to show the agency of (448) Lockhart in effecting the contract of purchase, and as bearing upon his general agency in obtaining and managing the farm for his principal, was both relevant and competent.

4. The contract contains a provision securing to the intestate the benefit of whatever sum the defendant might recover from the sales of the land, and further, that the intestate shall pay to him *"all expenses, that he may be at, in said litigation* and in making her title also." The sums charged were expended in securing the money, with the whole of which she is credited by the referee. It is an obvious proper diminution to be made.

5. The rent agreement of August 1st, 1875, the fruit of the efforts of Lockhart and accomplished through his instrumentality, of which his letters furnish plenary proof, accepted and ratified in its execution by the principal and to which the agent becomes an attesting witness also, containing an express mention of the agency, was material in like manner as the original contract in buying, to show the continuing relations subsisting between them as principal and agent.

6. The defendant ought not to be charged with the endorsed payments of annual interest amounting to $1,800, as upon his testimony, it was his own appropriation of that sum out of the receipts from cotton, and in the report of the referee he is charged with the whole fund received from that source, and he would be made responsible for the same money twice. It is needless to elaborate the question of the competency of the defendant to give his testimony upon the matter, as it is discussed in the opinion in the defendant's appeal. We will only add that his testimony is partially sustained by that of the witness, Gooch.

7. The subject of the last exception is disposed of in the preceding.

Upon a careful review of the whole matter, we find no ground for a correction of the rulings presented for review in this ap- (449) peal of the plaintiff, and affirm them. This will be certified that the cause may proceed in the court below.

No error. Affirmed.

In same case upon defendant's appeal:

SMITH, C. J. The controversy between the parties, though expanded into a great number of exceptions taken during the progress of the investigation before the referee, and again before the judge upon his review of the report, is in substance confined to the disposition of, and responsibility for the rent of the cotton made on the Deans farm during the years 1871 and 1872. The crops afterwards raised, and which pursuant to the contract were to be appropriated to the payment of the purchase money of the land, have passed into the defendant's hands, and the admitted amounts received on the sales of each year have been thus applied, and form charges in the account rendered by the referee against the defendant. The various questions made as to the admissibility of evidence are material only as affecting its sufficiency to sustain the findings of fact, alike by the referee and the revising judge, since under the late constitutional amendments, in enlargement of the appellate jurisdiction of this court, the duty is imposed upon us to eliminate the incompetent and weigh the force and effect of what remains, free from objection. The matters disputed in the appeal are comprehended in two inquiries, the solution of which in a great degree determines the result of the action, and they are:

1. Was Lockhart the general agent of the intestate, his wife's mother, in the management of the farm and in the disposal and appro-
(450) priation of the rent products to the reduction of the encumbering debt?

2. Was the delivery of the cotton received from the tenants to the officers of the railroad company at Garysburg for transportation to the consignee at Petersburg, a delivery to the defendant so as to impose on him, and remove from her, the consequences of subsequent loss?

These propositions were ruled by the referee, upon the proofs offered and received, favorably to the defendant, but his deductions of fact and law are reversed upon the hearing before the judge—much of the evidence being rejected and the residue held to be insufficient to warrant the findings. We propose to consider these propositions put into an interrogative form, and the competent and pertinent evidence applicable to them, as a substantial solution of the controversy involved in the defendant's appeal.

The principal exception taken and relied on by the plaintiff is to the legal capacity of the defendant, under the proviso of section 343 of the Code, to testify to transactions which took place between himself and the alleged agent, after the death of both principal and agent, and to the acts and admissions of the latter, while professing to act as such agent and within the scope of the authority conferred. The subject has been discussed and a construction put upon the statute, deciding the very point in the case of *Morgan v. Bunting, ante,* 66, against the objection, rendering further discussion unnecessary, and we pass to an examination of the proofs of the general agency of Lockhart.

We are clearly of opinion that the referee had sufficient evidence before him to support his conclusion, that Lockhart was not only the intestate's agent in bringing about the agreement for the purchase of the land, but in its general management afterwards, and in collecting, forwarding and disposing of the products of the farm, and we think his Honor erred in overruling the conclusion arrived at and an-
(451) nounced in the report. We are content to refer to the more prominent portions of the testimony to sustain the finding of the agency by the referee.

1. The farm belonged to Lockhart and was bought by the defendant under a sale by execution against him. He was active and interested in effecting the re-purchase by the intestate and its retention in the family, and in fixing the terms and conditions of the contract entered into for that purpose, to which he became a subscribing witness. This is an explicit sanction of the principal to the agency assumed and

exercised, and a ratification of what had been done in the incipient transactions with the defendant.

2. The intestate, her daughter and Lockhart, the husband, constituted a single family living in the same house, and it does not appear that she ever assumed personal control of the farm or undertook herself to supervise its operations, or to receive and dispose of its rents, a service unsuited to her sex, age and physical condition, or had any other person to act in her behalf.

3. During the long interval extending over several years and up to Lockhart's death, he alone did exercise supervisory authority, professing to derive it from the intestate, gathering and forwarding the crops in her name to the consignee commission house in Petersburg, and her knowledge of what was done and full assent may be reasonably presumed in the absence of evidence to the contrary.

4. The contract of lease entered into in 1875, procured through the active and persistent efforts of Lockhart, and to which he also is a subscribing witness as shown in his correspondence with the defendant, is a direct and positive recognition of the agency in that transaction, and in the instrument itself he is designated as *her agent.*

5. The presence of Lockhart and his sons at times on the farm, the contract for putting up houses for tenants, the manner of keeping the accounts by the consignees and their acquiescence in Lockhart's control of the funds derived from sales, the making out of the (452) papers showing the deliveries of cotton by the tenants at the railroad depot, these and numerous other concurring facts developed in the voluminous testimony of which it can hardly be supposed the principal was ignorant, strongly support the inference of a continuous authority conferred so to act, or of a ratification which is its equivalent.

II. The next inquiry relates to the legal effect of the deliveries to the transportation agents at Garysburg, in shifting the responsibilities, for a loss arising out of the failure of the commission house to which the cotton was sent, from the intestate to the defendant. The change could not take place and the defendant be charged with the loss, unless control over the cotton forwarded was then transferred to the defendant, so that its future disposal was at his discretion and risk. If control was retained by the agent, it would be unreasonable, merely because of the executory agreement for the lien, that the defendant should suffer by a disaster he was unable to avert, and which did not result from any want of diligence on his part. Until the cotton was put in the custody of the defendant, or some agency of his, and under his control, the perils of loss must follow the property and abide upon the intestate. The evidence shows this to have been the case, that

no such transfer had been made up to the bankruptcy of the consignees, and that the only money received from this source was the inconsiderable ratable share paid out of the bankrupt estate upon the proved claim.

These general views dispose of most of the exceptions arising upon this appeal, and it would be superfluous to pursue them in detail.

The exceptions numbered 14, 15 and 16 are to the exclusion of the defendant's explanation of his rendered account; of the head-
(453) ings to his letters; of the correspondence between himself and the agent; of the credits endorsed upon the notes; the testimony (unless obnoxious to the inhibitions of the Code, Sec. 343) is clearly relevant and proper, as otherwise inadvertent errors and mistakes would be beyond the reach of correction, and the truth often distorted or repressed. It remains then to be considered the bearing of the statute upon the defendant's capacity to show by his own testimony, that the endorsement was not a *transaction* with the deceased, of which she had any personal knowledge, or could speak, if living, in explanation, but his own individual act done when she was absent, and in which she did not herself participate. If *these circumstances* could be proved by an indifferent witness, it is manifest the mouth of the defendant would not be closed against explanations necessary to a correct understanding of the act itself, and if required, a correction in amount and date.

It is only when the "transaction or communication" is, or appears to have been between the deceased and the living party, that the statute interposes and prohibits the latter from giving in testimony relating to such "transaction or communication," and for the obvious reason that the other side cannot be heard. But the fact to which the testimony is pertinent being shown to have occurred out of the presence of the deceased, and no sense a *transaction* with her, (and we see no reason why the preliminary matter affecting the competency of a party to testify may not be proved by him as well as by an indifferent witness), the statutory impediment is removed and the objection ceases to have force. The endorsement is but evidence of a partial payment, capable of disproof by proper testimony, and it would seem equally so, when it is shown to the judge, that the deceased was not a party and no transaction was had with her, by the testimony of the living person who alone made it. To hold otherwise is to
(454) give to the entry the force of an estoppel excluding all explanatory evidence.

This view of the statute is not at variance with the interpretation put upon it in *Woodhouse v. Simmons*, 73 N. C., 30, where it is held that an assignee of a note under seal cannot prove that the debt had

not been paid, to repel the presumption that it had been, arising out of the lapse of time; for the denial of a transaction presumed in law stands upon the same footing as independent evidence offered of any fact. In the present case the entry is in the defendant's hand-writing, and the proposal is to show when and where it was made, not in the intestate's presence but as a voluntary appropriation of proceeds of rent-cotton with which he is charged in the account rendered by the referee, and to prevent a double charge against him.

It may be suggested in this connexion whether the administratrix in availing herself of this endorsement as evidence in exoneration *pro tanto* of her intestate, has not thereby herself opened the door to explanatory evidence from the defendant, but it is not necessary to decide the point. *Knight v. Killebrew, ante*, 400.

We regret that this is not the unanimous opinion of the court and that Mr. Justice RUFFIN dissents as to the last point, who is unable from impaired health to give his reasons in detail therefor.

We do not agree with the court that the defendant ought to be charged with the value of the entire crops raised on the farm during the years 1871 and 1872, but he is liable to account and is properly debited with the $450, due as interest to January 1st, 1872, and with $169.65 collected out of the bankrupt estate. This exception as to those crops is allowed, not only for the reasons already stated, but on the further ground that the forfeiture under the mortgage incurred by the non-payment of the principal moneys falling due on January 1st of the years 1872 and 1873, is waived, and the (455) intestate was compellable to pay only the interest accrued to those dates, and thus the excess beyond interest was surrendered to her.

While if material to the determination of the appeal we might sustain many exceptions to evidence admitted, we think that which is competent to be heard sufficient to warrant the referee's finding of fact and his conclusion of law. The report must therefore be confirmed and the adverse rulings of the court in regard thereto reversed. The judgment must be for redemption upon payment of the intestate's indebtedness for the residue of the purchase money, and if necessary for a sale of the premises for the satisfaction of the debt.

Error. Reversed.

Cited: McKee v. Lineberger, 87 N.C. 186; *Lockhart v. Bell*, 90 N.C. 504; *McRae v. Malloy*, 90 N.C. 526; *Waddell v. Swann*, 91 N.C. 107; *Thompson v. Onley*, 96 N.C. 13; *Hughes v. Boone*, 102 N.C. 162; *Gupton v. Hawkins*, 126 N.C. 83.

R. T. STEPHENSON v. SEABOARD & ROANOKE RAILROAD COMPANY.

Deed, Description of Property in.

A deed describing the property conveyed, as "the following articles of personal property, to wit, 300 railroad ties" to be delivered at a certain price, is not sufficiently definite to pass the title.

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

This was an action of claim and delivery for the possession of 307 railroad ties.

At the trial the plaintiff offered in evidence a mortgage given to him by J. T. Buffaloe on the 20th May, 1880, and registered on 22nd June, 1880, claiming that it conveyed to him the property sued for.

(456) The description given of the property in the deed is as follows: "the following articles of personal property, to wit, 300 railroad ties to be delivered at Kee's Crossing on the Seaboard and Roanoke railroad." The plaintiff also introduced as a witness the maker of the deed, (Buffaloe) who testified that, at the time he gave the mortgage to plaintiff, he had cut a little over 200 ties which were then in the woods; that he afterwards cut others, making in all that he placed upon the railroad 306, nearly 300 of which were good ties, the rest being "culls;" that none of the ties were delivered at Kee's Crossing, the point designated in the deed, but were delivered to the defendant at another point, under a contract made with it for the delivery of the ties, before the execution of the mortgage to the plaintiff, and that the defendant had paid the witness for the ties without the knowledge of the plaintiff.

His Honor thereupon expressed the opinion that the deed was not sufficiently definite, in the description of the property, to pass the title in the ties to the plaintiff, and in submission to that opinion the plaintiff took a non-suit and appealed.

Mr. R. B. Peebles, for plaintiff.

Messrs. Day & Zollicoffer, S. J. Wright and D. A. Barnes, for defendant.

RUFFIN, J. We concur in the view taken by his Honor. While it cannot be expected that a mortgage should set forth a description of the property conveyed with such certainty that it may be identified by the terms of the instrument alone, and without the aid of evidence *aliunde* to fit the description to the thing, still it is necessary that it

should furnish some description of the property accompanied with such certainty as will enable third parties, aided by inquiries which the deed itself suggests, to identify it.

This latter has been held sufficient, under the maxim *id cer-* (457) *tum est quod certum reddi potest,* and from necessity—it being many times impossible to set out such a description of the thing conveyed, as would in itself be absolutely certain and complete. But a less degree of certainty will not suffice, and especially under our registry laws, the fundamental policy of which is to give such notice to third parites as will enable them to deal securely with reference to the property conveyed in mortgage.

The property in question is in no manner described in the mortgage under which the plaintiff claims, nor is there any suggestion therein of evidence, which would enable a party purchasing, to know that it was intended to be conveyed thereby—the only particular mentioned, to wit, the point of delivery, being untruly stated, and so calculated to mislead rather than to enlighten any one.

To sustain such an instrument as a mortgage would be to enable the parties to commit gross frauds and tend to discourage trade, and would wholly defeat the policy of the law, which intends that the mortgage as registered should convey to every one notice of the property covered by it, and the terms upon which it is held.

No error. Affirmed.

Cited: Motor Co. v. Motor Co., 197 N.C. 373.

MARY A. JOLLY AND OTHERS v. D. O. BRYAN.

Tenants in Common—Statute of Limitations—Agent—Interest—Rents and Profits—Deed.

1. A tenant in common, in the possession and sole enjoyment of the common property, is not protected by the statute of limitations from accounting with his co-tenants for rents and profits. He is regarded as their agent, and the statute will begin to run only from demand and refusal to account.
2. He is also chargeable with interest from the date of demand or suit brought —and in this case, from 1873, when in the proceeding for partition the defendant set up the plea of sole seizin, thereby ending the confidential relations subsisting between himself and his co-tenants.
3. The *habendum* of a deed—to have and to hold said land with the rents and profits, etc.,—does not operate to pass title to rents theretofore accrued.

(458) CIVIL ACTION tried at Spring Term, 1882, of MOORE Superior Court, before *Shipp, J.*

In 1873 some of the parties, who constitute the plaintiffs in the present action, instituted proceedings against the present defendant, alleging that they were tenants in common with him in certain lands, and asking for a sale thereof, for the purposes of partition. The action pended upon the issues joined, until Spring Term, 1878, of the superior court, when a decree was rendered declaring that the plaintiffs were entitled as alleged by them, and directing the lands to be sold for partition, and accordingly the same were sold in November of that year.

Thereupon the plaintiffs instituted this action, in which they allege that the defendant has been in the exclusive possession and enjoyment of the said lands from the first day of January, 1867, and they pray for an account of the issues and profits thereof. In his answer the defendant sets up as a defence the statute of limitations. On the trial the judge held that the statute did not apply to an action like this, brought for an account by tenants in common against their cotenant, and so instructed the jury, to which the defendant excepted.

It appeared in evidence that on the 16th day of May, 1878, just before the sale under the said decree, the defendant purchased
(459) of the plaintiffs, Allen M. Martin and wife, their undivided share in said lands, and took from them a deed, the *habendum* of which was in these words: "To have and to hold the said lands and premises, and all and singular, the tenements, hereditaments, woods, ways, mines, minerals, improvements, *rents, issues, profits,* remainders and appurtenances thereto belonging," etc. And the defendant insisted that, according to the true construction of the deed, he had acquired the right of his grantors in all the antecedent rents and profits, and asked the court so to instruct the jury, which was declined, and he excepted.

In response to the issues submitted, the jury found that "the fair rental of the land" was $75 per year, and assessed the value for the whole period, after deducting for improvements, at the sum of $812. The jury, though instructed by the court that they might do so, allowed the plaintiffs no interest upon the annual values of the lands. In moving for judgment the plaintiffs asked the court, to allow them interest on the rental values, as fixed by the jury, from the end of each and every year that the defendant had the sole use of the lands. This was refused and the plaintiffs excepted. Both parties appealed.

Messrs. Hinsdale & Devereux, for plaintiffs.
Mr. W. A. Guthrie, for defendant.

RUFFIN, J. All the points involved in the two appeals seem to us to have been settled, if not directly, by necessary implication, by adjudications already made in this court. In *Wagstaff v. Smith,* 39 N. C., 1, it was held that a tenant in common, in possession and sole enjoyment of the common property was protected by the statute of limitations from accounting with his co-tenants, for rents and profits received more than three years prior to the bringing of the action; and that interest should be allowed against him, only from the time of actual demand made, or suit instituted. The decision (460) proceeding upon the idea that, under the statute of 4th Anne, which gave the right of action to one co-tenant in common against another in possession, to call him to account, *as bailiff,* for what he had received in excess of his own share, it was the *receipt* of the profits which created the cause of action, and that it did so immediately and *toties quoties* whenever it occurred; though as to the point about the interest, it was put upon what certainly seems to be an inconsistent ground, that money payable on demand drew no interest until demand made, either actual or by suit.

But the case itself was not permitted to stand long as an authority. In *Norcot v. Casper,* 41 N. C., 303, the point as to the statute of limitations in such cases, again came before the court and after much consideration, all three of the judges delivering opinions *seriatim,* it was conceded that the decision in the former case could not be sustained, either upon principle or authority; and accordingly the same was in terms overruled.

In discussing the question, in this latter case, it was said, that the effect of the statute, (it being the same with Rev. Code, ch. 31, sec. 99,) was to introduce between the parties the relation of principal and bailiff, as fully and effectually, as if the same had been done by express agreement and stipulation, on the part of one to act for all; and that, inasmuch as the statute would not begin to run, in case there had been this express understanding between the parties, until a demand and a refusal, or the office of bailiff had terminated, so neither could it in the case of the implied agency, under the statute. "The statute of limitations begins to run only when the cause of action accrues, and the cause of action cannot accrue until the one withholds what the other demands, or is presumed to demand, and as in every other agency, a demand is not presumed until the relation ceases." Again, it was said, that until the demand and refusal, (461) the defendant is not in fault; *it is the refusal* which puts him in

the wrong and exposes him to the action. He is deemed in law to have, by express contract, assumed to receive for his companions, their shares of the profits, from time to time as they shall accrue, and so long as he continues to do so, his agency lasts, and there can be no adverse relations between them, which can give rise to a cause of action; and consequently the statute of limitations was not allowed to prevail as a defence in that case.

Now does not the same reasoning apply with equal force to the point about the interest? Indeed, does it not render the decision in *Wagstaff v. Smith* in regard to that question, consistent with the reasoning in both cases, and put it upon impregnable ground?

If the statute has the effect, for one purpose, of establishing a contract on the part of the defendant to act as bailiff for the plaintiffs, that is, as their agent to receive and hold the profits, as they shall accrue, to their use and to account for the same when demanded, it must do so for all purposes. If an agent, either by express stipulation or by legal intendment, he is not liable for interest before demand and refusal or suit brought. As said in *Hyman v. Gray,* 49 N. C., 155, being an agent, he was not bound to seek the plaintiffs for the purpose of paying over to them; and if he had paid when demand was made, there would have been no default on his part, and he would not have been chargeable with interest at all. And there can be no principle upon which he can be charged with it, farther back than the date of demand.

If his refusal to account can have relation, so as to give the plaintiffs interest from the date of each annual receipt of profits, it must necessarily have the further effect to let in the defence of the statute of limitations; for the one is correlative of the other.

(462) When, then, did the defendant's liability for interest begin in this case? In the opinion of the court it began in 1873, when, in the action for partition, he set up his plea of sole seizin and thereby ended the confidential relations subsisting between his co-tenants and himself, and determined his office of bailiff. It would be absurd to say that, by setting up an adversary claim to the land itself, he did not deny the right of the plaintiffs to have an account from him of the profits issuing thereout. In fact, but for the analogy to the rule which prevailed in the action of ejectment, and according to which the action for *mesne* profits did not accrue until after judgment in the main action, nor the statute of limitations begin until after possession taken thereunder, we should have been obliged to hold that the whole of the plaintiff's present cause of action accrued at that time, and the statute then put in operation against it.

As it was, we think his Honor should have instructed the jury, that the plaintiffs were entitled to interest upon the aggregate amount in

the hands of the defendant, and held by him to their use, at the commencement of the said proceedings for partition, and upon the rental value of each and every year thereafter.

As we have seen, the law implies a contract on the part of the defendant, under the circumstances, to account and pay on demand; and the statute governing the case (Rev. Code, ch. 31, sec. 90) declares that "all sums of money due by contract of every kind whatever, excepting only money due on penal bonds, shall bear interest." *Barlow v. Norfleet,* 72 N. C., 35. As this, however, can be corrected by a simple calculation, it is not necessary to disturb the verdict, but only to modify the judgment in this particular.

As to the deed from the plaintiffs, Allen M. Martin and wife, to the defendant, we are of the opinion that it cannot have the effect given to it of passing the rents theretofore accrued. These sums had ceased to be *rents,* or in any wise incident to the land, and had become a debt due from the defendant personally to the plaintiffs (463) for moneys had and received to their use. To manifest an intention to pass sums so held, requires something more than the mere use, in the *habendum* of a deed, of the terms, *rents* and *profits,* as being appurtenant to the land conveyed; and this, independently of the technical rule, which restricts the operation of the *habendum* to that which is subject matter of the premises of the deed.

The judgment of the court below is therefore affirmed except as to interest, in which particular it will be modified as herein declared.

PER CURIAM. Judgment accordingly.

Cited: Brem v. Covington, 104 N.C. 594; *Young v. Young,* 115 N.C. 113; *Boone v. Peebles,* 126 N.C. 826; *Locklear v. Bullard,* 133 N.C. 266; *Chatham v. Realty Co.,* 174 N.C. 674; *Lawrence v. Heavner,* 232 N.C. 559.

E. MAUNEY & SON v. WILLIAM A. COIT.

Partnership, Evidence of—Running Account—Statute of Limitations.

1. Where plaintiff sued defendant for goods sold and delivered to A, *it was held* no error to admit proof that the goods were so sold, before establishing a partnership between A and the defendant. The order in which evidence essential to a recovery in such case may be introduced, is left to the discretion of the presiding judge.

2. The test of a person being a partner is his participation in the profits of the business *as such,* (involving also a common liability for losses), except in

cases where the profits are looked to as a means of ascertaining the compensation for services rendered under a special contract.

3. The charge of the court below upon the law governing the formation of partnerships, sustained.

4. A note or draft received for goods sold and delivered is not a discharge of the debt, but the plaintiff, upon surrendering the same or proving its loss, is at liberty to sue for goods sold and delivered.

5. The statute of limitations begins to run only from the date of the last item in accounts where the items are parts of one continuing mutual account, and the same may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other, keeps it.

(464) CIVIL ACTION, tried at January Special Term, 1882, of DAVIDSON Superior Court, before *Seymour, J.*

This action has for its object the recovery of a balance due the plaintiffs for goods sold and delivered and moneys advanced during the years 1871, 1872, 1873 and part of 1874, to one Amos Howes, trading and mining, at a place known as Gold Hill, in Rowan County, in his own name, and to charge the defendant as a dormant, and until a later date, undiscovered partner associated with him in business, with a liability therefor. This residuary indebtedness was ascertained to be about the first of June, 1874, as the plaintiffs allege, in amount $7805.76, for which, with other advances which the plaintiffs undertook to make and did afterwards make for the benefit and relief of said Howes, he then drew on a corporation know as the North Carolina Gold Amalgamating Company in favor of the plaintiffs, his drafts of that date maturing and in the sums following:

One at thirty days after sight, for.....$2,000;
A second on same terms, and amount.....$3,000;
A third at 3 months after sight for.....$3,500;
A fourth at 5 months after sight for.....$3,000;
And the last at 6 months after sight for.....$1,000;

not as the plaintiffs say in discharge, but as a means of payment of the accumulated indebtedness.

The drafts were presented and accepted on June 5th, the two (465) first falling due paid at maturity, and payment of the others refused by the company.

The drawer, Howes, anticipating the dishonor of the three unpaid drafts annexed to a list of them and executed the following paper writing, dated Sept. 3d, 1874, at Salisbury, N. C.: "I, Amos Howes, do hereby waive protest of all the above stated drafts, and agree to any extension of time the holders may assent to."

On September 15th, 1873, Howes conveyed by deed in trust to Franklin Coit, procured, the plaintiffs aver, through the influence of the defendant and with a fraudulent intent towards creditors, the Gold Hill mining property under the pretext of securing a large sum, $27,000, recited to be due to the defendant; and thereafter on July 10th, 1874, the trustee and defendant united in a deed for the same real estate to the said North Carolina Gold Hill Amalgamating Company, and the company at the same time reconveyed by mortgage to the defendant to secure the same sum mentioned in the first deed, and as a substituted arrangement therefor. The property was sold under the mortgage on August 28th, 1875, to W. L. Holmes and R. J. Holmes for a large sum, whereof they paid in cash $2,500 and gave notes on time for the residue, one of which in the sum of $7,500, due at 24 months from date with interest from date and payable to the defendant, has been attached as part of the assets of the alleged copartnership, to await the determination of the action.

The plaintiffs' account with Howes commences with a balance against him in a previous statement brought down to January 31st, 1874, and entered as of February, and consists of a series of items, of both the credits and debits, extended to June 2nd, showing an excess then due to plaintiffs of $6,611.84.

The account exhibited by Howes consists of amounts brought forward and entered on the last of April, 1874, and continued in items on either side thence, the one to June 2nd, the other to (466) July 10, wherein Howes charges himself with the drafts given at the former date, and this statement shows an excess of $1,878.74 due to him.

The plaintiffs allege that the defendant studiously concealed from them and others his partnership relations with Howes, on discovering which from the correspondence between the parties and otherwise, they commenced their suit, and that the series of acts of the defendant charged in the complaint were fraudulent contrivances to screen the common property from creditors and secure it to the defendant.

The defendant denies every imputation of fraud or concealment, alleges that he was not a partner secret or otherwise with Howes, and their only relations were those subsisting between creditor and debtor; that the indebtedness to him was *bona fide* and the conveyances made solely for its security and payment; and, denying his liability for the debts of Howes or possession of information to enable him to form a belief as to the extent of the plaintiffs' claim, insists, if he had incurred liability in the premises it had been discharged by the plaintiffs' accepting the drafts of Howes and failing to have those presented for

payment protested and notice thereof given to him; and further that the plaintiffs' demand is barred by the statute of limitations.

Upon issues submitted to the jury, put in the form of propositions, they find:

1. There was a copartnership existing between Amos Howes and the defendant in carrying on the business of mining and merchandizing at Gold Hill, in North Carolina.

2. The existence of the copartnership was concealed by the defendant from the public for the purpose of avoiding liability for its indebtedness.

3. The plaintiffs sold and delivered to Howes, goods, wares and merchandize, and advanced moneys for the benefit and at the instance of the copartnership and while it subsisted, in the amount of $7,-
(467) 500 without interest at June 1st, 1874.

4. The drafts were not taken by the plaintiffs in payment of their claim, but as collateral security for it. The note of W. L. and R. J. Holmes for $7,500 mentioned in the pleading is a portion of the firm assets.

6. The plaintiffs' cause of action accrued within three years next before its commencement.

Upon these findings the court gave judgment for the plaintiffs, which is set out in full in the record, and the defendant appealed.

Messrs. J. M. Clement and Watson & Glenn, for plaintiffs.

Messrs. J. M. McCorkle and W. H. Bailey, for defendant.

SMITER, C. J., after stating the above. This brief statement prepares us to enter upon a consideration of the appellant's exceptions.

1. The defendant objects that the plaintiffs were permitted to proceed with the proof of the goods sold and money advanced to Howes, before showing his association with the defendant in the business.

The force of the objection is directed against the order of introducing the testimony and not against the testimony itself. It is a necessary part of proof to establish the defendant's liability that the debt should have been contracted, and it was not inappropriate and certainly not erroneous to allow it to be introduced early in the trial. If the plaintiffs should fail to connect the defendant with the transaction afterwards, they must fail in their action. The order in which the parts of the whole evidence essential to a recovery shall be introduced, must be left to the discretion of the presiding judge, who will correct any injury which might follow the failure to offer the other necessary and connecting evidence, by directing the jury to discard it. This

is decided in the recent case of *State v. Jackson*, 82 N. C., 565, (468) where the rule of practice is stated.

2. The defendant further objected to the admission of evidence that in September, 1874, the sheriff was in possession of the personal property of the corporation acceptor, and that the laborers in its employ had liens, as a means of showing its insolvency at that time. This exception seems to have been inadvertently set out in the case, since it is expressly stated therein that "the company on which the drafts were drawn was, *as was admitted by defendant*, and found by the jury, insolvent in September, 1874."

3. The ground of the objection to proving that at the former trial of the cause the unpaid acceptances had been produced in open court and tendered to Howes, is not stated and we are unable to see its force or pertinency.

It is stated by the court in the case before us that there was a vast volume of evidence consisting mostly in depositions and letters, and consuming several days in the reading, on the question of partnership between Howes and the defendant, from which each party has selected a very small portion for the reviewing court, and that none of it is material in presenting the points of law involved in the appeal. We are therefore confined to an examination of the principles of law laid down for the guidance of the jury, mostly in abstract form, in passing upon the issues. The correctness of the instructions given and the denial of others asked by the defendant, are next to be considered.

1. The jury were charged in substance, at the plaintiffs' instance, that if there was an agreement in regard to the conducting of business and mining operations between Howes and the defendant, that the latter should furnish goods or money, or both, towards the capital stock, and in return, and as part of the profits should receive or be entitled to 7-16ths, or other part or proportion of the mine or mining property, whether with or without any share or proportion of the proceeds of the store or mine, or with or without interest on (469) money supplied, or commission on goods purchased, this would in law constitute a partnership as to creditors. And this would be so, although there was a further arrangement between themselves that defendant should not thereby become a partner; that Howes should repay to defendant the money and goods advanced with interest and commissions, and that the latter should have no share in the results of the business until such repayment and all the incurred debts were discharged.

But the court added to the instruction a proviso that the interest which the defendant was to acquire was to come out of the profits of the business.

2. That if the defendant and Howes combined to conceal their joint interest and copartnership relations, and the information was kept from the plaintiffs during and before the year 1874, there would be no want of diligence on their part in omitting to give notice of the refusal of the acceptors to take up the matured drafts.

3. If both drawer and drawee were insolvent on September 4th, 1874, there was no laches in failing to bring and prosecute a useless suit.

At the defendant's request the jury were further instructed:

4. If the defendant furnished money or goods to aid Howes in working the mine, this would not render him liable as a partner, unless there was a preponderance of evidence that he was to participate in the profits, and if the jury were not satisfied with the proofs of the partnership, their verdict should be that none existed.

5. If the drafts were received, and so intended to be, in payment of the then subsisting debt, the plaintiffs could not recover.

6. The retention by the plaintiffs of the drafts after dishonor, (470) is some evidence to the jury that they were accepted as payment.

The following instructions asked by defendant were refused:

7. If the drafts were received, either as payment or collateral security for the pre-existing debt, it was the plaintiffs' duty to present them when due to the acceptor, and if not paid, give notice to the defendant or Howes, and their failure to do so, exonerated the defendant from further liability, notwithstanding the waiver of Howes—the firm, if it ever existed, having been dissolved by the conveyance of the property on May 31st, 1874, to the company, and the consequent cessation of the joint business.

8. The accounts between the parties were not mutual and running, consisting of reciprocal demands, so as to protect from the operation of the statute of limitations the items entered of dates more than three years preceding April 28th, 1877, when the summons was sued out.

Taking the charge as a whole, upon the question of a copartnership and common responsibility, it affords the defendant no just occasion of complaint. It does not appear that any exception was taken to the exposition of the principle of law governing the formation of partnerships and the liabilities assumed by the members to those having dealings with them, when constituted. A participation in the profits of the business, *as such*, involving also a common liability for losses, unless this be excluded by evidence to the contrary, as in the exceptional cases in which the profits are looked to, as a means only of ascertaining the compensation which under the contract is to be paid for the services of an employee or some other specific obligation, many of which will be found in the note appended to the case of *Reynolds v. Pool*, (84 N. C., 37), contained in the American Reports, vol. 37, p.

609, seems to be the well settled rule prevailing in this state for determining the existence of a copartnership, in the relation of its members to those who may deal with it and become credi- (471) tors.

The necessary conditions seem to have been laid down by the court, and we must assume they were met in the evidence produced before the jury. We are content with a few references. Lindley on Part., 66; 1 Pars. Cont., 147; Add., Cont., Secs. 1293, 1294; Chitty Cont., 318, 322, note f., and cases cited in *Reynolds v. Pool, supra.*

The writing signed by Howes dispensing with notice to him of the non-payment of the drafts, relieved the plaintiffs from the duty of advising him of the drawee's refusal, and their total ignorance at the time of the defendant's legal liability for the debt dispensed with the duty of giving the notice to him, if, in deed, he, not being a party to the drawing, was in law, when known, entitled to notice.

The receiving of the drafts was not presumptively a satisfaction or discharge of the debt for which they were given, and it is affirmatively found by the jury that they were given as collateral security only. "A note given by all the parties to pay for the goods delivered," says DANIEL, J., "would not extinguish the original undertaking like a bond or judgment taken for it. The plaintiffs might still maintain their action for goods sold and delivered, provided they produced and delivered up the note on trial, or proved it was destroyed. *Wilson v. Jennings,* 15 N. C., 90.

The same rule was laid down in a case where the two partners after dissolution gave their note for goods sold, on which payments were made and then the note taken up, and a bill of exchange for the amount due on it substituted by one of them only, and it was declared that on surrendering the bill the action would lie upon the original contract of sale. *Patton v. Atkinson,* 23 N. C., 262.

When this case was before us upon the defendant's former appeal (80 N. C., 300) we stated the rule, applicable to the facts then appearing, to be, that "if the drafts were given and received, for and in closing up the account, and were afterwards accepted by (472) the company, it was the duty of the plaintiffs to present them at maturity for payment, and, if not paid in a reasonable time, to take proper steps for their collection, if they failed to do this and the drafts became worthless, it would in law be a discharge of the original debt, that is, of course, if they were lost by reason of the neglect of the holders to proceed to collect, and could have been collected by the use of reasonable diligence on their part." It is now, however, shown that any effort to enforce payment by action would have been fruitless in

consequence of the insolvency of the acceptor, and the law does not require the holder to do a *"vain thing."*

The last and remaining question to be noticed is as to the application of the statute of limitations to a part of the account. The case cited for the plaintiffs (*Green v. Caldcleugh,* 18 N. C., 320,) is so directly in point and conclusive, that we do not deem any further references to be required. The principle is there announced that the statute does not apply to those running accounts in which the "items are clearly parts of one continuing mutual account, which by the consent of the parties are to be charged therein whenever the same are to be adjusted." "It may be inferred," adds Judge DANIEL, "when each party keeps a running account of the debits and credits of the account, or when one only, with the knowledge and concurrence of the other, is confided in to keep the account of all the mutual dealings."

In the present case, accounts are kept both by the plaintiffs and by Howes, each embracing reciprocal charges and credits, against and for each other, in frequent entries and extending down to a period within which the statute does not operate, and thus all the conditions of the rule are fulfilled and the bar removed from all the items. C. C. P., Sec. 39.

These are the only exceptions necessary to be noticed, and finding no error in the rulings, the judgment must be affirmed. As the (473) cause has not been finally disposed of in the court below, it must be remanded for further proceedings therein, and it is so ordered.

No error. Affirmed.

Cited: Day v. Stevens, 88 N.C. 87; *Stokes v. Taylor,* 104 N.C. 400; *Fertilizer Co. v. Reams,* 105 N.C. 297; *Cotton Mills v. Cotton Mills,* 115 N.C. 487; *Kootz v. Tuvian,* 118 N.C. 395; *Bryan v. Bullock,* 119 N.C. 194; *Lance v. Butler,* 135 N.C. 423; *Bank v. Hollingsworth,* 135 N.C. 571; *Benson v. Jones,* 147 N.C. 424; *Gorham v. Cotton,* 174 N.C. 729; *Hollingsworth v. Allen,* 176 N.C. 631; *Bank v. Knox,* 187 N.C. 568; *Bank v. Odom,* 188 N.C. 678; *Gurganus v. Mfg. Co.,* 189 N.C. 204; *Hayworth v. Ins. Co.,* 190 N.C. 759; *Martin v. Bush,* 199 N.C 99; *Rothrock v. Naylor,* 223 N.C. 787; *Johnson v. Gill,* 235 N.C. 45.

PAUL BARNHARDT, EX'R, v. W. A. SMITH AND OTHERS.

Fraud, Evidence in—Judge's Charge—Depositions—Executors and Administrators—Wills.

1. Where in an action by an executor against his testator's vendee and the widow (who is also executrix and refuses to be a party plaintiff), it is alleged that there was complicity in the defendants, in the use of undue influence and fraud upon the helpless and diseased testator, to obtain a material reduction in the price of the land sold, and defendants resist recovery through the same attorney and upon the same general grounds, and such executrix has attempted to extinguish the right of action; *Held*, her declarations that she had used such influence are competent to go to the jury.

2. On cross-examination, a witness in answering a question as to such declarations gives also his own declarations, *it was held* to be too late, under a general objection to the question, to single out and assign for error such irresponsive statement.

3. Where counsel for a party is present at the taking of a deposition and examines the witness, he cannot raise an objection to the deposition at the trial.

4. And where the deposition of a resident is taken *de bene esse* and he leaves the state a few days before the sitting of the court, and is absent at the trial, such deposition may be read under the act of 1881, ch. 279—it being shown that he was out of the state and more than 75 miles from the place of trial.

5. Where it is shown or admitted that a widow obtained from her husband his personal estate and all his land, except a reversion in a part, and made common cause with another defendant whom she is charged with having assisted in using undue influence and fraud in the purchase of certain land from him, her letter showing her estimate of his mental condition is competent in such action to go to the jury; especially as the letter was shown to the purchaser, who, in response to her statement therein that she would not acknowledge the deed, declared he would see that she did, and subsequently obtained her acknowledgment.

6. Where an executor attacks a contract of purchase for fraud practiced upon the testator, a judge may refuse to charge that an assignment afterwards by one defendant, who is also executrix and claims as sole legatee, made to another defendant, is a relinquishment of the action. In such case the impeaching evidence may be heard although there is no reply to such assignment set up as a defence.

7. A release by a plaintiff executor is no relinquishment of the right of action, if he is kept in ignorance of material facts—especially if such release is made from himself and wife, individually, to himself as executor and to one of the defendants as executrix.

8. Pending the question between an executor and executrix and other defendants, as to a fraud practiced upon the testator in the sale of land, it is premature to entertain the will and determine the person to whom any residue belongs.

9. Where a judge gave an instruction asked as to the disposing capacity of a testator, it was not error to add, "that the law did not require a high degree of intelligence, but in order to the validity of an act of disposition it is necessary that the testator fully understand what he was doing."

(474) CIVIL ACTION tried at Spring Term, 1881, of CABARRUS Superior Court, before *Eure, J.*

The defendant appealed from the judgment of the court below.

Messrs. Fowle & Snow, Bynum & Grier, P. B. Means and E. G. Haywood, for plaintiff.

Messrs. W. J. Mongomery, C. Dowd and Wilson & Son, for defendants.

(475) SMITH, C. J. Daniel Barnhardt, stricken with paralysis and confined to his bed for three years before his death in February, 1879, on the 15th day of September, 1877, executed to the defendant, W. A. Smith, a penal bond in the sum of $8,000, with condition to be void if upon the payment of $4,000, the purchase money of the tract of land therein described, he should convey the same to the vendee according to the terms of their agreement in regard thereto. On September 16th, 1878, the said Smith assigned the title bond to his wife, the defendant, E. C. Smith, alleged to be a free-trader.

Subsequently the said W. A. Smith by false and fraudulent representations, as found by the jury, and suppressing and concealing the fact that he had entered into a contract with the defendant, J. H. Meares, for the sale of the land to him at the price of $4,100 of which $2,100 was to be paid in cash, induced the said Daniel Barnhardt to reduce the consideration to one-half the sum mentioned in the bond, and himself, and wife to unite in conveying title to said Meares by their deed bearing date on December 23d, 1878, and to be delivered to him on his complying with the terms of his contract. The execution of the deed, and the acknowledgment and private examination of the wife necessary to give it legal effect, were procured by the fraudulent practices of the said W. A. Smith, with the coöperating agency of the defendant, W. M. Smith, his son, an attorney and adviser of the parties, but without any knowledge or participation therein on the part of said Meares who acted in entire good faith. The deed was accordingly delivered to Meares and he paid into the hands of said W. M. Smith the sum in money agreed upon, and at the same time executed his note, his wife uniting with him in affixing her name thereto, to the said E. C. Smith for the residue of the purchase money, due at 12 months and bearing date December 27th, 1887, and with his wife recon-

veyed the premises to the said W. M. Smith in trust for the (476) security of the deferred payment due to his mother.

This secured note was afterwards transferred to the defendant, W. W. Reed, as collateral security for a loan in money of some $300 to the said E. C. Smith.

The cash payment made by Meares to the attorney and agent, W. M. Smith, has been applied, as he states in his answer he was directed to do, to the debts of the said Daniel Barnhardt and the residue remained in his hands at the death of the latter, which occurred soon afterwards.

Daniel Barnhardt died in February, 1879, leaving a will which has been admitted to probate in the proper court, and therein appointing the plaintiff executor, and his widow, Eveline Barnhardt, executrix, both of whom accepted the trust and qualified as such. The latter refuses to join in this action and is in consequence made a defendant with the others claiming adversely to the estate, and with them resists the plaintiff's recovery.

The complaint alleges the mental incompetency of the testator to modify his previous contract of sale, or to make a valid conveyance of the land, and that he was induced so to act through the fraud and falsehood practiced, and in which the said E. C. Smith, consenting and assisting the others, participated with said W. A. Smith.

The imputations of fraud are repelled in all the answers, and it is averred that the sum of $2,000 was the fair value of the property, that the contract for reducing the price was fully understood by the testator and assented to by him, and that he possessed full legal capacity to enter into the contract and carry it into effect by his deed.

The defendants set up as an estoppel an instrument under seal executed by the plaintiff and his wife, in which they acknowledge the receipt from the said Paul Barnhardt and Eveline Barnhardt, executor and executrix of the will of the testator, by the hands of said W. M. Smith of $211.45 in full payment of all claims against said (477) executor and executrix except an interest in a tract of land of 77 acres wherein the latter held an estate for her life. It is therein recited to be paid out of the proceeds of sale of the land by the deceased, and the plaintiff and wife agree to make no contest about the testator's will, and release all claim to any part of his estate except an interest in the 77 acre tract before mentioned.

The suit was instituted on May 30th, 1879, and on June 12th, thereafter, as shown by the date, the said Eveline executed under seal to said E. C. Smith what is in form an assignment to her and her heirs of "all the interest that I," (using the words of the instrument) "either as executrix of my husband's will or as a legatee under said

will, may have in and to the said note of $2,000, (referring to the subject of controversy) given by said Meares to said E. C. Smith, and also my interest in said tract of land." This is also relied on as a bar to the further prosecution of the action.

The substantial matters of fact in dispute evolved from the pleadings and in the form of issues submitted to the jury, were, with the responses to each, in these terms:

1. At what price did W. A. Smith contract to purchase the land from the deceased? Answer—$4,000.

2. Did W. A. Smith and W. M. Smith afterwards, by false representations and suppression of truth, induce the deceased to agree to sell or have the land for two thousand dollars? Answer—Yes.

3. At the time of the execution of the deed to Meares, was the said Daniel Barnhardt of sound mind and capable of comprehending the nature of the contract, and did he understand the said contract? Answer—No.

This summary statement will suffice to show the force and bearing of the several exceptions which the defendants' appeal from the rulings of the court during the trial, brings up for review.

(478) 1. One Petree, introduced and examined for the defendants, was asked in the cross-examination by the plaintiff, if the defendant, Eveline, did not have complete control over her husband, and if she had not stated to the witness that she had made the old man give her a right to the home and the 77 acre tract of land. The question was objected to by the defendants, objection overruled, and the witness allowed to answer. Thereupon he stated that he had a conversation with her in June before her husband's death, in which she said that "she had made the old man make, or had him to make her a gift of the lands," and witness added that he had in the lifetime of the deceased stated that his wife had complete control over him.

The testimony sought to be elicited by the inquiry was, the exercise of a controlling influence by the wife, as a fact, and her own corroborating admissions. The response is not to the first branch of the inquiry, but is confined to past declarations of her and himself. The objection is to the entire testimony asked for, (not that given in response and as may be inferred from the statement which follows, that she had not then herself been examined) is directed to the reception of her declarations—she, as it is insisted in argument, being but a nominal defendant against whom no judgment is demanded and no relief asked. Thus considered, the exception cannot be sustained. Not only is she of necessity made a defendant by reason of her refusal to join with her associate executor and trustee in asserting the equity of

the estate which they represent, but she is charged with complicity and the exercise of undue influence over a diseased and helpless old man, in procuring a conveyance of the land at half its value for the benefit of the defendant E. C. Smith—is defending the action and resisting the recovery with equal energy as the others, through the same attorney and upon the same general grounds—and attempts since the commencement of the suit, by an assignment, to extinguish the cause of action itself. She stands therefore fully identified (479) with her co-defendants, and her relations are equally adversary to the claim of the plaintiff. There is no reason why her declarations, as a defendant, should not be received as well as when coming from others.

The witness' own previous declarations should have been objected to, when he testified to having made them, and it is too late afterwards to complain of their admission. They were not responsive to the plaintiff's question.

Again, as a rule of practice, a party is not allowed to except generally to testimony, severable into distinct parts, some of which are competent and others not, and afterwards single out and assign as error the admission of the incompetent parts. The exception as embracing the whole testimony must be valid or it will not be sustained. It is not erroneous to refuse to rule out a volume of testimony when portions of it ought to be received; and therefore the salutary rule of practice prevails, which requires that the obnoxious evidence should be specifically pointed out and brought to the notice of the court, in order to a direct ruling on its reception. The principle is recognized where error is assigned in the charge of the court in general terms, and the charge consists of a series of propositions, some of which are correct and others bad in law. The exception will not be entertained for the reason that it does not directly point out the exceptional parts. *Insurance Co. v. Sea,* 21 Wall., 158.

2. The reading of the deposition of Dr. Meares, when offered in evidence on the trial, was resisted on two grounds: 1st. Because the witness had not been sworn and was not shown to be one of the excepted class to whom an affirmation is allowed in place of an oath. Bat. Rev., ch. 77, sec. 3. 2d. The witness is a resident of the state and his absence temporary only.

One of the defendants' counsel was present at the taking of the deposition and examined the witness without making any objection to his giving his testimony for want of an oath or other- (480) wise, and none was made previous to entering upon the trial. This is a clear waiver of the alleged defect or irregularity, since the objection, if made at the proper time, may have been removed or

remedied, and it would be manifestly wrong to allow it to be sprung upon the plaintiff after the cause has gone to the jury. "If therefore it appears," says STRONG, J., adverting to a similar exception, "that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—*if he refrained from making objections,* known to him at a time when *they might have been removed,* and until after such removal had ceased, he ought not to be permitted to raise the objection at all." *Shuttle v. Thompson,* 15 Wall., 151. "The general rule is," says FIELD, J., in more direct and explicit terms, "that all objections of a formal character and such as might have been obviated, if urged on the examination of the witness, must be raised at such examination or upon motion to suppress the deposition." *York Co. v. Railroad,* 3 Wall., 107.

The practice in this state is the same, and exceptions to the formality or regularity of taking depositions, if the party is present when they are taken, should then be made; and if not, before the issues are submitted to the jury. This was regulated by the act of March 28th, 1870, which declared that "no deposition shall be quashed or rejected on objection first made after a trial has begun because of an irregularity in taking the same." Acts 1869-70, ch. 227, sec 12—which is but a legislative recognition of "a rule of practice" already in force, as stated by the late Chief Justice in *Carson v. Mills,* 69 N. C., 32. See also *Kerchner v. Reilly,* 72 N. C., 171; *Katzenstein v. R. & G. R. R. Co.,* 78 N. C., 286; *Wasson v. Linster,* 83 N. C., 575.

(481) The next exception to the deposition is that the witness expects to return and his absence is not likely to be protracted beyond two terms of the court, as ruled to be necessary to its being read, in *Alexander v. Walker,* 35 N. C., 13.

It was in proof that the witness left a few days before the sitting of the court for the city of New York, declaring his purpose to proceed thence to California before his return, and was still away.

Whatever may be the proper interpretation of the language used in the former statute providing for the taking and using depositions, when the witness is "under the necessity of leaving the state" or "is about to leave the state," as contemplating something more than a brief absence, it is the manifest purpose of the act of 1881, ch. 279, to enlarge the operation of the law and admit evidence in this form in cases where it was not competent before. It provides in section 2 that the deposition of any witness may be taken, *de bene esse,* "when the witness lives at a greater distance, by the usual public mode of travel from the place of trial, than seventy-five miles," and "may

be read in evidence in the civil action in which it is taken, and shall be as competent as if said witness was present and examined in said action;" and in the next section, the deposition shall not be used "unless it appears to the satisfaction of the court that the witness is then dead or *gone out of the state,* or to a greater distance than seventy-five miles from the place where the court is sitting, or that by reason of age," etc.

The deposition meets two of those conditions, in the proof that he was "gone out of the state" and was then at a "greater distance than seventy-five miles from the place where the court was sitting."

3. The third exception is to the admission of the letter of the defendant Eveline, as substantive, instead of impeaching evidence.

It was received however to show her estimate of the mental condition of her husband, the weight of which the jury was to determine. It had been shown or admitted that the deceased (482) by deed or in his will had given her his personal property and all his land, except a remainder or reversion in the 77 acre tract, thus disclosing the influence which she had acquired and exercised over him. What we have already said about her voluntary assumption of hostile relations towards the claim asserted by the plaintiff on behalf of the estate, and making common cause with the other defendants in resisting it, renders further discussion of the point as to the competency of her declarations needless. But if it were otherwise, the letter was exhibited to the defendant, W. A. Smith, and at his suggestion, to the other defendant, W. M. Smith, who on reading it remarked—"This is Capt. Orchard's work, I see his finger in it," adding "that Mrs. Barnhardt could not write, and that he would attend to her, and see that she did acknowledge the deed," responding to an expression in the letter in which she says, "I have not acknowledged it yet, nor ever expect to." This would render the evidence competent if it were not so before, especially in connection with the fact that he did soon after procure her acknowledgment and private examination to complete the deed.

4. The defendants requested an instruction that the assignment by said Eveline was in law an extinguishment of the cause of action, and as there were no outstanding debts against the testator, and she as sole legatee was entitled to the fund, the right thereto vested in the defendant, E. C. Smith, and there could be no recovery in the suit. The instruction was refused, for the reason that the transaction was assailed for fraud concerted between the parties to it, and if successfully assailed the instrument would be inoperative and void. Nor, as his Honor held, and in our opinion correctly held, was it necessary to let in this impeaching proof that the invalidity for this cause should

be alleged in a formal replication. The legal sufficiency of an
(483) instrument is involved in setting it up as a defence, and this is an issue to be determined on the trial, at least under our present system. It is only when a counter-claim is relied on that the plaintiff's failure to reply may afford ground for a judgment for want of a replication, but not when the matter constitutes a defence to the action merely. C. C. P., Secs. 105, 106.

5. In the same manner must be disposed of the alleged release of the plaintiff. It is admitted by the atttorney who paid him the money and exacted the instrument, that the plaintiff was not advised of the facts of the case, and did not know of the excess of the price represented in the note of Meares.

It may be further remarked that the release itself is *from the plaintiff* and wife individually, to the plaintiff and the said Eveline, as representatives of the testator, and in their several fiduciary capacities, and for this reason it has no efficacy at law. The point is covered in both the last two exceptions by the ruling in *Jones v. Cohen,* 82 N. C., 75.

It is unnecessary to inquire into the provisions of the will, since its proper construction and the person to whom any residue found in the hands of the executor or executrix upon settlement of the administration account is due, will then come up for determination, but they are prematurely brought forward now.

6. The court was asked to direct the jury that, "the law does not require that persons should be able to make a disposition of their property with judgment and discretion in order to the validity of their act, and it is sufficient if the deceased understood what he was about." The instruction was given and it was added, "the law did not require a high degree of intelligence, but in order to the validity of an act of disposition, it was necessary that the deceased should have fully understood what he was doing." The exception was to the concluding words.

(484) We think there is no error, and that the language used, "fully understood," means only that the deceased did *understand* what he was engaged in doing, and is in antagonism to a partial or imperfect apprehension of it. The rule laid down by LORD COKE "that the person must be able to understand what he is about" approved in *Moffit v. Witherspoon,* 32 N. C., 185, *Horne v. Horne,* 31 N. C., 99, and more recently in *Paine v. Roberts,* 82 N. C., 451, as a general and practical rule for the guidance of juries, approximates an accurate statement of the law as to the degree of mental capacity required to make a valid disposition of property, as the subject will admit. In *Cornelius v. Cornelius,* 52 N. C. 593, a charge was upheld against the caveators in these words: "If the deceased understood the nature of

the act in which he was engaged in its full extent and effect" the testator possessed testamentary capacity. See O'Hara Wills, 14. Without multiplying references to the fruitless efforts of courts to give a more exact definition of legal ability to do a binding act, we prefer to adopt and adhere to the plain rule laid down in the earliest authorities, and pursued consistently in the past adjudications of this court. Taking the entire charge we think the law was correctly expounded.

Upon a full review we discover no error and judgment must be affirmed.

No error. Affirmed.

Cited: Bost v. Bost, 87 N.C. 479, 482; *Kesler v. Mauney,* 89 N.C. 372; *Sparrow v. Blount,* 90 N.C. 517; *Dempsey v. Rhodes,* 93 N.C. 127; *McRae v. Malloy,* 93 N.C. 157; *Worthy v. Brower,* 93 N.C. 347; *Rountree v. Britt,* 94 N.C. 110; *Smiley v. Pearce,* 98 N.C. 187; *Davenport v. McKee,* 98 N.C. 507; *Hammond v. Schiff,* 100 N.C. 175; *Armfield v. Colvert,* 103 N.C. 158; *Walker v. Scott,* 106 N.C. 61; *Davison v. Land Co.,* 118 N.C. 369; *S. v. Stanton,* 118 N.C. 1185; *McArter v. Rhea,* 122 N.C. 616; *Willeford v. Bailey,* 132 N.C. 403; *S. v. Ledford,* 133 N.C. 722; *Womack v. Gross,* 135 N.C. 379; *Bond v. Mfg. Co.,* 140 N.C. 384; *Rollins v. Wicker,* 154 N.C. 563; *Jeffords v. Waterworks Co.,* 157 N.C. 12; *Buie v. Kennedy,* 164 N.C. 301; *S. v. English,* 164 N.C. 508; *In re Craven,* 169 N.C. 567; *Phillips v. Land Co.,* 174 N.C. 545; *Nance v. Telegraph Co.,* 177 N.C. 315; *In re Ross,* 182 N.C. 481; *Sutton v. Melton,* 183 N.C. 370; *Dellinger v. Building Co.,* 187 N.C. 848; *In re Creecy,* 190 N.C. 302, 303, 306; *Michaux v. Rubber Co.,* 190 N.C. 619; *Cobb v. Dibrell Brothers, Inc.,* 207 N.C. 576.

J. W. GIDNEY, ADM'R, v. ANN E. MOORE AND OTHERS.

Executors and Administrators—Evidence, Declarations, Parol Trust—Privileged Communication—Married Women—Domicil.

1. An intestate entered into a contract of purchase of land, and paid part of the price, and the plaintiff administrator upon paying the balance procured title to himself in his representative capacity. In a proceeding for license to sell the land for assets to pay debts, the widow set up an equitable claim to a part thereof, alleging that the same was paid for by her husband with her money under an agreement to return the money, and asks that title be made to her as a means of repayment; *Held* competent for the widow to prove declarations of the intestate husband (while in possession of the land) that he paid for it with funds belonging to her. And this,

notwithstanding the objection made that the administrator in seeking to subject the land represents the creditors.

2. The rule announced in *Shields v. Whitaker*, 82 N. C., 516, in reference to charging land with a parol trust, approved.

3. Matter not appearing to be within the scope of professional consultation, but referring to other objects, will not be excluded as a privileged communication.

4. A general objection to obnoxious evidence will be sustained, if upon any ground the evidence should be rejected; but where the ground of an exception can be inferred from the record, another cannot be assigned here—the ground of an exception being a part of the exception itself.

5. Personal property given to a married woman is received under the law of her actual domicil, and not of the matrimonial domicil.

(485) SPECIAL Proceeding to sell land for assets transferred, on issues raised, and heard at Fall Term, 1881, of CLEVELAND Superior Court, before *Avery, J.*

J. L. Moore in his life-time entered into a contract with one Wilson for the purchase from him of a tract of land and gave his note therefor in the sum of $1,410.36, bearing date on January 1st, 1867, and of which he paid the larger portion previous to his death in 1874. The plaintiff, his administrator, has since discharged the residue of the debt and caused the land to be conveyed to himself in his representative capacity. The estate being found to be insolvent, he institutes the present action against the defendants, the widow and heirs at law, for license to sell the descended lands for assets to be used in the

(486) course of administration, including the "Wilson tract" to which he had himself taken title. The controversy raised by the answers, and more particularly by that of the defendant, Ann E. Moore, the surviving wife, is in regard to this land.

She sets up an equitable claim thereto, alleging that whilst the intestate and herself were residing in the state of Alabama, her father gave her for her sole and separate use the sum of $3,000 in gold coin, which she took into possession and brought with her on their removal to this state, and deposited the same in bank, where it remained for a considerable time; that she subsequently loaned one-half of the amount to the intestate on his agreeing to account to her therefor, and later let him have the residue on a special contract that he should buy the "Wilson land," pay for it, and have the title conveyed to her as a means of repayment to her; that he did bid off and purchase the land, but died before completing payment or taking any deed therefor; and that the intestate held possession and always recognized and admitted her right to the property.

The law of Alabama, at the time of the donation, secured to a married woman as her separate estate and free from liability for the debts of the husband, all property held by her previous to marriage or acquired afterwards, and constituted the husband a trustee with the right to manage the same and use the rents and profits, but they are not made subject to the claims of his creditors.

Three issues were submitted to the jury which, and the answers to each, are as follows:

1. Was the "Wilson tract" bought by the intestate for his wife under an agreement to return the money so belonging to her separate estate and placed in his hands, by his paying the purchase money for the same? Yes.

2. What portion of the purchase money did the intestate pay under the agreement? He paid all except what the plaintiff (487) has paid since his death.

3. What sum was paid by the plaintiff? $225.90, on July 14th, 1875.

Thereupon it was adjudged that the said Ann E. had an equity in said land, and the plaintiff held the legal estate as trustee, and that upon her repayment of the sum advanced by the plaintiff, as administrator, with interest, he convey the same to her in fee simple, and pay the costs of the action. From this judgment the plaintiff appealed.

Messrs. Hoke & Hoke, Bynum & Grier and Battle & Mordecai for plaintiff.

Mr. D. Schenck, for defendants.

SMITH, C. J. The exceptions presented in the record are to the rulings in the admission and rejection of evidence and to the denial of instructions asked to be given to the jury.

1. The defendant was allowed to prove declarations made by the intestate before his purchase that he had moneys belonging to his wife's separate estate and proposed to invest them in the "Wilson land," and while in possession after his contract of purchase that he had paid for it out of her separate estate; that her father had given her $1,500 which he had been allowed to use in consequence of an understanding with her to buy the "Wilson land" for her, and that the donation was in gold.

There was other corroborative testimony not necessary to be stated in elucidating the exception.

It is a well settled rule of evidence that whatever may be shown, and by whatever mode of proof, to charge a person with liability while living, is equally competent to fix that liability upon his estate in the hands of the representative devisee or heir. The death of the

(488) party cannot operate to exclude admissions he may have made, when the action to enforce a claim against his estate is prosecuted against his administrator or executor. The objection interposed to the reception of the intestate's admissions in the present case, is based upon the fact that the plaintiff in pursuing the land as a fund to be applied to debts, represents the creditors, whose right to have satisfaction out of the debtor's property, ought not to be impaired by declarations which he may have made in the interest of members of his own family for whom he is bound to provide. It is true that the statute gives the administrator, upon an ascertained insufficiency of the personal estate, the right to pursue and convert the *real estate* into assets to meet the liabilities of the intestate, even when he may have made a fraudulent alienation to others, while the estoppel obstructs his recovery of personal estate that may have been assigned in fraud of creditors, as in law the administrator stands in the shoes of his intestate, and neither can impeach the assignment for that cause. See *Burton v. Farinholt, ante,* 260. It was necessary to confer this power when recourse is had to land, because it is only through the statutory mode of procedure that it can be reached and subjected to the payment of debts, while the creditors themselves can appropriate personal property, thus disposed of, by an action against the fraudulent assignee as an executor *de son tort* and charge him with its value. While it is true the successful assertion and enforcement of the defendant's equity will diminish the resources out of which the creditors are to be paid, and they have an indirect interest in its defeat by reason of the insolvency of the debtor, it is equally true as to the results of the prosecution of any demand, which may enlarge the amount to be provided for, and correspondingly lessen the *pro rata* distribution of the assets, and yet in the latter case the right to have proof of the intestate's admissions cannot admit of question. Conse-

(489) quences, the same, follow the increase in the amount of liabilities, as the reduction of the fund with which they are to be provided for. Why shall any distinction be allowed and the same rule not alike prevail in both cases? If the estate were solvent and ample, the declarations as evidence to charge it would be received, how can insolvency impair the rights of the claimant, or deprive her of the means of establishing them? The wife stands in the same position as a creditor, and may sustain her equity, for which there has been a full consideration in the use of her money given, by such proofs as are available to other creditors in sustaining their demands. In respect to this controversy, the relations of the husband and wife are antagonistic, and his admissions of her right to the land of which he was in possession and in disparagement of his own,

are as truly in law against his interest as if made on behalf of a stranger. The marital relation, and the interest and sense of moral duty he may have felt when the repeated declarations came from his lips, are circumstances affecting the credit to be given them and their value as evidence; but to exclude them altogether is entirely insufficient.

It is insisted in argument here that the testimony of the witness, H. Cabaniss, should have been ruled out on the further ground that it embraced a confidential communication, made to him professionally, while the intestate was consulting him about business, the bankrupt act and his involvements in Tennessee. If the disclosure was of this kind, and the information thus obtained, it would not be allowed to be given in evidence and it would have been error to admit it. But to this several answers suggest themselves:

1. The matter testified to does not appear to have been within the scope of the professional consultation, which had reference to other objects, and it is plain that such are not within the protection of the rule.

2. The nature and character of the evidence, as a privileged communication to an attorney, are not assigned as a ground for (490) its repression.

3. The objection to similar testimony from the next witness examined and who sustained no such relation to the deceased, was made and could be made only upon the ground of its general incompetency, which has already been considered, and no distinction between the witness in this regard is suggested. It will be observed, also, that when the defendant proposed to show declarations of the intestate when in possession, and to trace the fund used in the purchase, a general objection is interposed to the admission of any of the evidence, it not appearing that the witness had been a legal adviser of the deceased, or then even suggested as a reason for its exclusion. The fact came out after the objection was overruled and the witness began to deliver his testimony. Such is the representation contained in the record, and a fair and reasonable interpretation is that a common objection was made to the *testimony* itself proceeding from either witness, and not to any personal *disability* from a previous professional employment on the part of one more than the other, to give in the testimony. It would be a surprise then to permit an exception not applicable to the proof, when offered and opposed, but growing out of the testimony which the witness then proceeded to give in, and to which no objection was made; and although a general objection to obnoxious evidence will be sustained when no ground has been assigned, if upon any ground it ought to have been rejected, yet when

the ground of the objection can be fairly inferred from the record as understood by the parties at the time, another cannot be assigned in the reviewing court. The ground of exception is to be deemed on appeal a part of the exception itself. *Bridgers v. Bridgers,* 69 N. C., 451; *Williams v. Kivett,* 82 N. C., 110. See also *Barnhardt v. Smith, ante,* 473, as to exceptions too large and comprehensive.

(491) 2. The declarations of the deceased offered by the plaintiff, not for the purpose of contradiction, but to show the facts declared, as hearsay or narrative, were properly refused. 1. Greenl. Evi., Secs. 109, 110; *Roberts v. Roberts,* 82 N. C., 29; *Perry v. Jackson,* 84 N. C., 230.

3. The objection to the competency of the defendant to prove the donation and delivery to her of the gold coin by her father, since deceased, derives no support from section 343 of the Code, which is wholly inapplicable. *Bryan v. Morris,* 69 N. C., 444; *Murphy v. Ray,* 73 N. C., 588; *Shields v. Smith,* 79 N. C., 517; *Hawkins v. Carpenter,* 85 N. C., 482; *Morgan v. Bunting, ante,* 66.

4. The court was asked and refused to charge that the marriage having taken place in Louisiana and the common law presumed to prevail there, that law would govern the subsequent acquisitions of property, although the parties had removed out of that state, and were residing in Alabama, when the gift was made, and hence the money, *instanter jure mariti,* belonged to the husband. While we do not assent to the proposition that the common law prevails in Louisiana, when we historically do know from what nation its territory was acquired, and what general system of jurisprudence was then in force, it is plain the money given the wife in Alabama is received under the provisions and conditions of the law of that domicil. "Where there is a change of domicil," in the words of Mr. Justice STORY, "the law of the actual domicil and not of the matrimonial domicil, will govern, as to all future acquisitions of movable property; and as to all immovable property, the law *rei sitæ.* Story Conf. Laws, Sec. 184, 2 Kent. Com. 133, note A, 3d Ed.

5. A series of instructions were asked to be given to the jury and declined, which may be embodied in a single proposition—that the evidence was legally insufficient to raise a trust or warrant the jury in finding the affirmative of the first issue. The court left the

(492) evidence to the jury, directing them that the defendant must satisfy them of the affirmative of that issue; that under the law the defendant had a separate estate in the fund, and that the intestate agreed with her, at or before the time of purchasing the land, that he would buy it for her and repay, by advancing the purchase

money, the sum received from her personal estate, otherwise their verdict must be in the negative.

The evidence was properly left to the jury, and of its sufficiency to charge the land with a parol trust, we will only refer to the recent cases where the subject is fully discussed. *Mulholland v. York,* 82 N. C., 510; *Shields v. Whitaker, Ib.* 516.

It must be declared there is no error, and this will be certified to the superior court of Cleveland for further proceedings according to law as declared in this opinion.

No error. Affirmed.

Cited: S. v. Kemp, 87 N.C. 539; *Link v. Link,* 90 N.C. 239; *Jones v. Call,* 93 N.C. 179; *Tobacco Co. v. McElwee,* 100 N.C. 153; *McNair v. Pope,* 100 N.C. 408; *Shaffer v. Gaynor,* 117 N.C. 24; *Presnell v. Garrison,* 121 N.C. 368; *McGowan v. Davenport,* 134 N.C. 531; *Byrd v. Spruce Co.,* 170 N.C. 484; *Proffitt v. Ins. Co.,* 176 N.C. 683.

JOSEPH DOBSON AND OTHERS v. ROXANA SIMONTON AND OTHERS.

Corporations, Judgments Against, and Assets of, How Administered.

1. Judgments against a corporation rendered upon process issued after it ceased to exist, are of no validity; and the same may be impeached by a party interested in the administration of its assets, which must be had under the provisions of chapter 26 of Battle's Revisal.
2. A *de facto* corporation is estopped to deny its existence as to those who deal with it, but this does not preclude proof of the subsequent cessation of its corporate functions.

CIVIL ACTION heard on exceptions to a referee's report at (493) Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The plaintiffs appealed. See *Bank v. Simonton, ante,* 187.

Messrs. Robbins & Long, Scott & Caldwell and D. M. Furches, for plaintiff.

Mr. J. M. Clement, contra.

SMITH, C. J. The referee in his report, to whose findings of fact there is no exception, those filed by the plaintiffs in the court below being withdrawn in the argument before us, states, as his conclusions drawn from the evidence, that no books for receiving subscriptions to

the capital stock of the Bank of Statesville were opened, as directed in the charter, under the supervision of the persons therein named, on the day mentioned, or at any other time, and no money was ever paid, or agreed to be paid under the memorandum prepared by direction of R. F. Simonton, to which his and four other names are affixed purporting to subscribe himself for 180 shares, and the others for 5 shares each; that two of the latter names were entered under an agreement with him that neither was to pay any money, and the shares annexed to their names should be transferred to him, as was afterwards done; that no meeting of stockholders was held to elect directors, or for any other purpose, and no meeting of those whose names are published, as directors, was had to elect a president, and no action was taken by them under the second and third sections of the act; that R. F. Simonton, the testator, published the due organization of the bank and its readiness to enter upon a general banking business, giving the names of the president and directors, and his own, as cashier, and solicited patronage for it; that thereupon the said Simonton, purporting to act in his said office, commenced operations in the corporate
(494) name of the bank and conducted the same under his own sole management, receiving deposits, and in other financial dealings, until his death on February 20th, 1876; that after his death, those who were the reputed directors assembled, and, to enable the bank to withdraw its balances in its northern correspondent banks, undertook to appoint C. A. Carlton, cashier in place of the deceased, and he conducted and carried on the business in like manner until the first day of June following, when the doors of the office of the bank were closed and it ceased to do business.

When the case was before us at January Term, 1878, upon the defendants' appeal from the interlocutory order, restraining them from prosecuting their separate actions to obtain priority of payment out of the effects and property of the corporation in the hands of its debtors, the court, RODMAN, J., delivering the opinion, use this language: "Assuming for the occasion only that the Bank of Statesville had a corporate existence, as to those who *bona fide* dealt with it, it is clear that it *has voluntarily dissolved.* Nobody claims to own its stock and all its supposed officers disclaim their offices. It is a clear case, therefore, for the appointment of a receiver to take charge of and preserve its effects, subject to the order of the court. 78 N. C., 63.

The receiver has been appointed and at this term, in an action against the executrix of R. F. Simonton, we have upheld his right to pursue and recover the assets of the bank and the indebtedness to it of the testator himself. *Bank v. Simonton, ante,* 187.

It appears from the referee's report, that the defendants, Hauser, J. L. Patterson, administrator, T. A. Patterson and R. R. Gwyn, instituted, one in March, and the others in May, 1877, their separate actions against the bank, and in two of them associating the executrix, as a co-defendant, in which judgments were entered and supplementary proceedings sued out. Many of the other creditors have also sued and recovered judgments against the bank at differ- (495) ent times during the year succeeding the cessation of the banking operations and the closing up of its business. These actions were all commenced by summons served on the last acting cashier, one of its reputed directors, and the executrix, one or more of them in each case, and judgments recovered upon this service of process.

The referee rules that the creditors, who have sued out and been restrained from prosecuting supplemental proceedings by injunction, are entitled to priority of payment, according to the several dates at which the process was sued out against persons indebted to the bank out of these respective debts when recovered by the receiver, and that all creditors by docketed judgments, according to the date of docketing each, have a preference out of the general fund to the extent of the value of any land on which they thereby become liens under the statute. The court affirms this ruling and the plaintiffs appeal.

While these are but declarations of the law as understood and do not become adjudications until the fund has been ascertained and its appropriation decreed among the creditors of the bank in the proper proportion, yet as the parties have treated the ruling as equivalent to, if not an actual adjudication, and it is desirable that the litigation growing out of the *de facto* operations of the corporation, which came into existence in utter disregard of the legal requirements of its charter, should be terminated, we proceed to determine the single inquiry as to the legal validity of the judgments and subsequent supplementary proceedings to enforce them, rendered on process which issued after the *de facto* existence of the corporation ceased and was served upon its former *de facto* officers.

The case to which we have already referred (this very case indeed upon similar facts then presented) established the dissolution of the bank, and the time when it dissolved is now fixed without objection, at a period long anterior to the bringing of any (496) of the suits. After June 1st, 1876, there was no such corporation as the Bank of Statesville, in fact or in law, and there could be no *de facto* officers to bind it by their acts, or on whom legal process could be served. The plaintiff's argument and the authorities relied on to support it are conclusive that a defunct corporation like a natural person who dies, cannot be brought into court by process served upon

officers or agents who were such when it lived. All such agencies cease with its dissolution except as provided in chapter 26 of Battle's Revisal, and its effects and property are then to be administered in accordance with those statutory provisions. The receiver is the administering officer, and the rights and priorities of creditors as exising at the time of dissolution cannot be displaced or disturbed by the active dilligence of creditors exercised afterwards. In this particular, the same rule prevails as in the administration of the estates of deceased persons. *Von Glahn v. DeRossett,* 81 N. C., 467.

This seems inevitably to follow from the fact that while the vitality of a corporation, not existing *de jure,* is incident to and inseparable from its acting as a corporate body, so the total and permanent cessation of all corporate functions must be an extinction of its life and being, for all purposes outside of an adjustment of its affairs and the collection and appropriation of its estate under the agency of its representative, the appointee of the court.

The principle decided in the cases of *Elizabeth City Academy v. Lindsey,* 28 N. C., 476, and *Railroad Co. v. Thompson,* 52 N. C., 387, that where a charter has been granted, those found in the exercise of the conferred corporate privileges are conclusively deemed to be in the rightful possession, and the sovereign alone can complain, is not repugnant to the proposition that where none such are exercising those functions, it is not to be considered as still subsisting, and its
(497) obligations may be enforced by an action when there is no such officer on whom process can be served to bind it, and the corporation itself is no longer *such de facto.*

These cases, and the more recent case of the *Attorney General v. Simonton,* 78 N. C., 57, to the same effect, declare that the corporation, acting as such, without, as well as under, legal authority, did exist in law as to those who dealt with it, and that those who "held themselves out" as officers of the corporation, "as to those who dealt with it are estopped to deny its existence." But this does not conclude parties from showing a subsequent expiration of its corporate life upon competent and sufficient proof of the fact.

The remaining enquiry is whether the plaintiffs, not parties to the judgments, can be allowed to impeach them and show their nullity. We think there is no doubt of their right to do so.

In *Hervey v. Edmunds,* 68 N. C., 243, an outside creditor of the defendant's intestate was permitted to assail the integrity of the judgment, for the reason that he was interested in the administration of the assets and preventing the priority attempted to be given to the plaintiff, Hervey. Still more direct is the interest of the other creditors in this a creditor's suit, to intercept and frustrate the efforts of

the defendant creditors, to secure a precedence in the order of payment, and thus diminish the fund brought into court, as to the distributive shares of the others. In this action every creditor is, at his election, an adversary contestant of the claims of all others, and all redress is open to him that would be to the debtor himself. *Overman v. Grier,* 70 N. C., 693; *Wordsworth v. Davis,* 75 N. C., 159; *Graham v. Tate,* 77 N. C., 120; *Long v. Bank,* 85 N. C., 354.

Without protracting the discussion and examining the other points made in the argument, we place our decision upon the ground that the Bank of Statesville having ceased to act after the 1st day of June, 1876, and all its supposed officers having since abdicated (498) their functions, the judgments recovered upon the processes so served as the referee finds, are nullities, and no priority has been thereby acquired by the creditors.

There is error in the ruling and the judgment is reversed and the cause remanded to be proceeded with according to law as declared in this opinion.

Error. Reversed.

Cited: Marshall v. R.R., 92 N.C. 332; *Marshall Foundry Co. v. Killian,* 99 N.C. 509; *Walton v. McKesson,* 101 N.C. 442; *Heggie v. Building & Loan Asso.,* 107 N.C. 591, 593; *Uzzle v. Vinson,* 111 N.C. 140; *Smathers v. Hotel Co.,* 167 N.C. 474; *Reynolds v. Cotton Mills,* 177 N.C. 425; *Smith v. Dicks,* 197 N.C. 361; *Buncombe County v. Penland,* 206 N.C., 304; *Sisk v. Motor Freight, Inc.,* 222 N.C. 632.

WILLIAM JOHNSTON v. S. P. P. SMITH.

Demurrer, Ruling of Court on—Contract, Consideration of—Corporation.

1. A judge is not required to specify the particular ground in his ruling upon a demurrer where several causes are assigned, though it would be more convenient for him to do so.
2. There must be an entire failure of consideration to defeat a sale or contract; an article may have an intrinsic, though no market value; and *it seems* that where the purchaser gets what he intended to buy although the thing bought be of no value, there is not a failure of consideration.
3. The principle announced in *Bank v. Statesville,* 84 N. C., 169, in reference to the existence of a corporation, sustained.

CIVIL ACTION heard upon a demurrer to the complaint at Fall Term, 1881, of MECKLENBURG Superior Court, before *Eure, J.*

The plaintiff complained—

1. That on the 3d day of March, 1879, the defendant made
(499) and delivered his promissory note, whereby he promised to pay to the plaintiff or order, four months after date thereof, the sum of twelve hundred and fifty dollars, payable at the Commercial National Bank of Charlotte, N. C., with interest at 8 per cent. per annum.

2. That at the maturity of the note, the plaintiff presented it for payment at the office of said bank, when and where payment of the same was refused.

3. That no part of said note has been paid, but the same is due with interest.

4. That said note was given for fifty shares of stock of the South Carolina Land and Improvement Company of par value of one hundred dollars per share, which plaintiff had sold to the defendant, but the said stock was to be held as collateral security for said note until the same was paid, and then a certificate therefor was to be delivered to the defendant.

5. That at the time of making the note the plaintiff was the owner of several hundred shares of stock of said company; that said stock has no market value and plaintiff cannot realize anything by the fifty shares which he has caused to be issued in defendant's name. The plaintiff now brings the said certificate of stock into court and offers the same to the defendant upon payment of said debt.

Wherefore plaintiff demands judgment for the sum of twelve hundred and fifty dollars with interest thereon at 8 per cent. per annum from maturity, and costs of action.

The defendant filed a demurrer, and assigned as grounds thereof—

1. That the complaint does not set forth and allege any, or a sufficient consideration for the note sued on, but does show a total want of consideration therefor.

2. That it alleges and shows a total failure of consideration therefor.

3. That it alleges and makes no tender of the shares of stock alleged to have been sold to defendant.

(500) 4. That the stock tendered is not that alleged to have been sold to defendant.

5. That the alleged certificate of stock was issued after the action was commenced, to wit, the 7th of February, 1880, and after the original complaint was filed.

6. The complaint does not allege the existence of any such company, as that purporting to issue the certificate of stock, or any legal author-

ity to do so, in those purporting to issue the same, or the validity thereof.

7. The said certificate filed as part of the complaint purports to be issued by a corporation, but the existence of such corporation is not alleged, nor its right to issue such, or any certificate of stock.

8. The complaint alleges and shows that said certificate of fifty shares of stock in said company was utterly worthless, of no value, when issued, and now.

After a discussion of the demurrer by counsel on both sides, his Honor adjudged that the demurrer be sustained. And thereupon the counsel for the plaintiff moved the court to state what grounds in the demurrer were sustained, and which were overruled, to the end that the plaintiff may amend as to any formal defect.

The motion was denied by the court, but the defendant was allowed to amend if he desired. The plaintiff declined to amend and appeal to this court.

Messrs. Jones & Johnston, for plaintiff.

Messrs. Bynum & Grier, for defendant.

ASHE, J. The exception taken by the defendant to the refusal of his Honor to specify in his judgment which of the causes of demurrer were sustained, is not tenable. We know of no law or rule of practice which required the court to do so, while we admit such a practice would be convenient to the party demurring and the (501) saving of labor to the appellate court.

The first and second causes of demurrer assigned, touching the want of consideration, involve the same point and will be treated together.

As the demurrer admits the facts stated in the complaint to be true, if the complaint had stated any facts from which it might be inferred that the stock had no value at the date of the contract, this ground of demurrer might properly have been sustained, but the complaint only states that the stock at the time of filing the complaint had no market value, and the plaintiff could not realize anything from it—*non constat*, but that the stock may have had a market value at the date of the sale; nor does it follow that although the stock may have had no *market* value at the time of filing the complaint, it may not have had some intrinsic value at that date, and even market value at the date of the sale. And if at the time of the sale it had any value, no matter how small, it was a sufficient consideration to support the sale. *McEntyre v. McEntyre*, 34 N. C., 299.

We understand the law to be settled by repeated adjudications in this state, that to defeat a sale or contract for the want of consideration, there must be an entire failure; and it is otherwise where there is only a partial failure, which can only be remedied by a distinct action, and now perhaps by a counterclaim. *Washburn v. Picot,* 14 N. C., 390; *Hobbs v. Riddick,* 50 N. C., 80. And what is meant by a failure of consideration is not simply that the article sold is worthless to the purchaser, but if it be of some value to the seller there is a consideration, by which the promise of the purchaser to pay the agreed price, however disproportionate, may be sustained. If it be of no value to either party, it of course cannot be the basis of a sale. But if it is beneficial to the purchaser, in any degree, he ought to pay for it, and the law fixes his obligation at the agreed price; and if it is (502) a loss to the seller he ought to be remunerated. *Johnson v. Titus,* 2 Hill Rep., 606; *Parley v. Batch,* 23 Pick., 283; *Hart v. Wright,* 17 Wend., 209; *Barnum v. Barnum,* 8 Conn., 469; *Brown v. Ray,* 32 N. C., 72; *Weatherly v. Miller,* 47 N. C., 166; *Findly v. Ray,* 50 N. C., 125.

But some of the authorities go even further than these we have cited, and hold that where the purchaser gets that which he really intends to buy, although the thing bought proves to be of no value, there is not a failure of consideration; as where one bought railway scrip and it was subsequently repudiated by the company upon the ground that it was issued without their authority, upon proof offered that the scrip was the only known scrip of the company, and had been for several months the subject of sale in the market; *Held,* the buyer had got what he really intended to buy, and could not rescind the contract on the ground of want of consideration. Benjamin on Sales, 322; *Lambeth v. Heath,* 15 M. & W., (Exchequer Rep.,) 486; *Barnum v. Barnum, supra.*

The third and fourth grounds should not have been sustained, for according to the terms of the contract as admitted by the demurrer, the stock was to be held as collateral security for the note given for the price; and the ceritficate for the same was not to be delivered to the defendant until the money was paid. We think it is to be inferred from the statement in the complaint, that the certificate filed in court was for fifty shares of the identical stock which the plaintiff alleged that he owned at the time of the sale, and that issued was a part of the same. It is true the certificate bears date the 7th of February, 1880, but the fifty shares may have been surrended by the plaintiff and issued again in the name of the defendant, which we believe is the usual course of transferring fractions of certified stock in banks and other corporations, and we presume it was done in this case.

What has been said in regard to the third and fourth grounds (503) applies equally to the fifth ground.

The sixth and seventh causes assigned cover the same ground and are insufficient.

We think the existence of the company and its right to issue stock are sufficiently set forth in the complaint. The fact that the defendant recognized the existence of the company and its right to issue stock by bargaining for and purchasing the stock is at least, so far as this case is concerned, *prima facie* evidence of its existence, and the right to issue stock. *Bank v. Statesville*, 84 N. C., 169.

The eighth ground must be overruled, for the reason, that "the complaint does not state that the certificate of fifty shares of stock in said company was utterly worthless and of no value when issued, and now." The complaint only states, that said stock has no *market value*, and plaintiff cannot realize any thing from it. Becuase an aritcle has no market value, it does not follow necessarily that it had no intrinsic value. The stock may have had no market value at the time of filing the complaint, and yet have had such value at the time of the sale.

We are of the opinion there was error in the ruling of his Honor in sustaining the demurrer. The demurrer must therefore be overruled. Let this be certified to the superior court of Mecklenburg that the defendant may be allowed to answer, etc.

Error. Reversed.

Cited: Jones v. Rhea, 122 N.C. 724; *Fair v. Shelton*, 128 N.C. 106; *Swift & Co. v. Aydlett*, 192 N.C. 344, 348; *Lumber Co. v. Buchanan*, 192 N.C. 774; *Williams v. Chevrolet Co.*, 209 N.C. 31; *Aldridge Motors v. Alexander*, 217 N.C. 755; *Mills v. Bonin*, 239 N.C. 502.

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(504)

E. BLACK v. BENJAMIN JUSTICE AND WIFE.

Deed, Registration of—Married Women—Execution Sale—Ejectment—Purchaser of Equity of Redemption.

1. A deed having no subscribing witness, may be admitted to probate and registration upon proof of the hand-writing of the maker; or, if the subscribing witness be dead, upon proof of his hand-writing. *Rollins v. Henry*, 78 N. C., 342, overruled upon this point. (Review of acts of assembly as to the registration of deeds, by ASHE, J.)

2. Money arising from the sale of the wife's land by husband and wife in 1851, becomes the property of the husband by virtue of his marital rights. And

the rule is not affected by the fact that the feme covert in this case was an infant at the time of making the executory contract, for there was no *conversion* until the contract was consummated, which was after she attained her majority.

3. Where an execution defendant with a fraudulent intent places money in the hands of another to buy his own property, the sale by the sheriff is a nullity, and the property still subject to the satisfaction of judgment creditors.

4. A purchaser of an equity of redemption has a sufficient legal interest in the land to enable him to recover possession thereof from the mortgagor.

CIVIL ACTION to recover land tried at Fall Term, 1881, of CLEVELAND Superior Court, before *Avery, J.*

The following issues were submitted to the jury:

1. Was the purchase money paid as the consideration for the deed executed by sheriff Logan to the feme defendant Mahala J. Justice, the money of the defendant Benjamin Justice?

(505) 2. Did Benjamin Justice cause said deed to be executed to the defendant M. J. Justice with intent to defraud his creditors?

3. Did the said M. J. Justice by false and fraudulent representation made by her agent prevent a fair competition of bidders, and thereby cause the land to sell for less than its value?

The plaintiff offered in evidence the transcript of a judgment from the judgment docket of the superior court of Gaston County, rendered in favor of the plaintiff against the defendant Benjamin Justice for the sum of $682.08, with interest on $671 from the 13th day of November, 1876, the date of the rendition of the judgment.

He offered a deed from the sheriff of Cleveland County covering the land in dispute, dated the 3rd of February, 1879, which recited the execution upon the aforesaid judgment, the sale thereunder on the 3rd of February, 1879, and that E. Black was the highest bidder.

The admission of this deed in evidence was objected to by the defendant because it had not been properly admitted to probate. The deed had no subscribing witness, and its execution was proved before the probate judge of the county of Cleveland by the oath of J. W. Gidney, who swore that he was well acquainted with the hand-writing of B. F. Logan (the sheriff), having often seen him write, and that his signature to the deed was in his own proper hand-writing. The objection was overruled and the defendant excepted.

The plaintiff then offered in evidence a deed conveying the same land from the sheriff to the feme defendant, dated February 9th, 1878, to show that both parties claimed from the same source.

The plaintiff also introduced John Falls, who testified that on the 6th of February, 1878, (the sale under which the defendant claimed,)

he bid off the land at sheriff's sale; that Benjamin Justice, the (506) defendant, came to him and told him that the land was about to be sold, and asked the witness if he would bid it off for his wife and let her have it; and that if the witness would bid off the land, pay for it, and convey it to his wife, he would give him $200. The land was sold and he bid it off, and during the same week, being court week, the defendant came to him and said he had money from his wife and wanted to pay for the land; that the witness paid the money handed to him by the defendant, who said it was his wife's money, and he transferred his bid to the wife and the sheriff made the deed to her. Benjamin Justice told witness that this money came from the proceeds of a tract of land that witness bought from his wife. Witness also testified that he bought the wife's interest in her mother's land before the wife was of age, or married, and the deed was executed to him by Benjamin Justice and his wife after her marriage and full age; that he paid her $47.50 for the land about February, 1851; the land bid off at sheriff's sale brought $26.00; and that Benjamin Justice was then in critical or failing circumstances and embarrassed with debt. He further testified that there was a large crowd of people present at the sale, and that the land is now worth $6.00 or $7.00 per acre, and at the sale was worth $5.00 per acre unencumbered.

A. R. Homesly, a witness offered by the plaintiff, testified that the sale did not come off Monday or Tuesday; that he was there as agent of the plaintiff to buy for him; that on Tuesday the defendant, Benjamin, told him that the land would not be sold; that he had it all arranged. The land is worth $10.00 per acre, and would have brought at a fair sheriff's sale $5.00 per acre.

Logan, the sheriff of the county, was then introduced by the plaintiff and testified, that the sale was for some cause postponed until Wednesday, and the land sold on that day; that sales are frequently postponed from day to day; that J. W. Gidney announced at the sale that there was a mortgage on the land, and thinks that (507) Gidney was counsel for Justice, and that it was "greenback" money that Falls paid him for the land.

The defendant, Mrs. Justice, introduced two judgments—one in favor of A. Williams, docketed April 6th, 1876, and the other in favor of G. M. Green, administrator, docketed December 2nd, 1869, both against Benjamin Justice.

The defendant proposed to offer in evidence a mortgage deed upon the land, of prior lien to plaintiff's and defendant's judgments, to show that the land was encumbered; and in answer to the testimony of the plaintiff that the land brought less than its value when Mrs. Justice bought, and also to show that plaintiff bought nothing at sheriff's sale.

The deed was admitted for the first purpose, but rejected for the second purpose.

The mortgage was then introduced for the first purpose, and was a deed from B. Justice and wife to J. Jenkins and H. D. Lee, dated 12th January, 1875, and registered 10th February, 1878.

H. D. Lee, witness for defendant, swore that the note secured by the mortgage was given January 12th, 1878, and that divers payments had been made thereon, from October, 1875, to 22d February, 1877, and that there is still due on it about $450.00.

Mahala J. Justice, the feme defendant, was then introduced on her own behalf and testified that having understood that the land had been advertised for sale, she requested her husband to ask Mr. Falls to bid it off, if she had money enough to pay for it. He told her afterwards what it came to, and she gave him $26.50 to pay Mr. Falls; that she got the money (silver) from Mr. Falls for her land soon after she married; that he paid her near fifty dollars and she kept that money from that time; and that she was married in 1850, and now lives on the homestead adjoining that place.

(508) At the request of the plaintiff the court gave the following instructions to the jury:

1. That if it is conceded, or the jury find, that the purchase was made when the husband was embarrassed with debt, when it is admitted that the purchase was made during coverture, the burden is upon her to prove distinctly that she paid for the land purchased with funds that were not furnished by the husband.

2. That if Benjamin Justice and M. J. Justice sold her land in 1851 (being then married) and received the money, that the money vested in the husband as his property.

3. If the money paid as a consideration for the deed to M. J. Justice was Benjamin Justice's money, then the sale would be fraudulent as to creditors.

4. That if Benjamin Justice, as his wife's agent, represented to A. R. Homesly, the agent of Black, that the debt was arranged and that there would be no sale, when such was not the fact, with the intent to get rid of Homesly as a competing bidder, and Homesly was misled by this false representation, and prevented from attending the sale, and did not attend the sale, then this sale is void as to creditors.

5. That even if Mrs. Justice paid her money for the land, yet if there was a fraudulent combination between her and her husband, he being embarrassed, to have the land sold for less than its value, in order that he might derive advantage therefrom, and they did procure it to be sold, it is void as to creditors.

6. That if the jury believe the testimony of Mrs. Justice, the money given to her husband to buy this land was the money and property of Benjamin Justice.

7. That it was incumbent on defendants to prove that the mortgage to Lee covered this land, and it was their duty to satisfy them of this fact.

The defendant asked for the following instructions:

1. If the money was derived from the wife's real estate and was kept by her separate and apart from the husband, and was (509) used by him with her assent in the purchase of this land at execution sale, the money then became impressed with the character and properties of land and her title is good.

2. Upon the pleadings and evidence in the case the plaintiff cannot recover judgment for the land.

3. No fraud or combination on the part of the husband to suppress bidding, not participated in by the wife, makes the deed of the sheriff void as to her.

4. Benjamin Justice was the agent of the wife only to bring the money to Falls.

The court refused the first and second instructions as requested, but gave the third; and the record does not show what disposition was made of the fourth.

The jury responded in the affirmative to each of the issues submitted and there was judgment thereon for the plaintiff, from which defendant M. J. Justice alone appealed.

Messrs. W. A. Hoke, D. Schenck, and Battle & Mordecai, for plaintiff.

Messrs. Bynum & Grier, for defendants.

ASHE, J., after stating the case, The exception taken by the defendant to the admission of the sheriff's deed offered by the plaintiff on account of alleged defect in the probate, would have given us no difficulty except for the opinion expressed by RODMAN, J., in the case of *Rollins v. Henry*, 78 N. C., 342, in which the learned judge says: "We are of opinion that this deed was improperly admitted. It does not come within any of the cases provided for by the statute;" (Bat. Rev., ch. 35, sec. 2, sub. div. 3 and 4) and held, that although a deed may be admitted to registration, by proof at common law, to make it evidence its execution must be proved on the trial, and for the position cited the case of *Carrier v. Hampton*, 33 N. C., 307. We can- (510) not give our assent to such a construction of those sections of the Revisal.

It will be noted that the decision in the case of *Carrier v. Hampton,* was made in 1850, at a time when the only statute law for the probate of deeds for registration was contained in the Revised Statutes, in which there was no provision for the probate of a deed having no subscribing witness. This omission was afterwards supplied by section 15 of chapter 37 of the Revised Code, which declared that "in all cases of the probate of any deed or other instrument required or allowed to be registered, having a subscribing witness who may be dead, satisfactory proof of his hand-writing or of the hand-writing of the grantor or maker, when there is no subscribing witness, shall be deemed sufficient proof for the purpose of allowing the registration thereof." It will be noticed that the act makes no reference to the death of the grantor but only to that of the subscribing witness.

By implication so much of this 15th section of chapter 37 of the Revised Code, as provided for the proof of the hand-writing of the grantor, when there was no subscribing witness, was repealed by the 2nd section of the act of 1871, ch. 271, which provided that, "whenever any such instrument (such as is required or allowed to be registered) shall not have a subscribing witness, and the maker thereof shall be a non-resident or *dead,* proof of his hand-writing shall be sufficient to admit the same to registration."

But in the next year after the passage of this act the 15th section of chapter 37, Revised Code, was re-enacted by the act of 1872, ch. 28; and the same act declares that all laws and clauses of laws in conflict with its provisions are repealed. The effect of which was to repeal the 2nd section of the act of 1871, ch. 271.

And sub-division 3 of Bat. Rev., ch. 35, sec. 2, is the act of 1871, and sub-division 4 is the act of 1872; the latter therefore repeals so much of the former as is in conflict with it and our opinion is that
(511) the deed was properly admitted in evidence.

In considering the case upon the exceptions, we think its determination depends mainly upon the correctness of the ruling of his Honor upon the first and second exceptions of the defendants, and they present the questions—first, was the land in dispute bought with the money of the defendant M. J. Justice? and secondly, has the plaintiff the right to recover the possession of the land under the pleadings and evidence in the action?

Assuming the testimony of Mrs. Justice to be true, and conceding that the land was bought with the money which was the proceeds of the sale of her land, just so soon as the land was converted into money it was personal property and vested in her husband by virtue of his marital rights. *Temple v. Williams,* 39 N. C., 39; *Rouse v. Lee,* 59 N. C., 352; *Ramsdale v. Craighill,* 9 Ohio, 198; *Sabel v. Slingluff,* 62

Maryland 13, and *Hackett v. Shuford,* at this term, *ante,* 144, and cases there cited.

Nor is this principle changed or affected by the fact that the defendant M. J. Justice was an infant at the time of making the executory contract for the sale of her land, for the *conversion* was not made until the contract was consummated by the receipt of the purchase money and the execution of the deed by herself and her husband, which was after she attained her majority. The doctrine, as to money converted into land or land into money, applies to cases where the conversion is directed in wills or made by sales authorized by the courts of equity. In this state it is held that the proceeds of real estate sold under a decree of court and belonging to infants and femes covert remain real estate, until the infant arrives at age and elects to hold the same as personalty, or the feme becomes discovert, or, by some valid act under the law while covert, makes her election or disposes of the fund; and while this was the rule without any statutory provision, it (512) is distinctly declared in the statute to be applicable to cases where such sales are authorized by decrees of court. *Bateman v. Latham,* 56 N. C., 35; *March v. Berrier,* 41 N. C., 524; *Scull v. Jernigan,* 22 N. C., 144.

But aside from the legal view of the question, upon the testimony of Mrs. Justice alone, the evidence offered in regard to the payment of money was such as to warrant the jury in coming to the conclusion, as a matter of fact, that it was the money of Benjamin Justice, and there was no error in the refusal of his Honor to give the instructions asked by the defendant upon this point.

The fact then having been found by the jury that the consideration of the deed made by the sheriff to M. J. Justice was money which was the property of Benjamin Justice, the sale made by the sheriff was a nullity. For if a defendant in an execution places money in the hands of another for the purpose of purchasing his own property at a sale under execution, with intent to defraud his creditors, and that person buys it and takes a deed for it, he is still the owner of it, and it may be sold to satisfy the judgment of another creditor. *Dobson v. Erwin,* 18 N. C., 569.

Upon this ground alone the plaintiff would have the right to recover, provided the land was subject to execution sale, and the action to secure possession can be maintained. And about that there can be no doubt. The defendants' counsel in their brief filed in the cause, rely upon the authority of the case of *Tally v. Reed,* 74 N. C., 463, but that case has no application. The question there was, whether, when a vendor of land retains the title to secure the payment of the purchase money, a sale of the land under a *fi. fa.* against the vendor passes

to the purchaser at sheriff's sale only the naked legal title, and vests in him the right to the purchase money. But the case of *Davis v. Evans*, 27 N. C., 525, does apply, and is decisive of the question.

(513) Chief Justice RUFFIN, speaking for the court in that case, says: "We consider that the act of 1812 makes the equity of redemption, when sold under execution, a legal interest to the extent, at least, of enforcing it by the recovery of possession from the mortgagor himself."

There is no error in the instructions of the plaintiff given by his Honor, except the fourth and fifth.

There is no proof that the sheriff participated in the alleged fraud and combination to prevent a competition at the sale, and unless he did so, the sale is not void. *Hill v. Whitfield*, 48 N. C., 120; *Crews v. First National Bank*, 77 N. C., 110.

But the error is immaterial and cannot affect the result for the verdict and judgment upon a view of the whole case appears to be right, and when that is the case, an error which has become immaterial will not be noticed. *Norwood v. Marrow*, 20 N. C., 578.

We are of the opinion there was no error, and the judgment of the superior court is therefore affirmed.

No error. Affirmed.

Cited: Love v. Harbin, 87 N.C. 253; *Woodley v. Hassell*, 94 N.C. 161; *Giles v. Hunter*, 103 N.C. 201; *Woodruff v. Bowles*, 104 N.C. 207; *Shaffer v. Hahn*, 111 N.C. 7; *Parrott v. Hardesty*, 169 N.C. 669; *Lumber Co. v. Lumber Co.*, 185 N.C. 239; *Weir v. Weir*, 196 N.C. 269.

J. B. GRANT v. M. EDWARDS AND OTHERS.

Ejectment, Evidence in—Homestead.

In an action to recover land, the plaintiff was the purchaser at a sale under execution upon a debt of defendant contracted in 1858; *Held*, (1) That proceedings allotting a homestead against such debt are void, and therefore should not have been admitted as evidence. (2) It is competent to prove the proclamations of the sheriff at the sale, to the effect, that without knowing the law in regard to homestead exemption, he sold such right as the defendant in the execution had, and that he had laid off his homestead which covered all the land offered for sale.

(514) CIVIL ACTION to recover land, tried at Fall Term, 1881, of NORTHAMPTON Superior Court, before *Gilmer, J.*

The case was submitted to a jury who found a special verdict as follows: That in an action begun before a justice of the peace against the defendant, Edwards, and in favor of one Spivey, to the use of the plaintiff, upon the defendant Edwards' bond, dated Nov. 1st, 1858, judgment was rendered in favor of the plaintiff on the 27th December, 1869, for $132.03 and costs; that a transcript in due form of this judgment was docketed upon the judgment docket of the superior court of Northampton County, and execution issued thereon on the 1st of January, 1870; that the sheriff levied this execution on the lands of the defendant Edwards whereon he then lived, first having the defendant's homestead duly appraised and laid off, including the entire tract of land sued for, which is worth about five hundred dollars; that such appraisement was in due form and returned to the office of the clerk of the superior court aforesaid, and filed with the judgment roll in the action, and a minute of the same made on the judgment docket; that the sheriff on the 5th day of February, 1870, after such appraisement of the homestead and after due advertisement put up the land for sale, proclaiming to the bystanders that without knowing what the law was, he sold such right and title of the defendant in this land as he was entitled by law to sell; that he had laid off the defendant's homestead and that it covered all the premises offered for sale, when the plaintiff became the purchaser for the price of ten dollars and took the sheriff's deed therefor, dated February the 5th, 1870.

If upon the above state of facts the court is of the opinion that the plaintiff is entitled to recover the possession of the land sued for, then we find all issues in favor of the plaintiff and assess his damages at forty dollars per annum with interest from the first day of January succeeding, on each year's rent; but if the court is of (515) a contrary opinion, then we find all issues in favor of the defendant.

Upon this finding of the jury there was judgment in favor of the defendant, and the plaintiff appealed.

Messrs. R. B. Peebles and Thos. N. Hill, for plaintiff.
No counsel for defendants.

ASHE, J. On the trial the court permitted the defendant, subject to the plaintiff's objection, to offer in evidence the proceedings had by the appraisers in setting apart the homestead of the defendant, and also evidence of the proclamation of the sheriff at the time of the sale, "that without knowing what the law was, he sold such right and title of the defendant in the land as he was entitled by law to sell;" that he had laid off the defendant's homestead, and that it covered all the

premises offered for sale. There was error in admitting the first evidence but none in admitting the latter.

The debt was contracted, as shown by the pleadings, in 1858, and the defendant had no right to his homestead against the debt. The appraisers therefore had no right to lay off and set apart the homestead to the defendant, as was decided in the case of *Gheen v. Summey*, 80 N. C., 187. They had no jurisdiction, and the proceeding had by them was a nullity as against this debt, and therefore incompetent evidence.

The other exception was properly overruled. What was said by the sheriff at the time of the sale was clearly admissible as a part of the *res gestæ*.

In addition to these exceptions to the evidence, the plaintiff insisted that upon the special verdict the judgment should have been given for the plaintiff, and that there was error in rendering it in favor of the defendant, and this exception we think was well taken.

(516) This case is distinguishable from that of *Wyche v. Wyche*, 85 N. C., 96. That was an action upon a note given in 1861, and judgment was obtained and docketed in March, 1869, execution was issued, the homestead of the defendant laid off and set apart to him, as in this case. It was proved by the deputy sheriff who sold the land, that the sale of the land was made subject to the right of the homestead therein, and the sheriff's deed expressly declared that this land is sold by the sheriff "subject to the right of the said Harris (the defendant) to a homestead therein," and this court held upon the authority of *Barrett v. Richardson*, 76 N. C., 429, that as the land had been sold at execution sale, subject to the homestead, the purchaser took it with the encumbrance, even though the debt be one against which no homestead right existed. The decision was put upon the ground that the sheriff had by his declarations at the sale, and by the terms of his deed, expressly limited the interest sold.

But in our case there is no such declaration at the time of the sale and no such statement in the deed. The sheriff did not profess to sell subject to the homestead right, but expressly declared that he did not know whether the defendant was entitled to his homestead or not, but whether he was or not, he sold just such interest as he had in the land, and his deed purported to do the same. It was a fair sale; there was no pretence of any fraud or collusion between the sheriff and the plaintiff. The defendant was not entitled to a homestead, and the plaintiff was the highest bidder and received the sheriff's deed. We can see no reason why that deed did not convey to him a good title to the land. We have nothing to do with the hardship of the case. It

is one of those "quick-sands" of the law into which the defendant has fallen without any power in the courts to rescue him.

There is error. The judgment of the superior court is therefore reversed, and judgment must be entered in this court for the plaintiff in accordance with the special verdict found by the (517) jury.

Error. Reversed.

Cited: Grant v. Edwards, 88 N.C. 247; *Keener v. Goodson,* 89 N.C. 277; *Long v. Walker,* 105 N.C. 101, 115; *Williams v. Whitaker,* 110 N.C. 396; *Joyner v. Sugg,* 132 N.C. 588.

J. M. BAILEY v. A. J. RUTJES AND OTHERS.

Contract—Promise of a Third Party.

Plaintiff delivered lumber under the order of A, the lessee, which was used in improvements upon the premises of B and C, the lessors, and sued the lessors for the price thereof; *Held*

(1) To entitle plaintiff to recover, he must show a contract, express or implied, on the part of the lessors to pay; and it was error to charge that if plaintiff *believed* he was furnishing it upon their credit they were liable.

(2) Ordinarily, an inference of fact will arise against the owner of premises that he promised to pay for improvements thereon, in case he stands by in silence and sees work done or material furnished, and afterwards accepts and enjoys the benefits derived therefrom.

(3) If the lessors, knowing that plaintiff expected them to pay for the lumber, acted in such wise as to create a belief on his part that they would do so and thereby induced him to deliver it, a promise on their part to pay might be inferred. But if not originally liable by reason of some contract, a promise to pay after the lumber was furnished and used, would be merely gratuitous and not a binding contract.

CIVIL ACTION tried at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

This action is brought to enforce a mechanic's lien upon the property of the "Glen Alpine Springs Company," composed of the defendants Walton and Pearson, for lumber furnished and used in repairing and erecting buildings on its premises. (518)

On the part of those defendants, it is insisted that the lumber was not furnished to their company but to their co-defendant, Rutjes, and upon his sole responsibility—he having leased the premises for five years, and being in possession thereof, at the time the lumber

was ordered and delivered, though he has subsequently surrendered his lease and restored the possession to the said defendants. On the trial the plaintiff testified that he delivered the lumber according to certain bills, (produced and numbered 1, 2, 3, etc.) furnished him by Rutjes, some of which were signed by Rutjes, while others were not. That he had no talk with either of the defendants, Walton or Pearson, before such delivery, but that he had previously delivered two other bills of lumber on the same premises and received from Rutjes orders upon the other defendants for the money, one of which the defendant Walton had paid, and the other partially paid, and that this occurred while he was engaged in sawing bill No. 1. He also testified that after the lumber was delivered on the premises, he applied to the defendant Walton for payment, who offered him a note on Rutjes which he declined, and while he had had no talk with the defendants, Walton and Pearson, about the lumber before its delivery, they had seen it delivered and knew that it was used on the premises; and on one occasion while the plaintiff was sawing the lumber the defendant Pearson ordered, in person, and paid for a lot of laths which were used in the buildings on the premises; that he had no acquaintance with Rutjes, who was a stranger in that part of the country, and made no contract with him in regard to the lumber.

The plaintiff also introduced the head-carpenter, and other workmen employed on the premises, who testsified to the use of the lumber in the buildings, and that the defendant Walton was frequently (519) present, giving directions about the work, and that he expressly promised to pay them their wages.

For the defence, the defendant Walton testified that one of the terms of Rutjes' lease was that he was to make the improvements on the premises, and to deduct the costs from the stipulated rent; that he had nothing to do with the contract with the plaintiff, and had refused to become responsible to him for the lumber, when asked to do so, and though occasionally at the springs while the work was going on, he had never assumed to direct it; that the money paid on the two orders referred to by the plaintiff was paid in consequence of an agreement that had reference to those particular lots of lumber, and was in fact a loan to Rutjes. This witness denied that he had paid or agreed to pay the workmen their wages.

The defendant Pearson testified in substance the same with his co-defendant Walton. And one Smith, who was clerk to Rutjes testified that he had made the contract for the lumber with plaintiff, as agent for Rutjes, and had told plaintiff that he, and not the other defendants was responsible therefor.

For the defendants, special instructions were asked which the court declined to give, and instructed the jury that to make the defendants liable, it was necessary that there should be a contract either express or implied between the plaintiff and themselves. That if the plaintiff reasonably believed when he was furnishing the lumber that it was upon the credit of defendants and was induced to so believe by their acts, they were liable; and that in this connection they might consider all the conduct of defendants as testified to by the witnesses. That if they believed that plaintiff furnished the lumber solely upon the credit of Rutjes, or that plaintiff agreed to look only to him for pay, then the defendants would not be liable. To which charge the defendants Walton and Pearson excepted, and after verdict and (520) judgment against them, they appealed.

Messrs. Jones & Avery and P. J. Sinclair, for plaintiff.
Mr. G. N. Folk, for defendants.

RUFFIN, J. The action is one for goods sold and delivered, and as said by his Honor, in order to maintain it, the plaintiff must show *a contract,* express or implied, on the part of the defendants to pay him for the lumber furnished. As the case discloses no facts going to show the existence of any express contract, at least prior to the date of the delivery, we are driven to conclude that the verdict was, or may have been, controlled by that part of the instructions which had reference to the implied contract.

The defendants complain of this, and we think justly so, because it made the case to turn, not upon the *agreement* of the parties, but upon the reasonable belief of one of them. To constitute any contract, there must be a proposal by one party and an acceptance by the other, resulting in an obligation resting upon one or both; or in other words there must be a *promise.* Pollock on Contracts 5.

The fact then that the plaintiff expected (however reasonably) the defendants to pay him for the timber, could certainly not be sufficient of itself to establish the existence of a contract, on their part to do so. *Brunhild v. Freeman,* 77 N. C., 128; *Taft v. Dickinson,* 6 Allen, 553; *Pendleton v. Jones,* 82 N. C., 249.

It must be shown further, that in some way, they assented to be charged either in terms or by conduct from which the law will infer their assent.

It is unquestionably true, that if in the absence of all express understanding, one stands by in silence (and much more if he actively encourages) and sees work done, or material furnished for work upon premises belonging to him, and of which he must neces- (521)

sarily get the benefit, and afterwards he does accept and enjoy it, a promise to pay the value thereof may be inferred, and ordinarily will be; and the inference under the circumstances will be purely one of fact, viz., whether the party's conduct has been such that a reasonable man might understand from it, that he meant to recognize the benefit as one conferred on himself, and to pay for it. In such a case, there can be no difficulty in making such an inference against the party, since the premises being his, the benefit of the labor done, or the material furnished must necessarily result to him, and withal, he had the opportunity and the power to countermand it, if he would.

But in the case at bar, the defendants, if their testimony is to be believed, had leased the premises to Rutjes for five years, and he had undertaken to have the improvements made, which called for the use of the lumber furnished by the plaintiff. They were therefore absolutely without the power, either to give or to withhold their sanction to its delivery and use, and ought not to be required to pay for it, unless they knew, or had reason to believe that the plaintiff was looking to them for pay for his lumber, and allowed him to deliver it under that expectation and without objection on their part. *Day v. Cayton,* 119 Mass., 513; *Wells v. Banister,* 4 Mass., 514. And it was in its failure to call the attention of the jury to this view of the case, that the error of the charge, as we conceive, consists. The instruction given should have been that if the defendants knowing that the plaintiff expected them to pay for the lumber acted in such wise as to create a reasonable belief on his part, that they would do so, and thereby induced him to deliver it, then the jury might infer a promise on their part, to pay for it.

In the present form of the action the question is, whether there was a subsisting contract between the parties in regard to the
(522) lumber, or not, and the doctrine of equitable estoppel has no application to the case.

If not originally liable by reason of a contract of some sort, the defendants cannot be made so because of their having resumed possession of the premises with its improvements, upon the surrender of their tenant.

It is true they thus derive some advantage from the materials furnished by the plaintiff, but that cannot be avoided, as it is impossible for them to reject, or restore to the plaintiff that benefit without a surrender of their own property; and this the law does not require them to make. Pollock on Contracts, 29. Nor under such circumstances would a promise to pay, made after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous and as such would make no contract.

For the reasons suggested, this court is of the opinion that the defendants are entitled to have the cause tried by another jury; and this renders it unnecessary that we should consider other points made as to the evidence received and its effect, as they may not again arise.

Error. *Venire de novo.*

Cited: King v. Phillips, 94 N.C. 558; *Hedgepeth v. Rose,* 95 N.C. 44; *Blount v. Guthrie,* 99 N.C. 101; *Boone v. Chatfield,* 118 N.C. 918; *Baker v. Robbins,* 119 N.C. 292; *Lumber Co. v. Lumber Co.,* 137 N.C. 436; *Morrison v. Mining Co.,* 143 N.C. 256; *Critcher v. Watson,* 146 N.C. 151; *Sprunt v. May,* 156 N.C. 400; *Weathers v. Cox,* 159 N.C. 577; *Mfg. Co. v. Assurance Co.,* 161 N.C. 93, 96; *Wilson v. Scarboro,* 163 N.C. 388; *Leffel v. Hall,* 168 N.C. 409; *Potato Co. v. Jenette,* 172 N.C. 4; *Blackwood v. R.R.,* 178 N.C. 344; *Overall Co. v. Holmes,* 186 N.C. 432; *Building Co. v. Greensboro,* 190 N.C. 504; *Brown v. Williams,* 196 N.C. 250; *Brown v. Ward,* 221 N.C. 346, 347.

HULL, LANIER & CO. v. M. E. CARTER AND OTHERS.

Surety and Principal.

Defendant merchant became indebted to plaintiff for goods sold and delivered in the sum of $650, and afterwards ordered more goods, but plaintiff declined to send them unless acceptances were given, which was done in drafts covering the *entire* indebtedness. Plaintiff filled the order for additional goods, only in part, owing to defendant's failure in business; *Held* in an action against the surety acceptors, that the violated promise to the principal debtor to fill the order, does not discharge the sureties and annul their contract, but that any claim for damages thereby incurred may be set up as a counter-claim.

CIVIL ACTION tried at Spring Term, 1882, of BUNCOMBE Supe- (523) rior Court, before *Gilliam, J.*

W. C. Davidson, doing a mercantile business at Asheville, in the course of which he had become indebted to the plaintiffs, merchants at Baltimore, in or about the sum of $650, on April 7th, 1876, sent them by letter an order for more goods. The plaintiffs in their answer four days afterwards, declined to fill the order, and assigned as a reason for not doing so, on the usual terms of credit, the overdue and unsettled outstanding indebtedness. So much of this letter as is material to the controversy arising upon the pleadings is in these words:

"We suggested in our last, acceptances on M. E. Carter, and we thought, should you want a bill of any extent you would certainly arrange for the balance. We are willing to sell you a small bill, say two or three hundred dollars, on our usual time. You will give us M. E. Carter's acceptance, say at 3, 4, 5 and 6 months. This will close up the old account in a manner satisfactory to us; will give you a stock and enable you to collect in your debts, and in the fall be in a good condition to make your season purchases. We regret very much to have to write you in this way, but both prudence and our judgment dictate that it is the proper course for us to pursue. We send statement of drafts, which please have accepted, and when, if you still desire, we will fill your order to the amount named."

The four enclosed drafts, three of which are in suit, the other having been since paid, were signed by Davidson and presented to the defendant, Carter, for an accommodation acceptance, which he refused, and after being shown the plaintiff's letter still refused, unless
(524) A. T. Davidson, the father of the drawer, would unite with him in accepting the drafts. Thereupon the debtor also applied to his father exhibiting the letter to him also, and upon the faith of the assurances and promises contained therein, the drafts received the signatures of both.

These drafts covering the entire indebtedness were transmitted to the plaintiffs on April 27th, in a letter reciting the plaintiffs' offer of a limited credit—that goods were needed in the prosecution of the debtor's business to the amount of four or five hundred dollars—and renewing the order mentioned in the first application.

The plaintiff firm was dissolved on April 30th by the withdrawal of the senior partner, Hull, and the others left in charge of its effects declined to send the goods required, and after the interchange of several communications on the subject, one of the remaining members on his individual responsibility forwarded a package of sixty prints, mentioned in the order, of the value of $168, on the 11th day of May.

Davidson failed in business in August, and his stock of goods was seized by the sheriff under executions issued to him. In the summer of 1877, Davidson became an invalid and died in the ensuing fall.

It was in evidence that, since the action was brought, in a conversation between the defendant A. T. Davidson and the partner, Lanier, to an inquiry of the former why the drafts were not returned when the firm refused to furnish the goods, the said Lanier answered that, "they never yielded any advantage which they had obtained."

It does not appear that the plaintiffs knew of the exhibition of their letter to Davidson, to the defendants, or to either; or that the accep-

tance by them was superinduced or in any manner influenced by what is therein written.

These are the material facts found by the judge, the parties waiving a trial by jury, and upon them he gave judgment (525) against the plaintiffs and they appealed.

Mr. James H. Merrimon, for plaintiffs.

Messrs. C. A. Moore, Reade, Busbee & Busbee and Battle & Mordecai, for defendants.

SMITH, C. J., after stating the above. It is manifest that whatever wrong may have been done by the denial of the credit to the extent asked, and the breach of faith and fair dealing in the refusal, it was personal to the debtor, and the damage, if any, resulting therefrom to the defendants, indirect and remotely consequential. It was the unauthorized use of the plaintiffs' letter accompanied, as we must infer, with the debtor's representation of his ability, with the aid of further supplies of goods and the postponement of his existing debt, to bridge over his present embarrassments and ultimately meet all his obligations, which induced the defendants to come to his relief and accept the drafts. It is difficult to conceive how the withholding goods, in excess of the value of those sent, up to the limits specified in the letter could be the efficient and primary cause of the financial troubles that so soon after ended in total insolvency, and the seizure of the stock under process sued out by other creditors, or how the full promised supply could have averted the disaster and saved the defendants from loss by reason of their suretyship.

But whatever effect may be attributed to the plaintiffs' violation of the terms of their agreement, on condition of the security to be given for their claim, and whatever the expectations of the defendants founded upon their confidence in the capacity of their principal, thus assisted, to discharge the assumed obligation and relieve them of their liability, they were not induced to accept the drafts from any communications addressed to themselves, or any assurances intended to be communicated to influence their action in the premises. (526) There has been no transaction *between the parties* to this suit, in which is contained an element of fraud, the fruits of which in consequence the law will not permit the party practicing it to receive.

If the defendants have been misled by the representations made to their principal and shown to them, it was not the intention of the plaintiffs, so far as the evidence appears, that they should be; and an intention to deceive the party who is deceived is an essential element

in a fraud, which vitiates the contract into which it enters, and releases from its obligations.

"Fraud cannot exist, as a matter of fact," remarks NASH, J., "where the intent to deceive does not exist, for it is emphatically the action of the mind which gives it existence." *Tilghman v. West,* 43 N. C., 183; *Saunderson v. Ballance,* 55 N. C., 322; Kerr on Fraud and Mistake, 55.

It was said in the argument that the ruling in the court below was controlled by an adjudicated case which the counsel were unable to cite, and in our researches we have been unsuccessful in finding. In the absence of authority and from our own reasoning, we cannot perceive sufficient legal grounds for the proposition maintained and necessary to the defendants' exoneration, that a violated promise to the debtor, communicated by him without the knowledge or assent of the creditors, can operate as a fraud practiced upon the defendants and made available to discharge them from their contract of suretyship. And it would be a singular result, that an assurance of a credit varying in value from $32 to $132, and its denial, should have the effect of destroying another contract, superinduced by it, for the payment of some $650. In our opinion the fact found by his Honor that the defendants united in their acceptances "upon the faith of that letter and upon no other consideration" is insufficient to discharge
(527) them from their voluntary undertaking. If the plaintiffs' conduct and disregard of their promise furnish a cause of action and a claim for damages to the debtor or to his sureties, it is but a counterclaim, measured by the extent of the consequential injury, and does not annul the contract of the sureties.

There is therefore error in the ruling of the court, and the judgment must be reversed, and a new trial awarded. Let this be certified.

Error. *Venire de novo.*

E. BLACK v. A. A. BAYLEES AND OTHERS.

Fraud, Evidence in—Agent and Principal.

1. In an action alleging fraud in preventing a fair competition of bidders at execution sale, whereby the land was bought at a reduced price, and to subject the land to the payment of plaintiff's debt; *Held,*

   (1) It is competent to prove the representations or declarations of defendant debtor "that the judgments had been arranged and there would be no sale," thereby inducing the witness not to attend.

(2) Also, to prove as a part of the *res gestæ* that the party who bid off the land got the money from the debtor, who said it was his wife's, and afterwards assigned his bid to the defendant wife.

(3) And also, to prove what the feme defendant had testified on a former trial—whether the same be offered as her admissions or to impeach her testimony. The rule laid down in *Jones v. Jones*, 80 N. C., 246, sustained.

2. The acts and declarations of one within the scope of his authority as agent in the purchase of land, are evidence against the principal.

3. No one can set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition.

CIVIL ACTION tried at Fall Term, 1881, of CLEVELAND Supe- (528) rior Court, before *Avery, J.*

The facts are as follows: The plaintiff is a judgment creditor of Benjamin Justice. He issues execution on his judgment, and the sheriff of Cleveland County returned, "No goods," etc., and the plaintiff alleges that he is informed and believes that the defendant, Benjamin Justice, has no property liable to execution, or from which the amount due on said judgment can be made, other than his interest in the lands conveyed by him and his wife (M. J. Justice) to the defendant Baylees, and assigned by means of the transfer of the notes for the security of which it was given, to the other defendants, besides Baylees and the Justices.

The lands sought to be subjected to the plaintiff's debt, are described in the complaint, and also the return upon the execution under which the defendant M. J. Justice purchased the land at execution sale.

The plaintiff contended that the land was the property of Benjamin Justice, and by the fraud of Benjamin as agent of his wife, he contrived to have the land bought for her at sheriff's sale at a greatly reduced price, whereby the creditors of Benjamin were defrauded of their rights.

The defendants for their defence relied upon a judgment in favor of A. Williams against Benjamin Justice, regularly docketed in Cleveland County, bearing date prior to the judgment of the plaintiff, an execution, sale, and sheriff's deed for the land in dispute to Mrs. M. J. Justice, and also a mortgage on the said land executed by Benjamin Justice and wife to defendant A. A. Baylees, to secure certain notes therein mentioned, which were afterwards assigned to the other defendants.

The following issues were submitted to the jury:

1. Was the consideration of the deed executed by B. F. Logan, sheriff, to the defendant, M. J. Justice, money belonging to her husband Benjamin Justice? No.

(529) 2. Was the defendant Benjamin Justice insolvent when said deed was executed? Yes.

3. Was Benjamin Justice the agent of his wife to procure the purchase of the land in controversy at the sheriff's sale for her? Yes.

4. Did Benjamin Justice by false and fraudulent representations prevent a fair competition of bidders at the sale of the land in controversy? Yes.

5. Was John Falls the agent of M. J. Justice to purchase the land in controversy for her? Yes.

The plaintiff introduced a sheriff's deed from B. F. Logan to Mrs. M. J. Justice dated February the 9th, 1878, embracing the land in the complaint described, to show that she claimed it under her husband.

Plaintiff then offered as a witness A. R. Homesly, who testified that he was acquainted with the lands described in the complaint, and the same were embraced in the deed of the sheriff to Mrs. Justice; that he attended Cleveland court on Monday and Tuesday of the week in which the sheriff sold the land of Benjamin Justice; that he was at said court as the agent of said plaintiff, Black, who was a creditor of Benjamin Justice, and was authorized by Black to purchase the said land for him, and that on Tuesday of the first week of the court Benjamin Justice approached him and told him that the Williams and Hamrick judgments had been arranged, and that there would be no sale, and thereby induced witness to leave, and that if witness had been present he would have bid for the land as agent for Black, and that the land did not bring its value, and was sold on the Wednesday following to satisfy said Williams and Hamrick judgments. The defendants objected to this testimony, but the objection was overruled, and the defendants excepted.

This witness further testified that the land was offered for sale on Monday and Tuesday and the sale postponed, and that it was after the postponement that Benjamin Justice told him the debt had
(530) been arranged, and the land would not be sold.

John Falls, a witness for the plaintiff, testified that he attended the sale and bid off the land, and afterwards assigned his bid to Mrs. Justice. The plaintiff then proposed to prove by this witness that Benjamin Justice, the husband of M. J. Justice, gave him the money to pay off his bid, and that this was in connection with the transaction of making the deed. There was objection by the defendants, which was overruled, and the defendants excepted. The witness testified that Benjamin Justice handed him the money (paper currency) to pay off the bid, and that Benjamin Justice was in embarrassed circumstances, and the general impression was he was failing at that time.

On cross-examination he testified that when Benjamin handed him the money he said it was his wife's money, and that she sent it by him. Witness testified that he contracted with her for some land before she was of age, or married, and paid her for it, and received a deed after she was of full age and married; that he paid her or her agent, Mrs. Hurd, forty-seven and $^{80}/_{100}$ dollars for the land which was the one-ninth of the land descended to her and others from her father.

This witness further testified, under objection by the defendants, that Mrs. Justice, on her examination in another action tried during the same court (*Black v. Justice, ante,* 504,) testified that she sent the money paid by Benjamin Justice to him, and that it was the same money, or part of the same money received by her in 1851 from the witness for her land; that she was married when the money was paid and the title made by herself and husband; that the money was paid in silver by Falls, and that she had kept the silver in her possession, and that she sent her husband Benjamin Justice to witness to get him to buy the land for her. Witness stated that he did not see Mrs. Justice before the sale—the business in reference to buying the (531) land was done through Benjamin Justice. He further testified that there was a "good crowd" present at the sale; that Gidney, an attorney for Benjamin Justice, said at the sale that he had a mortgage on the land which was then given in evidence, being the same mortgage referred to in the complaint, bearing date December the 4th, 1875. He further testified that the 203 acre tract if unencumbered was worth five dollars per acre.

Logan, the sheriff, testified that the money given him by Falls to pay for the land was "greenbacks."

The defendant introduced in evidence the judgment of A. Williams against B. Justice, docketed in October, 1869, and execution and sale, etc., April 1st, 1876.

Mrs. M. J. Justice was then introduced as a witness for the defence and testified that she was the wife of Benjamin Justice; that the money paid for the land was her money, the price of her interest in land descended from her father, which she received after she was married, in the year 1850; that she then told her husband she wanted it to buy her a home, and he agreed to it; that the sum was about $50.00; that she got about the same time five or six hundred dollars from her father's estate; that she kept the $50, and sent it to be paid for the land. It was sent by her husband to Falls whom she selected to buy the land as her agent. She told her husband to employ Falls to buy the land, but does not know what he was to pay Falls for his services; that she received silver from Falls for her land and kept it to buy land; that her husband had bought five or six different tracts

of land since 1851, and she was now living on his homestead, and nothing was said by her about the five or six hundred dollars in her examination in the other case, and she was not asked by counsel in that case as to her contract with her husband and the money that came from her father's estate; she is in possession of both the
(532) tracts of land purchased by her at the sheriff's sale of her husband's right and interest therein.

The characters of Mrs. Justice, Homesly, and Falls were proved to be good.

The defendants asked the court to charge the jury:

1. If Mrs. Justice did not authorize her husband to tell Homesly that there would be no sale, and that the debt was settled, she is not to be affected by it.

2. That no fraudulent conduct of Benjamin Justice to suppress biddings, not authorized by the wife, can affect her title.

His Honor declined to give the instructions because, as he said, "they were not necessary on the issues as submitted, and said he would waive the question of law raised by them until the facts bearing upon them were found by the jury, in response to the issues."

The jury responded to the first issue in the negative, but all the others in the affirmative. Judgment, appeal by defendants.

Messrs. Hoke & Hoke, Battle & Mordecai, and Schenck & Cobb, for plaintiff.

Messrs Bynum & Grier, for defendant.

ASHE, J., after stating the case. The first exception taken by the defendants was to the testimony of the witness Homesly, as to the representations made to him by Benjamin Justice in regard to the sale of the land. This exception, we think, was properly overruled. The very gist of the action is that Mrs. Justice claimed the land from Benjamin Justice, and that he by fraudulent representations prevented a fair competition of bidding at the sale, whereby his wife was enabled to buy the land at a grossly reduced price. The evidence was relevant and very material to the inquiry, and therefore admissible.

The second exception to the evidence that the defendant Mrs.
(533) Justice gave her husband the money to pay off the bid of Falls for the land, is equally untenable as the last. It was a part of the *res gestæ*, and on that ground was admissible, if no other, but was admissible also on the ground that it was pertinent to the first issue, and as a material circumstance in the charge of fraud as affecting the deed obtained by Mrs. Justice from the sheriff.

There was no error in overruling the third exception. Whether the testimony of Falls as to what Mrs. Justice had sworn to on a former trial, between the plaintiff Black and herself and husband, was offered as her admission simply, or for the purpose of impeaching her testimony, it was equally competent.

As admissions; it is always competent to prove what the opposite party has admitted, whether upon oath in a judicial proceeding or in conversation, as for instance, what a party has admitted in answer to a bill in equity, or upon examination before a commissioner in bankruptcy, and what is stated in an affidavit to obtain a *certiorari,* has been held to be admissible to prove any facts, which are of a character to be proved by mere admissions or representations. *Mushat v. Moore,* 20 N. C., 257; *Mason v. McCormick,* 85 N. C., 226; 2 Starkie Ev., 222; 1 Greenl. Ev., Sec. 527.

And as for the purpose of impeaching the testimony of Mrs. Justice, if it could have been offered for any such purpose before she was examined; it was competent without putting her on her guard, by asking her the preliminary question, whether she had not sworn to the facts proposed to be proved on a former trial. The testimony was material, and when that is the case, it has been held that the preliminary questions need not be propounded before offering the contradicting evidence. The rule as laid down by the more recent decisions of this court, seems to be, that when the testimony or declarations which it is proposed to contradict, are pertinent and material to the pending enquiry, the contradicting testimony may be (534) offered without any previous intimation, to the party sought to be impeached, of its existence or nature; but if the testimony offered to be contradicted is collateral merely, the answer of the witness is conclusive, except when the collateral matter consists in acts or declarations of the witness, indicating temper, bias, or prejudice, and affecting his credit; in such cases his answers may be disproved, but before it can be done he must be reminded of the substance of the conversation or declaration, the time, place and attending circumstances. *Jones v. Jones,* 80 N. C., 246; *State v. Patterson,* 24 N. C., 346; *State v. McQueen,* 46 N. C., 177; *Clark v. Clark,* 65 N. C., 655.

The only other exception is, to the refusal of his Honor to give the instructions asked. We cannot see how these instructions are pertinent to any of the issues submitted to the jury, or embrace any principle of law applicable to the facts of the case as found by the jury.

The jury found the facts that Benjamin Justice was insolvent at the time of the sale by the sheriff—that he was the agent of his wife in procuring the land to be bid off for her—and that by his fraudulent representations he prevented a fair competition at the sale, and thereby

enabled his wife to buy his land for a trifling sum compared to its true value.

As the agent of Mrs. Justice in conducting the transaction in regard to the purchase of the land, whatever was said or done by Benjamin Justice within the scope of his authority, was evidence against her. *McComb v. N. C. Railroad Company*, 70 N. C., 178. But aside from that view of the case, the defendant M. J. Justice claimed the land under her husband Benjamin Justice; the false representations made by him to Homesly the agent of Black, the plaintiff, whereby he prevented him from bidding at the sale was a fraud upon his creditors—

a fraud upon Black, who was one of his creditors. And it is
(535) held that no one can in equity be permitted to set up a benefit
derived through the fraud of another, although he may not have had a personal agency in the imposition. *Harris v. Delamar*, 38 N. C., 219; *Goode v. Hawkins*, 17 N. C., 393; *Meadows v. Smith*, 42 N. C., 7. The principle decided in these cases is decisive of the questions involved in this case.

We therefore hold there is no error, and that the judgment of the court below must be affirmed.

No error. Affirmed.

Cited: Burnett v. R.R., 120 N.C. 519; *Corbett v. Clute*, 137 N.C. 551; *Typewriter Co. v. Hardware Co.*, 143 N.C. 101; *Beeson v. Smith*, 149 N.C. 149; *Sprunt v. May*, 156 N.C. 392.

A. B. LONG v. G. W. LOGAN.

Exceptions to Report—Discretionary Power.

Exceptions to a report may be made, as a matter of right, at the term of the court to which the report is submitted; and after that, it is discretionary with the court whether the exceptions shall be filed or not. And no appeal lies from an exercise of such discretion.

MOTION by defendants to be allowed to file exceptions to the report of a referee, heard at Fall Term, 1881, of RUTHERFORD Superior Court, before *Avery, J.*

The motion was based upon the affidavit of the defendant, which is as follows: That at the —— term of the superior court of Rutherford County an adverse report was rendered against affiant; that said report and said cause was continued without further action on

account of the sickness of affiant's counsel, John F. Hoke, (536) of Lincolnton, N. C.; that Mr. Hoke is a regular attendant in full practice in said court, and is affiant's general counsel, and was, and is, his special counsel, particularly and especially familiar with the nature and condition of this cause; and affiant believed that he would be able to attend the present term of the court, and file exceptions to said report in apt time; that affiant is now informed and believes that Mr. Hoke has not been physically able to attend to this cause since the last term of this court, and is unable now to attend; that affiant was not advised of such being his condition in time to have employed other counsel, and that the local bar are so connected with the cause as counsel and witnesses, that they could not assume the position of attorney for affiant; that affiant's own health has been very feeble since the last term of this court—a large portion of the time he was unable to attend to business, and has been unable to prepare any proper exceptions to said report; that he is advised and believes that said report is erroneous in law and contrary to the facts, and that he has a good and meritorious cause of defence.

The facts found by his Honor were, that the report of the referee, which was adverse to the defendant, was filed at the Spring Term, 1881, and at said term a motion was made to confirm said report, which motion was refused on account of the sickness of John F. Hoke, senior counsel for defendant. The firm of Hoke & Son represented the defendant.

On the first call of the docket W. A. Hoke, the junior counsel, who alone was present, gave notice of a motion to be allowed to file exceptions, not then prepared, to the report of the referee, and when the cause was peremptorily called for trial, on the last day of the term, counsel offered the exceptions and moved the court be allowed to file them. His Honor announced that while it was discretionary with the court to allow or disallow the motion, the counsel for defendant would be permitted to read the exceptions offered in connection with the report in order to enlighten the court in the exercise (537) of its discretion, but if after hearing a full discussion, it appeared to the court, considering all the circumstances that the exceptions were offered for delay (as insisted by plaintiff's counsel) the motion would be disallowed, even though some of the exceptions might have been sustained on technical grounds, if filed in apt time.

After argument the court declined to allow the motion to file exceptions, and on motion ordered that the report be confirmed, and gave judgment accordingly for plaintiff. From which judgment the defendant appealed.

Mr. J. A. Forney, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. There is no error. The refusal to allow the exceptions to be filed, as held by his Honor, was a matter within his discretion and is not reviewable. The defendant had no *right ex debito justiciæ* to file exceptions after the term to which the report of the commissioner was returned, and could only do so by leave of the court.

In *State v. Peebles,* 67 N. C., 97, it is held "where a reference is made to commissioners to state an account and report to certain term of a court, and the report is made to that term, if exceptions be not filed at the same term, the report should be confirmed and judgment given upon motion; and if the motion be not made at the term, it is a matter of discretion with the court whether to allow exceptions to be filed at a subsequent term." And this decision is approved in *University v. Lassiter,* 83 N. C., 38. See also *Johnson v. Rowland,* 80 N. C., 1; *Boddie v. Woodard,* 83 N. C., 2; *Reese v. Jones,* 84 N. C., 597; *Henry v. Cannon, ante,* 24; *Gilchrist v. Kitchen, ante,* 20; *Hinton v. Deems,* 75 N. C., 18; *State v. Lamon,* 10 N. C., 174.

(538) The Code of Civil Procedure, says BYNUM, J., in the case of *Austin v. Clarke,* 70 N. C., 458, invests the courts with ample powers in all questions of practice and procedure, both as to amendments and continuances, to be exercised at the discretion of the judge presiding, who is presumed best to know what orders and what indulgence will promote the ends of justice. With the exercise of his discretion we cannot interfere, and it is not the subject of appeal.

And in *Cannon v. Beemer,* 14 N. C., 363, where the plaintiffs obtained a verdict which was set aside upon the payment of the costs of the term, and through misunderstanding some portion of the costs were not paid during the term, the court below directed judgment to be entered for the plaintiff, and the defendant appealed, Judge DANIEL said: "We are of the opinion that he (the judge) was too rigid with the defendant, yet as he exercised a discretionary power, we cannot disturb his judgment." And Chief Justice RUFFIN, also speaking for the court, said, "The granting a new trial and the terms of it were altogether in the discretion of the superior court, where the rule was made, and so also was the enlarging the rule, or the refusal to enlarge it at the subsequent term. We should indeed, in the case stated, in the record, if that be all, have been disposed to enlarge the rule in this case; but I am not as capable of forming an opinion as the judge who presided and knew the value of the controversy, and the other circumstances; and as it is a matter of discretion, his must determine the question, not ours."

So in our case, the judge in the court below permitted the exceptions to be read by the defendant's counsel in connection with the report, with the understanding that if it should appear they were intended merely for delay as insisted by the plaintiff's counsel, or only technical, that he would not allow them to be filed. They were read and fully discussed before him, and we must take it, that they were found to be only technical or for delay, as he refused to al- (539) low them to be filed. He heard the exceptions read and discussed in their bearing upon the report, and was certainly much better qualified to judge of their merit than we could possibly be, who have no opportunity of seeing or hearing them.

The excuse rendered in the affidavit of the defendant for not filing the exceptions in apt time, we do not think is sufficient to warrant this court in disturbing the judgment, upon the ground of an abuse of discretion, even if we had the right to do so.

For although his counsel was sick from one court to the next, and the defendant himself was too indisposed a part of the time to attend to business, he was represented by the junior counsel, who we must suppose was able to represent him, and we must presume that besides the local lawyers, whom he says he could not employ because of their connection with the case, as lawyer or witness, there were other attorneys, residing beyond the borders of his county, and attending the courts of the county, he might have employed.

How under the circumstances we might have exercised the discretion in the premises it is needless to say, but we do not feel that we are at liberty, in the face of the repeated adjudications of this court upon the matter of discretion involved in the case, to sustain the defendant's motion. We therefore hold there is no error. Let this be certified.

No error. Affirmed.

Cited: Wittkowsky v. Logan, 86 N.C. 541; *Long v. Gooch,* 86 N.C. 712; *Levenson v. Elson,* 88 N.C. 184; *Mfg. Co. v. Williamson,* 100 N.C. 86; *McNeill v. Hodges,* 105 N.C. 54; *Coleman v. McCullough,* 190 N.C. 593.

(540)

WITTKOWSKY & RINTELS v. G. W. LOGAN.

(For syllabus, see preceding case.)

MOTION made by defendant to be allowed to file exceptions to the report of a referee, and heard at Fall Term, 1881, of RUTHERFORD Superior Court, before *Avery, J.*

At Spring Term, 1881, of said court, when the referee submitted his report, an order was made by the judge presiding, to allow defendant's counsel ninety days after the term to file exceptions thereto. The exceptions were prepared after the preliminary call of the docket at Fall Term, 1881, and when the case was peremptorily called for trial at that term, the court stated to counsel for defendant, that while it was discretionary with the court to allow or disallow the motion, the counsel would be permitted to read the exceptions offered in connection with the referee's report, in order that the discretionary power of the court might be more intelligently exercised, and if after hearing a full discussion, it appeared to the court, considering all the circumstances, that the exceptions were offered for delay, (as insisted by the plaintiffs) then the motion would be disallowed, even though some of the exceptions offered might have been sustained on technical grounds, if filed in apt time.

After argument upon the exceptions, the court declined to allow the motion and ordered the report to be confirmed and gave judgment accordingly for the plaintiffs, from which judgment the defendant appealed.

Mr. M. H. Justice, for plaintiff.

Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. The law requires every one who excepts to a report of a referee or commissioner to file his exceptions thereto, at the
(541) term of the court to which the report is submitted; he can claim no further time as a matter of right; after that term he can only file them by leave of the court granted in the exercise of its discretion. Here, the defendant failed to file his exceptions at the spring term to which the report was made, and upon his motion ninety days were given him in which to file them. He failed again to do so, and then at the subsequent term asked to file them, but his Honor refused the motion. It was a matter entirely within his discretion over the exercise of which we have no control.

The case of *Long v. Logan, ante,* 535, with the authorities there cited, is decisive of this case. If anything, this is a stronger case against the defendant than that; for there, his motion was based upon an affidavit in which he undertook to excuse his laches, but in this case there is no excuse offered.

There is no error. This must be certified to the superior court of Rutherford that further proceedings may be had according to law.

No error. Affirmed.

Cited: Long v. Gooch, 86 N.C. 712.

COMMISSIONERS OF CLEVELAND COUNTY v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

Taxation—County Commissioners, Power of to Increase Valuation.

In revising the tax-lists the commissioners of a county *ex mero motu*, at their August meeting, increased the valuation put upon the property of a railroad company, and then caused notice to be served upon the company to appear at their September meeting and show cause why the same should not be fixed at the increased sum; *Held* that the notice was sufficient and the action of the board warranted in law. (The method of proceeding in such cases under sections 18 and 31 of the revenue act of 1881, pointed out by SMITH, C. J.)

PROCEEDING heard at Fall Term, 1881, of CLEVELAND Supe- (542) rior Court, before *Avery, J.*

The board of county commissioners of Cleveland, at the session held on the 2nd Monday in August, 1881, in revising the tax lists and valuation reported to them by the list takers, of their own motion and upon their own previous information and knowledge, without the aid of the testimony of witnesses and in the absence of notice to the defendant company of their intended action, came to the conclusion that the road-bed of the company lying in their county was undervalued on the list at the rate of $3,000 per mile, and should be increased to double that sum. The change was accordingly entered, and the commissioners ordered that notice issue to the company to appear at their next meeting on the 1st Monday in September, and show cause why the valuation should not be fixed at the proposed rate of $6,000 dollars for each mile of the track. Notice was given, according to the direction of the commissioners, to the company, and it appeared before them, at the time designated, by its counsel and moved to strike out

the increased valuation, and restore it to the original amount, not because the estimate was unequal or excessive, or upon any proof adduced of either, but upon the following assigned grounds:

1. The company was entitled to notice, and received none, before the August session, of the proposed change in the valuation of the property.

2. The action of the commissioners at that time, *ex mero motu* and without evidence, was arbitrary and not warranted by law.

3. The supervisory power conferred upon the commissioners to examine and revise the returned tax-lists, could only be called into exercise in such case upon the application of the list-taker, upon
(543) ten days previous notice to the owner, and then only on proof of an advance in value of twenty-five per centum or more since the last assessment.

Upon the hearing, the commissioners decided to adhere to their former estimate and fix the valuation at the proposed rate, but on being asked for further time for argument on behalf of the company deferred a final determination of the matter until their meeting in October, and directed notice thereof to issue to the counsel on whose behalf the postponement was asked. At this session the company was represented by other counsel who were heard, and upon consideration the commissioners declined to modify their former decision, and adjudged that the increased valuation should stand. From this the company appealed to the superior court, and from the ruling of the judge affirming the action of the commissioners, to this court.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiffs.
Messrs. D. Schenck and F. H. Busbee, for defendant.

SMITH, C. J. after stating the case. The argument before us is expanded to some extent beyond the scope of the exceptions appearing in the record, and proceeds entirely upon alleged irregularities in the action of the commissioners in deviating from the provisions of the 18th and 31st sections of the revenue act of 1881, ch. 137.

Those sections so far as pertinent to the present inquiry are in these words:

Sec. 18. The board of commissioners of each county, after notice in one newspaper, or by posters put up, shall meet on the second Monday in August, and revise the tax-lists and valuation reported to them, and complete the list by computing the tax payable by each person and affixing the same opposite his name. They shall sit for one day
(544) at least, and when necessary, shall sit until the revision is complete, and shall hear all persons objecting to the valuation of

their property, or to the amount of tax charged against them. They shall have power to summon and examine witnesses, and shall correct the lists of the list-takers, as may be right and just, and so that the valuation of similar property throughout the county shall be as near uniform as possible. They shall have power, after notifying the owner or agent, to raise the valuation upon such property as they shall deem unreasonably low.

Sec. 31. If any real or personal property has been, or after listing shall be destroyed or depreciated 25 per centum on its assessed value, otherwise than by the act of the owner, the party charged with the tax on such property may apply to the board of commissioners on or before the 1st Monday in September in each year, and upon proper proof may have the valuation reduced, and the commissioners shall make the proper order in relation thereto. In like manner if property shall have increased 25 per centum over the sum at which it has heretofore been assessed, the list taker, upon ten days notice to the owner, may apply to the board of commissioners to alter the valuation of the property, and upon proper proof they shall do so.

We reproduce these sections because upon their construction the validity of the proceedings of the commissioners in increasing the valuation of the property, and of the objections made thereto, entirely depend.

The notice required before the meeting in August is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. This sitting must be protracted until the work is completed. But authority is expressly conferred "to raise the val- (545) uation upon such property as they shall deem unreasonably low," and of this proposed increase special notice must be given to the owner or agent.

As the commissioners do not meet after the lists are delivered to their clerk (Sec. 16) before the 2d Monday in August, and then can only make the examination and ascertain that any property has been valued unreasonably low, it is obvious that in order to the giving notice, they must do so at a future day, when the owner can be present and be heard before the matter can be determined. Nor can any reason be suggested why it should be earlier than the regular meeting in September. The commissioners have complied with the requirements of the act.

It is true the power to summon witnesses is given in aid of their personal knowledge and information, but this is not an imperative duty, for it may not be necessary; and besides, when the company appeared before the commissioners in September, no objection whatever was made to the proposed increase, as being excessive, and no witness was offered to prove the fact, but resistance was offered on the ground that the change must be made at the August meeting, prolonged if necessary for that purpose, and therefore it was now too late to make it, and that what was then done without evidence and in the absence of the company or any one to represent it, was unauthorized and null.

The action of the commissioners in August was but preliminary and in no manner prejudicial to the company, for the matter, as *res integra,* came up for consideration and adjudication in September as if no previous conclusion had been reached. Indeed the reasonable interpretation of this action is that the commissioners then *deemed,* (and this opinion is put in the form of an entry upon the tax list) that the road-bed was estimated, *"unreasonably low"* and should be rated at the higher sum. But the question remained open and the
(546) company had opportunity to be heard, and was heard before the opinion of the commissioners passed into a judgment and became final. If the action in August were premature and wrong, the actual adjudication in September and October is not the less efficacious and valid on that account.

The other section (31) is intended to provide generally for the correction of valuations when a change has occurred after listing, either by destruction or depreciation from other causes, or by appreciation from improvement or by other means, at the instance of the taxpayer or list-taker respectively, but is not intended to interfere with the supervision to be exercised by the commissioners in adjusting and correcting valuations as to them may seem "right and just," at their meeting in August for this special duty. It has no application therefore to the present case.

There is therefore no error. Let this be certified.

No error. Affirmed.

Cited: R.R. v. Comrs., 87 N.C. 422; *Wolfender v. Comrs.,* 152 N.C. 89; *R.R. v. Comrs.,* 188 N.C. 267; *Hart v. Comrs.,* 192 N.C. 165.

J. B. GREEN AND OTHERS v. J. L. GREEN AND OTHERS.

Wills—Vested Legacy.

1. A legacy to one *payable* or *to be paid* at a particular time is a vested legacy.
2. A bequest to a legatee *when* he becomes of age, but in the meantime the property is given to a guardian for the legatee's benefit, vests at the death of the testator; and if the legatee die before twenty-one, the personal representative is entitled to it. The conditional word is annexed to the *payment*, not to the *gift* of the legacy.
3. But where it is given *at* twenty-one, or *in case*, or *provided* the legatee attain such age—these words annex the time to the substance of the legacy, and the legatee's right to it will depend on his being alive at the time fixed for payment.

PETITION by the plaintiffs as executors of Beady A. Green, for (547) the settlement of the estate of their testatrix, tried upon the issue raised by the pleadings, at Fall Term, 1881, of UNION Superior Court, before *Avery, J.*

The proceeding was commenced by the executors before the clerk of the superior court against J. L. Green, Lydia A. Duncan and J. R. Duncan, her husband, and others, legatees of the testatrix, for a final settlement of their administration and a discharge from their trust. After issuing the summons, but before filing the petition, Lydia A. Duncan died, and her husband, J. R. Duncan, qualified as her administrator, and was made a party to the suit as such. Lydia died before arriving at the age of twenty-one years.

The plaintiffs allege in their petition that they had settled up the estate of their testatrix, and paid off all the legacies bequeathed in her will, except the legacy of one hundred and twenty-five dollars to Lydia A. Green (now Duncan) to which they are advised and believe the said J. R. Duncan is not entitled as her administrator, as she died before attaining the age of twenty-one years.

The defendant Duncan in his answer controverted this allegation and contended that he was entitled to the legacy as the personal representative of the said Lydia.

This was the only issue raised by the pleadings, and involves a construction of the will of Beady Green, presenting the question whether the bequest to Lydia was a vested or contingent legacy.

The clauses of the will which are material to this investigation are as follows:

Item 2. I give and bequeath to my eldest daughter Beady E. Green, now intermarried with M. E. Hagler, one hundred and twenty-five dollars when she becomes of age.

Item 3. I give and bequeath to my daughter Sarah J. Green,
(548) single woman, one hundred and twenty-five dollars to be paid to her when she becomes of age.

Item 4. I give and bequeath to my youngest daughter Lydia A. Green, one hundred and twenty-five when she becomes of age, also one bed and furniture to have at my death.

Item 7. And whereas my youngest son William T. Green is about the age of fourteen, and will not be of full age of twenty-one years until the 7th day of December, 1882, and my youngest daughter Lydia A. Green will not arrive at the full age of twenty-one years until July 9th, 1885, and whereas my eldest son James L. Green will not be of full age of twenty-one years until September 3rd, 1879, now therefore my will and desire is that my step-son John B. Green is hereby constituted and appointed guardian of my three children, to have and to hold the custody and guardianship, both of their respective persons and estate, until they, the said William T. Green, Lydia A. Green, and James L. Green shall severally arrive at the full age of twenty-one years.

In the 8th item a guardian is appointed for the minors, Sarah J. Green and Henry T. Green, with like power and authority to that conferred upon the guardian in the 7th item.

The clerk of the superior court decided that the legacy was vested, and on the appeal to the superior court his Honor concurred in the decision of the clerk, from which judgment the plaintiffs appealed.

Mr. A. W. Haywood, for plaintiffs.
Messrs. Payne & Vann, for defendants.

ASHE, J. All the authorities agree that where a legacy is given to one *payable* or *to be paid* at a particular time, it is a vested legacy,
because in such cases the time is annexed to the payment and
(549) not to the gift; but where these words are omitted and the legacy is given *at* twenty-one, or *if when, in case of, or provided* the legatee attains the age of twenty-one or any other definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it to depend on his being alive at the time fixed for payment; and consequently if the legatee should die before that period arrives, his personal representative will not be entitled to the legacy. 2nd Williams on Executors, 1107, and Iredell's Executors, 142. But, says Roper in his work on Legacies, 386, all these and other similar words of condition may be so explained and controlled by the context of the will, as not to prevent the legacies from vesting before the happening of the event upon which they are

made payable. In such instances, the intention of the testator's will predominates over technical words and expressions, when it is declared, or appears from a sound and rational construction of the will. And the same author in pursuing the subject lays down as a general rule to guide in such cases, that "when the period of payment or enjoyment of the fund is deferred until the legatee attain twenty-one, and the first gift of it is made to him *when* or *after* he shall attain that age, but in the mean time the property is given to a parent, guardian or trustee for the legatee's benefit, the words *when* or *after*, which import a condition precedent to the vesting of the legacy, will not be permitted to produce that effect; on the contrary they will be considered as merely descriptive of the time when the legatee is to be let into *possession* of the fund, and then, according to the rule mentioned in the first section (which is, that when a legacy is given to be paid or payable at a future definite period, it is vested) the interest in the legacy will vest at the death of the testator, and if the legatee die before twenty-one, his personal representative will be entitled to the money. The principle is this: Since the *whole* interest in the fund is given in the one way or the other, to and (550) for the benefit of the legatee, it could not be the intention of the testator to make it contingent whether the legatee should have the absolute interest. That interest is split into two parts; till one period, it is given to the parent, guardian, or trustee; and at the other, it is given to the legatee. The reason why it was not sooner given to the legatee was from regard to his convenience, as it could not be conveniently given to a person under age. Hence it is apparent that the conditional words were merely annexed to the *payment* not to the *gift* of the legacy."

This rule of construction as laid down by the learned author has been supported by various decisions, among which is notably the case of *Branson v. Wilkinson*, 7 Ves., 421, where the testator gave to the two children of his niece one dock share, etc., when they should attain the ages of twenty-one, in equal shares, and appointed their father *trustee* for them during minority. The question was whether the legacies were vested or contingent, and SIR WILLIAM GRANT decided that they were vested, upon the ground that the testator in appointing a trustee for them during minority clearly showed his intention to postpone the possession and not the vesting of the legacies.

Applying the principles enunciated by these authorities to our case, we are led to the conclusion that the bequest to Lydia was a vested legacy. Here, as in the case of *Branson v. Wilkinson*, instead of a trustee, a guardian is appointed to have and to hold the custody

and guardianship of the person and estate of Lydia, until she attains the age of twenty-one. He is to have the guardianship of her person and the custody of her estate. What estate? She had no estate but the bed and furniture and the legacy. The bed was to be given her upon the death of the testatrix, who would hardly have appointed a guardian to take it into his custody and management. The
(551) legacy then was the only other property to which she had any claim. She had no other estate. But the testatrix directs that the guardian should have the custody of her estate, and it is necessarily the legacy to which she refers.

If it was her intention to make the payment by the executors of the legacy to Lydia depend upon the contingency of her attaining the age of twenty-one, there would have been no use in appointing a guardian to take charge of her estate.

The testatrix in making the will was evidently *inops consilii*, for the will clearly discloses the intention of making all of the three daughters equal. The gift to each is the same in amount, and yet in making the bequests she used expressions which in the abstract gave an absolute vested legacy to one of them, and contingent legacies to the others. There is no reason for this distinction to be gathered from the will, or, for aught that appears, from the circumstances of the legatees. The discrimination must have resulted from an ignorance of the meaning of the terms used. Taking the whole will together, we are clearly of the opinion it was the intention of the testatrix to give a vested legacy to Lydia, and it was her intention that it should be paid to her guardian and kept and managed by him, until she arrived at the age of twenty-one.

And as it is a vested legacy to be paid to Lydia when she arrives at the age of twenty-one, upon her death before that event, the right to it is transmitted to her administrator, the said J. R. Duncan.

There is no error. Let this be certified to the superior court of Union that further proceedings may be had according to this opinion and the law.

No error. Affirmed.

Cited: Blake v. Blake, 118 N.C. 576; *Hooker v. Bryan,* 140 N.C. 405; *In re Will of Shuford,* 164 N.C. 135; *Cilley v. Geitner,* 182 N.C. 718; *Greene v. Stadiem,* 198 N.C. 447; *Coddington v. Stone,* 217 N.C. 720; *Trust Co. v. Henderson,* 225 N.C. 570.

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L. A. SHUFORD AND OTHERS v. COMMISSIONERS OF LINCOLN COUNTY AND M. THORNBURG v. COMMISSIONERS OF GASTON COUNTY.

Taxation—Stock Law.

1. A tax levied only upon land under the provisions of the "stock law" (act 1879, ch. 135) is not within the constitutional prohibition as to uniformity of taxation, and hence the assent of the qualified voters of the district affected, is not necessary; and this, even though the act of the legislature styles it a *tax*.
2. It is regarded as a local assessment, and made with reference to special benefits derived from the property assessed, from the expenditure; while taxes are public burdens, imposed as burdens, for the purpose of general revenue.

APPLICATION for an injunction heard at Spring Term, 1881, of LINCOLN Superior Court, before *Eure, J.*

The injunction was refused and the plaintiffs appealed.

A similar application was made in *Thornburg v. Commissioners of Gaston County,* at chambers on the 8th of November, 1881, before *Avery, J.,* and refused.

Messrs. Hoke & Hoke, and Battle & Mordecai, for plaintiffs.

Messrs. Schenck & Cobb, for defendants.

RUFFIN, J. Shuford *v.* Commissioners of Lincoln County, and Thornburg *v.* Commissioners of Gaston County:

These two actions have a common object—it being to enjoin the collection of certain rates imposed, in the first case by the commissioners of Lincoln County, and in the second, by those of Gaston County, for the purpose of erecting fences around certain townships within those counties, under the act of 1879, ch. 135, known as the "Stock Law."

It is insisted by the plaintiffs:

1. That inasmuch as that statute made the adoption of its (553) provisions to depend upon the concurrence of "a majority of *the votes cast,*" at an election held for the purpose of ascertaining the will of the citizens affected in regard thereto, it was in violation of the 7th section of article seven of the state constitution, which declares that no tax shall be levied by any county or other municipal corporation, unless sanctioned *"by a vote of the majority of the qualified voters therein."*

2. That as the tax was directed to be levied only upon the lands situate in the townships, it was in violation of the 9th section of the

same article, which says that all taxes levied by any such corporation "shall be uniform and *ad valorem* upon all property in the same."

This latter proposition has already received the attention of the court at this term, in the case of *Cain v. Commissioners, ante,* 8, and after elaborate argument, and much thought bestowed upon it, the conclusion was reached that while rates, like these now under consideration, might in some sense be rightly denominated "taxes," still they are of a peculiar nature and do not fall within the meaning of that term, as employed in the constitution and statutes generally; that in its common acceptation the term applies only to such impositions as are levied for public revenue and the general purposes of government, and not to such assessments as are intended to defray the expenses of improvements, local in their nature.

Impositions of both sorts are alike, taxes, in that, the only power to levy them must be derived from the authority of the legislature. But still they constitute two distinct classes—those levied for carrying on the government and meeting such exigencies as are common to the whole people of the state, whether levied directly by the state authority, or through the municipal corporations by means of which the state exerts its powers, falling under the constitutional prohibi-
(554) tion; while those assessed upon property supposed to be benefited by some improvement, which though deemed expedient for the public are nevertheless undertaken for the especial benefit of a particular locality, are committed to the unrestrained discretion of the lawmaking power of the state, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantage it may derive therefrom.

As shown by the authorities cited by the Chief Justice in the opinion delivered in *Cain v. Commissioners,* the point has been under the consideration of the courts in several of the states, whose constitutions contain restrictions resembling our own, and almost without exception they have recognized the distinction suggested. Indeed, it was adopted by us more out of consideration for what seemed to us to be the overwhelming weight of authority, than as a deduction or conviction of our own.

In addition to the authorities there adduced, we think it not amiss to call attention to the following adjudications as bearing on the point.

In *Palmer v. Stamph.,* 29 Ind. 330, the supreme court of that state held that a provision of their constitution which directed the legislature "to prescribe by law for a uniform and equal rate of taxation, and for an equal and just valuation for taxation of all property, real and personal, did not preclude a law, whereby a special assessment was laid upon a specific property, the value of which was intended to

be advanced by a local improvement;" and to the same effect was the decision of the court of appeals of Virginia, in *Norfolk v. Ellis,* 26 Gratt., 224—the constitution of that state declaring that *"taxation* shall be equal and uniform throughout the state, and that all property shall be taxed in proportion to its value."

In *Presbyterian Church v. The City of Wayne,* 36 Ind., 338, it was held that a clause in their state constitution, which declared that no property used for religious purposes should be (555) liable to be *taxed,* did not exempt such property from a local assessment for the construction of a sewer in its vicinity—the court remarking that *"taxes* are public burthens imposed, as burthens, for the purpose of general revenue; *assessments* are made with reference to special benefit derived by the property assessed from the expenditure."

In *City of Bridgeport v. Railroad,* 36 Conn., 255, it was held that an assessment for benefits specially conferred by the laying out a highway, while strictly speaking *a tax,* was not so in the common acceptation of the term, and was not within the meaning of a statute, which in consideration of a certain tax paid by railroads in the state, exempted them from all other *taxation.*

In *Wallace v. Shelton,* 14 La., (Ann.) 498, where the constitution provided that *taxes* must be levied on all property in proportion to its value, it was decided that an act of the legislature providing for an assessment per acre by commissioners upon all the alluvial lands within certain parishes, for the purpose of making and repairing levees, did not come within the meaning of the constitution—and this, though in the act itself it was styled *"a tax."*

The very same distinction was taken by the English court of exchequer, in *Guardians of the Poor v. The Commissioners of Bedford,* 7 Exch., 777, where a provision in the statute of 34 Geo. III, to the effect that certain buildings erected for the use of the poor of the town, should be free from all parochial and parliamentary taxes, was held not to exempt them from an assessment for local improvements—the taxes mentioned being construed to mean such as were levied for the benefit of the whole kingdom.

This also, as it seems to us, effectually disposes of the other exception taken for the plaintiffs. If such assessments are not within the constitutional prohibition as to the uniformity of taxation, there can be no pretence for holding them to be within the restriction which requires the assent of the qualified voters of the (556) districts affected thereby. If our construction be the true one, they are altogether omitted from the constitution, and as tending to give some support to our conclusion, it is to be observed that in the

constitutions of several of the states, a uniformity of *assessments* as well as of *taxes* is provided for in express terms.

No error. Affirmed.

Cited: Comrs. v. Comrs., 92 N.C. 183; *Busbee v. Comrs.*, 93 N.C. 148; *Brockenbrough v. Comrs.*, 134 N.C. 23; *Sanderlin v. Luken*, 152 N.C. 741; *Tarboro v. Staton*, 156 N.C. 518; *Comrs. v. Webb*, 160 N.C. 595; Comrs. v. Davis, 182 N.C. 145; Gastonia v. Cloninger, 187 N.C. 768.

T. E. BARRETT v. J. L. BROWN, TRUSTEE.

Parties—Trusts and Trustees.

In a suit to enforce a trust, the trustees and *cestuis que trust* are all necessary parties, except where the trustee has assets sufficient to satisfy all the creditors in full and has paid all but the plaintiff, for in such case the plaintiff would have a right of action against him for money had and received.

CIVIL ACTION tried at Spring Term, 1881, of MECKLENBURG Superior Court, before *Eure, J.*

This case was tried upon demurrer to the complaint.

The plaintiff alleges that she is a creditor, for goods sold and delivered in 1874, of McMurray and Davis, who failing in their business as merchants, in 1875, executed a deed in trust, whereby they conveyed all their effects to the defendant in trust, to sell and apply the proceeds in payment of their debts, which trust the defendant accepted and has partially executed; that he has paid to the other creditors forty-five per cent. of their demands, and has on hand assets sufficient to pay a like rate upon the plaintiff's claim, but refuses so to do, though the same has been demanded of him.

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The prayer is that he be required to exhibit said deed in trust in court, that the same may be inquired of, and that plaintiff have judgment for a *pro rata* share of her claim, in the proportion which the whole amount of the assets bears to the whole indebtedness.

The defendant assigns as grounds of his demurrer:

1. The failure of the plaintiff to make the said McMurray & Davis parties to the action.

2. Her failure to make their other creditors parties.

From a judgment, sustaining the demurrer, the plaintiff appealed.

Mr. W. W. Flemming, for plaintiff.
Messrs. Wilson & Son, for defendant.

RUFFIN, J. As stated in Story's Eq. Plead., Sec. 207, the general rule is that in suits respecting the administration of trusts, the trustees and *cestuis que trust* are all necessary parties—the former as having the legal estate, and the latter as having the equitable and ultimate interest to be affected by the decree.

In support of the proposition the author refers, in a note to *Holland v. Baker,* 3 Hare 69, in which Vice Chancellor WIGRAM is reported as saying that he took it to be the right of trustees, when sued touching matters affecting the trust property, to *insist* that the *cestuis que trust* should be brought before the court, for they are not the owners of the property, but only in a sense the agents for the owners, and it is their right to have the *onus* of resisting adverse claims thrown upon the parties really interested, and not on themselves.

A better reason for the rule seems to be given in 1 Daniel's Chan. Prac., 240, where it is said to depend upon the intention of the court to do complete justice, by deciding upon and settling the (558) rights of all the persons interested, in one action, so as to prevent future litigation, and to render the performance of the decree perfectly safe to those who may be compelled to act under it.

This is the rule established for the courts of equity, and it is substantially the same with the rule under the Code of Civil Procedure. *Gill v. Young,* 82 N. C., 273.

Such being the reason upon which the rule is founded, it must hold good as long as the reason lasts; and especially is it applicable to a trust like the present, in which each *cestui que trust* is directly interested in contesting every claim other than his own, as the fund is evidently insufficient to pay the whole. *Oates v. Lilly,* 84 N. C., 643; *Wordsworth v. Davis,* 75 N. C., 159.

Counsel for the appellant concedes that such is the general doctrine, but insists that it has no application to the present case, since here, the trustee has so far executed his trust as to have ascertained and declared the percentage due upon the debts secured in the trust and this action is only to recover the plaintiff's dividend so declared to be due her.

If it appeared that the defendant, having had assets sufficient to pay all the creditors in full, had declared a dividend and paid all but the plaintiff, then unquestionably she could have her action at law, as for money had and received, against the defendant after demand and refusal, for then the parties in interest would be reduced to the plaintiff on the one hand and the defendant on the other. *Fitch v. Workman,*

9 Met., 517, and *Rush v. Good*, 14 Serg. and R., 226. And so she might, too, if as was the case in *Hoover v. Berryhill*, 84 N. C., 132, the distributive shares of each in a fund insufficient to pay all, had been ascertained in some judicial proceeding, to which all were parties, and so estopped from setting up a further claim for more.

But in the case before us, it is apparent that the defendant (559) had not, and may possibly never have, a fund sufficient to discharge all the demands against the trust property, and therefore every other creditor, though he may have been partially satisfied, is directly interested in the question, as to whether the plaintiff's claim shall be allowed or not, for accordingly as that may be determined, will the shares of all the others in the assets yet to be distributed, be lessened or enlarged. They are all still concurrently interested, though perhaps unequally so, with the plaintiff, and a due regard for the protection of the defendant demands that they should be before the court, so as to be bound by the judgment, and render its performance safe as to him.

No error. Affirmed.

Cited: Warren v. Howard, 99 N.C. 197; *Hancock v. Wooten*, 107 N.C. 16.

A. J. BYNUM v. J. F. MILLER & CO.

Fraudulent Assignment—Subsequent Purchaser.

A subsequent purchaser of personal property from one who has previously made a fraudulent assignment of it—or an assignment without consideration and for his own benefit, whether the purchase be with or without notice and for a valuable consideration, and such assignment has been registered, succeeds only to the rights of his assignor: *Therefore*, where the plaintiff and A were partners in trade, and upon dissolution the plaintiff sold his interest to A and took a mortgage on the goods to secure the price and also the debts of the firm; A remained in business for a while and then sold and conveyed the stock of goods to the defendant for a small sum in money, and his own individual note in a considerable amount which he owed when the said mortgage was executed; *Held* in an action by plaintiff for the goods, that the mortgage is sufficient in law to pass title as against the vendor and the defendant who claims under him, and that neither can impeach the same for fraud in its inception.

(560) CIVIL ACTION tried at Fall Term, 1881, of CLEVELAND Superior Court, before *Avery, J.*

The plaintiff appealed.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiff.
Mr. D. Schenck, for defendants.

SMITH, C. J. The plaintiff and W. H. Miller, as partners engaged in trade under the firm name of Bynum & Miller, and owning a stock of goods entered into a mutual agreement in dissolving their association under which the former sold and assigned his individual share in the stock of goods then in possession to the latter, and the said W. H. Miller, by his deed of mortgage dated on April 20th, 1878, reconveyed the said goods, with such others as he might thereafter purchase and add, to the plaintiff in trust to secure the payment of a debt therein recited to be due to the plaintiff in the sum of $300, payable on the first day of November following, and containing a power of sale in default of payment. This was followed a week later by a second mortgage of the interest of said Miller in the same goods and future accessions thereto, in the way of replenishing the stock, with condition to be void if the said Miller should pay off and discharge the indebtedness of the partnership on or before the said first day of November in full exoneration of the plaintiff, and in case of failure to do so, vesting in him, as mortgagee, authority to make sale of the goods and apply the proceeds to the discharge of the firm liabilities and his own relief. These deeds were proved in November, and registered on December 6th of the same year, having been withheld until that (561) time under an arrangement agreed on between the parties when they were executed, that they should not be registered unless the mortgagor "should be pressed" or become embarrassed, of which he was to give the plaintiff information, and that meanwhile Miller should retain and continue to dispose of the goods, as if they were his own.

On the 10th day of April, 1879, Miller executed a deed to the defendants for the entire stock of goods then on hand, of the estimated value of $2,700 and of which the additions thereto since the date of the mortgages constitute the principal part, for the recited consideration of $116 in money, and the surrender to Miller of his individual notes in the sum of $2,000 due and owing when the mortgages were made, and of debts in a like amount since contracted.

The defendants took and claim the goods under this assignment, and refuse to surrender them or any portion of them to the plaintiff.

It was in evidence that the indebtedness of Bynum & Miller, at the termination of the partnership, was about $2,300, which has since been paid off, the plaintiff having paid over $700 of the amount, and that the goods then on hand were more than sufficient for its discharge, besides firm assets in notes and accounts uncollected.

These issues were submitted to the jury:

1. Is the plaintiff owner of the property for which the suit is brought?

2. Did the defendants, J. F. Miller & Co., purchase the goods for value and without notice of the assignment?

3. Was the sale and conveyance to the defendants made with intent to hinder, delay or defraud the creditors of the assignor?

The plaintiff asked instructions to be given to the jury to this effect:

1. The deeds to the plaintiff are sufficient in law to pass title
(562) to the goods as against Miller, the mortgagor, and against the defendants who claim under him, and can be impeached by neither.

2. To give effect to the assignment to the defendants, they must have bought the goods for a valuable consideration and without notice of the prior incumbrances, and the registration thereof was constructive notice of them.

3. If the conveyance to the defendants was with a fraudulent intent, it would be void as to the creditors of Miller and the plaintiff.

4. If the fraudulent purpose of Miller was known to the defendants, or they had information of such facts as reasonably authorized the inference that he entertained such purpose, in either case they would be participants in the fraud and could not defend against the plaintiff's title.

In the view we have taken of this appeal, it is necessary only to consider a single exception—the refusal of the judge to give the first instruction which would have been decisive of the right of recovery, and left only the damages to be assessed. In our opinion the exception is well taken and the jury should have been so charged.

Whatever diversity of views may exist elsewhere, the law is well settled by adjudications in this state, that a subsequent purchaser of personal property from one who has previously made a fraudulent assignment of it, or an assignment without consideration and for his own benefit, whether the purchase be with or without notice and for a valuable consideration, and such assignment has been proved and registered as required by law, stands in the place of his assignor, and neither is permitted to impeach its force and validity. The estoppel upon the assignor extends to his subsequent vendee, and as to both, the conveyance, though it may be void as to creditors, is equally efficacious as to them.

(563) We are content to recall some of the cases in which the proposition is stated and maintained:

In *Garrison v. Brice*, 48 N. C., 85, PEARSON, J., thus declares the law: "The statute of 13th Eliz. avoids voluntary conveyances of personal property, as well as land, as against creditors. But the 27th Eliz. avoids conveyances of *land* only, as against subsequent purchas-

ers. So although the defendant is a purchaser for a full and valuable consideration, yet the deed previously executed by his vendor to the plaintiff although voluntary and in trust for his wife and children, vested the title in the plaintiff and was valid, not only as against the husband, but as against the defendant who is a subsequent purchaser." He distinguishes the case from that of *Hiatt v. Wade,* 30 N. C., 340, cited in support of the opposite opinion, in that, "grass was the subject of the conveyance, growing in the meadow," and treated as part of the land.

So again the same eminent jurist says in another case—*Long v. Wright,* 48 N. C., 290: "The position that a conveyance of slaves made with an intent to hinder, delay and defraud creditors is void against a subsequent purchaser who bought in good faith and paid therefor a fair price, is not supported by any statutory provision or by any principle of the common law." This statement of the law, he defends upon an examination of the authorities, and referring to a suggestion of Chief Justice RUFFIN in *Plummer v. Worley,* 35 N. C., 423, that the statute of 27th Eliz. is but an affirmation of the common law, proceeds: "The remedy given to subsequent creditors rests upon the enactment of the statute * * * * and that in the absence of a statutory provision making it void against a subsequent purchaser, the legal effect of the deed (conveying slaves) was to take the title out of the debtor and vest it in the plaintiff's intestate, *notwithstanding a fraudulent intent in regard to creditors* and the trust intended for the debtor."

In *Barwick v. Wood,* 48 N. C., 306, the same judge delivering (564) the opinion uses this language: "It is settled that 27th Eliz., (Rev. Code, ch. 50, sec. 2,) which protects subsequent purchasers does not embrace *personal property,* and the common law only protected against fraud, rights which existed at the time of the fraudulent conveyance, citing and approving *Long v. Wright.*

Again in *Green v. Kornegay,* 49 N. C., 66, BATTLE, J., expresses the opinion of the court and reaffirms the doctrine: "The recent case of *Long v. Wright,* 48 N. C., 290, shows that the defendant, as the *subsequent purchaser of a personal chattel, could not set aside the prior conveyance to the plaintiff's intestate.* The case of *Williford v. Conner,* 12 N. C., 379, is equally in point to show that *as a creditor,* the defendant could take advantage of the deed to the intestate, being *voluntary* and *fraudulent,* only by reducing his debt to judgment and seizing the property under execution," or, it may be added, by a direct proceeding in equity to have the fraud declared and the property subjected to his demand.

The only case that seems to look in a contrary direction, which we recall, is that of *Dukes v. Jones*, 51 N. C., 14, in which it is held that a bill of sale absolute in terms, but intended to operate as a mortgage or security only, was void against a subsequent *bona fide* purchaser under the registration law, for the reason that such instruments are effectual only when registered, and from the day of registration, against creditors and purchasers for a valuable consideration; and this bill of sale in the language of the Chief Justice "was put in such a shape that it could not be registered, for the registration of a deed, absolute on its face, cannot be the registration of a mortgage, so that a deed which does not set out on its face the true nature of the transaction, is not susceptible of registration." Of the want of registration, purchasers as well as creditors who are put on the same footing, can alike (565) take advantage. If the mortgage deed is upon its face fraudulent, and so to be adjudged in law upon an inspection of its provisions, as contended for the defendant, the registration is of an instrument complete in form and what it was intended to be, and the requirements of the statute are fully met; and if the infectious fraud is in the use to be made of it in keeping off creditors and securing the benefits to the debtor, under an agreement preceding or attending the making of the conveyance, the case falls directly within the principle established in the adjudications to which we have referred, and from which we have largely quoted. When his Honor stated to counsel for the plaintiff that the jury would be instructed that the plaintiff's mortgage deeds were in law presumed to be fraudulent and the burden rested on him to rebut the presumption in order to sustain his title to any portion of the goods, in deference to which a non-suit was submitted to, he committed an error in law in applying the principle to the facts of the case and placing the defendants in the same favorable position as if they were creditors and were enforcing their demands, as such, in a due course of law.

We do not undertake to say what shall be the extent of the recovery, nor to pass upon any of the other exceptions. We simply decide that these vendees cannot impeach the mortgages by evidence of fraud in their inception, and in this respect succeed only to the rights of their vendor.

For the error pointed out there must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

Cited: Grocery Co. v. Taylor, 162 N.C. 312.

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T. P. SILER, ADM'R, v. T. R. GRAY, ADM'R.

Executors and Administrators, When Liable for Contracts of Deceased, and When Not.

The general rule—that a personal representative of a deceased person is bound to perform all his contracts, or make compensation out of the estate in case of non-performance—is subject to the exception that where such contract requires something to be done by the contracting party in person, as here, and he die before performance, the personal representative is not liable to an action for a breach of the same occasioned by his death.

CIVIL ACTION tried at Fall Term, 1881, of MACON Superior Court, before *McKoy, J.*

On the 11th day of October, 1869, Jesse R. Siler, being the owner of a certain tract of land, conveyed the same in fee to his son Leon F. Siler, the two, at the same time entering into a contract of which the following is a copy:

"This agreement made and entered into this the 11th October, 1869, between J. R. Siler of the first part, and L. F. Siler of the second, both of Macon county, in the state of North Carolina, witnesseth, that for and in consideration of L. F. Siler's administering to the comfort of J. R. Siler and his wife, H. D. Siler, during their lives and seeing that they are well provided for, and also in consideration of L. F. Siler's consent that J. R. and H. D. Siler shall have a life estate and joint occupancy with him in J. R. Siler's home tract of land, surveyed, etc., and in further consideration that L. F. Siler shall pay Roxana E. Moore and Harriet T. Sloan five hundred dollars each at the demise of J. R. and H. D. Siler, the said J. R. and H. D. Siler have this day signed, sealed and delivered to L. F. Siler a deed in fee simple to two hundred and sixty-eight acres of land, known as J. R. Siler's home place, and bounded, etc.; Now if the said L. F. Siler shall well and faithfully comply with the terms of this agreement, then this contract shall be construed to be complied with otherwise the said L. F. Siler shall forfeit and pay to the said party of the first part or his (567) heirs the sum of five thousand dollars. In testimony of which we bind our heirs and legal representatives, hereunto setting our hands and seals, etc." (Signed and sealed by J. R. Siler and L. F. Siler.)

Immediately upon the execution of the deed and said agreement, L. F. Siler went into the joint occupancy of the land with J. R. Siler, and resided thereon with his own family and that of J. R. Siler, until his death in 1870, during which period he took charge of the farm; and after his death his widow and children remained upon the premises

with J. R. Siler and his wife, and so continued to do until his death in March, 1876, and her death in the year following.

The plaintiff is the administrator of J. R. Siler, and the defendant, the administrator of L. F. Siler.

In his complaint the plaintiff alleges a breach of said agreement, in that, neither the legal representatives of the said L. F. Siler, or his heirs, or any person for him have undertaken or offered, since his death, to comply with the terms thereof, by either supporting the said J. R. Siler and his wife, or by paying to the said Roxana E. Moore and Harriet T. Sloan the sums agreed to be paid them, and he prays for judgment against the estate of the defendant's intestate for the sum of five thousand dollars.

In his answer the defendant alleges that his intestate fully complied with all the stipulations contained in said agreement, up to the time of his death, and that a farther performance on his part was thus rendered impossible by the act of God.

At the trial the plaintiff offered the above agreement in evidence, and insisted that the measure of damages was the sum of five thousand dollars—the sum mentioned in the instrument, but his Honor (568) ruled that the sum mentioned was a penalty and not liquidated damages, to which the plaintiff excepted.

The plaintiff then offered evidence tending to show that after the death of the defendant's intestate, the plaintiff's intestate, supported himself and wife, during the remainder of his life, and that he was compelled to employ others to superintend his business; and other evidence to show the damages he sustained by reason of the failure on the part of the defendant's intestate, or his representatives, to perform the stipulations contained in said agreement, but his Honor, holding that the plaintiff could not recover of the defendant except for a breach of the contract committed in the lifetime of his intestate, excluded the evidence, and thereupon the plaintiff excepted, submitted to a non-suit, and appealed.

Mr. J. H. Merrimon, for plaintiff.
Mr. Armistead Jones, for defendant.

RUFFIN, J. There being no evidence offered in support of the breach, alleged to consist, in non-payment of the sums stipulated to Roxana E. Moore and Harriet T. Sloan, that part of the case is excluded from our consideration, and the plaintiff's right to recover left to depend upon, as the only other matter complained of, the failure of the personal representatives, or heirs at law, of the intestate L. F. Siler, after his death, to contribute to the support of J. R. Siler and

his wife—as to which this court fully concurs in the ruling of his Honor in the court below. The general rule unquestionably is, that the personal representatives of a party are bound to perform all his contracts, whether specially named in them or not, or else make compensation for their non-performance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself (569) *in person.*

In 1 Chitty's Pleading, 19, it is said that no action lies against the executor upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform; and again, in Chitty on Contracts, 138, that death, though not in general a revocation of an agreement, may be such when the engagement is a personal one, to be performed by the deceased himself, and requiring personal skill or taste.

In Pollock on Contracts, 367, the principle is thus stated: "All contracts for personal service, which can be performed only during the life of the contracting party, are subject to the implied condition that he shall live to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his death."

In such cases, it is held that the act of God furnishes an excuse sufficient. Accordingly in *Bourt v. Firth,* 4 Court of C. P., 1, a plea to an action on an apprentice-bond that the apprentice was prevented by sickness from performing the contract, was ruled to be a valid plea and the defence a good one, the court saying that incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding an absolute and unconditional covenant to render the same; and again in *Farrow v. Wilson,* reported in the same volume at page 744, it was held that where one party covenanted to serve another as *farm-bailiff,* the death of either party dissolved the contract—such being an implied condition, it was said, in every contract for personal services—and the same doctrine has been recognized in *Robinson v. Davidson,* 6 Court of Exchequer, 268; *Taylor v. Caldwell,* 113 E. C. L. Rep., 826; *Dickey v. Linscott,* 20 Me., 453.

Assuming such to be the law, under which does the case at bar fall? the general rule, or the exception as stated? This must depend upon the intention of the parties, for at last, it is in every case (570) purely a question as to their intention.

It is true that the cases put down in the books, like those cited by us, are generally those in which the contracts sued on have been to marry—to teach an apprentice—to render services as an author, or as a doctor or a lawyer—such as will be determined by the very nature

of the services to be rendered or the skill requisite to perform them, to the exclusion of all thought of performance by any other person than the contracting party.

But still this is so, even in contracts of that nature, because the law *implies* such to have been the intention of the parties, and for that reason, and that alone, construes them to be *personal* contracts, and takes them out of the general rule.

Now if such be the consequence of an implied intention of the parties, how much more should it follow in the cast of a contract, in which they have clearly manifested a purpose to treat their contract as personal, and the very circumstances surrounding them forbid that any other construction should be put upon it?

Here, the contract on the part of the defendant's intestate was that *he* would administer to the comfort of his father and mother during their lives, and would *see* that they were provided for; and further, that he would jointly occupy with them their home, and he and his family become members of their family; thus, every feature of it depending upon the relation which he, as a near kinsman, bore to them, and upon the confidence which they reposed in him personally.

It is to be observed, moreover, that the contract was an entire one, to be performed by the administrator in whole or not at all. If bound to maintain them, and *see* to their comfort, he must needs have
(571) had the correlative right to demand admittance, stranger though he might have been, into their home, that he might become an inmate thereof.

If in the life-time of all the parties, the defendant's intestate had sought to introduce a stranger into the family, and through his agency to have performed the services stipulated to be rendered by himself, can it be supposed that the law would, for one moment, have tolerated such a course? and if not, then should the law, after his death, furnish a substitute for him, in his administrator, when he, himself, could not appoint one? We think not; and for the reason that the parties to the contract, manifestly, never contemplated or intended that there should be one.

Our conclusion therefore is that so much of said agreement as imposed upon the defendant's intestate the duty of providing for the plaintiff's intestate and his wife, and of looking after their comfort, was purely personal in its nature, and inasmuch as the defendant could not have enforced his right to perform it, so neither is he liable to an action for not having done so.

There is no error, and the judgment of the court below is affirmed.

No error. Affirmed.

Cited: Burch v. Bush, 181 N.C. 128; *Hall v. Trust Co.,* 200 N.C. 738.

W. M. MEBANE AND OTHERS v. ALFRED LAYTON AND OTHERS.

Fraud—Parties—Pleading—Jurisdiction—Equity.

1. Creditors affected by the fraud of a common debtor in the conveyance of his property, have the right to join in one action to subject the same to the payment of their debts. The complaint here is not therefore demurrable for misjoinder.
2. Judgment upon the claims not necessary to give the right to bring such suit. *Bank v. Harris,* 84 N. C., 206, approved.
3. And whatever may be the *sum demanded* the court of equity has jurisdiction. *Fisher v. Webb,* 84 N. C., 44, and cases cited.

CIVIL ACTION tried at January Special Term, 1882, of GUIL- (572) FORD Superior Court, before *Gudger, J.*

The plaintiffs, suing for themselves and other creditors of the defendant, Alfred Layton, allege that he is indebted to the plaintiff, Mebane, by two justice's judgments, one for the sum of $11.85 and costs rendered upon an open account contracted in 1866; and the other for $20.72 and costs, both of which have been "docketed in the superior court;" and also by a note for $37.43 due since September 1863; that he is also indebted to the plaintiff, Coble, in his own right by bond for $110.00 due the 6th of October, 1875, and to him as administrator of one Goley in three several justice's judgments, one for $2.75; one for $2.17; and the third for $4.70, and costs on each—all of which were rendered upon debts contracted in February, 1867, and all likewise "docketed in the superior court;" and that he is indebted to other persons, and in other amounts, unknown to plaintiffs; that being thus indebted, and insolvent, the said defendant in July, 1866, contracted with one Brothers, for the purchase of a tract of land at the price of $200, for which he paid the entire purchase money; but, for the purpose of defrauding his said creditors, procured the deed for the same to be made to his mother, the defendant Lucinda, who afterwards and without other consideration conveyed it to his (defendant's) wife, the defendant Rebecca.

Thereupon they insist upon their right to follow his funds in the said land, and that the same be sold for the satisfaction of their demands, and those of his other creditors.

The defendants demur to the complaint upon the following grounds:

(573) 1. For misjoinder—In that the plaintiffs have separate and distinct interests, and sue upon distinct claims, which should not be united in the same action.

2. That as it appears from the complaint, each plaintiff embraces in his demands against the defendant, a claim that has not been reduced to judgment, and for an amount that falls exclusively within the jurisdiction of a justice of the peace.

3. That it does not appear that the alleged judgments have been docketed in the *superior court of Guilford County.*

4. For that it does not appear that executions have been issued under such judgments and returned *nulla bona.*

5. For that it is not averred that the defendant, Layton, has no other property or effects, sufficient to satisfy the plaintiffs' debts, the allegation of his *insolvency* being insufficient to support this action.

6. For that the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the plaintiffs appealed.

Messrs. Scott & Caldwell, for plaintiffs.

Mr. John N. Staples, for defendants.

RUFFIN, J. By their demurrer, the defendants admit the demands of the plaintiffs; the existence of other creditors and claims against the debtor; his insolvency; and his covinous attempt to secrete his effects, and, with the coöperation of his mother and wife, to secure them for his own ease and comfort. It is difficult then to conceive of anything more that can be needed to entitle the plaintiffs to the relief they seek at the hands of a court of equity.

If the two active creditors had sued for their own benefit only, a simple allegation of the insolvency of the debtor might have been, and in fact would have been deemed insufficient to support their action; for though thus insolvent, he might still have possessed tangible (574) property liable to be taken under execution, sufficient to satisfy their demands, and thus render a resort to the court of equity unnecessary. But suing as they do for the benefit of every creditor alike, an allegation of absolute insolvency, as existing at the date of the attempted perversion of his property and as still continuing, must suffice, as it is apparent that the fund perverted must be needed to satisfy all the demands against the debtor. And as his interest in the property sought to be reached is purely an equitable one, no other court is competent to give the needed relief.

In *Bank v. Harris,* 84 N. C., 206, there was a careful review, by the present Chief Justice, of the rule and the reason hitherto adopted by

the courts of equity in this state, not to aid a creditor in such cases, until he had exhausted all his legal remedies, by reducing his claim to judgment and issuing an execution thereunder; and as it was thought that the rule obviously grew out of the relations which the two courts of law and equity then bore towards each other, so it was considered that it must cease altogether, now, that the functions of the two courts are consolidated, and committed to the "superior courts." Accordingly, it was held in that case, that it is not now necessary to have a judgment and execution, and a return of *nulla bona,* before invoking the aid of the court to set aside a conveyance, executed with the fraudulent intent to hinder and delay creditors.

All the cases cited by counsel in support of this branch of his demurrer were referred to in that decision, and the conclusion arrived at as to the effect of the change of system is admitted to be a departure from the doctrine there laid down.

Neither does the objection, that the plaintiffs have embraced in their actions demands founded on contract, and less in amount than two hundred dollars, hold good. The object of the action is not simply to enforce those contracts, but to reach a fund of the (575) debtor improperly converted into land, and the title taken to another. It is just the distinction taken in *Murphy v. McNeill,* 82 N. C., 221, where the jurisdiction of the court was upheld in an action to foreclose a mortgage, given to secure a debt less than two hundred dollars.

The interest of the debtor in this land could not be sold under execution, as the title was never in him, and none but a court of equity could ever reach it. And as was said in *Fisher v. Webb,* 84 N. C., 44, no part of the jurisdiction of the old court of equity has been conferred upon the court of a justice of the peace, so as to enable it to try any action heretofore solely cognizable in a court of equity.

In Story's Eq. Plead., Sec. 285, it is said that an exception to the general doctrine of misjoinder is made, when the parties have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests; and as an illustration, in the next section it is said that two or more creditors may join in one bill against their common debtor and his grantees to remove an impediment created by his fraudulent conveyance of his property.

In *Brinkerhoff v. Brown,* 6 John., Ch. 139, CHANCELLOR KENT ruled that different creditors might unite in one bill, the object of which was to set aside a fraudulent conveyance of their common debtor. It was so held also, in *McDurmut v. Strong,* 4 John., Ch. 687; *Emerton v. Lyde,*

1 Paige, 637, and *Conro v. Iron Co.*, 12 Barb., 27, and by this court in *Wall v. Fairley*, 73 N. C., 464.

Indeed in all these cases, the right of the creditors, affected by the fraud, to join in one action, seems to have been taken for granted, and the only question mooted, was, as to the right of a single creditor by suing alone, to acquire a priority for himself.

In our opinion the court below erred in sustaining the demur-
(576) rer, and its judgment is therefore reversed; and judgment will be entered here overruling the same, and remanding the cause to the end that the defendants may have the opportunity to answer.

Error. Reversed.

Cited: Love v. Rhyne, 86 N.C. 578; *Edwards v. Love*, 94 N.C. 369; *Frank v. Robinson*, 96 N.C. 33; *Roberts v. Lewald*, 107 N.C. 309; *LeDuc v. Brandt*, 110 N.C. 291; *Guilford v. Georgia Co.*, 112 N.C. 40; *Silk Co. v. Spinning Co.*, 154 N.C. 425; *Eddleman v. Lentz*, 158 N.C. 70; *Moore v. Bank*, 173 N.C. 184; *Chatham v. Realty Co.*, 180 N.C. 503; *Robinson v. Williams*, 189 N.C. 257.

R. C. G. LOVE v. M. H. RHYNE.

Jurisdiction—Counter-claim—Equity—Partnership.

1. In an action before a justice of the peace for a sum due by note and within his jurisdiction, *it was held* that a counter-claim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties, could not be allowed—the jurisdiction to settle such matters being in a court of equity.

2. The principle announced in *Murphy v. McNeill*, 82 N. C., 221, and *Boyett v. Vaughan*, 85 N. C., 363, approved.

CIVIL ACTION tried at Fall Term, 1881, of GASTON Superior Court, before *Avery, J.*

This action was commenced before a justice of the peace for the recovery of the sum of $104.33 due by note and account, and the only defence set up, as a counter-claim or set-off, is an alleged indebtedness arising out of unadjusted partnership dealings between the parties and to be ascertained upon a settlement. The justice upon the evidence adduced disallowed the defendant's claim and upon his appeal the cause was removed to the superior court. There, upon defendant's motion, opposed by the plaintiff, a reference was made to the clerk

to take and report an account of the partnership matters. When (577) the report came in at a subsequent term, the plaintiff moved the court to vacate the order of reference and set aside the report. He was allowed also to interpose a demurrer upon the ground that the matters of defence were of exclusive equitable cognizance and not within the jurisdiction conferred upon the justice, and thereupon he demanded judgment for his undisputed demand. The court overruled the demurrer, denied the plaintiff's motion, and he appealed.

Messrs. G. F. Bason and Schenck & Cobb, for plaintiff.
Messrs. Wilson & Son, for defendant.

SMITH, C. J. The only question, as the record states, intended to be presented on the appeal, is, whether the justice has "jurisdiction of the defence set up in the answer," and to this, without reference to any irregularity in the proceedings, our attention will be confined.

The jurisdiction in the adjustment of partnership transactions, under our former system, was committed alone to the court of equity, and no action growing out of them could be maintained at law by one partner against another, until a settlement, and for a definite sum found to be due. "At law," says Mr. CHITTY, "one partner cannot in general sue his co-partner or co-tenant in any action in form *ex contractu,* but must proceed by action of account, or by bill in equity; a rule founded on the *nature of the situation of the parties, the difficulty at law adjusting complicated accounts between them, and the propriety, arising from the confidence reposed by the parties in each other* of their being examined upon oath, which can only be effected in a court of equity. Therefore in the case of a co-partnership, one partner cannot at law recover a sum of money received by the other on account of the firm, unless on a balance struck that sum is found to be due to him alone." 1 Chitty Pl., 26.

In like manner, DANIEL, J., declares, that "before one partner or his representative can sue another partner at law, the (578) settlement of the firm must be complete and a balance struck." *Graham v. Holt,* 25 N. C., 300.

While one of the reasons assigned for the rule—the inability to examine the parties and obtain their testimony—no longer exists under the recent changes in the law of evidence, the rule is firmly established in practice. The exclusive jurisdiction thus vests, not because there is no contract, (for all partnerships and joint operations rest upon the basis of an agreement, express or implied,) but because in the course of its execution equities spring up among the members, which can only

be adjusted in a court of equity. These equities confer the jurisdiction to be exercised, and not the contract from which they flow.

The governing principle is decided in *Murphy v. McNeill*, 82 N. C., 221. It cannot be supposed that the constitutional provision (Art. IV, Sec. 27,) which gives to a justice of the peace jurisdiction, "under such regulations as the general assembly shall prescribe, of civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars," was intended to confer upon these subordinate judicial officers the large plenary powers necessary to be exercised in adjusting partnership transactions, and ascertaining to whom and what sums are due.

In a recent case where the subject was fully considered, the court says: "We do not understand that in this change of systems any portion of the jurisdiction of a court of equity has been apportioned to a justice's court, so as to enable it to try any action, however small the amount involved and though incidentally connected with a contract, which was heretofore solely cognizable in a court of equity." *Fisher v. Webb*, 84 N. C., 44; *Mebane v. Layton, ante*, 571.

As the settlement of a partnership cannot be enforced in an action before a justice, neither is it admissible when urged by the
(579) defendant as a means of extinguishing, by a resultant balance to be ascertained upon settlement, the demand, or any portion of it preferred by the plaintiff. *Derr v. Stubbs*, 83 N. C., 539; *Boyett v. Vaughan*, 85 N. C., 363.

It was urged by Mr. Wilson, in support of the remedy, that if disallowed, an insolvent debtor owing the defendant a much larger sum than his own claim might collect his debt and not pay that due the defendant. If this inconvenience does in fact follow, it cannot be allowed to unsettle the fundamental rules of pleading and practice. But we do not see why, in such case, the enforcement of the smaller demand may not be restrained until the larger debt can be ascertained and applied to its payment, unless it would interfere with the exemptions allowed by law; and this equity is the stronger, for that, it was unattainable as a defence to the action for a defect of jurisdiction in the justice's court to entertain it.

We are therefore of opinion that the plaintiff was entitled to his motion for judgment, the only defence to the action being the alleged counter-claim.

Judgment reversed and judgment here for the plaintiff.

Error. Reversed.

Cited: Raisin v. Thomas, 88 N.C. 150; *Hooks v. Houston*, 109 N.C. 626; *Love v. Huffines*, 151 N.C. 381; *Arrow v. Chandgie*, 200 N.C. 805.

J. T. GREGORY, EX'R, v. B. F. ELLIS AND OTHERS.

Homestead—Dower.

This case is governed by the decision in *Watts v. Leggett*, 66 N. C., 197, in reference to assignment of dower and allotment of homestead.

SPECIAL PROCEEDING, commenced in the probate court and (580) heard at Fall Term, 1881, of HALIFAX Superior Court, before *Gilmer, J.*

This was a petition filed by the plaintiff as executor of G. W. Owens, deceased, to sell the real estate of the testator for the payment of his debts.

The petition was filed against the widow and devisees of the testator, setting forth the facts, that the personal estate was insufficient to pay the debts and that the testator was seized and possessed at the time of his death of valuable real estate, consisting of many different lots and tracts of land, some of which he devised, others he directed his executor to sell for the payment of his debts, and some others he left undisposed of by his will.

The will was executed in May, 1875, and admitted to probate in the probate court of Northampton County on the 24th day of June, 1879, the testator having died on the 7th, and J. T. Gregory, the executor therein appointed, being the judge of probate of the county of Halifax, where the testator resided at the time of his death.

The testator left surviving him his wife Missouri F. Owens, and Elizabeth M. Owens, his only child, who is a minor of tender years without guardian, and defended the proceedings by her mother, who was appointed by the court her guardian *ad litem.*

The second and third items of the will are as follows: "I give to my wife Missouri F. Owens the dwelling in which I reside (in the town of Halifax), also the store house in which I am engaged in business at this time, together with the three lots on which they are situated and the adjoining lots (three lots), with all the improvements thereon, also one thousand dollars. Third, I give to my daughter Elizabeth M. Owens the tract of land now owned by me known as the Eppes tract (mill excepted), also the land known as the Ponton land, also one thousand dollars."

The widow dissented from the will and filed her petition for dower in the lands of which her husband died seized and pos- (581) sessed, and upon proper proceedings had thereunder the following real estate was set apart and assigned to her for dower, to-wit, the dwelling house and lots situated in the town of Halifax whereon the

testator resided and did business as a merchant at the time of his death, embracing the dwelling house and store occupied by him, together with the other buildings and premises connected therewith, and also the dwelling house now occupied by Mrs. Josephine Stephenson, together with the other buildings and premises connected therewith, embracing a small strip of land adjacent thereto measuring nine by one hundred and seventy-one and a half feet, also two hundred acres, lying immediately upon the public road, of that portion of the Eppes tract situated on the north side of the Halifax and Warrenton road.

The defendant Elizabeth M. Owens in her answer set up the defence, that there were no debts against the testator's estate that were contracted before the 1st day of May, 1877, (Act 1877, ch. 253), and none contracted prior to the 1st of January, 1869, (Bat. Rev., ch. 55, sec. 26), that as she was an infant and the only child of the testator, she was entitled to a homestead to the value of one thousand dollars in fee simple, set apart to her out of the Eppes and Ponton tracts of land described in the Pleadings.

The judge of probate ordered the sale of all the lands belonging to the estate of the testator, except the land assigned to the widow for her dower, and that devised by the will to the defendant Elizabeth M. Owens, which were reserved to abide the issues raised by the answer of the said defendant.

These issues were transmitted to the superior court of Northampton and removed to the superior court of Halifax to be tried.

When the case was called for trial the following facts were (582) agreed upon: That the personal estate of the testator George W. Owens, was insufficient to pay his debts; that the outstanding debts amounted to $13,784.30 of which $4,842.65 was contracted prior to May 1st, 1877; that the personal assets amounted to five thousand and thiry-two dollars, $4,630, of which, the residue, after paying the funeral and other expenses of administration, was, under an order of the court made March 7th, 1881, in a creditors' bill against the plaintiff for an account and settlement of his administration, distributed *pro rata* among the creditors, being 33¾ per cent. to each creditor, leaving still outstanding and unpaid an indebtedness of $9,152.39 with interest from the 7th of March, 1881. It was further agreed that the lands assigned to the widow were worth from $3,000 to $3,500; that portion of which embracing the dwelling house and other buildings and improvements on the lot where he resided at the time of his death, and had resided for several years previous to his death, was worth over $2,000, and that the real estate outside the dower was worth about $6,000.

Upon the case agreed and the pleadings in the cause it was adjudged by the court "that a homestead be allotted and set apart to said defendant out of those lands of which the plaintiff's testator died seized and possessed, that have been assigned to the widow of said testator as and for her dower, to be enjoyed subject to said dower. It is further adjudged that the plaintiff have a license to sell all the real estate devised to said defendant and also the reversionary interest in the lands covered by the dower, except so much thereof as shall be allotted and set apart to said defendant as and for her homestead, and that the cause be remanded to the clerk of the court and judge of probate for Northampton County to be proceeded in according to law and as above adjudged."

From this judgment the defendant appealed, assigning for error, that a homestead should have been adjudged to be set apart for her in fee simple from the lands of the testator not covered by (583) the dower, and that she should be let into immediate possession and enjoyment thereof, and that she should be allowed to have her election to have the homestead set apart to her from the lands devised to her, unencumbered by dower.

Messrs. T. N. Hill and Mullen & Moore, for plaintiff.
Mr. R. B. Peebles, for defendant.

ASHE, J., after stating the above. The exceptions taken by the defendant are unfounded. It is manifest from the case agreed that all the lands of the testator must be sold to raise assets sufficient to satisfy the debts, except such as are covered by the dower and homestead. The dower has been assigned and the main question is, which of the lands are to be allotted to the defendant for her homestead.

This question has been settled by the decision of this court in the case of *Watts v. Leggett*, 66 N. C., 197, where PEARSON, C. J. in delivering the opinion of the court said: "If the homestead had been laid off in the life time of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling house in which the husband had usually resided and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower, until the death of the widow, leaving them of course to the present enjoyment of such part of the homestead and

land appertaining thereto, as is not covered by the dower." And
(584) he further held that the proper construction of the act of 1868-69, ch. 137, was to give the widow and children only the same rights of homestead, as if the husband and father had not neglected to have his homestead laid off in his life time. This decision was cited and approved in the case of *McAfee v. Bettis,* 72 N. C., 28.

As the homestead under the constitution must embrace the dwelling, if there be one, where the husband or father had his last place of residence, with the buildings used therewith, the right to select the homestead can have no application except in such cases as where the husband or father owned several tracts of land, but had no residence on either, or where the dwelling and appurtenances exceeded in value one thousand dollars.

The right claimed by the defendant to have her homestead set apart to her in fee simple under the act of 1877, is not allowable under the facts of the case. The debts contracted prior to the 1st of May, 1877, amounted to $4,842.65, and after the distribution of the personal assets *pro rata* among all the creditors, there still remained due upon the debts contracted previous to that date 66¼ per cent., to the payment of which the fee simple estate in all the lands of the testator were liable, subject to the dower and the right of homestead as it existed prior to that act. *Gamble v. Watterson,* 83 N. C., 573.

There is no error. Let this opinion be certified to the superior court of Northampton that further proceedings in the case may be had according to law.

No error. Affirmed.

Cited: Graves v. Hines, 108 N.C. 265; *Williams v. Whitaker,* 110 N.C. 394; *Stern v. Lee,* 115 N.C. 435; *Morrisett v. Ferebee,* 120 N.C. 8; *Barnes v. Cherry,* 190 N.C. 774.

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(585)

IN PEARSON V. BOYDEN, FROM ROWAN:

Cloud Upon Title—Jurisdiction.

The principle announced in *Busbee v. Macy* and *Lewis,* 85 N. C., 329 and 332, is decisive of this case.

SMITH, C. J. The land described in the complaint with other tracts, is devised in the will of Nathaniel Boyden to the defendant Archibald

H. Boyden, in trust for the support and maintenance of the defendant, Nathaniel A. Boyden, during his life, with contingent limitations of the remainder at his death, and the testator annexes to the devise this further provision:

I further will and direct that, in case at my death my said son, Nathaniel, shall own property sufficient to discharge all the debts he may then owe, then it is my will and desire that in that event, all the above property, devised and bequeathed in trust to my said son, Archibald, shall at my decease vest absolutely in my son, Nathaniel, with the full right in his life time to dispose of all or any part thereof.

The testator died in 1873, and it is alleged that the devisee, Nathaniel A., then owned a large estate exceeding in value the sum of $15,000, and was indebted in a very small amount, so that under the terms of the devise, an estate in fee absolute and free from the declared thrusts, at once vested in him at the death of the testator.

The plaintiffs have purchased the interest of the said Nathaniel A., in the land, and claim title thereto by virtue of a sale under mortgage made by him, and of sales by the sheriff under execution and for unpaid taxes, "by which said sales and deeds of conveyance, all of which have been duly registered" in the language of the complaint, "the plaintiffs acquired all the estate of Nathaniel A. Boyden in and to said land, which plaintiffs are advised and believe was (586) an estate in fee simple absolute."

Such are the facts contained in the complaint upon which the plaintiffs demand judgment that—

1. The will of Nathaniel Boyden, deceased, be construed "and it be adjudged how the lands above described herein are held and owned," and

2. The plaintiffs be declared "owners of the land," and "entitled to the possession and beneficial enjoyment and use thereof."

The defendants demur, assigning for cause thereof, "that the plaintiffs have no right because of having purchased a speculative title at mortgage sale, to institute an action to have a cloud removed from their title."

There is no fact averred and no reason suggested why the plaintiffs cannot assert their legal title to the land in a direct proceeding, as in the former action at law for the recovery of possession, and the want of jurisdiction in the court to entertain the case presented in the complaint and give the required relief, is so manifest upon the principle announced and acted on in the recent cases of *Busbee v. Macy* and *Busbee v. Lewis,* reported in volume 85, pages 329 and 332 of our reports, that a re-examination of the subject is needless. The right claimed is a purely legal right, and when there is no obstruction in the way of en-

forcing it, and none such appears, it must be asserted in a legal and not before an equitable tribunal.

"There can be found no instance, we confidently believe," says the court in the last mentioned case, "in which a court has ever entertained a bill to remove a cloud from the title of a person, who was himself out of possession, or in a condition to test the question as to the superiority of title in a court of law."

The plaintiffs propose to avoid this difficulty by confining the appellants to the assigned ground of demurrer, (the plaintiff's ac-
(587) quired "speculative title at mortgage sale") and insist that the ruling of the court below in respect thereto is alone presented in the appeal.

We do not think the form of the pleading requires this rigorous interpretation of its terms. It is a demurrer to the jurisdiction of the court to entertain the application at all, and that the jurisdiction cannot be aided by the allegation of a title denominated speculative, derived through the concurring conveyances set up. This seems to be a reasonable and fair construction of the words of the demurrer, and a sufficient answer to the objection. But if it were not, the want of jurisdiction patent upon the face of the complaint, is a fundamental obstacle to the continued prosecution of the suit, and this objection will be entertained and acted on whenever brought to the attention of the court.

This was the disposition made of the cases cited, though the exception was not taken, for no tribunal will proceed to try a cause not committed to its cognizance, even with the assent of the parties to the exercise of the jurisdiction.

The proper judgment, where the court has no jurisdiction, is to dismiss the action, but as the appeal is from the overruling of the demurrer, and the plaintiffs then obtained leave to amend the complaint, and may perhaps be able to remedy the defects pointed out, we conclude to remand the cause, so that it may occupy the position in the court below, as if the error had not been committed and the demurrer had been sustained, and then be proceeded with according to law.

PER CURIAM. Cause remanded.

Cited: Byerly v. Humphrey, 95 N.C. 155; *Woodlief v. Merritt,* 96 N.C. 228; *Murray v. Hazell,* 99 N.C. 172; *Wardens v. Washington,* 109 N.C. 23; *McNamee v. Alexander,* 109 N.C. 244; *Paul v. Washington,* 134 N.C. 385; *S. v. R.R.,* 145 N.C. 521; *Campbell v. Cronly,* 150 N.C. 463; *Bank v. Whilden,* 159 N.C. 282.

(588)

*STATE OF NORTH CAROLINA v. FENDAL BEVERS.

Entries and Grants—Estoppel—Contract by Agent of the State—Confederate Securities—Ex Turpi Causa.

1. Lands once granted by the state to individual citizens do not become "vacant lands" within the meaning of the statute, where the state subsequently acquires title to them but abandons the actual use to which they were put.
2. One who procures a grant of land knowing that the same had been previously granted, perpetrates a fraud upon the state.
3. An estoppel cannot be set up against the state, but the truth of any transaction undertaken in her name may be shown.
4. A contract made by an officer or agent of the state in the absence of authority is illegal and may be avoided at the election of the state; and where public funds are improperly converted by him, the state (like an individual) can elect to call for the original fund or follow it in its converted form.
5. Confederate bonds or treasury notes constitute in themselves consideration sufficient to support a contract.
6. Where one can establish his case otherwise than through the medium of an illegal transaction to which he was himself a party, the rule *ex turpi causa* does not apply.

CIVIL ACTION tried at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

The plaintiff asked that defendant be declared trustee, and be decreed to convey title to plaintiff of a certain tract of land (situate near the city of Raleigh) in his possession, and the cause was submitted upon the following "case agreed:"

In the year 1862, John Devereux, as quarter-master for cer- (589) tain military forces known as "State Troops," acting under orders issued by James G. Martin, as adjutant general of the state, agreed to purchase from Miss Temperance Lane the land in dispute, for the purpose of using the same as a camp of instruction, in order to render the said troops more efficient in carrying on a war then waged against the United States. The said Temperance Lane thereupon executed a certain paper writing, purporting to be a deed, conveying said land in fee simple to Z. B. Vance, governor of the state, which paper writing had the formal requisites of a deed, and expressed a consideration of $2500, the same being paid her in certain other paper writings, purporting to be bonds of the Confederate States. The land was immediately taken into possession and used as a camp of instruction for about the space of —— months, when such use was discontinued, and

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

at no time since has it been used by the state for any purpose. The instrument executed by Temperance Lane was never registered, and it is now lost. In February, 1871, the defendant entered the land, as vacant land, and after paying all fees and charges procured a grant of it in 1872, which grant has been properly registered. In 1872, the defendant procured from said Lane, for a nominal consideration, a deed to himself for the same land, which has also been duly registered. At the time of his procuring the grant, the defendant had notice of the circumstances connected with the purchase and use of the land, as herein stated. He took possession at once after the delivery of the grant to him, and has retained the same ever since.

The prayer of the complaint is that the defendant may be decreed to convey whatever title he may have acquired in the land, to the state; and also a general prayer for relief.

For the defendant it was insisted: 1. That the quartermaster, acting merely under the orders of the adjutant-general, had no authority to purchase the land for the state, and his attempted purchase (590) was therefore void. 2. That the contract of purchase was made, and so understood by the parties, for a purpose inconsistent with the duty which the state owed to the national government, and therefore no court would lend its aid to either for its enforcement. 3. That when the state ceased to occupy the land, or use it for any purpose, it again became subject to entry, and was properly granted to the defendant in 1872. 4. That the state is estopped by her grant to defendant to deny his title.

The court below gave judgment for defendant, and the plaintiff appealed.

Attorney General and D. G. Fowle, for plaintiff.

Messrs. Battle & Mordecai, Hinsdale & Devereux and Mason & Devereux, for defendant.

RUFFIN, J. If the land in dispute was really the subject of entry and grant, that of course puts an end to the case, and renders it needless to consider any of the other points made. We will therefore consider that branch of the case first.

To be the subject of entry under the statute, lands must be such as *belong to the state,* and such as are *vacant and unappropriated.* Bt. Rev., ch. 41, sec 1. If then any one of the many grave objections, urged by defendant against the validity of the state's title under the contract of 1862, be well founded, so that the land did not, in fact, "belong to the state," that very circumstance placed it beyond the reach of the statute, and forbade its being acquired by the defendant

in the manner attempted. And besides, lands that have been once granted by the state to individual citizens, that is, cut off from the undefined public domain and appropriated to private uses, do not become vacant, within the meaning of the statute, simply because the state may in some way again acquire them, and fail to put them to any special use; or, as in this case, after having used (591) them for a time, should wholly abandon them.

This was the reasoning of the court in *Hoover v. Thomas*, 61 N. C., 184, with reference to lands that had been confiscated, and with still greater force does it apply to lands actually purchased by the state, and paid for at improved values.

It is not to be supposed that the legislature intended that lands, under such circumstances as these, should be subject to private appropriation and entry, at any moment when their actual use might be discontinued, and at the insignificant price fixed by law for the vacant and unimproved lands of the state.

The lands of delinquent tax-payers, bid in for the state, did become immediately subject to entry, and so continued to be, until the act of 1872, which ceded them to the board of education. But this was by virtue of the express provision of the statute of 1798, and the very fact that any necessity for such a statute, at all existed, tends strongly to confirm us in the opinion that the construction given to the one now under consideratin, is the true one.

Our conclusion therefore is, that in no point of view could the land in controversy be the subject of lawful entry, at the date of defendant's grant; and being for land not thus subject, that instrument is void, and may be objected to in the pending action.

The rule is well established, that where the land entered is both vacant and subject to entry, objection can only be taken to the grant in some direct proceeding looking to that end; for in that case, it is not void, but only irregular and voidable. But if the land be not vacant, or, if vacant, not the subject of lawful entry, then the grant is void, and advantage may be taken of it in any action, in which the title to the land becomes involved. *Hoover v. Thomas, supra; Harshaw v. Taylor*, 48 N. C., 513; *Lovinggood v. Burgess*, 44 N. C., 407.

As to the estoppel insisted on: It is notorious that grants are (592) always issued at the instance of the grantee, and upon his suggestion that the land is vacant. The state does not warrant it to be so, or the liability of the land to entry. Nor is it any fraud in the state to grant land which is not so liable; on the contrary, the statute on the subject declares it to be a fraud on her to procure a grant from her under such circumstances. And moreover, the state being a sovereign,

is never estopped, but may always show the truth of any transaction undertaken in her name.

It cannot be denied, and we do not understand it to be denied in the argument, that the contract entered into in 1862, between the quarter-master and the owner of the land, was unlawful, so unlawful that no court owing allegiance to the government under which we live, would lend its aid to any party who participated in the guilt thereof. There is no principle better established, than that it is the duty of every court to withhold its countenance from every contract, or other act, the direct object or probable tendency of which, is injurious to good morals or contray to public policy, and especially from one that tends to subvert the political institutions of the country, or endanger the public safety.

Much ingenuity and very great learning were displayed at the bar by counsel on both sides of the case, in discussing the question, whether the maxim *ex turpi causa, non oritur actio,* could be made to apply to a contract to which the state was a party. As there is another principle involved, which in our opinion controls the case, it is not necessary that we should consider that question, further perhaps than to say, that in the case of the state, it would be more a question of constitutional power to contract, than of integrity of purpose. Within the scope of her power to act, as limited *only* by the two constitutions under which she exists, her will is the law, and her policy the
(593) true policy, at least so far as concerns the courts which sit under and by virtue of her authority. Anything beyond this, undertaken in her name, is void, not because of the imputation of immorality or impolicy to it, but solely because of its being *ultra vires.*

But apart from every question of unlawfulness growing out of its tendency and purpose, that contract was illegal and void at the election of the state, because of the entire absence of authority in the officer who made it, to bind her to it. Acting as she must necessarily do through her officers and agents, her safety imperatively demands that her specific instructions should be observed, and only such authority exerted in her name, as is conferred by law.

Under the law of this state, there is but one power that can appropriate the public money, or authorize any conversion of the state's property, and that one is the general assembly of the state; and any officer, who, having the state's money or other property in his charge, applies it to any purpose without the sanction of that branch of the state's government, is guilty of a breach of duty, however honestly it may be done—as doubtless it was done in this instance, without the least thought of private gain, and only in obedience to what was supposed to be the lawful commands of his superior in office. We have

searched the statute-books in vain, (even those belonging to those unsettled times), for a law, or the semblance of a law, emanating from any source, which authorized the purchase of the land in suit, for the state, by any one or for any purpose; or for a sanction given to it by that power which alone could sanction it.

It is not disclosed in the record how the quartermaster became possessed of the bonds, which were given and accepted by the owner of the land in exchange for it, nor is it material that we should know, since he held them professedly for the state and as her (594) agent, and the other contracting party so understood it, and so consented to deal with him—thus participating in, and becoming equally responsible for, the misapplication of the state's property. She, too, (the other contracting party,) was bound to know the law, and to take notice of the officer's lack of authority.

Under such circumstances, the general rule of a court of equity would be, that the principal whose funds had thus been improperly converted, might have his election to call for the original fund, holding the property into which it had been converted, as a security for it; or to follow it in its converted form. *Cook v. Tullis,* 18 Wall., 332; *Cooper v. Landis,* 75 N. C., 526; *Beam v. Froneberger, Ib.,* 540; *Younce v. McBride,* 68 N. C., 532. Such we say would be the general rule. Is there any just reason why this should be made an exceptional case? We frankly own, we can detect nothing in its circumstances which would justify such a course. It is true, the state's property in the hands of her officer, and which was as we have seen missapplied, consisted of the bonds of the Confederate government. But there can be no room for any distinction, in principle, between them and the treasury notes that were issued by the same authority. To say nothing of the decisions of this court, the supreme court of the United States has repeatedly held that the Confederate treasury notes, when recognized by the parties as money, and dealt with in the ordinary course of business, disconnected with any purpose, directly, to be attained by putting them in circulation, constituted in themselves consideration sufficient to support a contract, either executed or executory. The same principle must hold good in the case of its bonds, when treated as property and accepted under similar circumstances. The existence of that power as a nation was no more intimately connected with, or its ability to resist the authority of the United States dependent upon, the one class of instrument than the other.

Neither should she be excluded upon the ground that the land (595) was intended to be put to an unlawful use. The principle upon which the courts refuse their aid in such cases is this: No court will lend assistance to one who founds his cause of action upon an illegal

act, to which he was himself a party. As soon as the court perceives that the action proceeds *ex turpi causa*, and that the plaintiff's hands are polluted, it withholds its aid—not out of any consideration for the defendant, but because it will not, on the score of example and public policy, give countenance to such a plaintiff.

But to put this principle into operation in any particular case, it must appear that the very party, who is seeking aid from the court participated in the unlawful purpose. Indeed, it is said, that the very test of its application is, whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction, *to which he was himself a party*. If he can, there is no policy of the law which closes the door of the courts against him. How is it then with the plaintiff in this action? So far as seen, no stain is upon her garments. In no way known to her law, or in which she was capable of declaring her will, did she authorize *any* contract to be made in her name for the land in dispute. The officer who made it, as well as he who directed it to be made, was utterly without authority to commit her to it. Can it be said, under circumstances such as these, that she is *in pari delicto*, and underserving a hearing in the courts of the country? On the other hand, the owner of the land not only consented to its sale for an unlawful use, but accepted the state's property from an agent unauthorized by law to part with it. To apply the rule of exclusion in such a case would be, to overlook the very principle upon which it is founded, and would besides do violence to another principle,

(596) (equally well founded in good morals and sound policy, and of universal application,) which declares, that "as against an innocent party, no one shall set up his own iniquity as a defence."

The defendant being a purchaser without value and with full notice of all the facts of the case, stands in the shoes of his vendor, and can make no defence which she could not, and in his hands the land is subject to the same equity in favor of the state, as it would be in hers. That equity, according to the election of the state as declared in this action, is to follow the fund in its converted form, and take the land.

The judgment of the superior court is reversed, and judgment upon the case agreed rendered in this court, that the plaintiff recover the land of the defendant.

Error. Reversed.

Cited: Dugger v. McKesson, 100 N.C. 11; *Bickett v. Nash*, 101 N.C. 583; *Pittman v. Pittman*, 107 N.C. 162; *Wool v. Saunders*, 108 N.C. 736; *Bank v. Adrian*, 116 N.C. 540, 543; *S. v. Bland*, 123 N.C. 740; *Henry v. McCoy*, 131 N.C. 589; *Newton v. Brown*, 134 N.C. 443; *Janney v. Blackwell*, 138 N.C. 439; *Berry v. Lumber Co.*, 141 N.C. 394;

Electrova Co. v. Ins. Co., 156 N.C. 237; *Anderson v. Meadows*, 159 N.C. 408; *Walker v. Parker*, 169 N.C. 152; *Fineman v. Faulkner*, 174 N.C. 14; *Perry v. Morgan*, 219 N.C. 380; *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 316; *Raleigh v. Fisher*, 232 N.C. 635.

STATE v. W. C. HASTINGS.

Criminal Law—Evidence—Forgery.

1. The solicitor is not restricted to the first bill of indictment found, but may before entering upon the trial send another bill to the grand jury and require the accused to answer that. *State v. Dixon*, 78 N. C., 558, approved.
2. Evidence, though not of itself sufficient to warrant conviction, was properly admitted if in association with other proof it pointed to the party accused.
3. In forgery, *State v. Leak*, 80 N.C. 403, sustained.

INDICTMENT for forgery tried at Fall Term, 1881, of MECKLENBURG Superior Court, before *Avery, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State. (597)
Mr. R. D. Graham, for defendant.

SMITH, C. J. The defendant is charged, and upon trial was convicted of forging a bond for the payment of money to himself, and purporting to be executed by Talor Nance and A. J. Derr, as described in the indictment. Before the jury were empanelled the defendant's counsel moved to quash the bill, basing the motion upon the facts contained in an affidavit and which the court finds to be true, that a bill for the same offence had been found at a former term, and having become mutilated, a second bill had been prepared and conveyed to the door of the grand jury room and handed to the foreman by an attorney employed to aid in the prosecution, and returned a true bill; and that, upon objection for this irregularity, a third bill was sent upon which the solicitor now proposed to put the defendant on trial. The attorney who handed the second bill to the foreman did not appear before the grand jury, nor did he say anything about the indictment calculated to influence the action of the jurors in considering and passing upon the charge.

The motion was properly denied, for the former bills in connection with the facts stated, constitute no legal impediment to the putting the defendant on trial upon the last and more perfect bill, at the election of the solicitor. This is the recognized practice, and is convenient and necessary in the administration of the criminal law for the removal of all grounds of exception to the form of the bills previously sent, or for any irregularity in the manner of acting upon them. *State v. Dixon*, 78 N. C., 558.

The second exception is to the admission of evidence. Talor Nance, the first named obligor on the bond, testified that he did not sign it, but that he had before executed a note to the defendant with
(598) A. J. Derr as surety, for the same sum and due at thirty days from the date; that soon after its execution and before maturity, the defendant proposed to witness to sell him the note for twenty dollars, saying he was hard up for money; that accepting the offer and while on their way to witness' house to carry the agreement into effect, the defendant was arrested, and thereupon the matter was deferred to the next week, defendant saying he would not need the money sooner, and that after his return from Charlotte he would then either himself bring or send the note to witness.

The state was then, after objection made and overruled, allowed to prove by the witness that the forged instrument was delivered to him the week after by the defendant's father.

In like manner, after objection of defendant, the same witness was permitted to testify that a short time afterwards the defendant inquired if he, witness, had paid the genuine note. There was other testimony not set out in the case, as deemed not material to present in explanation of the exceptions.

We think the evidence was properly admitted, not as of itself, sufficient to warrant a conviction, but of facts, in association with others pointing to the party by whom the criminal act was perpetrated.

The evidence alone does not directly connect the defendant with the imputed crime, but as the forged instrument is a duplicate or reproduction of an original and genuine note, given to and in his possession, and comes to the witness in accordance with the defendant's promise, and through the hands of his father at the designated time—these concurrent circumstances, how far aided by the unreported evidence does not appear, tend to show the defendant's guilt, and with the aid of the other evidence were sufficient to satisfy the minds of the jury.
(599) The evidence is clearly competent, and we can only declare there was no error in allowing it to be heard by the jury.

The last objection is to the refusal to give certain instructions to the jury. Omitting such as were asked and given, those denied are in substance as follows:

1. That in order to a conviction the jury must believe upon the evidence that the intent to make a fraudulent use of the instrument existed in the defendant's mind when he made it.

2. That the intent must have been to defraud both or one of the persons by whom it professes to have been executed, and

3. That there is no evidence of such intent.

The court charged the jury that the state must satisfy them beyond a reasonable doubt that the alleged criminal act was committed by the defendant; that he forged or procured to be forged, or assented to the forgery knowingly and wilfully of the forged note, and that the act was done with intent to defraud some person, whether the persons whose names are subscribed as obligors, or others.

The instructions given present the defendant's case fairly before the jury and leave him no just grounds for complaint.

The bill in form follows approved precedents, and we are unable to understand wherein it is defective so as to support the motion in arrest of judgment. Certainly the additional averment suggested has no proper place in the indictment, and the allegation of an intent to defraud without specifying the person against whom the intent is directed is expressly authorized by statute. Bat. Rev., ch. 33, sec. 67; *State v. Leak*, 80 N. C., 403.

There is no error, and this will be certified to the end that the court may proceed to judgment upon the verdict.

No error. Affirmed.

Cited: S. v. McNeill, 93 N.C. 555; *S. v. Parrish*, 104 N.C. 689; *S. v. Kirkland*, 175 N.C. 772; *S. v. Harden*, 177 N.C. 582; *S. v. Southerland*, 178 N.C. 678; *S. v. Pannil*, 182 N.C. 840.

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(600)

STATE v. HOWELL SPIER.

Criminal Law—Evidence.

What a defendant says at a preliminary investigation before a committing magistrate, is inadmissible as evidence against him on the trial of an indictment, unless it appears that he was advised of his right to refuse to answer any question, and that such refusal should not be used to his preju-

dice, even though the declaration was not in the nature of a confession, but consisted of a denial of some fact upon which the state relied for a conviction—and this, notwithstanding the act of 1881, allowing him to testify in his own behalf.

INDICTMENT for larceny tried at Spring Term, 1881, of GREENE Superior Court, before *Graves, J.*

The defendant is charged with stealing and also with the felonious receiving a hog, the property of E. M. Albritton, and on the trial offered himself as a witness in his own behalf. Upon the cross-examination he was asked by the solicitor if he stated before the justice of the peace at the preliminary hearing, that he did not know whether the hog was scarred or not. The defendant objected to the question, but it was admitted and the witness answered, "I do not remember telling Mr. Holliday, (the justice) that I did not see the scar until the hog was cleaned and then paid no attention to it."

The prosecutor had testified that his hog had a scar on the neck and one of the ears had rotted off, and these marks were among the means of identifying the property.

The justice being recalled to contradict, stated that the defendant had said that if his hog had any scar, he did not notice it. The defendant's statement was not reduced to writing. Verdict guilty, judgment, appeal by defendant.

(601) *Attorney General, for the State.*
No counsel for defendant.

SMITH, C. J. The exception to the ruling in admitting the declarations of the defendant before the examining magistrate, as evidence against him, must be sustained upon the authority of two adjudications in this court, *State v. Matthews,* 66 N. C., 106, and *State v. Rorie,* 74 N. C., 148, in construing section 23 of chapter 33 of Battle's Revisal.

In the latter case the prisoner's statement committed to writing by the justice was offered and received in evidence against him on his trial. Previous to its being made, the justice had informed him of the offence with which he was charged, and said to him that "if he wanted to tell anything he could do so, but it was just as he chose," and on the appeal SETTLE, J., delivering the opinion says: "It was the duty of the magistrate to inform the prisoner that his refusal to answer should not be used to his prejudice at any stage of the proceedings. The caution is not a mere matter of form; it is a substantial

right, necessary for the protection of prisoners who are too poor to employ counsel, and too ignorant to conduct their own defence."

In reply to the suggestion that the defendant's words were not a confession, but a denial of his guilt, he proceeds: "It was a declaration which the state used to procure a conviction; and it is not for the state to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution." *State v. Garrett*, 71 N. C., 85.

It does not appear that anything was said to the defendant to induce his declaration, nor the caution directed in the statute given, but we think the scope and meaning of it embraces the present case; and to render admissible as evidence against a prisoner what he may say during the investigation, he should not only be advised of his right to refuse to answer any question, but that such refusal (602) "shall not be used to his prejudice in any stage of the proceedings."

It is suggested, however, that as the act of 1881, ch. 110, renders a person charged with the commission of a criminal offence competent to give evidence on his own behalf on the trial, and when he avails himself of the privilege he occupies the position of any other witness, "equally liable to be impeached or discredited," as is said in *State v. Efler*, 85 N. C., 585, his declarations, in conflict with his testimony, although made before the examining magistrate, should be received as they would be against an indifferent witness, when offered to discredit. We do not give this sweeping operation to the act in outhorizing the introduction of evidence, before excluded from considerations of general policy and a just regard to the rights of one accused of crime. No reason occurs to us for allowing the jury to hear proof of declarations offered to impair the force of his present testimony, and thus strengthen the case against him. which would not be received to establish his guilt. This is not the purpose of the enabling act. The declarations before the justice, unless accompanied with the prescribed cautions, are rejected because they are not deemed voluntary and reliable. For the same reason, confessions produced by undue influence of hope or fear are not received against an accused party. These latter certainly are not rendered competent under the statute; and why should the former be? Every consideration that forbids the introduction of the evidence in the one case, forbids it in the other. Undoubtedly, when an accused person testifies, he must disclose all the facts of the transaction, and waives his right to be exempt from self-crimination in the matter, and this is a necessity of the position he voluntarily occupies; and he equally exposes himself to discredit by any *legal evidence* that can be brought against him. In this respect

(603) he stands in the position of any other witness, but his right to object to improper evidence remains unaffected.

Error. There must be a *venire de novo.* Let this be certified.

Error. *Venire de novo.*

Cited: S. v. Conrad, 95 N.C. 669.

STATE v. JOHN L. KING.

Criminal Law—Evidence—Affray—Intent.

1. Upon trial of an indictment, the written examination of a witness taken before a committing magistrate, is inadmissible in evidence, unless the witness is dead, or too ill to be present, or insane, or has removed from the state at the instigation or connivance of the defendant or prosecutor; proof that he did not respond to the summons is not sufficient. Bat. Rev., ch. 33, sec. 34.
2. Where an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence, and hence on trial of an affray, a party cannot be heard to say that he did not intend to bring about a breach of the peace.
3. But where the act becomes criminal only by reason of the intent, then, unless the intent is proved the offence is not proved.

INDICTMENT for an affray tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

Appeal by defendant.

Attorney General, for the State.

Messrs. Argo & Wilder, for defendant.

SMITH, C. J. The defendant and William Broadwell were indicted for an affray and for mutual assaults of each upon the other,
(604) and upon the trial the former was found guilty and the latter acquitted. The exceptions of the defendant presented in his appeal are to the rulings of the court in rejecting evidence on the trial before the jury. The absence of any statement of the facts of the transaction to which the excluded testimony may be deemed pertinent, is a serious impediment in the way of determining its competency and relevancy and passing upon the sufficiency of the exceptions; and it devolves upon the appellant to show the alleged errors in the rulings of the court, of which he complains.

1. The first exception is to the refusal of the court to allow the introduction of the written examination of one Smith, before the justice upon the preliminary hearing.

The witness had been summoned for the state, but failed to answer when called for by the solicitor, and (as the other defendant proved,) had stolen cotton and run away. Such testimony has been declared competent in this state when the witness is dead, or after search cannot be found; and perhaps the rule would have been extended to the case of a non-resident who was absent and beyond the jurisdiction of the court, as stated by Mr. WHARTON in his Law of Evidence, section 178. The cases are collected and the principle restated in *State v. Grady*, 83 N. C., 643. But the matter is now regulated by statute, and while the act recites the conditions on which the state may introduce the examination, we think the accused party, as he before had the right, so now, he may offer the evidence under like circumstances as is permitted to the state. Bat. Rev., ch. 33, sec. 34.

The statute authorizes the admission of the former testimony of the witness, taken by the examining magistrate, before the grand or petit jury, when the "accused was present at the taking thereof, and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead, or so ill as not to be able to travel, or by procurement or connivance of the defendant hath (605) removed from the state, or is of unsound mind." And so upon a fair construction of the act as modifying the pre-existing rule, the accused may use the testimony if the witness is dead or too ill to be present, or insane, or has removed from the state at the instigation or with the connivance of the prosecutor. It is apparent no foundation has been laid for the introduction of the evidence of the witness, who merely does not respond to the obligations of the subpœna, and is simply proved to have "*run away*," and not that any effort has been made to secure his presence.

"Proof of mere disappearance," remarks the author to whom we have referred, in the absence of a regulating statute, "is not by itself enough to admit such testimony, if by due diligence the witness' attendance could have been secured," and numerous cases are referred to in support of the proposition. The proposed evidence was therefore properly refused, under the provisions of the statute.

2. The appellant excepts to the ruling out of his own testimony, and that he was not allowed to state that in using the language imputed to him and admitted by himself, (and which is not set out in the record) he did not intent to bring about a breach of the peace—nor to give his reasons for striking his associate defendant, while he was permitted to detail all the facts and circumstances attending the

difficulty—nor his motives in grasping Broadwell by the throat—nor to repeat what he said to his father soon after the occurrence, not offered in corroboration of his own evidence, for which purpose no objection was made on the part of the state, but to bring out the reasons he then assigned for his conduct—nor to say that in using the offensive language to Broadwell he did not then have any idea it would lead to a fight.

This evidence all belongs to one class, and the contention is that it is competent to a defendant when charged with a criminal
(606) act to testify to his *intent* as a state or operation of his mind, outside of the act done, and self-exculpatory in its effect.

The proposition asserted in broad terms and sufficient to comprehend and sustain the exceptions to the rejected testimony, is in our opinion unsupported by authority or sound reason, and rests upon a misconception of the class of cases to which such evidence is applicable. When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence, and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act. A party cannot excuse himself for an act intentionally done, and which is in violation of law, by saying he did not so intend.

But where the acts are themselves equivocal and become criminal only by reason of the intent with which they are done, both must unite to constitute the offence, and both facts must be proved in order to a conviction. In such case, unless the intent is proved the offence is not proved. As the criminal intent may be and usually is inferred from the declarations and conduct of the accused, he is permitted to disavow the imputed purpose and repel the presumption. None of the cited cases go beyond this.

In *Seymour v. Wilson*, 14 N. Y., 568, under a statute which says that the question of fraudulent intent in making an assignment or transfer "*shall be a question of fact and not of law*," the assignor was allowed to say upon his examination that it was not his purpose in making the conveyance to delay or defraud his creditors; and this was again ruled in *Griffin v. Marquand*, 21 N. Y., 121, and *Forbes v. Waller*, 25 N. Y., 430, upon the authority of the preceding case.

In *Miller v. People*, 5 Barb., 203, where the defendant was charged with an indecent exposure of his person, and the proof was
(607) that he was seen undressed in the back yard of his own premises, he was allowed to show that the *exposure* was not intentional, and the rule is thus declared by the court: "It is a general rule of evi-

dence that a man shall be taken to intend that which he does or which is the immediate and natural consequence of the act. But when an act in itself indifferent becomes criminal, if it be done with a particular intent, then the intent must be alleged and proved." In *Willard v. Herkimer County*, 44 N. Y., 22, a case growing out of a statute which subjected to the penalty of fifty dollars any person who removed a pauper from one county to another without legal authority, and there left him, when the removal was made with *intent to charge the county to which the pauper was removed with his support*, the court while adhering to previous decisions on the maxim *stare decisis*, nevertheless say: "Were we without any direct authority in this court adjudging the admissibility of such an inquiry (of intent) to be put to the accused party, I should be very unwilling now to concede it. Intent is to be judged of usually by the light of surrounding facts and circumstances. These afford a satisfactory test which all can know and consider as well as the witness."

The test of the admissibility of the evidence of motive or intent, is the materiality of the motive or intent in giving character to the act, and when they must as separate elements co-exist to constitute guilt or produce a legal result. When as distinct facts each must be alleged and proved, the inference to be deduced may be met and repelled by the direct testimony of the party as to their being entertained by him. 1 Whar. Evi., Sec. 482. None of the evidence offered comes up to this requirement, and we cannot see how the defendant's conduct in provoking and bringing on a fight is extenuated by his belief that his adversary would submit to the offered indignities and show no spirit of resentment. If his language was calculated to lead to a breach of the peace and did lead to a breach of the peace, (608) he must be deemed in law to have intended this natural result of the act, and cannot escape its legal consequences.

The case of the *State v. Perry*, 50 N. C., 9, in which it is held that where a person uses towards another such abusive language as is calculated and intended to bring on a fight, and induces that other to strike him, he is guilty, though he may be unable to return the blow, is not repugnant to the rule we have laid down.

The intent is inseparable from the tendency of the provocation, and they are connected to express fully the proposition of law. When one knowingly gives such provocation as is *calculated* to bring about retaliatory violence, and violence does ensue in consequence, he cannot escape responsibility to the criminal law, by saying that he did not expect it from the adversary to whom it was offered, because of a supposed want of courage to resent.

So far as we can see, the proffered evidence in defence was incompetent upon the question of the defendant's guilt and was properly excluded from the jury.

An affray has been committed and one party has been acquitted. We perceive no injustice done the other at the trial.

There is no error, and this will be certified.

No error. Affirmed.

Cited: S. v. Bridgers, 87 N.C. 565; *Hannon v. Grizzard,* 89 N.C. 122; *S. v. Voight,* 90 N.C. 745; *S. v. Pierce,* 91 N.C. 610; *S. v. Smith,* 93 N.C. 518; *Phifer v. Erwin,* 100 N.C. 65; *S. v. Jacobs,* 103 N.C. 402; *S. v. Kittelle,* 110 N.C. 584; *S. v. Corporation,* 111 N.C. 664; *S. v. Behrman,* 114 N.C. 804; *S. v. Jones,* 118 N.C. 1239; *S. v. McLean,* 121 N.C. 595; *S. v. R.R.,* 122 N.C. 1061; *S. v. McDonald,* 133 N.C. 684; *S. v. Morgan,* 136 N.C. 630; *S. v Powell,* 141 N.C. 782; *Smith v. Moore,* 149 N.C. 193; *Sanford v. Eubanks,* 152 N.C. 700; *Smathers v. Hotel Co.,* 167 N.C. 474; *S. v. Sykes,* 180 N.C. 681; *S. v. Jessup,* 181 N.C. 550; *S. v. Falkner,* 182 N.C. 796; *S. v. Lattimore,* 201 N.C. 34.

(609)

STATE v. JOHN W. PAYNE.

Criminal Law—Judge's Charge—Insanity.

1. To establish an offence the state must prove an essential element beyond a reasonable doubt.
2. But where proof is offered in justification, etc., it is only necessary the jury should be *satisfied* that the matter is true.
3. Therefore the plea of insanity must be established to the satisfaction of the jury. And although it is error in the court to charge that the burden is upon the defendant to prove insanity by a preponderance of evidence, yet as the case shows it was not prejudicial to the defendant, a *venire de novo* will not be awarded.

INDICTMENT for stealing a horse, tried at Spring Term, 1882, of BUNCOMBE Superior Court, before *Gilliam, J.*

The mare alleged to have been stolen was put in the stable of the prosecutor on the night of Saturday, the 15th of January, 1882. The defendant was that evening in the neighborhood within three miles of the house of the prosecutor, and on the next day at 10 o'clock he was seen alone riding the mare bare-back in the county of McDowell, forty miles distant from the house of prosecutor, offering to sell her, and when pursued left the mare and fled on foot.

The defendant offered evidence tending to prove that he was of unsound mind, and insisted by his counsel that if the act of felonious taking was proved, that he was not criminally responsible, and asked the court so to charge. The court charged the jury that in absence of proof to the contrary every man was presumed to have that degree of capacity to be responsible for his acts, civil and criminal, and that the burden was upon the defendant to show by a preponderance of evidence that his was such a state of mental weakness or mental disease, that he did not know the nature and quality of the act, (610) and that it was wrong.

The defendant excepted to the charge, and appealed from the judgment pronounced upon the verdict against him.

Attorney General, for the State.
Mr. J. H. Merrimon, for defendant.

ASHE, J. The error assigned consists in charging that the burden was upon the defendant to show by a *preponderance* of evidence that his was such a state of mental weakness or mental disease that he did not know the nature and quality of the act, and that it was wrong.

If his honor, instead of charging the jury that the defendant must prove his defence in excuse of the crime charged, by a preponderance of evidence, had told them he must prove it to the *satisfaction* of the jury, his charge would have been in conformity to the most approved forms. *State v. Haywood,* 61 N. C., 376. His Honor does not seem to have had his attention directed to the distinction between proof required to establish an offence, and that offered in justification, excuse, or mitigation. In the former case, the state is required to prove an essential element which must be established beyond a reasonable doubt; in the latter, it is only necessary that the jury should be *satisfied* that the matter in mitigation, justification, or excuse, is true. The doctrine of reasonable doubt never applies to the condemnation of a prisoner, but to his acquittal.

In *State v. Ellick*, 60 N. C., 450, which was an indictment for murder, PEARSON, C. J., said "the principle in which the doctrine of reasonable doubt as to the fact of homicide is grounded, is, that in *favor of life;* the fact that the *state* is required to establish must be proved beyond a reasonable doubt. It certainly would not be in favor of life to apply this doctrine to matter of mitigation, which the prisoner is required to establish. Hence in regard (611) to that, the rule is, the jury must be satisfied by the testimony that the matter offered in mitigation is true."

It is proper to state that his Honor's charge is fully sustained by the case of *Commonwealth v. York,* 9 Metcalf, 93, where it was held that "when there was any evidence tending to show excuse or mitigation, it is for the jury to draw the proper inferences of fact from the whole evidence, and to decide the fact, on which the excuse or extenuation depends, according to the preponderance of evidence." But in *State v. Willis,* 63 N. C., 26, Judge BATTLE, speaking for the court, said: "We prefer to stand *super antiquas vias,* and to adhere to the rules laid down in the *State v. Ellick,* above referred to. In that case, the erroneous statement which we have inadvertently made in the *State v. Peter Johnson,* that it was incumbent on the prisoner to establish the matters of excuse or extenuation, beyond a reasonable doubt, is corrected. In it, is also corrected what we consider as erroneous, in the decision of the *Commonwealth v. York,* that matters of excuse or extenuation which the prisoner is to prove must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury."

His Honor's charge was certainly much more favorable to the defendant than if he had followed the rule laid down by Judge BATTLE, for evidence might be submitted to a jury when there is a preponderance in favor of one party, and yet fail to satisfy the jury. In such a case the jury would not be justified in finding a verdict in favor of him in whose favor the weight of evidence is found.

But here, the state does not appeal. It makes no complaint. It is the appeal of the defendant. He has not been prejudiced by the charge, and though there may be error "when the error com-
(612) plained of in the judge's charge is in no degree prejudicial to the defendant," it is held to be no ground for a *venire de novo. State v. Frank,* 50 N. C., 384.

Upon this view of the case, we must hold there is no error. Let this be certified to the superior court of Buncombe that further proceedings may be had according to law.

No error. Affirmed.

Cited: S. v. Potts, 100 N.C. 465; *Harding v. Long,* 103 N.C. 6; *S. v. Davis,* 109 N.C. 784; *S. v. Barringer,* 114 N.C. 841; *S. v. Hancock,* 151 N.C. 701; *S. v. Jones,* 191 N.C. 759; *S. v. Bracy,* 215 N.C. 257; *S. v. Cureton,* 218 N.C. 495; *S. v. Harris,* 223 N.C. 703.

STATE v. HENRY POTEET.

Retailing—Prohibition Act.

1. Where one received sundry drinks of spirituous liquor in payment of a certain sum, the seller to have credit for each drink, and so *toties quoties* until the debt was satisfied; *Held* to be in violation of the statute against retailing without license.
2. The "prohibition act" of 1881, ch. 319, being submitted as a whole to the popular vote and defeated, has never been in force. Nor has section 31, chapter 116 of the act of 1881 any application to this case.

INDICTMENT tried at Spring Term, 1882, of BURKE Superior Court, before *Eure, J.*

The defendant was charged with selling spirituous liquor by a measure less than a quart in violation of the act of 1874-75, ch. 39.

The case was submitted to a jury, and the only evidence offered before them was the testimony of Laban Shufing, who testified that the defendant owed him one dollar and twenty-five cents; that about a year before the trial, he went to defendant to buy (613) some whiskey, and defendant told him, he could not sell less than a quart, but that he (the witness) might go to the barrel and draw any time he pleased, until he was paid the one dollar and twenty-five cents; that he took the glass and drew him a drink then, and when he wanted a drink, for two or three weeks, he would go and draw his drink from the barrel until he considered he was paid the one dollar and twenty-five cents, and he received the drinks in payment of the said amount; and he and the defendant had no other settlement.

The court charged the jury that if the transaction between the defendant and the witness was as detailed by the witness, and the drinks of whiskey were received in payment of one dollar and twenty-five cents, the defendant was guilty.

To this charge the defendant excepted, and then asked the court to charge the jury, that the act of the legislature under which the defendant was indicted had been repealed by section 31, chapter 116, of the acts of 1881, and by the "prohibition act" of 1881, ch. 319.

The jury found a verdict of guilty, and the defendant appealed from the judgment pronounced.

Attorney General, for the State.
Mr. S. J. Ervin, for defendant.

ASHE, J. The first exception taken by the defendant to the charge of the court, was, that according to the evidence there may or may not have been a sale, and that only leaving the credibility of the witness to the jury was error. We cannot give our assent to this position. The construction of a written contract is purely a matter of law, in all cases where the meaning and intention of the parties are to be collected from the instrument itself, but if the contract be
(614) verbal and the parties dispute about the terms, or the terms are obscure, equivocal or uncertain, it is for the jury to find not only the terms but their meaning; but where there is no dispute about terms and they are precise and explicit, it is as much a question of law, as the construction of a written contract. *Sizemore v. Morrow,* 28 N. C., 54; *Festerman v. Parker,* 32 N. C., 474; *Young v. Jeffreys,* 20 N. C., 357.

There is no dispute about the facts of this case. There was nothing to be left to the jury but the credibility of the witness. Whether there was a sale of the whiskey by the small measure was a question for the court, and we think the ruling of the court was correct.

The instruction given the jury by the court is fully sustained by the decision of this court in *State v. Kirkham,* 23 N. C., 384, the facts of which were, that the defendant was applied to by the prosecutor to purchase some spirituous liquor; the defendant told him he could not sell less than a quart; the prosecutor agreed to purchase a quart provided the defendant would permit him to take it in small quantities, as he might want it, until the quart was taken, to which defendant agreed. During that day the prosecutor took three half pints, and that some twelve months or more thereafter he got the other half pint and paid for the quart. It was held that this was a violation of the act of the legislature, prohibiting the sale of spirits by the small measure without a license.

Our case is distinguishable from the case of *State v. Bell,* 47 N. C., 337, and *State v. Simmons,* 66 N. C., 622. In the former, there was a sale of a quart of spirituous liquor, under an agreement that the seller was to retain it in a *separate vessel* and the buyer to have access to it when he pleased, under which agreement the buyer drank the whole at various times; and in the latter, the *contract was for a gallon of spirits*—a portion less than a quart was delivered at
(615) the time of the sale, and afterwards three quarts were received, and the money paid, and subsequently the remainder of the gallon. In both cases, it was held that it was no violation of the statute. In the one case the liquor is set apart in a separate vessel, and in both cases there was a contract for a quantity not less than a quart.

But in our case there was no contract for any specific quantity. The buyer was to have it by the drink, and the defendant was to have a credit for each drink, and so *toties quoties* until the debt was satisfied. That is the manifest meaning of the contract, and we are unable to see the distinction between such an arrangement and the receipt of the money by the defendant for each drink.

The other exception of the defendant to the refusal of his Honor to charge the jury, that the statute under which the defendant was indicted was repealed by the act of 1881 called the "prohibition act," and by section 31, chapter 116 of the act of 1881, cannot be sustained.

We are of the opinion the act of 1881, ch. 319, is not and never has been in force, and therefore cannot have the effect contended for, of repealing any former legislation on the subject of retailing spirituous liquors. The act was submitted as a whole to the popular vote and defeated by a majority against its ratification. We are aware the opinion has been expressed by some of the legal profession in the state, that the penalties prescribed in the act alone were defeated, and all the other portions of the act went into operation on the 1st of October, 1881, and by implication repealed the former legislation on the subject of selling and manufacturing spirituous liquors, repugnant to, or inconsistent with its provisions.

But such a construction can only be given to the act by attributing to the legislature the most egregious folly of enacting a law for the promotion of what many persons regarded as a great moral reform, and at the same time incorporating into it a provision (616) that might prove destructive of the very securities which the state has provided by the existing law for the regulation of the traffic in spirits. We have the law forbidding the sale of spirits by the small measure, under which this indictment is preferred. He who is convicted of a violation of its provisions is liable to be punished by fine or imprisonment, or both, at the discretion of the court. The legislature passed the act of 1881 imposing much greater restrictions upon the traffic in spirituous liquors than theretofore existed, and provided very severe penalties for the violation of its provisions. Its policy and purpose were to impose and enforce additional restrictions upon the manufacture and sale of the article. If by the adverse vote on its ratification only the penalties are rejected, and the remaining provisions of the act are in force, and it has the effect of repealing the statute under which this indictment was brought, then he who chooses to do so may sell spirituous liquor *ad libitum*, and there is no law to punish him—and this by virtue of a statute professing to establish prohibition.

As to the other branch of this exception, that the act of 1881, ch. 116, sec. 31 repeals section 84, Bat. Rev., ch. 32, as amended by the act of 1874, ch. 39, there is nothing in it. The section 31 has reference to a definite and distinct offence, and has no application.

There is no error. Let this be certified to the court below that the case may be proceeded with according to law.

No error. Affirmed.

Cited: S. v. Kittelle, 110 N.C. 572; *S. v. Holder,* 133 N.C. 713; *S. v. Colonial Club,* 154 N.C. 182.

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(617)

STATE v. R. L. CROUSE.

Proceeding in Bastardy—Evidence—Collateral Matter.

1. The act of 1879, ch. 116, in reference to proceedings in bastardy, repeals only so much of the former law as gave the magistrate the right to initiate the same upon his own knowledge or information, and leaves it optional with the mother whether she will institute proceedings against the father, even before the birth of the child. But if the child after its birth is likely to become a county charge, proceedings may be taken by a county commissioner.
2. An issue of bastardy being a civil suit, either party has the right of appeal, and no notice thereof is necessary where the adverse party is in court. Act 1879, ch. 92, secs. 6, 8.
3. The party eliciting evidence on cross-examination, which is collateral and not material to the issue, is bound by the answer of the witness.

PROCEEDING in bastardy tried at Fall Term, 1881, of GASTON Superior Court, before *Avery, J.*

Verdict for the state, judgment, appeal by the defendant.

Attorney General, for the State.

Messrs. Schenck & Cobb, for the defendant.

ASHE, J. This proceeding was begun before a magistrate, who upon the examination of A. J. Pasour, who swore that she was with child, that the child when born will be a bastard and may be chargeable upon the county, and that the defendant did beget the said child, issued a warrant against the defendant, and upon his appearance postponed the investigation until the birth of the child, when the case was tried before the said magistrate and the defendant acquitted. From the

judgment the said Pasour appealed to the superior court; and in that court there were numerous exceptions taken by the defendant.

Before the case was submitted to the jury, he moved to dis- (618) miss the proceeding:

1. Because the warrant was issued before the child was born.

2. Because the prosecutrix had no right of appeal to the superior court, and

3. Because there was no notice of appeal in the papers.

The first exception involves the question of jurisdiction, and is founded upon the construction which the defendant's counsel has given to the act of 1879, ch. 116; but it is an improper construction of the statute. It provides "that no justice of the peace shall issue any warrant in bastardy ceases except on the voluntary affidavit of the mother of the child, or the affidavit of one of the board of county commissioners that said bastard child is a pauper and about to become chargeable to the county;" and that "all laws and clauses of laws in conflict with this statute are hereby repealed."

Under the law as provided in Battle's Revisal, ch. 9, sec. 1, any justice of the peace upon his own knowledge, or information made to him, that any single woman within his county was big with child or had been delivered of a child or children, might cause her to be brought before him to be examined on oath respecting the father, and if she should accuse any man of being the father, the justice might issue a warrant against him to answer the charge.

The act of 1879 was intended especially to repeal so much of that section as gave to the justice the right to initiate proceedings of this kind, but to leave it entirely to the option of the woman whether she would institute proceedings against the father; unless after the birth of the child it should appear that the child is a pauper, or was likely to become a charge to the county, and in that case proceedings may be taken at the instance of the commissioners of the county. This is the only alteration of the law with regard to bastardy, effected by the act of 1879, and all we think that was intended to be (619) effected. If the woman sees proper to do so, she may now, as heretofore, institute proceedings against the father before the birth of the child. There is nothing in the act of 1879 to change the law in this respect.

The use of the word *mother* in that act, while that of *woman* is used in all previous acts in relation to proceedings in bastardy, possibly led the defendant's counsel into an erroneous construction of the act. He has probably taken the word "mother" as used in common parlance to mean a woman who has borne a child, but in legal intendment she is as much a mother during the period of gestation as after

the birth of the child. She is recognized by the law and called mother whenever she has been mentioned in those cases affecting the rights of her unborn child—as for instance, an infant *in ventre sa mere,* or in the *mother's* womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or the surrender of a copyhold estate, or a guardian appointed to it. 1 Blk. Com., 130. "Every legitimate infant *in ventre sa mere* is considered as born for all beneficial purposes." Co. Litt., 36. And in *Musgrave v. Parry,* 2 Vernon, 710, it is held that a *mother* may justify detaining writings on behalf of a child *in ventre sa mere.* The person who begets the child, throughout the chapter on bastardy, (Bat. Rev., ch. 9,) is called *father* even before its birth; and if he who begets the child is styled father even before its birth, surely she upon whom it is begotten is not misnamed by the appellation of *mother.*

The second and third exceptions were properly overruled. By the second section of the act of 1879, ch. 92, exclusive original jurisdiction is given to justices of the peace, "of all bastardy proceedings and issues arising thereunder." And it has been repeatedly dicided by this court, that an issue of bastardy is a civil suit. *State v. McIn-*
(620) *tosh,* 64 N. C., 607; *State v. Pate,* 44 N. C., 244. And the right of appeal to the superior court is given to the party against whom judgment is rendered in any civil action in a justice's court, by the act of 1877, ch. 251, sec. 6; and by section 8 of the same act, it is provided that no notice of appeal is necessary when the adverse party is present "at the time of the motion for appeal." *Richardson v. Debnam,* 75 N. C., 390.

The next exception taken by the defendant is to the ruling of the judge upon the rejection of evidence. After the case was put to the jury, the solicitor offered in evidence the examination of the woman taken before the magistrate, and the defendant objected on the ground that the magistrate had no right to take her examination before the child was born. This objection has already been disposed of by the opinion we have expressed upon the first exception.

The prosecutrix, who was introduced as a witness for the state, swore that the defendant was the father of the child, and that it was begotten between the second and third weeks of July, 1880, and was born on the first of April, 1881. After the defendant was examined in his own behalf and had contradicted the testimony of the prosecutrix, one Miller was put on the stand and testified that he had had connection with her on the 30th of June, 1880, and the defendant's counsel then proposed to prove by him that he had connection with her at various times before the 30th of June, 1880, in order to contradict her testimony that she had not had connection with the wit-

ness *at any other time,* but the solicitor objected on the ground, the testimony the defendant proposed to contradict was not material to the issue, and as to that the defendant was bound by her answer. The objection was sustained, and properly so, upon the ground assigned by the solicitor. *Clark v. Clark,* 65 N. C., 655.

There is no error. Let this be certified, etc.

No error. Affirmed.

Cited: S. v. Bailey, 88 N.C. 701; *S. v. Jones,* 91 N.C. 631; *S. v. Burton,* 113 N.C. 665; *S. v. Ballard,* 122 N.C. 1027, 1030; *S. v. Liles,* 134 N.C. 737; *S. v. Addington,* 143 N.C. 688.

(621)

STATE v. SAMUEL MOTT.

Transfer of State Case from Inferior to Superior Court.

The transfer of a case from an inferior or superior court to the next succeeding term of either court, in pursuance of the provisions of the act of 1879, ch. 302, for the speedy trial of criminals, gives jurisdiction to the court to which it is transferred—to try all such offences as are cognizable in the inferior court; and the entry of a receipt of the clerk of one court to the clerk of the other, for the papers, is merely directory. Nor is it error to transfer the trial of one of several defendants, who was imprisoned by reason of his inability to give bond for his appearance, to the next succeeding court.

INDICTMENT for larceny tried at Spring Term, 1881, of WAYNE Superior Court, before *Graves, J.*

This defendant and two others were indicted for larceny at March Term, 1881, of the inferior court of Wayne County. At that term the cause was continued as to all three, and thereupon two of them gave bail for their appearance at the next term of that court, but the defendant not being able to do so, was committed to jail to await his trial, and there remained until the next ensuing term of the superior court—that being the next court held in the county. The same person being clerk of both courts, all the papers in the cause were transferred by him to the superior court, without however the entry of a formal receipt therefor, from himself as clerk of that court, upon the docket of the inferior court, but only of a minute in the words, "Transferred to the superior court." At the said term of the superior court, the defendant was put upon trial and convicted by the jury.

A motion was then made in arrest of judgment, upon the ground that the superior court had no jurisdiction of the cause, inasmuch as the clerk had failed to enter a receipt for the papers upon the docket
(622) of the inferior court, as required to do by the act of 1879, ch. 302; and further, for that said act did not contemplate the transfer of the cause as to one defendant when there were others in the same indictment, as to whom the cause remained in the inferior court.

His Honor being of opinion that the transfer as made was a sufficient compliance with the requirements of the statute, and that the entry made upon the docket of the inferior court was substantially a receipt, as the same person was clerk of both courts, overruled the motion in arrest, and proceeded to judgment, and thereupon the defendant appealed.

Attorney General, for the State.
No counsel for defendant.

RUFFIN, J. In our opinion his Honor took the correct view of the case. The act of 1879, to which reference is had in the statement of the case, provides that in those counties in which inferior courts may be established, those courts and the superior courts shall alike have power to try all causes coming within the limited jurisdiction of the inferior courts, whether returned to one or the other court, and directs that whenever any case shall be left untried in either court, and the party accused shall be confined in jail, it shall be the duty of the clerk of the court in which it may be pending, to transfer it to the next court, of either kind, that may be held in the county, and that the court to which it is so transferred shall proceed to try it, as if it had there originated; and further, it provides "that in such cases the handing over of the papers by the clerk of one court to the clerk of the other, where the cause is to be tried, and the docketing of the cause in the same, with the receipt of the latter on the docket of the former, shall be deemed a sufficient transfer of the cause from one court to the other."

(623) The purpose of the statute, as may be clearly seen from its wording, is two-fold: First, to secure to the party accused, when by reason of his poverty, or other cause, he may be actually imprisoned, a speedy trial of the charge against him; and secondly, to save to the county, as far as possible, the expense incident to his confinement. And it would be strange if the courts should permit its policy, thus humane and economical, to be defeated by a mere omission on the part of an officer, to note upon his docket a circumstance, which could

in no way, affect the rights of the accused or the powers of the court. For, it is to be observed that the entry is required to be made upon the docket of that court from which the cause is removed, and this in order that the record may disclose what disposition was made of it. As to the court to which the removal is made, all that is needed to give it jurisdiction is that the papers should be placed upon its files, and the cause stated upon its docket. Very clearly then, the provision of the statute, as to the entry of the receipt of the one clerk to the other, is merely directory, and its omission altogether could *not* be taken advantage of by the accused, and much less when it was substantially complied with, as in this case.

The statute is a remedial one, partially, as we have seen, for the benefit of the accused, and is therefore to be liberally interpreted; and we can conceive of no good reason why one defendant, so circumstanced as to be within the mischief, should be deprived of its benefit merely because his co-defendants were more fortunate than himself in being able to escape confinement.

There is no error. Let this be certified to the superior court of Wayne County to the end that the cause may be proceeded with according to law.

No error. Affirmed.

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(624)

STATE v. GEORGE WATSON.

Quashing Indictment—Plea in Abatement—Apt Time.

A plea in abatement to an indictment, for an alleged disqualification of the grand jurors who found the bill, (here, non-payment of taxes for preceding year,) should be allowed if filed in apt time, that is, at the time of arraignment before plea of not guilty.

INDICTMENT for larceny tried at Fall Term, 1881, of RICHMOND Superior Court, before *Graves, J.*

The indictment was found by the grand jury of Anson County at Spring Term, 1880, of the superior court for that county, against the defendant John Dulton and others. A *capias* was issued for the defendant returnable to Fall Term, 1880, of said court, at which court the cause was continued upon the affidavit of Henry Beverly, one of the co-defendants, to Spring Term, 1881, at which term the defendant George Watson filed a plea in abatement to the indictment, founded upon an alleged defect in the organization of the grand jury, by whom

the bill of indictment was presented, to wit: that two of the grand jurors were incompetent to serve as such, for the reason that they had not paid their taxes for the year preceding the term of the court at which said bill of indictment was found. Upon this plea the court found the facts as follows: The bill was found at Spring Term, 1880, and at Fall Term, 1880, the defendant was in court and ready for trial, but the case was continued on the application of his co-defendant Beverly. The judge declined to try Watson alone at Fall Term, 1880, and continued the case as to all the defendants.

On these facts the court declined to quash the bill on this plea, and the defendant excepted.

(625) The defendant then pleaded not guilty, but the verdict was set aside and a new trial granted. A severance of the defendants was then ordered by the court and the defendant was allowed to be tried apart from the other defendants. His cause was then removed upon his affidavit to the county of Richmond, where at Fall Term, 1881, he was brought to trial, and found guilty. Judgment, appeal by defendant.

Attorney General, for the State.
Messrs. Burwell & Walker, for defendant.

ASHE, J. The only exception taken on the trial was to the ruling of his Honor in admitting certain evidence which was objected to by the defendant, but we think it needless to consider it, as we are of the opinion that an error was committed in declining to entertain the plea of abatement.

Every defendant has the right before he is put to answer a charge of the state against him, to require that the accusation should be preferred by a bill of indictment found by a grand jury composed of men qualified to serve, as prescribed by law, and he is at liberty to avail himself of the disqualification of any one or more of them when or before he is called upon to plead. *State v. Smith,* 80 N. C., 410.

The non-payment of taxes for the year preceding the term of the court when a bill of indictment is found, has been held to disqualify a grand juror, and a defendant may avail himself of such a disqualification by a plea in abatement if filed in *apt time. State v. Griffice,* 74 N. C., 316. What is meant by *apt time* is the *arraignment* of the defendant. *State v. Griffice, supra; State v. Haywood,* 73 N. C., 437; *State v. Seaborn,* 15 N. C., 305; *State v. Baldwin,* 80 N. C., 390.

In these, and other cases we might cite, the time limited for filing a plea in abatement is the arraignment, and the "arraignment is nothing but the calling of the offender to the bar of the court to

answer the matter charged against him by indictment or ap- (626) peal." 2 Hale P. C., 216; 4 Black., 321. In this case the defendant was not called upon to plead until the Spring Term, 1881, when he filed his plea in abatement. Archbold (Crim. Plead., p. 73,) lays it down, that where the defendant has any special matter to plead in abatement, or in bar, or if the indictment be demurrable, he should plead it, or demur at the time of arraignment before the plea of not guilty. This the defendant has done, and we are of the opinion his plea should have been entertained, and there was error in the court declining to do so.

The judgment of the court below must therefore be reversed and the verdict set aside and the case remanded that the truth of the matter set forth in the defendant's plea may be inquired of.

Error. Reversed.

Cited: S. v. Carland, 90 N.C. 673; *S. v. Haywood,* 94 N.C. 850; *S. v. Potts,* 100 N.C. 460; *S. v. Gardner,* 104 N.C. 741; *S. v. Sharp,* 110 N.C. 605; *S. v. Paramore,* 146 N.C. 606; *S. v. Mallard,* 184 N.C. 671; *S. v. Oliver,* 186 N.C. 330; *S. v. Barkley,* 198 N.C. 351.

STATE v. F. H. WATSON.

Removal of Division Fence, Not Indictable.

The removal of a fence dividing the fields of the defendant and the prosecutor, is not indictable under the statute (Bat. Rev., ch. 32, sec. 93), where the fence is altogether on the land of the defendant.

INDICTMENT for a misdemeanor tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The defendant was indicted for removing a fence contrary to the statute. Bat. Rev., ch. 32, sec. 93. The jury returned a special verdict as follows: On the 27th of March, 1881, the defendant without the consent of the prosecutor moved a certain fence, dividing (627) the cultivated field of the prosecutor from the field of the defendant and his brother. The said fence was established four years ago by the prosecutor and one Montague (who has since conveyed his land to the defendant and his said brother) as a division fence between them, but was located altogether on the land of said Montague, since conveyed as aforesaid to the defendant and his brother, and that only two months and nine days' notice was given to the prosecutor of the

defendant's purpose to move the fence. If upon the foregoing facts, the court shall be of opinion that the defendant is guilty, then the jury find him guilty; and if otherwise, they find him not guilty. The judge being of opinion in favor of the defendant, gave judgment accordingly, and the solicitor for the state appealed.

Attorney General, for the State.
Messrs. A. M. Lewis & Son, for defendant.

RUFFIN, J. It being ascertained by the verdict that the fence, the removal of which gives rise to this prosecution, was altogether upon the defendant's land, the case falls within the decisions made in *State v. Mason*, 35 N. C., 341, and *State v. Williams*, 44 N. C., 197. In both of those cases, the indictment proceeded under this same statute, and the construction given to it by the court, is, that it was not intended to embrace a case of destruction of property by the owner thereof; but that to bring a case within it, the party accused must be shown to have been guilty of an actual trespass upon the property of another. We cannot see that the case is at all varied by the fact, that the fence was intended to be a dividing one between the fields of the defendant and the prosecutor. As found by the jury, it was built upon the land which subsequently became the property of the defendant, and was in his actual possession; and while he may (628) have violated another statute (Bat. Rev., ch. 48, secs. 9, 10,) so as to render him civilly liable, he cannot be proceeded against under an indictment.

No error. Affirmed.

Cited: S. v. Reynolds, 95 N.C. 618; *S. v. Howell*, 107 N.C. 840; *S. v. Jones*, 129 N.C. 509.

STATE v. O. T. ROBINSON.

Disorderly House—Evidence—Trial.

1. On trial of an indictment for keeping a disorderly house, it is sufficient to warrant a conviction to prove that the defendant kept a shop on a public highway, at which were seen drinking and disorderly crowds, in the morning and at night, participated in and encouraged by the defendant himself, whether few or many are proved to have been thereby in fact disturbed.
2. In such case, proof that the female members of a witness' family were not permitted, on account of the character of the house, to pass by it on their

way to a Sunday school, was properly left to the jury as some evidence of annoyance.

3. On cross-examination of a witness, at great length, to show his bias against the defendant, in that, he reported a certain violation of the criminal law to the state solicitor, the judge said to counsel that the examination had been carried far enough, and that it was the duty of a good citizen to report crime when inquired of by the solicitor; *Held* that the remark was proper, and did not amount to an invasion of the province of the jury.

INDICTMENT for keeping disorderly house, tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Messrs. Argo & Wilder, for defendant.

SMITH, C. J. The indictment is for keeping a disorderly (629) house, and the exceptions apparent upon the record are to the admission of certain testimony offered to support the charge. These we proceed to consider.

1. A witness for the state who had frequently passed the defendant's shop in the early morning and late at night, and had seen there drinking and disorderly crowds, was asked whether the female members of his family were permitted to go along the road leading by the shop on their way to the Sunday school, on account of its character. The testimony on objection was received as some evidence of disturbance and annoyance.

The testimony is admitted solely to show the inconvenience to the family which prevented the use of a public road, passing by the house of the defendant. Thus restricted we see no just objection to its being heard by the jury. The witness spoke of the condition and character of the place from personal observation, and it was not improper to allow him to say what were the consequences to the other persons of his family.

2. Another witness had testified to the disorderly character of the house, and to his having come to the solicitor at the instance of another to report a case of retailing liquor without license, against the defendant, and had then mentioned the disorderly conduct of the defendant, and was cross-examined at great length upon these matters, in order to prove his ill-will and prejudice towards the accused, when his Honor remarked that the counsel had carried the examination in that direction far enough, and that it was the duty of a good citizen to report crime when inquired of by the solicitor. The exception is to the latter part of the remark, as violating the act of 1796.

We think the expression used was pertinent and proper, and correct in itself. It certainly becomes a law abiding citizen to convey, not to withhold, any information he may possess, when interrogated
(630) by the prosecuting officer of the state, and the act is not to his discredit. His activity in bringing about a prosecution may be inquired into to show the bias or ill-will of the witness, and this his Honor did not interfere with, until the examination had become needlessly protracted; and this was within the discretion of the court, when no right is denied and no material information withheld. We are able to see how the enunciation of a correct proposition, not calculated to mislead, can be deemed a judicial impropriety or an intimation to the jury of an opinion as to the weight of the evidence or their finding upon it. The judge does not sit upon the bench as a silent and passive spectator of what is going on, but to administer the law and guide the proceedings before him, and if such exceptions as this are entertained, it would greatly impair the judicial functions and the administration of justice.

3. The third exception may be dismissed with the remark that the testimony that the defendant had been seen in unruly and turbulent crowds, drunk, hallooing and noisy, as they came to and went from the house, was affirmative evidence of guilt. *State v. Thornton*, 44 N. C., 252.

After verdict a new trial was moved for the additional reason that according to the evidence, the offence had not been committed and the finding of the jury was against the evidence. If by this it be meant that the verdict is against the weight of the evidence, the suggestion cannot be entertained here, as the duty of determining the facts upon the proofs, and the sufficiency of the proofs, rest alone with the jury, and with the judge below in an application addressed to his discretion, to set the verdict aside.

If it be intended to say that there is no evidence in support of the charge, we have to say in answer that an instruction to this effect should have been asked while the case was before the jury. Not only was this not done, but the case states that no exception was
(631) taken to the charge. The defendant cannot therefore complain. But if it had been requested in time and refused, it would not be error. There was much evidence of the disorderly character of the house and of the defendant's own direct encouragement of it. It was on a public road, and it must be assumed that the disturbance to those who resided in the vicinity was also a disturbance to all orderly and good citizens passing along the road. It is no excuse for the defendant's conduct that his house disorderly maintained and in itself a public nuisance, did not in fact annoy or disturb a witness examined

as to its character. A house of this description by the side of a high-way is itself a nuisance and punishable by the law, and must be assumed to produce its natural consequences. In *State v. Wright,* 51 N. C., 25, it is held that a house although if disorderly kept in a retired place in the country and annoying to two families only, was not an indictable offence, becomes so, as remarks PEARSON, C. J., "if this disorder had been committed in a town where all the good people of the state had a right to be and to pass and repass, or *on or near a public high-way.*"

When therefore a house thus located is shown to have been continuously maintained as disorderly, whether few or many are proved to have been in fact disturbed, the offence is consummated. It cannot be necessary to summon numerous witnesses to prove personal annoyance to each, for when the illegal character of the house is established by sufficient proof, it becomes indictable, for the reason that no one has a right to keep a disorderly house when people passing may be disturbed, and some are disturbed.

There is no error. This will be vertified for judgment below.

No error Affirmed.

Cited: S. v. Wilson, 93 N.C. 609; *S. v. Calley,* 104 N.C. 860; *S. v. Jacobs,* 106 N.C. 696; *S. v. Howard,* 129 N.C. 661; *S. v. Baldwin,* 178 N.C. 690; *S. v. Hart,* 186 N.C. 601; *S. v. Shipman,* 202 N.C. 544; *S. v. Everhardt,* 203 N.C. 618; *S. v. Carter,* 233 N.C. 584.

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(632)

STATE v. WILLIAM GAINUS.

Presence of Grand Jury—Indictment for Assault with Intent.

1. The transcript of a record in the form used in this state, reciting the selection of a grand jury, etc., and that an indictment is presented in manner and form following, etc., is sufficient to show the presence of the grand jury when the presentment was made.
2. In an indictment for an assault with intent to murder, it is not necessary to state the instrument used by the assailant.

INDICTMENT for assualt with intent to kill, removed from Greene, and tried at Spring Term, 1881, of WAYNE Superior Court, before *Graves, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. William J. Clarke, for defendant.

RUFFIN, J. Of the many exceptions taken in the court below, two only were relied upon for the defendant in this court:

First: The transcript of the record in the case, after setting forth in the usual form that a superior court was holden for the county, the sheriff's return of the *venire*, and the election and impanelling of the grand jury, proceeds as follows: "It is presented in manner and form following, that is to say," following which is a copy of the indictment against the defendant. It is insisted that the transcript is fatally defective, in that, it omits to state that the grand jury were in court when the presentment was made. The most certain answer to the objection is the statement contained in the record itself. It is there specifically set out who composed the grand jury, and that *they present* the offence in manner and form as set forth in the indictment,
(633) and that upon *their presentment* to the court, a record of their finding was made—thus by an irresistible implication (and that too according to the form universally in use) signifying all which it is said it should contain.

Secondly: The offence charged in the indictment is, that the defendant "in and upon one Joseph Frazier, then and there being, feloniously and wilfully did make an assault, and the said Frazier then and there did beat, shoot, wound and ill-treat, with intent in so doing, then and there, feloniously, wilfully and of his malice aforethought to kill and murder the said Joseph Frazier," etc.; and it is insisted that this is also defective, in that, it omits to set forth the weapon used in making the assault, and the manner of its use; and for lack of such averments, a motion in arrest of judgment is made in this court. The indictment is in conformity to approved precedents, and has the sanction of the writers upon criminal pleading. In 2 Wharton Cr. Law, Sec. 1282, it is said that in an indictment for an assault with intent to commit an offence, the same particularity is not required as in indictments for the commission of offence itself. And as an illustration of the rule, it is further said, that in an indictment for an assault with intent to murder, it is not necessary to state the instrument used by the assailant; the means of effecting the criminal intent, and the circumstances evinced of the design, are considered to be matters of evidence to the jury, and not necessary to be incorporated in the indictment. To the same effect is 2 Archbold, 262, note; *State v. Dent*, 3 Gill. & John., 8; *Wall v. State*, 23 Ind., 150.

The principle upon which these authorities go, is, that the assault is *per se* indictable, and the intention being but a matter of aggrava-

tion need not be minutely detailed—a specific allegation thereof being sufficient; and from analogy, in the case of *Com. v. Rogers,* 5 Sergt. & R., 463, an indictment for an assault with intent to (634) rob, was held good, without specifying the property intended to be stolen.

No error. Affirmed.

Cited: S. v. Russell, 91 N.C. 625; *S. v. McNeill,* 93 N.C. 554; *S. v. Bordeaux,* 93 N.C. 563; *S. v. Weaver,* 104 N.C. 762.

STATE v. ROBERT BOYD.

Indictment—Shooting at Railroad Car.

An indictment for violating the act of 1877, ch. 4, in shooting or throwing a missile at a railroad car or locomotive, which fails to charge that the same was in actual motion or stopped for a temporary purpose, is defective.

INDICTMENT for a misdemeanor, tried at Fall Term, 1881, of VANCE Superior Court, before *Gudger, J.*

The defendant is indicted for violating the act of 1877, ch. 4—if any person shall cast, or throw, or shoot any stone, rock, bullet, shot, pellet, or other missile, at, against, or into any railroad car, locomotive or train, while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, with intent to injure said car or locomotive, or any person therein or thereon, the person so offending shall be guilty of a misdemeanor, etc.—and the bill charges that he "unlawfully and wilfully did cast, throw and shoot at, against and into a certain railroad car, the property of the Raleigh & Gaston railroad company, then and there being, a certain missile, to wit, a stone, with intent," etc., as alleged in one count to injure the said railroad car; and in the other, some person then in said railroad car. After conviction a motion was made in arrest of judgment, which being denied, and judgment pronounced, the defendant appealed.

Attorney General, for the State. (635)
No counsel for the defendant.

SMITH, C. J. We think the objection well taken to the sufficiency of the bill, and that it fails to charge the criminal act intended by the

statute which creates the offence. The manifest purpose of the enactment, as must be inferred from its structure, is to protect railroad trains, and the locomotives and cars which make them up, from wanton aggression and violence, and to secure the safety of persons upon them, while the trains are making their passage from one point to another upon the road, and are in actual use by the company. This is apparent from the qualifying words, "while in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose"—evidently contemplating the two conditions of the train during its passage over the track, when in actual motion or stopped for a temporary purpose during its progress.

The indictment is too general in its terms, and its allegations would be supported by proof that the injuring was done to a car not in use, and off the track, or even within the car-house. The statute does not make such an act (injurious to private property only and to be redressed by suit) a public offense, and subjecting the offender to punishment in the state's prison.

The defect in the charge is, that it does not specify the alleged violence as done to the car or locomotive of a train while in the course of running over the road, and either as then in actual motion or at temporary rest, and thus exclude cases not within the purview of the statute. The only indictment under it, which has been before us, alleged the car to be on the railroad track and in motion, when shot at by the accused. *State v. Hinson*, 82 N. C., 597.

There is error, and judgment must be arrested.

Error. Judgment arrested.

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(636)

STATE v. ALBERT WHITFORD.

Marriage—Effect of the Act of 1866.

The marriage act of 1866, ch. 40, validates a marriage celebrated between a man and woman at the time they were slaves, and makes the living together as man and wife after emancipation and up to the date of ratification of the act, evidence of the parties' consent. Nor can such marriage be avoided by a failure to have an acknowledgment of the same entered of record.

INDICTMENNT for bigamy, tried at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger, J.*

The evidence offered by the state and objected to by the defendant, was, that the defendant before emancipation was a slave of a Mr. Whitehurst; that Dinah Hancock was also a slave of a Mr. Hancock, and while so being slaves they went before a colored preacher, who was also a slave, and in the presence of a large crowd joined hands and the marriage ceremony was performed by said preacher. From that time, which was in the year 1857, they have cohabited and lived together as man and wife until the year 1880. It was further proved on the part of the state by the testimony of Alexander Bass, that he was a justice of the peace for Craven County; had known the defendant and Sylvia Bryant three or four years, and that on the 24th day of March, 1880, he married the defendant and Sylvia Bryant under a license issued to him by the register of deeds of Craven County. The license was produced and read before the jury.

The defendant requested the court to charge the jury:

1. That if the jury should find that no consent was given to marriage since ratification of the act of 1865-66, the defendant must be acquitted.

2. That if the jury should find that no consent was given to (637) marriage since the slaves were emancipated, the defendant must be acquitted.

The court declined to give these instructions, and charged the jury that if they should find from the evidence that the defendant and Dinah Hancock were married while they were slaves, according to the forms then prevailing, and after their emancipation continued to cohabit and live together as husband and wife, until this year, (1880) that would be a valid marriage between the defendant and Dinah, and if the defendant on the 24th day of March, 1880, was married to Sylvia Bryant, and Dinah Hancock was living at the time of said marriage to Sylvia, (as charged in the indictment) the defendant would be guilty.

The defendant excepted to the charge and the refusal of the court to give the instructions asked. There was a verdict of guilty, a new trial refused, and judgment pronounced, from which the defendant appealed.

Attorney General, for the State.

Mr. William W. Clark, for defendant.

ASHE, J. The correctness of the charge to the jury depends upon the question whether the marriage celebrated between the defendant and Dinah Hancock, while they were both slaves, was a valid marriage.

The indictment is preferred under the 5th section of the act of 1866, ch. 40, which reads: "That in all cases where man and woman, both or one of whom were lately slaves and are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married, as man and wife, at the time of the commencement of such cohabitation, although they may not have been married in due form of law."

And the act proceeds to require such persons to acknowledge
(638) the fact of such cohabitation before the clerk of the county court, or a justice of the peace, and the time of its commencement, and that an entry of the same shall be made in a book kept for the purpose, which entry shall be *prima facie* evidence of the allegations therein contained; and the 6th section makes the failure to have the acknowledgment recorded, in a specified time, a misdemeanor punishable at the discretion of the court.

The defendant contends that there was error in refusing to give the instructions asked, the substance of which is, that if the jury should find that no consent to the marriage was given, either since the emancipation or since the ratification of the act, the jury should acquit. It was intended by asking these instructions to raise the constitutional question, urged by the defendant, that the original marriage of slaves was void, for as slaves, they were incapable of making a contract, and marriage by our law is a civil contract; therefore, a marriage between such persons was void, and that while the legislature may render valid an act which is void on account of some formal defect, they have no power to validate a contract void for the want of consent. However this may be, as an abstract proposition, we do not think that question is presented by the facts of this case, and we therefore do not undertake to discuss, or decide it.

The evidence in the case, in our opinion, does not warrant the instructions asked. There was no evidence offered before the jury from which they would have been justified in drawing the conclusion, that no consent had been given to the marriage between the defendant and Dinah; but on the other hand, there was ample evidence, all that the law required, to establish the fact that consent had been given to the marriage, and upon the statement of facts as laid before the jury the charge of the judge was consistent with the law, as declared by the legislature and expounded by this court.

(639) The act makes the cohabitation and living together *as man and wife*, after emancipation, and continued up to the time of the ratification of the act, evidence of the consent; if so, surely the continuing cohabitation and living together in that relation, after ratification for several years, with a full knowledge of the existence of the

act and its purpose, must be held to be plenary evidence of a *consent* to the marriage.

In the case of *State v. Harris,* 63 N. C., 1, where the question arose as to the competency of a female witness who while a slave had cohabited with the defendant *as man and wife,* and after emancipation they had continued the relation and complied with all the requirements of the act, Mr. Justice READE, speaking for the court, said: "The substance of marriage, the *consent* of the parties, existing, it was as clearly within the power of the legislature to dispense with any particular formality, as it was to prescribe such. This neither made nor impaired the contract, but gave effect to the parties' *consent,* and recognized as a legal relation that which the parties had constituted a natural one. So that by force of original consent of the parties while they were slaves, renewed after they became free, and by the performance of what was required by the statute, they became to all intents and purposes man and wife."

This case differs from ours, in that, there was there an acknowledgment of record of the fact of cohabitation and its commencement, as required by the statute. But in a more recent decision of this court, it has been held that an entry of the acknowledgment is not essential to the consummation of the marriage, and that a marriage constituted by operation of the act, cannot be avoided by a failure to have the acknowledgment entered of record. *State v. Adams,* 65 N. C., 539.

This, in our opinion, is the only construction which can be legitimately given to the act, for it expressly declares that under certain circumstances of cohabitation, etc., *the parties shall be* (640) *deemed to have been lawfully married as man and wife at the time of the commencement of such cohabitation,* although they may not have been married in due form of law. The act then proceeds: And all persons whose cohabitation is hereby ratified into a state of marriage shall go before the clerk, etc., and acknowledge the fact of such cohabitation and the time of its commencement; and such entry shall be *prima facie* evidence of the allegations therein contained; and on failure to have the marriage recorded before the 1st of September, 1866, they shall be deemed guilty of a misdemeanor, and their failure for each month thereafter shall constitute a separate and distinct offence. According to the very words of the act, it is a duty to be performed after the cohabitation is ratified into a state of marriage, and the parties are deemed guilty of a misdemeanor if they fail to have their marriage recorded. The marriage was a thing complete before this duty was to be performed. The requirement of having an entry made of the fact of cohabitation and its commencement, was no doubt intended for the benefit of the issue of such marriages, as might have

been born after the commencement of the cohabitation, to perpetuate the evidence of their legitimacy.

There is no error. Let this be certified.

No error. Affirmed.

Cited: Long v. Barnes, 87 N.C. 332; *Baity v. Cranfill,* 91 N.C. 298; *Branch v. Walker,* 102 N.C. 37; *Jones v. Hoggard,* 108 N.C. 180; *S. v. Melton,* 120 N.C. 595; *Erwin v. Bailey,* 123 N.C. 635; *Bettis v. Avery,* 140 N.C. 186; *Forbes v. Burgess,* 158 N.C. 132; *Croom v. Whitehead,* 174 N.C. 309.

STATE v. BENJAMIN POWELL AND ANOTHER.

Appeal—Construction of Constitution—Prosecutor—Costs.

1. The clause of the constitution (Art. IV, sec. 27,) providing that in criminal cases in a justice's court, "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," is for the benefit only of the party accused.
2. Where a party charged with an offence before a court of competent jurisdiction has been tried and acquitted, the result is final, and no appeal is allowed the state to correct errors of the court below, except where judgment is given for the defendant upon demurrer, special verdict, motion to quash or in arrest of judgment.
3. But so much of a judgment as is personal to the prosecutor of record and taxes him with the costs, may be appealed from, as in such case the proceeding assumes the character of civil controversy.
4. Review of acts of assembly regulating appeals from justices' courts by SMITH, C. J., and their repugnancy to the constitution pointed out. Bat. Rev., ch. 33, secs. 114-124; Acts 1879, ch. 92; Acts 1881, ch. 210.

(641) INDICTMENT for assault and battery, tried at Fall Term, 1881, of ANSON Superior Court, before *Graves, J.*

The defendants, Powell and Edwards, were charged in a magistrate's warrant with committing an assault upon the person of the complainant, Henry Waddell. Upon the trial the defendants were acquitted, and the case dismissed at the costs of the prosecutor who thereupon appealed to the superior court. When the case was called in that court the defendants moved to dismiss the proceedings on the ground that it did not appear from the transcript of the justice that the prosecutor had authorized the justice to mark his name as prosecutor. The motion was overruled and the defendants excepted. The pleas of former

acquittal and not guilty were then entered. The issue as to the former was first tried, and it appeared that the same offence here charged was tried before the justice, who had exclusive jurisdiction of the same, and defendants acquitted. The judge told the jury that the question of former acquittal was one both of law and fact, and directed them to find against defendants. To this the defendants excepted, and insisted that having been once tried and acquitted before a court of competent jurisdiction, they could not be again held (642) to answer the same charge in an appellate court. The issue upon the plea of not guilty was then tried, and also found against the defendants, who appealed from the judgment pronounced.

Attorney General, for the State.
Messrs. Burwell & Walker, for defendants.

SMITH, C. J. To guard the liberty of the citizen against the exercise of oppressive power in the new state government about to be formed, the constitution of 1776 inserted a provision in the declaration of fundamental rights, that no freeman should "be put to answer *any criminal charge* but by indictment, presentment or impeachment, nor be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court," as heretofore used, secs. 8 and 9.

These sections are modified in the constitution of 1868, the first, so as to admit of the exception contained in an amendment added to the latter, in these words:

"The legislature may however provide other means of trial for petty misdemeanors *with the right of appeal.*" Sec. 13. In distributing the judicial power, section 27 of article 4 entitled "Judicial Department," confers upon justices of the peace, besides their restricted civil jurisdiction, the right to hear and determine "all criminal matters arising within their counties, when the punishment cannot exceed a fine of fifty dollars or imprisonment for one month," in place of which term, thirty days confinement has been, among recent changes in the organic law, substituted. The section also provides that when the power thus vested in these subordinate judicial officers shall be exercised, "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," securing to the accused the ancient right, of which, but for the appeal (643) he would be deprived, to have the question of his guilt passed upon and determined by a jury.

The two clauses contained in the bill or rights prefacing the original, and with the qualifications mentioned, reiterated in that prefac-

ing the constitution of 1868, are utterances for the protection and security of persons who may be charged with crime, and not for its more efficient suppression and more certain punishment of the affender; and when authority is conferred upon the legislature to commit to inferior officers the trial of *"petty misdemeanors"* with the subsequent restrictions upon the punishment to be awarded, and then only "with the right of appeal" to a court where the trial is to be *de novo* and before a jury, it must be understood that this restraint is imposed upon the legislature, and this declared right reserved for the benefit of the accused and for his security alone. The pre-existing law and practice recognized and enforced in numerous adjudications had settled the principle, that when a party charged with any offence before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the state to correct any error committed by the court, and this has been uniformly maintained since the adoption of the new constitution, as before. *State v. Jones,* 5 N. C., 257; *State v. Taylor,* 8 N. C., 462; *State v. Martin,* 10 N. C., 381; *State v. Credle,* 63 N. C., 506; *State v. Phillips,* 66 N. C., 646; *State v. West,* 71 N. C., 263; *State v. Armstrong,* 72 N. C., 193. The right of the state to appeal from erroneous rulings in the court below exists only where judgment is given for the defendant upon a demurrer to the bill, or upon a special verdict, or on a motion to quash or in arrest of judgment. *State v. Lane,* 78 N. C., 547; *State v. Swepson,* 82 N. C., 541; *State v. Moore,* 84 N. C., 724.

(644) It can scarcely be supposed that the framers of our present organic law intended so large a departure from a rule, established by so many decisions and so persistently enforced, in authorizing an appeal by "the party against whom judgment is given" and a jury trial in the appellate court upon the merits of a criminal proceeding before a justice, to include the state as a *party* to the trial, and give to each an equal right to have the cause re-heard. It is a more reasonable interpretation of provisions, obviously designed for the personal security of an accused person, to restrict the application of the term used to the accused party against whom the judgment may have been rendered, and is in harmony with the uniform previous course of judicial procedure in all the courts of the state.

But the general assembly, very soon after the reorganization of the government, passed an act intended to enumerate the offences, of which, by reason of the restraint imposed upon the punishment, a justice might take cognizance, and to prescribe the conditions upon which he should assume jurisdiction and proceed to a determination of the cause. His authority to exercise final jurisdiction in the premi-

ses was confined to cases originating in the voluntary movement of the "party injured by the offence and without collusion with the accused," which with other requisites were to be set out in a complaint made in writing and on oath, and proved before him at the trial. Under these conditions, and subject to his estimate of the gravity of the offence and the adequacy of the limited punishment he could impose, he was permitted to enter upon the trial without a jury unless the complainant or accused demand a jury trial, and then with a jury, to decide the issue of the "guilt or innocence of the accused." From the judgment rendered "either the accused or the complainant" is allowed an appeal to the superior court and "in all cases of appeal the trial shall be anew without prejudice from the former proceedings." Bat. Rev., ch. 33, secs. 114 to 124. This enactment applies only to prosecutions instituted by the aggrieved and injured party, and (645) proceeds upon the idea that he and the wrong-doer are the parties to the criminal action, and the same rights should be accorded to each.

But these essential incidents to the exercise by a justice of the criminal jurisdiction vested in him under the constitution, are swept away by later legislation which commits to his cognizance certain specific misdemeanors, and all others, where the punishment is prescribed within the limits of the constitution, and dispenses with the preliminaries referred to and necessary under the former law. Acts 1879, ch. 92; Acts 1881, ch. 210. The tenth section of the act of 1879 displaces section 124 in the act of 1869 allowing the appeal, and substitutes the following: "The party against whom such judgment shall be given may appeal to the superior court from the same, and the party injured may appeal if he shall be dissatisfied with the judgment, if he will authorize the justice to endorse his name upon the warrant as the *prosecutor*. When an appeal is taken the whole matter shall be heard anew in the superior court." This provision seems to contemplate the trial of a person charged with any of the criminal acts, previously mentioned, the prosecution of which is not required to begin with the voluntary action of the injured party, and so the latter is allowed to appeal only when he consents to appear as prosecutor, and the endorsement of his name as such upon the process. There would seem to be no necessity for this qualification of the right of appeal when, as in the preceding section, a party sues out a peace warrant for his personal protection against apprehended violence, since he is necessarily and from his relations to the subject matter of the proceeding, a prosecutor in such a case. If the allowance of the appeal when taken by the prosecutor from a decision or verdict of acquittal is

intended, upon a fair construction of the act, to have the ef-
(646) fect of removing the entire cause to the superior court and then subjecting the accused to a second trial *de novo,* as if there had been none before, we are confronted with the question of its consistency with the guaranties and provisions of the constitution, and those personal securities, which under the former organic law was so tenaciously held by the citizen and so constantly upheld and asserted by our predecessors. Reluctant as the court is, and ought to be, to pronounce an act of the general assembly passed with deliberation, void because of its repugnancy to the constitution, and which it will only so declare when the repugnancy is manifest and free from reasonable doubt, the predominant authority of the latter must be maintained when they are irreconcilable, and this we do not hesitate to say of the provision of the act in question upon the suggested interpretation of its intent and meaning. In our opinion an acquitted defendant cannot be again put upon trial for the same offence at the instance of the state, neither in the form of a second independent prosecution, nor of an appeal which attempts to avoid the results of a former trial in the same prosecution. In saying this, we do not dispute the efficacy of the appeal in removing for review so much of the adverse judgment as is personal to the prosecutor and taxes him with the payment of costs. To this extent the proceeding assumes the character of a civil controversy, and the legislation would not be obnoxious to the objections directed against a removal of the criminal charge, (after the accused has been found and adjudged not guilty,) which annuls the protection thus afforded and exposes the accused to another trial.

"*Nemo debet bis vexari pro una et eadem causa* is a principle of the common law, remarks SETTLE, J., in *State v. Credle, supra,* as well as of humanity." And BYNUM, J., declares in *State v. West,* already cited, that "when a defendant in a criminal action has once been tried and acquitted upon an indictment good in form, no appeal lies,
(647) even though the acquittal is in consequence of an erroneous charge of the judge upon the law." The recent case of *State v. Tyler,* 85 N. C., 569, is but a reässertion of the same principle.

There was therefore error in the refusal of the court to dismiss the appeal and in proceeding to put the defendants again on trial, for the court did not acquire jurisdiction in the premises to do so by the appeal.

The finding the defendants not guilty by the justice put an end to the prosecution, and what was subsequently done in putting the defendants a second time in peril was without warrant of law.

This will be certified for the purpose of having the cause finally disposed of in accordance with this opinion, and it is so adjudged.

Error. Reversed.

Cited: S. v. R.R., 89 N.C. 585; *S. v. Crook*, 91 N.C. 542; *S. v. Byrd*, 93 N.C. 628; *In re Deaton*, 105 N.C. 63; *S. v. Hamilton*, 106 N.C. 661; *S. v. Ostwalt*, 118 N.C. 1214; *S. v. Ivie*, 118 N.C. 1229; *S. v. Taylor*, 118 N.C. 1264; *S. v. Morgan*, 120 N.C. 564; *S. v. Whitley*, 123 N.C. 729; *S. v. Savery*, 126 N.C. 1088, 1093; *S. v. Butts*, 134 N.C. 608; *S. v. Bailey*, 162 N.C. 584; *S. v. Cole*, 180 N.C. 683; *S. v. Nichols*, 215 N.C. 81.

STATE v. MORRIS LOCKE.

Appeal—Certiorari—Discharge of Jury Before Verdict.

1. An appeal does not lie from the refusal to discharge a prisoner when a mistrial is ordered. The mode of procedure to have such a case renewed, is by a petition in due form for a writ of *certiorari*, setting forth the grounds of the application.
2. A jury were discharged before verdict, in the trial of a rape case, upon the following facts found by the court: Cause committed to jury on Monday of school week of term; jury kept together until half past ten o'clock Saturday night, when they came into court and were polled, each juror stating that it was impossible for the jury ever to agree; the court finding they could not agree, held it to be unnecessary to prolong the term of the court for the purpose of the trial, ordered a juror to be withdrawn and a mistrial entered, and the prisoner to be remanded to jail; *Held* no error.

INDICTMENT for rape tried at Fall Term, 1881, of ROWAN Supe- (648) rior Court, before *Eure, J.*

The prisoner was charged with rape committed upon an infant female under ten years of age, and was put upon his trial at said term. The jury being unable to agree upon a verdict were discharged, the presiding judge directing the following entry to be made of record: "This cause having been committed to the jury on Monday of the second week of the term, who were kept together constantly in consideration of the same until Saturday night of the same week, at the hour of ten and a half o'clock, at which time they come into court and are polled; and in reply to inquiries made by the court as to the possibility of their agreeing upon a verdict, each juror for himself declares, and all the jurors declare, that it is impossible for them ever to agree on a verdict. Upon the answers to these inquiries made by the court, the

court finds that the jury cannot agree to a verdict in this case, and that it is unnecessary to prolong the court for the purpose of this trial, and useless to keep the jury together longer in the consideration of a verdict. It is therefore ordered that a juror be withdrawn and a mistrial had, and that the prisoner be remanded to jail until the next term of this court." Thereupon the prisoner's counsel moved for his discharge, which being refused, he prayed an appeal.

In stating the case on appeal, his Honor says that he found the facts to be as set out in the record, and upon the facts as found, directed the mistrial to be entered.

Attorney General, for the State.

Mr. John S. Henderson, for prisoner.

RUFFIN, J. The prisoner's counsel seemed to be aware that the appeal could not be maintained, upon the ground that no appeal will lie from an interlocutory judgment in a criminal action, and (649) without insisting thereon asked for a rule upon the state to show cause why a writ of *certiorari* should not issue, relying upon the matter set out in the record as sufficient to support his motion.

We feel constrained both to dismiss the appeal and to deny the motion for a *certiorari*: The first, for the reason above suggested, that no appeal will lie in a criminal action except from a final judgment; and the latter, because the practice of this court is to grant writs of *certiorari* only when applied for by petition in due form, setting forth the grounds of the application. This, it was said in *Jefferson's case,* 66 N. C., 309, is the regular and orderly mode of proceeding, and that it should not be departed from except under peculiar circumstances.

But apart from any mere question of procedure, we are of opinion that the strictest requirements of the law, (as laid down in *State v. Honeycutt,* 74 N. C., 391; and *State v. McGimsey,* 80 N. C., 377), were all met and fully complied with in the care taken by his Honor to make the record and declare his finding thereon. Seeing nothing in the case that can possibly constitute a legal defence against the further prosecution of the prisoner, we dismiss his appeal, and overrule his motion for a *certiorari.*

As to the suggestion that his Honor found but the single fact of the inability of the jury to agree, it is unsupported by the statement of the case as prepared by his Honor. He distinctly states that he found all the facts set out in the record, and that acting upon those facts, as found, he directed the mistrial; and without any such express declaration, it would be so understood from the very manner of making up the record.

PER CURIAM. Appeal dismissed, certiorari refused.

Cited: S. v. Twiggs, 90 N.C. 687; *S. v. Dry*, 152 N.C. 814; *S. v. Tripp*, 168 N.C. 154; *Taylor v. Johnson*, 171 N.C. 85.

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(650)

STATE v. R. S. NASH.

Assault Upon Several Is an Assault Upon Each—Former Acquittal.

1. An indiscriminate assault upon several persons is an assault upon each individual.
2. To support the plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the *same offence*, both in law and in fact—an exact and complete identity of the two offences charged.

(MR. JUSTICE ASHE, dissenting.)

INDICTMENT for assault and battery tried at Fall Term, 1881, of RICHMOND Superior Court, before *Graves, J.*

The defendant was indicted for an assault and battery committed upon one Nathan Reynolds, and for his defence relied upon the plea of *former acquittal.* The jury returned a special verdict as follows: "That the defendant was indicted at the present term of this court for an assault on one Atlas Spivey, and upon that trial the state showed in evidence that on the 23rd day of December, 1879, the said Atlas Spivey and Nathan Reynolds, and some eighteen more persons, went to the defendant's house with guns, bells, horns, and tin pans, and marched around the house, and when about to leave fired off the guns; and that the defendant thereupon fired a gun at them and in direction of the crowd, twice, in rapid succession, and one shot struck the said Spivey; and that upon such trial the defendant was acquitted by the jury; and further, that the evidence in the present indictment is to the same acts of the defendant, and that the said Nathan Reynolds was stricken by a shot from the defendant's gun fired as aforesaid. If in law these facts amount to a (651) former acquittal, then the jury find in favor of the defendant; but if in law they do not amount to a former acquittal, then they find that he was not formerly acquitted."

His Honor, being of opinion with the defendant, rendered judgment accordingly, and the solicitor for the state appealed.

Attorney General, for the State.
Messrs. Burwell & Walker, for defendant.

RUFFIN, J. To support a plea of *former acquittal,* it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offence; *the same, both in fact and in law.* See note to 1st Bennett and Heard's Leading Crim. Cases, 522.

In the principal case of *Rex v. Vandercomb,* 516, there referred to, and which was argued, as stated by Mr. Justice BULLER, before all the judges of England, it was held, that unless the first indictment were such, as that the defendant might have been convicted upon it by proof of the facts contained in the second, then, an acquittal on the former can be no bar to a prosecution for the latter. In *State v. Jesse,* 20 N. C., 95, it was said by this court, in discussing the very point, that two offences may have several circumstances in common, and yet to constitute either some other circumstance is to be added; and it is the allegation on the record of this additional circumstance, peculiar to each, which constitutes them distinct crimes; and therefore it is not always sufficient to make a judgment on an indictment for one a bar to an indictment for the other, that the same evidence may be competent and material to both. The true test is as stated in *Rex v. Vandercomb*: Could the defendant have been convicted upon the first
(652) indictment upon proof of the facts, not as brought forward in evidence, but, *as alleged in the record of the second.*

Upon this principle it was, that the court of King's Bench held in *Rex v. Taylor,* 3 B. and C., 502, that if it appeared manifest to the court, *from the inspection of the two indictments,* that the offences charged could not be the same, the defendant could not by averment show them to be the same, *because that would be to contradict the record.*

Now to apply this principle to the present case: The first indictment was for an assault on one Spivey; could the defendant have possibly been convicted thereof upon proof of the averments contained in the record of the second, to wit, of an assault upon the prosecutor Reynolds?

A battery is violence done to the person of another, and though there be but a single act of violence committed, yet if its consequences affect two or more persons, there must be a corresponding number of distinct offences perpetrated. Accordingly it has been held that an acquittal on a charge of attempting to poison A, was no bar to an indictment for attempting to poison B, although on the same occasion and by the same act of preparation, because in such case, it was said,

there were two distinct offences. *People v. Warren,* 1 Parker C. C., 388. In like manner it was held in *State v. Standifer,* 5 Porter, 523, that if one commit an assault by one stroke upon two persons, a conviction or acquittal upon an indictment alleging the assault upon one, was no bar to a subsequent prosecution for the assault on the other. And still more to the purpose was the ruling of our own court in *State v. Merritt,* 61 N. C., 134, to the effect, that an indiscriminate assault upon several persons was an assault upon each and every one of them.

It is true that a decision to the contrary of this was rendered by the court of Vermont in *State v. Damon,* 2 Tyler, 390; but it is said in a note to Archbold's Criminal Pr. and Pl., 112, to be against the weight of authority and repugnant to reason, and by Bennett and Heard, 534, to be clearly not law. (653)

The decision in *State v. Jesse, supra,* has been twice approved by the court (*State v. Birmingham,* 44 N. C., 120, and *State v. Revels, Ib.,* 200,) and the principle upon which it proceeded is clearly asserted in many of the elementary writers on criminal law, (1 Chitty, 457; 2 East, P. C., 519; 1 Wharton, 505,) and as it seems to us is easily distinguished from the *State v. Town of Fayetteville,* 6 N. C., 371, where the conduct complained of was one of mere neglect, and the omitted duty of keeping the streets in repair was an entire one, not susceptible of division into parts, so that each may become the subject of a prosecution.

How can it be certainly known what motive induced the verdict of acquittal in the former trial? For aught that can be seen, the jury in that case may have wholly disbelieved the evidence as to Spivey's being stricken, or even as to his being one of the company fired upon. If so, then clearly the verdict should not stand in the way of a prosecution for the battery upon one who was present and who was actually injured. It is true the last verdict establishes the fact both of his presence and the injury done him, but in the case supposed, which are we to adopt—the former or the latter finding? No such difficulty can arise in the case of two prosecutions for the same identical act, for then the first verdict will conclude as to the truth of every matter necessary to support it, and will draw to it every intendment as well of law as of fact—a thing that cannot be done in favor of two contradictory verdicts.

The only safe rule is to stand by the decisions of our courts, and to hold that the plea of *former acquittal* cannot avail, unless there should be an exact and complete identity in the two offences charged.

Our conclusion therefore is that the plea relied on was not a bar to the pending prosecution against the defendant, and the state was entitled to judgment upon the special verdict. (654)

The judgment below is reversed, and this opinion will be certified.

ASHE, J., dissenting. After a careful consideration of the case, I find myself unable to concur with the majority of the court in the views expressed in the opinion of my brother RUFFIN.

The indictment charges the defendant with having destroyed the public peace by assaulting and beating one of its citizens.

It is not a question between the assailant and the injured party; so far as they are personally concerned, the injuries may be redressed by a civil action. But it is a question between the government and the citizen, and when the crime charged in the indictment against the defendant is for an assault and battery which was committed on another, at the same time and place, and with the same instrument and the same stroke or blow, the transaction is one and not divisible. It is one offence against the state, and the state cannot split the one crime and prosecute it in its parts; and therefore when the defendant has been tried and acquitted by a court of competent jurisdiction of the assault and battery on one, it may be pleaded in bar of a prosecution for the assault and battery upon the other.

The decisions on this subject I find to be contradictory, but I think the weight of the authorities support my conclusion. I am sustained in the position by the following:

In *State v. Lindsay,* 61 N. C., 468, this court held that where one was indicted for an assault and battery, and it was found that in a former indictment against him and others, the assault charged against him was given in evidence with other acts of like character, his conviction of the riot was a bar to the second prosecution.

(655) In *Wilson v. State,* 45 Tex., 76, it was decided that the stealing of different articles of property belonging to different persons, at the same time and place, is but *one offence* against the state, and that the accused cannot be convicted upon separate indictments, charging defendant with parts of one transaction as a direct offence. A conviction on one of the indictments bars a prosecution on the other.

To the same effect is *Addison v. State,* 3 Tex., (Court of App.,) 40; *Hudson v. State,* 9 Tex., (*ib.*) 151; *Jackson v. State,* 14 Ind., 327; *State v. Williams,* 10 Humph., 101; *Lorton v. State,* 7 Miss., 55.

In *State v. Egglisht,* 41 Iowa, 574, where the defendant had delivered at the same time and by the same act to the teller of a bank four forged checks, which purported to have been drawn by four different parties, it was held that this constituted but *one offence* of uttering forged checks, and that a conviction for uttering one of the checks was a bar to a conviction for uttering the others. In Indiana it has been

decided that where the same act results in the death of two or more, and the person committing the act is convicted or acquitted on a trial for the indictment for the murder of one, he cannot be indicted for the murder of the other, when the evidence offered on the last trial is the same and in no wise different from that employed on the trial of the former indictment, and the crimes charged in the two indictments are identical in all their parts, incidents and circumstances. *Clem v. State*, 42 Ind., 420.

The case more directly in point is that of the *State v. Damon*, 2 Tyler (Vermont), 390. The defendant was there indicted for an assault and battery upon one Miller and pleaded "former conviction" on an indictment for an assault and battery on one Doty, alleging that the wounding of each was by the same stroke and at the same time. The court said in its opinion: "It appears the defendant wounded two persons in the same affray, at the same time and with the same stroke. On a regular complaint made, he has (656) been convicted before a court of competent jurisdiction for assaulting, beating and wounding Frederick Miller, one of those persons. He stands here indicted for assaulting, beating and wounding Elias Doty, the other of those persons, and the defendant pleads in bar the former conviction which he alleges to be for the same offence. The only question is, whether the defendant has been already convicted of the offence charged in the indictment. Of this there can be no doubt, for it is apparent on the record, that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice RANDALL, were at the *same place and in the same affray*, and the wounds made by the same instrument and by the same stroke. This is not a question between either of the persons injured by the assault and battery and their assailants; redress has or may be obtained by them by private actions. But it is a question between the government and its subject, and the court are clearly of opinion that the indictment cannot be sustained."

But it is said, in the opinion of the majority of the court that that case is not authority, and has been so declared by Bennett and Heard in their notes to their Leading Cases; and that it is also said by the annotator of Archbold Pl. and Pr. to be against the weight of authority. It is the opinion of three commentators against that of the supreme court of Vermont. So far as the weight of the authority is concerned, I prefer to stand by the court.

The case of *Rex v. Vandercomb* is cited as authority for the position, that unless the defendant could have been convicted upon the first indictment, upon proof of the facts, not as brought forward in the evidence, but as alleged in the record of the second indictment, the

plea of former conviction could not avail him. Can that be law? In many cases it would be impossible to ascertain, except by the (657) evidence whether the offences are the same, where there are different indictments for offences that are of the same character and grade. Suppose A, for instance, is indicted jointly with B, for an assault on C, and both are convicted, and afterwards A is indicted for the same assault, the record would not show that fact; and unless he were permitted to show the fact by proof, he would be twice convicted for the same offence. The evidence must necessarily be admitted, and such, according to my experience, has been the practice in this state.

The principle which is enunciated in *State v. Damon,* I think is sustained by the case of the *State v. Town of Fayetteville,* 6 N. C., 371, where the defendants were indicted for not keeping the streets of the town in repair, and three or four streets were presented on the same indictment, it was held the defendants should be indicted but once for all; if seperate bills be found, on a conviction on one, it might be pleaded in bar to the others, and in the opinion delivered by Chief Justice TAYLOR, he concluded by saying: *This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced."* The case of the *State v. Merritt,* 61 N. C., 134, (cited and relied upon in the opinion of the court,) I do not think is in conflict with the authorities I have above cited. It only decides that an indiscriminate assault upon several is an assault upon each, but does not go the length of holding that separate indictments would lie for an assault upon each. All I think that is to be inferred from that decision, is, that being an assault upon each, the solicitor might make his election and indict for the assault upon any one of them.

I am of the opinion that there was no error in the judgment of the superior court.

PER CURIAM. Error.

Cited: S. v. Nash, 88 N.C. 618; *S. v. Williams,* 94 N.C. 895; *S. v. Robinson,* 116 N.C. 1048; *S. v. Bynum,* 117 N.C. 752; *S. v. Bynum,* 117 N.C. 753; *S. v. Lawson,* 123 N.C. 742; *S. v. Taylor,* 133 N.C. 759; *S. v. Hankins,* 136 N.C. 623; *S. v. Hooker,* 145 N.C. 583; *S. v. White,* 146 N.C. 609; *S. v. Freeman,* 162 N.C. 597; *S. v. Crisp,* 188 N.C. 800; *S. v. Malpass,* 189 N.C. 355; *S. v. Bell,* 205 N.C. 227; *S. v. Pierce,* 208 N.C. 49; *S. v. Dills,* 210 N.C. 185; *S. v. Lippard,* 223 N.C. 170; *S. v. Williams,* 229 N.C. 416; *S. v. Hicks,* 233 N.C. 516; *S. v. Leonard,* 236 N.C. 128; *S. v. Barefoot,* 241 N.C. 655.

(658)

STATE v. JAMES MASSEY.

Assault with Intent to Commit Rape.

On trial of an indictment for assault with intent to commit rape, it appeared that the prosecutrix, while going from her house to her mother-in-law's, about a mile distant, was carrying with her a child in a baby-carriage and accompanied by a boy of six years of age. Soon after passing defendant's house, she heard defendant (who was about seventy-five yards off) say, "Halt, I intend to ride in the carriage. If you don't halt, I'll kill you when I get hold of you." She ran and called for her mother-in-law, defendant running after her and telling her to stop, until she got to the gate where she met another woman to whom she related the matter; *Held* that the evidence is not sufficient to warrant a conviction of the intent charged. At most, the circumstances only raise a suspicion of defendant's purpose, and it was error in the court to permit the jury to consider them. (*State v. Neely*, 74 N. C., 425, overruled.)

INDICTMENT for an assault with intent to commit rape, tried at Fall Term, 1881, of ROCKINGHAM Superior Court, before *Gudger, J.*

The prosecutrix testified that about the first of November, 1881, she left her house at the cotton factory, near Leaksville, in Rockingham County, about 8 o'clock in the morning, intending to visit her mother in-law, who resided about one mile north-west of the factory; that she was carrying with her a child in a baby-carriage, which she pushed before her, and was accompanied by a small boy, some five or six years of age; that she soon passed the house of the defendant, which is a house used as a tenement for operatives, and had proceeded half way to her mother-in-law's, when she met a female acquaintance, who was going to the factory, and had some conversation with her, and continued her journey; soon after passing the "half way tree," she heard some one say, "halt, I intend to (659) ride in that carriage;" she turned, saw the defendant, and said, "sir?" and he replied, "if you don't halt in a minute, I'll kill you when I get hold of you." She then began to run and call for her mother-in-law to come to her. The defendant kept running after her, telling her to stop, and threatening to kill her if she did not stop, and continued to halloo to her to stop, until she got to the gate, where a colored woman met her, and she turned to show her the man, but he was gone. She told the colored woman and her mother-in-law about the matter—sent for her husband—described the clothes of defendant, whom she had never seen but once before, when on inquiry she was told it was James Massey. When he first called her, he was about seventy-five yards from her. In her flight she pushed the baby-carriage

before her. Her mother-in-law heard her cries. There was other evidence, but it is not material to the inquiry.

The defendant's counsel insisted that from the facts and circumstances developed by the testimony, there was no evidence fit to be left to the jury as to the intent charged; and the matter of intent was left so much in the dark that the court should charge the jury that they could not reasonably convict the defendant of the intent charged. But the judge, feeling himself bound by the decision in *Neely's case,* 74 N. C., 425, declined to give the instruction asked, and left the matter to the jury. Defendant excepted. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. That the defendant is guilty of an assault, according to the testimony of the prosecutrix, there can be no question; but we are of the opinion the evidence in the case did not warrant the (660) jury in convicting him of the intent charged, and that the court erred in not submitting to the jury the instruction asked by defendant.

We think the jury should have been instructed that there was no evidence, or at least none reasonably sufficient, to maintain the charge against the defendant of an assault on the witness, with a felonious intent to have carnal knowledge of her person by force and against her will. Such a charge would have been substantially that asked for by defendant. But as the case was left to the jury without any instructions, they were at liberty to infer that the evidence was sufficient to warrant them in finding the defendant guilty of the assault with intent. In this consists the error. Where a judge refuses to instruct the jury that the evidence does not prove the offence charged in the indictment, it is good ground for exception.

In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. Roscoe Cr. Ev., 310; *Rex v. Lloyd,* 7 C. & P., 318; *Joice v. State of Georgia,* 53 Ga. Rep., 50.

When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law ascribe it to that which is not criminal. "It is neither charity nor common sense nor law, to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will

reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent." *State v. Neely,* 74 N. C., 425. Dissenting opinion. Every man is presumed to be innocent until the contrary is proved, and it is a well established rule in criminal cases, that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence (661) of the party accused, the court should instruct the jury to acquit, for the reason the proof fails to sustain the charge. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

Even conceding that the defendant pursued the prosecuting witness with the intent of gratifying his lustful desires upon her, does it follow that he intended to do so "forcibly and against her will?" That is an essential element of the crime charged, and must be proved. It must be established by evidence that does more than raise a mere suspicion, a conjecture or possibility, for "evidence which merely shows it *possible* for the fact in issue to be as alleged, or which raises a mere *conjecture* that it is so, is an insufficient foundation for a verdict, and should not be left to the jury." *Matthis v. Matthis,* 48 N. C., 132; *Sutton v. Madre,* 47 N. C., 320; *Wittkowsky v. Wasson,* 71 N. C., 451; *State v. Bryson,* 82 N. C., 576.

There is no evidence in this case, in our opinion, from which a jury might reasonably come to the conclusion that the defendant intended to have carnal knowledge of the person of the prosecutrix, at all hazards and against her will. At most, the circumstances only raised a suspicion of his purpose, and therefore should not have been left to the consideration of the jury.

In the case of *Com. v. Merrill,* 14 Gray, 415, which was an indictment for an assault with intent to commit rape, the court say: "The nature of the charge presupposes that the intent was not carried out. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal or equally consistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to war- (662) rant a verdict of guilty."

The Attorney General relied upon *Neely's case.* The opinion there, was delivered by the late Chief Justice, to whose eminent abilities and learning we are always disposed to yield a becoming deference; but it was a divided court; there was a dissenting opinion filed by Mr. Justice RODMAN and concurred in by Mr. Justice BYNUM, both highly distinguished for their learning and legal acumen; and after a careful consideration of the different views of the question presented by these

eminent jurists, we feel constrained to differ from the majority of the court, and adopt the reasoning and conclusion of the dissenting opinion, as enunciating the correct principle applicable to the case.

A *venire de novo* must therefore be awarded the defendant. Let this be certified.

Error. *Venire de novo.*

Cited: S. v. White, 89 N.C. 465; *S. v. Mitchell,* 89 N.C. 523; *S. v. Powell,* 94 N.C. 970; *S. v. McBryde,* 97 N.C. 396; *S. v. Jeffreys,* 117 N.C. 744, 747; *S. v. Deberry,* 123 N.C. 704; *S. v. Garner,* 129 N.C. 539, 542; *S. v. Adams,* 133 N.C. 671; *S. v. Smith,* 136 N.C. 686; *S. v. Garland,* 138 N.C. 683; *S. v. West,* 152 N.C. 833; *S. v. Hawkins,* 155 N.C. 472; *S. v. Rogers,* 166 N.C. 390; *S. v. Oakley,* 176 N.C. 757; *S. v. Gray,* 180 N.C. 704; *S. v. Hill,* 181 N.C. 560; *S. v. Blackwelder,* 182 N.C. 905; *S. v. Kincaid,* 183 N.C. 717; *S. v. Allen,* 186 N.C. 307, 310; *S. v. Dison,* 187 N.C. 855; *S. v. McLeod,* 196 N.C. 545; *S. v. Allen,* 197 N.C. 686; *S. v. McLeod,* 198 N.C. 654; *S. v. Johnson,* 199 N.C. 431; *S. v. Shipman,* 202 N.C. 535; *S. v. Carter,* 204 N.C. 305; *S. v. Jones,* 222 N.C. 38; *S. v. Gay,* 224 N.C. 143; *S. v. Walsh,* 224 N.C. 221; *S. v. Shoup,* 226 N.C. 73; *S. v. Burgess,* 226 N.C. 771; *S. v. Moore,* 227 N.C. 327, 328; *S. v. Harvey,* 228 N.C. 65; *S. v. Heater,* 229 N.C. 541; *S. v. Hovis,* 233 N.C. 364; *S. v. Webb,* 233 N.C. 387; *S. v. Jarrell,* 233 N.C. 746; *S. v. Burnette,* 242 N.C. 172.

STATE v. WILLIS HUGHES.

Indictment—Burglary and Entering Dwelling Without Breaking.

1. It was error to quash an indictment framed under the act of 1879, ch. 323 (amending the act of 1875, ch. 166) charging that defendant "did enter a dwelling house in the night time otherwise than by breaking," and containing other necessary averments.

2. The act, by construction of the court, makes it a misdemeanor for any person to wilfully break into a store-house, etc., or "*to enter* into a dwelling house in the night time otherwise than by breaking."

INDICTMENT under the statute for entering into a dwelling house in the night time otherwise than by breaking, tried at Fall (663) Term, 1881, of VANCE Superior Court, before *Gudger, J.*

The indictment is as follows: The jurors for the state upon their oaths present, that Willis Hughes, late of Vance County aforesaid,

on the first day of August, 1881, with force and arms at and in the county aforesaid, a dwelling house of one E. G. Davis there situate, then occupied by one Frank Ward, about the hour of eleven on the night of the same day, unlawfully and wilfully did enter otherwise than by breaking, with intent the goods and chattels and moneys of the said E. G. Davis in the said dwelling house then and there being, then and there feloniously and wilfully to steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Before the jury were impanelled, the defendant, through his counsel, moved to quash the indictment. His Honor sustained the motion and order the bill to be quashed, and the solicitor for the state appealed.

Attorney General, for the State.
No counsel for defendant.

ASHE, J. The indictment was preferred under the act of 1874-5, ch. 166, as amended by the act of 1879, ch. 323. The act of 1874-5 is entitled "An act to punish breaking into an uninhabited house with intent to commit a felony," and provides that any person who shall wilfully break into a store house where any merchandise or other personal property is kept, or any uninhabited house with intent to commit a felony, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail or state's prison, for not less than four months nor more than ten years.

The act of 1879, entitled "An act to punish the entering of a dwelling house in the night time otherwise than by breaking," amended the act of 1874-5, by inserting after the word "house," and be- (664) fore the word "with," in the fourth line of section one of said act, the following, "or any dwelling house in the night time otherwise than by breaking," making the act of 1875-5 read: "That any person who shall wilfully break into a store house where any merchandise or other personal property is kept, or any uninhabited house or any dwelling house in the night time otherwise than by breaking, with intent to commit a felony, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than ten years."

So it seems by a literal construction of the act, it is made a misdemeanor to break into a dwelling house in the night time otherwise than by breaking, with intent to commit a felony. But such a construction is insensible. And every interpretation that leads to an absurdity ought to be rejected. The interpretation which renders a statute null and void cannot be admitted; it is an absurdity to say that after it is reduced to terms it means nothing.

It ought to be interpreted in such a manner as that it may have effect, and not be found vain and illustive. Potters Dwarris, p. 128. The same author on page 144 says "that statutes must be interpreted according to the intent and meaning, and not always according to the letter, and whenever the intent can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute; this is the rule when the words of the statute are obscure." And whenever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. *U. S. v. Freeman*, 3 Howard, 565.

Applying these rules of exposition to the act in question, as it stands amended, it is evident it was the intention of the legislature to
(665) make it a penal offence, to wilfully break into a store house where merchandise, etc., is kept, or into an uninhabited house, or to wilfully enter into a dwelling house in the night otherwise than by breaking, with intent to commit a felony.

Of the object and intent of the amendment to the act, there can be no doubt. The law had already provided for the punishment of burglariously breaking into a dwelling house in the night time with intent to commit a felony; but there was no law which made it a penal offence to enter a dwelling house in the night by other means than a burglarious breaking with intent to commit a felony, as was illustrated in the case of *State v. Henry*, 31 N. C., 463, in which it was held not to be burglary where the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser after a few minutes entered the house without breaking any part, but through the unfastened door, with intent to commit a felony. It was the object and intent of the amendment to make cases like this indictable. And when the intention of the legislature is so manifest, it is the duty of the courts to effectuate that intention, if it is possible to do so, by any reasonable construction, however obscure and ambiguous the language of the statute may be.

Governed by this principle, we therefore hold that the act must be construed as if it read, "or *to enter* into a dwelling house in the night otherwise than by breaking." The words *to enter* must be supplied by intendment to bring sense out of the amendment and subserve the purpose of the law makers.

There is error. The judgment of the court below is reversed. Let this be certified that further proceedings may be had in conformity to this opinion and the law.

Error. Reversed.

Cited: S. v. Mumford, 227 N.C. 134.

(666)

STATE v. BRISTOW EDWARDS.

Indictment—Larceny.

A and B, owners of a mill, employed C as a miller, giving him one-third of the toll received, as compensation for keeping the mill, and the flour alleged to have been stolen was made of undivided toll wheat; *Held* that in the indictment the ownership of the flour was not properly laid in the miller, but it should have been charged to be the property of A and others.

INDICTMENT for larceny tried at Spring Term, 1881, of ROCKINGHAM Superior Court, before *Avery, J.*

The defendant was charged with stealing flour, the property of P. J. Waynick. It appeared in evidence that the said P. J. Waynick was a miller in the employment of T. C. Moore and Elisha Wade, who were the owners of the mill, and the said Waynick had entire charge of the mill and profits. The toll received was divided equally between P. J. Waynick and the said Moore and Wade, the said Waynick receiving one-third thereof as a compensation for keeping the mill.

The flour taken was made by grinding a half bushel of the undivided toll wheat, the said wheat having been run through the mill just after cleaning, and put in a sack which was set in a box in the mill-house, from which it was taken.

The defendant's counsel asked the court to charge the jury, that the ownership of the flour was not properly laid in P. J. Waynick, but that the bill should have charged that it was the property of said Moore, Wade and Waynick.

But his Honor refused this instruction and charged the jury, "that if the said P. J. Waynick was the miller, and had entire charge of the mill, and if the flour taken was made from wheat in which the said Waynick had an undivided interest, as a part of his compensa- (667) tion for keeping the mill, then he was a bailee, and the jury would find that the property was his as charged in the bill of indictment. The jury found a verdict of guilty. Judgment, appeal by defendant.

Attorney General, for the State.
No counsel for the defendant.

ASHE, J. The case of the *State v. Patterson*, 68 N. C., 292, is decisive of this case. There, the defendant was indicted for larceny in stealing cotton, which was charged in the indictment as the property of W. M. Ballard "and another." The proof was that the cotton was raised by W. M. Ballard on the plantation of J. D. Pemberton, under a verbal agreement that Ballard was to pay Pemberton one-half of the cotton

raised; the cotton was stored in the gin-house on the plantation and had not been divided when stolen. Pemberton testified that he considered the cotton as belonging to himself and Ballard. Upon this proof the counsel for the defendant insisted that the cotton until divided was in law the sole property of W. M. Ballard, and that the ownership was improperly charged in the bill of indictment as being the property of W. M. Ballard and another, and that under that bill of indictment the defendant could not be convicted.

His Honor refused to charge as requested, and held that the ownership of the property was properly laid in the indictment, in accordance with Rev. Code, ch. 35, sec. 19. This court sustained the ruling and affirmed the judgment.

The facts of this case bear such close analogy to those of the case under consideration, that the authority of its decision must govern us in holding there was error.

Let this be certified that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: Gray v. Warehouse Co., 181 N.C. 170.

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(668)

STATE v. ELISHA MACE.

Indictment—Perjury—Administration of Oath—Material Matter.

1. An indictment need not necessarily be signed by any one.
2. On trial of an indictment for perjury, an exception was taken that no witness testified that defendant repeated the words "so help me God," as prescribed by the statute; *Held*, it being affirmatively shown that an oath was administered, the presumption is that it was rightfully done.
3. Where the perjury assigned was in the falsity of an oath made by defendant on trial of A for larceny, and there was evidence showing that some of the stolen articles were found in the possession of A; *Held* that the testimony of this defendant, given on said larceny trial, that he received other of the stolen articles from A, bears upon a matter material to the issue.

INDICTMENT for perjury, tried at Fall Term, 1881, of MITCHELL Superior Court, before *Seymour, J.*

The defendant was indicted for perjury, alleged to have been committed in the trial of an indictment for larceny, against one James Taylor and four others, had at Fall Term, 1872, of Mitchell Superior Court.

The solicitor of the district being absent at that term, the presiding judge appointed J. W. Bowman, Esq., to act as such *pro tempore,* who prepared the bill of indictment against the said Taylor and others, and signed the same in his own name as solicitor.

The larceny charged upon Taylor and his co-defendants, was the taking of some pigs, the property of one Wiseman; and the evidence offered on the trial went to show that two of the stolen pigs had been found in the possession of the present defendant, and being examined in regard thereto, he testified that he had received them from the said Taylor; and the perjury was alleged to have consisted in the (669) falsity of that statement.

On the trial of the defendant, at Fall Term, 1881, two witnesses testified that he was sworn in the usual way upon the Bible, but no one could remember that he repeated the words, "so help me, God," before kissing the book.

For the defence three exceptions were taken:

1. That the original indictment against Taylor and others being signed by Mr. Bowman instead of the regular solicitor was not sufficient to constitute the case as one in court.

2. That inasmuch as no witness testified that he repeated the words "so help me God," as prescribed in the statute, it did not appear that he had taken an oath, the violation of which was in law perjury.

3. That since the other evidence, introduced in the trial of the indictment against Taylor and others, showed that others of the stolen pigs had been found in the actual possession of Taylor, it was not material to show that those found in the defendant's possession had been received from him, and therefore the defendant's testimony, alleged to be false, was given with reference to an immaterial matter and could not support the charge of perjury against him.

The exceptions were overruled. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

No counsel for defendant.

RUFFIN, J. This court is of the opinion that no one of the defendant's exceptions is well taken.

I. The signature of the prosecuting officer, while usually attached to the indictment, forms no part of it, and is in no manner essential to its validity. The indictment is not his work, but is the act of the grand jury declared in open court, and need not be signed by any one; and if it be, it is mere surplusage and cannot vitiate it. *State v.* (670) *Vincent,* 4 N. C., 493; *State v. Cox,* 28 N. C., 440.

II. The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. The maxim *omnia presumuntur rite esse acta* applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while important, are not likely to attract such attention as to insure their being accurately remembered.

III. We presume the other point, as to the immateriality of the evidence given in by the defendant, the alleged falsity of which is the subject of this prosecution, could hardly have been seriously taken. If a number of articles of any kind be stolen, the greater the number of them that can be traced to the possession of a party accused, the greater the probability of his guilt must be—and certainly, in no point of view could it be considered an immaterial circumstance to show that all of the missing articles came recently to his possession.

There is on error. Let this be certified to the court below, to the end that the matter may be proceeded in according to law.

No error. Affirmed.

Cited: S. v. Arnold, 107 N.C. 864; *S. v. McBroom,* 127 N.C. 536; *S. v. Sultan,* 142 N.C. 573; *S. v. Pitt,* 166 N.C. 269; *S. v. Shemwell,* 180 N.C. 719.

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(671)

STATE v. CHARLES WILLIAMS.

Forgery—Common Law Punishment.

One convicted of forgery at common law was subject to corporal punishment, but imprisonment in the penitentiary or county jail is substituted in lieu thereof by Battle's Revisal, ch. 32, sec. 29.

INDICTMENT for forgery tried at November Special Term, 1881, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendants, Charles Williams and John Deal, were found guilty by the jury, and the court sentenced each of them to be imprisoned in the penitentiary for two years, from which judgment they appealed, assigning as error, that as the bill of indictment is drawn at common law, and not under the statute, a sentence of imprisonment in a penitentiary upon their conviction was not warranted by the common law.

Attorney General, for the State.
Messrs. Russell & Ricaud, for defendants.

SMITH, C. J. Upon the conviction of the defendants of the joint forgery specified in the bill of indictment, they were sentenced each to confinement in the state prison for the term of two years. From the judgment both appeal, and assign as error that the offence charged is not within the statute, and being but a misdemeanor is not punishable at common law with corporal punishment, and hence not with that imposed which is its substitute. It has been already decided that an indictment for the false making of a written order, such as that described, without averments of a disposing power in the person whose name is used to obtain the goods or money, and of a corresponding duty in the person on whom the order is drawn to comply (672) with it, is not sufficient under the statute, but good at common law. *State v. Lamb,* 65 N. C., 419; *State v. Leak,* 80 N. C., 403.

The general assembly in 1869, enacted that every crime or offence whatever, heretofore punishable by the laws of North Carolina when the present constitution went into effect, with whipping, *or other corporal punishment,* shall hereafter, in lieu of such corporal punishment, be punished by imprisonment in the state's prison, or county jail, for not less than four months nor more than ten years. Bat. Rev., ch. 32, sec. 29.

If then corporal punishment could be administered in any form upon a conviction of the offence as recognized by the common law, the offender may now be sent to the state's prison for a term within the prescribed limits and the judgment pronounced for a term within those limits, is with warrant of law. The text writers and early adjudicated cases, show, that the pillory was usually adjudged at common law where the conviction was of an infamous crime, such as forgery and perjury, (7 Com. Dig., 534,) and whatever differences of opinion may have been entertained, as to the subject matter of the offence, there is a general concurrence among them, that this form of punishment may be inflicted for the common law offence. Thus, forgery is defined by BLACKSTONE and by others as "the fraudulent making or alteration of a writing to the prejudice of another man's rights," (4 Com., 247,) and he adds, "the offender may suffer fine, imprisonment and *pillory;*" and in 4 Bac. Abr., Title, *Forgery,* it is declared that the offender is punishable with fine and imprisonment and such other corporal punishment as the court in its discretion may think proper.

In the case of *King v. Ward,* 2 Lord Ray., 1461, where the information charged the forgery of a written order for a disposal of certain goods mentioned in an accompanying schedule, the question of the

(673) writings, for the false and fraudulent making of which the offender was liable at common law, was fully considered on a motion in arrest of judgment. In support of the motion it was insisted that the crime at common law could only be committed by the falsification of records and instruments of a public nature, and perhaps of deeds. Numerous cases were referred to, in which a wider scope had been given to the common law, and in accordance with these precedents the court overruled the motion, and ordered the prisoner "to stand in the pillory before Westminster-Hall gate, and to pay a fine of 500 pounds." This decision is said "to have settled the rule that the *counterfeiting of any writing* with a fraudulent intent, whereby another may be prejudiced, is forgery at common law." 2 East, 361; 2 Russell, 350.

So *King v. O'Brian*, 7 Mod., 378, for a similar offence the prisoner was adjudged "to stand in the pillory for one hour" and pay a fine of five pounds.

Previous to the adoption of the constitution of 1868, which abolishes all forms of corporal punishment, except the death penalty limited to a few specified crimes, it was enacted that "the punishment of the pillory shall be used only for crimes that are infamous, or done in secrecy or malice, or done with deceit and intent to defraud." Rev. Code, ch. 34, sec. 120.

The result is that in cases where the pillory could have been adjudged against an offender, he may now be made to undergo the substituted punishment of confinement in the penitentiary.

There is therefore no error, and this will be certified to the end that the court may proceed to judgment.

No error. Affirmed.

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(674)

STATE v. HENRY EASON.

False Pretence—Indictment.

An indictment for false pretence charging that defendant wilfully, knowingly, falsely and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same, and by means of said false pretence did obtain from the prosecutor three dollars in money, with intent, etc., is sufficient. The averment that the act was done with felonious intent is surplusage—calling the misdemeanor a felony does not make it a felony.

INDICTMENT for false pretence tried at Spring Term, 1881, of CHOWAN Superior Court, before *Gilmer, J.*

STATE *v.* EASON.

The indictment is as follows: The jurors for the state upon their oath present that Henry Eason, late of the county of Chowan, with force and arms at, and in said county, on the first day of April, 1881, designing and intending to cheat and defraud K. R. Pendleton, out of his goods and moneys, chattels and property, did unlawfully, wilfully, designedly, falsely, and feloniously and knowingly pretend to the said K. R. Pendleton, that he, the said Henry Eason, had cut for him, for the use of J. A. Woodard, twenty cords of wood, whereas in truth and in fact, he, the said Henry Eason, had not cut for him, the said K. R. Pendleton, for the use of said J. A. Woodard, twenty cords of wood, as he the said Henry Eason then well knew to be false, by color and means of which said false pretence he the said Henry Eason did then and there unlawfully and with felonious intent obtain from the said K. R. Pendleton to the amount of three dollars, being then and there the property of the said K. R. Pendleton with felonious intent to cheat and defraud the said K. R. Pendleton contrary to the form of the statute in (675) such case made and provided and against the peace and dignity of the state.

The jury found the defendant guilty in manner and form as charged in the bill of indictment. There was a motion in arrest of judgment. The motion was sustained, and the solicitor appealed.

Attorney General, for the State.
Messrs. Gilliam & Gatling, for defendant.

ASHE, J. To constitute the crime of "false pretence" under section 67, chapter 32, Battle's Revisal, there must be a false pretence of a subsisting fact; the pretence must be knowingly false; the money, goods, or thing of value of the person defrauded, must be unlawfully obtained by means of the false pretence, and with the intent to cheat and defraud him of the same. *State v. Phifer,* 65 N. C., 321; *State v. Jones,* 70 N. C., 75; Bishop Cr. Law, secs. 397, 409; Archbold, 246.

As nothing in the record indicating the defect in the bill of indictment, upon which the motion in arrest was made, and no exception to the ruling of the court stated, we are at a loss to ascertain upon what ground the judgment was arrested in the court below. For the indictment contains averments of every essential element of the offence of "false pretence." It avers that the defendant knowingly and falsely pretended to K. R. Pendleton that he had cut for him for the use of J. A. Woodard twenty cords of wood, whereas he had not cut twenty cords of wood, and by means of the said false pretence had unlawfully obtained from the said K. R. Pendleton three dollars of the money of the said K. R. Pendleton with the intent to cheat and defraud the said K. R. Pendleton of the same.

The indictment is drawn after the usual form of precedents (Archbold, 245,) except that it avers that the false pretence was made
(676) with a *felonious intent,* but that is mere surplusage. The indictment is for the misdemeanor under the statute, and calling it a felony or charging the act to be felonious, does not make it a felony. *State v. Slagle,* 82 N. C., 653; *State v. Upchurch,* 31 N. C., 454.

Finding no defect in the indictment, nor in the record as perfected and brought up by *certiorari,* the judgment of the court below must be reversed.

Let this be certified that further proceedings may be had in conformity to this opinion and the law.

Error. Reversed.

Cited: S. v. Dickson, 88 N.C. 645; *S. v. Mikle,* 94 N.C. 847; *S. v. Sherrill,* 95 N.C. 666; *S. v. Whedbee,* 152 N.C. 782.

STATE v. NOAH TOWNSEND.

Libel—Indictment.

1. In an indictment for libel, the alleged libellous matter must be set out *according to its tenor.* Tenor imports *identity,* and whenever that is destroyed, either by the omission or adoption of any one word, however slight the sense may be affected, it is fatal to the indictment.
2. To give the substance is not sufficient; though the misuse or omission of a letter which works no such change in a word as to make of it a different one, will not be treated as a fatal variance.

INDICTMENT for libel, removed from Catawba and tried at Fall Term, 1881, of CALDWELL Superior Court, before *Seymour, J.*

The defendant is charged with libel on one P. C. Henkel, the prosecutor. The indictment contains but one count in which there are but two specifications of libellous matter as contained in a printed card published by the defendant. The first is that he published of and concerning the prosecutor matters "according to the tenor and effect
(677) following, that is to say: It is true P. C. Henkel has been shaking his coon skin in the church paper, and in many other ways endeavoring to manufacture public sentiment in his favor, and to do this, he, the said Henkel, has not only employed his friends as instruments, but has resorted to the foul means of false testimony and secret conspiracy." The second is that in another part of said card, he published of any concerning the prosecutor other matters "according to the tenor

and effect following, that is to say; That which made P. C. Henkel depose falsely on the witness stand at Hickory is the cause of this muss, and we told you in the other sheet what that was, viz.: The devil, the father of lies, the source of all ungodly conduct."

On the trial, after making proof of its publication by the defendant, the state solicitor proceeded to read the card to the jury, and when he came to the part embraced in the second specification, the defendant objected to the reading, on the ground that there was a variance between the matter as contained in the card and as set out in the indictment—the variance consisting in the omission in the latter of the word "all," which in the card preceded the words "this muss," but the court holding the variance to be immaterial overruled the objection, and the defendant excepted.

The court instructed the jury that each one of the specifications, as set out in the indictment, contained matter libellous *per se*, to which the defendant also excepted.

Verdict of guilty, appeal by defendant.

Attorney General, for the State.
Mr. M. L. McCorkle, for defendant.

RUFFIN, J. We fully concur in the opinion expressed by his Honor, that the matter contained in the card and copied into the indictment, is libellous in its nature.

Its tendency to degrade the prosecutor and render him odious, (678) is patent; and therein it comes fully up to the requirements laid down by the authors when defining the offence of libel. Sterner rules are applied to written or printed defamation than to verbal slander, because of the deliberation with which it is perpetrated, and the more permanent and extended consequences attending it.

But it is needless to elaborate this part of the case, since according to our law, an error was committed with reference to the evidence offered and received in support of the second specification, such as entitles the defendant to a trial by another jury.

As contained in that part of the card, the words are as follows: "That which made P. C. Henkel depose falsely on the witness stand at Hickory is the cause of *all this muss*," etc. As set out in the indictment, they are the same, except that the word *"all"* preceding the words *"this muss,"* is omitted.

According to the current of authorities, beginning with the oldest and extending to the latest, and almost wholly unbroken, *libel* belongs to that class of cases, in which it is held to be absolutely necessary to set out in the indictment the alleged libellous matter *according to its*

tenor. *Rex v. Burr*, 12 Mod., 218; *Wood v. Brown*, 6 Taunt., 168; 1 Russell, 352; 2 Bish. Cr. Pro., sec. 744; *State v. Sweeny*, 10 Sergt. & R., 173; *State v. Wright*, 1 Cush., 46; *State v. Brownlow*, 7 Hump., 63; *Whitaker v. Freeman*, 12 N. C., 271. The reason given for this is, that the court may be able, from an exact knowledge of the contents of the publication as seen in the record, to form its judgment thereon; and that the accused may, if he please, demur, and thus have the opinion of the court, as a question of law, upon the sufficiency of the matter to constitute libel, and thereby avoid submitting it as a mixed question to the jury.

(679) Whenever necessary to be set out in the indictment, the law, to be consistent, must require it to be proved as charged. 'Tis needless to cite authorities for this, or refer to the many cases in which slight variances have been held by the courts to be fatal, as they are all to be found in the text books, and must be familiar.

An unmistakable principle which runs through them all is, that while the misuse or omission of a letter, which works no such change in a word as to make of it a different one, will not be treated as a fatal variance, still, *tenor* imports *identity*, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be so regarded.

We are fully sensible of the fact that this strictness of pleading in criminal matters has given rise to much criticism, as having a tendency to obstruct the course of public justice, and we would gladly avoid it in this case if we could. But it is the duty of the courts to administer the law as they find it, and not to amend it. We have no more right to depart from this well established principle, technical though it may be, than from any other well recognized rule of law. Nor are we sure but that, at last, it is the only safe rule to pursue. To admit the substance, only, to be alleged and proved in such cases, would be to open a wide door to conjecture on the part of those, upon whom the duty should devolve of determining when *the substance* had been sufficiently maintained; and soon one deviation from exactness would beget another, until finally all certainty, at which the law wisely aims and which is so imperatively demanded for the safety of the citizen, would be completely lost. The most that can be said against the rule is, that it imposes upon the pleader the exercise of just so much care and circumspection as may be necessary to insure exactness; and surely that can be no good reason for dispensing with it altogether, at the risk

(680) of introducing uncertainty into the administration of the law itself.

The judgment of the court below is reversed and a *venire de novo* awarded.

Error. *Venire de novo.*

STATE v. JAMES ALDRIDGE.

Indictment—Slander of Women.

An indictment under the act of 1879, ch. 156, for slandering an innocent woman, must contain the averment that the woman is innocent.

INDICTMENT tried at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger, J.*

The defendant was tried and convicted upon an indictment under the act of 1879, ch. 156, entitled "an act to make the slander of women indictable," and appealed from the judgment pronounced.

The indictment is as follows: The jurors, etc., present, that James Aldridge, late of the county of Craven, on the 1st day of May, A. D. 1879, with force and arms, at and in the county aforesaid, did unlawfully and wilfully attempt in a wanton and malicious manner to injure the reputation of one Holland Williams, by falsely stating that he had carnal intercourse with her, against the form of the statute in such case made and provided and against the peace and dignity of the state.

Attorney General, for the State.

No counsel for defendant.

ASHE, J. The act under which this indictment was preferred (681) reads: "That any person who may attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken, which amounts to a charge of incontinency, shall be guilty of a crime, and on conviction thereof shall be fined or imprisoned at the discretion of the court."

The object of the legislature in passing this act was to protect the character of innocent women, that is, chaste and virtuous women, against wanton and malicious attempts to destroy their reputation by charges of incontinency. It is for the protection only of innocent women, and as was said by Mr. Justice RUFFIN in the case of *State v. McDaniel,* 84 N. C., 805, "the *innocency* of the woman, who is the subject of the attempt, lies at the very foundation of the offence, and constitutes its most essential element, its very *sine qua non,* and must of necessity be distinctly averred in the indictment." There is no such averment in this bill of indictment and in that particular it is defective, and the judgment of the court below must therefore be arrested.

Let this be certified to the superior court of Craven County that the case may be proceeded with according to law.

Error. Reversed.

Cited: S. v. McIntosh, 92 N.C. 797; *S. v. Edens,* 95 N.C. 695; *S. v. Moody,* 98 N.C. 672; *S. v. Grigg,* 104 N.C. 884; *S. v. Ferguson,* 107 N.C. 849; *S. v. Bagwell,* 107 N.C. 860; *S. v. Johnson,* 182 N.C. 886.

STATE v. JOHN PURIFY.

Indictment—Obstructing Highway.

Where one was indicted for obstructing a "public highway," and the proof was that he obstructed a "private cartway;" *Held* a variance. Whether an indictment will lie for obstructing a private cartway—Quære.

(682) INDICTMENT for a nuisance in obstructing a highway, tried at Fall Term, 1881, of CRAVEN Superior Court, before *Gilmer, J.*

Upon the special verdict found by the jury, his Honor held that the defendant was not guilty as charged in the bill of indictment, and the solicitor for the state appealed.

Attorney General, for the State.

No counsel for defendant.

RUFFIN, J. It is impossible to doubt the correctness of the judgment of the court below.

The charge preferred against the defendant in the indictment is the obstruction of "a certain *common and public highway* leading from the dwelling house, etc., to the public road, etc.," whereas the proof offered was, that he had obstructed "a *certain private cart-way,* leading from the dwelling house, etc., to the public road," etc.

Even if we should concede that an indictment would lie for obstructing a private cart-way—which according to the authorities seems more than doubtful—still it must be truly charged, and not, as in this instance, as a public highway.

A *public highway* is one established by public authority, and kept in order by the public, under the direction of the law; or else it is one used generally by the public for twenty years, and over which the public authorities have exerted control, and for the reparation of which they are responsible. *State v. McDaniel,* 53 N. C., 284; *Boyden v. Achenbach,* 79 N. C., 539.

A *cart-way* is as distinct as possible. Indeed, it is a way established by law for a person who has not the benefit of a public highway, and for that reason alone. Bat. Rev., ch. 104, sec. 38.

Because of the variance between the allegations made in the indictment and the proof offered in support of them, the defendant was clearly entitled to an acquittal.

No error. Affirmed.

Cited: Kennedy v. Williams, 87 N.C. 8; *Stewart v. Frink,* 94 N.C. 488; *Warlick v. Lowman,* 103 N.C. 124; *Burwell v. Sneed,* 104 N.C. 121; *S. v. Summerfield,* 107 N.C. 898; *S. v. Wolf,* 112 N.C. 894; *S. v. Fisher,* 117 N.C. 739; *S. v. Haynie,* 169 N.C. 282; *Waldroup v. Ferguson,* 213 N.C. 201; *Hildebrand v. Telegraph Co.,* 219 N.C. 405; *Chesson v. Jordan,* 224 N.C. 291.

(683)

STATE v. JOHN T. FREEMAN.

Towns and Cities—Police Officer May Arrest Without Warrant.

1. A police officer may arrest without warrant for violation of municipal ordinances, committed in his presence; but the offender must be taken before the mayor as soon as practicable, a warrant obtained and trial had.
2. If the arrest be made at a time and under such circumstances, as that a trial cannot be had without delay, the officer may keep the offender in custody—commit him to jail or the "lock-up"—but if the officer be guilty of a gross abuse of authority, he is liable to indictment.

INDICTMENT for an assault and false imprisonment, tried at Fall Term, 1881, of HENDERSON Superior Court, before *McKoy, J.*

The evidence on the part of the state was that the prosecutor, King, between the hours of ten and eleven o'clock at night, on the day of the alleged assault, was found by the defendant lying in a state of helpless intoxication on the side-walk in a street of the town of Hendersonville, with his head on the step of the post office. On that night there was an exhibition in the court-house, and persons returning to their homes from the court-house along the street had to walk around the prosecutor; that defendant with the assistance of others took him up and carried him to the calaboose, and placed two blankets upon the floor, and laid him on them. During the night, the prosecutor awoke, thirsty, and called for water, which was furnished him by some one passing by, and at seven o'clock the next morning, the defendant informed the mayor of the arrest, who issued a warrant for the prosecutor to the defendant, (the marshal of the town,) who served it upon him and carried him before the mayor by whom he was tried and convicted of a violation of ordinance No. 12 of the town. (684)

The ordinance is as follows: "That to be found in a helpless state of intoxication, or to be drunk and disorderly within the corporate limits of the town of Hendersonville, is declared a nuisance, and any person who may be guilty of such offence shall upon conviction thereof by the mayor forfeit and pay a fine not to exceed ten dollars, or be imprisoned in the 'lock-up' of said town for not more than five days, or both, at the discretion of the mayor."

The defendant and King were friendly, and during the day preceding the arrest at night, he advised King, who was then intoxicated, to go to his son's house in town or to the hotel, and offered to assist him.

Upon the evidence the defendant's counsel asked the court to charge the jury that the defendant was not guilty, which was declined, and the jury were instructed that if the defendant arrested the prosecutor without process for a violation of a town ordinance in being helplessly drunk and lying on the street, and when there was no danger of an escape, and when no breach of the peace was being made, or any threatened breach of the peace, and carried him to the calaboose and shut him up during the night, when the mayor was within a few hundred yards of the place of arrest, instead of carrying him before the mayor, the defendant would be guilty. Verdict of guilty, judgment, appeal by the defendant.

Attorney General, for the State.
No counsel for the defendant.

ASHE, J. The defendant is the police officer of the incorporated town of Hendersonville. Such an officer was unknown to the common law. He is the creature of a statute, and such an officer has and can only exercise such powers as he is authorized to do by the legislature,
(685) expressly or derivatively. By the 23d section of chapter 111 of Battle's Revisal, it is provided that the town constable, as a peace officer, shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have the same power as a constable in the county to execute all process that may be issued by the mayor, and to enforce the ordinances and regulations of the commissioners, as they may direct.

What then are the powers of a constable in the county? In executing warrants and other process issued by justices of the peace, he is a ministerial officer; in the apprehension of those who violate the law, he is a conservator of the peace. By the original and inherent power he possesses, he may, for treason, felony, breach of the peace, and some misdemeanors less than a felony committed in his view, apprehend the supposed offenders *virtute officii,* without any warrant. Chitty Cr.

Law, 19. He may arrest without warrant for affrays, riots and breaches of the peace, and for violent and disorderly acts and threats, committed in his presence; he may arrest one in the act of exhibiting publicly an obscene picture, or of exposing his naked body, or of committing like offences against decency and morality. 1 Arch. Cr. Pl., 26, note 2. These last mentioned offences are nuisances, and drunkenness falls within the same category. If he may be apprehended without warrant for these when committed in the presence of the officer, we can see no reason why he may not *upon view* be arrested for public drunkenness; for when open and exposed to public view, it becomes a nuisance and an indictable offence. *State v. Waller*, 7 N. C., 229.

Holding that a person may be arrested for drunkenness upon view, when it is a public nuisance, the question occurs, what is the officer to do with the offender when he shall have been arrested without warrant. All the authorities agree that he should be carried, as soon as conveniently may be, before some justice of the peace. And if (686) he is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lock-up, or even tie him, according to the nature of the offence and the necessity of the case. Arch. Cr. Pl., 27; 2 ch. 13, sec. 7; Dillon Mun. Corp., 271; *State v. Stalcup*, 24 N. C., 50. In this latter case where the prisoner was tied, it was held the officer was the judge of the *necessity*, but if he be guilty of a gross abuse of his authority, and do not act honestly according to his sense of right, but under pretext of duty is gratifying his malice, he is liable to indictment. The jury must judge of his motive from the facts submitted to them.

In our case there was no gross abuse of official authority, and it appears the officer acted honestly and under no pretext of gratifying his malice, for the evidence discloses the fact, that the defendant and the prosecutor were friendly, and that on the day before the prosecutor was found lying in the street, the defendant had kindly remonstrated with him and advised him to go to his son's, and offered to go with him.

The prosecutor was found lying helplessly intoxicated upon the sidewalk near the post office, which is generally a place much frequented, opposing an obstruction to all persons passing and repassing. The officer, as we think was his duty, arrested him. What was he to do with him? He could not be expected to carry him to his own house, and it would have been a farce to carry him before a justice for trial in his then condition. While it is the duty of a peace officer when he apprehends an offender, whether with a warrant or without one, upon view, as in this case, to carry him at once before a justice or other tribunal having jurisdiction, the law is not unreasonable, and does not require

that he should do so at a late and unreasonable hour of the night,
(687) but should do so at an early hour the next morning. That was done in this case. And we are of the opinion the officer did what it was lawful for him to do under the circumstances. The prosecutor was too much intoxicated to be tried, and it was too late for a trial if he had been sober. He carried him to the lock-up and made him as comfortable as the circumstances would admit, and the next morning at seven o'clock carried him before the magistrate of police.

This case is distinguishable from those of *State v. Parker,* 75 N. C., 249, and *State v. James,* 78 N. C., 455. In the former the prosecutor was arrested for being intoxicated in violation of a town ordinance and imprisoned, not for safe keeping until he could be tried before a competent tribunal, but he was imprisoned until he became sober, and then released without being carried before a magistrate; and in the latter, the person arrested was committed to jail by the officer, after he had been carried before the justice by virtue of a warrant and tried, without any written mittimus. A magistrate has no right to send a man to prison by a verbal order, and the officer who executes such an order is not protected by it.

There is error. The judgment of the superior court is reversed. Let this be certified.

Error. Reversed.

Cited: S. v. Hunter, 106 N.C. 708; *S. v. McAfee,* 107 N.C. 816; *S. v. Edwards,* 126 N.C. 1053; *Sossamon v. Cruse,* 133 N.C. 475; *Martin v. Houck,* 141 N.C. 321; *S. v. Loftin,* 186 N.C. 206; *Wilson v. Mooresville,* 222 N.C. 286, 288; *James v. R. R.,* 233 N.C. 599; *S. v. Pillow,* 234 N.C. 148; *Moser v. Fulk,* 237 N.C. 306; *S. v. Mobley,* 240 N.C. 485, 486.

STATE v. MATT. BRAGG.

Larceny—Landlord and Tenant—Evidence.

On a trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, is not admissible. To render such evidence competent, the indictment should be framed under the statute, and describe the crop as "growing, standing or ungathered" in the field, and cultivated for food or market.

(688) INDICTMENT for larceny tried at Spring Term, 1880, of NORTHAMPTON Superior Court, before *Gudger, J.*

In separate counts the bill of indictment charges the defendants, Matt. Bragg and Hugh Cain, with the larceny and felonious receiving of ten pounds of seed-cotton, and also of ten pounds of lint cotton, specifying the value of each, the property of M. W. Ransom, and upon trial before the inferior court of Northampton County, both were found guilty.

Before the jury the state offered testimony to show that on a certain night in January, 1879, the gin house on the plantation of said Ransom, some four miles distant from the town of Jackson, was entered and a considerable quantity of loose cotton stored therein, both in the seed and picked, taken and carried away. The next day the two defendants were met on the road leading thence towards Jackson, each with a bag of seed cotton, which they subsequently concealed behind a log, where it was found and recognized as corresponding with that stolen.

The state also offered evidence that the defendant, Matt. Bragg, removed from the plantation of Ransom where he lived, on the day preceding the theft, to an adjoining plantation, known as "Mowfield," where the other defendant lived, and that he carried with him a lot of cotton, part of which his wife had gleaned from a field he had cultivated, and the residue from a field which had been cultivated by another tenant, who gave his consent to her gathering it. Both fields were cultivated under a contract with the owner upon shares. There was other testimony, not necessary to mention, pointing to the defendants as the persons who entered the gin house and implicating them in the criminal act. (689)

The evidence of the removal of the ungathered cotton from the fields was admitted, after objection to its pertinency under the form of the indictment, and the court charged the jury in relation thereto (and to this the defendants also except) in these words:

"If the jury should believe that the cotton found in the sacks was gathered from the fields of M. W. Ransom cultivated on shares, with a felonious intent to deprive him of his part of the cotton, they should find the defendants guilty; but if they should believe that the defendants took the cotton without a guilty knowledge or intent, or under a belief or misapprehension that they had a right to take it, then they should find them not guilty."

The defendants moved for a new trial for the errors assigned, and being refused and judgment pronounced, the defendant, Matt. Bragg, appealed to the superior court. Upon a hearing in that court, the judge being of opinion that no error had been committed, affirmed the ruling of the inferior court, and directed his judgment to be certified. From this judgment the defendant prayed an appeal to this court, which was denied, and thereupon he sued out a writ of *certiorari*, under which the

record is brought up, and we are required to review the regularity of the proceedings and the rulings in the trial court.

Attorney General, for the State.
No counsel for defendant.

SMITH, C. J., after stating the above. We think there was error committed in receiving evidence of the gleanings of the cotton left in the fields, and in the directions given to the jury as to its effect. The subject matter of the larceny charged is "seed cotton" and "lint cotton," terms which, unexplained, seem to designate the article, after it
(690) has been picked or taken from the plant, in its condition before and after its undergoing the process of separating the seed from the fibre or lint. In commerce it is sold in both states, and a contract of sale, describing it in either way, would undoubtedly be understood as meaning the gathered and not the ungathered article in the field, unless there are other terms indicating a different intent. There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offence. *State v. Clark,* 30 N. C., 226; *State v. Horan,* 61 N. C., 571.

Thus a charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. *State v. Moore,* 33 N. C., 70.

The error in admitting the evidence is repeated in the instructions to the jury as to its legal sufficiency and effect. Growing or matured cereal crops in the field are not the subject of larceny at common law, because before severance they partake of the nature of the realty and are not within the terms of the definition of the offence.

The felonious removal of "growing, standing, or ungathered indian corn, wheat, cotton, potatoes and rice," was made larceny by statute, and to the list of articles have been added terms of more comprehensive import—"fruit, vegetable or other product," restricted to such as are "cultivated for food or market." Rev. Stat., ch. 34, sec. 24; Rev. Code, ch. 34, sec. 21; and Bat. Rev., ch. 32, sec. 20.

But an indictment, admitting evidence in its support, under the statute, must designate the stolen article, as it is there described, as *growing, standing or ungathered* in the field, and not by the simple name it bears after being gathered. Without these superadded words, the charge must be understood as referring to the cotton after it
(691) is picked and put to itself. And so an article not specially mentioned in the act, but embraced in the generic word "product,"

must not only be named, but described as having been "cultivated for food or market." *State v. Liles,* 78 N. C., 496. This is in accordance with the adjudged cases. *State v. Turner,* 66 N. C., 618; *State v. Krider,* 78 N. C., 481; *State v. Patrick,* 79 N. C., 655; *State v. House,* 65 N. C., 315.

For the error in allowing the testimony of the gleaning of the remnant of the crop left in the field, and the directions given the jury as to its pertinency and sufficiency to sustain the allegations in the bill, there must be a new trial, and the superior court should have so adjudged upon the appeal. The judgment of the affirmation is therefore reversed, and this will be certified to the end that further proceedings be had in accordance with this opinion.

Error. *Venire de novo.*

Cited: S. v. Ballard, 97 N.C. 447; *S. v. Edwards,* 190 N.C. 324; *S. v. Johnson,* 220 N.C. 779.

STATE v. GEORGE COPELAND.

Larceny—Landlord and Tenant.

1. An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop to his own use, even if done with a felonious intent, for the reason, that under the act of 1877, ch. 283, he is in the *actual* possession of the same until a division is made.
2. Where in such case the defendant cropper was hauling seed cotton to the lessor's gin, there was proof that he threw a sack thereof off the wagon by the road-side, and returned to the spot at night and carried the cotton away, which was afterwards found near defendant's house; *Held* that the act of throwing it off the wagon was not an abandonment of his own possession, and the subsequent taking, no trespass upon the possession of the lessor. *Held further,* that if the cotton had been delivered to the lessor at the gin, giving him actual possession thereof, and the defendant had then secretly taken and carried it away, he would have been guilty of larceny. (Review of the landlord and tenant act, rights of parties and remedies thereunder, by ASHE, J.)

INDICTMENT for larceny tried at Fall Term, 1881, of ANSON (692) Superior Court, before *Graves, J.*

It was in evidence on the part of the state that the defendant was cultivating, as a cropper, a part of the land of one Mowery in Anson County.

The defendant was to do the labor and Mowery was to furnish the team and implements, and was to have half of the crop, and defendant

was to pay for the supplies furnished him, and gather the crop and haul it on Mowery's wagon and with his team, to his gin house to be divided after it was ginned. At the time of harvesting, the defendant, among other cotton, gathered two bags of seed cotton, which was placed (on the same day it was gathered) on the wagon by the defendant, who also got on the wagon himself; and after going some distance the defendant threw the two bags of cotton off the wagon beside the wagon-way: The act was observed by one of the party, and brought to the attention of a witness who was examined by the state, who watched the cotton until about dark, when he saw the defendant come and take up the two bags and carry them off. After nightfall, Mowery and some three or four others went to the house of the defendant, and arrested him without a warrant. No threats were made or promises to induce him to confess, but he was told he had better tell all he knew about it, and in consequence of what he said, the cotton was found about fifty yards from the defendant's house. There was a verdict of guilty, and the defendant moved for a new trial, assigning error in the charge to the jury. Motion refused, judgment, appeal by defendant.

(693) *Attorney General, for the State.*
Messrs. Burwell & Walker, for defendant.

ASHE, J. Several errors were assigned, but it is needless to consider any of them except that which alleges error in the instruction given by his Honor, "that if the defendant had feloniously taken the cotton from the stalks growing in the field, and carried it away at the same time, he could not be convicted under this bill of indictment, but if he picked the cotton and put it in the sacks or bags and afterwards put it on the wagon, and then threw it off, and afterwards the same evening came and feloniously took and carried it away with the intent to steal it, the last taking would be larceny and the defendant could be convicted under the bill of indictment."

There was clearly no error in the first part of the charge, and whether there was error in the latter part, or second proposition of the charge, presents the only question in the case for our determination. We are relieved from the consideration of the question, whether the defendant bore the relation of "tenant or cropper" to Mowery, and of the different principles of law applicable to those relations, by the act of 1876-77, ch. 283. By that act it is provided that where land is leased or cultivated by a cropper, unless otherwise agreed, the crops raised on said land shall be deemed to be in the possession of the lessor, until all the rents shall be paid and all the stipulations contained in the lease shall be performed, etc.; and if any portion of the crop shall be removed from

the land by the tenant or cropper without the consent of the lessor, he may have his remedy by an action of claim and delivery.

And it is provided by the second section of said act, that whenever the lessor or his assigns shall get the *actual* possession of the crop, or any part thereof, otherwise than by the mode prescribed in the preceding section (*i. e.* by action of claim and delivery) and shall refuse or neglect, upon notice of five days, to make a fair division of the (694) crop, the lessee or cropper shall be entitled to the remedy given in the action upon a claim for the delivery of personal property. While the first section of the act declaring that the lessor shall be deemed to be in the possession of the crop, it at the same time, in the second section, recognizes the *actual* possession in the lessee or cropper, until the division, or surrender of the same to the lessor, under the terms of an agreement. The lessor has no right under the act, when there is no agreement to that effect, to take the actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon the removal of the crop by the lessee or cropper.

And should he take the possession by any other means, the lessee or cropper may bring an action of claim and delivery against him, and recover the possession or damages, by complying with the requirements of the act.

And by the third section of the act, upon a controversy arising between the parties, and neither of them has availed himself of the provisions of the first and second sections, either of them may proceed to have the matter determined by a justice of the peace, or the superior court of the county, as the one or the other of these tribunals may have jurisdiction; but it is provided that if the lessee or cropper shall give the bond required by the act, he shall *retain* the possession of the crop. The lessor under this proceeding can only get possession by giving the bond required by the fourth section of the act, upon the failure of the lessee or cropper to give bond.

Notwithstanding the provisions of the first section, the whole tenor of the act contemplates the right of the lessee or cropper to hold the *actual* possession, until such time as a division shall be made.

When the lessee or cropper is thus authorized to hold the actual possession of the crop against the lessor, can it be, that he is (695) liable to an indictment for larceny for secretly appropriating the crop or any part thereof to his own use, even if done with a felonious intent?

Larceny is the felonious taking and carrying away the personal goods of another, with the intention of appropriating the same to one's own use, or *causa lucri*, without the consent of the owner. To constitute the

offence, there must be a *taking* which is as essential an ingredient of the crime as the asportation. "Taking is a material part of larceny, but it may be presumed from the possession of the property." "When there is no trespass in taking the goods, there can be no felony in carrying them away." 2 Wharton Crim. Law, sec. 1802.

In England it was long doubted whether, as a lodger had a special property in the goods let with the lodgings, the stealing of them was larceny, and it was at length held by a majority of the judges that it was not. This decision was made in the case of *Rex v. Moore,* Show., 50, and the ground of the decision was that the lodger and not the landlord had the possession, during the time for which the lodgings were let, and therefore the landlord could not maintain trespass for taking the goods. "Regularly," says LORD HALE, (vol. 1, p. 515), "a man cannot commit felony of goods whenever he hath property. If A and B be joint tenants or tenants in common of an horse, and A takes the horse, possibly *animo furandi,* yet this is not felony, because one tenant in common, taking the whole, doth but what by the law he may do." The reason for this is, that there is in fact no *taking,* for he is already in possession; it is merely the subject of an action of account. Archb. C. L., p. 181.

The same doctrine applies to bailees at common law.

The principle is that felony cannot be committed by a person having a legal possession of goods; as for instance "a watchmaker to whom a watch was given by the owner for the purpose of having it regu-
(696) lated, disposed of the watch, and applied the proceeds to his own purposes; it was held that this was no larceny, as the watchmaker had in the first instance obtained the possession of the watch rightfully, and as, unless there was a *taking* in the first instance *animo furandi,* no subsequent dealing with the chattel could amount to larceny." 2 Wharton Criminal Law, sec. 1861, and references in note 31.

To apply these principles to our own case, the defendant as a cropper under Mowery had picked the cotton and put it in sacks; the sacks containing the cotton were placed by him upon the wagon of Mowery to be hauled, according to the agreement, to his gin, where it was to be ginned, and then divided; the defendant at the same time got on the wagon with the cotton, and it was not out of his actual possession until thrown off by him beside the road, which was no abandonment of his possession. His possession was not only rightful and exclusive, but he had an interest in the cotton. The possession of Mowery by virtue of the act of 1876-77 was at most only constructive. The act of throwing off the cotton cannot be held to be a trespass upon his possession, for he never had an actual possession, or right to the actual possession, until delivered at his gin; so that, there was no *taking* in any legal sense,

and as the act of the defendant was wanting in that essential element of the crime of larceny, there was error in the instructions given by the judge to the jury.

If the defendant had delivered the cotton to Mowery at his gin, thereby giving him the *actual* possession thereof, and had then secretly taken and carried it away, there can be no doubt he would have been guilty of larceny, as he would have been upon the facts of this case but for the legislative enactment.

There is error. Let this be certified to the superior court of Anson that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: S. v. Webb, 87 N.C. 559; *S. v. McCoy,* 89 N.C. 468; *S. v. King,* 98 N.C. 650; *Jordan v. Bryan,* 103 N.C. 64; *S. v. Ruffin,* 164 N.C. 417.

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(697)

STATE v. L. R. SPELLER.

Indictment—Carrying Concealed Weapons.

1. Carrying a pistol concealed in violation of the act of 1879, ch. 127, even for self-protection, is not excused by a communication of threats of violence made against the defendant.
2. By article one, section twenty-four, of the constitution, the "right to keep and bear arms" shall not be infringed, but the "practice of carrying concealed weapons" may be prohibited; and even without this constitutional provision, the court say that the legislature may by law *regulate* the right to bear arms in a manner conducive to the public peace.

INDICTMENT for misdemeanor tried at Fall Term, 1881, of WASHINGTON Superior Court, before *Bennett, J.*

The defendant was charged with carrying a concealed weapon contrary to the statute—Acts 1879, ch. 127.

At the trial, one Cahoon was introduced as a witness by the state, and testified that he saw the defendant have a pistol at a certain place, away from his own premises. The pistol was concealed in the pocket of his pants. This was on Monday after the defendant and one Jenkins had a difficulty on Saturday, when Jenkins had attempted to cut him with a razor. The defendant's counsel proposed to ask this witness what the defendant said as to the possession of the pistol, but on objection on the part of the state, was not permitted to do so.

It was further given in evidence by the state that after their difficulty on Saturday, Jenkins and defendant, each applied for and procured a

state warrant against the other. When the officer having the warrant against the defendant arrested him on Monday, he asked him if he had a weapon, and was told that he did not, but on searching him found a pistol concealed in the hip pocket of his pants.

(698) On the part of the defence it was shown that after the difficulty on Saturday, Jenkins had threatened the defendant with violence, and that his threats had been communicated to the defendant.

The defendant himself was examined as a witness, and his counsel proposed to ask him whether Jenkins had assaulted him with a razor on the Saturday before his arrest on Monday, but upon objection on the part of the state, it was not allowed. The defendant then testified that he was not the owner of the pistol, and that he had procured it after the assault upon him, and after he had been informed of the threats made by Jenkins to take his life. He got it to defend himself, and out of fear of Jenkins, from whom he lived only about one-half mile. He lived four miles from the nearest justice, and a mile and a half from the nearest peace officer.

The defendant's counsel asked the court to charge the jury if the defendant had reason to believe, and did believe, that his life was in danger, and took the pistol with him solely for his own protection, while he sought a justice to complain to, he would not be guilty.

His Honor declined so to charge, and instructed the jury that if they were satisfied that the defendant when not upon his own premises had carried the pistol concealed about his person, he was guilty under the statute, even though Jenkins had assaulted him, and made threats against him, and he had procured the pistol and carried it in consequence of those threats. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Mr. W. A. Moore, for defendant.

RUFFIN, J. This court is of the opinion that neither one of the defendant's exceptions should be sustained. The first, if for no

(699) other reason, because the case fails to set out the purpose of the declaration of the defendant, which he sought to make proof of, and which was excluded by the court; and we therefore cannot see its pertinency, or know that any harm came to the defendant on account of its exclusion.

It would be a vain thing to disturb a verdict and judgment because of the exclusion of testimony which ought not, and from its very nature could not, have any bearing upon the case, and to avoid doing a vain thing, the courts invariably require it of him who complains of the

improper exclusion of testimony, that he should plainly set forth in his exception its purport, or substance, in order that it may be seen to be relevant, and such as might aid the jury in making up their verdict.

We might not feel disposed to enforce this rule in all its rigor against a defendant in a criminal action, so long as we could see that there was a chance even of his being injured by it. But in a case like the present, where the defendant himself became a witness and testified, directly, to what he sought to establish, indirectly, by his declarations made at the time, we can have no hesitation in doing so. The only possible advantage he could have derived from the rejected testimony, was its tendency to confirm his sworn statement, that he carried the pistol because of his apprehended danger, and taking that statement to be true, while it possibly might have influenced the court in affixing the punishment, it should not have had, as we shall presently see, any weight with the jury in determining the issue as to the guilt or innocency of the defendant.

The exception taken to the charge of the court, as we are told at the bar, is based upon the supposed unconstitutionality of the statute under which the defendant is prosecuted, and the lack of lawful power in the legislature to deprive a citizen at any time of his right to bear arms, and especially when needed to repel a threatened assault from which great bodily harm might reasonably be apprehended. (700)

We concede the full force of the ingenious argument made by counsel upon this point, but cannot admit its application to the statute in question. The distinction between *the "right to keep and bear arms,"* and *"the practice of carrying concealed weapons"* is plainly observed in the constitution of this state. The first, it is declared, shall not be infringed, while the latter may be prohibited. Art. I, sec. 24.

As to the surest inhibition that could be put upon this *practice* deemed so hurtful as to be the subject of express mention in the organic law of the state, the legislature has seen fit to enact that at no time, and under no circumstances, except when upon his own premises, shall any person carry a deadly weapon *concealed* about his person, and it is the strict duty of the courts, whenever an occasion offers, to uphold a law thus sanctioned and approved. But without any constitutional provision whatever on the subject, can it be doubted that the legislature might by law *regulate* this right to bear arms—as they do all other rights whether inherent or otherwise—and require it to be exercised in a manner conducive to the peace and safety of the public? This is as far as this statute assumes to go. It does not say that a citizen when beset with danger shall not provide for his security by wearing such arms as may be essential to that end; but simply that if he does do so, he must wear them openly, and so as to be seen by those with whom

he may come in contact. The right to wear *secret weapons* is no more essential to the *protection* of one man than another, and surely it cannot be supposed that the law intends that an unwary advantage should be taken even of an enemy. Hence it takes no note whether the secret carrying be done in a spirit of foolish recklessness, or from a sense of apprehended danger, but in either case declares it to be unlawful. Indeed, were there any difference made, we might expect it to be
(701) against one who felt himself to be under some pressure of necessity, since in his case the mischievous consequences intended to be avoided, might the more reasonably be anticipated. And it would be a strange passage in the history of legislation to enact that it shall be unlawful for any person to carry concealed weapons about his person, *except* when it may be supposed he shall have occasion to use them. This disposes of the defendant's last exception.

If the fact that he had been previously assaulted could furnish no justification, or in any way affect the issue to be tried by the jury, it was certainly proper to exclude the evidence with regard to it.

No error. Affirmed.

Cited: S. v. Dixon, 114 N.C. 852; *S. v. Reams,* 121 N.C. 557; *S. v. Woodlief,* 172 N.C. 888; *S. v. Kerner,* 181 N.C. 575; *S. v. Mangum,* 187 N.C. 479.

STATE v. HIRAM ROTEN.

Indictment—Carrying Concealed Weapons.

On trial of an indictment under the act of 1879, ch. 127, for carrying a weapon concealed, it was shown that defendant had two pistols buckled around him without scabbards and naked on a belt, on the outside of his clothing; *Held* that the presumption of concealment raised by the statute was rebutted and the defendant not guilty. But if the privilege of carrying arms in such manner should be abused, the party would be liable to indictment at common law, under the rule laid down in *Huntley's case,* 25 N. C., 418.

APPEAL from the inferior court heard at Fall Term, 1881, of ASHE Superior Court, before *Seymour, J.*

The defendant was indicted in the inferior court of Ashe County for carrying a pistol concealed about his person while off his own premises.

(702) The jury returned a special verdict which was as follows: "We find that the defendant on the 24th day of December, 1880, went to Horse Creek Store with two pistols buckled around him without

scabbards and naked on a belt on the outside of his clothing, and off his own premises. If that is unlawful we find him guilty, if not, we find him not guilty." Upon this verdict the court passed sentence upon the defendant, and he appealed to the superior court, and that court held there was error, reversed the judgment below, and ordered the defendant to be discharged, from which judgment the solicitor for the state appealed to this court.

Attorney-General, for the State.
No counsel for defendant.

ASHE, J. The defendant was indicted under the act of 1879, ch. 127, which makes it an indictable offence for a person, except on his own premises, "to carry concealed about his person any pistol, bowie-knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knuckles, or other deadly weapon of like kind," and the fourth section of said act, provides that, "any person being off his own premises and having upon his person any deadly weapon described in section one, such possession shall be *prima facie* evidence of the concealment thereof."

The evident intention of the legislature in passing this statute was to prohibit the pernicious practice of going secretly armed, and thereby prevent the dangerous use of deadly weapons in sudden personal conflicts, in which oftentimes an undue advantage is taken of the unwary. We see nothing in the statute that prohibits the carrying of the prescribed weapons openly about the person.

But it is contended on the part of the state that the fourth section of the act makes the possession of such a weapon *prima facie* evidence of its concealment, however carried, whether open to view or concealed. But what is *prima facie* evidence of a fact? It is sim- (703) ply such evidence in judgment of law, as is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. Its effect is to shift the burden of proof from the state to the defendant, that is all.

Admitting the full force of the position assumed by the state, it must be that if in the development of the evidence of the case it should be shown that the weapon was carried openly and in view to every one, the legal presumption would be rebutted. In the case of *Doggett v. R. R. Co.*, 81 N. C., 459, where the defendant was indicted for killing stock under section 11, chapter 16, of Battle's Revisal, which makes the killing or injury of stock by cars running on a railroad, if prosecuted within six months, *prima facie evidence of negligence*, this court held that the effect of the act was "the 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 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 if they fail to do this, the defendant is not to be held liable."

When then in this case the jury in their special verdict find that the pistol was carried by the defendant buckled around him, without scabbard and naked in a belt, on the outside of his clothing, the fact found by the jury repels the *prima facie* evidence of concealment, and it was equivalent to finding the fact, that there was no concealment, and the court upon such a finding could not do otherwise than hold that the state had failed to establish its charge against the defendant.

To constitute the offense, there must be a concealment. When the proof shows there was no concealment, there is no violation of the statute. It would be a contradiction in terms to hold that a person
(704) *conceals* that which he carries about him *openly and to the view of everybody.* The legislature in our opinion never intended to make it an indictable offence to carry such arms as are described in the 1st section of the act—openly and in view.

The construction here given to the statute might seem to ascribe to the legislature the intention of giving sanction to the *open* wearing of arms. The answer to that is, simply, that the legislature has not forbidden it, otherwise they would not have used the term "concealed."

If the privilege of so wearing arms should be abused, the public is protected by the common law. "The offence of riding or going armed with unusual and dangerous weapons to the terror of the people, is an offence at common law and is indictable in this state. A man may carry a gun for any lawful purpose of business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people. It is the wicked purpose, and the mischievous result, which essentially constitute the crime." *State v. Huntley,* 25 N.C. 418.

But the defendant in our case was indicted, not at common law, but for a violation of the statute, and for the reasons given we are of opinion there was no error in the judgment of the superior court.

Let this be certified.

No error. Affirmed.

Cited: Randall v. R. R., 104 N.C. 421; *S. v. Miller,* 112 N.C. 886; *S. v. Baldwin,* 152 N.C. 831; *S. v. Pollard,* 168 N.C. 124; *S. v. Mangum,* 187 N.C. 479; *S. v. Gregory,* 203 N.C. 531.

(705)

STATE v. J. T. SMITH.

Witness—Defendant in State Case.

A defendant in a criminal action is competent and compellable to testify for or against a co-defendant, provided his testimony does not criminate himself. (Review of acts of assembly upon the rules of evidence, by ASHE, J.)

INDICTMENT for assault and battery, tried at Fall Term, 1881, of WATAUGA Superior Court, before *Seymour, J.*

The defendant was indicted jointly with one Green; and on the trial the state called Green as a witness against his co-defendant Smith, to which Smith excepted.

It appeared to the court, and the court so decided, that Green was an unwilling witness, and that the truth could not be elicited from him without allowing the state to ask leading questions. The court thereupon allowed the state's counsel to put leading questions to the witness, and the defendant Smith excepted.

The state then called Smith as a witness against Green. He objected, and the court held that he was competent and compelled to testify against his co-defendant. Several questions were then put to him, and upon his objection the court decided that he need not answer as his answers might criminate himself. The witness thereupon declined to answer, and no testimony was given by him. The defendant Smith excepted to the ruling of the court, allowing him to be called to the witness stand.

Green was acquitted by the jury and Smith found guilty, and there was judgment against him from which he appealed.

Attorney-General, for the State.
No counsel for defendant.

ASHE, J. All the exceptions taken by the defendant bear upon (706) the question whether under the law as it now exists, a defendant in a criminal action is competent and compellable to testify against a co-defendant.

There have been several changes in the law in this respect. The act of 1866, ch. 43, (Bat. Rev., ch. 43, sec. 15,) provided that the parties and persons in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, in behalf of either or any of the parties to said suit or other proceeding. This act applied to criminal as well as civil actions.

But the following section, (16 Bat. Rev.) which was supplemental to the preceding section as a proviso, declared that "nothing contained in the 15th section of this chapter shall render any person who in any criminal proceeding is charged with the commission of an indictable offence, *competent or compellable to give evidence for or against himself, or shall render any person* compellable to answer any question tending to criminate himself," etc.

So much of this act as made it lawful for co-defendants in the same indictment to testify for or against each other was repealed by the act of 1870, ch. 177. But this act was repealed by the act of 1871, ch. 4, and the act of 1866, ch. 43, so far as it related to criminal proceedings, was expressly re-enacted. And so stood the law until the act of 1881, ch. 110, by the first section of which the act of 1866 (Bat. Rev., ch. 43, sec. 16,) was amended by striking out the words "competent or compellable to give evidence for or against himself, or shall render any person."

With this amendment the section reads: "Nothing contained in the 15th section of this chapter shall render any person, who in any criminal proceeding is charged with the commission of an indictable offence,
(707) compellable to answer any question tending to criminate himself," etc. It leaves intact the provisions of the 15th section, and if the act had stopped there, a defendant would have been competent and compellable to testify for or against himself. But it is enacted by the 2nd section of this act, "that on the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offences, and misdemeanors in the superior, inferior, criminal, and justice of the peace courts of the state, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him.

The purpose and effect of this section was to qualify and restrict the provisions of the said 15th section, so as to make it lawful for a defendant to testify in his own behalf if he choose to do so, but not otherwise.

It does not repeal or affect in any manner the provisions of that section by which a defendant in a criminal action is made competent and compellable to testify for or against a co-defendant, provided his testimony does not criminate himself. The defendant Green then was a competent witness against his co-defendant Smith, and Smith against Green.

The exception to the ruling of his Honor as to allowing the solicitor to put leading questions to the witness Green cannot be sustained. He was a competent witness, and when he was put on the witness stand, he occupied the same position of any other witness. He was under the

same obligation to speak the truth and the whole truth—unless it should criminate himself. He was entitled to the same privileges and to receive the same protection, equally liable to be impeached and discredited, and alike subject to all the rules of evidence. *State v. Efler,* 85 N. C., 585.

There is no error. Let this be certified that further proceedings may be had agreeably to this opinion and the law.

No error. Affirmed.

Cited: S. v. Weaver, 93 N.C. 600; *S. v. Frizell,* 111 N.C. 724; *S. v. Medley,* 178 N.C. 712; *S. v. Perry,* 210 N.C. 797; *S. v. Howard,* 222 N.C. 292; *S. v. Norton,* 222 N.C. 420.

(708)

STATE v. JACOB WOOL.

Selling Liquor on Sunday.

A licensed retail liquor dealer is indictable under the act of 1877, ch. 38, for selling liquor on Sunday, *except on the prescription of a physician and for medical purposes,* even though the same be bought for and used by a sick person, and the defendant so informed at the time of the sale.

INDICTMENT for misdemeanor, tried at Fall Term, 1881, of CHOWAN Superior Court, before *Bennett, J.*

The defendant was tried and convicted for selling spirituous liquor on Sunday, without having a physician's prescription, and not for medical purposes.

The defendant at the time of the sale was a retail liquor dealer in the county of Chowan, duly licensed, and sold to one Joseph Jones, on Sunday, a pint of spirituous liquor, the said Jones at the time not having a prescription from a physician, but the same was bought for a sick person, and the defendant was so informed at the time, and the liquor was used by said sick person. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Gilliam & Gatling, for defendant.

ASHE, J. The indictment was preferred against the defendant for a violation of the act of 1877, ch. 38, the first section of which reads: "That it shall be unlawful for any person to sell spirituous or malt or

other intoxicating liquors on Sunday except on the prescription of a physician and for medical purposes."

The object of the legislature in passing this act, was, to prevent the traffic in intoxicating liquors on the Sabbath day. Before its (709) passage, the licensed dealer could sell as well on that as on any other day of the week; and so might have done the unlicensed dealer, if he sold under the prescription of a physician and for a medical purpose. *State v. Wray,* 72 N. C., 253. The act then in no way affected the rights of an unlicensed dealer, for he, according to that decision, had the right to do what is allowed him to do by the act, that is, to sell on Sunday, *bona fide,* for a medical purpose upon the prescription of a physician, and the only effect of the act was to restrict the franchise of him who had license to sell by a measure less than a quart.

We can well imagine many cases where it would be a hardship not to be allowed to sell spirituous liquor for medical purposes, where the prescription of a physician is not, or could not be obtained, but the legislature has seen proper to attach both qualifications to the right of selling on Sunday, and we must administer the law as the law-makers have seen proper to declare it.

There is no error. Let this be certified to the superior court of Chowan that further proceedings may be had.

No error. Affirmed.

Cited: S. v. Bryson, 90 N.C. 748; *S. v. McBrayer,* 98 N.C. 623; *S. v. Dalton,* 101 N.C. 682; *S. v. Kittelle,* 110 N.C. 561, 585, 587.

In *Long v. Gooch,* from Halifax:

This was a motion by the plaintiffs to be allowed to file exceptions to the report of a referee in a case pending in Halifax superior court. The judge granted the motion and the defendants appealed.

SMITH, C. J. The referee made his report, embodying his findings of law and fact at Spring Term, 1880, and being adverse to the (710) plaintiffs, they were allowed thirty days in which to except. No exceptions being filed, the two defendants who had answered the complaint, moved the court at the next and each successive term for an order of confirmation. The motion was not acted on at two of the terms, in consequence of the absence of the papers in the cause; at another, a continuance was granted; and at Fall Term, 1881, the pre-

siding judge gave "leave to the plaintiffs, upon payment of all the costs accrued since the filing of the report of the referee, to file the exceptions tendered, the cause to be heard at chambers as of this term." The exceptions are confined to the referee's conclusions of law, and purport in the caption to have been filed at Spring Term, 1880.

The defendants appeal from the refusal of his Honor to grant the motion to confirm, and the order permitting exceptions to be filed in the cause.

The principle has been too long settled and recognized to be open to discussion, that orders made in the progress of a cause, such as this now the subject of complaint, rest in the sound discretion of the judge, and may allow or refuse them as he may deem right and proper under the special circumstances of the case, and his action is not under the reviewing power of this court. This is declared in many of the cases to which our attention has been called in the argument, and results necessarily from the constitution of the court invested with an appellate jurisdiction, restricted, except under recent amendments, to the correction of errors in law committed by the inferior court. *Simonton v. Chipley,* 64 N. C., 152; *Long v. Holt,* 68 N. C., 53; *Childs v. Marlen, Ib.,* 307; *Moore v. Dickson,* 74 N. C., 423; *State v. Lindsey,* 78 N. C., 499.

It is true the suggestion is made in some of the opinions, that cases may occur of judicial rulings so oppressive and unjust, and so repugnant to the legal rights of suitors, as to warrant the interference of the court in the exercise of the supervisory jurisdiction conferred by (711) the constitution, "over the proceedings of the inferior court." Thus RODMAN, J., in *Moore v. Dickson,* remarks: "Undoubtedly the granting or refusing a continuance is in the discretion of the judge below, and it would require circumstances proving beyond doubt hardship and injustice to induce this court to review his exercise of it, *if in any case it has the power to do so.*" And BYNUM, J., in like manner declares in *State v. Lindsey:* "It is unnecessary for us to say that in *no* case will this court review a refusal of a judge below to continue a case, *for even if such right of review exists in any case,* it does not appear in this case that the discretion of the judge was in any wise abused."

Nor does it become us to say under what circumstances, if any such case be anticipated, this court would be constrained to interfere in the management of a cause committed to the judge who conducts it, but certainly no abuse of his discretion is disclosed in the record before us. How could a judge be expected to enforce a trial and determine a motion, when the papers are not present, and he can know nothing of the merits of the controversy, except from verbal statements? And how can we, without the facts which determined him to grant the continuance, declare it was not right and proper, or that the allowance of the

filing of exceptions upon points of law alone, under the stringent conditions imposed, was an act of wrong to the appellants? It may have been eminently proper that this privilege should be accorded, and such must have been the opinion of his Honor, or it would have been denied.

A striking illustration of the improvidence of the attempted appeal is furnished in the fact, that while a speedy hearing could have been obtained, and a decision had upon the exceptions under the order, an appeal even if successful would produce but a longer delay, and
(712) would be fruitless, unless the exceptions are to be rejected.

We must reiterate our former rulings, that the allowance of the exceptions, and the delay consequent upon it, are within the discretion of the court, and from its exercise no appeal lies. See *ante* 535, 540.

PER CURIAM. Appeal dismissed.

Cited: Thomas v. Myers, 87 N.C. 34; *Levenson v. Elson,* 88 N.C. 184; *Allison v. Whittier,* 101 N.C. 495.

In *Twitty v. Logan,* from Rutherford:

SMITH, C. J. Upon the hearing of the defendant's motion to set aside the judgment under section 133 of the Code, his Honor finds the facts to be these:

At the special term of the superior court of Rutherford, held in August, 1880, and on the calling of the cause, the defendant's counsel announced that he was not prepared to enter upon the trial in consequence of the absence of his client, and asked for a continuance. In support of the motion the attending physician was introduced as a witness, and testified that the defendant was unable from sickness to be present, produced in a measure by excitement and over anxiety about several important suits pending in the court, as the time of trial approached, and that he had advised the defendant that his attendance would imperil his life. The presiding judge thereupon stated that no affidavit had been offered to show the necessity of the defendant's presence, or that he could give any material testimony in his support, and ruled that the cause must be tried, but it would not be entered upon until the afternoon session. After deliberating, the defendant's counsel remarked that he would be no better prepared by the short interval allowed, and if compelled to try he would begin at once. The jury were then empanelled, and after recess the trial proceeded, terminating
(713) in a verdict and judgment for the plaintiff. The defendant ap-

pealed, but failing to perfect his appeal under the statute, applied to this court for a writ of *certiorari* to bring up the record, which application was pending at the time the present motion was acted on.

The judge also sets out the substance of the defendant's affidavit, offered in support of his motion for relief, in which he assigns his health and physical condition, and the advice of his physician, as the reasons for non-attendance upon the trial; and that, if present, he would have testified to the value of the rents he had collected, with which, assessed, as damages, for detaining the land in dispute, he is charged by the finding of the jury; and also to the value of permanent improvements put on the premises, adding his assurance of the validity of his own title. The court finds that no claim for betterments is set up in the answer, and the object of the action was the enforcement of a lien upon the land for the remaining unpaid purchase money, the defendant asserting a claim to the land derived from a sale by the sheriff under an execution against the debtor. Upon these facts his Honor declined to disturb the former proceeding, and refused the defendant's motion. From this ruling he appeals.

1. The rendition of the judgment upon the verdict is not the subject-matter of the complaint, so much as the preceding order requiring the trial to proceed, and denying the application for the postponement. The control and regulation of judicial proceedings which involve no substantial right must rest largely in the breast of the presiding judge, and, in the ordering or deferring a trial, according to his estimate of the merits of the particular case. Certainly when the discretion has not been grossly abused to the manifest wrong and oppression of a litigant party, if in any case, its exercise will not be revised by this court. At the present term we have refused to entertain an appeal from the refusal of the judge to compel a trial and an order of continu- (714) ance, although there had been great remissness on the part of the appellee; and the refusal to continue and an order for the trial, the correlative proposition, if the point now presented, and it is not before us in the appeal, must be disposed of in a similar manner.

2. The judgment, though the consequence of the trial enforced upon the defendant, was not "taken against him through his mistake, inadvertence, surprise or excusable neglect," for he was represented by counsel, and his case presented to the jury.

The application does not fall within the provisions of the statute. *Boyden v. Williams,* 80 N. C., 95.

3. The error, or wrong, if such there be, and we see no evidence of either, is in the ruling of the court, and not an irregularity subject to correction at a subsequent term. To allow the correction of the erroneous ruling of one judge at a subsequent term presided over by another,

would be in effect to confer upon the latter a supervision over the decisions of the former, a proposition the very statement of which is its own refutation. We have at the present term refused to review the ruling, which the present motion seeks to reverse in another method, in denying the defendant's application for a *certiorari;* for stronger reasons must we affirm the action of the judge in his refusal to set aside the judgment. We refer to the following cases: *Badger v. Daniel,* 82 N. C., 468; *State v. Vann,* 84 N. C., 722; *Spaugh v. Boner,* 85 N. C., 208; Tourgee Code, sec. 299, and notes.

No error. Affirmed.

Cited: Clemmons v. Field, 99 N.C. 402; *Cummings v. Swepson,* 124 N.C. 584; *Chappell v. Stallings,* 237 N.C. 216.

In *Rollins v. Henry,* from Buncombe:

SMITH, C. J. The petition to rehear directs attention to an omission on the part of the court, in the opinion delivered, (84 N. C., 569,) to notice and dispose of an exception thus stated in the record: The
(715) court further charged the jury that the judgment in *Gudger, Ex'r, v. W. L. Rollins,* execution thereon, the sheriff's sale under it, and his deed to the plaintiffs, passed the legal title to the plaintiffs. Defendant excepted.

It is insisted that this direction is erroneous and entitles the defendant to a new trial. The argument is that inasmuch as the deed under which the defendant acquired title conveys the land charged with a liability for the notes given in part of the consideration, and creates a lien for their security, the land was not subject to sale under execution for their payment, and no estate passed by virtue of the sheriff's deed, in analogy to the ruling in *Camp v. Coxe,* 18 N. C., 52. We do not concur in this view. That case is decided upon a construction of the act of 1812 which authorizes a sale under execution of the debtor's equity of redemption, and legal right of redemption in lands, and it is held not to extend to a sale for the mortgage debt itself, but to have been intended for the benefit of other creditors, including perhaps other debts not secured in the mortgage, due the mortgagee. The decision rests upon a consideration of the insurmountable embarrassments to be met in putting a literal interpretation on the words of the act, pointed out in the opinion, and the inherent absurdity of selling an estate subject to incumbrance and in that condition, and whose value is determined by adding the sum bid

to that secured, and at the same time extinguishing in whole or in part the incumbering debt itself. In other words, while an encumbered estate, as such, is sold, the purchaser gets an unincumbered estate, which he did not buy.

The facts of the present case place it wholly outside of scope of the rule announced in *Camp v. Coxe,* and other subsequent affirming cases, and of the reasoning by which it is supported.

Here, no equity of redemption or trust estate residing in the (716) debtor has been sold, but his legal estate in the land, so that by its conversion into money the debt may be paid and the lien discharged. What obstacle exists in the way of such sale and appropriation? And why may not this be done by process of law? Its operation is in effect an enforcement of the lien by the satisfaction of the debt with which it is connected.

It is difficult to understand upon what ground the creditor can be deprived of his remedy against the property of his debtor, because a lien has been created for the security of the debt. Every judgment recovered and docketed for the space of ten years is a lien upon the lands of the debtor, and in the absence of personal property, must be enforced and made effectual by execution, and can be in no other way. In the partition of land among tenants in common, the charge upon the more valuable shares in favor of those of inferior value, for equality in the division, is enforced by process directing a sale. We see no sufficient reason for denying to the creditor the remedy which he has pursued, in appropriating the land of the debtor to the satisfaction of his debt, merely because of a coëxisting lien. Indeed it would seem that this property should be first thus applied, and at least he has the right to subject it to his judgment.

But if there were any technical impediments to the mode of procedure adopted, and the lien remained unimpaired by the sale, the legal title would pass; and such was the ruling of the court to which the defendant objects, and the ruling is sustained by authority. *Tally v. Reed,* 74 N. C., 463; *Isler v. Koonce,* 81 N. C., 378, where the subject is considered. While the point was not noticed before, it was directly presented in argument, and not overlooked in reaching the conclusion at which we arrived in disposing of the case on appeal, but on reëxamination we find no cause for disturbing the judgment and it must be affirmed.

No error. Affirmed.

(717) In *Mauney v. Gidney,* from Cleveland:

RUFFIN, J. This is an application to re-hear the case in which the plaintiff's appeal has been dismissed, at this term, upon the ground that the undertaking for the appeal had not been justified.

The judgment appealed from was rendered at a special term of Cleveland superior court held in January, 1881, and the cause was docketed here on the 19th day of May following.

The petitioner bases his application upon the ground that his appeal was taken before the decision in *Bryson v. Lucas,* 85 N. C., 397, where it was for the first time held that an appeal bond, to avail for any purpose, must be justified by the sureties thereto, and inasmuch as the practice had hitherto and almost universally been different, he was unavoidably surprised—there being no question as to the entire solvency of his sureties or of their ability to justify if the same had been required, or such had been understood to be the practice.

In coming to the conclusion we did in the case referred to, the court felt constrained by the peremptory language of the statute, which could not be disregarded without doing violence to a plainly declared intention of the legislature, though we were, at the same time, aware that the profession had in practice given a different interpretation to it, which had long been acquiesced in by the courts.

A practice so general, and thus apparently sanctioned, furnishes an excuse, we think, to the plaintiff for his inadvertence, or negligence, and warrants the equitable interference of the court to prevent its working him an injury. Accordingly we allow his motion, and direct his appeal to be restored to the docket; though it must be expressly understood
(718) that no such indulgence will be shown to appeals hereafter to be taken, but that the requirements of the statute will be steadily adhered to.

The plaintiff's motion is allowed. The cause will be docketed in this court.

Judgment accordingly.

In *Howerton v. Henderson,* from Granville:

RUFFIN, J. This is an application on the part of the defendant, for a writ of *certiorari* to bring up an appeal from the superior court of Granville County, which has been lost, as the petitioner avers without

default on his part. In support of the motion, he offers, besides his sworn petition, the affidavits of his two attorneys, Jno. W. Hays and Geo. Wortham, and of the clerk of the superior court; and also a letter from M. V. Lanier, who was of opposing counsel in that court, and which was read without objection. The respondent, on the other hand, relies upon an affidavit of the same clerk to sustain him in his opposition to the motion.

While there are some discrepancies in the several statements, as set out in the different affidavits, owing doubtless to a failure of or difference in the recollection of the parties making them, still the following facts seem sufficiently well established to justify the court in acting upon them:

The cause was tried at Fall Term, 1881, of the court—beginning on the 17th and terminating on the 29th of October. In addition to this action, there was another pending in the court, at the same time, between the same parties plaintiff and one Jenkins as defendant, involving similar issues, as well of law as of fact, and it was agreed in writing between the counsel in the two actions, that the one should abide the decision in the other, and that in case it was against the defendant no execution should issue in either case, until after a final (719) adjudication in the supreme court, in the event an appeal should be taken.

With this understanding a jury was waived, and all issues of law and fact were submitted in this action to the judge, who, after hearing the proofs, gave judgment for the plaintiffs, from which an appeal was prayed in open court, and notice thereof accepted of record, and this defendant being infirm and of limited means, it was agreed between his counsel and those of Jenkins, (the defendant in the other action mentioned,) that the latter should see to the giving of the appeal bond.

Accordingly, the latter did make a bond and filed it with the clerk during the term at which the judgment was rendered, but the sureties thereto failed to justify the same.

Some week or more after the adjournment of court, Mr. Hays, as counsel for petitioner, prepared a statement of the case on appeal, and submitted the same to Mr. Lanier, of counsel for the plaintiffs in the action, who suggested some amendments which were assented to, and the statement then agreed to and signed by those gentlemen as the attorneys of the respective parties. This statement, with the other papers in the cause, Mr. Hays then delivered to the clerk, calling his attention to the fact that it had been agreed to and signed by counsel as the one to be certified to the supreme court, but for some reason the clerk either failed to apprehend it, or subsequently overlooked it, and laboring under the impression that no such statement of the case had

been filed, he omitted to prepare and forward the transcript of the cause, in time for the October term of this court.

In March, 1882, Mr. Wortham, learning from a gentleman of the bar in Raleigh, who was likewise of counsel for the petitioner, that the transcript had not been forwarded, called on the clerk to ascertain the reason, and upon being told by that officer that no case on appeal (720) had ever been filed, took the papers for the purpose of seeing Mr. Hays about the matter, but not being able to do so for a day or two, he examined the papers himself and found the case in the file. Thereupon he immediately returned the papers to the clerk, it being on the 10th day of March, and requested him to prepare and forward the transcript at once, which he undertook to do, and would have done, but for the fact that he was taken sick, and by reason thereof was unable to do so before the 20th of the month, by which time the call of the docket for that district in this court had been completed.

Upon the docketing of the appeal on the 22d of March, the counsel representing the plaintiffs in this court, moved to dismiss it, upon the two-fold ground that it was not docketed in time, and that the appeal bond had not been justified, and upon that motion being allowed, the defendant presents this application.

This court is of opinion that the petitioner is entitled to the benefit of the writ.

1. Whatever imperfection there may have been in the appeal bond given, was waived when the counsel for the appellee in the case, agreed to and signed the statement of the case on appeal.

The bond had then been on file in the clerk's office for a week or more, and if not satisfied with it, that was the time to have made known the objection.

2. It has not been usual, nor is it required that appeals taken from a superior court held during a term of this court should be docketed during the same, but it has always been held to be sufficient if docketed at the ensuing term. The practice which obtained under the Rev. Code, ch. 4, sec. 25, of docketing appeals at the "term next ensuing," the taking thereof has not been abrogated by any provision of the Code of Civil Procedure, or any rule of this court, the latter only providing, (721) that, if sooner docketed and before the expiration of the time assigned to the district, they shall be called.

3. That the appeal taken in this case was not docketed in time at the next ensuing term of this court, was altogether owing to the unexpected indisposition of the clerk of the superior court. If able to have prepared the transcript of the record on the 10th of March, as he was specially importuned to do by petitioner's counsel, the cause would have been here and might have been heard upon the first call of the docket, as we

find by reference to the calendar of causes kept here. We can discover nothing that savors of a lack of diligence in the conduct either of the petitioner or his counsel. If he had omitted to ask for a *certiorari* at this term, then according to the authorities he would have forfeited his claim to the aid of the court. *Staples v. Mooring,* 26 N. C., 215; *Smith v. Lyon,* 82 N. C., 2. But as it is, he is in time.

4. The petitioner, it is true, fails to set forth in his application the merits of his case, even so far as to present a *prima facie* case, if it stood alone we should be compelled to deny his motion. But he accompanies his petition with the statement of the case as heretofore presented in this court, and was allowed to read the same without objection, and thus remedied the defect.

The conclusion of the court therefore is that the writ issue as prayed for, in order that the petitioner's appeal may be restored to the docket.

PER CURIAM. Motion allowed.

Cited: Roulhac v. Miller, 89 N.C. 196; *McMillan v. Nye,* 90 N.C. 13; *Suiter v. Brittle,* 92 N.C. 55; *Blair v. Coakley,* 136 N.C. 409.

In *Gulley v. Macy,* from Wake:

RUFFIN, J. This cause has hitherto been twice before this court, once as reported in 81 N. C., 356, and again in 84 N. C., 434.

On the latter occasion, a new trial was granted to the parties, (722) provided they saw fit to avail themselves of it, but upon a supposition that they might decline, we declared our understanding of their rights upon the facts, as they then appeared to us from the verdict of the jury and the admissions of the parties.

We held that the plaintiff, Mibra Gulley, was entitled to be subrogated to the rights of the defendant, Thompson, whose mortgage debt she had paid, and to have with interest the value of her money paid to him, subject, however, to the claims of the creditors of her former husband, Thomas C. Nichols, as to whom the mortgage was void, because of its non-registration; that the defendant, Allen, was entitled to be reimbursed the amount he paid for the land to the defendant Macy, as administrator of said Nichols, as the same was used in the due administration of the estate and the payment of debts, and that he was also entitled to have the present values of such permanent improvements as he had put upon the land, provided they did not exceed the amount

with which he was chargeable for rents and profits during its occupation.

This opinion proceeded upon the idea, that the sale of the land attempted to be made by the administrator was void, because of the irregularities existing in the proceedings, under which the license to sell was obtained—such as the failure to serve process upon the husband of the then defendant, Mibra, and the premature appointment of a guardian *ad litem* of the infant defendants, his acceptance of service of process, and his permitting his answer to be prepared under the direction of the administrator.

When the cause was again called in the court below, the parties both declined another trial of the facts by a jury, but the defendants insisted that the sale of the land by the administrator was made good, notwithstanding the irregularities therein, by virtue of the act of 1879,
(723) ch. 257, as amended by the act of the special session of 1880, ch. 23, which acts, in substance, provide that in all civil actions and special proceedings, determined in any courts of the state, wherein any or all of the defendants were infants, idiots, or lunatics, the judgments rendered shall be effectual and binding upon such infants, etc., and their estates, notwithstanding there may have been no personal service of the summons or complaint upon them.

His Honor, however, gave judgment in conformity with the opinion theretofore expressed by this court, and the defendants appealed.

It is not deemed necessary, for a just decision of this cause, that we should determine the question raised at the bar and discussed with so much ingenuity and learning, as to the constitutionality of the curative statutes relied upon by the defendants, and the power of the legislature to enact retroactive laws. These are questions much too grave to be passed upon needlessly in any contingency, and we are especially willing to forego their consideration in this instance, as there is some division in the minds of the members of the court, with reference to the efficacy to be given to those enactments, under the peculiar circumstances of this case.

It must be borne in mind, that neither the plaintiff Mibra nor her children, who together constitute the plaintiffs in the action, lay claim to the land as privies to the former owner, Nichols, whose administrator undertook to sell it, for the sake of getting assets in hand, under proceedings conducted with so much irregularity. They claim as purchasers for value under a mortgage executed by the intestate to Thompson, which failed of being the first and highest lien upon the land, not because of any taint of fraud that attached to it, but solely because of its being absolute on its face, while intended as a security, and was not and could not be registered. Their purchase was made with
(724) money *advanced* by Daniel White, who was father of the plain-

tiff, Mibra, and grandfather of the other plaintiffs, and his gift was accompanied with express instructions that it should be employed in the redemption of the land from Thompson, and that when redeemed it should be for her use during her life with remainder to the infant plaintiffs; and in subrogating her to the rights of the mortgagee, Thompson, and declaring her to be entitled to receive the value of her money and interest, it was of course contemplated that when received, it should be held upon the terms originally imposed by the grantor.

As has been said, the sale by the administrator was adjudged to be inoperative, on account of irregularities committed with reference to both the mother and the infant children. There is no statute that professes to cure those irregularities, so far as she is concerned, and the sale as to her is still inoperative and void. Under such circumstances as these, we cannot imput to the legislature an intention to confirm, and give effect to, as against infant defendants, proceedings conducted with such irregularity and indifference to the rights of parties, as to render them void as against an adult defendant embraced in the same action, and having identically the same interest.

The sole object of the statute is to prevent a failure in the proceedings of the courts, and to give security to titles derived from them; and if for any reason this object should be disappointed, and the proceedings as against any party be vacated, so as no longer to support the title of a purchaser under them, there can be no good reason why infants as well as others, should not be remitted to their original rights.

Feeling assured that the statute was not intended to apply to a case like the present, and there being no other point made, we are of opinion that there was no error in the judgment of the court below, and the judgment of this court is rendered in conformity therewith, (725) except that the clerk of this court is directed to take the accounts there ordered to be taken, and to make his report here, and the cause is retained here for further directions.

PER CURIAM. Judgment accordingly.

In *King v. Page*, from Jones:

No errors assigned and none appearing on the record, judgment below affirmed.

In *Boyett v. Vaughan,* from Halifax:

ASHE, J. This is an application made by the defendant to this court for an order of restitution, upon the following state of facts disclosed in his affidavit and in the record of the case:

At June Term, 1878, the plaintiff recovered judgment for two hundred dollars, interest and costs. See 79 N. C., 528. Execution was issued to the sheriff of Halifax County, and the defendant paid and satisfied the same in full. The plaintiff received the money, except so much thereof as was applied to the payment of costs.

Upon petition of defendant to rehear the cause, the former judgment of this court was reversed, and a *venire de novo* awarded, with a reservation to the defendant of a right to make such motion as he might be advised in reference to the fund collected from him under the final process issued upon said judgment. See 85 N. C., 363.

The defendant is entitled to the order of restitution. The law is, when a judgment is reversed, the party shall be restored to all
(726) that he has lost by occasion of the judgment, and a writ of restitution shall be awarded. Cro. James, 699; *Perry v. Tupper,* 70 N. C., 538; *Rollins v. Henry,* 77 N. C., 467. And where the plaintiff has execution and the money is levied and paid, and that judgment is afterwards reversed, the party shall have restitution without a *scire facias,* because it appears on the record that the money is paid, and there is a certainty of what is lost. 2 Salk., 588; 2 Saun. Rep., Williams' notes, z; Tidd's Pr., 1033.

It is therefore ordered that a writ of restitution be issued to the sheriff of Halifax County, to the end that Thaddeus Vaughan may be restored to all things he hath lost on occasion of the judgment aforesaid erroneously rendered against him in favor of J. E. Boyett.

PER CURIAM. Judgment accordingly.

In *Reed v. Exum,* from Wayne:

SMITH, C. J. The order of reference made at January Term, (84 N. C., 430), directed the clerk to make the computation and ascertain the amount of the plaintiff's damages, upon the basis and according to the rights of the parties declared in the opinion. This involved only a correction of the errors in the ruling of the court below. The referee now reports that the purchase money, reduced by the scale, and the

value of the improvements, are absorbed in the rental values allowed by the jury as compensation for the use of the land, which would be barred by the statute of limitations. He has charged the defendant with the damages accruing between the first days of December, 1872 and 1880, inclusive, a period of eight years. In this the directions of the order are not pursued. The action was commenced on October 28, 1876, and the statutory bar defeats any claim for damages beyond the period of three years immediately preceding that date. (727) In like manner the damages are assessed by the jury only up to the time of trial in the superior court, and that amount recovered. The defendant should be charged only with such damages as are assessed by the jury, which accrued between October 28, 1872, and the time when the verdict was rendered, and those not embraced within this period must be stricken from the account. We think the correction is fairly within the scope of the defendant's first exception, as the over-charge is outside the terms of the reference. The rest of this, and the other exceptions, are overruled.

The action is for the recovery of land and for damages for withholding possession, and the duress alleged in obtaining the deed is but in anticipation of the defence and a reply to it. Such a deed may be avoided at law as well as in equity, and an adjudication in either court would be equally decisive. In an action of this kind, the damages are assessed up to the trial, and such only adjudged. *Whisenhunt v. Jones,* 78 N. C., 361; *Burnett v. Nicholson, ante,* 99.

The referee will therefore reform his report in the particulars mentioned, and judgment will then be entered for the plaintiff.

In *Stell v. Barham,* from Wake:

SMITH, C. J. At the last term (85 N. C., 88) we refused to entertain an appeal *in forma pauperis,* in this case, inasmuch as it appeared in the record that when the judge granted the order allowing an appeal without security, he had not before him the defendant's affidavit of insolvency, and this was held to be necessary, because the statute is mandatory upon the judge when the conditions are complied with, and this he must ascertain before granting the application. (728) He gave the defendant twenty days after making the order on the last day of the term, in which to prepare and file the affidavit of inability, by reason of poverty, to give the security required by law. This he had no legal authority to do in support of an order already

entered. As this ruling dispensed with the necessity of immediate efforts to procure the affidavit, even if it were practicable during the last day of the term when the cause was concluded, we think it a proper case in which to award the writ. The case prepared on the attempted appeal shows that questions of law are involved, which the defendant has the right to have considered in this court.

The writ of *certiorari* will therefore issue, requiring the transmission of the record when an appeal-undertaking has been perfected in the court below, or the presiding judge shall make the order, as in case of an appeal allowed without security, under the conditions prescribed by the statute as a substitute for such undertaking.

PER CURIAM. Motion allowed.

Cited: Warren v. Harvey, 92 N.C. 140; *S. v. Warren,* 100 N.C. 493.

In *Burnett v. Nicholson,* from Halifax:

After the opinion in this case was filed and reported, (see *ante,* 99,) the plaintiffs moved for judgment here against the parties to the undertaking on appeal for the costs, and also for the amount directed by the judgment, as affirmed, to be paid to them.

The motion was disposed of by Mr. Justice RUFFIN, as follows:

At Fall Term, 1880, of Halifax superior court, the plaintiffs had a judgment rendered in their behalf for the sum of $500 against the defendants of record, who appealed therefrom, giving an undertaking for the appeal with D. P. Moore and others as sureties.

(729) In this court, the judgment was affirmed, and the plaintiffs now move for judgment against the parties to said undertaking, not only for the costs of appeal, but for the amount directed by said judgment as affirmed, to be paid to them.

This motion the defendants resist upon the ground that it was the intention of the parties who signed the undertaking, and those who took it, only to secure to the plainitffs the costs of the appeal, and that the failure thus to limit their liability, in terms, was owing to a mistake or inadvertence of the gentleman who prepared the instrument for the signatures, though they submit to a judgment for the costs only.

In support of their allegations of such mistake, they file and were allowed to read a letter from the gentleman of the bar who prepared the instrument, and the affidavits of some of the parties themselves all of

which contain positive averments as to the intention of the parties, and the fact that there was a mistake on the part of the draughtsman.

The undertaking, as written, obliges the parties to pay to the appellees all such costs and damages as may be awarded against the appellants on such appeal, not exceeding fifty dollars, and also, in case said judgment or any part thereof shall be affirmed, to pay them the amount directed to be paid by the judgment as affirmed.

The plaintiffs deny that there was any mistake made in the instrument, or, if there was any, that they participated therein, or can be affected thereby.

The contention between the parties raises an issue of fact, which as a court we prefer not to try, and certainly not upon mere *ex parte* affidavits, but would rather submit to a jury, regarding that to be the most appropriate tribunal to determine disputed matters of fact.

Two courses are open to us—either to grant the plaintiffs' motion, and have the defendants to seek their remedy by an independent action in the superior court, for the purpose of having the instru- (730) ment reformed, and in the meantime for an injunction; or else, to reserve our judgment for the present, and to cause proper issues to be prepared and sent down to the superior court to be tried by a jury. We deem the latter the most equitable course, and therefore direct the following issues to be sent down to the superior court of Halifax County, and submitted to a jury there, and their verdict thereon to be certified to this court:

1. Was there a mistake of fact made in executing the undertaking for the appeal heretofore taken in this case, in that, it was made contrary to the intention of the parties, to secure to the plaintiffs the amount of the judgment recovered, as well as the costs of the appeal?

2. Was such mistake mutual to the parties plaintiff and defendant, or their agents?

The plaintiffs will have judgment against the defendants of record for the amount of the judgment affirmed, and the costs; and against the sureties on the undertaking for the appeal, for the costs only.

PER CURIAM. Judgment accordingly.

Cited: McMinn v. Patton, 92 N. C., 374.

In *Deloatch v. Rogers,* from Northampton:

SMITH, C. J. Since the opinion in *Deloatch v. Rogers,* (*ante,* 357,) was filed, and while passing through the press, my attention has been called to a misapprehension of fact in regard to the statements contained in the record. The case states that at two of the designated voting places, Rich Square and Occoneechi, *each,* 300 of the obnoxious and uncounted ballots were cast, and not that number in both, the qualifying distributive word appended having been inadvertently overlooked in transcribing the expression into the opinion. This cor-
(731) rection changes the result, giving a majority of the votes to the plaintiff and rendering the first portion of the opinion wholly inapplicable to the facts of the case. But as the decision sustains the ruling of the court in the rejection of all the ballots that have the name of the person voted for to fill the office of clerk, when there was no vacancy to be supplied, the oversight does not affect the conclusion reached and the proper determination of the appeal.

In *State v. Dunn,* from Robeson:

The defendant was convicted for burning a gin-house and sentenced to twenty-five years' imprisonment in the penitentiary; *Held* that the judgment is erroneous. The term of imprisonment in such case cannot exceed ten years. A *certiorari* was granted to the end that the record in the case may be reviewed. Bat, Rev., ch. 32, sec. 6; *State v. Lawrence,* 81 N. C., 522; *State v. Green,* 85 N. C., 600—opinion by ASHE, J.

In *State v. Shoe,* from Guilford:

This was an application for a *certiorari* involving matter similar to that in the preceding case, and the ruling of the court based upon the authorities therein cited—opinion by RUFFIN, J.

In *State v. Morgan,* 85 N. C., 581: The following should have (732) appeared among the authorities cited in the report of the case, to wit, *Regina v. Brownlow,* 39 Eng. Com. Law Rep., 34, to the effect—A coroner's inquisition on a dead body, found, that on a day and at a place named, the deceased being on board a steamer received a shock from the bursting of the boiler, and that boiling water, coal, etc., were thereby thrown against deceased, of which shock, etc., the deceased *instantly* died; Inquest quashed because no time was sufficiently laid for the time of the death.

In *Stradley v. King,* 84 N. C., page 637, line 3: The transcript upon which the court acted shows "that there was agreement" between purchaser and plaintiff, etc. After the publication of the reports the counsel interested caused a certified copy of the record to be sent up, and called attention to the omission of the word "no" in the said transcript —which should read "there was no agreement," etc.

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